FEDERAL COURT OF AUSTRALIA

Luke v Aveo Group Limited (No 3) [2023] FCA 1665

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| File number(s): |  |
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| Judgment of: | **MURPHY J** |
|  |  |
| Date of judgment: | 22 December 2023 |
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| Catchwords: | **REPRESENTATIVE PROCEEDING** – settlement approval application under s 33V of the *Federal Court of Australia Act 1976* (Cth) – whether the proposed settlement is fair and reasonable in the interests of group members to be bound to it including as between group members – the role of a contradictor – serious lack of expedition and inefficiency on the part of the applicants’ solicitors – proposed settlement approved – applicants’ legal costs approved in a substantially reduced amount. |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) ss 33C, 33V, 37AF, 37AG |
|  |  |
| Cases cited: | Attorney-General v Mayas (1988) 14 NSWLR 342  *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653  *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527  *Clarke v Sandhurst Trustees Ltd* (No 2) [2018] FCA 511  *Coatman v Colonial First State Investments Ltd* [2022] FCA 1611  *Dyczynski v Gibson* [2020] FCAFC 120; 280 FCR 583  *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433  *Elliott-Carde v McDonald's Australia Ltd* [2023] FCAFC 162  *Ghee v BT Funds Management Limited* [2023] FCA 1553  *Gill v Ethicon Sàrl (No 10)* [2023] FCA 228 *Hogan v Australian Crime Commission* [2010] HCA 21; 240 CLR 651  *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323; 335 ALR 439  *Kuterba v Sirtex Medical Limited (No 3)* [2019] FCA 1374  *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3)* [2018] FCA 1842; 132 ACSR 258  *Webb v GetSwift Limited (No 7)* [2023] FCA 90 |
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| Division: | General Division |
|  |  |
| Registry: | Victoria |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
|  |  |
| Number of paragraphs: | 160 |
|  |  |
| Date of hearing: | 22 November 2023 |
|  |  |
| Counsel for the Applicants: | Mr N J Kidd SC and Mr D Meyerowitz-Katz |
|  |  |
| Solicitor for the Applicants: | Levitt Robinson Solicitors |
|  |  |
| Counsel for the Respondent: | Mr P D Crutchfield KC and Mr B A McLachlan |
|  |  |
| Solicitor for the Respondent: | Arnold Bloch Leibler |
|  |  |
| The Contraveners: | Mr L W L Armstrong KC and Mr K Loxley |
|  |  |
| Counsel for Mr Stewart Levitt trading as Levitt Robinson Solicitors: | Mr S Puttick |
|  |  |
| Counsel for the Interveners: | Mr J Adamopoulos |

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| **Table of Corrections** |  |
| 12 March 2024 | In the third sentence of the quote at paragraph 159, replacing “Frequently, class actions perform a public function by being employed to vindicate statutory policies such as disclosure to the securities market, approving cartels of posturing safe medical and pharmaceutical products: see Legg M, *Class Actions, Litigation Funding and Access to Justice* (Law Research Paper No 17-57, UNSW, 7 September 2017)” with “Frequently, class actions perform a public function by being employed to vindicate statutory policies such as disclosure to the securities market, prohibition of cartel conduct and the provision of safe medical and pharmaceutical products: see Legg M, *Class Actions, Litigation Funding and Access to Justice* (Law Research Paper No 17-57, UNSW, 7 September 2017)”. |
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ORDERS

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|  | | VID 996 of 2017 |
|  | | |
| BETWEEN: | MICHAEL ROBERT LUKE (IN HIS CAPACITY AS THE CO-EXECUTOR OF THE ESTATE OF ROBERT COLIN LUKE, DECEASED)  First Applicant  MEREDITH ANNE LUKE (IN HER CAPACITY AS THE CO-EXECUTOR OF THE ESTATE OF ROBERT COLIN LUKE, DECEASED)  Second Applicant  ANN MARY STROUD (IN HER CAPACITY AS THE CO-EXECUTOR OF THE ESTATE OF JOAN MARY COLOMBARI, DECEASED) (and another named in the Schedule)  Third Applicant | |
| AND: | AVEO GROUP LIMITED (ACN 010 729 950)  Respondent | |

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| order made by: | MURPHY J |
| DATE OF ORDER: | 22 december 2023 |

**THE COURT NOTES THAT:**

A. Galactic Aveo LLC will not seek to recover a funding commission from the applicants and group members; and

**UPON THE UNDERTAKINGS BY:**

1. **GALACTIC AVEO LLC THAT** it will not seek to enforce any contractual rights it has in relation to recovery of legal costs and disbursements from group members who entered into a litigation funding agreement with it; and

2. **STEWART LEVITT TRADING AS LEVITT ROBINSON SOLICITORS** **THAT** Levitt Robinson Solicitors will not seek to enforce any contractual rights the firm has in relation to recovery of legal costs and disbursements from group members who retained the firm.

**THE COURT ORDERS THAT:**

**Costs**

1. Pursuant to s 33V(2) of the *Federal Court of Australia Act 1976* (Cth);

(a) the Applicants’ legal costs and disbursements for the conduct of this proceeding up to the date of settlement be approved in the sum of $8,523,516;

(b) the Applicants’ legal costs of the settlement approval process be approved in the sum of $394,538; and

(c) the Administration Costs, as defined in the Settlement Scheme, be approved in the sum of $186,000 plus GST.

2. Stewart Levitt trading as Levitt Robinson pay the Contradictor’s reasonable fees within 21 days of receipt of an invoice.

**Administration**

3. Within seven (7) days after the distribution by the Administrator of the whole of the Settlement Sum, the Administrator is to apply to the Court for the proceeding to be dismissed with no further order as to costs.

4. The Administrator have liberty to apply with respect to any issues arising under the Administration.

5. The Applicants and the Respondent be excused from attendance in relation to any application brought by the Administrator pursuant to Order 4.

**Confidentiality Application**

6. Pursuant to ss 37AF and 37AG(1)(a) of the *Federal Court of Australia Act 1976* (Cth) (the **Act**), on the ground that the order is necessary to prevent prejudice to the proper administration of justice, the material set out in **Annexure A (Confidential Material A)** is, until further order or until after the expiry of all periods in which an appeal may be brought from this Court’s orders made on 22 November 2023 (as specified in Annexure A), not to be published or disclosed without prior leave of the Court to any person other than: (a) the Court; (b) the Applicants; (c) the Applicants’ legal representatives; (d) group members who have provided an appropriate acknowledgment of their obligations under this order; (e) counsel appointed as Contradictor; (f) counsel for Levitt Robinson; (g) Galactic Aveo LLC; and (h) Galactic Aveo LLC’s legal representatives, with such permitted disclosures to be on terms that none of those persons or entities disclose the Confidential Material A or any part of it to any person or entity other than those listed in this order.

7. Pursuant to ss 37AF and 37AG(1)(a) of the Act, on the ground that the order is necessary to prevent prejudice to the proper administration of justice and until further order, the material set out in **Annexure B (Confidential Material B)** is not to be published or disclosed without prior leave of the Court to any person other than: (a) the Court; (b) the Applicants; (c) the Applicants’ legal representatives; (d) counsel appointed as Contradictor; (e) counsel for Levitt Robinson; (f) Galactic Aveo LLC; and (g) Galactic Aveo LLC’s legal representatives, with such permitted disclosures to be on terms that none of those persons or entities disclose the Confidential Material B or any part of it to any person or entity other than those listed in this order.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**Annexure A**

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| **#** | **CB tab** | **Evidence/ Submissions** | **Document /Section over which Confidentiality claimed** | **Time** |
| 2. | 7 | **Confidential Affidavit of Stewart Alan Levitt 29 September 2023** | Exhibit SAL-10 Confidential Opinion (whole) | Until further order |
| 3. | 11 | **Contradictors’ Confidential Outline of Submissions dated 16 October 2023** | Parts specified below. |  |
|  |  | [23] | content of footnote 30. | Until expiry of appeal periods |
|  |  | [25]-[27] | whole | Until further order |
|  |  | [31] | whole | Until further order |
|  |  | [43] | From “That abandonment” to end paragraph | Until further order |
|  |  | [44] | whole | Until further order |
|  |  | [48] | From “We address this below” to end paragraph | Until further order |
|  |  | [49] | From “Having analysed” to end paragraph | Until further order |
|  |  | [50] | Whole | Until further order |
|  |  | [52-62] | Whole | Until further order |
|  |  | [66] | The words in parentheses | Until further order |
|  |  | [67] | Contents of footnote 45. | Until further order |
|  |  | [69] | The words “it appears” in the first line to “the litigation funder” in the penultimate line | Until further order |
|  |  | [70] | Whole | Until further order |
|  |  | [74] | Whole | Until further order |
|  |  | [79(a)] | The words “having regard … the evidence,” | Until further order |
|  |  | [100]-[101] | Whole | Until further order |
|  |  | [127] | Second sentence of chapeau (“With the benefit … the Court.”) | Until further order |
|  |  | [127(a)] | Whole | Until further order |
|  |  | [127(d)-(e)] | Whole | Until further order |
|  |  | [128]-[129] | Whole | Until further order |
|  |  | [132] | Second sentence (“That history”) to end paragraph | Until further order |
|  |  | [136]-[137] | Whole | Until expiry of appeal periods |
|  |  | [139] | From beginning up to the words “instructions from Adamson,” in the second sentence | Until expiry of appeal periods |
|  |  | [142(d)] | The words “although it is … much,” | Until expiry of appeal periods |
|  |  | [143] | Second sentence | Until further order |
|  |  | [143] | Last sentence, the words “the claims here … reports, then” | Until further order |
| 4. | 10 | **Applicants’ Confidential submissions in reply dated 31 October 2023** | Parts specified below. |  |
|  |  | [7]-[14] | Whole | Until further order |
| 5. | 18 | **Confidential Affidavit of Stewart Alan Levitt sworn 2 November 2023** | Parts specified below. |  |
|  |  | [24]-[25] | Whole. | Until further order |
|  |  | [26] | Whole. | Until expiry of appeal periods |
|  |  | [29] | Fourth and fifth lines, the words “other than” to “Adam Bell SC”. | Until further order |
| 9. | 13 | **Costs Referee’s first report dated 26 July 2023** | Parts specified below. |  |
|  |  | [20] | First sentence, the words “Whilst … applicant,” | Until further order |
|  |  | [21]-[22] | Whole | Until further order |
|  |  | [24] | Whole | Until further order |
|  |  | [26] | Entries in chronology bearing the following dates:  March 2016  May 2016  October 2016  August 2017  December 2017  July 2020  15 June 2022 (first sentence only) | Until further order |
|  |  | [46]-[50] | Whole (including sub-heading F.1) | Until further order |
|  |  | [75] | First sentence, the words “not to … fees and” | Until further order |
|  |  | [77] | Whole | Until expiry of appeal periods |
|  |  | [78] | Whole | Until further order |
|  |  | [86]-[105] | Whole (including headings) | Until further order |
|  |  | [110] | First two sentences | Until expiry of appeal periods |
|  |  | [111] | Second and third sentences (“On a number … being incurred.”) | Until expiry of appeal periods |
|  |  | [112] | Second sentence (“I assume…”) to end paragraph | Until expiry of appeal periods |
|  |  | [113] | Whole | Until further order |
|  |  | [114] | Second sentence (“An example…” to end paragraph | Until expiry of appeal periods |
|  |  | [116] | Second sentence (“A March…”) to end paragraph | Until expiry of appeal periods |
|  |  | [132] | Whole | Until further order |
|  |  | [142]-[143] | Whole | Until further order |
|  |  | [152] | Second sentence (“By late…”) to end paragraph | Until expiry of appeal periods |
|  |  | [168] | Whole | Until further order |
|  |  | [169] | Whole | Until expiry of appeal periods |
|  |  | [170] | Whole | Until further order |
|  |  | [215] | The third sentence (“However, I consider…”) | Until further order |
|  |  | [218] | Third and fourth sentences (“The file … be successful.”) | Until further order |

Annexure B

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| --- | --- | --- | --- | --- |
| **#** | **CB tab reference** | **Evidence/ Submissions** | **Document /Section over which Confidentiality claimed** | **Claimant** |
| 10. | 5 | Confidential Affidavit of Stewart Alan Levitt 28 September 2023 | [11]–[21], whole | Stewart Levitt |

REASONS FOR JUDGMENT

MURPHY J:

# INTRODUCTION

1 Before the Court is an interlocutory application dated 28 April 2023 in which the applicants in this class action, Michael Robert Luke and Meredith Ann Luke (in their capacities as co-executors of the estate of Robert Colin Luke, deceased) and Ann Mary Stroud and Neil Bernard Colombari (in their capacities as co-executors of the estate of Joan Mary Colombari, deceased), seek Court approval of a proposed settlement under s 33V of the *Federal Court of Australia Act 1976* (Cth) (the **Act**).

