

FEDERAL COURT OF AUSTRALIA

NOTICE OF PROPOSED SETTLEMENT

Luke & Ors (the “Applicants”) v Aveo Group Ltd VID996/2017

(“AVEO Class Action”)

1 Why is this notice important?

- 1.1 You are receiving this notice because you have been identified as someone who may be a Group Member in the Aveo Class Action. It contains important information about a proposed settlement of the Aveo Class Action and has been provided pursuant to orders of the Federal Court of Australia (**Court**). Any questions you have concerning the matters contained in this notice should not be directed to the Court or Aveo. You should contact the Applicants’ solicitors, Levitt Robinson, at aveo@levittrobinson.com, or seek advice from another lawyer.
- 1.2 On 27 March 2023, the Applicants, Stewart Levitt, Class Marketing and Management Pty Limited, Galactic Litigation Partners LLC, Galactic Aveo LLC (the **Funder**) and Aveo Group Limited (**Aveo**) agreed to an in-principle settlement of the AVEO Class Action for \$11 million inclusive of costs, without admission of liability (the **proposed settlement**). The proposed settlement has no effect unless it is approved by the Court. The Applicants have applied to the Court for approval of the proposed settlement and this notice is provided to you so you are informed as to your rights in regard to it.
- 1.3 The Court has appointed independent barristers, Lachlan Armstrong KC and Kane Loxley, as Contradictors to represent the interests of the Group Members in the settlement approval application (the **Contradictors**). The Court also appointed an independent Costs Referee to assess the reasonable legal costs to be paid from the proposed settlement and report to the Court.

2 The claims in the class action

- 2.1 The class action was brought on behalf of current and former residents of Aveo villages who owned units under pre Aveo Way contracts and who have sold or may in the future sell their units under the Aveo Way Programme. The case only seeks damages for former residents of Aveo villages who have sold their units under the Aveo Way Programme.
- 2.2 Before the Aveo Way Programme was introduced, many residents in Aveo's retirement villages had residence contracts that allowed them to share in any capital gain once their unit was sold.
- 2.3 Under the Aveo Way Programme, incoming residents in Aveo's retirement villages were offered an Aveo Way contract, which had no capital gain entitlements to the resident and, in many cases, had a higher exit fee (including a "deferred management fee" and an "Aveo Membership Fee") than the contracts previously offered at the villages. In the Class Action, the Applicants said that this meant the residents received less money when they sold their units, because the Aveo Way contract was less valuable for residents than the previous contracts.
- 2.4 Aveo denied this and said that the Aveo Way contract had other benefits which offset the removal of the capital gain share and the increase to exit fees.
- 2.5 The Applicants' main claims against Aveo in the class action are that:
- (a) Aveo engaged in a system of unconscionable conduct by designing and implementing the Aveo Way Programme, including because:
 - the Aveo Way contracts were less desirable than the previous contracts offered at Aveo's villages, and that was not disclosed to the Applicants and Group Members;
 - the Aveo Way Programme resulted in Aveo obtaining a significant financial benefit; and
 - Aveo and its village managers had significantly greater bargaining power than the Applicants and Group Members, and the Applicants and Group Members were in a position of vulnerability relative to Aveo;

- (b) the Aveo Way Programme involved Aveo's wholly-owned real estate agent, Aveo Real Estate Pty Ltd, breaching fiduciary duties to the Applicants and Group Members, by acting in conflict of interest and wrongly profiting from the agency relationship; and
- (c) Aveo engaged in misleading or deceptive conduct by misrepresenting to the Applicants and Group Members that they would be no worse off if they agreed to their units being marketed and sold on the terms of the Aveo Way contract, when in fact they were likely to have been worse off; and
- (d) Aveo also engaged in misleading or deceptive conduct by failing to disclose to Freehold Group Members that they did not need to appoint a real estate agent to sell their units because, under the Aveo Programme, the person who bought the unit was Aveo or one of its village managers.

2.6 The class action **only claims damages on behalf of Group Members who have sold their interests in units under the Aveo Way Programme**. No claim for damages is made on behalf of Group Members who are current Aveo residents. The class action only seeks declarations and injunctions on behalf of those Group Members.

2.7 Aveo denied all allegations made against it in the class action.

2.8 If you want further details of the Applicants' claims and Aveo's defences, the *Third Further Amended Statement of Claim and Defence* are available on Levitt Robinson's website at <http://levittrobinson.com/class-actions> under "Current Class Actions" and then "Aveo".

3 The proposed settlement

3.1 The trial came on for hearing before the Honourable Justice Anderson in the Federal Court of Australia in Melbourne on 16 March 2023 and ran for six days, following which the proposed settlement was reached.

3.2 Relevantly for Group Members, the main terms of the proposed settlement, considered together with positions taken by Levitt Robinson and the Funder since the settlement, mean that under the proposed settlement:

- (a) Aveo will pay \$11 million inclusive of interest, legal costs and settlement administration costs, without admission of liability;
- (b) the Applicants, on their behalf and on behalf of all Group Members, will release and forever discharge Aveo and its related entities from the Applicants' and the Group Members' Claims (as defined);
- (c) the class action will be dismissed with all existing costs orders being vacated and with Aveo bearing its own costs;
- (d) Levitt Robinson will accept \$9.66 million for the legal costs and disbursements it incurred, as approved by the independent Costs Referee, and will not seek \$10.96 million which the firm says it actually incurred;
- (e) the Funder will not seek payment of a litigation funding commission from the Applicants and Group Members, although it has reserved its right to seek reimbursement of legal costs paid or due to be paid above the \$9.66 million recommended for approval by the independent Costs Referee or such other amount approved by the Court;
- (f) the remainder of the monies after deduction of legal costs and settlement administration costs will be distributed to Group Members who have sold their interests in units under the Aveo Way Programme, and who later register to participate. As it was never alleged by the Applicants that current residents had suffered any loss or damage as a result of the implementation of the Aveo Way Programme, none of the available settlement monies will be distributed to Group Members who remained current residents as at the date of the settlement on 27 March 2023; and
- (g) a suitably qualified and independent person will be appointed to act as Administrator to distribute any remaining settlement monies to Group Members.

- 3.3 If approved, the great majority of the settlement monies will be taken up by the Applicants' legal costs, but the final amount remaining for distribution to Group Members will depend on whether the Court accepts the Contradictors' submission that 25% of the \$11 million settlement (\$2.75 million) should be set aside from the settlement sum and distributed to Group Members. Levitt Robinson opposes that outcome, essentially because such a reduction will mean that the firm will be out-of-pocket in the sum of approximately \$2 million.

4 The merits of the proposed settlement

- 4.1 When Levitt Robinson, senior and junior counsel briefed for the Applicants in the hearing, and the Funder, decided to recommend the proposed settlement to the Applicants they knew that the settlement amount would only cover the Applicants' legal costs, and that if the proposed settlement was approved there would be little or nothing left to distribute to the Group Members.
- 4.2 That represented a very disappointing result for them and the Group Members. The reasons why they agreed to the proposed settlement are explained in a confidential opinion prepared by the Applicants' counsel (**Confidential Opinion**) and provided to the Contradictors and to the Court .
- 4.3 The Contradictors have considered the Confidential Opinion, and reviewed relevant parts of Levitt Robinson's file. After due consideration the Contradictors filed confidential submissions with the Court in which they do not oppose settlement approval.
- 4.4 If you wish to read the Confidential Opinion or the Contradictors' confidential submissions you must contact Levitt Robinson and will be required to sign a strict confidentiality agreement. It is likely to be easier if you simply telephone Levitt Robinson and ask the firm's representative to explain those documents to you, on a confidential basis. But the course you take is a matter for you.

- 4.5 The Honourable Justice Murphy, who is docketed with the settlement approval application, has considered the confidential opinion and the Contradictors' confidential submissions. His Honour has expressed a preliminary view (subject to any further evidence and submissions and subject to any objections by Group Members) that in the circumstances of the case the proposed \$11 million settlement appears to be fair and reasonable as between the parties. His Honour indicated that his remaining concern was whether to accept the Contradictors' submission that 25% of the settlement monies (\$2.75 million) should be set aside for distribution to Group Members.

5 The Contradictors' argument that \$2.75 million should be set aside for Group Members

- 5.1 The Applicants, Levitt Robinson and the Funder accept the Costs Referee's assessment of reasonable legal costs of \$9.66 million. But costs in relation to the settlement approval application are still being incurred and there will be costs involved in distributing monies to Group Members. Putting those amounts together, Levitt Robinson estimate such costs at approximately \$550,000. The Costs Referee is to report to the Court setting out her opinion as to the reasonableness of those proposed costs.
- 5.2 Although the Contradictors do not oppose approval of the proposed settlement, they submit that the deductions for legal, funding settlement administration costs should be limited to 75% of the settlement monies (\$8.25 million). That outcome is opposed by Levitt Robinson, as having regard to the costs that are still being incurred it estimates that it will be out-of-pocket in the order of \$2 million. The Funder also opposes that outcome.
- 5.3 It is for the Court to decide how much should be deducted from the settlement for legal and settlement administration costs, and that will determine how much of the settlement is left to be distributed to Group Members.