2 The applicants bring the class action on their own behalf and on behalf of approximately 2,700 current and former owners of freehold or leasehold interests in units in retirement villages operated by the respondent, **Aveo** Group Limited, which is a major operator of retirement villages in Australia. The proceeding is funded by **Galactic** Aveo LLC pursuant to litigation funding agreements it entered into with the applicants and approximately 232 group members.

3 The applicants’ claims arise from Aveo’s introduction of the “Aveo Way Programme”, which it began implementing in about 2014 and 2015, and which it continues to implement today. The essence of the claims is that Aveo sold to the applicants and group members their rights to occupy a retirement village unit upon a certain set of contractual terms, commonly a freehold interest in the unit with lower deferred management fees and the prospect of a capital gain when leaving the unit, Aveo then altered the terms on which incoming residents were to be offered units. The central allegation is that under the Aveo Way, in practice, incoming residents could only acquire a leasehold interest, which meant that the applicants and group members were not able to sell as attractive a set of rights to incoming residents as the rights they had themselves originally purchased; that the value of their existing rights was therefore materially diminished; and that Aveo unconscionably took advantage of its bargaining power in order to shift the applicant and group members over to being required to sell their existing rights under the Aveo Way.

4 The applicants have reached an in-principle settlement with Aveo (the **proposed settlement**) under which, if approved, Aveo will pay the applicants and group members $11 million (**settlement sum**) inclusive of interest, legal costs and settlement administration costs in full and final settlement of the proceeding.

5 Mr Levitt’s evidence in the approval application shows that he knew that the settlement sum would be consumed by Levitt Robinson’s legal costs. In an affidavit in support of the approval application he said that the firm had incurred $10,999,558 in legal costs in conducting the case up to the date of settlement, and estimated the costs of the settlement approval application at $251,450. It must have been plain to Mr Levitt that the sum provided under the proposed settlement would mean that the applicants and group members would get nothing.

6 Group members might reasonably ask how the applicants and their lawyers could conscientiously put forward the proposed settlement for approval when the group members are to receive nothing under the settlement, yet the applicants’ lawyers seek payment in full for their work. A group member who objected to the proposed settlement complained that the “[t]he fees applied by Levitt Robinson appear to be unreasonable and what remains for the Group Members is an insult”. Group members might also reasonably ask how the Court could conclude that such a settlement is fair and reasonable in the group members’ interests. They might think that a settlement under which the only winners are the lawyers indicates that something is terribly amiss in the operation of the class action regime in Pt IVA of the Act.

7 The Court’s fundamental task in a settlement approval application under s 33V(1) of the Act is to determine whether the settlement is fair and reasonable and in the interests of the group members who will be bound by it, including as between the group members. There must be a good reason why a settlement could be considered fair and reasonable from the perspective of group members, when the lawyers and litigation funders get more out of the class action than the people for whom the proceeding is brought: *Clarke v Sandhurst Trustees Ltd* (No 2) [2018] FCA 511 at [29]; ***Petersen*** *Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3)* [2018] FCA 1842; 132 ACSR 258 at [244].

8 However, the fact that a proposed settlement is reached on terms which are quite unfavourable to group members does not necessarily indicate that the settlement is not fair and reasonable having regard to their interests, nor does it necessarily indicate a failure in the operation of the Pt IVA regime. Every day, in courts around the country, litigants are forced to confront the reality that their claims or defences are not as strong as they thought, and are forced to the realisation that it is appropriate to settle the case on unfavourable terms, or even to entirely capitulate. That is what happened here.

9 The parties reached the proposed settlement after six days of trial. The evidence in the approval application tends to show that the applicants accepted the offer of $11 million inclusive of costs because they (or more accurately their lawyers) had come to the view that the applicants’ and group members’ claims were likely to fail if the trial continued to judgment. It is not the Court’s role in a settlement approval application to second guess the decisions or risk appetite of the applicants or their lawyers. Different applicants and different lawyers will have different risk settings, and the question is whether the proposed settlement falls within the range of reasonable outcomes: ***Kelly*** *v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323; 335 ALR 439 at [74]. Even so, it is perhaps worth noting that the applicants’ assessment of their prospects of success had a sound basis. Having regard to the materials in the approval application, I consider that their claims were likely to have failed had the trial continued to judgment.

10 I was satisfied that the proposed settlement fell within the range of reasonable outcomes of the proceeding, and fair and reasonable in the interests of group members to be bound to it, including as between group members. On 22 November 2023 I made orders to approve the proposed settlement.

11 But there remained a question as to the reasonableness of Levitt Robinson’s legal costs and of Galactic’s litigation funding charges. The Court must decide whether it is ‘just’ under s 33V(2) of the Act to approve the payment of those amounts from the settlement fund.

12 Class actions are intended to be conducted for the benefit of the applicants and group members rather than for service providers such as lawyers and funders and the legal costs and litigation funding charges should be both reasonable and proportionate: *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 at [148]. The Court has a supervisory role in relation to the legal costs and litigation funding charges proposed to be deducted from a settlement, and it is appropriate to scrutinise those costs as part of the settlement approval process:*Kelly* at [11], [333] and [346]; *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 at [91].

13 In order to best protect the group members’ interests I made orders on 8 June 2023 to appoint:

(a) Elizabeth Harris, an experienced legal costs consultant, as a referee pursuant to s 54A of the Act (the **Costs Referee**) to inquire and report in relation to the reasonableness of the applicants’ legal costs for work done up to the hearing of the settlement approval application, including costs anticipated but yet to be incurred as at the date of her report. The Costs Referee concluded that the reasonable legal costs incurred by Levitt Robinson up to the date settlement was reached were not $11 million as Levitt Robinson initially claimed, but instead $9,664,594. That represented a reduction of $1,334,964 (the **Disallowed Costs**). Neither the applicants, Levitt Robinson nor Galactic opposed adoption of the Costs Referee’s reports, and I concluded that it was appropriate to adopt the reports and disallow those costs; and

(b) Lachlan Armstrong KC and Kane Loxley of counsel as contradictor (**Contradictor**), to assist the Court to perform its judicial function by representing group members’ interests in the settlement approval application. The Contradictor submitted that after taking account of the Disallowed Costs, the Court should further reduce Levitt Robinson’s approved costs by $1,141,078 which the Contradictor submitted resulted from Levitt Robinson’s lack of expedition and serious inefficiency (the **Avoidable Costs**).

If both the Disallowed Costs and the Avoidable Costs are taken into account Levitt Robinson’s reasonable legal costs will be reduced by $2,476,042, to a total $8,523,516.

14 The Contradictor contended that Levitt Robinson failed to act with due expedition and efficiency by failing to serve the applicants’ expert evidence in accordance with the Court ordered pre-trial timetable. On the Contradictor’s argument, had Levitt Robinson complied with the pre-trial timetable in relation to the service of its expert evidence the applicants would have had Aveo’s expert reports by late November/early December 2022; because of Levitt Robinson’s late service of its expert reports it did not receive Aveo’s expert reports until the eve of trial; that the parties’ expert evidence was pivotal to achieving a settlement and that the case would most likely have settled at a mediation in December 2022 had the expert evidence been on; and because the parties did not have their expert evidence, the case did not settle at the mediation and Levitt Robinson ran up $1.141 million in costs in the period immediately prior to trial which would have been avoided had the firm complied with its professional obligations.

15 Levitt Robinson denied any serious lack of expedition, inefficiency or delay, and said that any failure on its part that was found to exist did not cause the Avoidable Costs. It said, and I accept, that the Court should be cautious before requiring the firm to write off substantial costs when there is no suggestion that they were incurred other than in an honest endeavour to prosecute the applicants’ and group members’ claims. This was a large and complex case and it is appropriate to be cautious before reaching a conclusion, several years later, well removed from the heat of battle, and with the benefit of 20/20 hindsight, as to what could or should have been done by Levitt Robinson.

16 But for the reasons I explain I came to broadly accept the Contradictor’s submissions. I am persuaded that Levitt Robinson failed to act with due expedition and was seriously derelict in failing to serve the applicants’ expert evidence in accordance with the Court-ordered pre-trial timetables. It is more likely than not that the case would have settled earlier had the firm complied with its professional obligations, and the $1.141 million in costs which the firm ran up in the immediate lead up to trial were avoidable.

17 It is material to my view that the question of whether the applicants and group members had suffered any loss in the value of their freehold or leasehold interests in units in retirement village operated by Aveo was central to the case. Notwithstanding that centrality, Levitt Robinson ran the case for more than five and a quarter years before it obtained a report by an expert property valuer. Levitt Robinson did not serve its expert evidence until 16 January 2023, which was so late that the applicants could not realistically expect to receive Aveo’s expert reports in response until effectively the eve of trial.

18 When Aveo served its expert reports on 10 March 2023, three business days before trial, it should have been immediately apparent that Aveo’s expert evidence, coupled with the evidence of its sales managers, seriously damaged the prospects of the applicants being able to establish loss. It is sufficiently clear on the materials in the approval application that the difficulties the applicants faced in establishing loss were significant in the decision to accept the proposed settlement. Had Levitt Robinson complied with the pre-trial timetable so that Aveo was required by the pre-trial timetable to serve its expert evidence by late November 2022, it is likely that at the December 2022 mediation the applicants' lawyers would have understood the difficulties the applicants faced in establishing loss, and that the case would have settled at around that point. The applicants would thereby have avoided the $1.141 million in Avoidable Costs that Levitt Robinson ran up in 2023, in the immediate pre-trial period.

19 I do not, though, accept the Contradictor’s contention that after reducing Levitt Robinson’s approved costs by: (a) $1.335 million in Disallowed Costs; and (b) $1.141 million in Avoidable Costs; none of Levitt Robinson’s costs incurred in the settlement approval application should be approved. In the circumstances of the case a reduction of $2.476 million is sufficient, and Levitt Robinson’s reasonable costs incurred in the settlement approval application should be approved. Those costs are minor in the scheme of things and they would have been incurred regardless of whether Levitt Robinson complied with the pre-trial timetable for service of the applicants’ expert reports.

20 I have therefore approved Levitt Robinson’s reasonable and proportionate costs up to the date of settlement in the amount of $8,523,516, and also approved the firm's reasonable costs of the settlement approval process in the amount of $394,538, as assessed by the Costs Referee. I have ordered that Levitt Robinson pay the costs of the Contradictor. If not for the legal costs that Levitt Robinson sought to have deducted from the settlement fund the greater part of the Contradictor’s fees would not have been incurred.

21 When the settlement approval costs and the settlement administration costs (estimated at $186,000) are taken into account, there will be approximately $1,895,946 available for distribution to the applicants and group members, which represents approximately 17% of the settlement. That is a far from a happy result for them, but the unfortunate reality is that their case was weak and always likely to fail. The fact that this is a class action rather than ordinary *inter partes* litigation does not provide a proper basis for giving group members something for what turned out to be worth nothing or something beyond what the true value of their claims are worth: ***Kuterba*** *v Sirtex Medical Limited (No 3)* [2019] FCA 1374 at [18]-[19].

# THE EVIDENCE

22 The applicants rely upon the following:

(a) affidavits of Stewart Levitt, senior partner of Levitt Robinson and the solicitor on the record in the proceeding, sworn 26 April 2023, 28 September 2023 and 29 September 2023;

(b) confidential affidavits of Stewart Levitt sworn 28 September 2023 and 29 September 2023;

(c) affidavits of Brett Imlay, special counsel with Levitt Robinson, sworn 26 April 2023, 30 October 2023 and 2 November 2023;

and the exhibits thereto;

(d) the applicants’ submissions in reply to the Contradictor’s submissions dated 31 October 2023.

23 The Contradictor relies upon submissions dated 16 October 2023 and reply submissions dated 10 November 2023, and claims confidentiality in respect of parts of them;

24 Mr Levitt, trading as Levitt Robinson, was given leave to file evidence and make submissions in relation to his own interests. He relies upon the following:

(a) the affidavit of Mr Levitt sworn 21 October 2022, made in support of the applicants’ application to vacate the trial date;

(b) a confidential affidavit of Mr Levitt sworn 2 November 2023;

and the exhibits thereto; and

(c) confidential submissions dated 2 November 2023.

25 Galactic relies upon:

(a) the affidavit of Fredrick Schulman, Galactic’s sole director, sworn 27 October 2023; and

(b) submissions dated 3 November 2023.

26 The Costs Referee’s reports dated 26 July 2023, 10 August 2023, 14 November 2023 and 21 November 2023 are also before the Court.

27 I have drawn directly and indirectly on the affidavits and written submissions in these reasons.

# THE RELEVANT PRINCIPLES

28 The applicable principles in relation to settlement approval under s 33V of the Act are well-established and I recently set them out in *Webb v GetSwift Limited (No 7)* [2023] FCA 90 at [15]-[17]. The organising principle of s 33V(1) is whether the proposed settlement is fair and reasonable and in the interests of the group members to be bound by the settlement, including as between the group members. Upon the Court deciding to approve a proposed settlement, s 33V(2) empowers the Court to “make such orders as are just with respect to the distribution of any money paid under a settlement”.

29 There are three essential questions to be addressed in the approval application:

(a) whether the proposed settlement is fair and reasonable having regard to the interests of the group members considered as a whole, the *inter partes* question;

(b) whether the proposed arrangements for sharing any settlement fund between the applicants and group members are fair and reasonable, again having regard to the interests of the group members considered as a whole, the *inter se* question; and

(c) as an aspect of (b) above, whether the proposed deductions from the settlement fund before distribution to the group members, for example, legal costs, litigation funding charges, a reimbursement payment to the applicant and settlement administration costs are reasonable such that it is appropriate to approve them.

# THE ROLE OF THE CONTRADICTOR

30 The precise role of a contradictor in any case will be defined by the terms of their appointment by the Court. Here, my orders specified that the Contradictor’s role was to represent the interests of group members and to assist the Court to perform its judicial function in deciding whether the proposed settlement of this proceeding is fair and reasonable having regard to the interests of group members who will be bound by the settlement (if approved), and as between group members.

31 Contradictors are regularly appointed in this context. In *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653 at [123] Justice John Dixon observed as follows:

The court appoints a contradictor on a s 33V application in order to more effectively discharge its judicial function. In doing so, a court does no more than refine its process to the task. In my view…a contradictor appointed by a court on a s 33V application has, on behalf of and for the benefit of group members, the rights and powers of a party to the dispute unless the scope and extent of such powers is expressly constrained by the appointing court or necessarily constrained by the context of the appointment.

32 The appointment of a contradictor to represent the interests of absent group members in a settlement approval application can provide real assistance to the Court in the discharge of its judicial function. Sometimes a contradictor’s submissions shine a light into the dark corners of a proposed settlement, in circumstances where the parties (both friends of the deal) fail to do so. Appointment of a contradictor can be a useful tool in ensuring “both that justice is done and is seen to be done”: J Kirk SC (as his Honour then was), “The Case for Contradictors in Approving Class Action Settlements” (2018) 92 *Australian Law Journal* 716, 729.

33 Here, the Contradictor accepted that its role was to act as counsel for the group members who are not otherwise directly represented before the Court. The Contradictor said, correctly in my view, that its role was not to take every arguable point that might be said to be in the group members’ interests, but rather to exercise the normal and proper forensic judgements of counsel in determining what submissions ought be made in the interests of those they represent, and to assist the Court to exercise its protective role under s 33V: *Gill v Ethicon Sàrl (No 10)* [2023] FCA 228 at [42] (Lee J). That includes, where appropriate, explaining to the Court why the contradictor chooses not to take a point, or to make a submission, that might be regarded as open. That is so because it is important that the Court be satisfied that its appointed contradictor has not overlooked something that the Court would expect to have been considered.

34 The Contradictor’s submissions in this case were helpful. They brought to light a concern in relation to the quantum of the legal costs proposed to be deducted from the settlement fund and paid to the applicants’ lawyers, which no other party brought to my attention.

# OVERVIEW OF THE PROCEEDING

35 The essence of the applicants’ and group members’ claims is that Aveo, having sold to them rights to occupy their retirement village units upon a certain set of terms, then:

(a) altered the terms on which new residents might be offered units; and

(b) in practice tended to confine the existing residents to the terms of the Aveo Way.

Their central contention is to the effect that the changed terms meant that the claimants were not able to sell as attractive a set of rights as they had themselves originally purchased, that the value of their existing rights was therefore materially diminished, and that Aveo had unconscionably taken advantage of its bargaining power in order to shift residents over to the Aveo Way. The applicants relied heavily on the proposition not only that the applicants and group members suffered (or were likely to suffer) loss from the diminished value of the rights that they were able to sell, but also that Aveo arrogated to itself the benefit of all future capital appreciation on the units.

36 The applicants alleged four species of conduct said to give rise to Aveo’s liability, which can be summarised as follows.

37 *First*, the Unconscionable System claim. The gist of this claim is that Aveo had a multiplicity of “levers”, that is, existing and available aspects of its business and relationship with residents that it could use to move, by power or influence, residents of its retirement villages in their decision-making. Aveo knew that it had these “levers,” and in so knowing it designed the Aveo Way.

38 The object of the Aveo Way was to replace pre-Aveo Way interests in units in Aveo’s retirement villages (**Pre-AWIs**) with Aveo Way interests (**AWIs**). Aveo wished to do this because it expected that it could obtain a financial benefit from the replacement of Pre-AWIs with AWIs. Relevantly, the differences are that:

(a) the holders of Pre-AWIs were generally entitled to capital appreciation, whereas the holders of AWIs were not (with Aveo obtaining that entitlement under AWIs); and

(b) the holders of AWIs were exposed to a deferred management fee (**DMF**) either of a greater percentage, faster accrual, or both (with Aveo obtaining the benefit of those changes); and

(c) some holders of AWIs paid additional membership fees to Aveo.

39 The mechanism adopted by Aveo to implement the replacement of Pre-AWIs with AWIs was by ensuring that, upon the introduction of the Aveo Way, the price paid by the incoming resident for an AWI in a retirement unit would be the price paid by Aveo to the outgoing resident for or in respect of the Pre-AWI. If, as the applicants alleged, the Pre-AWIs were more valuable than AWIs (or were likely to be), then that meant that Aveo benefited, by avoiding having to pay that difference in value between what it bought (a Pre-AWI) and what it sold (an AWI). Without paying the outgoing interest holder anything more for the interest, Aveo acquired the additional value attributable to the superiority of the Pre-AWI over the AWI.

40 In this way Aveo was alleged to have converted a portfolio of interests in which residents were generally entitled to capital gains (and to a lower DMF), into a portfolio of interests in which Aveo was entitled to capital gains (and a higher DMF), without having to pay the outgoing resident anything for the greater value of the Pre-AWI that the resident held. That system is one of the crucial aspects of the conversion to Aveo Way on which the applicants’ case was focused. It worked against the outgoing interest holder in relation to capital gains and at a portfolio level resulted in a massive capital gain for Aveo.

41 The applicants contended that they are not just complaining about Aveo legitimately pursuing its own advantage. They allege that, using the levers available to it, Aveo took a number of steps to achieve its desired result, which were not necessary to protect its legitimate interests, which it did for the primary purpose of obtaining a benefit for itself, resulting in detriment (or the likelihood thereof) to the applicants and group members. The features that are alleged to support a finding that Aveo’s conduct was unconscionable include its superior knowledge and bargaining power, its purposes in introducing and effecting Aveo Way, the vulnerability of the applicants and group members, and the fact that ARE, Aveo’s “in-house” real estate agency, was used by Aveo to effect the system when ARE stood in a fiduciary relationship with the selling applicants and group members (who were its clients).

42 *Second*, the introduction and promotion of Aveo Way at a village-level by some village operators was unconscionable and caused damage to some group members. It is alleged that AWIs were (or were likely to be) less valuable than Pre-AWIs, and having regard to that and all of the circumstances of each sale, introducing and promoting Aveo Way in relevant Aveo villages involved statutory unconscionability by Aveo directly, and as an accessory to the village operators’ conduct.

43 *Third*, that Aveo and the village operators represented to the applicants and group members that disposing of Pre-AWIs pursuant to the Aveo Way would leave sellers of Pre-AWIs *no worse off*. That is alleged to constitute misleading or deceptive conduct, either because selling pursuant to the Aveo Way would or was likely to, in fact, leave sellers worse off, or (on the basis that the representation related to a future matter), because there were no reasonable grounds for the representation. This is alleged against Aveo directly and also as an accessory to the village operators’ conduct.

44 *Fourth*, the failure to disclose to the applicant and group members (in the presence of a reasonable expectation of disclosure) that there was no need for the holders of freehold Pre-AWIs to appoint ARE to sell their freehold interest constituted unconscionable conduct. It is alleged that there was no need for the holders of freehold Pre-AWIs to appoint ARE to sell their interests because, inter alia, the relevant village operator would inevitably be the purchaser of the Pre-AWI (so that there was no need to identify a buyer). This is alleged against Aveo directly and as an accessory to the failure to disclose by relevant village operators, and also as an accessory to ARE’s failure to disclose which includes an allegation that Aveo is accessorially liable for ARE’s unconscionable and misleading conduct and deceptive charging of commission on the sales.

## The centrality of loss in the case

45 The essence of the applicants’ claims was that the introduction of the Aveo Way programme caused a reduction in the desirability of units in Aveo retirement villages, giving rise to: (a) a lower sale price for an outgoing resident’s unit than otherwise would have been achieved; and/or (b) a longer time on the market for the unit than would otherwise have been the case. The applicants’ case centrally turned upon evidence as to the value of units in Aveo’s retirement villages before the introduction of Aveo Way, compared to their value when resold or re-leased under the terms of the Aveo Way. Essentially, if the applicants and group members who held Pre-AWIs could not show that they had suffered, or were likely to suffer, a loss as a result of the introduction of the Aveo Way then it was not unconscionable for Aveo to introduce the Aveo Way and doing so did not involve misleading or deceptive conduct.

46 The centrality of loss in the case was obvious from early in the proceeding. Since almost everything in the proceeding turned on the Court’s acceptance that there has been a lower sale price for units or longer sale time since the Aveo Way programme was introduced, on 30 July 2019 Aveo submitted that a separate question as to loss should be heard.

47 That suggestion was opposed by the applicants. I was, however, attracted to the idea and I made orders on 30 July 2019 authorising National Judicial Registrar Gitsham to confer with the parties in the endeavour to have them agree, or to set, a separate question in relation to loss, and to make such directions as she considers appropriate, including by setting a timetable to a hearing of a separate question.

48 Unfortunately, that process became a lengthy one. The conferral process before Registrar Gitsham involved a series of case management hearings in the second half of 2019 and the first half of 2020. Aveo provided the applicants with the raw sales data in relation to freehold unit sales in July 2019 and it provided the raw sales data in relation to leasehold unit “sales” in September 2019. The applicants engaged two actuaries with expertise in the valuation of retirement village interests to review the sales and leasehold data with which it had been provided. Eventually the applicants proposed alternative separate questions in relation to loss but the parties could not agree on those.

49 Aveo eventually filed an interlocutory application dated 12 February 2021 in which it sought determination of separate questions pursuant to rule 30.01 of the *Federal Court Rules 2011* (Cth) (the **Separate Question Application**). It proposed two separate questions, based on common questions drawn from the Further Amended Application, namely:

1. Whether upon the implementation of the Aveo Way Programme with respect to an outgoing resident with a Pre-AWFI [a pre-Aveo Way freehold interest]:

(a) the outgoing resident would, or would likely, receive less monies upon the sale of their interest than if the Aveo Way Programme had not been implemented;

(b) the period of time in which the unit was required to be marketed before sale to a new resident would likely be prolonged.

2. Whether upon the implementation of the Aveo Way Programme with respect to an outgoing resident with a Pre-AWLI [a pre-Aveo Way leasehold interest]:

(a) the outgoing resident would, or would likely, receive less monies upon the sale of their interest than if the Aveo Way Programme had not been implemented;

(b) the period of time in which the unit was required to be marketed before sale to a new resident would likely be prolonged

50 I heard that application on 31 August 2021 and made orders to dismiss the application on 2 September 2021.

# KEY TERMS OF THE PROPOSED SETTLEMENT

51 The proposed settlement is recorded in a Deed of Settlement dated 27 March 2023 (**Settlement Deed**) to which the following are signatories:

(a) the applicants;

(b) Aveo;

(c) Mr Levitt, in his personal capacity and as the senior partner of Levitt Robinson;

(d) Class Marketing and Management Pty Ltd (which I understand to be a class action marketing company associated with Levitt Robinson); and

(e) Galactic Aveo LLC (which is the Galactic entity funding the proceeding) and

(f) Galactic Litigation Partners LLC (which is the Galactic parent company).

52 The key terms of the proposed settlement are that, upon final orders of the Court approving the proposed settlement (after expiry of all appeal periods) on the terms contained in the Settlement Deed or substantially on the terms of the Settlement Deed,

(a) Aveo will pay $11 million in full and final settlement of the proceeding into the Settlement Account, inclusive of interest, costs and settlement administration, to be distributed by the Administrator as directed by the Court;

(b) the applicants on behalf of themselves and on behalf of all group members will release Aveo, its related bodies corporate, its related entities and/or its related persons respectively from all of their Claims; and

(c) the applicants on behalf of themselves and on behalf of all group members, Mr Levitt by himself and his servants or and agents, and Galactic and its related entities, agree that they will not bring or pursue, or otherwise aid, abet, counsel, provide funding or procure that a third-party bring or pursue a Claim against Aveo, its related bodies corporate, its related entities and/or its related persons;

53 One unusual term of the proposed settlement is the requirement for Mr Levitt to provide to Aveo a signed copy of an agreed public statement on Levitt Robinson letterhead, the terms of which are as follows:

Levitt Robinson has today withdrawn the class action proceedings against Aveo.

Levitt Robinson acknowledges that the introduction and implementation by Aveo and its related entities of Aveo Way contracts were lawful, in accordance with industry standards and that we are now satisfied that the Federal Court is not likely to find that its introduction has caused current or former residents of Aveo to suffer any loss.

We express regret for any distress or anxiety which Aveo residents and staff have experienced as a result of or incidental to the Aveo class action litigation.

# IS THE PROPOSED SETTLEMENT FAIR AND REASONABLE *INTER PARTES*?

## Counsel’s Confidential Opinion

54 I have had the benefit of considering the Confidential Opinion of Nick Kidd SC and Daniel Meyerowitz-Katz of counsel dated 28 September 2023, who were briefed in the trial. Because the proposed settlement was reached after six days of trial, counsel had substantially more information regarding the parties’ respective cases and their prospects than is commonly the case in a settlement approval application. At the point settlement was reached the parties had put on detailed opening written submissions and had made oral openings, both sides had called their lay witnesses, both sides had filed and served their expert evidence, and the trial judge had made some remarks about aspects of the applicants’ case during the oral openings.

55 The Confidential Opinion is careful and comprehensive, and the level of candour is consistent with the expectations of the Court. Counsel did not endeavour to put a gloss on the proposed settlement. Because of its confidentiality I cannot go to the detail of the Confidential Opinion but it does not damage that confidentiality to note that it sets out some events in the lead up to the trial, including changes in the applicants’ counsel team, the applicants’ failure to comply with the pre-trial timetables for filing expert evidence and the asserted reasons for that failure, the applicants’ unsuccessful application to vacate the trial, the lateness of Aveo’s expert evidence, the applicants’ second unsuccessful application to vacate the trial, the trial judge’s remarks in the course of oral openings which the applicants saw as favourable to Aveo, and the trial judge’s ruling that the applicants’ claim that ARE acted in breach of its fiduciary duties to holders of pre-AWFIs was outside the scope of the pleading.

56 Counsel concluded that the proposed settlement is fair and reasonable in the interests of group members to be bound by it, and as between group members. It is appropriate to give substantial weight to their opinion.

## The Contradictor’s submissions

57 The Contradictor put on detailed written and oral submissions. Insofar as the submissions go to the applicants’ prospects of success in the case they are confidential and I cannot go to the detail of them. It suffices to note that the Contradictor, who was charged with the obligation to represent the interests of absent group members, concluded that notwithstanding that the proposed settlement represents a very disappointing result for group members it could not responsibly be put that some feature of the proposed settlement *inter partes* ought be rejected by the Court.

58 The Contradictor also considered an argument as to whether, irrespective of the prospects of the applicants’ claims, it was in the interests of group members to have those claims prosecuted to their conclusion. On this argument, compared to a settlement under which they are to receive nothing, group members had nothing to lose by continuing the case. That risk fell entirely on Galactic, and it is a risk that Galactic assumed in financing the claim. On this argument the proposed settlement is not in the interests of group members to be bound to it.

59 But, the Contradictor noted, that argument is not tenable because:

(a) it ignores the terms of the litigation funding agreements (**LFAs**) with the applicants and the Terms of Engagement Levitt Robinson entered into with Galactic. Galactic did not agree to fund the case to judgment regardless of its own assessment of the prospects, and it had the right to terminate the LFA and the Terms of Engagement; and

(b) it proceeds on a false premise that Galactic would have continued to fund the litigation in the event the settlement offer was refused. The applicants and their lawyers were obliged to keep Galactic fully informed in relation to the prospects of the case, and it is appropriate to infer that they did so. It seems likely that the same concerns that lay behind the applicants’ decision to accept a costs-only settlement would have motivated Galactic to cease funding the proceeding if the applicants wanted to continue it. If funding ceased then there is nothing to show that Levitt Robinson would be prepared to continue to act in the case without litigation funding, and nothing to show that the applicants would have been prepared to assume the risk of an adverse costs order in the case.

60 The Contradictor’s submissions point strongly in favour of approving the proposed settlement *inter partes*.

## The scope of the proposed releases

61 Clause 3.1.2 of the Settlement Deed provides that upon final settlement approval orders the applicants for and on behalf of themselves and on behalf of group members release Aveo, its related bodies corporate, its related entities and/or its related persons respectively from all of their “Claims” (as defined).

62 “Applicants’ and Group Members’ Claims” is defined in cl 1.1 to mean “any claim or cause of action in the Proceedings or any claim or cause of action arising out of, or in relation to, the subject matter of the Proceeding including any other potential or related Claim”.

63 “Claim” is broadly defined in cl.1.1 to mean:

any claim, demand, action, suit or proceeding for damages, debt, restitution, equitable compensation, account, injunctive relief, specific performance, declaratory relief or any other remedy, whether by original claim, cross-claim, claim for contribution or otherwise whether presently known or unknown and whether arising at common law, in equity, under statute or otherwise and whether involving a third party or party to this Deed and all liabilities, losses, damages, costs (including legal costs on a full indemnity basis), interest, fees, and penalties of whatever description (whether actual, contingent or prospective).

64 Thus, the applicants purport to release not only group members’ claims in the proceeding, but also “any claim” by a group member “in relation to the subject matter of the Proceeding”, including “any other potential or related Claim”, whether the Claim is known or unknown, and whether it involves someone other than a party to the Settlement Deed.

65 The phrases “in relation to the subject matter of the Proceeding” and “any other potential or related Claim” carry broad meanings, which include a group member’s claims “relating to” the subject matter of the proceeding and to related claims. That may extend to include a group member’s claim which is individual or idiosyncratic to the group member; that is, claims which are not common claims under s 33C of the Act. As I said in *Ghee v BT Funds Management Limited* [2023] FCA 1553 at [27]-[29], acting on own behalf the applicants can provide Aveo with whatever release they like, but there are limits to their capacity to release group members’ claims. The Full Court in *Dyczynski v Gibson* [2020] FCAFC 120; 280 FCR 583 at [250]-[251] (Murphy and Colvin JJ) and [395]-[396] (Lee J) held that the authority of the representative applicant in a class action does not extend to settling individual or idiosyncratic claims of group members (as opposed to ‘common claims’ recognised under s 33C of the Act), subject to the qualifications expressed by Lee J (at [398]).

66 I raised this difficulty in the settlement approval hearing and it was resolved by counsel for Aveo accepting that the releases cannot and are not intended to go beyond the common claims of the group members which are or could have been pleaded in the proceeding. Having regard to that concession in open Court, I concluded that the scope of the releases did not stand in the way of settlement approval.

## Relevant factors under the Class Actions Practice Note (GPN-CA)

### The stage of the proceeding at which settlement was achieved

67 There had been six days of trial at the point the parties reached the proposed settlement, and the applicants and their lawyers were therefore in a good position to make an informed assessment as to whether prospects of success of the applicants’ and sample group members’ claims were such that it was appropriate to effectively abandon their claims, and instead settle for legal costs only.

### The complexity and likely duration of the litigation

68 The case is both factually and legally complex and had the proposed settlement not been reached the initial trial would have run for approximately 4 additional weeks. The proposed settlement avoids the uncertainty and delay associated with prosecuting the claims to judgment.

### The risks of establishing liability and loss or damage

69 The applicants’ prospects of establishing that Aveo engaged in unconscionable conduct or misleading or deceptive conduct essentially turns on their ability to establish that the introduction of the Aveo Way Programme caused loss to the holders of pre-AWI interests. Having regard to the evidence in the approval application I am satisfied that the applicants’ and sample group members’ prospects of establishing loss were very low. In my view it is more likely than not that their claims would have failed. This points strongly in favour of approving the proposed settlement.

### The range of reasonableness of the settlement in light of the best recovery

70 The proposed settlement represents a negligible percentage of the potential best-case outcome for the applicants and group members. Indeed, once the proposed deductions for legal costs are applied, they will receive nothing.

### The reasonableness of the proposed settlement in light of the attendant litigation risks

71 The proposed settlement is a very disappointing result for the applicants and group members, and no doubt also for the applicants’ lawyers. But as I have said, the prospects of the applicants’ and sample group members’ succeeding in establishing loss were low. Based on the materials in the approval application it is more likely that than not that their claims would have failed had the initial trial continued to judgment. I therefore consider that the proposed settlement is reasonable in light of the attendant risks of litigation and that it falls within the range of reasonable outcomes in the case.

72 I note in this regard that Levitt Robinson’s evidence is redolent with complaint in relation to the trial judge’s refusal of the applicants’ two applications to vacate the trial (which had the result that the applicants did not receive Aveo’s expert evidence until the eve of trial) and his Honour’s finding that the applicants’ claim of breach of fiduciary duty by ARE, and of Aveo’s involvement in that breach fell outside the pleadings. Those matters are said to have been important to the decision to accept the proposed settlement.

73 Of course, instead of deciding to recommend acceptance of a costs-only settlement the applicants (or more accurately their lawyers) might have chosen to continue to judgment and, if unsuccessful, to then appeal the trial judge’s rulings and judgment. Different lawyers or a different funder, with different appetites for risk, might have made such a decision. But it is not my role in a settlement approval application to second-guess the applicants’ lawyers to such an extent. It is clear that the decision to settle was a reasonable option in light of all the circumstances. In any event Mr Shulman stated that Galactic would not have funded an appeal. There is nothing to show that Levitt Robinson would have been prepared to conduct an appeal without litigation funding, or that the applicants would have been prepared to take on the risk of an adverse costs order in any appeal.

### The reaction of the class

74 Only one group member filed a notice of objection to the proposed settlement. Ms Jill Orr, the executor for Valda Rutledge (deceased), said:

The fees applied by Levitt Robinson appear to be unreasonable and what remains for the Group Members is an insult.

75 That is not an objection to the proposed settlement, but rather to the legal costs Levitt Robinson proposes to deduct from the settlement fund. I accept the broad thrust of this objection, but it does not stand in the way of approving the settlement. For the reasons I later turn to explain, I consider the legal costs that Levitt Robinson proposed be deducted from the settlement fund are not reasonable, and that the firm's costs should be approved in a reduced amount.

76 For the above reasons, notwithstanding that group members will receive very little from the proposed settlement, I am satisfied that it is fair and reasonable in the interests of group members *inter partes*.

# IS THE PROPOSED SETTLEMENT FAIR AND REASONABLE *INTER SE*?

77 The revised Settlement Scheme (**Scheme**) is annexed to the 14 December 2023 orders. Under cl. 39 of the Scheme the settlement fund of $11 million is to be allocated as follows, and in this sequence:

(a) first, reimbursement of legal costs and disbursements paid by Galactic, in the amount approved by the Court;

(b) second, any unpaid or unbilled costs and disbursements of Levitt Robinson;

(c) third, the costs incurred by Levitt Robinson in the settlement approval application;

(d) fourth, the reasonable settlement administration costs incurred by the Administrator of the Scheme; and

(e) fifth, the residue remaining after payment under (a) to (d) above – the “Net Settlement Distribution Fund” - will be distributed amongst those eligible group members who registered to participate in the settlement (**Registered Group Members** or **RGMs**) in the same proportion as the “sale” price for each person’s freehold or leasehold interest bears to the total sale prices of the freehold and leasehold interest of Eligible Group Members.

78 The basic process contemplated by the proposed Scheme provided as follows:

(a) only Eligible Group Members (**EGMs**) (as defined) are eligible to claim against the settlement fund;

(b) the EGMs must register by a Court-approved deadline in order to be considered for a distribution from the settlement fund;

(c) Korda Mentha or such other suitable qualified person nominated by Aveo is appointed as the Administrator of the Scheme and will vet registrations by EGMs, and the data submitted by EGMs regarding the freehold or leasehold sale prices that form the basic integer in the calculation of their pro rata entitlements from the settlement fund;

(d) the Administrator may obtain from Aveo any necessary details to confirm the eligibility of any RGM;

(e) the Administrator will provide to each RGM a “Certificate of Claim Amount”; which the RGMs will have an opportunity to dispute;

(f) any dispute in relation to (e) above is to be arbitrated by the Administrator;

(g) the Certificates of Claim Amount as agreed or arbitrated will form the basis for the calculation of RGMs’ pro rata entitlements; and

(h) the Net Settlement Distribution Fund will be distributed according to those pro rata entitlements.

79 The Contradictor identified a small error in the proposed Scheme which Levitt Robinson then addressed, and also asserted a more substantive error which it ultimately withdrew.

80 Mr Levitt’s evidence addressed the quantum of administration costs. It shows that Korda Mentha’s estimated its settlement administration costs at $427,300 (excl. GST) for 2,700 claimants, reflecting full participation, and $402,500 (excl. GST) reflecting half participation, including a fixed component of $340,000 which appears to be payable irrespective of the rate of group member participation. However, Steven Nicols, the Court-appointed administrator in several other class action settlements schemes, provided a fee estimate of $186,000 (excl. GST) for full participation and $132,000 (excl. GST) for half participation. On 22 November 2023 I made orders to appoint Mr Nicols as the Administrator.

81 I had a concern that the Administrator should not be the arbiter of disputes in relation to any Certificate of Claim Amount, as it was the Administrator who had decided the amount in that Certificate in the first place. But, having regard to the fact that the Scheme does not require the Administrator to make “judgment calls”, and having regard to the small percentage of each RGMs loss that is likely to be paid under the Scheme, I concluded that the cost of providing an independent review was not justified by the benefit.

82 In my view the proposed settlement is fair and reasonable *inter se*.

# WHETHER LEVITT ROBINSON’S COSTS ARE REASONABLE

## The change in Levitt Robinson’s position

83 The quantum of the costs which Levitt Robinson sought to have deducted from the settlement fund reduced over time. In his first affidavit Mr Levitt stated that the firm had incurred $10,999,558 in legal costs (incl. disbursements and GST) in conducting the proceeding on behalf of the applicant up to the date of settlement, made up as follows:

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He also estimated that Levitt Robinson would incur $251,450 in costs in the settlement approval application, assuming that no contradictor was appointed and that the approval hearing concluded within one day.

84 But by the time of the approval hearing on 22 November 2023 the Costs Referee had provided her reports. She did not accept that Levitt Robinson’s costs of approximately $11 million were reasonable. Instead, she concluded that the firm’s reasonable legal costs up to the date of settlement were $ $9,664,594; being a reduction of $1,335,406. Neither Levitt Robinson, nor any other party, opposed adoption of the Costs Referee’s Reports. I concluded that it was appropriate to adopt the Costs Referee’s Reports. Thus, at this point, Levitt Robinson sought approval to deduct approximately $9.665 million from the settlement fund.

## Galactic’s position in relation to Levitt Robinson’s costs

85 Galactic’s position as to the reasonableness of Levitt Robinson’s costs also changed over time. At the time that settlement was reached Galactic had paid Levitt Robinson only $7.69 million of the approximately $11 million in legal costs that Levitt Robinson claimed to have incurred; which meant that there was approximately $3.31 million outstanding. At an early case management hearing in the approval application Galactic submitted through senior counsel that Levitt Robinson’s costs claim was not reasonable, and that costs should not be approved in any greater amount than $7.69 million. In his affidavit Mr Schulman stated that Levitt Robinson initially provided an estimate of $8.195 million to Galactic and the applicants, to run the proceeding from the start to the conclusion of the initial trial. Then, he said that less than two months before the trial was due to commence, Levitt Robinson sought to revise its estimate upwards to $11.639 million; an increase of $3.5 million.

86 But by the approval hearing on 22 November 2023 Galactic no longer contended that Levitt Robinson’s costs were unreasonable. Neither Galactic nor Levitt Robinson explained the reason for that change of position. In my view it is appropriate to infer that Levitt Robinson and Galactic have come to a private arrangement in regard to Levitt Robinson’s costs.

## The salient procedural steps

87 To understand the Contradictor’s contentions in relation to Levitt Robinson’s alleged lack of expedition and its inefficiency, and also Levitt Robinson’s response, it is unfortunately necessary to descend to an extent into the minutiae of the firm’s conduct of the proceeding, at least in relation to the seven-month period from November 2021 to 2 July 2022, which the Contradictor focussed on.

88 By orders made 2 September 2021 I dismissed the application for a separate question, and listed the initial trial of the proceeding on 1 March 2023, on an estimate of five weeks. That allowed 18 months for the parties to complete the remaining pre-trial steps.

89 By the orders made to September 2021, the applicants were required to provide Aveo with a proposed timetable for the further steps in the litigation by 16 September 2021, including for:

(a) an express pleading of the applicants’ claim for “special value” loss articulated in the hearing on 31 August 2021;

(b) identification of the sample group members whose claims are proposed to be part of the initial trial of common issues and for filing points of claim and points of defence in regard to those persons, discovery including in relation to the sample group members;

(c) opt out;

(d) the filing of lay and expert evidence; and

(e) finalising the common issues for trial.

The orders provided for Aveo to respond to the proposed timetable by 30 September 2021, and for the parties to confer in an attempt to agree the timetable by 7 October 2021.

90 The parties reached an agreed timetable for the necessary interlocutory steps up to trial. On 11 October 2021 I made orders, by consent, setting out the timetable to trial (the **first pre-trial timetable**). The orders provided that:

(a) by 11 October 2021, the applicants file a proposed Third Further Amended Statement of Claim;

(b) by 24 December 2021, the applicants file points of claim in relation to sample group members’ claims, and by 25 March 2022 Aveo file points of defence;

(c) by 22 November 2021, the parties exchange proposed categories of documents to be discovered with respect to the claims of the third and fourth applicants and the unconscionable system claim, and by 6 December 2021 seek to agree on those categories. At this point there had already been substantial discovery but there had not yet been discovery in relation to the leasehold claims, or the unconscionable system claim;

(d) by 4 March 2022, the parties exchange proposed categories of documents to be discovered in respect of the sample group members, and by 25 March 2022 seek to agree on those categories;

(e) by 4 March 2022, the applicants provide a proposed form of the opt out notice to Aveo, and by 18 March 2022 the parties seek to agree on the form and content of that notice and accompanying orders for publication, responses and inspection; and

(f) by 1 April 2022, any party wishing to bring an interlocutory application in relation to discovery, the filing of proposed points of claim on behalf of sample group members, or the form and content of the opt out notice and accompanying orders file and serve such an application. Any such application was to be determined at a hearing listed on 21 April 2022.

91 Most importantly for the present application, the consent orders provided that:

(a) by 13 May 2022 the applicants serve their lay evidence; by 8 July 2022 Aveo serve its lay evidence; and by 29 July 2022 the applicants serve any lay evidence in reply,

(b) by 29 July 2022 the applicants serve their expert evidence; by 28 October 2022 Aveo serve its expert evidence; and by 25 November 2022 the applicants serve any expert evidence in reply; and

(c) there be a mediation by 16 December 2022.

92 On 5 October 2021 the applicants sought and were granted leave to serve seven subpoenas on retirement villages said to be in close proximity to the retirement village in which the property the subject of the Colombari applicants’ claim was located. The documents were said to be necessary for the preparation of the Colombari applicants’ evidence in relation to the value of their property. On 15 October 2021 the applicants sought and were granted leave to serve six further subpoenas.

93 The applicants did not comply with the order to file points of claim on behalf of sample group members by 24 December 2021, and they were substantially late in that regard.

94 On 14 April 2022 the applicants filed an interlocutory application seeking leave to file points of claim on behalf of sample group members, outside the timeframe in the first pre-trial timetable. The applicants also sought orders for further discovery by Aveo and for approval of the form, content and mode of distribution of an opt out notice. In an affidavit in support of the application sworn 14 April 2022 Mr Levitt stated that Levitt Robinson had been unable to comply with the timetable and it expected to serve the last sample group member’s points of claim before the end of April 2022. He said that preparing the points of claim had taken much longer than anticipated including because of: (a) the commitments of Mr Imlay and counsel arising from the rescheduling of the settlement approval application in the 7-Eleven class action; (b) difficulties in finding appropriate sample group members and investigating their claims; (c) deficiencies in the information discovered by Aveo relevant to sample group members’ claims; (d) the appointment of senior counsel in the proceeding as the counsel assisting the Star Casino Royal Commission, so that he was no longer available; and (e) that the delay in investigating sample group members’ claims meant that the time set aside in December 2021 by two other members of the counsel team could not be utilised.

95 Mr Levitt further stated that the parties had agreed on the categories of discovery in relation to the new Colombari applicants added in November 2021; that such discovery had largely been provided, and that all but one of the categories of further discovery by Aveo had been agreed. Levitt Robinson had provided a proposed opt out notice and orders to Aveo but the parties had been unable to agree on the form of the notice.

96 I heard the applicants’ application for variation of the first pre-trial timetable on 21 April 2022. By orders that day I revised some aspects of the first pre-trial timetable by extending the time for compliance (the **second pre-trial timetable**) so that:

(a) by 29 April 2022, the applicants serve the last of the sample group members’ points of claim. Aveo was directed to advise as to whether it consented to the points of claim provided to it by 6 May 2022. If there was no dispute Aveo was ordered to serve points of defence in relation to sample group members’ points of claim by 24 June 2022;

(b) for Aveo to provide discovery in respect to sample group members by 24 June 2022; and

(c) to extend the time for the parties to serve their lay and evidence, as follows:

(i) by 22 July 2022 the applicants serve their lay evidence; by 16 September 2022, Aveo serve its lay evidence; and by 7 October 2022, the applicants serve any lay evidence in reply; and

(ii) by 19 August 2022 the applicants serve their expert evidence; by 18 November 2022 Aveo serve its expert evidence; and by 9 December 2022 the applicants serve any expert evidence in reply.

97 In an affidavit by Danielle Gleeson, a solicitor at Levitt Robinson, dated 20 May 2022 she exhibited correspondence to show that the parties:

(a) had resolved all disputes regarding the further categories of documents to be discovered by Aveo; and

(b) had agreed the form of the proposed opt out orders but not the form of the proposed opt out notice or newspaper notice.

The correspondence showed that Aveo was not persuaded as to the utility of hearing the sample group member claims as part of the initial trial and it neither consented to nor opposed the filing of points of claim in relation to them.

98 The proceeding was then transferred to the docket of Justice Anderson (the **trial judge**). His Honour listed the proceeding for a case management hearing on 2 June 2022, and made orders that day:

(a) granting leave to the applicant to file and serve the proposed points of claim for five sample group members (which had already been provided to Aveo);

(b) for Aveo to file and serve points of defence by 24 June 2022; and

(c) to appoint an *amicus curiae* to represent the interests of group members who had not sold their units and had not entered into a LFA. The *amicus* was appointed because Aveo expressed concerns regarding the form of funding equalisation order that the applicants’ proposed opt out notice had said Galactic might seek in relation to unfunded group members.

99 On 4 July 2022, at the applicants’ request, the Court issued 29 subpoenas all of which were said to be to assist with the preparation of the applicants' expert evidence. 25 of the subpoenas were issued to retirement village operators seeking sales information to assist in the preparation of reports by the applicants’ expert valuer in relation to the claims of the sample group members, and five were issued to accounting firms and real estate agents seeking information requested by the applicants’ forensic accountant.

100 On 9 August 2022 the trial judge heard an interlocutory application in relation to the appropriate form of the opt out notice, in which the *amicus curiae* opposed the form of opt out notice proposed by Levitt Robinson. On 12 September 2022 his Honour made orders approving the form and content of the opt out notice in a revised form.

101 The applicants failed to serve their lay evidence in compliance with the second pre-trial timetable. Instead, they served 12 lay affidavits between 29 July and 19 August 2022, between about one week and one month later than that extended timetable. Aveo was required to serve its lay evidence by 16 September 2022 but given the delay in provision of the applicants’ lay evidence it could not be expected to file its lay evidence until approximately mid-October 2022.

102 There was then some delay by Aveo in providing the further discovery it was required to provide. The applicants also experienced some delay in obtaining some of the documents that they had subpoenaed.

103 The applicants also failed to serve their expert evidence by 19 August 2022 in compliance with the second pre-trial timetable. Instead, over two months later, the applicants filed an interlocutory application dated 24 October 2022 in which they sought to vacate the hearing. The application was supported by an affidavit made by Mr Levitt sworn 21 October 2022. He deposed that the trial date was no longer maintainable because of:

(a) delay in the process of identifying sample group members and preparing their points of claim;

(b) delay in the provision of further discovery by Aveo which was required by the applicant’s experts for their reports;

(c) delay in production of documents by various subpoena recipients, for various reasons;

(d) turnover in the applicants’ counsel team through no fault of the applicant; and

(e) limitations in the applicants’ resources.

Two months after the due date the applicants had not filed any expert evidence.

104 Mr Levitt proposed a revised timetable to the primary judge, which accommodated the vacation of the trial date, and then two distinct processes:

(a) an application for leave to file and serve a Fourth Further Amended Statement of Claim and Fourth Amended Application; and

(b) an application for leave file and serve points of claim for one or more further sample group members.

105 The trial judge heard the application to vacate the hearing on 17 November 2022 and refused the application. In his Honour’s view the applicants failed to adequately explain the delay, and there had been a lack of application, diligence and expedition by Levitt Robinson: see 17 November 2022 transcript of hearing at T30.1-21; T34.25-,T35.20; and T 38.3-11.

106 Rather than vacate the trial date his Honour made orders to again extend the pre-trial timetable (the **third pre-trial timetable**), and required the applicants to serve their expert evidence by 16 January 2023. By orders made on 2 December 2022, in accordance with what had been discussed at the 17 November 2022 hearing, the third pre-trial timetable provided that:

(a) by 5 December 2022 Aveo serve its lay evidence; by 19 December 2022 the applicants serve any further lay evidence; by 27 January 2023 Aveo serve its lay evidence in response; by 17 February 2023 the applicants serve any lay evidence in reply; and

(b) by 16 January 2023 the applicants serve their expert evidence, subject to a guillotine order; and by 24 February 2023 the respondents serve their expert evidence.

107 Under the third pre-trial timetable, the applicants would not receive Aveo’s expert evidence until a week before the trial was scheduled to commence. That was obviously tight, but that was no doubt informed by his Honour’s view (expressed in the hearing) that if the case was adjourned he could not hear it for the rest of the year. It was also informed by the fact that the case had been on foot for more than five years at that point.

108 The applicants complied with the third pre-trial timetable. They served three further lay affidavits on or before 19 December 2022 and their expert reports on 16 January 2023. Their expert evidence comprised:

(a) a report by Dennis Barton, an actuary; and

(b) seven reports by Nicole Adamson, a property valuer, in relation to the applicants and each of the sample group members.

As it eventuated, the applicants did not to rely on Mr Barton’s report.

109 Aveo, however, failed to comply with the third pre-trial timetable. It did not serve its lay evidence by 5 December 2022 and instead served a series of lay affidavits between 6 and 22 December 2022. Then, on 21 February 2023 Aveo informed the applicants that it would not be in a position to serve all of its expert evidence by 24 February 2023. It said that it anticipated doing so by 13 March 2023 (that is, two weeks into the hearing). It served one expert report on 24 February 2023, being a report of Laila Burnet, a property valuer.

110 In response to that news the applicants made another application to vacate the trial. The trial judge heard the application on 27 February 2023. His Honour declined to vacate the trial, and instead made orders again extending the timetable (the **fourth pre-trial timetable**). The orders required Aveo to serve its expert evidence by 10 March 2023, subject to a guillotine order, and pushed back the start of the trial to 14 March 2023, which ultimately became 16 March 2023.

111 There was a mediation in February 2023, which was held after the applicants’ lay and expert evidence had been served but before Aveo’s expert evidence. The case did not settle.

112 On the evening of Friday, 10 March 2023 Aveo served:

(a) a further report by Ms Burnet;

(b) a further affidavit by Keith Tang, a lay witness who had earlier provided an affidavit dated 20 December 2022;

(c) affidavits by two new lay witnesses;

(d) a report by Dawna Wright, a forensic accountant; and

(e) a report by Greg Houston, an economist.

113 The applicant did not receive any lay evidence from Aveo before 6 December 2022, received new lay evidence as late as 10 March 2023, and received the majority of Aveo’s expert evidence, including evidence on loss and damage, three business days before trial.

114 The trial commenced on 16 March 2023, and settled after six days, on very unfavourable terms for the applicants and group members.

## The Contradictor’s submissions

115 It is common ground between the relevant parties that the Costs Referee’s Reports should be adopted. Levitt Robinson accepts that it is appropriate to reduce its claimed costs by the Disallowed Costs of $1.335 million, and the firm seeks approval for the deduction of costs up to the date of settlement in the amount of $9.665 million.

116 In addition to the Disallowed Costs the Contradictor submitted Levitt Robinson’s costs should be reduced by the Avoidable Costs of $1.141 million. The Contradictor contended that a lack of due expedition and serious inefficiency by Levitt Robinson led to the delay in service of the applicants’ expert evidence. As I have said, on the Contradictor’s argument, had Levitt Robinson complied with the pre-trial timetable in relation to the service of its expert evidence the applicants would have had Aveo’s expert reports by late November/early December 2022; because of Levitt Robinson’s late service of its expert reports it did not receive Aveo’s expert reports until the eve of trial; that the parties’ expert evidence was pivotal to achieving a settlement and that the case would most likely have settled at a mediation in December 2022 had the expert evidence been on; and because the parties did not have their expert evidence, the case did not settle at the mediation and Levitt Robinson ran up $1.141 million in costs in the period immediately prior to trial which would have been avoided had the firm complied with its professional obligations.

117 The Contradictor relied upon Mr Levitt’s affidavit sworn 21 October 2022, made in support of the first application to vacate the trial date, much of which he then incorporated into his affidavit sworn 2 November 2022 in the approval application. In his 21 October 2022 affidavit Mr Levitt stated (at [72]) that:

[72] The following factors have contributed to the Applicants’ not having filed their expert evidence by the time required by the April 2022 Orders or at all:

72.1 by way of context, the pleading amendments in February 2021 to include the Unconscionable System Claims and in November 2021 to include the special value claim and the introduction of sample group member claims, resulted in:

(i) the Applicants seeking further discovery by the Respondent;

(ii) the Applicants subpoenaing a number of entities for the purpose of obtaining documents to instruct its expert witnesses with; and

(iii) the need for Applicants to call expert evidence in respect of the new allegations.

72.2 delays in the Respondent producing the documents responsive to the various categories of discovery…;

72.3 the need to issue subpoenas to numerous entities, and delays incurred by the process of obtaining production of documents sought under subpoena (including, the following three matters):

(i) the access regime whereby the Respondent required first access to documents produced by certain addressees to enable it to make claims of privilege;

(ii) the application of redactions and negotiating confidentiality undertakings in relation to certain documents produced pursuant to the subpoenas;

[iii] amendments made to the addressee details of certain subpoenas due to difficulties in identifying the correct entity;

72.4 the large volume of material produced under subpoena and during discovery, which has resulted in a significant document review process, simultaneously with other work required in the proceeding; and

72.5 additional or further requests by the Applicants for information to address deficiencies in the discovery or non-compliance with discovery or subpoena obligations, or other material they have required in order to instruct their expert witnesses.

118 Mr Levitt then said (at [74] and [75]) that the applicants sought and obtained leave to issue subpoenas to five of Aveo’s external advisors who were engaged to undertake advisory work, such as audit and valuation services, in order to instruct its expert witnesses. He said that documents produced under the subpoenas had been relevant to the work undertaken by the applicants’ expert property valuer and forensic accountant, but that the applicants had still not received all of the subpoenaed documents.

119 The evidence, however, shows that the applicants did not seek leave to issue those subpoenas until 4 July 2022. The Contradictor contended that there was nothing in Mr Levitt’s affidavits to explain the delay between the filing of the Third Further Amended Statement of Claim in November 2021 which added the Unconscionable System Claim and the application for leave to issue the subpoenas on 4 July 2022. The Contradictor accepted that there was a flurry of activity by the applicants from July 2022 onwards but argued that the evidence does not explain Levitt Robinson’s delay between November 2021 and July 2022. The Contradictor contended that had Levitt Robinson complied with the first pre-trial timetable, or even the second pre-trial timetable, both of which provided plenty of time for Levitt Robinson to obtain and serve the applicants’ expert evidence, the firm was likely to have received Aveo’s expert reports by late November or early December 2022.

120 The Contradictor noted that, in refusing the first application to vacate the trial, the trial judge found that there had been a lack of application, diligence and expedition by Levitt Robinson, and that the firm had failed to adequately explain the delay: see 17 November 2022 transcript of hearing at T30.1-21; T34.25-35.20; and T38.3-11.

121 The Contradictor noted that when Aveo’s expert evidence was received, the reports of its expert valuer had the advantage of being based in Aveo’s sales data. That is, Aveo’s expert valuation evidence was not based in an extrapolation from the growth in value of “normal” residential real estate over the years. Aveo’s expert valuation evidence was corroborated by Aveo’s sales managers who gave direct evidence of their experience selling units under the Aveo Way. They said that the Aveo Way contract was more attractive to prospective purchasers; that units under the Aveo Way were easier to sell than units under pre-Aveo Way terms; and that there had been no negative impact on prices following the introduction of the Aveo Way.

122 The Contradictor argued that, in light of all the circumstances, it is likely that the case would have settled at the December 2022 mediation had the parties exchanged their expert reports prior to then. In that event Levitt Robinson would not have run up $1.141 million in Avoidable Costs.

## Levitt Robinson’s submissions

123 Levitt Robinson relied on the observations of Beach J in *Elliott-Carde v McDonald's Australia Ltd* [2023] FCAFC 162 at [106] where his Honour said:

… one can conjure up an analogy from the alchemy of equity. As Lee J observed in *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* (2020) 385 ALR 625 at [39], no group member has an ascertained interest in the settlement fund created by a class action, and each requires the aid of the Court to claim their share. Each claim is at the least closely analogous to that of a beneficiary. And because he who seeks equity must do equity, it is inequitable for the person who has created or realised a valuable asset not to have their costs, expenses and fees incurred in producing the asset paid out of the very fund or property that that person’s efforts have created…

The firm argued that the Court should be slow to take the “penal step” of disallowing costs properly incurred, and should only do so only if there are indications that something in the conduct of the proceedings had miscarried.

124 Levitt Robinson noted three matters at the outset:

(a) that the proceeding concerned claims on behalf of some 2,700 group members which could reasonably be quantified as having a claim value in the hundreds of millions. And there was no suggestion by the Contradictor that the claims were made without a reasonable basis. Accordingly, and consistently with my remarks in *Petersen* at [128]-[135], the assessment of whether Levitt Robinson’s costs are proportionate should be adjudicated against that expectation;

(b) the proceeding was a complex one with settlement being reached very late; and

(c) there is force in the remarks of Beach J in approving the proposed settlement in *Kuterba* at [18]-[19]. That application involved a proposed settlement reached midway through a trial in which, after all Court-approved deductions, the group members were to receive only 50% of the gross settlement. His Honour said:

…such a 50% level compares favourably with other contexts. But **one has to be careful with such a metric, let alone some general assertion that “in every class action, group members should get at least 50% of the gross settlement sum**”. Take the following situation. Assume that a litigation funder and external lawyers take on a very complex and high risk case (with a commensurably higher commission rate than normal) on behalf of say a large group of persons who have contracted cancer. Say that proving causation by the alleged carcinogen is extremely difficult. Assume that the action has been launched on the basis only of problematic epidemiology showing a heightened risk and some biology that shows only a possible biological pathway. Then assume that after extensive discovery and expensive expert reports it becomes clear that there is no viable biological pathway demonstrated, such that it is apparent that the group members have no cause of action for damages. Let it also be assumed that nevertheless the respondent is prepared to pay a modest amount to settle the matter, and let it also be assumed that nevertheless the respondent is prepared to pay a modest amount to settle the matter, and let it also be assumed that legal expenses and the funding commission would soak up 90% of that modest settlement sum. Is it seriously suggested that the group members should receive at least 50% of the settlement sum for what, after forensic investigation that group members did not have to pay for and where the risk for this on their behalf was taken on and funded by others, are shown to be likely valueless claims? One can multiply such examples.

**No power contained in or philosophy underpinning Part IVA provides a proper basis for giving group members something for what turned out to be nothing or to give them something beyond what the true value of their claims are worth, reflecting the product of the face value times the probability of success times the probability of recovery. Moreover, to so artificially allocate is economically distortive and unnecessarily disincentivises the reasonable investment of time and expense in investigating, funding and prosecuting class actions.**

(Emphasis added.)

125 Levitt Robinson submitted that the Contradictor’s contention:

…turns on an hypothesised concatenation of counterfactuals from a most protracted procedural history in a highly complex litigation. For one thing, the hypothesis is interposed by the Applicants *two* applications to vacate the trial, each of which was refused.

Fundamentally, it requires the finding - which rises little higher than speculation and is controverted by both a corpus of evidence and judicial experience - that the earlier exchange of expert evidence would have resulted in an earlier settlement, and specifically *arguendo* a settlement some months out from the start of the trial.

It contended that there is no rational basis for the Court to conclude that the case would have settled sooner, and thus that the costs incurred in the immediate lead up to trial would have been avoided. But in the event the Court found that the costs were avoidable Levitt Robinson accepted that the Court should rely upon the Cost Referee’s assessment that Avoidable Costs were $1.141 million.

126 Levitt Robinson relied upon three particular aspects of “the shifting forensic environment” confronting the applicants’ lawyers in the relevant period:

(a) first, that the applicant’s lawyers made two applications to vacate the trial date, the refusal of which gave rise to some obvious difficulties for the applicants;

(b) second, Aveo’s late service of its lay evidence in December 2022 and still further lay evidence as late as 10 March 2023, and then most of its expert evidence only three business days before the commencement of the trial, much of which was not responsive to the applicants’ expert evidence; and

(c) third, the trial judge’s comments during opening submissions, and then his Honour’s evidentiary and pleading rulings which essentially foreclosed the breach of fiduciary duty claims.

127 Levitt Robinson noted that Mr Levitt said in his 21 October 2022 affidavit (at [21]) that the reasons the applicants did not comply with the timetable for filing points of claim for sample group members included that:

21.1 the steps taken in the selection of sample group members (which involved considerations such as the availability of relevant documents, the State in which the village was located, and the different time periods in which units were sold);

21.2. the reasons for the selection of the sample group members for whom the Applicants have since served Points of Claim;

21.3. information sought from the Respondent during the sample group member selection and points of claim processes, and delays in the Respondent supplying that information;

21.4. the steps taken by the Applicants when they realised that they would not be in a position to comply with the 11 October 2021 orders (including proposing orders amending the timetable to trial on 21 December 2021);

21.5. communications with the Respondent about the timetable delays; and

21.6. the causes of the delays leading to the Applicants' non-compliance with the October 2021 Orders.

128 Levitt Robinson then noted that the points of claim for sample group members were served on Aveo in June 2022, and that there was then delay by Aveo in serving its points of defence, which were ultimately served 13 days later than they were due under the June 2022 orders. On this argument there was no lacuna in the evidence between November 2021 and July 2022 and Mr Levitt had properly explained any delay that had and was occurring.

129 Levitt Robinson relied on Mr Levitt’s explanation (in his 21 October 2022 affidavit at [70]-[71]) for the firm’s failure to serve the applicants’ expert evidence in compliance with the first pre-trial timetable which required that to be done by 29 July 2022, and the second pre-trial timetable which required it to be done by 19 August 2022. In the affidavit Mr Levitt said that he expected that the applicants’ expert property valuer would be able to finalise her report before the end of 2022, but that the applicants’ forensic accountant would require at least two months to prepare a report following receipt of all the requested information, which Mr Levitt anticipated receiving by the end of October 2022 or early to mid-November 2022.

130 Levitt Robinson contended that it was unlikely that the case could be settled until both parties had served their expert evidence, and once the trial judge refused to vacate the hearing date and set the third pre-trial timetable, that could not happen until after 24 February 2023, when Aveo was required to serve its expert evidence. On this argument, the costs incurred in the first two months of 2023 were therefore not avoidable.

131 Levitt Robinson also posed a counterfactual that, if the adjournment application had been successful and the trial date vacated, the expert evidence would have been exchanged later and independently of the trial, and the costs incurred in the immediate lead up to trial on 1 March 2023 would have been avoided. That seemed to be an argument that Avoidable Costs were incurred because of the trial judge’s refusal to vacate the trial date rather than because of delay by Levitt Robinson.

132 Levitt Robinson also relied on Mr Levitt’s evidence (in his 21 October 2022 affidavit at [65]-[67]) that Levitt Robinson had engaged an expert property valuer during 2021; before the 2 September 2021 orders which fixed the case for hearing on 1 March 2023. He stated that Levitt Robinson had been attempting to find an appropriate expert property valuer for some time but, because of Aveo’s far-reaching business operations, the firm had substantial difficulty in finding an appropriate expert who did not have a potential conflict of interest. Then, after Levitt Robinson had engaged the expert property valuer, she had been unable to travel freely and to visit many retirement villages in the second half of 2021, due to the COVID-19 pandemic.

133 Finally, Levitt Robinson rejected the Contradictor’s contention that it was likely that the case would have settled in December 2022 if the parties had exchanged their expert evidence by that time. Levitt Robinson relied on to the trial judge’s remarks which it said were adverse to the applicants’ case during opening addresses, and the his Honour’s evidentiary and pleading ruling which effectively knocked out the applicants’ claim of breach of fiduciary duty. The firm said that it was not the exchange of expert evidence which sank the applicants’ expectations as to the value of their claims and instead, the case settled when it did and for the amount that it did because of the view, based on the trial judge’s remarks and rulings, that the applicants were unlikely to succeed in establishing loss. That is, Levitt Robinson submitted that it could not be shown that the case would have settled sooner had the parties exchanged their expert evidence earlier, and the so called Avoidable Costs had not been shown to be, in fact, avoidable.

## Consideration

134 It is common ground that it is appropriate to approve a $1.335 million reduction in Levitt Robinson’s costs for the Disallowed Costs. After that reduction Levitt Robinson’s reasonable costs up to the date settlement was reached are *no more than* approximately $9.665 million. The question is whether it is appropriate to approve a further $1.141 million reduction in Levitt Robinson’s costs, for the Avoidable Costs.

135 I commence by noting that some matters point away from accepting the Contradictor’s argument. First, it is important to keep in mind the realities of litigation and to avoid hindsight bias. The Court should be cautious before deciding, years later, well-removed from the heat of battle, and with the benefit of 20/20 hindsight, what could or should have been done by the applicant’s lawyers between November and 2021 and July 2022. As Levitt Robinson submitted, the Court should only take the course for which the Contradictor contended if it can be shown that something in the firm’s conduct of the proceeding miscarried.

136 Second, I accept that the trial judge’s remarks during the oral openings, and his Honour’s decision that the applicants’ claim of breach of fiduciary duty was outside the pleadings were an important factor in the applicants’ decision to accept the costs-only settlement. That information did not emerge until the trial and there can be no legitimate criticism of Levitt Robinson for taking those matters into account in deciding to recommend acceptance of the proposed settlement.

137 Third, as both The Contradictor and Levitt Robinson said, it is appropriate to conclude that the case was unlikely to settle until the parties had the benefit of seeing the competing expert valuation evidence. It was reasonable for the applicants to wait until the expert material was in before they could be expected to make a decision as to whether to settle or not.

138 Fourth, in the circumstances of the case, there is some force in the remarks of Beach J in *Kuterba* at [18]-[19]. The facts of this case are not like those in *Petersen*.

139 Even so, I am satisfied that a serious lack of expedition and inefficiency by Levitt Robinson in the preparation of the applicants’ expert evidence led to it running up $1.141 million in Avoidable Costs in the immediate lead up to the trial. In my view it is more likely than not that those costs would not have been incurred had the firm shown appropriate expedition, efficiency and competence in filing and serving the applicants’ expert evidence.

140 It is important to keep in mind that the issue as to whether the applicants and group members had suffered any loss in the value of their freehold or leasehold interests in a unit in a Aveo-operated retirement village, as a result of the introduction of Aveo Way, was always central in the case. The applicants’ and sample group members’ claims of unconscionable and misleading and deceptive conduct were dependent on a finding of loss by the Court in order to be made out. That is, Aveo’s conduct in introducing the Aveo Way programme could not be unconscionable or misleading or deceptive if there was no devaluation of the unit or lengthening of the time it took to sell.

141 In those circumstances it was in my view seriously derelict for Levitt Robinson to conduct this large, complex and expensive proceeding for more than five years before it obtained a report from an expert property valuer. Levitt Robinson received an expert property valuer’s report for the first time in late December 2022, five and a quarter years after the firm commenced the case, and just two months before trial. Sometimes a party might obtain a “quick and dirty" expert’s report, not for exchange with the other side, so as to get a more informed understanding of loss, but there is no evidence of that here. To my mind it beggars belief that Levitt Robinson would have run up such huge costs, including by fighting off an attempt to have loss decided as a separate question, when it did not have a proper basis for understanding whether it could establish loss, or the approximate quantum of any loss that it could establish.

142 That is not to suggest that there is any rule in large complex litigation that a competent and prudent lawyer for a plaintiff must obtain an expert loss report before issue. Particularly in class action litigation it will often be impossible for the applicants’ lawyers to reach even an approximate estimate of loss before they have an understanding of the size and make-up of the class, and have the benefit of discovered and subpoenaed documents. But, in a case where establishing loss was so central, to fail to obtain an expert property valuer’s report until two months before trial was neither competent nor efficient. This large and complex case consumed substantial resources of the parties, and substantial judicial and administrative resources, when the applicant’s lawyers could not have known whether the applicants’ and group members’ claims were worth the candle.

143 One can see why, at a superficial level, Levitt Robinson might have believed that the applicants and group members were likely to have suffered loss. As the Contradictor said, putting to one side the leasehold interests, at face value it makes sense that a freehold interest with lower deferred management fees and the prospect of a capital gain was, all else being equal, likely to be more valuable than a leasehold interest with higher deferred management fees and no prospect of capital gain. And it makes sense that someone who purchased the former, but then was only able to sell the latter, is likely to receive a sale price lower than if they were able to sell the same bundle of rights as they had purchased. But as Aveo submitted in opening, such an analysis does not take account of the fact, that the market for a unit in a retirement village is fundamentally different from that for “normal” residential real estate. Nor does it take account of what Aveo’s sales data before and after introduction of the Aveo Way showed. Such an analysis did not take into account that the priorities and concerns of retirees when entering a retirement village are likely to be different to those of the person acquiring real estate for different purposes; the purchase of a unit in a retirement village is likely to be made primarily for lifestyle rather than financial reasons. In such circumstances, and in a case of this size, complexity and cost, it was critical that Levitt Robinson obtained the opinion of an expert property valuer experienced in the retirement village sector well prior to trial. In my view it was highly remiss of Levitt Robinson to take the case as far as it did without having an expert valuer’s report.

144 The Contradictor’s argument does not, however, go as far as that. The Contradictor submitted only that Levitt Robinson did not act with due expedition and showed serious inefficiency in the period between November 2021 and July 2022 by failing to obtain and serve an expert valuer’s report in accordance with the first and second pre-trial timetables. If Levitt Robinson had met the first pre-trial timetable it would have served the applicants’ expert evidence by 29 July 2022 and it should have received Aveo’s expert evidence by 28 October 2022. If the firm had met the second pre-trial timetable it would have served the applicants’ expert evidence by 19 August 2022 and it should have received Aveo’s expert evidence by 18 November 2022 2022.

145 In my view the Contradictor’s argument is plainly correct.

146 In the first application to vacate the trial, counsel for the applicants accepted that the critical factor in the application was the applicants’ inability to put on their expert evidence. In deciding that the applicants had not properly explained the delay in that regard, the trial judge did not limit his concerns just to the seven-month period from November 2021 to July 2022 upon which the Contradictor relied. His Honour said:

HIS HONOUR: And what I see, when I read the affidavit material – when I look at the file, having been a judge that has come in to this recently, I see a lot of applications. I see a lot of delay. I see a lack of focus on getting on with the job. That – if you – there’s a responsibility of solicitors acting on behalf of group members and that’s a wider responsibility than when they’re acting in relation to individual clients because they’re acting for the class. And it’s incumbent upon the solicitors to act with due diligence and expedition. And the one thing I see when I read the file, and I’ve read it, is a lack of application, diligence and expedition.

I see numerous applications being made for what it seems to me to be matters which go to the periphery rather than the heart of getting the case on for trial. I see a massive amount of costs being run-up for what I can see to be not much benefit to date. We’re five years down the track and you’re saying, “I’m not ready to go to trial” and you were told a year ago when the trial date was. Now, what am I missing?

(Transcript 17 November 2022, T30.7-20).

147 I agree. While it appropriate to focus on the seven-month period upon which the Contradictor relied, it should be kept in mind that Levitt Robinson commenced the proceeding on 13 September 2017, and at the point the expert evidence was due the firm had been allowed just under five years to prepare the applicants’ case. That is a very generous amount of time. The Court’s file shows repeated failures by Levitt Robinson to comply with Court-ordered timetables, many of which orders were made by consent. That is not to say that Levitt Robinson were alone in those failures, but my central concern is not with any failures by Aveo’s lawyers.

148 I accept the Contradictor's submission that there is a lacuna in the evidence upon which Levitt Robinson sought to rely to explain away its failure to serve the applicants’ expert evidence in accordance with the first or second pre-trial timetables. The evidence shows that:

(a) Levitt Robinson commenced the proceeding on 13 September 2017.

(b) by orders made on 2 September 2021 the proceeding was fixed for hearing on 1 March 2023. The case had been on foot for four years at that point and the applicants were given 18 months to be ready for trial;

(c) by consent orders made on 11 October 2021, the applicants were required to serve their expert evidence by 29 July 2022. Under the timetable, at the point the applicants’ expert evidence was due the firm would have been allowed just under five years to prepare the applicants’ case. The applicants agreed to a time limit of 10 months to put on its expert evidence, and that should have been readily achievable in circumstances where the case had been on foot for four years, there had been an extensive debate between the parties as to whether the applicants could establish loss, and Levitt Robinson had engaged an expert property valuer earlier in 2021;

(d) by orders made on 21 April 2022, the time for the applicants to serve their expert evidence was extended to 19 August 2022; and

(e) the applicants had still not obtained their expert evidence by 24 October 2022, almost two months after the due date under the second pre-trial timetable. It appears that Levitt Robinson said that the firm could not put on its expert evidence until mid-January 2023. Notwithstanding the generosity of the time it had been provided, Levitt Robinson did not come close to meeting the first or second pre-trial timetables.

149 I am well satisfied that in the period from November 2021 to July 2022 Levitt Robinson showed a lack of application, diligence and expedition in relation to the critical task of filing and serving the applicants’ expert evidence.

150 One cannot know with certainty that the case would have settled in December 2023 had Levitt Robinson served the applicants' expert evidence in accordance with the first or second pre-trial timetables. But I am not here concerned with certainty. As Levitt Robinson accepted, the case was unlikely to be settled until the parties had the expert evidence. In my view the expert evidence was pivotal to achieving a settlement. Indeed, the first pre-trial timetable was structured so as to ensure that the parties’ lay and expert evidence would be served well before trial, and the case could be mediated at a point when the parties were properly informed as to the strengths and weaknesses of their respective cases, and before running up substantial costs in the lead up to trial. I have also had the benefit of reading the lay and expert evidence, and in my view it is likely that (upon receipt of Aveo’s expert evidence) the applicant’s lawyers would have recognised the strength of Aveo’s position on loss, and moved to settle the case on the most favourable terms they could achieve. In my view it likely that the case would have settled at the mediation in December 2022 had Levitt Robinson complied with the first or second pre-trial timetables.

151 Nor am I prepared to give Levitt Robinson the benefit of any doubt as to whether settlement was likely to have been achieved in December 2022. It was seriously derelict for Levitt Robinson to take the case as far as it did without having an expert valuation report, and its delay in serving the applicants’ expert evidence was gross. It sits poorly for the firm to then come before the Court and argue that it cannot be proven that, had it met its professional obligations, the case would have settled earlier.

152 Levitt Robinson’s argument that - if the adjournment application had been successful and the trial date vacated, the expert evidence would have been exchanged later and independently of the trial, and the costs incurred in the immediate lead up to trial on 1 March 2023 would have been avoided - has no force. The trial judge refused the application to vacate the trial date because of a lack of application, diligence and expedition on the part of Levitt Robinson. That tends to support rather than detract from the Contradictor’s argument.

153 In my view it is ‘just’ pursuant to s 33V(2) of the Act to approve Levitt Robinson’s costs up to the date settlement was reached in the sum of approximately $9.665 million, which takes into account a reduction of approximately $1.335 million for Disallowed Costs and $1.141 million for Avoidable Costs.

## Whether the litigation funding charges are reasonable and proportionate

154 Under the LFAs Galactic entered into with the applicants and approximately 232 group members Galactic is entitled to be reimbursed from the settlement fund for the $7.69 million in costs it paid to Levitt Robinson, and also entitled to a funding commission of 35% of the gross settlement.

155 Galactic does not, however, seek to enforce the LFAs. It has waived its entitlement to a funding commission, and it undertook to the Court that it would not seek to recover from the applicants and funded group members any shortfall it suffers between the costs it has paid Levitt Robinson and the costs approved by the Court.

156 Galactic seeks reimbursement only of the $7.69 million in costs it paid to Levitt Robinson.

157 In my view it is appropriate that the burden of the reduction in approved costs falls on Levitt Robinson rather than upon Galactic. Levitt Robinson was in charge of the conduct of the litigation on behalf of the applicants, not, Galactic; the increased legal costs it ran up were to its benefit rather than to Galactic’s benefit, and it cannot sensibly be said that Galactic is a winner from the case. Mr Schulman’s affidavit shows that, upon reimbursement of the costs it paid to Levitt Robinson, Galactic will be substantially out-of-pocket as a result of funding the case. Galactic is a subsidiary of Galactic Litigation Partners LLC (**GLP**), a New York based litigation funding company. To fund the litigation, GLP borrows funds from institutional investors which are secured by the expected proceeds of various legal proceedings which are funded by litigation special purpose vehicles, including Galactic Aveo LLC which funded this case. Galactic Aveo LLC then borrows the funds from GLP at rates exceeding 18% per annum. As the proceeding has been on foot for over five years, the interest that has accrued on amounts spent so far by Galactic exceeds $5.2 million, which money is lost.

# THE APPLICATION FOR CONFIDENTIALITY

158 As I have said, the starting point for consideration of suppression or non-publication orders is that it is mandatory under s 37AE for the Court to take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice. The Court must be satisfied that the order is necessary “to prevent prejudice to the proper administration of justice” (s 37AG(1)(a)), and “necessary” is a “strong word”: *Hogan* at [30].

159 The need to keep a tight rein on confidentiality orders is heightened in the context of class action litigation. As I said in *Coatman v Colonial First State Investments Ltd* [2022] FCA 1611 at [8]-[9]:

Class actions are not just disputes between private parties about private rights, they have a public dimension: *Madgwick v Kelly* [2013] FCAFC 61; 212 FCR 1 at [91]. The settlement of class action proceedings is not just a private bargain between the parties in which the parties may legitimately seek to keep aspects of the settlement confidential: *McGraw-Hill* at [107]. Frequently, class actions perform a public function by being employed to vindicate statutory policies such as disclosure to the securities market, prohibition of cartel conduct and the provision of safe medical and pharmaceutical products: see Legg M, *Class Actions, Litigation Funding and Access to Justice* (Law Research Paper No 17-57, UNSW, 7 September 2017). It is important to safeguard the public interest in open justice, which is entrenched in the settlement approval regime under Part IVA of the FCA Act: *Jenkings v Northern Territory of Australia (No 4)* [2021] FCA 839 at [64]-[65] (Mortimer J).

There is also a significant public interest in information relating to legal costs and litigation funding charges in class action litigation. In recent years those matters have been considered by the Australian Law Reform Commission and the Parliamentary Joint Committee on Corporations and Financial Services and have been the subject of much media commentary: see ALRC Report No 134, Integrity, Fairness and Efficiency - An Inquiry into Class Action Proceedings and Third-Party Litigation Funders, (December 2018); Parliamentary Joint Committee on Corporations and Financial Services, Litigation Funding and the Regulation of the Class Action Industry (21 December 2020); see also *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842; 132 ACSR 258 at [20]; *Endeavour River Pty Ltd v MG Responsible Entity Ltd (No 2)* [2020] FCA 968 at [35].

160 In the course of the approval hearing I informed the parties of my view that the claims for confidentiality in respect to the materials in the approval application went too far, and I made rulings in relation to a number of the claims. I directed the applicants to put on a revised and more appropriately calibrated application for confidentiality orders. I have made confidentiality orders in the proposed revised form, with a few minor variations.

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| I certify that the preceding one hundred and sixty (160) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Murphy. |

Associate:

Dated: 22 December 2023

SCHEDULE OF PARTIES

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|  | VID 996 of 2017 |
| Applicants |  |
| Fourth Applicant: | NEIL BERNARD COLOMBARI (IN HIS CAPACITY AS THE CO-EXECUTOR OF THE ESTATE OF JOAN MARY COLOMBARI, DECEASED) |