5.4 It should though be understood that, if the proposed settlement is approved, whether or not the Contradictors' argument is accepted, the return for Group Members under the proposed settlement will be very low. There are approximately 2,700 former residents (or their representatives) who have sold their interests in units under the Aveo Way Programme who are Group Members, and (provided they register their interest in participating in the settlement) may be entitled to share in any distribution, and:

- (a) if the Contradictors' argument is not accepted, and further legal and settlement administration costs are allowed to be deducted from the settlement monies, there will be approximately \$790,000 available for distribution to Group Members which, if distributed equally amongst them, means they will receive about \$292 each; and
- (b) if the Contradictors' argument is accepted, there will be \$2.75 million available for distribution to Group Members, which, if distributed equally, means they will receive about \$1,018 each.

6 Group Members who have signed Funding Agreements

6.1 If you are a Group Member who is a former resident, or the Estate of a former resident, and you or the Estate have signed a funding agreement (**Funding Agreement**), the Funder has agreed that it will not seek to enforce its rights to claim the percentage commission to which it is entitled under the Funding Agreements. Nor will the Funder apply to the Court seeking an order that Group Members who have not signed a funding agreement should pay a percentage commission.

6.2 Part of the monetary compensation payable to Group Members who have signed a Funding Agreement may also have to be paid to the Funder to reimburse the Funder for any shortfall between the costs the Funder has had to pay and the amount that is approved by the Court to be deducted from the settlement. The Funder has reserved its right to seek such amounts.

- 6.3 Any amount payable to the Funder by a Group Member who has signed a Funding Agreement would ordinarily come out of the compensation that the Group Member would otherwise receive from the Settlement. If the Funder does propose to claim any such amounts, the Applicants will seek an order that they are shared between the Group Members as a whole, and not only paid by those Group Members who have signed Funding Agreements.

7 Your options

- 7.1 **If you have opted out of the class action**, you may disregard this notice.
- 7.2 **If you are in favour of the proposed settlement**, that is, although the result is disappointing you accept that it is fair and reasonable in the circumstances of the case, there is nothing you need to do at this time.
- 7.3 **If you wish to object to the proposed settlement**, or any aspect of it, you must file with the Court a completed NOTICE OF OBJECTION TO PROPOSED SETTLEMENT using the form attached to this Notice and marked “**Schedule 1**” by emailing it to vicreg@fedcourt.gov.au and copying aveo@levittrobinson.com or by posting a copy to the Registrar of the Federal Court of Australia, 305 William Street, Melbourne, Victoria, 3000, by **no later than 4:00 pm on 17 November 2023**.

If you file a Notice of Objection, you or your legal representative may wish attend the settlement approval hearing and make further submissions to the Court in support of your objection.

You should understand that the Applicants have agreed to the proposed settlement because they do not want to continue the class action against Aveo, and the Funder no longer wishes to fund the proceedings. If you want to oppose the proposed settlement and want the class action to continue then it is likely that you will need to persuade the Court that you can substitute some other person for the Applicants to bring the proceeding, and can meet the legal costs that will be involved in the case, and any order for security for costs which might be made.

Whether you file a Notice of Objection or not the Contradictors will represent Group Members’ interests at the settlement approval hearing.

- 7.4 You can take legal advice about your options and the information contained in this Notice. Further information can be obtained by telephoning Levitt Robinson on **(02) 9286 3133** or by email aveo@levittrobinson.com or by contacting another lawyer of your choice.

8 Settlement Approval Hearing

- 8.1 The application for Court approval of the proposed settlement will be heard before Justice Murphy at the Federal Court of Australia at 305 William Street in Melbourne on 22 November 2023 at 10.15 am AEDT and via video-link (**Approval Hearing**).
- 8.2 In determining the application for approval, the Court will consider whether the proposed settlement is fair and reasonable having regard to the interests of Group Members and as between them. The Contradictors will appear at the Approval Hearing and make submissions on the Group Members' behalf.

“Schedule 1”

Notice of Objection to Proposed Settlement with Aveo

No. VID 996 of 2017

Federal Court of Australia
District Registry: Victoria
Division: General

Michael Robert Luke (in his capacity as the co-executor of the estate of Robert Colin Luke, deceased) and others
Applicants

Aveo Group Limited ACN 010 729 950
Respondent

TO: The Registrar, Federal Court of Australia
Victorian Registry
Owen Dixon Commonwealth Law Courts Building
305 William Street
Melbourne Victoria 3000
vicreg@fedcourt.gov.au

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| Name of group member: | |
| Capacity of group member (Are you an Owner, a former Owner, an Executor or an Administrator or do you hold a power of Attorney? Please specify: | |
| Unit No and Village: | |
| Has the Unit already been sold (Yes or No)? | |

I am a Group Member in the above Proceedings and I object to the proposed settlement of these proceedings because *[set out reasons for objection below or attach additional pages]*:

Date:

Signature:

Name of signatory: