

## NOTICE OF FILING

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### Details of Filing

Document Lodged:	Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number:	VID996/2017
File Title:	MICHAEL ROBERT LUKE (IN HIS CAPACITY AS THE CO-EXECUTOR OF THE ESTATE OF ROBERT COLIN LUKE, DECEASED) & ANOR v AVEO GROUP LIMITED
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagos".

Dated: 4/11/2021 10:23:12 AM AEDT

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Form 17

Rule 8.05(1)(a)

Federal Court Of Australia

District Registry: Victoria

Division: General

No. VID 996 of 2017

**Robert Michael Luke (in his Capacity as the Co-Executor of the Estate of Robert Colin Luke, Deceased) and Others**

Applicants

**Aveo Group Limited (ACN 010 729 950)**

Respondent

## **Third~~Second~~ Further Amended Statement of Claim**

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## A. INTRODUCTION

### 1 The First and Second Applicants (the **Luke Applicants**):

- (a) are the co-executors of the estate of their father, Robert Colin Luke, deceased (the **Luke Estate**), pursuant to a grant of probate made by the Supreme Court of Queensland on 29 May 2015; and
- (b) in their capacity as co-executors of the Luke Estate, were the registered owners of 7/21 Gracemere Boulevard, Peregrin Springs, Queensland in what was formerly known as the Peregrin Springs Retirement Country Club, being Lot 7 in SP148376 (the **Luke Property**).

1A The Third and Fourth Applicants (the **Colombari Applicants**):

- (a) are the co-executors of the estate of their mother, Joan Mary Colombari, deceased (the **Colombari Estate**), pursuant to a grant of probate made by the Supreme Court of New South Wales on 22 November 2016; and
- (b) in their capacity as co-executors of the Colombari Estate, have vested in them all of the property of the Colombari Estate, including a chose in action against the Respondent arising out of a lease of Independent Living Unit 308 in Aveo Bayview Gardens, 36-42 Cabbage Tree Road, Bayview, New South Wales, 2104 (the **Colombari Property**).

2 The Respondent:

- (a) at all material times, was and is a company incorporated under the laws of Australia;
- (b) has, since at least about 2001, carried on a business (the **Aveo Business**) of acquiring, developing, and operating Retirement Villages in Australia and New Zealand (**Aveo Villages**) in its own right and through other entities, including Aveo Healthcare Limited (**AEH**) and Retirement Villages Group (**RVG**) and their subsidiaries;

**Particulars**

The Aveo Villages include the villages listed in Schedule 2.

- (c) has, since at least about 2001, also operated Aveo Villages through a number of corporate entities (**Aveo Managers**);
- (d) has, since about late December 2005, conducted the Aveo Business under, and been the registered owner of, various trade marks (**Aveo Trade Marks**);

**Particulars**

The Aveo Trade Marks include the following registered trade marks:

- (i) "Aveo Live Well" (trade marks 1088967, 1088965, 1414189 and 1414186);
  - (ii) "Aveo Retirement Living" (trade marks 1714624 and 1714620);
  - (iii) "Aveo" (trade mark 1725897);
  - (iv) "Aveo Assisted Living" (trade marks 1411870 and 1411867);
  - (v) "Aveo Healthcare" (trade marks 1547125 and 1547127).
- (e) has, since about late 2005, licensed the Aveo Trade Marks to the Aveo Managers;



- (f) at all material times, has been and is operated by persons with extensive experience in the operation of retirement villages and the marketing, sale and lease of interests in retirement villages;
- (g) at all material times, has been and is a corporation included in the official list of the financial market operated by the Australian Securities Exchange Limited, under the listing code "**AOG**";
- (h) at all material times, has owned a majority of the issued share capital in, and has "controlled" within the meaning of the *Corporations Act*, AEH;
- (i) at all material times, has been the ultimate owner of all of the issued share capital in, and has "controlled" within the meaning of the *Corporations Act*, Retirement Villages Group Management Pty Limited ACN 119 974 819 (**RVGM**), the manager of the RVG;

#### **Particulars**

- (i) RVGM is and has been appointed as the manager of the RVG pursuant to a "Securityholders Deed" dated 18 October 2007.
- (ii) At all material times, the RVG has been comprised by three entities stapled together to form one unlisted stapled security, in that an RVG stapled security has comprised one share in Retirement Villages Australia Limited, stapled to one unit in the Retirement Villages Trust and one share in RVNZ Investments Limited.
- (j) at all times since about 18 April 2016, has owned the majority of the stapled securities in, and "controlled" within the meaning of the *Corporations Act*, the RVG.

2A At all relevant times:

- (a) Paul McAlpine:
  - (i) was the General Manager, Sales in the Respondent's Retirement Division;
  - (ii) in his capacity as General Manager, Sales:
    - (A) made, or participated in making, decisions that affected the whole, or a substantial part, of the business of the Respondent; or
    - (B) had the capacity to affect significantly the Respondent's financial standing;
  - (iii) in the premises, was an "officer" of the Respondent, within the meaning of s 9 of the *Corporations Act* 2001 (Cth);

## (b) Stephen Gook:

- (i) was the National Marketing Manager in the Respondent's Retirement Division;
- (ii) in his capacity as National Marketing Manager:
  - (A) made, or participated in making, decisions that affected the whole, or a substantial part, of the business of the Respondent; or
  - (B) had the capacity to affect significantly the Respondent's financial standing;
- (iii) in the premises, was an "officer" of the Respondent, within the meaning of s 9 of the *Corporations Act 2001* (Cth);

## (c) Anthony Sargent:

- (i) was the General Manager of Product Development & Strategy in the Respondent's Retirement Division;
- (ii) in his capacity as General Manager, Product Development & Strategy:
  - (A) made, or participated in making, decisions that affected the whole, or a substantial part, of the business of the Respondent; or
  - (B) had the capacity to affect significantly the Respondent's financial standing;
- (iii) in the premises, was an "officer" of the Respondent, within the meaning of s 9 of the *Corporations Act 2001* (Cth);

## (d) Alison Quinn:

- (i) was the Executive General Manager of the Respondent;
- (ii) in her capacity as Executive General Manager:
  - (A) made, or participated in making, decisions that affected the whole, or a substantial part, of the business of the Respondent;
  - (B) had the capacity to affect significantly the Respondent's financial standing; or
  - (C) was a person in accordance with whose instructions or wishes the directors of the Respondent were accustomed to act;

- (iii) in the premises, was an "officer" of the Respondent, within the meaning of s 9 of the *Corporations Act* 2001 (Cth);
- (e) Geoffrey Grady:
  - (i) was the Chief Executive Officer and a director of the Respondent;
  - (ii) in the premises, was an "officer" of the Respondent, within the meaning of s 9 of the *Corporations Act* 2001 (Cth).

3 In this pleading:

- (a) **"Retirement Village"** includes a "retirement village" as defined in the following Acts (the **RV Acts**), as applicable:
  - (i) the *Retirement Villages Act* 1999 (NSW) (**NSW Act**);
  - (ii) the *Retirement Villages Act* 1999 (Qld) (**Qld Act**);
  - (iii) the *Retirement Villages Act* 1986 (Vic) (**Vic Act**);
  - (iv) the *Retirement Villages Act* 1987 (SA) (**1987 SA Act**);
  - (v) the *Retirement Villages Act* 2016 (SA) (**2016 SA Act**);
  - (vi) the *Retirement Villages Act* 2004 (Tas) (**Tas Act**);
- (b) **"Manager"**, in relation to a Retirement Village, means a person who manages the operations of the Retirement Village and includes (but is not limited to), as applicable:
  - (i) an "operator" of the Retirement Village within the meaning of the NSW Act;
  - (ii) a "manager" of the Retirement Village within the meaning of the Qld Act;
  - (iii) a "manager" of the Retirement Village within the meaning of the Vic Act;
  - (iv) an "administering authority" of the Retirement Village within the meaning of the 1987 SA Act;
  - (v) an "operator" of the Retirement Village within the meaning of the 2016 SA Act;
  - (vi) an "operator" of the Retirement Village within the meaning of the Tas Act;

- (c) **"Management Agreement"** means an agreement for the provision of services by the Manager of a Retirement Village to a resident of the Retirement Village and includes (but is not limited to), as applicable:
  - (i) a "service contract" within the meaning of the NSW Act;
  - (ii) a "service agreement" within the meaning of the Qld Act;
  - (iii) a "management contract" within the meaning of the Vic Act;
  - (iv) "residence contract" within the meaning of the 1987 SA Act and the 2016 SA Act;
  - (v) a "service contract" within the meaning of the Tas Act;
- (d) **"Relevant Aveo Manager"** means the particular Aveo Manager for any particular Aveo Village;
- (e) **"Aveo Way Interest"** or **"AWI"** means a 99-year leasehold interest in an Aveo Village purchased after the introduction into that Aveo Village of the Aveo Way Programme and subject to the terms of the Aveo Way Contract (which is described below at paragraph 17(d));
- (f) **"Pre-Aveo Way Freehold Interest"** or **"Pre-AWFI"** means a freehold interest in an Aveo Village held before the introduction into that Aveo Village of the Aveo Way Programme and subject to the terms of a non-Aveo Way Management Agreement;
- (g) **"Pre-Aveo Way Leasehold Interest"** or **"Pre-AWLI"** means a leasehold interest in relation to, or a licence to occupy, a residential unit in an Aveo Village held before the introduction into that Aveo Village of the Aveo Way Programme and subject to the terms of a non-Aveo Way Management Agreement;
- (ga) **"Pre-Aveo Way Interest"** or **("Pre-AWI")** means an interest that is either a Pre-AWFI or a Pre-AWLI;
- (h) **"DMF", "deferred management fee"** or **"exit fee"** refers to the fee payable pursuant to a Management Agreement on the resident exiting the agreement.

4 The Luke Applicants bring this proceeding against the Respondent on behalf of the Luke Estate and as a representative parties pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) on behalf of all persons who:

- (a) have or had a Pre-AWFI in an Aveo Village in which the Aveo Way Programme has been introduced (including the executors, administrators, and lawful assigns of persons who held such interests); and
- (b) have not settled their claims the subject of this proceeding,  
  
(together and severally, **Freehold Group Members**).

- 4A The Colombari Applicants bring this proceeding against the Respondent on behalf of the Colombari Estate and as representative parties pursuant to Part IVA of the *Federal Court of Australia Act* on behalf of all persons who:
- (a) have or had a Pre-AWLI in an Aveo Village in which the Aveo Way Programme has been introduced (including the executors, administrators, and lawful assigns of persons who held such interests); and
  - (b) have not settled their claims the subject of this proceeding,
- (together and severally, **Leasehold Group Members**).
- 5 As at the date of this pleading, there are more than seven Freehold Group Members who have claims set out in this pleading against the Respondent.
- 5A As at the date of this pleading, there are more than seven Leasehold Group Members who have claims set out in this pleading against the Respondent.
- 6 The Luke Applicants and a sub-group of Freehold Group Members have sold their Pre-AWFIs at a time when the Respondent has or had introduced the Aveo Way Programme into the relevant Aveo Village (**Freehold Sales Sub-Group Members**).
- 6A The Luke Applicants and a further sub-group of Freehold Group Members have sold their Pre-AWFIs at a time when the Respondent has or had introduced the Aveo Way Programme into the relevant Aveo Village, through Aveo Real Estate Pty Ltd (**ARE**), a wholly-owned subsidiary of the Respondent, as sales agent and, have paid a sales commission to ARE (**ARE Sub-Group Members**).
- 6B The Colombari Applicants and a sub-group of Leasehold Group Members have surrendered their Pre-AWFIs at a time when the Respondent has or had introduced the Aveo Way Programme into the relevant Aveo Village (**Leasehold Sales Sub-Group Members**).
- 6C The Luke Applicants, the Colombari Applicants and a sub-group of the Freehold Group Members and Leasehold Group Members, comprise persons who:
- (a) held a Pre-AWI in which the Aveo Way Programme was introduced (including the executors, administrators, and lawful assigns of persons who held such interests); and
  - (b) are either a Freehold Sales Sub-Group Member or a Leasehold Sales Sub-Group Member; and
  - (c) were entitled to some or all of the benefit of any appreciation in the value of the land or real property the subject of their Pre-AWI; and
  - (d) have not settled their claims the subject of this proceeding,
- (together and severally, **System Group Members**).

- 7 As at the date of this pleading, there are more than seven Freehold Sales Sub-Group Members, Leasehold Sales Sub-Group Members, ARE Sub-Group Members, and System Group Members, respectively, who have claims set out in this pleading against the Respondent.

## **B. THE AVEO BUSINESS**

- 8 Each Relevant Aveo Manager:

- (a) was a Manager in one or more Aveo Villages;
- (b) operated one or more Aveo Villages:
  - (i) in accordance with the Respondent's business model;
  - (ii) using the Respondent's intellectual property, including the Aveo Trade Marks, under licence from the Respondent;
  - (iii) in accordance with the Respondent's directions and policies;
- (c) was wholly or partly owned or controlled by the Respondent or by entities associated with the Respondent;
- (d) included among its directors or officers one or more appointees of the Respondent who were employees or officers of the Respondent;
- (e) is and at all material times has been operated by persons with extensive experience in the operation of retirement villages and the marketing and sale of interests in retirement villages.

### **Particulars**

Particulars will be provided after discovery insofar as this allegation is not admitted or denied, and if particulars are requested.

- 9 In accordance with each of the RV Acts, a person who becomes a resident of a Retirement Village is and at all relevant times has been required to enter into a Management Agreement with the Manager of that Retirement Village.

### **Particulars**

See Qld Act, ss 9, 10(4)(c), 12; NSW Act, s 24; Vic Act, s 32E(2) and (3); 1987 SA Act, ss 3 (definitions of "residence contract") and 17; 2016 SA Act, ss 3 (definition of "residence contract") and 20; Tas Act, ss 3 (definitions of "residence contract" and "service contract"), 6(1) and Sched 1.

- 10 The Luke Applicants' Management Agreement (as defined below) and the Management Agreements entered into by Aveo Managers and the Freehold Group Members from time to time (**Freehold Group Member Management Agreements**):

- (a) in each case, did not permit existing residents to sell their interest in a residential unit in an Aveo Village unless the incoming resident agreed to enter



into a Management Agreement on terms to be determined by the Relevant Aveo Manager;

- (b) in the case of the Luke Applicants and some or all of the Group Members, required existing residents to grant the Relevant Aveo Manager an option to purchase the resident's interest, which was exercisable in specified circumstances, including a resident wanting to sell his or her interest;
- (c) required residents to consent to, or otherwise permitted, the registration of a mortgage, caveat, or other registrable interest on the title of the resident's unit in order to secure the payments due under the Management Agreement or the option to purchase the unit, or both; and
- (d) required (if permissible under the Relevant RV Act), permitted (if such a requirement was impermissible), or did not prohibit the Relevant Aveo Manager or an entity related to the Relevant Aveo Manager (a **Relevant Real Estate Agent**) to be appointed as the real estate agent for the sale of that resident's interest, when the resident wanted to sell.

#### Particulars

- (i) Clause 11.1(b) of the Luke Applicants' Management Agreement.
- (ii) Particulars of the Group Member Management Agreements will be provided in separate Points of Claim, or after the determination of the common questions.

10A The Colombari Applicants' Management Agreement (as defined below) and the Management Agreements entered into by Aveo Managers and the Leasehold Group Members from time to time (**Leasehold Group Member Management Agreements**):

- (a) in each case, was structured such that:
  - (i) on entry into the unit, the resident paid an "**Ingoing Contribution**" as an interest-free loan to the Relevant Aveo Manager, which was repayable on exit;
  - (ii) on exit, the outgoing resident was paid:
    - (A) a refund of the Ingoing Contribution; plus
    - (B) a fixed percentage of any capital gain, being the amount by which the resale price (i.e the Ingoing Contribution paid by the new incoming resident) ("**Resale Price**"), or, if the Ingoing Contribution was repaid before the incoming resident had paid the Resale Price, the fair market value of the unit at the time of exit, as otherwise agreed ("**Resale Value**"), exceeded the amount of the Ingoing Contribution originally paid by the outgoing resident (the "**Leasehold Capital Gain**"); less

- (C) applicable fees and charges, including any exit fee;

**Particulars**

- (0) Clauses 2.1, 13, 17, 19, and 20 of the Colombari Applicants' Management Agreement.
  - (1) Particulars of the Group Member Management Agreements will be provided after the determination of the common questions.
- (b) required, expressly or by implication, that a new incoming resident would agree to the form of Management Agreement offered to them by the Respondent at the time of entry into the unit;

**Particulars**

- (i) Clause 19.2 of the Colombari Applicants' Management Agreement.
  - (ii) Particulars of the Group Member Management Agreements will be provided in separate Points of Claim, or after the determination of the common questions.
- (c) required (if permissible under the Relevant RV Act), permitted (if a such a requirement was impermissible), or did not prohibit a Relevant Real Estate Agent to be appointed as the real estate agent for the lease of that resident's unit, when the resident wanted to surrender their lease.

**Particulars**

- (i) Clause 19.3 of the Colombari Applicants' Management Agreement.
  - (ii) Particulars of the Group Member Management Agreements will be provided in separate Points of Claim, or after the determination of the common questions.
- 11 At all relevant times, once a resident had given notice that his or her interest was for sale or that he or she intended to surrender their lease, it was open to the Respondent, itself or through the Relevant Aveo Manager:
- (a) if the Management Agreement held by a Freehold Group Member provided the Respondent or the Relevant Aveo Manager with an option to purchase the unit at a value provided for by that Management Agreement, to exercise that option; or
  - (b) in the case of the Leasehold Group Members, to repay the Ingoing Contribution and to pay the Leasehold Capital Gain (calculated by reference to the fair market value of the unit as agreed), less applicable fees and charges; or
  - (c) otherwise to offer to purchase the resident's interest.
- 12 [deliberately left blank]

- 13 At all material times, the Respondent and the Aveo Managers have involved themselves in the marketing, resale and lease of residential units in Aveo Villages through the following means:
- (a) the Respondent has maintained and does maintain a section on its website in which such properties are marketed;
  - (b) each Aveo Village has maintained and does maintain an on-site sales office using the Respondent's branding and livery, including the Aveo Trade Marks, from which sales staff acting or purporting to act on behalf of the Respondent conduct the marketing, sale and lease of interests in residential units in that Aveo Village;
  - (c) the Respondent has determined, or alternatively been involved in determining, the standard terms of Management Agreements entered into by Aveo Managers so as to include, *inter alia*, provisions of the type pleaded at paragraphs 10 and 10A above.
- 14 At all material times, it was each of the Aveo Managers' practice (where applicable), after entering into a Management Agreement in relation to a freehold unit in an Aveo Village, to secure its interests under that Management Agreement by registration of a mortgage, caveat, or other registrable interest on the title of the unit.
- 15 By reason of one or more of:
- (a) the requirement to enter into a Management Agreement (as pleaded in paragraph 9);
  - (b) the standard terms of Management Agreements between the Relevant Aveo Manager and existing residents (as pleaded in paragraphs 10 and 10A); and
  - (c) the Respondent's entitlement to purchase the units and interests (as pleaded in paragraph 11);
  - (d) the registration of a mortgage, caveat, or other registrable interest on the title of an interest in a residential unit in an Aveo Village (as pleaded in paragraph 14);
  - (e) where relevant, the Respondent's control over AEH and the RVG, as pleaded at paragraph 2; and
  - (f) the Respondent's extensive knowledge and experience in the retirement village industry,

the Respondent, itself or through the Relevant Aveo Managers, has and at all relevant times has had the ability to restrict the sale and lease of interests in units in Aveo Villages in the manner and on the terms that the Respondent requires.

## C. THE AVEO WAY PROGRAMME

- 16 Commencing in about January 2014, the Respondent designed and began implementing a programme (the **Aveo Way Programme**) to alter the terms of Management Agreements to be signed by incoming residents in Aveo Villages.

### Particulars

- (a) In about January 2014, Anthony Sargent and James Wiltshire of the Respondent began developing a proposal for new Aveo contract terms [AVE.003.012.1486 and AVE.003.012.1487].
- (b) On or about 17 February 2014 the new proposal was referred to in a Retirement Report to the AOG Board by Alison Quinn [AVE.003.001.1094].
- (c) On or about 21 May 2014 the proposed Aveo Way contract terms were sent by Anthony Sargent to Geoff Grady for his sign-off [AVE.003.001.9035 and AVE.003.001.9036].
- (d) In about June 2014 the Aveo Way Programme proposal was approved by the Respondent's executive management and approved for trial at 8 villages.
- (e) On or about 6 June 2014 the Aveo Way Programme trial commenced at the Aveo Island Point retirement village.
- (f) In about June 2014 the Aveo Way Programme trial commenced at the Aveo Hampton Heath retirement village.
- (g) On or about 11 August 2014 a report on the Respondent's retirement operations to the AOG Board incorporated an updated on the Aveo Way Programme [AVE.009.183.1638].
- (h) In about early September 2014 the Aveo Way Programme trial commenced at the Aveo Minkara, Bayview Gardens, Peninsula Gardens, Maple Grove, Mosman Grove, and Lindfield Gardens retirement villages.
- (i) On or about 23 September 2014 the Aveo Way Programme was presented to and discussed by the AEH Board [AVE.009.123.2500].
- (j) On or about 12 November ~~17 October~~ 2014 the Aveo Way Programme was presented to and discussed by the AOG Board [AVE.101.009.5006].
- (k) On or about 28 October 2014 a board paper was prepared for the AOG Board with information regarding the financial impact of the Aveo Way Programme [AVE.003.011.9113].
- (l) On or about 31 October 2014 the impact of the Aveo Way Programme on valuations was discussed by the AEH Board [AVE.101.003.6407].
- (m) On or about 3 November 2014 the Aveo Way Programme was approved by the AOG and AEH Boards to be implemented across both the AOG and AEH portfolios [AVE.003.003.9320].

- (n) On or about 27 November 2014 the Aveo Way Programme was presented to and discussed by the RVG Board, which resolved to approve the Programme in principle, subject to completion of a trial [AVE.009.121.1169].
- (o) On or about 1 December 2014, 10 retirement villages in the RVG portfolio were approved for the Aveo Way Programme trial [AVE.003.077.6135].
- (p) On or about 21 January 2015 the Aveo Way Programme commenced at all AEH retirement villages.
- (q) On or about 3 February 2015 training in relation to the Aveo Way Programme was conducted for AEH sales staff.
- (r) In about February 2015 the deferred management fee payable under the Aveo Way Contract was increased from 33% accruing over five years to 35% accruing over three years [AVE.003.077.4975 and AVE.003.029.2764].
- (s) On or about 21 April 2015 training in relation to the Aveo Way was conducted for the staff of the Respondent's freehold villages.
- (t) On or about 28 April 2015 Public Information Documents reflecting the Aveo Way Contract were distributed to the Respondent's Queensland retirement villages, and the staff of those villages were instructed to use those documents and not the previous versions. The Public Information Document for Aveo Peregrine Springs as at 16 April 2015, a copy of which was given to Janice Mary Cox to purchase her AWI in the Luke Property (as described below), included the following in clause 2.12:

Note 2

Every freehold/sublease accommodation unit in the village has a separate freehold title. Whilst the current residents of those accommodation units own the freehold to their accommodation units, the Scheme Operator intends to buy those accommodation units back from those residents as and when they leave the retirement village and offer prospective new residents of those accommodation units a right to reside in the form of a 99 year lease over the accommodation unit they select.

- (u) On or about 29 July 2015 the RVG Board approved the implementation of the Aveo Way Programme across the entire RVG portfolio [AVE.009.122.7162].
  - (v) The Applicants repeat and rely on the matters pleaded in paragraph 2A above.
- 17 Under the Aveo Way Programme as it applied or was to apply in Aveo Villages in which residents held Pre-AWFIs, the Respondent determined that:
- (a) outgoing residents who held a freehold interest in a unit in an Aveo Village would sell that interest to the Relevant Aveo Manager;
  - (b) an incoming resident would acquire an AWI in the Aveo Village in which the Relevant Aveo Manager as registered proprietor was the lessor of that interest;
  - (c) [not used]

- (d) the Relevant Aveo Manager would require the incoming resident to enter into a Management Agreement for the unit on the same or substantially the same terms as the form of contract settled upon by the Respondent (**the Aveo Way Contract**) rather than on the terms of the Management Agreement which had been in place between the existing resident and the Relevant Aveo Manager (**the Relevant Former Contract**) or substantially on the terms of the Relevant Former Contract; and
- (e) the sale price to the outgoing resident with a Pre-AWFI would be the ingoing contribution paid by the incoming resident in accordance with the Aveo Way Contract.

#### **Particulars**

Document AVE.003.001.9036, being the Aveo Way proposal approved by the Respondent's executive management in or about June 2014.

- 17A Where a sale occurred under the Aveo Way Programme of what was previously a Pre-AWFI, as the incoming resident purchased their interest from the Relevant Aveo Manager and the outgoing resident sold their interest to the Relevant Aveo Manager, in practice there was no contact or communication, direct or indirect, between the outgoing resident and the incoming resident, save to the extent that the residents could be said to be indirectly communicating through the Respondent or its related entities.
- 17B Under the Aveo Way Programme as it applied or was to apply in Aveo Villages in which residents held Pre-AWLIs:
  - (a) outgoing residents surrendered their Pre-AWLI to the Relevant Aveo Manager;
  - (b) an incoming resident would acquire an AWI in the Aveo Village in which the Relevant Aveo Manager as registered proprietor was the lessor of that interest;
  - (c) the Relevant Aveo Manager would require the incoming resident to enter into a Management Agreement for the unit on the same or substantially the same terms as the Aveo Way Contract rather than on the terms of the Relevant Former Contract or substantially on the terms of the Relevant Former Contract;
  - (d) in practice there was no contact or communication, direct or indirect, between the outgoing resident and the incoming resident, save to the extent that the residents could be said to be indirectly communicating through the Respondent or its related entities; and
  - (e) the Resale Price to the existing resident was the ingoing contribution paid by the incoming resident in accordance with the Aveo Way Contract.

#### **Particulars**

- (i) Document AVE.003.001.9036, being the Aveo Way proposal approved by the Respondent's executive management in or about June 2014.



17C. The Aveo Way Contract had the following characteristics:

- (a) the exit fee payable consisted of:
  - (i) a "deferred management fee":
    - (A) [not used]
    - (B) from about 2 February 2015, of 35% of the ingoing contribution paid by the resident, accumulating over 3 years; and
  - (ii) an uncapped "Aveo Membership Fee" of \$1,500 in June 2015 and indexed at 2.5% per annum thereafter (Membership Fee);
- (b) on exiting the contract, the resident received a refund of their ingoing contribution less applicable fees and charges, and did not receive a share of any capital gain in the property (while also not bearing any capital loss, except where the resale price of the unit was less than the agreed resale value).

18 In order to facilitate and as part of the implementation of the Aveo Way Programme, the Respondent developed and implemented training programs and sales and leasing procedures for all persons engaged in the marketing, sale and leasing of interests in applicable Aveo Villages, including the Respondent, the Relevant Aveo Managers, and ARE, such that all such persons endeavoured to sell and lease, and did sell and lease, units subject to the Aveo Way Contract rather than any and no other form of contract

#### Particulars

- (a) From about May 2014, Paul McAlpine of the Respondent was assigned to [AVE.003.004.9272], and did in fact, create an "Aveo sales framework", in order to document, present to sales staff, and train sales staff to use, a consistent sales methodology incorporating the Aveo Way Programme.
- (b) On 5 September 2014, a draft Aveo Way "sales tool" was circulated between Stephen Gook, Anthony Sargent, Alison Quinn, and Paul McAlpine [AVE.003.002.7347].
- (c) In about mid-September 2014, Stephen Gook developed various documents to be utilised by Aveo sales staff to promote the Aveo Way Programme [AVE.005.006.8634].
- (d) On or about 11 September 2014, a presentation on the Aveo Way program was conducted for the Respondent's sales and operations staff [AVE.003.001.6503 and AVE.003.001.6504].
- (e) Training in relation to the Aveo Way Programme was conducted for the Respondent's sales staff on or about 3 February 2015, followed up with individualised training with the relevant Territory Sales Manager [AVE.005.004.1914].

- (f) On or about 3 February 2015, a memorandum with instructions for selling properties in accordance with the Aveo Way Programme was distributed to the Respondent's sales staff [AVE.101.037.6738].
- (g) A further training session was conducted for the sales staff at the Respondent's Business Review seminar on or about 28 February 2015.
- (h) On or about 10 February 2015, a document entitled "Selling the Aveo Way" was sent to Alison Quinn by Paul McAlpine [AVE.003.013.4088].
- (i) On or about 12 February 2015, instructions regarding the Aveo Way Programme were incorporated into the Respondent's sales training materials [AVE.003.077.6271], and thereafter all sales staff were trained using these materials.
- (j) On or about 21 April 2015, training in relation to the Aveo Way Contract and the conversion of freehold to leasehold tenure was conducted for staff of the Respondent's freehold villages [AVE.005.006.6105].
- (k) On 28 April 2015, public information documents regarding the Aveo Way Contract were distributed to various villages, and the staff were instructed not to distribute public information documents to new residents other than the documents regarding the Aveo Way Contract [AVE.003.030.5799, AVE.003.030.5800, AVE.003.042.7623, and AVE.003.042.7625]. The Public Information Document for Aveo Peregrine Springs as at 16 April 2015, a copy of which was given to Janice Mary Cox to purchase her AWI in the Luke Property (as described below), included the following in clause 2.12:

Note 2

Every freehold/sublease accommodation unit in the village has a separate freehold title. Whilst the current residents of those accommodation units own the freehold to their accommodation units, the Scheme Operator intends to buy those accommodation units back from those residents as and when they leave the retirement village and offer prospective new residents of those accommodation units a right to reside in the form of a 99 year lease over the accommodation unit they select.

- (l) On or about 28 May 2015 a presentation was made to the Respondent's Victoria-based staff regarding the Aveo Way Programme [AVE.003.010.1824 and AVE.003.010.1825].
- (m) From about 30 May 2015, a document entitled "Sale Document Preparation Checklist—QUEENSLAND AVEO WAY" [AVE.009.082.5862] was distributed to the Respondent's Queensland-based sales staff.
- (n) On 5 June 2015, RVG sales staff in Victoria were instructed that "all new prospective purchasers are to be offered The Aveo Way going forward unless in freehold where this will be dealt with on a case by case basis" [AVE.003.013.4211].

- (o) On 26 June 2015, the Respondent's sales staff were instructed that all Transaction Details and Special Conditions Requests must have "Aveo Way" recorded against the DMF and Capital Gain fields [AVE.003.080.2126].
- (p) The Applicants repeat and rely on the matters pleaded in paragraph 2A above, and the matters particularised at paragraph 20 below in respect of Aveo's 2015 Annual Report.

19 In order to facilitate and as part of the introduction and promotion of the Aveo Way Programme by the Relevant Aveo Managers and ARE, the Respondent created and distributed (or caused to be created and distributed) to the Relevant Aveo Managers and ARE:

- (a) promotional material in respect of the Aveo Way Contract;
- (b) a standard form letter to be addressed to residents of Aveo Villages who were selling freehold units in those villages (**Standard Form Letter**), which letter:
  - (i) set out certain characteristics or purported characteristics of the Aveo Way Contract;
  - (ii) set out a proposal in relation to the marketing of the residents' units in accordance with the Aveo Way Programme; and
  - (iii) included an authority to be signed by the resident in the following terms:

"I/we agree to Aveo marketing my/our unit at [Aveo Village] to prospective new residents on the basis that the new resident will enter into the new 'The Aveo Way' Contract and otherwise adopting the process and proposal set out in this letter."

- (c) in relation to Pre-AWLIs, no Standard Form Letter or equivalent document seeking the consent of the resident to the Aveo Way Programme.

20 The Respondent's dominant purpose and, or alternatively, its anticipated and intended outcomes, of introducing and promoting the Aveo Way Programme was to benefit the Respondent by (Aveo's Anticipated Benefits):

- (a) increasing the returns generated by the Respondent's assets in order to achieve the Respondent's financial targets, including:
  - (i) a targeted annual return on assets of 6.5% of value in the financial year ending 30 June 2016, up from 4% in the financial year ending 30 June 2014; and

#### Particulars

(A) Email of 21 May 2014 from Anthony Sargent to Geoff Grady [AVE.003.001.9035 and AVE.003.001.9036 (at .9040)].

(B) Minutes of Meeting of Directors of AVG held on 12 November 2014 [AVE.101.009.5006 at .5008].

- (ii) a targeted annual return on assets of 8% of value in the financial year ending 30 June 2018;

**Particulars**

From about May 2014, a spreadsheet was created within AVG in respect of "Primary Projects" [AVE.003.004.9272], which included (at item 9) "Financial and contractual terms and conditions (the Aveo Way)" that had, as its stated objective/goal, to "Improve returns to 8.0% by FY18".

- (b) increasing the net present value of its assets by:

- (i) increasing its projected future share of deferred management fee and capital gain income; and
- (ii) obtaining Membership Fees from incoming residents, or from a portion of them;

**Particulars**

(A) On or about 28 October 2014 a board paper was prepared for the Respondent's Board with information regarding the financial impact of the Aveo Way Programme [AVE.003.011.9113], which provided that:

- (1) there would be increased cashflows on account of membership fees [at 9114];
- (2) reinstatement and refurbishment costs "Will not become a material Aveo cost in the near future as not liable for these costs until the incoming resident on the Aveo Way arrangements leaves the village. There will be additional capital gain received to offset additional cost responsibility within a six month of it be incurred" [at 9115];
- (3) there would be an increase in DMF (or "Deferred Accommodation Fee") to 33% for independent living units at an increased rate of accrual, having regard to the fact that for residents that entered between 2006 and 2010 approximately 30% had departed with an average stay of 2.6 years and this downwards trend in duration of stay was expected to continue for residents that had entered in the period 2011 – 2016 together with an increase in the age of residents upon their entry into Aveo Villages [at 9117];

(B) Minutes of Meeting of Directors of AVG held on 12 November 2014 [AVE.101.009.5006 at 5010] provide that:

- (1) One of the key aspects of The Aveo Way is the introduction of the Aveo membership fee of \$1,500 p.a. which will allow subsidised independent living unit village base fees of \$500 p.a. and \$1,500 p.a. for serviced apartment village fees;

- (2) The financial and contractual outcomes of The Aveo Way include an expected improvement in Net Present Value of \$91 million (or 10.2%) on the 31 December 2013 reported value.
- (C) On or about 27 November 2014 the Aveo Way Programme was presented to and discussed by the RVG Board, during which presentation it was noted [AVE.009.121.1169 at 1174 - 1175]:
- (h) some of the objectives of The Aveo Way include increasing demand, the value of the portfolio and to facilitate the conversion of title from freehold to leasehold over an organic, 10 to 15 year roll over period;*
- ...
- (j) ... One of the key aspects of The Aveo Way is the introduction of the Aveo membership fee of \$1,500 p.a. which will allow subsidised ILU Village base fees of \$500 p.a. and \$1,500 p.a. for SA village fees;*
- ...
- (p) the implementation of The Aveo Way is accretive to the RVG portfolio by \$78 million or 23.7% based on the 30 June 2014 reported value. The key contributors are the improved DMF and capital gains returns, offset by the cost of stamp duty associated with converting from freehold to leasehold tenure, and the increased responsibilities associated with reinstatement and refurbishment costs. These costs are expected to be incurred over the 10 to 15 year period it will take to roll out The Aveo Way";*
- (r) subject to the implementation of The Aveo Way, credit would typically be given by valuers to recognise the uplift in the portfolio from improved resident contract terms based on a demonstrated pattern of behaviour;*
- (D) On 12 February 2015, an internal AVG memorandum concerning "Queensland Agreements – Aveo Way Implementation and Additional Changes" [AVE.003.029.2764] provided (inter alia):
- The Deferred Management Fee (DMF) has been amended to a maximum of 35% over three years (i.e. accrued 7% for year one, 21% year two and 35% year three) and is calculated daily on the ingoing contribution. This DMF is offered on all unit types...;*
  - All residents under the Aveo Way will become an Aveo Way Member. An accrued Aveo Way Membership fee of \$1500 for each completed 12 months that increases each financial year by 2.5% and is payable upon termination.*
- (E) On about 12 February 2015, the Respondent's sales training materials [AVE.003.077.6271] provided that:
- (1) Membership fee is levied at \$1500 per annum, and accumulates over the course of the resident's time in the village and is payable on departure and*

deducted from the exit entitlement. The fee is increased by 2.5% each year that the resident remains in the village.

(2) The Deferred Management Fee (DMF) is set at 7% in the first year, and increases in each of the subsequent two years at which point it is capped at 35% of the entry price. ... The DMF is remuneration accruing to Aveo.

(F) RVG's board minutes of 29 July 2015 [AVE.009.122.7162] recorded [at 7167 - 7168]:

the Board received an initial presentation with respect to The Aveo Way in November 2014 at which time a trial of The Aveo Way contracts was approved for a selection of 10 RVG villages. Further to this presentation, the Board has requested additional information with respect to the financial impacts associated with rolling out The Aveo Way standard form of contract across the remainder of the RVG portfolio;

some of the benefits associated with this form of contract to residents include a guaranteed buyback no later than twelve months after departure, with the operator covering all selling and refurbishment costs. In return for these benefits, the operator will receive 100% of the capital gain, a faster DMF accrual period (35% over 3 years) and will be able to experience greater control over the village generally due to the leasehold tenure of the contracts;

...

the costs with respect to implementing The Aveo Way contract, as set out on page three of the Board paper were NOTED, with a NPV of \$70m to be realised over time.

(G) Aveo's 2015 Annual Report provided at p14:

The Group successfully trialled the new Aveo Way contract across a selected group of villages in the first half of FY2015, and implemented it as the standard contract across all Group villages in the second half. [T]he contract offers... improved terms for Aveo, including DMF of 35% of entry price accrued over three years and 100% of capital gains. ...

The improved Aveo Way DMF/CG [Deferred Management Fee / Capital Gain] terms have the potential to increase the fair value of the Group's retirement investment properties by 5% to 10% as the improved contracts are rolled out.

(H) Aveo's 2016 Annual Report provided at p62, relevantly, an increase in the "fair value of investment properties (which includes retirement villages and independent living units and serviced apartments within them) of \$78M.

(I) Aveo's 2017 Annual Report provided at p5 and p24, relevantly:

Underlying profit after tax of \$108.4 million was an improvement of 22% on FY16. ...



Key financial highlights for FY17 include:

...

- Net tangible assets (NTA) per stapled security of \$3.37, up 12% from 30 June 2016.

...

The gain in NTA was helped by... an increase in the asset valuation of the retirement portfolio as better contract terms were recognised...

...[O]ur share of capital gains increased by 85% through a combination of higher sales volumes and increased amounts per transaction.

...

DMF margins were impacted by legacy RVG resident contract that have inferior terms relative to the average Aveo contract. However, this will be improved over the longer term as the Aveo Way contracts are introduced into the RVG portfolio.

- (J) Aveo's 2017 Annual Report provided at p63, relevantly, an increase in the fair value of investment properties (which comprise land and buildings held to produce rental income and capital appreciation) of \$147M.

Further particulars may be provided following discovery and other interlocutory steps.

- (c) through purchasing freehold units and converting them to similar or uniform leasehold tenure:

- (i) increasing its operational control of the units, and of the body corporate of strata-titled Aveo Villages; and

#### **Particulars**

- (A) Memorandum dated 14 March 2014 circulated to the Respondent's senior management [AVE.001.002.0057], which relevantly provided:

#### Conversion of Freehold to Leasehold – Advantages:

- More control of the operation, property
- Simpler operational requirements
- Reduced stress in relation to aging assets on common property or individual title

- (B) RVG's board minutes of 29 July 2015 [AVE.009.122.7162] recorded [at 7167]:

- (i) the Board received an initial presentation with respect to The Aveo Way in November 2014 at which time a trial of The Aveo Way

contracts was approved for a selection of 10 RVG villages. Further to this presentation, the Board has requested additional information with respect to the financial impacts associated with rolling out The Aveo Way standard form of contract across the remainder of the RVG portfolio;

(ii) some of the benefits associated with this form of contract to residents include a guaranteed buyback no later than twelve months after departure, with the operator covering all selling and refurbishment costs. In return for these benefits, the operator will receive 100% of the capital gain, a faster DMF accrual period (35% over 3 years) and will be able to experience greater control over the village generally due to the leasehold tenure of the contracts

(C) Obtaining the freehold of residential units gave to the Respondent (directly or indirectly) powers of control in respect of leased units by virtue of the Respondent's becoming the lessor, including the timing and mode of reinstatement or refurbishment of those units.

(D) Aveo's 2017 Annual Report provided at p5 and p24, relevantly:

Buyback sales revenues increased substantially as the high levels of buyback stock acquired as part of the Active Asset Improvement Program were sold to incoming residents.

(ii) increased control over residents' Management Contracts, including as to the ability to make changes to such contracts;

#### **Particulars**

Memorandum dated 14 March 2014 circulated to the Respondent's senior management [AVE.001.002.0057], which relevantly provided:

Conversion of Freehold to Leasehold – Advantages:

- Ability to be more flexible with changes to residence contracts, including changing DMF structures and the method by which capital gains are shared

(iii) obtaining a tax benefit by allowing deferral of capital gains tax;

#### **Particulars**

Memorandum dated 14 March 2014 circulated to the Respondent's senior management [AVE.001.002.0057], which relevantly provided:

Conversion of Freehold to Leasehold – Advantages:

- Tax benefit – capital gains can be deferred until the sale of the village

20A By reason of:

- (a) each of Aveo's Anticipated Benefits; and
- (b) the fact that the acquisition of outgoing residents' pre-AWFIs was essential to implementing the Aveo Way Programme,

the Respondent (and each of the Relevant Aveo Managers) would derive, and derived, special value or advantage (**Special Value**) from the acquisition of Pre-AWFIs, and the surrender of Pre-AWLIs, and replacement of them with AWIs, that:

- (c) was not, or would not have been, available to an incoming resident purchaser; and, or alternatively
- (d) exceeded, or would exceed, any benefit available to an incoming resident who purchased or acquired the pre-AWFI or pre-AWLI on substantially the same terms as the Management Contract applicable to that pre-AWI.

20B. By reason of the Special Value, following and for the purposes of the implementation of the Aveo Way Programme the Respondent (and each Relevant Aveo Managers) was, or would likely have been:

- (a) more willing and anxious to purchase or acquire Pre-AWFIs, or to obtain the surrender of pre-AWLIs, than other potential purchasers or acquirers of those pre-AWIs;
- (b) if necessary to acquire a pre-AWFI, or to secure the surrender of a pre-AWLI, willing to purchase the Pre-AWFI, or to secure the surrender of a pre-AWLI, at 'fair market value'.

21 Additionally, at all material times, for a resident in an Aveo Village, the terms of an AWI were or are less favourable than the terms of a Pre-AWFI or Pre-AWLI.

### **Particulars**

- (i) In relation to the Luke Applicants:
  - (A) the Exit Fee payable under the Aveo Way Contract (being Ms Cox's AWI, as defined below) accrued at a faster rate and reached a higher amount (ie to 35% over three years) than the Exit Fee payable under the Luke Applicants' Management Agreement (which accrued to 30% over four years);
  - (B) Ms Cox had a leasehold interest. The Luke Applicants had a freehold interest. Ms Cox's AWI provided that the resident was to receive no share of any capital gain on the unit, however the resident could, subject to clause 21.7, be liable for a capital loss, whereas the Luke Applicants' Management Agreement permitted the Luke Applicants to receive the entirety of any capital gain less the applicable Exit Fee;
  - (C) Ms Cox was liable to pay Membership Fees under Ms Cox's AWI;

(D) Ms Cox did not, unlike the Luke Applicants, have the security of holding a registered interest in fee simple in the Luke Property, which (would have) provided greater financial protection and, accordingly, value, in the event that ARH or the Respondent should encounter financial difficulties;

(E) further particulars may be provided after the service of expert evidence.

(ii) In relation to some or all of the Freehold Group Members:

(A) the Exit Fee payable under the Aveo Way Contract accrued at a faster rate and reached a higher amount than the Exit Fee payable under the Freehold Group Member Management Agreements;

(B) the Aveo Way Contract provided that the resident was to receive no share of any capital gain on the unit, however the resident could be liable for a capital loss, whereas the Freehold Group Member Management Agreements permitted the Freehold Group Members to receive a share of any capital gain;

(C) the Aveo Way Contract provided that the group member was liable to pay Membership Fees;

(D) the purchaser of an AWI in respect of the unit the subject of a Freehold Group Member's Pre-AWFI did not have the security of holding a registered interest in fee simple in the real property associated the unit, which (would have) provided greater financial protection and, accordingly, value, in the event that the Relevant Aveo Manager or the Respondent should encounter financial difficulties;

(E) further particulars will be provided after discovery.

(iii) In relation to the Colombari Applicants:

(A) the Exit Fee payable under the Aveo Way Contract (being the Wabitschs' AWI, as defined below) accrued at a faster rate (over three years) than the Exit Fee payable under the Colombari Applicants' Management Agreement (which accrued over five years);

(B) The Wabitschs' AWI provided that the resident was to receive no share of any capital gain on the unit, whereas the Colombari Applicants' Management Agreement provided that the Colombari Applicants would receive the entire capital gain less a percentage fee;

(C) The Wabitsch's AWI provided that Membership Fees would accrue (at \$1500 per annum, increasing at 2.5% per annum);

(D) further particulars may be provided after the service of expert evidence.

(iv) In relation to some or all of the Leasehold Group Members:

(A) the Exit Fee payable under the Aveo Way Contract accrued at a faster rate and/or reached a higher amount than the Exit Fee payable under the Leasehold Group Member Management Agreements;

(B) the Aveo Way Contract provided that the resident was to receive no share of any capital gain on the unit, however the resident could be liable for a capital loss, whereas the Leasehold Group Member Management Agreements permitted the Leasehold Group Members to receive a share of any capital gain;

(C) the Aveo Way Contract provided that the group member was liable to pay Membership Fees;

~~(C)~~(D) further particulars will be provided after discovery.

21A By reason of the matters alleged in paragraph 21, upon the implementation of the Aveo Way Programme with respect to an outgoing resident with a Pre-AWFI or Pre-AWLI (as alleged in paragraphs 17 and 17B above):

(a) the outgoing resident would, or would likely, receive less monies upon the sale of their interests (in the case of outgoing residents with a Pre-AWFI) or surrender of their interests (in the case of outgoing residents with a Pre-AWLI) than if the Aveo Way Programme had not been implemented; and

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

22 From at least the time of the introduction of the Aveo Way Programme, the Respondent and the Relevant Aveo Managers knew, or alternatively ought to have known, the matters pleaded ~~alleged in paragraphs 20 to 1 and~~ 21A above.

#### Particulars

(a) Constructive knowledge is to be inferred from the Respondent's and the Relevant Aveo Managers' extensive experience in operating retirement villages and marketing and selling of interests in retirement villages. Given that experience, they must or should have known that it would decrease the value of a unit in a retirement village if that unit was sold subject to a Management Agreement which, compared with the existing Management Agreement:

(i) increased the exit fee payable, and introduced the Membership Fees;

(ii) increased the rate at which the exit fee accrued; and/or

(iii) decreased the amount of, or eliminated all, capital gain receivable by the resident on exit.

(b) ~~[not used]~~ The matters particularised at paragraph 20.

(c) A memorandum dated 14 March 2014 and circulated to the Respondent's senior management indicated that the conversion of units from freehold to leasehold tenure

may be perceived as less secure by residents and may constitute a lesser form of security for resident financing [AVE.001.002.0057].

- (d) A draft Aveo Way Strategy document dated 10 May 2014 noted that "The AOG, AEH and RVG portfolios have... average DMF of 28% based on entry price and CG of 32%", and the 2013 McCrindle Baynes Villages Census had found that most retirement village residents perceived exit fees as "excessive and far too high" [AVE.003.001.5038].
  - (e) The Respondent's "Projects Summary" document rated the development of the Aveo Way Programme as 2 out of a scale of 10 for "Does it driver [sic] Resident Satisfaction" [AVE.003.003.9233].
  - (f) At a meeting of the Respondent's Board of Directors on 12 November 17-October-2014 it was noted that residents of units at higher price points would be resistant to the Aveo Way Programme because of a desire to retain capital gains [AVE.101.009.5006].
  - (g) In about November 2014 and February 2015, a resident of the Aveo Bayview Gardens retirement village expressed concerns to James Wiltshire, Dianne Miller, and Kai Drescher of the Respondent about the effect on the market for units in the village of residents receiving no share of the capital gains under the Aveo Way Programme [AVE.003.042.7398].
- 23 At all relevant times, the most common reasons for a person who owned or leased a unit in a Retirement Village to sell or cease residing in that unit on account of either death or ill health requiring relocation to accommodation providing a higher level of care than was available in their existing residence.

#### Particulars

According to the Respondent's internal data as at about 30 June 2015, approximately 50% of departing residents moved to a higher level of care, 30% died, 10% moved to another retirement village or unit, and 10% left the retirement village sector.

- 24 At and following the time the Aveo Way Programme was introduced, it was foreseen or, alternatively, reasonably foreseeable, by the Respondent and by the Relevant Aveo Managers:
- (a) that the Luke Applicants, the Colombari Applicants, Freehold Group Members and Leasehold Group Members would at some stage in the foreseeable future have to sell their Pre-AWFI or surrender their Pre-AWLI, including most commonly on account of death or ill health requiring relocation to accommodation providing aged care; and

#### Particulars

The Applicants repeat and rely on the matters pleaded and particularised in paragraph 23 above.

- (b) that the Relevant Aveo Manager would be required and, or alternatively, requested or directed, by the Respondent to promote and prefer sales and



leases of interests in an Aveo Village to be made pursuant to the Aveo Way Programme.

### Particulars

The Applicants repeat and rely on the matters pleaded and particularised in paragraphs 18 and 20 above.

- 25 On and after the introduction of the Aveo Way Programme, neither the Respondent nor any of the Relevant Aveo Managers or ARE told the Luke Applicants, the Colombari Applicants, some or allany of the Freehold Group Members, or some or allany of the Leasehold Group Members:

(a) that they would, or would be likely to, receive less money by selling their Pre-AWFI or surrendering their Pre-AWLI in an Aveo Village under the Aveo Way Programme than if they sold their Pre-AWFI under their Relevant Former Contract or surrendered their Pre-AWLI on the basis that the incoming resident would have entered into a new lease in the form of the Relevant Former Contract or substantially in the form of the Relevant Former Contract; or

(b) of the matters in paragraphs 20 to 20B above, and nor were the Applicants or Group Members otherwise aware of those matters.

- 26 The Luke Applicants, the Colombari Applicants, the Freehold Group Members, and the Leasehold Group Members had a reasonable expectation that the Respondent and the Relevant Aveo Manager and the Relevant Real Estate Agent (if and whilst retained to act upon the sale of a Pre-AWFI, or the sale and surrender of a Pre-AWLI) would disclose complete and accurate information to them (whether adverse or beneficial) in relation to any actual or potential financial consequences for the Luke Applicants, the Colombari Applicants, Freehold Group Members, and Leasehold Group Members which would or were likely to result from the Respondent or the Relevant Aveo Manager changing the terms on which a Pre-AWFI could be sold or a Pre-AWLI surrendered or interests in an Aveo Village could be acquired, or otherwise from the introduction of the Aveo Way Programme.

### Particulars

The reasonable expectation is based on the following:

- (a) the status of the Luke Applicants, the Colombari Applicants, the Freehold Group Members and the Leasehold Group Members as existing residents in an Aveo Village;
- (b) the experience of the Respondent and the Relevant Aveo Managers of the market for residential units in a Retirement Village;
- (c) the relative inexperience of the Luke Applicants, the Colombari Applicants, the Freehold Group Members and the Leasehold Group Members of the market for residential units in a Retirement Village;
- (d) the power of the Respondent or the Relevant Aveo Managers to give or withhold consent to a purchaser or lessee and to affect or influence the terms upon which the

purchaser or lessee could take up residence in the Aveo Village, as pleaded above at paragraph 15;

(e) the matters pleaded at paragraph 127 below, and a real estate agent's duty to its principal described in subparagraph 174(l)(ii) below;

(f) the matters pleaded in:

(i) paragraphs 10(d), 10A(c), 17(d), 17A, 17B(c) and 17B(d) above; and

(ii) as to the Luke Applicants, paragraphs 36, 41 to 44, 46 to 51, 53, 55, 56, 58, 59(e), 62, 69 and 70(b)(iii) below;

(iii) as to the Colombari Applicants, paragraphs 71K to 71N, 71P to 71R, 71T, 71W(e) and 71Z below.

In relation to the Freehold Sales Sub-Group Members and Leasehold Sales Sub-Group Members, further particulars will be provided by separate Points of Claim, or after the determination of the common questions.

- 27 The Luke Applicants and Freehold Sales Sub-Group Members who have received a Standard Form Letter from the Respondent in relation to the sale of those units subject to the Aveo Way Contract had a reasonable expectation that the Respondent and the Relevant Aveo Manager and the Relevant Real Estate Agent (if and whilst retained to act upon the sale of a Pre-AWFI) would disclose to them:

(a) if it was the case, that they would, or would be likely to, receive less money by selling their Pre-AWFI in an Aveo Village under the Aveo Way Programme than if they sold their Pre-AWFI to a purchaser entering into the Aveo Village on the terms of the Luke Applicants' Management Agreement or the Freehold Group Member Management Agreements (as applicable); and

(b) the matters set out at paragraphs 20A and 20B above.

### **Particulars**

The reasonable expectation is based on:

(i) representations by the Respondent and/or the Relevant Aveo Manager, in the Standard Form Letter, setting out the Aveo Way Programme and which stated that existing residents had a "choice" whether to adopt the Aveo Way Programme; and

(ii) the matters particularised at paragraph 26 above.

- 27A The Colombari Applicants and the Leasehold Sales Group Members had a reasonable expectation that the Respondent and the Relevant Aveo Manager and the Relevant Real Estate Agent (if and whilst retained to act upon the surrender of a Pre-AWFI) would disclose to them, ~~if it was the case, that:~~

(a) if it was the case, that:

- (i) at the time their unit was being marketed for lease, the Respondent offered or intended to offer to prospective incoming residents a lease that was on substantially less favourable terms to the resident than the terms of the Colombari Applicants' Management Agreement or the Leasehold Group Member Management Agreements (as applicable); and
- (ii) as a result, the Colombari Applicants and the Leasehold Sales Group Members were likely to receive a lower Leasehold Capital Gain than they would otherwise have received; and
- (b) the matters set out at paragraphs 20A and 20B above.

#### D. THE SALE OF ROBERT COLIN LUKE'S PROPERTY

##### *Aveo Peregian Springs*

- 28 The Aveo Peregian Springs Country Club (formerly known as the "Peregian Springs Retirement Country Club") (**Aveo Peregian Springs**):
- (a) is located on the land at 21 Gracemere Boulevard, Peregian Beach, Queensland, as described in SP 148376;
  - (b) is and at all times since about 2003 has been a "retirement village" within the meaning of the Qld Act and the land therein, including the Luke Property, has at all relevant times been "retirement village land" within the meaning of the Qld Act;
  - (c) is and at all material times has been an Aveo Village.
- 29 At all material times, the Manager of Aveo Peregian Springs has been Aveo Retirement Homes Limited (ACN 061 603 718) (**ARH**).
- 30 ARH:
- (a) is and at all material times has been a wholly owned subsidiary of the Respondent; and
  - (b) has been the registered owner of the business name "Aveo Peregian Springs Country Club" since 22 June 2006.
- 31 The directors and secretaries of ARH from time to time:
- (a) have been directors and secretaries of the Respondent; and/or
  - (b) have held a position within the Aveo Business.

### Particulars

The Luke Applicants refer to and rely on Schedule 1 to this pleading.

- 32 At all material times, ARH has operated various Aveo Villages, including Aveo Peregrin Springs, in accordance with the Respondent's business model, using the Respondent's intellectual property, including the Aveo Trade Marks, and in accordance with the Respondent's directions and policies.

### ***Purchase by Robert Colin Luke and Marjorie Amelia Luke***

- 33 By a contract for sale dated 29 September 2003, Robert Colin Luke and Marjorie Amelia Luke, purchased the Luke Property as registered joint proprietors for a purchase price of \$270,000.00.

### Particulars

The contract of sale is in writing.

- 34 On 29 September 2003, Robert Colin Luke and Marjorie Amelia Luke entered into a "Residence Contract" with ARH (the **Luke Applicants' Management Agreement**).

### Particulars

The Applicants' Management Agreement is in writing.

- 35 On 2 December 2003:
- (a) Robert Colin Luke and Marjorie Amelia Luke were registered as joint proprietors of the Luke Property; and
  - (b) ARH registered a caveat on the title to the Luke Property asserting a caveatable interest pursuant to an option to purchase.

### Particulars

- (i) Registered Transfer No 707255729.
  - (ii) Registered Caveat No 707255749.
- 36 There were restrictions in the Luke Applicants' Management Agreement as follows:
- (a) Robert Colin Luke and Marjorie Amelia Luke could not deal with the Luke Property without ARH's written consent (cl 4.10);
  - (b) Robert Colin Luke and Marjorie Amelia Luke had to give ARH notice in writing telling ARH that they wanted to sell the Property before marketing the Luke Property (cl 11.1(a));
  - (c) Robert Colin Luke and Marjorie Amelia Luke had to appoint ARH or an agent nominated by ARH as the sole and exclusive agent for the sale of the Luke Property for a period of 60 days following notice being given (cl 11.1(b));

- (d) prior to selling the Luke Property, Robert Colin Luke and Marjorie Amelia Luke had to obtain ARH's prior written consent to any purchaser and the terms of the sale contract (cl 11.1(c)); and
- (e) ARH could refuse to consent to the Luke Property being sold to any purchaser if:
  - (i) the proposed purchaser was not a qualifying resident, being a person who is at least 65 years old and for whom ARH reasonably believes the Property to be suitable (cll 11.1(d) and 13.1);
  - (ii) Robert Colin Luke and Marjorie Amelia Luke had not complied with clauses 12, 13 and 14 of the Luke Applicants' Management Agreement.

37 Under the Luke Applicants' Management Agreement:

- (a) ARH had an option to purchase the Luke Property at the Resale Value of the Luke Property, being the amount a person would pay to buy the Luke Property on the terms provided for in clause 13.8 of the Residence Contract determined on a fair market basis (cl 13.3); and
- (b) ARH could exercise its option to purchase the Luke Property in specified circumstances, one of which was the giving of a Notice of Sale by the resident (cl 11).

### ***Sale of the Luke Property***

38 On 23 May 2007, Marjorie Amelia Luke died.

39 After Marjorie Amelia Luke's death, Robert Colin Luke continued to occupy the Luke Property and, on 13 September 2009, became the sole proprietor of the Luke Property by survivorship.

40 In 2014, Robert Colin Luke's health began to decline and, as a result, he needed to relocate from the Luke Property to a nursing home.

### **Particulars**

Robert Colin Luke was hospitalised in about early October 2014 and did not return to live in the Luke Property after that time but instead went to live in a nursing home after he was discharged from hospital.

41 By enduring power of attorney certified on 3 October 2014, the Second Applicant was appointed as an attorney for Robert Colin Luke.

42 On or about 21 October 2014, the Second Applicant, as attorney for Robert Colin Luke, notified ARH that Robert Colin Luke desired to sell the Luke Property, in accordance with clause 11.1(a) of the Luke Applicants' Management Agreement, which notification was treated as a Notice of Sale.

### Particulars

Notification of Intention to Vacate dated 21 October 2014.

43 On 16 October 2014, Robert Colin Luke was provided by Ms Meg Rossiter, Sales Consultant employed by, or on behalf of:

(a) ARE; and

(b) ARH; and

(c) the Respondent,

with a preliminary assessment of the Luke Property, which estimated the resale price of the Luke Property to be \$378,000.00.

44 The preliminary assessment was:

(a) on the letterhead of "Aveo" and bore an Aveo Trade Mark;

(b) apparently prepared by ARH, in that it was provided to Robert Colin Luke by Ms Rossiter and the following words appeared at the bottom of the page: "*Should you have any queries regarding the above matter, please do not hesitate to contact the Sales Consultant, Meg Rossiter at Aveo Peregrin Springs*";

(c) not signed; and

(d) silent as to the source of the estimated resale price.

45 Robert Colin Luke:

(a) did not challenge the estimated resale price as a fair estimate of the value of the Luke Property if sold as freehold; and

(b) took no steps to obtain an independent estimate or valuation of the value of the Luke Property.

46 By 31 October 2014, the Luke Property was cleaned and readied to be handed over to ARH by the children of Robert Colin Luke, including the Luke Applicants, for the purposes of marketing and selling the Luke Property.

47 On or about 31 October 2014, ARH took vacant possession of the Luke Property.

### Particulars

(a) The last of Robert Colin Luke's possessions were removed from the Luke Property.

(b) The First Applicant handed the keys to the Property to the receptionist at Aveo Peregrin Springs.

48 On or about 16 December 2014, in accordance with clause 11.1 of the Luke Applicants' Management Agreement:



- (a) ARH nominated ARE as the real estate agent which Robert Colin Luke was required to appoint as the sole and exclusive agent for the sale of the Luke Property for a period of 60 days; and
- (b) Robert Colin Luke duly appointed ARE as the property agent for the sale of the Property under a written agreement that included, or was subject to, the following terms (**Real Estate Agency Agreement**):
  - (i) ARE was to perform the service of the "sale" of the Luke Property;
  - (ii) ARE was appointed as the exclusive sales agent for the period 23 January 2015 to 24 March 2015;
  - (iii) in reliance on the Preliminary Assessment, the list price of the Luke Property was agreed by Robert Colin Luke to be \$379,000.00;
  - (iv) in consideration for the service to be performed, ARE was to be paid a commission of 5% of the first \$18,000 of the sale price plus 2.5% of the balance of the sales price plus GST, payable if a contract was entered into and settlement of the contract occurred.

#### Particulars

The appointment under the Real Estate Agency Agreement is contained in and evidenced by a form prescribed under the *Property Occupations Act 2014 (Qld)* and described as a "Form 6 – appointment and reappointment of a property agent, resident letting agent or property auctioneer" (the **Form 6**). The Form 6 was signed by Karol Kljajcin on behalf of ARE on 9 December 2014 and by Robert Colin Luke on 21 January 2015.

- 49 In about early November 2014, Robert Colin Luke executed an enduring power of attorney in favour of both the Luke Applicants and, in accordance with that power of attorney, the Luke Applicants became responsible for the sale of the Luke Property on behalf of Robert Colin Luke.
- 50 On 21 March 2015, Robert Colin Luke died.
- 51 From the time of their respective appointments as attorneys of Robert Colin Luke and, subsequently, as co-executors of the Luke Estate, the Luke Applicants had responsibility for the sale of the Luke Property on behalf of the Luke Estate.
- 52 Pursuant to clauses 4.10, 11.1, and 13.1 of the Luke Applicants' Management Agreement, the Luke Property had to be sold to a "qualifying resident".
- 53 Pursuant to clause 14.3 of the Luke Applicants' Management Agreement, the Luke Estate remained liable:
  - (a) for the period up to and including the 90<sup>th</sup> day after vacation of the unit, for the full General Services Charges;

- (b) from the 91<sup>st</sup> day until the day the unit was sold, for a percentage of the General Services Charge equal to the percentage of the Resale Price that was left after payment by the Luke Estate of the Exit Fee.

54 In the time between the appointment of ARE on 23 January 2015 and early June 2015:

- (a) ARE did not introduce the Luke Applicants, as co-executors of the Luke Estate, to any prospective purchaser who was ready willing and able to purchase the Luke Property; and
- (b) ARE made no real or substantial effort to sell the Luke Property or, alternatively, failed to take the steps that a real estate agent in its position would reasonably be expected to take to sell the Luke Property.

#### **Particulars**

(i) ARE did not:

- (A) cause the Luke Property to be advertised as "for sale" in public real estate listings;
- (B) cause the Luke Property to be displayed in the sales section of the Respondent's website.

(ii) Further particulars may be provided after discovery.

55 On or about 3 June 2015, the First Applicant had a telephone conversation with Ms Karol Kljajcin (Sales Assistant, "Aveo Peregrin Springs") during which Ms Kljajcin said to the First Applicant that the regional sales manager had been trying to contact the Luke Applicants regarding a potential change in tenure in future Management Agreements.

56 On 12 June 2015, the Second Applicant sent an email to Ms Rossiter and Ms Kljajcin stating that the Luke Applicants had still not received any communication from the regional sales manager and requesting that information about the change in tenure be sent to the Luke Applicants by email.

57 On 17 June 2015, Ms Rossiter sent an email to the Second Applicant, which email:

- (a) attached promotional material in relation to the Aveo Way Programme, which bore Aveo Trade Marks and had been created and distributed to Ms Rossiter by the Respondent;
- (b) attached a Standard Form Letter dated 28 May 2015, addressed to Dougall Hay and purporting to be sent by Sandy Spencer, "Sales Manager Qld North"; and
- (c) stated "I can confirm that there will be no impact on you financially" if the Aveo Way Programme was adopted to sell the Luke Property.

- 58 By email dated about 4 July 2015, the First Applicant sent a letter to Sandy Spencer asking questions about the Aveo Way Programme and the sale of the Luke Property.
- 59 On 7 July 2015 at about 4:15pm, Sandy Spencer called the First Applicant by telephone, during which call:
- (a) Mr Spencer explained the Aveo Way Programme and the transition to leasehold which was being brought into all "76 or 75 of Aveo's Villages";
  - (b) Mr Spencer said words to the effect of there were "issues around existing freehold" and that under leasehold "Aveo takes the majority of costs";
  - (c) Mr Spencer said that there were more sales in another Aveo Village where residents held leasehold interests compared to Aveo Peregrine Springs where residents held freehold interests;
  - (d) Mr Spencer acknowledged that property values had increased overall, but he said that people did not buy into retirement villages for capital gains;
  - (e) the First Applicant said that he was happy for Aveo to exercise their option to purchase the Luke Property, to which Mr Spencer responded that he would have to discuss this with his sales team.
- 60 On 13 July 2015, Mr Spencer sent an email to the First Applicant in relation to selling the Property pursuant to the Aveo Way Programme, which stated "I can confirm that there will be no change to the end result financially in regards to the net proceeds of sale" and that "this process is about recognising the difficulties associated with residing within Freehold Schemes in retirement".
- 61 Neither in the email of 13 July 2015, nor at any other time, was any information provided by any of the Respondent, ARH or ARE to the Luke Applicants, as co-executors of the Luke Estate, as to:
- (a) the asserted difficulties associated with residing within freehold schemes in retirement; or
  - (b) Aveo's Anticipated Benefits; or
  - (c) the matters in paragraphs 20A or 20B; or
  - (d) the fact that, in the premises of the matters in subparagraphs (b) and (c) above:
    - (i) the price obtainable for a Pre-AWFI was, or was likely to be, higher than the price that an incoming resident was willing to pay for an AWI in the same property; and
    - (ii) the price obtainable for the Pre-AWFI in the Luke Property was, or was likely to be, higher than \$379,000;
- and nor did the Luke Applicants know of such matters at relevant times.

- 62 On 21 September 2015, Ms Kljajcin sent an email to the Second Applicant, which email:
- (a) stated "Please sign and return the attached Aveo Way Leasehold Agreement today if possible";
  - (b) attached a Standard Form Letter dated 21 September 2015 from Ms Kljajcin addressed to the Luke Applicants, bearing an Aveo Trade Mark, and containing a proposal that the Luke Property be marketed and sold in accordance with the Aveo Way Programme; and
  - (c) stated that a "buyer" had offered to "purchase" the Luke Property for \$379,000 as a leasehold interest.
- 63 The Second Applicant, as co-executor of the Luke Estate, signed the Standard Form Letter from Ms Kljajcin on 21 September 2015.
- 64 By a Contract for Residential Lots in a Community Title Scheme dated 19 October 2015 (**Luke Applicants' Sale Contract**), the Luke Applicants, as co-executors of the Estate, sold the Luke Property to ARH for a purchase price of \$379,000.00.

#### Particulars

The contract is in writing.

- 65 The Luke Applicants' Sale Contract contained an express term (Special Condition 5.2) that the contract was subject to and conditional upon ARH entering into a lease in respect of the Property with ARH as lessor and a new resident as lessee, and the settlement of that lease occurring contemporaneously with the settlement of the Luke Applicants' Sale Contract.
- 66 In accordance with Special Condition 5.2 of the Luke Applicants' Sale Contract:
- (a) by a Lease (**Ms Cox's AWI**) executed 12 October 2015, ARH as lessor and Ms Janice Mary Cox as lessee agreed to a 99-year lease commencing 23 November 2015 of the Property and an "ingoining contribution" payable by Ms Cox of \$379,000.00; and

#### Particulars

The lease is in writing.

- (b) the settlement of Ms Cox's AWI and the settlement of the Luke Applicants' Sale Contract took place simultaneously on 23 November 2015.
- 67 The terms of Ms Cox's Lease are less favourable than the Luke Applicants' Management Agreement for the reasons particularised in paragraph 21 above.
- 68 [not used]
- 69 Prior to the settlement of Ms Cox's AWI and the settlement of the Luke Applicants' Sale Contract, there was no contact or communication, direct or indirect, between the Luke

Applicants and Ms Cox (save to the extent that ARE communicated with Ms Cox on the Luke Applicants' behalf<sup>ves</sup>).

70 At the settlement of Ms Cox's AWI and settlement of the Luke Applicants' Sale Contract:

- (a) a deposit in the amount of \$10,000, which Ms Cox had made payable to "Aveo Group Limited", was released to the Respondent;
- (b) Ms Cox provided bank cheques as follows:
  - (i) an amount of \$119,125.80 payable to the Respondent, reflecting the Exit Fee and Reinstatement Fee payable by the Luke Applicants to ARH under the Luke Applicants' Management Agreement, less the Stamp Duty, registration fees and adjustments payable by ARH in respect of the purchase of the Property and the deposit paid by Ms Cox;
  - (ii) an amount of \$3,877.61 to Minter Ellison Lawyers, who acted for one or more of the Respondent and ARH on the transaction, being the sum of their legal fees in relation to both the purchase from the Luke Applicants and the lease to Ms Cox;
  - (iii) an amount of \$10,917.50 to ARE, being the commission claimed by ARE under the Real Estate Agency Agreement Form-6;
  - (iv) an amount of \$1,572 to the Department of Natural Resources and Mines (Queensland), being the sum of the registration fees payable by each of Ms Cox, ARH, and the Luke Applicants in respect of the transaction;
  - (v) an amount of \$11,690 to the Office of State Revenue (Queensland), being the Stamp Duty payable by ARH in respect of the purchase of the Property;
  - (vi) an amount of \$4,586.33 to Peregrine Springs Retirement Country Club Gracemere Manor, being the sum of the levy adjustments payable by each of Ms Cox, ARH, and the Luke Applicants;
  - (vii) an amount of \$219,281.43, to the Luke Estate.

71 Between 31 October 2014 and 23 November 2015, the Luke Estate paid the General Services Charge as required under clause 14.3 of the Applicants' Management Agreement.

#### **DA. THE SURRENDER OF JOAN MARY COLOMBARI'S LEASE**

##### ***Aveo Bayview Gardens***

71A Aveo Bayview Gardens:

- (a) is located on the land at 36–42 Cabbage Tree Road, Bayview, New South Wales 2104, as described in Folio 121/789400;

- (b) is and at all times since about 2003 has been a "retirement village" within the meaning of the NSW Act;
  - (c) is and at all material times has been an Aveo Village.
- 71B At all material times, the Manager of Aveo Bayview Gardens has been Aveo North Shore Retirement Villages Pty Ltd (ACN 123 218 799) (**ANSRV**).
- 71C ANSRV:
- (a) is and at all material times has been a wholly-owned subsidiary of the Respondent; and
  - (b) has been the registered owner of the business name "Aveo Bayview Gardens" since about 19 April 2007.
- 71D The directors and secretaries of ANSRV from time to time:
- (a) have been directors and secretaries of the Respondent; and/or
  - (b) have held a position within the Aveo Business.

#### **Particulars**

The Applicants refer to and rely on Schedule 3 to this pleading.

- 71E At all material times, ANSRV has operated various Aveo Villages, including Aveo Bayview Gardens, in accordance with the Respondent's business model, using the Respondent's intellectual property, including the Aveo Trade Marks, and in accordance with the Respondent's directions and policies.

#### ***Acquisition by Joan Mary Colombari***

- 71F By a lease dated 8 May 2008, Joan Mary Colombari acquired a leasehold interest in the Colombari Property for a term of 99 years commencing 26 May 2008, at a price of \$390,000.

#### **Particulars**

The lease is in writing.

- 71G Annexure A to the lease were the terms of a management agreement with ANSRV (the **Colombari Applicants' Management Agreement**).

#### **Particulars**

The Colombari Applicants' Management Agreement is in writing.

- 71H The Colombari Management Agreement was subject to the terms pleaded in paragraph 10A above.



### ***Surrender of the lease***

- 71I In mid-2011, Joan Mary Colombari had a stroke.
- 71J In about May 2014, Joan Mary Colombari decided to relocate from the Colombari Property to a serviced apartment (SA 231) in Aveo Bayview Gardens due to poor health and at the suggestion of ANSRV or, alternatively, the respondent.

#### **Particulars**

- (a) In about early to mid 2014, Dianne Miller, office manager at ANSRV, and various nursing staff at ANSRV, suggested to Mrs Colombari and to the Third Applicant in multiple oral conversations that, as a result of her poor health, Mrs Colombari was struggling to live in her existing unit and ought to move to a serviced apartment.
  - (b) In about May 2014, Dianne Miller or, alternatively, other staff members at ANSRV informed Mrs Colombari that SA 231 was available and was suitable for her needs.
  - (c) Mrs Colombari decided to relocate to SA 231 in reliance on the advice from ANSRV staff.
- 71K On 26 May 2014, the Respondent prepared transfer information from the Colombari Property to SA 231, assigning a resale price to the Colombari Property of \$375,000.

#### **Particulars**

Transfer Information from Bec Williams to Rhonda Wotton dated 26 May 2014.

- 71L On 29 May 2014, Dianne Vickrage-Hill, Sales Consultant at the Respondent, provided the Third Applicant with a financial results upon transfer form, with an assigned resale price of \$360,000, and a proposed transfer acceptance form.

#### **Particulars**

Email from Ms Vickrage-Hill to the Third Applicant sent on 29 May 2014 at 11.03am.

- 71M On 11 September 2014, Ms Vickrage-Hill responded to questions from the Third Applicant about the sale of the Colombari Property.

#### **Particulars**

Email from Ms Vickrage-Hill to the Third Applicant sent on 11 September 2014 at 5.24pm.

- 71N On 3 October 2014, Ms Vickrage-Hill provided the Third Applicant with another transfer acceptance form, which the Third Applicant signed.
- 71O On 7 November 2014, Joan Mary Colombari, through the Third Applicant as her attorney, submitted an expression of interest for SA 231.
- 71P On 9 December 2014, the Third Applicant, as attorney for Joan Mary Colombari:
- (a) notified ANSRV that Joan Mary Colombari intended to vacate the Colombari Property; and

### Particulars

Notification of Intention to Vacate dated 9 December 2014.

- (b) gave ANSRV permission to enter the Colombari Property for the purpose of conducting a market value assessment.

### Particulars

Permission of Entry for Market Value Assessment dated 9 December 2014.

71Q On 21 January 2015, the Third Applicant was provided with an "entitlement assessment" of the Colombari Property, which estimated the resale price of the Colombari Property to be \$370,000.00.

71R The entitlement assessment was:

- (a) on the letterhead of "Aveo" and bore an Aveo Trade Mark;
- (b) apparently prepared by ANSRV;
- (c) silent as to the source of the estimated resale price.

71S The Colombari Applicants on behalf of Joan Mary Colombari:

- (a) did not challenge the estimated resale price as a fair estimate of the value of Joan Mary Colombari's interest in the Colombari Property if sold on the basis of the existing management agreement; and
- (b) took no steps to obtain an independent estimate or valuation of the value of Joan Mary Colombari's interest in the Colombari Property.

71T On 28 January 2015, the Third Applicant entered into an exclusive agency agreement with ARE to find a new tenant for the Colombari Property.

### Particulars

Sales Inspection Report and Exclusive Agency Agreement dated 28 January 2015.

71U In about May 2015, Joan Mary Colombari executed a Surrender of Lease in respect of the Colombari Property.

71V On 15 June 2015,

- (a) by a Lease (**the Wabitsch's AWI**) executed 15 June 2015, ANSRV as lessor and Mr Franco Wabitsch and Mrs Robyn Isabel Wabitsch as lessees agreed to a 99-year lease commencing 15 June 2015 of the Colombari Property and an "ongoing contribution" payable by them of \$380,000.00; and

### Particulars

The lease is in writing.

(b) the settlement of the Wabitsch's AWI took place.

71W Upon settlement, Joan May Colombari was obliged to pay to the Respondent, ANSRV, ARE and/or to the persons to whom she was directed:

- (a) an exit fee of \$136,500;
- (b) reinstatement costs of \$8,700;
- (c) legal fees of \$1,461;
- (d) registration fee of \$107; and
- (e) a commission of \$10,450.

71X The terms of Ms Wabitsch's Lease are less favourable than the Colombari Applicants' Management Agreement for the reasons particularised in paragraph 21 above.

71Y At no time were the Colombari Applicants or Joan Mary Colombari informed by any of the Respondent, ANSRV or ARE, of:

- (a) the Aveo's Anticipated Benefits; or
- (b) the matters in paragraphs 20A or 20B; or
- (c) the fact that, in the premises of the matters in subparagraphs (a) and (b) above:
  - (i) the price obtainable for a Pre-AWLI was, or was likely to be, higher than the price that an incoming resident was willing to pay for an AWI in the same property; and
  - (ii) the price obtainable for the Pre-AWLI in the Colombari Property was, or was likely to be, higher than \$380,000.

71Z There was no contact or communication, direct or indirect, between the Colombari Applicants and Mr and Mrs Wabitsch, other than through the Respondent or its related entities.

### E. RESPONDENT'S DIRECT CONTRAVENTIONS IN RESPECT OF THE LUKE APPLICANTS AND FREEHOLD GROUP MEMBERS

72 Karol Kljajcin:

- (a) in various emails to the Luke Applicants:

- (i) held herself out in her email signature as "Sales Assistant, Aveo Peregrin Springs, Retirement, Aveo";
- (ii) included a disclaimer (the **Aveo Email Disclaimer**) which stated:

"Aveo Group Limited or its subsidiaries will not be liable for any virus damage caused by this message. Any views expressed in this email are not necessarily the views of Aveo Group Limited."

**Particulars**

- (A) Email to the Second Applicant, cc the First Applicant, dated 9 December 2014.
  - (B) Email to the Second Applicant dated 15 July 2015.
  - (C) Email to the Luke Applicants dated 21 September 2015.
  - (D) Email to the Luke Applicants and other undisclosed recipients dated 28 October 2015.
- (b) in other correspondence to the Luke Applicants, used Aveo Trade Marks;

**Particulars**

- (A) Letter to the Luke Applicants dated 18 May 2015.
  - (B) The 21 September 2015 Standard Form Letter.
  - (C) Letter to the Luke Applicants dated 13 October 2015.
- (c) utilised Aveo Trade Marks in the course of supplying services to the Luke Applicants;
- (d) marketed and promoted the Aveo Way Programme to the Luke Applicants using material produced by the Respondent;

**Particulars**

The 21 September 2015 Standard Form Letter.

- (e) was authorised by the Respondent to engage in the activities pleaded in the preceding sub-paragraphs; and
- (f) in the premises:
- (i) was employed, appointed or permitted by the Respondent to (inter alia):

(A) promote; and

(B) to effect sales in accordance with

the Aveo Way Programme;

(ii) \_\_\_\_\_ in her dealings with the Luke Applicants;

(A) \_\_\_\_\_ was held out by the Respondent to be an officer or agent of the Respondent; and,

(B) \_\_\_\_\_ in accordance with ss 128 and 129(3) of the *Corporations Act* 2001 (Cth), is taken to;

(1) \_\_\_\_\_ have been duly appointed by the Respondent as a Sales Assistant; and

(2) \_\_\_\_\_ to have had the authority to exercise the powers and perform the duties customarily exercised or performed by a Sales Assistant of the Respondent; and, or alternatively,

(iii) \_\_\_\_\_ her actions are taken for the purposes of the *Australian Consumer Law*, by s 139B(2) of the *Australian Consumer Law*, to have been engaged in also by the Respondent.

73 Meg Rossiter:

(a) in various emails to the Luke Applicants:

- (i) held herself out in her email signature as "Sales Consultant, Aveo Peregrine Springs, Retirement, Aveo Group";
- (ii) included the Aveo Email Disclaimer;

#### Particulars

- (A) Email to the Luke Applicants dated 27 April 2015.
- (B) Email to the Second Applicant dated 3 May 2015.
- (C) Email to the Second Applicant dated 6 July 2015.

(b) utilised Aveo Trade Marks in the course of supplying services to the Luke Applicants;

#### Particulars

Attachments to Ms Rossiter's email to the Second Applicant dated 17 June 2015.

(c) marketed and promoted the Aveo Way Programme to the Luke Applicants using material produced by the Respondent;

### Particulars

Attachments to Ms Rossiter's email to the Second Applicant dated 17 June 2015.

(d) was authorised by the Respondent to engage in the activities pleaded in the preceding sub-paragraphs; and

(e) in the premises:

(i) was employed, appointed or permitted by the Respondent to (inter alia):

(A) promote; and

(B) effect sales in accordance with,

the Aveo Way Programme; and

(ii) in her dealings with the Luke Applicants:

(A) was held out by the Respondent to be an officer or agent of the Respondent; and,

(B) in accordance with ss 128 and 129(3) of the *Corporations Act* 2001 (Cth), is taken to have been duly appointed by the Respondent as a Sales Consultant and to have had the authority to exercise the powers and perform the duties customarily exercised or performed by a Sales Consultant of the Respondent; and, or alternatively,

(C) her actions are taken for the purposes of the Australian *Consumer Law*, by s 139B(2) of the *Australian Consumer Law*, to have been engaged in also by the Respondent.

74 Sandy Spencer:

(a) in his emails to the Luke Applicants:

(i) held himself out in his email signature as "Territory Sales Manager QLD North" for "Aveo Group";

(ii) included the Aveo Email Disclaimer;

### Particulars

Email to the Applicants dated 13 July 2015.

(b) marketed and promoted the Aveo Way Programme to the Luke Applicants;

### Particulars

(i) Email to the Applicants dated 13 July 2015.



- (ii) Telephone conversation with the First Applicant pleaded in paragraph 59 above.
- (c) was authorised by the Respondent to engage in the activities pleaded in the preceding sub-paragraphs;
- (d)            in the premises:
  - (i)            was employed, appointed or permitted by the Respondent to (inter alia):
    - (A)            promote; and
    - (B)            effect sales under,
    - the Aveo Way Programme; and,
  - (ii)            in his dealings with the Luke Applicants;
    - (A)            was held out by the Respondent to be an officer or agent of the Respondent; and,
    - (B)            in accordance with ss 128 and 129(3) of the *Corporations Act* 2001 (Cth), is taken to have been duly appointed by the Respondent as a Sales Manager and to have had the authority to exercise the powers and perform the duties customarily exercised or performed by a Sales Manager of the Respondent; and, or alternatively,
    - (C)            his actions are taken for the purposes of the *Australian Consumer Law*, by s 139B(2) of the *Australian Consumer Law*, to have been engaged in also by the Respondent.

### ***Unconscionable Conduct by the Respondent***

- 75 At the time of their appointments as attorneys of Robert Colin Luke and, subsequently, as co-executors of the Estate, and until the time that the Luke Property was sold, the Luke Applicants:
- (a) had neither purchased, nor owned, ~~nor marketed and sold~~ any property in a Retirement Village other than the Luke Property, nor marketed or sold any such property;
  - (b) had no specialised or professional knowledge or experience in relation to the Retirement Village industry, including in relation to such matters as:
    - (i) the value of different legal interests in land in Retirement Villages;
    - (ii) the legislation governing Retirement Villages;
    - (iii) the terms of Management Agreements; or

- (iv) the marketing and sale of units in Retirement Villages; and
  - (c) had no relevant knowledge or understanding of the corporate structure of the different entities trading under the "Aveo" brand and did not understand there to be any relevant distinction between the Respondent, ARH, and ARE.
- 76 In introducing and promoting the purchase of units in Aveo Villages pursuant to the Aveo Way Programme that had been, or are, held as Pre-AWFIs pursuant to the Aveo Way Programme, the Respondent engaged in and is engaging in conduct:
- (a) in trade or commerce; and
  - (b) in connection with the supply or possible supply of retirement village management services or real estate agent services to the Luke Applicants and the Freehold Group Members within the meaning of s 21 of the *Australian Consumer Law*.
- 77 By introducing and promoting the Aveo Way Programme in Aveo Villages that had Pre-AWFI, the Respondent engaged in and is engaging in conduct that was and is unconscionable and in contravention of s 21 of the *Australian Consumer Law* in that:
- (a) it reduced or would likely reduce the amount which the Luke Applicants and the Freehold Group Members received or would likely receive upon sale of their Pre-AWFI;

#### Particulars

The Luke Applicants and Freehold Group Members repeat and rely on the matters pleaded in paragraphs 17 to 17C, 20 to 21 and 21A above.

The Luke Applicants also rely on paragraphs 54 to 71 above.

In relation to Freehold Sales Sub-Group Members, further particulars will be provided by separate Points of Claim, or after the determination of the common questions.

- (b) the change from freehold to leasehold estates in Aveo Peregrin Springs and other Aveo Villages in which units were held as freehold interests was and is a significant alteration to the way in which those villages were structured and proprietary interests in units in those villages ~~em~~ were held;
- (c) the Respondent had and has the knowledge pleaded at paragraph 22, and the matters pleaded in paragraph 24 were foreseen or reasonably foreseeable by the Respondent;
- (d) the Respondent's dominant purpose, or anticipated and intended outcomes, of this conduct was and is to benefit the Respondent or entities related to the Respondent;

### Particulars

The Applicants repeat and rely on the matters pleaded in paragraph 20 above.

- (e) the Respondent had and has significantly greater bargaining power than the Luke Applicants and the Freehold Group Members, because of:
  - (i) the Respondent's ~~its~~ experience in developing and managing Retirement Villages, as pleaded in paragraph 2 above, in circumstances where the Luke Applicants and the Freehold Group Members had no specialised or professional experience in the Retirement Villages industry; and
  - (ii) the matters pleaded above at paragraphs 8 to 10, 11 to 15, 22 to 27, and 75 above;
- (f) the Aveo Way Programme was and is not reasonably necessary to protect the legitimate interests of the Respondent;

### Particulars

The Applicants repeat and rely on the matters pleaded in paragraph 11 above and say further that, where relevant, the Respondent could have exercised its option or caused the Relevant Aveo Manager to exercise its option (as applicable) to purchase Pre-AWFI itself or through a related company at fair market value for that interest, and then leased the unit to the incoming resident on the terms of the Aveo Way Contract, rather than refusing to purchase the Pre-AWFI until an incoming lessee had been identified who was willing to buy an AWI in respect of the same unit, and then causing the vendor of the Pre-AWFI to receive as the sale price of the Pre-AWFI an amount equal to the ingoing contribution paid by the incoming resident for their AWI.

- (g) the Respondent failed and has failed to inform the Luke Applicants and some or all of the Freehold Group Members:
  - (i) of the matters in paragraphs 20 to 20B above; or
  - (ii) that they would or would likely achieve a lower sale price and/or endure a longer sale period in respect of their unit under or as a result of marketing and selling the unit in accordance with the Aveo Way Programme (as to which see paragraphs 50 to 62 and 65 above and below at 82);

and nor were the Luke Applicants or those Freehold Group Members otherwise aware of those matters;
- (h) in the sale of their units in Aveo Villages, the Luke Applicants and the Freehold Group Members were or are (as applicable) in a position of vulnerability relative to the Respondent, in that:
  - (i) the purchase price of a unit in a Retirement Village is affected by the nature of the interest being purchased and the terms of the Management Agreement which the new resident is being offered, both

of which were and are in the control of the Respondent and/or the Relevant Aveo Manager, at the direction of the Respondent;

- (ii) in accordance with the Aveo Way Programme, the Respondent, the Relevant Aveo Manager, or the Relevant Real Estate Agent, and not the existing resident, was and is the one who dealt and negotiated, or deals and negotiates, with the incoming resident;
- (iii) the Luke Applicants and the Freehold Group Members had no knowledge of the matters pleaded in paragraphs 20 to 20B above, or any knowledge of or control over the terms of the Management Agreements that the Respondent chose to offer to prospective residents;
- (iv) the matters pleaded above at paragraphs 8 to 10, 11 to 15, ~~18~~, 22 to 27, and 75 existed; and
- (i) the Luke Applicants and the Freehold Group Members were or are further vulnerable to the Respondent because they were and are required to continue paying fees in respect of their Pre-AWFI in accordance with the Luke Applicants' Management Agreement and the Freehold Group Member Management Agreements until the time of sale or for so long as permissible under statute.

77A But for the above contravention, the Luke Applicants and some or all of the Freehold Sales Sub-Group Members would have entered into an alternative arrangement in that they would have sold their Pre-AWFI under the terms of their Management Agreements.

#### Particulars

In relation to the Freehold Sales Sub-Group Members, further particulars will be provided by separate Points of Claim, or after the determination of the common questions.

78 The Luke Applicants and Freehold Sales Sub-Group Members have suffered or will likely suffer loss or damage because of the above contravention.

#### Particulars

The loss or damage is to be quantified as including one or more of the following:

- (a) in relation to the Luke Applicants:
  - (i) they would have entered into an alternative arrangement in that they would have sold their Pre-AWFI under the terms of the Luke Applicants' Management Agreement as alleged in paragraph 77A above;
  - (ii) upon the alternative transaction, the price paid for the Luke Applicants' Pre-AWFI would either have been based on acquisition by ARH at fair market value (see clauses 13.3 and 13.8 and Schedule B of the Luke Applicants' Management Agreement), or acquisition by a purchaser at its market value;

- (iia) further or alternatively, the Special Value of their Pre-AWFI, of which they were unaware;
  - (iii) the Luke Applicants further refer to and repeat the matters at paragraphs 20 to 21, 21A, 61 and 67 above;
  - (iv) as a result the Luke Applicants lost the valuable opportunity to obtain an increased price for the sale of their Pre-AWFI;
- (b) any fees paid in accordance with the Luke Applicants' Management Agreement and the Group Member Management Agreements as a result of the prolongation of the sale period in which the arising from:
- (i) the lesser desirability of AWIs in comparison with Pre-AWFIs; and, or alternatively
  - (ii) the requirement or emphasis, as directed by the Respondent, upon the sale of residential units under the Aveo Way Programme, as pleaded at paragraph 18 above;
- (c) any commission paid to ARE;
- (d) in relation to the Luke Applicants, further particulars may be provided after the service of expert evidence;
- (e) in relation to the Freehold Sales Sub-Group Members, further particulars will be provided by separate Points of Claim, or after the determination of the common questions.
- 79 Further or alternatively, neither at the time of introducing the Aveo Way Programme into Aveo Peregrin Springs and into other Aveo Villages, nor at any other time, did the Respondent disclose to the Luke Applicants or to ARE Sub-Group Members that no agent need be appointed to sell their Pre-AWFI if it was to be sold under the terms of their respective Relevant Former Contracts (the **lack of need to appoint an agent**).

### Particulars

There was no need to appoint an agent because:

(a) in the case of the Applicants and some of the ARE Sub-Group Members:

(i) the Relevant Manager already had an option to purchase the Pre-AWI at market value—once the owner of a Pre-AWI had given a Sale Notice (**Aveo's Exercisable Option to Purchase**); and, or

(b) in relation to all ARE Sub-Group Members:

(i) the Respondent's policy was that the Relevant Aveo Manager would purchase the property; and

(ii) of the matters pleaded at paragraphs 17(a) and 20A(b) above,

and it was therefore unnecessary to market the property to third parties, or to otherwise locate and introduce a third party purchaser.

80 By its omission to disclose as pleaded at paragraph 79 above, the Respondent engaged in conduct that was unconscionable and in contravention of s 21 of the *Australian Consumer Law* in that:

- (a) it reduced the amount which the Luke Applicants and ARE Sub-Group Members received upon sale of their Pre-AWFI by the sum of the agent's commission;
- (b) it prolonged the period the Luke Applicants and the ARE Sub-Group Members continued to pay fees;
- (c) the Respondent knew, or ought to have known, that once the Luke Applicants and, where applicable, the ARE Sub-Group Members, had given a Sale Notice the Relevant Aveo Manager:
  - (i) \_\_\_\_\_ had an exercisable option to purchase the Pre-AWFI; and
  - (ii) \_\_\_\_\_ was intended to become the owner, and so would necessarily be the purchaser, of the Pre-AWFI under and in consequence of the Aveo Way Programme;

#### **Particulars**

Constructive knowledge is to be inferred from:

- (i) the Respondent's relationship with the Relevant Aveo Managers;
  - (ii) the Respondent's knowledge of the Luke Applicants' Management Agreement and the Freehold Group Members' Management Agreements (as applicable); and
  - (iii) Publicly available title searches.
- (d) the sole or dominant purpose of this conduct was to benefit one or more of the Relevant Real Estate Agent, the Relevant Aveo Manager, and the Respondent, by:
- (i) the provision of sales agent's commission for undertaking no work for the owner of the pre-AWFI to identify the relevant purchaser (namely the Relevant Aveo Manager); and, or alternatively
  - (ii) the payment of a sales agent's commission by the owner of the pre-AWFI for the work required to identify a purchaser from the Relevant Aveo Manager of an AWI, rather than a purchaser of the pre-AWFI;
- (e) the Respondent had significantly greater bargaining power than the Luke Applicants and the ARE Sub-Group Members, because of its experience in the industry and relationship with the Relevant Aveo Manager and the Relevant Real Estate Agent, as pleaded in paragraphs 2, 8, 10(d), 11, and 48(a) above,



and because of its control over the sales process as pleaded at paragraph 15 above;

- (f) the Luke Applicants and the ARE Sub-Group Members had a reasonable expectation that a lack of any need to appoint an agent would have been disclosed to them by the Respondent; and

#### Particulars

The Applicants rely on the matters particularised at paragraph 26 above.

- (g) these omissions of information were not reasonably necessary to protect the legitimate interests of the Respondent,

#### **(Aveo's Unconscionable Omission).**

- 81 Aveo's Unconscionable Omission caused the Luke Applicants and the ARE Sub-Group Members loss or damage.

#### **Particulars**

The loss or damage is:

- (a) any fees paid in accordance with the Luke Applicants' Management Agreement and the ARE Sub-Group Members' Group Member Management Agreements as a result of the prolongation of the period in which the Pre-AWFI was required to be sold as a result of the Aveo Way Programme;
- (b) any commission paid to ARE;
- (c) in relation to the Luke Applicants, further particulars may be provided after the service of expert evidence;
- (d) in relation to the ARE Sub-Group Members, further particulars may be provided after discovery and by separate Points of Claim, or after the determination of the common questions.

#### ***Misleading or deceptive conduct***

- 82 At least from the introduction of the Aveo Way Programme into Aveo Peregrin Springs and into other Aveo Villages, the Respondent represented and continued to represent to the Luke Applicants and the Freehold Group Members that selling their Pre-AWFI in accordance with the Aveo Way Programme would not, or was not likely to, result in reduction of the amount they would receive had their Pre-AWFI been sold under the terms of their respective Relevant Former Contracts and that they would be no worse off if they agreed to sell pursuant to the Aveo Way Programme (**the No Worse Off Representation**).

#### **Particulars**

- (a) The No Worse Off Representation was implied or constituted by silence.

(b) In so far as it was implied, it is to be implied from the following circumstances:

- (i) The Respondent introducing and conducting the Aveo Way Programme without providing information to the Luke Applicants and Freehold Group Members as to the matters in paragraphs [20] to [20B] above, or the effect or likely effect on the Luke Applicants and Freehold Group Members when they sold their Pre-AWFIs, as pleaded in paragraphs 21 to 27 above.
- (ii) The power of the Respondent to affect or influence the terms of new Management Agreements to be used in Aveo Villages between the Relevant Aveo Manager and the incoming resident, as pleaded in paragraphs 8 to 10 and 11 to 15 above.
- (iii) The involvement of the Respondent in marketing and selling existing units in Aveo Villages, as pleaded in paragraph 13 above.
- (iv) The experience of the Respondent in marketing and selling existing units in Aveo Villages, as pleaded in paragraph 2 above, and the knowledge of the Respondent of the market for units in Aveo Villages which it derived from that experience and as pleaded in paragraph 23 above.
- (v) The likely vulnerability of residents in Aveo Villages commonly needing or having to sell their unit given the usual circumstances of sale being death or the need to move to increased care, as pleaded in paragraphs 23 and 24(a) above.
- (vi) The lack or comparative lack of experience of the Luke Applicants and the Freehold Group Members in the market for units in Retirement Villages, as pleaded in paragraph 75 above in relation to the Luke Applicants and as will be particularised in relation to the Group Members by separate Points of Claim, or after the determination of the common questions.
- (vii) The Respondent's materials asserting the advantages of the Aveo Way Programme, as pleaded in paragraph 19 above.
- (viii) The absence of communication between the Luke Applicants and the Freehold Group Members, as existing residents, and the incoming resident acquiring his or their lot, as pleaded in paragraph 17A above.

(c) In so far as it was constituted by silence, the Luke Applicants and the Freehold Group Members refer to and repeat paragraph 25 about non-disclosure and paragraphs 26 and (as to the Freehold Sales Sub-Group Members) 27 above about the reasonable expectation of disclosure.

(d) Further, ~~t~~The No Worse Off Representation was also made expressly to the Luke Applicants on the following occasions:

- (i) when the email from Ms Rossiter was sent on 17 June 2015;
- (ii) during the telephone call between Mr Spencer and the First Applicant on 7 July 2015;
- (iii) when the email from Mr Spencer was sent on 13 July 2015;

(iv) when the email was sent by Ms Kljajcin on 21 September 2015;

83 The No Worse Off Representation was made in trade or commerce.

84 The No Worse Off Representation was misleading or deceptive, or likely to mislead or deceive, in that selling a Pre-AWFI in accordance with the Aveo Way Programme did in fact or would, or alternatively was likely to:

- (a) result in reduction of the amount the Luke Applicants and the Freehold Group Members would receive or would have received had the Pre-AWFI been sold under the terms of their respective Relevant Former Contracts; and/or
- (b) prolong the period required in order for the unit to be sold.

#### **Particulars**

The Applicants repeat and rely on the matters pleaded in paragraphs 20 to 21 and 21A, 54 to 62 and 65 above.

85 Further or alternatively:

- (a) the No Worse Off Representation was with respect to a future matter within the meaning of s 4(1)(a) of the *Australian Consumer Law*;
- (b) unless the Respondent adduces evidence to the contrary, the Respondent is taken not to have had reasonable grounds for making the No Worse Off Representation by reason of s 4(2) of the *Australian Consumer Law*; and
- (c) the No Worse Off Representation would then be taken to have been misleading or deceptive by reason of s 4(1) of the *Australian Consumer Law*.

86 In the circumstances, the Respondent engaged in misleading or deceptive conduct contrary to s 18 of the *Australian Consumer Law*.

87 The Luke Applicants as co-executors of the Luke Estate agreed to sell the Luke Property, and some or all of the Freehold Sales Sub-Group Members agreed to sell their properties, pursuant to the Aveo Way Programme in reliance upon the No Worse Off Representation.

#### **Particulars**

In relation to the Luke Applicants, they relied on the No Worse Off Representation in:

- (a) accepting that the sale price of \$379,000 was a fair market value for their Pre-AWFI Luke Property at the time of sale;
- (b) agreeing to the terms of the Standard Form Letter dated 21 September 2015 from Ms Kljajcin;
- (c) agreeing to the terms of the Luke Applicants' Sale Contract; and
- (d) settling the sale of the Luke Property.

In relation to the Freehold Sales Sub-Group Members, further particulars will be provided by separate Points of Claim, or after the determination of the common questions.

- 87A But for the above contravention, the Luke Applicants and some or all of the Freehold Sales Sub-Group Members would have entered into an alternative arrangement in that they would have sold their Pre-AWFI under the terms of their Management Agreements.

#### Particulars

In relation to the Freehold Sales Sub-Group Members, further particulars will be provided by separate Points of Claim, or after the determination of the common questions.

- 88 In the circumstances, the Luke Applicants and the Freehold Sales Sub-Group Members have suffered loss or damage because of the above contravention of s 18 of the *Australian Consumer Law*.

#### Particulars

The Applicants refer to and repeat the particulars to paragraph 78.

### F. THE RESPONDENT'S INVOLVEMENT IN CONTRAVENTIONS BY AVEO MANAGERS – LUKE APPLICANTS AND FREEHOLD GROUP MEMBERS

- 89 Karol Kljajcin:

- (a) in various emails to the Luke Applicants, held herself out in her email signature as "Sales Assistant, Aveo Peregian Springs", in circumstances where "Aveo Peregian Springs Country Club" was a business name owned by ARH and ARH was the operator of the Retirement Village of that name;

#### Particulars

- (i) Email to the Second Applicant, cc the First Applicant, dated 9 December 2014.
- (ii) Email to the Second Applicant dated 15 July 2015.
- (iii) Email to the Luke Applicants dated 21 September 2015.
- (iv) Email to the Luke Applicants and other undisclosed recipients dated 28 October 2015.

- (b) was authorised or permitted by ARH to hold herself out as a Sales Assistant at Aveo Peregian Springs;

- (c) in the premises, in her dealings with the Luke Applicants;

- (i) \_\_\_\_\_ was held out by ARH to be an officer or agent of ARH; and,

- (ii) \_\_\_\_\_ in accordance with ss 128 and 129(3) of the *Corporations Act* 2001 (Cth), is taken to have been duly appointed by ARH as a Sales Assistant

and to have had the authority to exercise the powers and perform the duties customarily exercised or performed by a Sales Assistant of the Respondent; and, or alternatively

(iii) her actions are taken for the purposes of the *Australian Consumer Law*, by s 139B(2) of the *Australian Consumer Law*, to have been engaged in also by the Respondent.

90 Meg Rossiter:

(a) in various emails to the Luke Applicants, held herself out in her email signature as "Sales Consultant, Aveo Peregian Springs";

#### Particulars

(A) Email to the Luke Applicants dated 27 April 2015.

(B) Email to the Second Applicant dated 3 May 2015.

(C) Email to the Second Applicant dated 6 July 2015.

(b) was authorised or permitted by ARH to hold herself out as a Sales Consultant at Aveo Peregian Springs;

(c) in the premises, in her dealings with the Luke Applicants;

(i) was held out by ARH to be an officer or agent of ARH; and,

(ii) in accordance with ss 128 and 129(3) of the *Corporations Act* 2001 (Cth), is taken to have been duly appointed by ARH as a Sales Consultant and to have had the authority to exercise the powers and perform the duties customarily exercised or performed by a Sales Consultant; and, or alternatively,

(iii) her actions are taken for the purposes of the *Australian Consumer Law*, by s.139B(2) of the *Australian Consumer Law*, to have been engaged in also by the Respondent.

#### ***Relevant Aveo Managers' Unconscionability***

91 In introducing and promoting the Aveo Way Programme in relevant Aveo Villages, including Aveo Peregian Springs, ARH and other Relevant Aveo Managers which have introduced and promoted the Aveo Way Programme in their Aveo Villages (**Aveo Way Managers**) engaged in and are engaging in conduct:

(a) in trade or commerce; and

(b) in connection with the supply or possible supply of retirement village management services or real estate agent services to the Luke Applicants and

the Freehold Group Members within the meaning of s 21 of the *Australian Consumer Law*.

- 92 By introducing and promoting the Aveo Way Programme in Aveo Villages that had Pre-AWFIs, including Aveo Peregrin Springs, and procuring the Luke Applicants and the Freehold Sales Sub-Group Members to agree to sell their units in those villages pursuant to the Aveo Way Programme, ARH and the other Aveo Way Managers engaged in and are engaging in conduct that was and is unconscionable and in contravention of s 21 of the *Australian Consumer Law* in that:

- (a) it reduced or would likely reduce the amount which the Luke Applicants and the Freehold Group Members received or would likely receive upon sale of their Pre-AWFIs;

#### Particulars

The Applicants repeat and rely on the matters pleaded in paragraphs 20 to 21 and 21A, 25, 54 to 62 and 78 above.

- (b) the change from freehold to leasehold estates of units in Aveo Peregrin Springs and other relevant Aveo Villages in which units were held as freehold interests, was and is a significant alteration to the way in which that village was structured and proprietary interests in units in it were held;
- (c) the Respondent's dominant purpose, or anticipated and intended outcomes, of this conduct was and is to benefit ARH and other Aveo Way Managers, and the Respondent, by:
- (i) increasing the fees payable by incoming residents to it and them; and
- (ii) otherwise obtaining Aveo's Anticipated Benefits;
- (d) ARH and other Aveo Way Managers had and have significantly greater bargaining power than existing residents, because of the matters pleaded at paragraphs 2, 8, 20 to 22, 25, 29, 32, and 77(e) above;
- (e) the Luke Applicants and the Freehold Group Members were in a position of vulnerability relative to ARH and the other Aveo Way Managers because:
- (i) the purchase price of a unit in a Retirement Village is affected by the nature of the interest being purchased and the terms of the Management Agreement which the new resident is being offered, both of which were and are in the control of the Relevant Aveo Manager;
- (ii) in accordance with the Aveo Way Programme, the Relevant Aveo Manager, or the Relevant Real Estate Agent, and not the existing resident, was and is the one who dealt and negotiated, or deals and negotiates, with the incoming resident;



- (iii) the Luke Applicants and the Freehold Group Members had no knowledge of the matters pleaded in paragraphs 20 to 20B above, or any knowledge or control over the terms of the Management Agreements that the Relevant Aveo Manager chose to offer to prospective residents;
- (iv) the matters pleaded above at paragraphs 8 to 10, 11 to 15, 18, 22 to 27, and 75 existed; and
- (f) the Aveo Way Programme was and is not reasonably necessary to protect the legitimate interests of ARH and Aveo Way Managers in the Pre-AWFI's,

#### **Particulars**

The Applicants repeat and rely on the matters pleaded in paragraphs 11, 23 and 24(a) above and say further that, where relevant, the Respondent could have exercised its option or caused the Relevant Aveo Manager to exercise its option (as applicable) to purchase Pre-AWFI's itself or through a related company at market value for that interest, and then leased the unit to the incoming resident on the terms of the Aveo Way Contract, rather than refusing to purchase the Pre-AWFI until an incoming lessee had been identified who was willing to buy an AWI in respect of the same unit, and then causing the vendor of the Pre-AWFI to receive as the sale price of the Pre-AWFI an amount equal to the ingoing contribution paid by the incoming resident for their AWI.

#### **(Aveo Way Manager's Unconscionability).**

- 92A. But for the above contravention, the Luke Applicants and some or all of the Freehold Sales Sub-Group Members would have entered into an alternative arrangement in that they would have sold their Pre-AWFI under the terms of their Management Agreements.

#### **Particulars**

In relation to the Freehold Sales Sub-Group Members, further particulars will be provided by separate Points of Claim, or after the determination of the common questions.

- 93 The Luke Applicants and the Freehold Sales Sub-Group Members have suffered, or will likely suffer, loss or damage by ARH's or another Aveo Way Manager's Unconscionability.

#### **Particulars**

The Applicants repeat and rely on the particulars to paragraph 78 above.

- 94 Further, neither at the time of introducing the Aveo Way Programme into Aveo Peregian Springs and into other Aveo Villages, nor at any other time, did ARH or the other Aveo Way Managers disclose to the Luke Applicants or to ARE Sub-Group Members the lack of need to appoint an agent because of:

(a) Aveo's Exercisable Option to Purchase; and

(b) the matters in paragraphs 17(a) and 20A(b) above.

95 By their omissions to disclose as pleaded at paragraph 94 above, ARH and the Aveo Way Managers engaged in conduct that was unconscionable and in contravention of s 21 of the *Australian Consumer Law* in that:

- (a) it reduced the amount which the Luke Applicants and ARE Sub-Group Members received upon sale of their Pre-AWFI by the sum of the agent's commission;
- (b) it prolonged the period the Luke Applicants and the ARE Sub-Group Members continued to pay fees;
- (c) ARH and the Aveo Way Managers knew, or, alternatively, ought to have known, of the matters pleaded in paragraphs 17(a) and 20A(b) above and, where applicable, ARH and the Aveo Way Managers knew, or, alternatively, ought to have known, that the Relevant Aveo Manager had an exercisable option to purchase the Pre-AWFI;

#### **Particulars**

Constructive knowledge of the option to purchase is to be inferred from:

- (i) ARH and the Aveo Way Managers' knowledge of the relevant Management Agreements; and
- (ii) Publicly available title searches.
- (d) the sole or dominant purpose of this conduct was to benefit one or more of ARE, the Relevant Aveo Manager and the Respondent;
- (e) ARH and the Aveo Way Managers had significantly greater bargaining power than the Luke Applicants and the ARE Sub-Group Members, because of their experience in the industry and relationship with the Respondent and ARE, as pleaded in paragraph 92(d) above;
- (f) the Luke Applicants and the ARE Sub-Group Members had a reasonable expectation that a lack of any need to appoint an agent would have been disclosed to them by ARH and the Aveo Way Managers; and

#### **Particulars**

The Luke Applicants and the ARE Sub-Group Members rely on the matters particularised at paragraphs 26 and 27 above.

- (g) these omissions of information were not reasonably necessary to protect the legitimate interests of ARH and the Aveo Way Managers,

#### **(Aveo Way Manager's Unconscionable Omission).**

96 The Respondent:

- (a) actively promoted and marketed the Aveo Way Programme;

### Particulars

The Applicants repeat and rely on the matters pleaded in paragraphs 16 to 17A, 17C to 20 and 72 to 74 above.

- (b) knew that the Aveo Way Programme was being introduced into particular Aveo Villages, including Aveo Peregian Springs, by the Relevant Aveo Managers; and

### Particulars

- (i) The Respondent knew this to be the case because, as pleaded above at paragraphs 16 to 17A, 17C to 20, it occurred at the instigation, and for the intended anticipated benefit, of the Respondent.
  - (ii) The Respondent had the relationships with the Relevant Aveo Managers pleaded in paragraphs 2(c), 8, and 29 to 32 above.
  - (iii) [not used]
  - (iv) The Luke Applicants repeat and rely on the matters pleaded and particularised in paragraphs 16 and 18 above.
- (c) in the circumstances pleaded at paragraphs 16 to 20 and 54 to 69 and 70 above, caused and facilitated the introduction of the Aveo Way Programme into relevant Aveo Villages, including Aveo Peregian Springs.
- 97 By reason of the matters pleaded in paragraphs 92 to 96 above, and its relationships with the Relevant Aveo Managers pleaded in paragraphs 2(c), 8, and 29 to 32, the Respondent:
- (a) had knowledge of and facilitated the essential elements of the Aveo Way Managers' Unconscionability;

### Particulars

The Luke Applicants repeat and rely on the Respondent's knowledge as pleaded in paragraphs 20, 22, 2-8, 29, 32 and 77(e) above.

- (b) had knowledge of and facilitated the essential elements of the Aveo Way Managers' Unconscionable Omission; and

### Particulars

The Applicants repeat and rely on the matters pleaded in paragraphs 13, 16 to 20, and 89 to 90 above, and the Respondent's knowledge as pleaded in paragraphs 22, 2-8, 29, 32 and 77(e) above.

- (c) by reason of sub-paragraphs (a) and (b) above, was directly or indirectly, knowingly concerned in or party to the Aveo Way Managers' Unconscionability and the Aveo Way Managers' Unconscionable Omission.
- 98 In the premises of the preceding paragraph, the Respondent was a person involved in the Aveo Way Managers' Unconscionability and the Aveo Way Managers'

Unconscionable Omission within the meaning of ss 2(1) and 236(1) of the *Australian Consumer Law*.

- 99 By reason of the Respondent's involvement in the Aveo Way Managers' Unconscionability and the Aveo Way Managers' Unconscionable Omission, pursuant to s 236(1) of the *Australian Consumer Law* the Luke Applicants, the Freehold Sales Sub-Group Members, and the ARE Sub-Group Members are entitled to recover damages from the Respondent for loss or damage arising from the Aveo Way Managers' Unconscionability or the Aveo Way Managers' Unconscionable Omission.

***Aveo Way Managers' Misleading or Deceptive Conduct***

- 100 At least from the introduction of the Aveo Way Programme into Aveo Peregrine Springs and into other relevant Aveo Villages, ARH and the other Aveo Way Managers represented and continued to represent to the Luke Applicants and the Freehold Group Members that selling their Pre-AWFI in accordance with the Aveo Way Programme would not, or was not likely to, result in reduction of the amount they would receive had their Pre-AWFI been sold under the terms of their respective Relevant Former Contracts and they would be no worse off if they agreed to sell pursuant to the Aveo Way Programme (**the Aveo Way Manager's No Worse Off Representation**).

**Particulars**

- (a) The Aveo Way Manager's No Worse Off Representation was implied or constituted by silence.
- (b) In so far as it was implied, it is to be implied from the following circumstances:
  - (i) ARH and the Aveo Way Managers introducing and conducting the Aveo Way Programme without providing information to the Luke Applicants or the Freehold Group Members as to:
    - (A) the effect or likely effect on the Luke Applicants and the Freehold Group Members when they sold their Pre-AWFI, as pleaded in paragraph 25(a) above; or
    - (B) any of the matters pleaded at paragraphs 20 to 20B above.
  - (ii) The power of ARH and the Aveo Way Managers to dictate the terms of Management Agreements, as pleaded in paragraphs 9 to 10 and 11 to 15 above.
  - (iii) The involvement of ARH and the Aveo Way Managers in marketing and selling existing units, as pleaded in paragraph 13 above.
  - (iv) The experience of ARH and the Aveo Way Managers in marketing and selling existing units, as pleaded in paragraph 8 above and the knowledge of ARH and the Aveo Way Managers of the market for units in Retirement Villages which is derived from that experience.

- (v) The likely vulnerability of residents in Aveo Villages given the common or usual circumstances of sale being death or the need to move to increased care, as pleaded in paragraphs 23 and 24(a) above.
  - (vi) The lack or comparative lack of experience of the Luke Applicants and the Freehold Group Members in the market for units in Retirement Villages, as pleaded in paragraph 75 above in relation to the Applicants and as will be particularised in relation to the Freehold Group Members by separate Points of Claim, or after the determination of the common questions.
  - (vii) Marketing materials asserting the advantages of the Aveo Way Programme provided to the Applicants and Freehold Group Members by ARH and the Aveo Way Managers, were issued as pleaded in paragraphs 19 and 89 to 90 above.
  - (viii) The absence of communication between the Luke Applicants and the Freehold Group Members and the incoming resident, as pleaded in paragraph 17A above.
- (c) In so far as it is constituted by silence, the Applicants refer to and repeat paragraph 25 about non-disclosure and paragraphs 26 and 27 about the reasonable expectation of disclosure.
- (d) Further the Aveo Way Manager's No Worse Off Representation was made expressly to the Luke Applicants by ARH on the following occasions:
- (i) when the email from Ms Rossiter was sent on 17 June 2015;
  - (ii) when the email was sent by Ms Kljajcin on 21 September 2015;
- (e) The Aveo Way Manager's No Worse Off Representation had a continuing effect on the Luke Applicants until the date on which the Property was sold.
- 101 The Aveo Way Manager's No Worse Off Representation was made in trade or commerce.
- 102 The Aveo Way Manager's No Worse Off Representation was misleading or deceptive, or likely to mislead or deceive, in that selling the Pre-AWFIs in accordance with the Aveo Way Programme did in fact or would, or alternatively was likely to:
- (a) result in reduction of the amount the Applicants and the Freehold Group Members would receive or would have received had the Pre-AWFIs been sold under the terms of their respective Relevant Former Contracts;
  - (b) prolong the period required in order for the unit to be sold.

### Particulars

The Applicants repeat and rely on the matters pleaded in paragraphs 20 to 21 and 21A above.

- 103 Further or alternatively:

- (a) each of ARH's and the Aveo Way Manager's No Worse Off Representations was with respect to a future matter within the meaning of s 4(1)(a) of the *Australian Consumer Law*;
  - (b) unless the Respondent adduces evidence to the contrary, ARH and the Aveo Way Managers are taken not to have had reasonable grounds for making the ARH No Worse Off Representation by reason of s 4(2) of the *Australian Consumer Law*; and
  - (c) ARH's and the Aveo Way Manager's No Worse Off Representation would then be taken to be misleading or deceptive by reason of s 4(1) of the *Australian Consumer Law*.
- 104 In the circumstances, ARH and the Relevant Aveo Managers engaged in misleading or deceptive conduct contrary to s 18 of the *Australian Consumer Law* (**the Relevant Aveo Manager's M/D Conduct**).
- 105 The Luke Applicants and some or all of the Freehold Sales Sub-Group Members relied upon the Aveo Way Manager's No Worse Off Representation in agreeing to sell the Luke Property, and some or all of the Freehold Sales Sub-Group Members' properties, pursuant to the Aveo Way Programme.

#### Particulars

The Applicants refer to and rely on the particulars to paragraph 87 above.

- 105A. But for the above contravention, the Luke Applicants and Freehold Sales Sub-Group Members would have entered into an alternative arrangement in that they would have sold their Pre-AWFI under the terms of their Management Agreements.

#### Particulars

In relation to the Freehold Sales Sub-Group Members, further particulars will be provided by separate Points of Claim, or after the determination of the common questions.

- 106 In the circumstances, the Luke Applicants and Freehold Sales Sub-Group Members have suffered loss or damage.

#### Particulars

The Applicants and Freehold Sales Sub-Group Members repeat and rely on the particulars to paragraph 78 above.

- 107 By reason of the matters pleaded in paragraphs 94 to 97 above, the Respondent:
- (a) had knowledge of and facilitated the essential elements of the Relevant Aveo Managers' M/D Conduct; and
  - (b) by reason of sub-paragraph (a) above, was directly or indirectly, knowingly concerned in or party to the Relevant Aveo Managers' M/D Conduct.



### Particulars

The Applicants repeat and rely on the matters pleaded in paragraphs 13, 16 to 20, and 89 to 90 above, and the Respondent's knowledge as pleaded in paragraphs 22, 27-8, 29, 32, 77(e) above.

- 108 In the premises of the preceding paragraph, the Respondent was a person involved in the Relevant Aveo Managers' M/D Conduct within the meaning of ss 2(1) and 236(1) of the *Australian Consumer Law*.
- 109 By reason of the Respondent's involvement in the Relevant Aveo Managers' M/D Conduct, pursuant to s 236(1) of the *Australian Consumer Law* the Luke Applicants and the Freehold Sales Sub-Group Members are entitled to recover damages from the Respondent for loss or damage arising from the Relevant Aveo Managers' M/D Conduct.

### G. THE RESPONDENT'S INVOLVEMENT IN CONTRAVENTIONS BY ARE – LUKE APPLICANTS AND FREEHOLD GROUP MEMBERS

- 110 Ms Kljajcin executed the Form 6 as a registered real estate salesperson working for ARE (as licensed agent) and was authorised by ARE to do so.
- 111 Accordingly, in her dealings with Robert Colin Luke and, subsequently, with the Luke Applicants:

(a) Ms Kljajcin was held out by ARE:

(i) to be a person employed, appointed or permitted, by ARE to enter into the Real Estate Agency Agreement and provide services to the Luke Applicants under and in accordance with it; and

(ii) to be an officer or agent of ARE and, in accordance with ss 128 and 129(3) of the *Corporations Act* 2001 (Cth), is taken to have been duly appointed by ARE as a real estate salesperson working for a licensed agent and to have had the authority to exercise the powers and perform the duties customarily exercised or performed by a real estate salesperson working for a licensed agent; and, or alternatively,

(b) Ms Kljajcin's actions are taken for the purposes of the *Australian Consumer Law*, by s 139B(2) of the *Australian Consumer Law*, to have been engaged in also by ARE.

- 112 At the time that she executed the Form 6, Ms Kljajcin and, through her, ARE knew that ARH:

(a) had an option to purchase the Luke Property pursuant to the Luke Applicants' Management Agreement; and

(b) would be the purchaser.

112A Alternatively to the matters pleaded in paragraph 112 above, from at least April 2015 Ms Kljajcin and, through her, ARE and the Respondent, knew that ARH was intended by the Respondent and ARH to, and would:

(a) be proposed to the Luke Applicants as the purchaser of the Luke Property; and

(b) likely become the purchaser of the Luke Property;

in consequence of the introduction and implementation of the Aveo Way Programme.

113 The Standard Form Letter included a provision in the following terms:

"Commission will also remain payable by you to Aveo Real Estate Pty Ltd in respect of the sale of your freehold unit to Aveo in accordance with your appointment of Aveo Real Estate Pty Ltd as selling agent for your unit."

114 At the time that she sent the 21 September 2015 Standard Form Letter to the Applicants, Ms Kljajcin and, through her, ARE knew that the 21 September 2015 Standard Form Letter contained ~~it had~~ the provision pleaded in the preceding paragraph.

### ***ARE's Unconscionability***

115 ARE is and at all material times has been:

- (a) a wholly-owned subsidiary of the Respondent;
- (b) operated by persons with extensive experience in the operation of retirement villages and the marketing and sale of interests in retirement villages;
- (c) a licenced real estate sales agent under the applicable legislation in each of NSW, Queensland, Victoria, South Australia, and Tasmania; and
- (d) a related company to ARH and the Relevant Aveo Managers.

116 At all material times, the Respondent had a policy and, in accordance with that policy, the Respondent and the Relevant Aveo Managers had a practice, that when a resident of an Aveo Village gave notice to the Respondent or to the Relevant Aveo Managers of an intention to sell a Pre-AWFI, ARE would be nominated as the Relevant Real Estate Agent.

### **Particulars**

This was stated in the Respondent's sales training material, including in [AVE.003.077.6271].

117 Robert Colin Luke and the ARE Sub-Group Members appointed ARE as the property agent for the sale of his or their Pre-AWFIs pursuant to, in the case of Robert Colin Luke, the ~~Form 6 Real Estate Agency Agreement~~ and, in the case of each of the ARE Sub-Group Members, agreements (the **ARE Appointment Agreements**) pursuant to which:

- (a) ARE was to sell the ARE Sub-Group Member's Pre-AWFI; and
- (b) in consideration for the introduction by ARE to a purchaser of that Pre-AWFI and ARE's thereby being the effective cause of sale of the Pre-AWFI, the ARE Sub-Group Member was to pay a commission on the sale price to ARE.

#### Particulars

- (i) In relation to the ~~Form 6~~Real Estate Agency Agreement, the Applicants repeat and rely on clause 2.1 of the terms and conditions annexed to the Form 6, and the matters pleaded in 47(b) above.
  - (ii) Particulars of the ARE Appointment Agreements will be provided in separate Points of Claim or after the determination of the common questions.
- 118 The Luke Applicants and the ARE Sub-Group Members who appointed ARE as sales agent were required by ARE, purportedly pursuant to the ~~Form 6~~Real Estate Agency Agreement and the ARE Appointment Agreements, to pay a portion of the proceeds of sale of the Pre-AWFI to ARE as commission, even though:
- (a) under the Aveo Way Programme, the purchaser of the Pre-AWFI was and had to have been the Relevant Aveo Manager;
  - (b) the Relevant Aveo Manager had an exercisable option to purchase the Pre-AWFI;
  - (c) the Relevant Aveo Manager was not introduced to the Luke Applicants and the ARE Sub-Group Members by ARE; and
  - (d) ARE did not have any role, and was never intended to have any role, in securing, and was not the effective cause of, the sale of the Pre-AWFI to the Relevant Aveo Manager.
- 119 By requiring the Luke Applicants and the ARE Sub-Group Members to pay commission under the Real Estate Agency Agreement and the ARE Appointment Agreements in the circumstances of the preceding paragraph, ARE engaged in conduct:
- (a) in trade or commerce; and
  - (b) in connection with the supply or possible supply of real estate sales and marketing services to the Luke Applicants and the ARE Sub-Group Members within the meaning of s 21 of the *Australian Consumer Law*.
- 120 By:
- (a) ARE's non-disclosure, as pleaded below at paragraph 126; and

- (b) requiring payment by the Luke Applicants and the ARE Sub-Group Members of commission, and accepting such payment, in the circumstances pleaded in paragraph 118,

ARE engaged in conduct that was unconscionable and in contravention of s 21 of the *Australian Consumer Law* in that:

- (ba) it involved ARE receiving a sizeable sales agent's commission when ARE was not the effective cause of sale, because:
- (i) ARH or the Relevant Aveo Manager knew of the Luke Applicants' or the ARE Sub-Group Members' intention to sell their respective Pre-AWFI before ARE was appointed under the Real Estate Agency Agreement and the Appointment Agreements;
  - (ii) ARE did not identify or introduce the buyer of the Pre-AWFI, because the buyer would always be ARH or the Relevant Aveo Manager under the Aveo Way Programme;
- (c) it reduced the amount which the Luke Applicants and the ARE Sub-Group Members received or would receive upon sale of their Pre-AWFIs by the sum of the commission;
- (d) it prolonged the period that the Luke Applicants and the ARE Sub-Group Members continued to pay fees;
- (e) where relevant, ARE knew, or ought to have known, that the Relevant Aveo Manager had an exercisable option to purchase the Pre-AWFI;

#### **Particulars**

Constructive knowledge is to be inferred from:

- (i) ARE's relationship with the Relevant Aveo Managers as pleaded above;
  - (ii) Publicly available title searches.
- (f) the sole or dominant purpose of this conduct was to benefit one or more of ARE, the Relevant Aveo Manager and the Respondent, as particularised at paragraph 80(d) above;
- (g) ARE had significantly greater bargaining power than the Luke Applicants and the ARE Sub-Group Members, because of:
- (i) its (ARE's) experience in the retirement village industry; and
  - (ii) its relationship with the Relevant Aveo Manager and the Respondent;  
and

### Particulars

- (A) The Applicants rely on the matters pleaded at paragraphs 75 and 115 above.
- (B) Particulars of the ARE Sub-Group Members will be provided by separate Points of Claim, or after the determination of the common questions.
- (iii) its knowledge:
  - (A) that the Aveo Way Programme had been, or would be, introduced; and
  - (B) of the matters pleaded at paragraph 17 and 17B above,  
as pleaded and particularised at paragraphs 18 and 19 above;
- (h) the Luke Applicants and ARE Sub-Group Members had a reasonable expectation that a lack of need to appoint an agent would have been disclosed to them by ARE, as pleaded ~~below~~ at paragraphs 26, 27 and 127; and
- (i) these omissions of information were not reasonably necessary to protect the legitimate interests of ARE, in that it was not reasonably necessary for ARE to be paid commission by a vendor of a property which it had been commissioned to sell when it had not introduced the vendor to the purchaser,

### (ARE's Unconscionability).

- 121 The Luke Applicants and ARE Sub-Group Members have suffered loss or damage by ARE's Unconscionability.

### Particulars

The loss or damage is:

- (a) any fees paid in accordance with the Luke Applicants' Management Agreement and the ARE Sub-Group Members' Management Agreements as a result of the prolongation of the period in which the Pre-AWFI was required to be sold as a result of the Aveo Way Programme;
  - (b) any commission paid to ARE;
  - (c) in relation to the Luke Applicants further particulars may be provided after the service of expert evidence;
  - (d) in relation to the ARE Sub-Group Members, further particulars will be provided by separate Points of Claim, or after discovery or the determination of the common questions.
- 122 The Respondent:
- (a) actively promoted and marketed the Aveo Way Programme;

### Particulars

The Applicants repeat and rely on the matters pleaded in paragraphs 16 to 20, ~~54 to 67~~ and 72 to 74 above.

- (b) knew that the Aveo Way Programme was being introduced into relevant Aveo Villages, including Aveo Peregrin Springs;

### Particulars

- (i) The Respondent knew this to be the case because as pleaded above at paragraphs 16 to 20, it occurred at the instigation of the Respondent.
- (ii) The Applicants also rely on paragraph 2A above.
- (c) in the circumstances pleaded at paragraphs 16 to 20 and 72 to 74 above, caused and facilitated the introduction of the Aveo Way Programme into relevant Aveo Villages, including Aveo Peregrin Springs;
- (d) had the policy and knew about the practice pleaded at paragraph ~~115~~–116 above;
- (da) by reason of the matters in subparagraph (d) above and paragraphs 6A and 20 to 20B, created circumstances in which ARE was conflicted as between its obligations to its principal (being the owner of the Pre-AWFI) and loyalty to the Respondent and or the Relevant Aveo Manager, as described at subparagraph 174(l)(ii) below;
- (e) prepared the Standard Form Letter, including the provision pleaded at paragraph 113 above; and
- (f) was the ultimate holding company of ARE.
- 123 By reason of the matters pleaded in paragraphs 13, 16 to 20, 121(a) and 122 above, the Respondent:
- (a) had knowledge of and facilitated the essential elements of ARE's Unconscionability; and
- (b) by reason of sub-paragraph (a) above, was directly or indirectly, knowingly concerned in or party to ARE's Unconscionability.
- 124 In the premises of the preceding paragraph, the Respondent was a person involved in ARE's Unconscionability within the meaning of ss 2(1) and 236(1) of the *Australian Consumer Law*.
- 125 By reason of the Respondent's involvement in ARE's Unconscionability, pursuant to s 236(1) of the *Australian Consumer Law* the Luke Applicants and the ARE Sub-Group Members are entitled to recover damages from the Respondent for loss or damage arising from ARE's Unconscionability.



***ARE's Misleading or deceptive conduct – lack of need to appoint a real estate agent***

- 126 Neither at the time of appointment as exclusive agent to sell the Pre-AWFI, nor at any other time, did ARE disclose to the Luke Applicants or to the ARE Sub-Group Members the lack of need to appoint a real estate agent, or any other agent, to assist in the sale of their Pre-AWFI following the introduction and implementation of the Aveo Way Programme.
- 127 The Luke Applicants and the ARE Sub-Group Members had a reasonable expectation that a lack of any need to appoint an agent would have been disclosed to them by ARE because:
- (aa) the Relevant Aveo Manager had the right under its Management Agreement to appoint the Relevant Real Estate Agent as the sole and exclusive agent for a period of 60 days;
  - (ab) of the matters pleaded in paragraph 116 above;
  - (ac) of the real estate agent's duties to its principal described in subparagraph 174(l)(ii) below;
  - (a) the Luke Applicants and the ARE Sub-Group Members were appointing and had appointed ARE as their agent;
  - (b) ARE was a related company to the Relevant Aveo Manager and the Respondent, as pleaded in paragraph 115 above;
  - (c) the Relevant Aveo Manager and the Respondent, and accordingly ARE which was a related company, were experienced in the industry, as pleaded in paragraph 115 above;
  - (d) the Luke Applicants and the ARE Sub-Group Members relied upon ARE to provide necessary information in relation to a sale, including how to obtain the best price; and

**Particulars**

- (i) The Luke Applicants relied on ARE by:
  - (A) accepting and not challenging the estimate of the resale price of the Property;
  - (B) not taking steps to ascertain the true market value of the Property;
  - (C) not terminating ARE's appointment as property agent after the period of exclusivity described in pursuant to the Form 6 had expired on 24 March 2015;
  - (D) signing the 21 September 2015 Standard Form Letter.

(ii) Particulars of the ARE Sub-Group Members will be provided by separate Points of Claim or after the determination of the common questions.

- (e) ARE knew or ought to have known of the reliance pleaded in sub-paragraph (d) above.

#### Particulars

Constructive knowledge is to be inferred from the appointment of ARE as the agent and from paragraphs 6A, 48 and 110 to 116 ~~114~~ above. Further particulars may be provided after discovery.

- 128 ARE's omission to disclose the lack of need to appoint an agent to sell a Pre-AWFI was conduct in trade or commerce.
- 129 By remaining silent about the lack of need to appoint an agent, ARE engaged in conduct which was misleading or deceptive or likely to mislead or deceive, because the Relevant Aveo Manager was, in fact, able and ready to purchase the Pre-AWFI at its fair market value, or its market value.

#### Particulars

The Applicants repeat and rely on paragraphs 20 to 20B and 118 above.

- 130 In the circumstances, ARE engaged in misleading or deceptive conduct contrary to s 18 of the Australian Consumer Law (**ARE's M/D Conduct**).
- 131 Because ARE remained silent about the lack of need to appoint an agent, the Luke Applicants and the ARE Sub-Group Members agreed to pay, and did in fact pay, commission to ARE.
- 132 In the circumstances, the Luke Applicants and the ARE Sub-Group Members have suffered loss or damage by ARE's M/D Conduct.

#### Particulars

The Luke Applicants and the ARE Sub-Group Members repeat and rely on the particulars to paragraph 121 above.

- 133 By reason of the matters pleaded in paragraphs 13, 16 to 20, 121(a) and 122 above, the Respondent:
- (a) had knowledge of and facilitated the essential elements of ARE's M/D Conduct; and
  - (b) by reason of sub-paragraph (a) above, was directly or indirectly, knowingly concerned in or party to ARE's M/D Conduct.
- 134 In the premises of the preceding paragraph, the Respondent was a person involved in ARE's M/D Conduct within the meaning of ss 2(1) and 236(1) of the *Australian Consumer Law*.

- 135 By reason of the Respondent's involvement in ARE's M/D Conduct, pursuant to s 236(1) of the *Australian Consumer Law*, the Luke Applicants and the ARE Sub-Group Members are entitled to recover damages from the Respondent for loss or damage arising from ARE's M/D Conduct.

#### H. RESPONDENT'S DIRECT CONTRAVENTIONS IN RESPECT OF THE COLOMBARI APPLICANTS AND LEASEHOLD GROUP MEMBERS

- 136 Dianne Vickrage-Hill:

- (a) in various emails to the Colombari Applicants:
  - (i) held herself out in her email signature as "Sales Consultant, Aveo Bayview Gardens, Retirement";
  - (ii) included the Aveo Email Disclaimer;

##### Particulars

- (A) Email to the Third Applicant dated 28 January 2015.
- (B) Email to the Third Applicant dated 2 September 2016.
- (b) in other correspondence to the Colombari Applicants, used Aveo Trade Marks;

##### Particulars

Undated Aveo Live Well 5 Step Guide to Listing your Property including attached business card.

- (c) was authorised by the Respondent to engage in the activities pleaded in the preceding sub-paragraphs; and
- (d) in the premises, in her dealings with the Colombari Applicants, ~~was~~:
  - (i) was held out by the Respondent to be an officer or agent of the Respondent; and,
  - (ii) in accordance with ss 128 and 129(3) of the *Corporations Act* 2001 (Cth), is taken to have been duly appointed by the Respondent as a Sales Assistant and to have had the authority to exercise the powers and perform the duties customarily exercised or performed by a Sales Assistant; and, or alternatively,
  - (iii) her actions are taken for the purposes of the *Australian Consumer Law*, by s 139B(2) of the *Australian Consumer Law*, to have been engaged in also by the Respondent.

### ***Unconscionable Conduct by the Respondent***

- 137 At the time of their appointments as attorneys of Joan Mary Colombari and, subsequently, as co-executors of the Colombari Estate, and until the time that the Colombari lease was surrendered, the Colombari Applicants:
- (a) needed to surrender the Colombari lease without delay in order for Joan Mary Colombari to move into a serviced apartment, due to the decline in her health;
  - (b) had neither leased, purchased, nor owned, ~~nor marketed and sold any property in a Retirement Village other than the Colombari Property, nor marketed or sold any property in a Retirement Village;~~
  - (c) had no specialised or professional knowledge or experience in relation to the Retirement Village industry, including in relation to such matters as:
    - (i) the value of different legal interests in land in Retirement Villages;
    - (ii) the legislation governing Retirement Villages;
    - (iii) the terms of Management Agreements; or
    - (iv) the marketing and sale of units in Retirement Villages; and
  - (d) had no relevant knowledge or understanding of the corporate structure of the different entities trading under the "Aveo" brand and did not understand there to be any relevant distinction between the Respondent, ANSRV, and ARE.
- 138 In introducing and promoting the purchase of units in Aveo Villages that had Pre-AWLIs pursuant to the Aveo Way Programme, the Respondent engaged in and is engaging in conduct:
- (a) in trade or commerce; and
  - (b) in connection with the supply or possible supply of retirement village management services or real estate agent services to the Colombari Applicants and the Leasehold Group Members within the meaning of s 21 of the *Australian Consumer Law*.
- 139 By introducing and promoting the Aveo Way Programme in Aveo Villages that previously had Pre-AWLIs, the Respondent engaged in and is engaging in conduct that was and is unconscionable and in contravention of s 21 of the *Australian Consumer Law* in that:
- (a) it reduced or would likely reduce the amount which the Colombari Applicants and the Leasehold Group Members received or would likely receive upon the surrender of their Pre-AWLI;

### Particulars

The Colombari Applicants repeat and rely on the matters pleaded in paragraphs 20 to 21 and 21A above.

- (b) the Respondent had and has the knowledge pleaded at paragraph 22 and the matters pleaded in paragraph 24 were foreseen or reasonably foreseeable by it;
- (c) the dominant purpose, or anticipated and intended outcomes, of this conduct was and is to benefit the Respondent or entities related to the Respondent;

### Particulars

The Colombari Applicants repeat and rely on the matters pleaded in paragraph 20 above.

- (d) the Respondent had and has significantly greater bargaining power than the Colombari Applicants and the Leasehold Group Members, because of:
  - (i) its experience in developing and managing Retirement Villages, as pleaded in paragraph 2 above, in circumstances where the Colombari Applicants and the Leasehold Group Members had no specialised or professional experience in the Retirement Villages industry; and
  - (ii) the matters pleaded above at paragraphs 8 to 9, 10A to 13, 15, 20-22 to 26, 27A, and 137 above;
- (e) the Aveo Way Programme was and is not reasonably necessary to protect the legitimate interests of the Respondent;

### Particulars

- (i) The Respondent's legitimate interests would have been adequately protected had the Respondent either:
  - (A) caused the Colombari Applicants' Pre-AWLI and the Leasehold Group Members' Pre-AWLIs to be surrendered and the Colombari Property, and the property of the Leasehold Group Members' Pre-AWLIs, to be leased to a new resident on the same or substantially the same terms as the Colombari Applicants' Management Agreement or the Leasehold Group Members' Management Agreements (as applicable); or
  - (B) caused the new resident to enter into a lease on the terms of the Aveo Way Contract but agreed to pay to the Colombari Applicants and the Leasehold Group Members an amount calculated by reference to a lease to the new resident on the same or substantially the same terms as the Colombari Applicants' Management Agreement or the Leasehold Group Members' Management Agreements (as applicable).
- (ii) The Respondent's target of increasing its return on assets to 8% by the financial year ended 30 June 2018 was not an interest in need of protection.

- (f) the Respondent failed and has failed to inform the Colombari Applicants and the Leasehold Group Members that they would or would likely achieve a lower Resale Price in respect of their unit under or as a result of marketing and leasing the unit in accordance with the Aveo Way Programme (as to which see below at paragraphs 71Y and 141);
- (g) in the surrender of their leases in Aveo Villages, the Colombari Applicants and the Leasehold Group Members were or are (as applicable) in a position of vulnerability relative to the Respondent, in that:
  - (i) the Resale Price of a unit in a Retirement Village is affected by the terms of the Management Agreement which the new resident is being offered, which was and is in the control of the Respondent and/or the Relevant Aveo Manager, at the direction of the Respondent;
  - (ii) in accordance with the Aveo Way Programme, the Respondent, the Relevant Aveo Manager, or the Relevant Real Estate Agent, and not the existing resident, was and is the one who dealt and negotiated, or deals and negotiates, with the incoming resident;
  - (iii) the Colombari Applicants and the Leasehold Group Members had no knowledge of or control over the terms of the Management Agreements that the Respondent chose to offer to prospective residents;
  - (iv) the matters pleaded above at paragraphs 8 to 9, 10A to 13, 15, 22 to 26, 27A, and 137 existed; and
  - (v) Joan Mary Colombari was particularly vulnerable due to her urgent need to relocate to a serviced apartment; and
- (h) the Colombari Applicants and the Leasehold Group Members were or are further vulnerable to the Respondent because they were and are required to continue paying fees in respect of their Pre-AWLIs in accordance with the Colombari Applicants' Management Agreement and the Leasehold Group Members' Management Agreements until the time of sale or for so long as permissible under statute.

139A But for the above contravention, the Colombari Applicants and some or all of the Leasehold Sales Sub-Group would have entered into an alternative arrangement on the termination of their Pre-AWLI in which:

- (a) the incoming resident would have entered into a new lease in the form of the Relevant Former Contract or substantially in the form of the Relevant Former Contract; and, or alternatively
- (b) ANSRV or the Relevant Aveo Manager would pay to obtain the surrender of the Pre-AWLI rather than permit an incoming resident to enter into a new lease in the form of the Relevant Former Contract or substantially in the form of the Relevant Former Contract.



### Particulars

In relation to the Leasehold Sales Sub-Group Members, further particulars will be provided by separate Points of Claim, or after the determination of the common questions.

- 140 The Colombari Applicants and the Leasehold Sales Sub-Group Members have suffered or will likely suffer loss or damage because of the above contravention.

### Particulars

The loss or damage is to be quantified as including one or more of the following:

- (a) in relation to the Colombari Applicants:
  - (i) they would have entered into an alternative arrangement on the termination of their Pre-AWLI in which:
    - (A) the incoming resident would have entered into a new lease in the form of the Resident's Former Agreement or substantially in the form of the Resident's Former Agreement as alleged in paragraph 139A above; or alternatively,
    - (B) ANSRV would have paid fair market value, or market value, for the surrender of the Pre-AWLI rather than permit an incoming resident to enter into a new lease in the form of the Resident's Former Agreement or substantially in the form of the Resident's Former Agreement;
  - (ii) the Colombari Applicants further refer to and repeat the matters at paragraphs 20 to 21, 21A and 71X above;
  - (iii) as a result the Colombari Applicants lost the valuable opportunity of obtaining an increased amount upon the surrender of their Pre-AWLI.
- (b) fees paid in accordance with the Colombari Applicants' Management Agreement and the Management Agreements of Leasehold Group Members during the prolongation of the sale period arising from the lesser desirability of AWIs in comparison with Pre-AWLIs.
- (c) in relation to the Colombari Applicants, further particulars may be provided after the service of expert evidence.
- (d) in relation to the Leasehold Sales Sub-Group Members, further particulars will be provided by separate Points of Claim, or after the determination of the common questions.

### ***Misleading or deceptive conduct***

- 141 At least from the introduction of the Aveo Way Programme into Aveo Bayview Gardens and into other Aveo Villages, the Respondent represented and continued to represent to the Colombari Applicants and the Leasehold Group Members that surrendering the

Pre-AWLI in the Colombari Property, and the other properties of the Leasehold Group Members, in accordance with the Aveo Way Programme would not or was not likely to result in reduction of the amount they would receive had an incoming resident entered into a new lease in the form of the Relevant Former Contract or substantially in the form of the Relevant Former Contract and that they would be no worse off if they agreed to surrender pursuant to the Aveo Way Programme **(the Leasehold No Worse Off Representation)**.

#### Particulars

- (a) The Leasehold No Worse Off Representation was implied or constituted by silence.
- (b) In so far as it was implied, it is to be implied from the following circumstances:
  - (i) The Respondent introducing the Aveo Way Programme without providing information as to the effect or likely effect on the Colombari Applicants and Leasehold Group Members when they surrendered their Pre-AWLIs, or as to the matters in paragraphs 20 to 20B, as pleaded in paragraphs 21 to 26 and 27A above.
  - (ii) The power of the Respondent to affect or influence the terms of new Management Agreements to be used in Aveo Villages between the Relevant Aveo Manager and the incoming resident, as pleaded in paragraphs 8 to 9 and 10 to 15 above.
  - (iii) The involvement of the Respondent in marketing and leasing existing units in Aveo Villages, as pleaded in paragraph 13 above.
  - (iv) The experience of the Respondent in marketing and leasing existing units in Aveo Villages, as pleaded in paragraph 2 above, and the knowledge of the Respondent of the market for units in Aveo Villages which it derived from that experience and as pleaded in paragraph 23 above.
  - (v) The likely vulnerability of residents in Aveo Villages commonly needing or having to surrender their lease given the usual circumstances of surrender being death or the need to move to increased care, as pleaded in paragraphs 23 and 24(a) above.
  - (vi) The lack or comparative lack of experience of the Colombari Applicants and the Leasehold Group Members in the market for units in Retirement Villages, as pleaded in paragraph 137 above in relation to the Colombari Applicants and as will be particularised in relation to the Colombari Group Members by separate Points of Claim, or after the determination of the common questions.
  - (vii) The Respondent's materials asserting the advantages of the Aveo Way Programme, as pleaded in paragraph 19 above.
  - (viii) The absence of communication between the Colombari Applicants and the Leasehold Group Members, as existing residents, and the incoming resident acquiring his, her, or their lot, as pleaded in paragraph 17B above, which might have allowed the Colombari Applicants and the Leasehold Group Members to

become aware of the effect of the Aveo Way Programme on the market value of their Pre-AWLIs.

- (c) In so far as it was constituted by silence, the Applicants refer to and repeat paragraph 25 about non-disclosure and paragraphs 26 and 27A above about the reasonable expectation of disclosure.
- 142 The Leasehold No Worse Off Representation was made in trade or commerce.
- 143 The Leasehold No Worse Off Representation was misleading or deceptive, or likely to mislead or deceive, in that surrendering a Pre-AWLI in accordance with the Aveo Way Programme did in fact or would, or alternatively was likely to result in reduction of the amount the Colombari Applicants and the Leasehold Group Members would receive or would have received had:
- (a) the incoming resident entered into a new lease in the form of the Relevant Former Contract or substantially in the form of the Relevant Former Contract; or alternatively,
- (b) ANSRV paid to obtain the surrender of the Pre-AWLI rather than permit an incoming resident to enter into a new lease in the form of the Relevant Former Contract or substantially in the form of the Relevant Former Contract, in respect of the Colombari Property.

#### Particulars

The Applicants repeat and rely on the matters pleaded in paragraphs 20 to 21 and 21A above.

- 144 Further or alternatively:
- (a) the Leasehold No Worse Off Representation was with respect to a future matter within the meaning of s 4(1)(a) of the *Australian Consumer Law*;
- (b) unless the Respondent adduces evidence to the contrary, the Respondent is taken not to have had reasonable grounds for making the Leasehold No Worse Off Representation by reason of s 4(2) of the *Australian Consumer Law*; and
- (c) the Leasehold No Worse Off Representation would then be taken to have been misleading or deceptive by reason of s 4(1) of the *Australian Consumer Law*.
- 145 In the circumstances, the Respondent engaged in misleading or deceptive conduct contrary to s 18 of the *Australian Consumer Law*.
- 146 The Colombari Applicants as co-executors of the Colombari Estate agreed to surrender the lease and some or all of the Leasehold Sales Sub-Group Members agreed to surrender their leases pursuant to the Aveo Way Programme in reliance upon the Leasehold No Worse Off Representation.

### Particulars

The Colombari Applicants relied on the Leasehold No Worse Off Representation in:

- (a) accepting that the price of \$380,000 was a fair market value at the time;
- (b) settling the surrender of the interest in the Colombari Property; and
- (c) not seeking legal advice as to whether or to what extent they could have prevented ANSRV from selling the Colombari Property under the terms of the Aveo Way Contract.

In relation to the Leasehold Sales Sub-Group Members, further particulars will be provided by separate Points of Claim, or after the determination of the common questions.

146A But for the above contravention, the Colombari Applicants and some or all of the Leasehold Sales Sub-Group Members would have entered into an alternative arrangement on the termination of their Pre-AWLI in which:

- (a) the incoming resident would have entered into a new lease in the form of the Relevant Former Contract or substantially in the form of the Relevant Former Contract; or
- (b) the Relevant Aveo Manager would have paid to obtain the surrender of the Pre-AWLI rather than permit an incoming resident to enter into a new lease in the form of the Relevant Former Contract or substantially in the form of the Relevant Former Contract.

### Particulars

In relation to the Leasehold Sales Sub-Group Members, further particulars will be provided by separate Points of Claim, or after the determination of the common questions.

147 In the circumstances, the Colombari Applicants and the Leasehold Sales Sub-Group Members have suffered loss or damage because of the above contravention of s 18 of the *Australian Consumer Law*.

### Particulars

- (a) In relation to the Colombari Applicants, they refer to and rely on paragraph 140 above.
- (b) In relation to the Leasehold Sales Sub-Group Members, including the Leasehold Sub-Group Members, further particulars will be provided by separate Points of Claim, or after the determination of the common questions.

## I. THE RESPONDENT'S INVOLVEMENT IN CONTRAVENTIONS BY AVEO MANAGERS – COLOMBARI APPLICANTS AND LEASEHOLD GROUP MEMBERS

148 Dianne Vickrage-Hill:

- (a) in various emails to the Colombari Applicants, held herself out in her email signature as "Sales Consultant, Aveo Bayview Gardens, Retirement", in

circumstances where "Aveo Bayview Gardens" was a business name owned by ANSRV and ANSRV was the operator of the Retirement Village of that name;

(b) was authorised or permitted by ANSRV to hold herself out as a Sales Consultant at Aveo Bayview Gardens; and

(c) \_\_\_\_\_ in the premises, in her dealings with the Colombari Applicants; and

(i) \_\_\_\_\_ was held out by ANSRV to be an officer or agent of ANSRVARH; and,

(ii) \_\_\_\_\_ in accordance with ss 128 and 129(3) of the *Corporations Act 2001* (Cth), is taken to have been duly appointed by ANSRV as a Sales Consultant and to have had the authority to exercise the powers and perform the duties customarily exercised or performed by a Sales Consultant; and, or alternatively,

(iii) \_\_\_\_\_ her actions are taken for the purposes of the *Australian Consumer Law*, by s 139B(2) of the *Australian Consumer Law*, to have been engaged in also by ANSRV.

### ***Relevant Aveo Managers' Unconscionability***

149 In introducing and promoting the Aveo Way Programme in Aveo Villages that previously had Pre-AWLIs, including Aveo Bayview Gardens, ANSRV and other Relevant Aveo Managers which have introduced and promoted the Aveo Way Programme in their Aveo Villages with Pre-AWLIs (**Leasehold Aveo Way Managers**) engaged in and are engaging in conduct:

(a) in trade or commerce; and

(b) in connection with the supply or possible supply of retirement village management services or real estate agent services to the Colombari Applicants and the Leasehold Group Members within the meaning of s 21 of the *Australian Consumer Law*.

150 By introducing and promoting the Aveo Way Programme in Aveo Villages with Pre-AWLIs, including Aveo Bayview Gardens, and procuring the Colombari Applicants and the Leasehold Sales Sub-Group Members to agree to surrender the lease of their units in those villages pursuant to the Aveo Way Programme, ANSRV and the other Aveo Way Managers engaged in and are engaging in conduct that was and is unconscionable and in contravention of s 21 of the *Australian Consumer Law* in that:

(a) it reduced or would likely reduce the amount which the Colombari Applicants and the Leasehold Sales Sub-Group Members received or would likely receive upon the surrender or transfer of their Pre-AWLIs;

### Particulars

The Applicants repeat and rely on the matters pleaded in paragraphs 20 to 21 and 21A above.

- (b) the dominant purpose, or anticipated and intended outcomes, of this conduct was and is to benefit ANSRV and other Leasehold Aveo Way Managers, and the Respondent, by increasing the fees payable to it and them;
- (c) ANSRV and other Leasehold Aveo Way Managers had and have significantly greater bargaining power than existing residents, because of the matters pleaded at paragraphs 2, 8, 71B, 71E, 32, and 139(d) above;
- (d) in the surrender of their leases of their units in Aveo Villages, the Colombari Applicants and the Leasehold Group Members were or are (as applicable) in a position of vulnerability relative to the Leasehold Aveo Way Managers, in that:
  - (i) the incoming contribution for a lease of a unit in a Retirement Village is affected by the terms of the Management Agreement which the new resident is being offered, which was and is in the control of the Leasehold Aveo Way Managers; and
  - (ii) in accordance with the Aveo Way Programme, the Respondent, the Relevant Aveo Manager, or the Relevant Real Estate Agent, and not the existing resident, was and is the one who dealt and negotiated, or deals and negotiates, with the incoming resident;
  - (iii) the Colombari Applicants and the Leasehold Group Members had no knowledge of the matters pleaded in paragraphs 20 to 20B above, or any knowledge of or control over the terms of the Management Agreements that the Leasehold Aveo Way Managers chose to offer to prospective residents;
  - (iv) the matters pleaded above at paragraphs 8 to 9, 10A to 13, 15, 22 to 26, 27A, and 137 existed;
  - (v) Joan Mary Colombari was particularly vulnerable due to her urgent need to relocate to a serviced apartment; and
- (e) the Aveo Way Programme was and is not reasonably necessary to protect the legitimate interests of ANSRV and Leasehold Aveo Way Managers in the Pre-AWLIs,

### Particulars

The Applicants refer to and rely upon paragraph 139(e) above.

**(Leasehold Aveo Way Manager's Unconscionability).**



- 151 The Colombari Applicants and the Leasehold Sales Sub-Group Members have suffered, or will likely suffer, loss or damage by ANSRV's or another Leasehold Aveo Way Manager's Unconscionability.

**Particulars**

The Applicants repeat and rely on the particulars to paragraph 140 above.

- 152 The Respondent:

- (a) actively promoted and marketed the Aveo Way Programme; and

**Particulars**

The Applicants repeat and rely on the matters pleaded in paragraphs 16 to 20 and 136 above.

- (b) knew that the Aveo Way Programme was being introduced into particular Aveo Villages, including Aveo Bayview Gardens, by the Leasehold Aveo Way Managers; and

**Particulars**

- (i) The Respondent knew this to be the case because as pleaded above at paragraphs 16 to 20, it occurred at the instigation of the Respondent.
- (ii) The Respondent had the relationships with the Relevant Aveo Managers pleaded in paragraphs 2, 8, and 29 to 32 above.
- (iii) The Applicants repeat and rely on the matters pleaded and particularised in paragraphs 16 and 18 above.
- (c) in the circumstances pleaded at paragraphs 16 to 20 and 71Z above, caused and facilitated the introduction of the Aveo Way Programme into relevant Aveo Villages, including Aveo Bayview Gardens.
- 153 By reason of the matters pleaded in paragraphs 149 to 152 above, and its relationships with the Relevant Aveo Managers pleaded in paragraphs 2, 8, and 29 to 32, the Respondent:
- (a) had knowledge of and facilitated the essential elements of the Leasehold Aveo Way Managers' Unconscionability; and

**Particulars**

The Applicants repeat and rely on the Respondent's knowledge as pleaded in paragraphs 19(c), 20, 22, 27-8, 71B, 71E, 139(d) above.

- (b) by reason of sub-paragraph (a) above, was directly or indirectly, knowingly concerned in or party to the Leasehold Aveo Way Managers' Unconscionability.

- 154 In the premises of the preceding paragraph, the Respondent was a person involved in the Leasehold Aveo Way Manager's' Unconscionability within the meaning of ss 2(1) and 236(1) of the *Australian Consumer Law*.
- 155 By reason of the Respondent's involvement in the Leasehold Aveo Way Managers' Unconscionability, pursuant to s 236(1) of the *Australian Consumer Law* the Colombari Applicants and the Leasehold Sales Sub-Group Members are entitled to recover damages from the Respondent for loss or damage arising from the Leasehold Aveo Way Managers' Unconscionability.

### ***Aveo Way Managers' Misleading or Deceptive Conduct***

- 156 At least from the introduction of the Aveo Way Programme into Aveo Bayview Gardens and into other relevant Aveo Villages, ANSRV and the other Leasehold Aveo Way Managers represented and continued to represent to the Colombari Applicants and the Leasehold Group Members that surrendering the Pre-AWLI in the Colombari Property, and the other properties of the Leasehold Group Members, in accordance with the Aveo Way Programme would not or was not likely to result in reduction of the amount they would receive had an incoming resident entered into a new lease in the form of the Relevant Former Contracts or substantially the same terms as their respective Relevant Former Contracts and they would be no worse off if they agreed to surrender pursuant to the Aveo Way Programme (**the Leasehold Aveo Way Manager's No Worse Off Representation**).

#### **Particulars**

- (a) The Leasehold Aveo Way Manager's No Worse Off Representation was implied or constituted by silence.
- (b) In so far as it was implied, it is to be implied from the following circumstances:
  - (i) ANSRV and the Leasehold Aveo Way Managers introducing the Aveo Way Programme without providing information as to the effect or likely effect on the Colombari Applicants and the Leasehold Group Members when they surrendered their Pre-AWLI, as pleaded in paragraph 25 above.
  - (ii) The power of ANSRV and the Aveo Way Managers to dictate the terms of Management Agreements, as pleaded in paragraphs 9 to 15 above.
  - (iii) The involvement of ANSRV and the Leasehold Aveo Way Managers in marketing and leasing existing units, as pleaded in paragraph 13 above.
  - (iv) The experience of ANSRV and the Leasehold Aveo Way Managers in marketing and leasing existing units, as pleaded in paragraph 8 above and the knowledge of ANSRV and the Aveo Way Managers of the market for units in Retirement Villages which is derived from that experience.
  - (v) The likely vulnerability of residents in Aveo Villages given the common or usual circumstances of surrender being death or the need to move to increased care, as pleaded in paragraphs 23 and 24(a) above.

- (vi) The lack or comparative lack of experience of the Colombari Applicants and the Leasehold Group Members in the market for units in Retirement Villages, as pleaded in paragraph 137 above in relation to the Colombari Applicants and as will be particularised in relation to the Leasehold Group Members in separate Points of Claim or after the determination of the common questions.
  - (vii) Marketing materials asserting the advantages of the Aveo Way Programme provided to the Colombari Applicants and Leasehold Group Members by ANSRV and the Leasehold Aveo Way Managers, as pleaded in paragraphs 19 and 148 above.
  - (viii) The absence of communication between the Colombari Applicants and the Leasehold Group Members and the incoming resident, as pleaded in paragraph 17B above, which might have allowed the Colombari Applicants and the Leasehold Group Member to become aware of the effect of the Aveo Way on the market value of their Pre-AWLIs.
- (c) In so far as it is constituted by silence, the Colombari Applicants and the Leasehold Group Members and Leasehold Sales Sub-Group Members refer to and repeat paragraph 25 about non-disclosure and paragraphs 26 and 27A about the reasonable expectation of disclosure.
  - (d) The Colombari Applicants also rely on the matters pleaded in paragraph 71J above.
  - (e) The Leasehold Aveo Way Manager's No Worse Off Representation had a continuing effect on the Colombari Applicants until the date on which the Colombari Property was sold.
- 157 The Leasehold Aveo Way Manager's No Worse Off Representation was made in trade or commerce.
- 158 The Leasehold Aveo Way Manager's No Worse Off Representation was misleading or deceptive, or likely to mislead or deceive, in that surrendering the Pre-AWLI pursuant to the Aveo Way Programme did in fact or would, or alternatively was likely to reduce the amount the Colombari Applicants and the Leasehold Group Members would receive or would have received had:
- (a) the incoming resident entered into a new lease in the form of the Resident's Former Agreement or substantially in the form of the Resident's Former Agreement; or
  - (b) the Relevant Aveo Manager paid to obtain the surrender of the Pre-AWLI rather than permit an incoming resident to enter into a new lease in the form of the Resident's Former Agreement or substantially in the form of the Resident's Former Agreement.
- 159 Further or alternatively:
- (a) each of ANSRV's and the Leasehold Aveo Way Manager's Leasehold No Worse Off Representations was with respect to a future matter within the meaning of s 4(1)(a) of the *Australian Consumer Law*;

- (b) unless the Respondent adduces evidence to the contrary, ANSRV and the Leasehold Aveo Way Managers are taken not to have had reasonable grounds for making the Leasehold No Worse Off Representation by reason of s 4(2) of the *Australian Consumer Law*; and
  - (c) ANSRV's and the Leasehold Aveo Way Manager's Leasehold No Worse Off Representation would then be taken to be misleading or deceptive by reason of s 4(1) of the *Australian Consumer Law*.
- 160 In the circumstances, ANSRV and the Relevant Leasehold Aveo Managers engaged in misleading or deceptive conduct contrary to s 18 of the *Australian Consumer Law* (**the Relevant Leasehold Aveo Manager's M/D Conduct**).
- 161 The Colombari Applicants relied upon the Leasehold Aveo Way Manager's No Worse Off Representation (here, ANSRV's) in agreeing to surrender the lease, and some or all of the Leasehold Sales Sub-Group Members relied upon Leasehold Aveo Way Managers' No Worse Off Representation to surrender their leases, pursuant to, or in contemplation of, the Aveo Way Programme.

#### Particulars

The Applicants refer to and rely on the particulars to paragraph 146 above.

- 162 In the circumstances, the Colombari Applicants and Leasehold Sales Sub-Group Members have suffered loss or damage.

#### Particulars

The Applicants repeat and rely on the particulars to paragraph 147 above.

- 163 By reason of the matters pleaded in paragraphs 150 to 153 above, the Respondent:
- (a) had knowledge of and facilitated the essential elements of the Relevant Leasehold Aveo Managers' M/D Conduct; and
  - (b) by reason of sub-paragraph (a) above, was directly or indirectly, knowingly concerned in or party to the Relevant Leasehold Aveo Managers' M/D Conduct.

#### Particulars

The Colombari Applicants repeat and rely on the matters pleaded in paragraphs 13, 16 to 19(c), and 136 above, and the Respondent's knowledge as pleaded in paragraphs 22, 2-8, 71B, 71E, 139(d) above.

- 164 In the premises of the preceding paragraph, the Respondent was a person involved in the Relevant Leasehold Aveo Managers' M/D Conduct within the meaning of ss 2(1) and 236(1) of the *Australian Consumer Law*.
- 165 By reason of the Respondent's involvement in the Relevant Leasehold Aveo Managers' M/D Conduct, pursuant to s 236(1) of the *Australian Consumer Law* the Colombari Applicants and Leasehold Sales Sub-Group Members are entitled to recover damages

from the Respondent for loss or damage arising from the Relevant Leasehold Aveo Managers' M/D Conduct.

## J. UNCONSCIONABLE SYSTEM CLAIM

### *Available levers*

166 At and from the time the Respondent started to design the Aveo Way Programme (in about January 2014):

(a) the Respondent:

(i) controlled each Aveo Manager;

(ii) operated the Aveo Villages (itself, through Relevant Aveo Managers, or through its associated entities, including AEH and RVG and their subsidiaries);

#### **Particulars**

Paragraphs 2(b), (c), (e) and (h)–(j), 3(d), 8, 29–32 and 71B–71E above are relied upon.

(b) the Respondent controlled ARE;

#### **Particulars**

Paragraphs 2(h)–(j), 6A, 43, 44, 55 to 60, 62, 72 to 74, and 110 to 115(a) and 116 above are relied upon.

(c) the Respondent conducted the Aveo Business using the Aveo Trade Marks (itself, through Aveo Managers, who were licensed to use them, through associated entities, and through persons held out as representing it);

#### **Particulars**

Paragraphs 2(d), (e), 8(b)(ii), 13(b), 32, 44, 71E and 72 to 74, above are relied upon.

(d) each resident holding a Pre-AWI had been required to enter into a Management Agreement with the Relevant Aveo Manager, and had done so;

#### **Particulars**

Paragraphs 3(c), 9, 34, and 71G above are relied upon.

(e) the Management Agreements of many residents holding a Pre-AWI contained terms that:

(i) precluded sale of the Pre-AWFI or further leasing of a unit that had been subject to a Pre-AWFI otherwise than on terms of a Management Agreement determined by the Relevant Aveo Manager;

### Particulars

Paragraphs 9, 10(a), 10A(b), 36, 52, 53 and 71H above are relied upon.

- (ii) gave the Respondent or Relevant Aveo Manager the option to purchase, or otherwise the ability to obtain, the Pre-AWI;

### Particulars

Paragraphs 10(b), 11, 37, 80(c), 94, 95(c), 112(a), 118(b) and 120(e) above are relied upon.

- (iii) required them to consent to, or otherwise permitted, registration of a mortgage, caveat or other registrable interest on title, to secure payments due under the Management Agreement or purchase option;

### Particulars

Paragraphs 10(c), 14 and 35(b) above are relied upon.

- (iv) required, permitted, or did not prohibit the Relevant Aveo Manager or ARE acting as real estate agent for the sale of the Pre-AWFI or further leasing of a unit that had been subject to a Pre-AWLI;

### Particulars

Paragraphs 10(d), 10A(c), ~~and 36(b)-(d)~~ and 116 above are relied upon.

- (f) the Respondent was able to restrict the sale of the Pre-AWFI or further leasing of a unit that had been subject to a Pre-AWLI in the manner and on the terms that the Respondent required;

### Particulars

Paragraphs 9, 10, 10A, 11, 13(c), 14, 15, 36 and 37 above are relied upon.

- (g) many residents holding a Pre-AWI:
  - (i) had:
    - (A) not purchased, owned, leased, marketed or sold any property in a Retirement Village, apart from having purchased, and owning, the Pre-AWI;
    - (B) no relevant specialised or professional knowledge or experience in relation to the Retirement Village industry;
    - (C) no relevant knowledge or understanding of the corporate structure of the different entities trading under the "Aveo" brand;



### Particulars

Paragraphs 75 and 137 above are relied upon.

- (ii) would sell or surrender their pre-AWI on account of death, or ill-health requiring relocation to accommodation providing aged care;

### Particulars

Paragraphs 23, 24, 39, 40, 71I, 71J and 137(a) above are relied upon.

- (h) outgoing residents did not generally communicate with incoming residents, where the outgoing resident's Pre-AWI was sold to the Respondent or the Relevant Aveo Manager, rather than to the incoming resident, or in the case of surrender of a Pre-AWI in the nature of a leasehold interest;

### Particulars

Paragraphs 17A, 17B, 69 and 71Z above are relied upon.

- (i) the Respondent, Relevant Aveo Managers and ARE had experience and expertise in the marketing, lease, and sale of interests in Retirement Villages greater than that of most Pre-AWI interest-holders;

### Particulars

Paragraphs 2(b), (c), (e), (f), 8(e), 13, 15(f), 75(b), 77(e) and 115 above are relied upon.

- (j) the Respondent and Relevant Aveo Managers were involved in the marketing, lease, and resale of residential units in Aveo Villages;

### Particulars

Paragraphs 2(f), ~~and~~ 13, 43, 44, 55 to 60, 62, 72 to 74, 76, 89 to 92, 110 to 115(a) and 116 above are relied upon.

- (k) when purchasing or in the context of surrender of Pre-AWIs, the Respondent, Relevant Aveo Managers, and ARE had bargaining power significantly greater than that of outgoing residents;

**Particulars**

Paragraphs 2(b), (c), (e), (f), 9–15, 77(e), 80(e), 92(d), 95(e), 120(g), 139(d) and 150(c) above are relied upon.

- (l) Pre-AWIs in land in, or real property within, Aveo Villages gave the holder an entitlement to the benefit of any appreciation in the value of that land or real property (a **Capital Appreciation Entitlement**).

**Particulars**

Paragraphs 3(f), (g) and (ga) above are relied upon.

(the matters in this paragraph 166, the **Available Levers**).

**Design**

167 At and from the time the Respondent started to design the Aveo Way Programme in about January 2014, it was aware of the Available Levers.

168 The Respondent designed the Aveo Way Programme to:

- (a) replace Pre-AWIs, which had given the outgoing resident a Capital Appreciation Entitlement, with AWIs, which:

(i) did not give the incoming resident a Capital Appreciation Entitlement, and thereby obtain at no expense to the Respondent that Capital Appreciation Entitlement; and, or alternatively,

(ii) exposed the incoming resident to:

(A) an increased:

(1) rate of accrual; and, or alternatively

(2) quantum,

of deferred management fees or exit fees;

(B) in some or all cases, additional membership fees;

and, or alternatively,

(iii) provided to the Respondent increased operational control of units and the body corporate of strata-titled Aveo Villages, and over the terms of Management Contracts;

(the **Desired Result**);

(b) by the following mechanism:

- (i) each time an outgoing resident wished to sell or surrender a Pre-AWI in land or real property in an Aveo Village, the Respondent or a Relevant Aveo Manager would purchase the Pre-AWI and sell an AWI in that land or real property to an incoming resident, or in the event of surrender of a leasehold Pre-AWI would lease an AWI in the land or real property to an incoming resident;
- (ii) the ingoing contribution paid by the incoming resident for the AWI would be the amount paid to the outgoing resident (less certain deductions) for the Pre-AWI.

#### Particulars

Paragraphs 16, 17, 17B, 17C, 20, 21 to 22, 24, 25 above, and 173(a) below (and the particulars to that paragraph), are relied upon.

(the **Mechanism**)

#### **Implementation**

169 The Respondent implemented the Aveo Way Programme, using the Available Levers, in order to achieve the Desired Result by the Mechanism.

#### Particulars

Paragraphs 16–27A, 38–69, 71I–71Z, 72–75, 77, 79, 80, 82, 84, 87, 89, 90–92, 94–97, 100, 102, 105, 107, 110–120, 122–123, 126, 127, 129, 131, 132, 136, 137, 139, 141, 143, 146, 148, 150, 152, 153, 156, 158, 161, 163, and 166–168 above are relied upon.

170 The Respondent implemented the Aveo Way Programme by:

- (a) using the Available Levers;

#### Particulars

As to:

- i. sub-paragraph 166(a) (control of Relevant Aveo Managers and operation of Aveo Villages), the Applicants rely on the paragraphs there particularised, and paragraphs 13, 16, 17, 17B, 18, 19, 77(h)(i), 80(e), 92(d), 94–97, 100, 102, 105, 107, 116, 139(g)(i), 149, 150, 152–153, 156, 158, 161 and 163 above.
- ii. sub-paragraph 166(b) (control of ARE), the Applicants rely on the paragraphs there particularised, paragraphs 19, 48, 55 to 60, 62, 71T, 72 to 74, 79, and 110–120, 122–123, 126–127, 131, 133 above, and sub-paragraph 170(g) below.
- iii. sub-paragraph 166(b) (Aveo Trade Marks), the Applicants rely on the paragraphs there particularised, and paragraphs 44(a), 57(a), 62(b), 71R, 72(b) and (c), 73(b) and (c), and 136(b) above.

- iv. sub-paragraphs 166(d)–(e) (Management Agreements), the Applicants rely on the paragraphs there particularised, and paragraphs 16, 17, 17B(a)–(c) and (e), 17C, 18, 19, 34, 36, 37, 42, 48, 52, 53, 65, 77(h), 79, 92(e), 116–118, 139(g) and 150(d) above.
- v. sub-paragraph 166(g) (characteristics of outgoing residents), the Applicants rely on the paragraphs there particularised, and paragraphs 17, 17A, 17B, 23, 24(a), 39–48, 50–51, 54–64, 69, 71J–71Z, 77(e)(i), 115–120 and 139(d)(i) above.
- vi. sub-paragraph 166(h) (non-communication between outgoing and incoming residents), the Applicants rely on the paragraphs there particularised, and paragraphs 17A, 17B(d), 69, 71Z, 77(h)(ii), 92(e)(ii), 139(g)(ii) and 150(d)(ii) above.
- vii. sub-paragraphs 166(i) and (j) (experience in marketing and resale), the Applicants rely on the paragraphs there particularised, paragraphs 17, 17B(a)–(c) and (e), 18, 19, 48, 55–62, 71K–71V, 77(e)(i), 80(e), 95(e), 120(g) and 139(d)(i) above, and sub-paragraphs 170(d)–(g) below.
- viii. sub-paragraph 166(k) (bargaining power), the Applicants rely on the paragraphs there particularised, and paragraphs 17, 17B, 39–70, 71F–71Z, 77(e)(i), 79, 80(e), 92(d), 95(e), 120(g) and 139(d)(i) above.
- ix. sub-paragraph 166(l) (nature of Pre-AWI), the Applicants rely on the paragraphs there particularised, and paragraphs 17–17C, 20, 20A, 21, 21A, 67, 71X, 77(a), 92(a), 120(c), 139(a) and 150(a) above.

- (b) creating the Aveo Way Contract;

**Particulars**

Paragraphs 3(e), (f), (g) and (ga), 17, 17B(a)–(c) and (e) and 17C above are relied upon.

- (c) causing and facilitating the introduction of the Aveo Way Programme into Aveo Villages;

**Particulars**

Paragraphs 2(c), 2(d), 2(h), 2(i), 2(j), 8(b), 8(c), 8(d), 16, 17, 17B, 17C, 18, 19, 28–32, 57–67, 71B–71E, 71R, 72(d) and (e), 73(c) and (d), 74(b) and (c), 96–99, 107–109, 115, 122–125, 133, 152–155 and 163–165 above are relied upon.

- (d) developing and implementing training programs, sales and leasing procedures for the Aveo Way Programme;

**Particulars**

Paragraphs 18, 57, 59, 60, 62, 72(d) and (e), 73(c) and (d), and 74(b) and (c) above are relied upon.

- (e) creating and distributing promotional material and the Standard Form Letter, directed toward outgoing residents, or causing their creation and distribution;

**Particulars**

Paragraphs 19, 57, 72(d) and (e), 73(c) and (d), 74(b) and (c) and 113–114 above are relied upon.

- (f) actively promoting and marketing the Aveo Way Programme, and causing Aveo Way Managers to do so;

**Particulars**

Paragraphs 19, 24(b), 57(a), 72(d), 73(c), 74(b), 76, 77, 91, 96(a), 122(a), 138, 139 and 152 above are relied upon.

- (g) its policy of nominating ARE as the Relevant Real Estate Agent;

**Particulars**

Paragraphs 48, 71T, 79, 115–117, 122–123 and 133–135 above are relied upon.

- (h) non-disclosure by the Respondent and Aveo Way Managers to the System Group Members (as outgoing residents):

- (i) of the likelihood of financial detriment;
- (ii) that the Aveo Way Programme would or would be likely to result in a lower sale price (in the case of Pre-AWFIIs), lower payment on surrender (in the case of Pre-AWLIIs) and/or a longer sale period;

**Particulars**

Paragraphs ~~20 to 17~~ 21A, 25, 77(a), 77(g), 84, 92(a), 102, 120(c)–(d), 139(a), 139(f), 143, 150(a), and 158 above are relied upon.

- (i) representations to System Group Members to the effect that sale or surrender of their pre-AWI and the subsequent lease of an AWI to the incoming resident of the same unit would not or would not be likely to leave outgoing residents worse off than if they sold their Pre-AWFI under their Relevant Former Contract or surrendered their Pre-AWLI on the basis that the incoming resident entered into a new lease in the form of the Relevant Former Contract or substantially in the form of the Relevant Former Contract;

**Particulars**

Paragraphs 57(c), 71M, 71T, 82, 100, 141, and 156 above are relied upon.

- (j) the actions of persons who were, or were held out to be, officers or agents of the Respondent, including:
- (i) Paul McAlpine;

**Particulars**

Paragraphs 2A(a) and 18 above (and the particulars thereto) are relied upon.

- (ii) Stephen Gook;

**Particulars**

Paragraphs 2A(b) and 18 above (and the particulars thereto) are relied upon.

- (iii) Anthony Sargent;

**Particulars**

Paragraphs 2A(c), 16 and 18 above (and the particulars thereto) are relied upon.

- (iv) Alison Quinn;

**Particulars**

Paragraphs 2A(d), 16 and 18 above (and the particulars thereto) are relied upon.

- (v) Geoffrey Grady;

**Particulars**

Paragraphs 2A(e) and 16 above (and the particulars thereto) are relied upon.

- (vi) Karol Kljajcin;

**Particulars**

Paragraphs 55, 62–63, 72, 89, and 110–114 above are relied upon.

- (vii) Meg Rossiter;

**Particulars**

Paragraphs 43, 44(b), 57, 62, 73 and 90 above are relied upon.

- (viii) Sandy Spencer;

**Particulars**

Paragraphs 57(b), 58–60, 59, 60, 74 above are relied upon.

- (ix) Dianne Vickrage-Hill;



### Particulars

Paragraphs 71L–71N, 136 and 148 above are relied upon.

- (x) Relevant Aveo Managers.

### Particulars

Paragraphs 96(b) and 122(b) above are relied upon.

### ***The System of Conduct***

171 The Respondent's system of conduct constituted by the matters alleged in paragraphs 167–170 (the **Aveo Way System**) was conduct:

- (a) in trade or commerce;
- (b) in connection with the supply or possible supply of retirement village management services or real estate agent services to the System Group Members within the meaning of s 21 of the *Australian Consumer Law*.

### ***The Desired Result is achieved***

172 By the Aveo Way System, the Respondent achieved the Desired Result by the Mechanism.

### Particulars

Paragraphs 20 to 21, 21A, 25, 64, 66–67, 70, 71V–71W and 167–172 above (and the particulars to those paragraphs), and paragraphs 173(a) and (b) below (and the particulars to those paragraphs) are relied upon.

### ***Unconscionability factors***

173 The Aveo Way System:

- (a) was for the primary purpose of the Respondent obtaining a benefit;

### Particulars

Paragraphs 16–17C, 20 to 22, 25, 77(d), 80(d), 92(c), 95(d), 120(f), 139(c) and 150(b) above are relied upon.

- (b) resulted in:
  - (i) benefit to the Respondent, being that it obtained each of the elements of the Desired Result set out at paragraphs 168(a)(i) to (iii) above; the Capital Appreciation Entitlements, at no expense to it, in land in which System Group Members had held Pre-AWIs;
  - (ii) equivalent or commensurate detriment to the System Group Members, in that they were undercompensated for their Pre-AWIs because the

price paid to the System Group Members did not reflect the value of ~~thei~~ Pre-AWIs ~~Capital Appreciation Entitlements~~;

**Particulars**

Paragraphs 3(e), (f), (g) and (ga), 17, 17B(a)–(c) and (e), 17C, 20 to 20B, 64, 70, 71, 71V–71Z, 77(a), 78, 81, 87, 88, 92(a), 93, 95(a), 105, 106, 120(c), 121, 132, 139(a), 140, 143, 147, 150(a), 151, 158 and 162 above are relied upon.

- (c) was not reasonably necessary to protect the legitimate interests of the Respondent, or Aveo Way Managers.

**Particulars**

Paragraphs 77(f), 80(g), 92(f), 95(g), 120(i), 139(e) and 150(e) above are relied upon.

174 The Aveo Way System had the following characteristics:

- (a) the Respondent and Aveo Way Managers had significantly greater:
- (i) bargaining power than System Group Members;

**Particulars**

Paragraphs 77(e), 80(e), 92(d), 95(e), 120(g), 139(d) and 150(c) above are relied upon.

- (ii) knowledge, experience, and expertise in relation to the marketing, sale and leases of interests in retirement villages than System Group Members;

**Particulars**

Paragraphs 2(f), 8(e), 15(f), 75(b), 77(e), 80(e) and 115 above are relied upon.

- (b) for a resident in an Aveo Village, the terms of an AWI were or are less favourable than the terms of a Pre-AWFI or Pre-AWLI;

**Particulars**

Paragraphs 3(e), (f), (g) and (ga), 17, 17B(a)–(c) and (e), 17C, 20 to 21, 21A, 22, 25, 67, 71X, 77(a), (c) and (g), 84(a), 92(a), 102(a), 120(c)–(d), 139(a), (b) and (f), 143, 150(a) and 158 above are relied upon.

- (c) the Respondent did not inform System Group Members that they would, or would be likely to, receive less than the amount that would have been paid in respect of Pre-AWIs under the terms of Relevant Former Contracts, or less than what they would or would be likely to receive if they did not participate in the Aveo Way Programme (as implemented by the Respondent);

### Particulars

Paragraphs ~~20 to 21, 21A~~, 22, 25, 77(a), (c), ~~(e)~~, (g), 84, 92(a), 102, 120(c)–(d), 139(a), (b) and (f), 143, 150(a) and 158 above are relied upon.

- (d) the System Group Members lost the valuable opportunity of obtaining:
  - (i) amounts that would have been paid in respect of Pre-AWIs under the terms of Relevant Former Contracts;
  - (ii) what they would have received if they had not participated in the Aveo Way Programme (as implemented by the Respondent);

### Particulars

Paragraphs 3(e), (f), (g) and (ga), 17, 17B(a)–(c) and (e), 17C, ~~20 to 21, 21A~~, 25, 67, 77(a), 80(a), 92(a), 95(a), 120(c), 139(a) and 150(a) above are relied upon.

- (e) AWIs were less desirable than Pre-AWIs, such that System Group Members' units would be on the market for longer before sale or re-lease, as the Respondent knew or ought to have known;

### Particulars

Paragraphs 3(e), (f), (g) and (ga), 17C, ~~20 to 21, 21A~~, 22, 67, 71X, 77(g), 84(b), 102(b), 120(c)–(d) and 139(f) are relied upon.

- (f) the Respondent did not inform System Group Members as outgoing residents that the Aveo Way Programme would or would be likely to result in a lower price (in the case of AWIs), lower payment on surrender (in the case of Pre-AWIs) and/or a longer sale period;

### Particulars

Paragraphs ~~20 to 21, 21A~~, ~~22~~, 25, 77(a), 77(g), 84, 92(a), 102, 120(c)–(d), 139(a), 139(f), 143, 150(a) and 158 above are relied upon.

- (g) System Group Members had a reasonable expectation that the Respondent would disclose complete and accurate financial information to them, but the Respondent did not disclose to them the likelihood of financial detriment;

### Particulars

Paragraphs 26, 27 and 27A above are relied upon.

- (h) the difference between the Pre-AWIs held by System Group Members, and the AWIs sold to incoming residents, was a significant difference and alteration to the way in which interests in land or real property were held in Retirement Villages, especially in the case of freehold Pre-AWIs;

### Particulars

Paragraphs 3(e), (f), (g) and (ga), 17C, 20 to 21, 21A, 67, 71X, 77(b) and 92(b), above are relied upon.

- (i) System Group Members were in a position of vulnerability relative to the Respondent and Relevant Aveo Managers;

**Particulars**

Paragraphs 23, 24(a), 77(h)–(i), 92(e), 139(g)–(h), 150(d) and 166(g) (and the paragraphs particularised in respect of each characteristic there pleaded) above are relied upon.

- (j) the representations alleged in paragraph 170(i) above were misleading or deceptive, and were relied on;

**Particulars**

Paragraphs 57(c), 82, 84, 86, 87, 100, 102, 104, 105, 141, 143, 145, 146, 156, 158 and 160 above are relied upon.

- (k) in the case of System Group Members who are ARE Sub-Group Members:

- (i) the Respondent did not disclose to ARE Sub-Group Members that no agent need be appointed to sell the Pre-AWI if it was to be sold at market value, which failure to disclose was itself:

- (A) unconscionable;
- (B) misleading or deceptive;

**Particulars**

In relation to the failure to disclose, paragraphs 79 and 94 are relied upon.

In relation to the unconscionability of non-disclosure, paragraphs 80 and 95 are relied upon.

In relation to the misleading or deceptive nature of non-disclosure, paragraphs 126–130 are relied upon.

- (ii) ARE engaged in conduct that contravened section 21 of the *Australian Consumer Law*;

**Particulars**

Paragraphs 10(d), 48 and 115–120 above are relied upon.

- (l) ARE, and Aveo Way Managers that acted as real estate agent in relation to sales by System Group Members of Pre-AWIs (which included the surrender of Pre-

AWLIs and the attendant entry into an AWI by an incoming resident), breached fiduciary duties owed to System Group Members, in that:

- (i) where Pre-AWIs were to be sold or surrendered to the Respondent or to a Relevant Aveo Manager, rather than sold or assigned (or otherwise disposed of) on the open market, non-disclosure of that matter, and of the matters in paragraphs 20 to 20B, and the charging of commission, involved the agent:
  - (A) preferring its own interests to its duty to the principal;
  - (B) wrongfully profiting from the agency relationship;
- (ii) implementing the Aveo Way System required that the real estate agent procure the cost-equivalency required by the Mechanism (described in paragraph 168(b)(ii) above), whereas the real estate agent's duty to its principal was:
  - (A) to not allow its own interests, or the interests of a third party, to conflict with the interests of the owner of the Pre-AWI;
  - (B) to not prefer its own interests, or the interests of a third party, over the interests of the owner of the Pre-AWI;
  - (C) accordingly:
    - (1) to seek to procure the highest price for the Pre-AWI that was available; and
    - (2) not to withhold any information from the owner of the Pre-AWI that might influence or impact upon any decision by them to accept or reject any offer made to acquire their Pre-AWI, including the matters pleaded in paragraphs 17, 17B, 17C, 20A and 20B above;
- (iii) in each of the cases pleaded in paragraph 174(l)(i) and (ii) above, the breach of fiduciary duty caused loss or damage to the relevant System Group Member.

#### **Particulars**

Paragraphs 20 to 20B, 24, 48, 70(b)(iii), 79, 80, 94, 95, 112, 115–120 and 166(e)(iv) above (and the paragraphs there particularised) are relied on.

Loss or damage includes:

- (A) the difference between the price in fact paid for the Pre-AWI, and the fair market value of the Pre-AWI, or the actual market value of the Pre-AWI; and

(B) the quantum of any commission payment to the real estate agent; and

(C) any fees or other costs incurred by reason of the prolongation of the period in which the Pre-AWI was sold as a result of the Aveo Way Programme.

Further particulars will be provided after discovery.

- (m) the System Group Members had no knowledge of or control over the terms of the Management Agreements offered to prospective incoming residents under the Aveo Way System;

#### **Particulars**

Paragraphs 77(h)(iii), 92(e)(iii), 139(g)(iii) and 150(d)(iii) above are relied upon.

- (n) the Respondent directed, or controlled, or knew or ought to have known about, the conduct of Aveo Way Managers and ARE in implementing the Aveo Way Programme.

#### **Particulars**

Paragraphs 2(b), (c), (e) and (h)–(j), 3(d), 6A, 8, 29–32, 43, 44, 56, 57, 71B–71E, 72 to 74, 96, 97, 110 to 115(a), 122, 123, 133, 147, 152, 153, 163, above are relied upon.

### ***Unconscionable conduct***

- 175 By reason of the matters alleged in paragraphs 166–174 above, the Aveo Way System was conduct that was unconscionable and in contravention of s 21 of the *Australian Consumer Law*.

### ***Causation***

- 176 But for the above contravention:

(a) the Luke Applicants, and some or all of the Freehold Sales Sub-Group Members would have entered into an alternative arrangement in that they would have sold their Pre-AWFI:

(i) under the terms of their Management Agreements;

(ii) to the Relevant Aveo Manager, having regard to the matters in paragraphs 20 to 20B above;

(b) the Colombari Applicants and some or all of the Leasehold Sales Sub-Group Members would have entered into an alternative arrangement on the termination of their Pre-AWFI in which:



- (i) as the incoming resident would have entered into a new lease in the form of the Residents Former Agreement or substantially in the form of the Residents Former Agreement; or
- (ii) the Relevant Aveo Manager would have paid those Group Members, having regard to the matters in paragraphs 20 to 20B above, for the surrender of the Pre-AWLI rather than permit an incoming resident to enter into a new lease in the form of the Resident's Former Agreement or substantially in the form of the Resident's Former Agreement.

177 The Aveo Way System caused the Luke Applicants, the Colombari Applicants and the other System Group Members to suffer loss or damage.

### Particulars

That loss or damage may be quantified as:

- (a) that proportion of the benefit to the Respondent pleaded in paragraph 173(b)(i) (adjusted as necessary for other differences in value as between the entitlements under a Pre-AWI and the entitlements under an AWI) referable to each System Group Member; or
- (b) alternatively, an amount calculated on the basis that, had it not been for the contravention, the Luke Applicants, the Colombari Applicants, and some or all of the System Group members would have entered into an alternative arrangement in that they would have disposed of their Pre-AWIs for prices and amounts reflecting:
  - (i) their value of the Pre-AWIs under, or having regard to, the terms of the Relevant Former Contracts; and, or alternatively,
  - (ii) the matters in paragraphs 20 to 20B above.

They Group Members lost the valuable opportunity to enter into such alternative transactions which would have likely resulted in a higher payments being made to them;

- (c) fees paid in accordance with Management Agreements during the prolongation of the sale period arising from the lesser desirability of AWIs in comparison with Pre-AWIs.

Paragraphs 20~~1~~ to 22, 77(a), 78, 81, 88, 93, 106, 121, 132, 139(a), 140, 150(a), 151 and 162 above are relied upon.

Further particulars may be provided after discovery.

Date: 3 November, 2021



Signed by Stewart A Levitt  
Levitt Robinson  
Solicitors for the Applicants

3/11/21

This pleading was prepared and amended by Daniel Meyerowitz-Katz and settled by K P Hanscombe QC.

The amendments in the Second Further Amended Statement of Claim were drawn and settled by Richard Attiwill QC, Emrys Nekvapil, Jim Hartley and Daniel Meyerowitz-Katz.

The amendments in the Third Further Amended Statement of Claim were drawn and settled by Adam Bell SC, Philip Tucker, Emrys Nekvapil, Jim Hartley and Daniel Meyerowitz-Katz.

#### **Certificate of lawyer**

I certify to the Court that, in relation to the further amended statement of claim filed on behalf of the Applicants, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date:

3/11/21.



Signed by Stewart A Levitt  
Levitt Robinson

## Schedule of Parties

Federal Court Of Australia  
District Registry: Victoria  
Division: General

No. VID 996 of 2017

Second Applicant: **Meredith Anne Luke (in her Capacity as the Co-Executor of the Estate of Robert Colin Luke, Deceased)**

Third Applicant: **Ann Mary Stroud (in her Capacity as the Co-Executor of the Estate of Joan Mary Colombari, Deceased)**

Fourth Applicant: **Neil Bernard Colombari (in his Capacity as the Co-Executor of the Estate of Joan Mary Colombari, Deceased)**

### Schedule 1: ARH Office Bearers

Blackmore	Karen	Secretary	15/09/1999	22/12/2000	Secretary	15/09/1999	22/12/2000
Brown	Glen Robert	Director	21/12/2005	04/10/2006	Chief Financial Officer	<i>[Not known to Applicants]</i>	
Brown	Peter Ross	Director	27/02/2003	19/10/2012	Director	27/02/2003	14/09/2012
Forrester	Desmond James	Director	17/09/1993	28/10/2005	Director	01/07/1987	28/10/2005
Forrester	Rodney Thomas	Director	17/09/1993	25/07/2008	Director	01/07/1987	30/06/2008
Gaffney	Michael Thomas	Secretary	15/09/1997	16/02/1998	Secretary	15/09/1997	16/02/1998
Godfrey	Lisa Mary	Secretary	19/09/2012	20/06/2014	Secretary	25/10/2012	20/06/2014
Grady	Geoffrey Earl	Director/CEO	09/10/2012	Current	Director Alternate Director Alternate Director	01/07/2013 20/09/2014 16/12/2008	Current 14/10/2014 04/03/2009
Guihot	Darryl Leonard	Director	13/10/2008	08/07/2010	Chief Financial Officer	<i>[Not known to Applicants]</i>	
Hunt	David Allan	Director	08/07/2010	Current	Chief Financial Officer	<i>[Not known to Applicants]</i>	
Jamieson	John Edward	Director	01/11/2001	29/10/2004	Director	02/09/1999	29/10/2004
Lorenz	Justin Peter	Director	02/10/2015	Current	Group Finance Manager	<i>[Not known to Applicants]</i>	
Macdonald	James Charles	Alternate Director Director	24/11/2000 09/04/2002	30/06/2001 31/12/2004	Alternate Director Alternate Director	04/05/2001 22/12/2000	19/05/2001 19/01/2001
Moodie	Nicole Amanda	Secretary	20/06/2014	Current	Secretary	20/06/2014	Current
Palmer	William Arthur	Director	23/06/1997	01/11/2001	Director	29/01/1990	01/11/2001
Parker	Philip	Director	17/09/1993	18/03/2014	Director	01/07/1987	21/02/2012
Pearson	Michael Paul	Secretary	12/12/2005	29/05/2006	Secretary	12/12/2005	29/05/2006
Quinn	Alison Jane	Director	18/03/2014	02/10/2015	Head of Retirement Division	<i>[Not known to Applicants]</i>	
Russell	Timothy James	Alternate Director	13/05/2005	02/06/2005	General Manager, Investments	<i>[Not known to Applicants]</i>	
Shannon	Michael Barry	Secretary	29/06/2011	19/10/2012	Secretary	29/06/2011	25/10/2012
Stewart	Susan Elizabeth	Secretary	29/05/2006	29/06/2011	Secretary	29/05/2006	29/06/2011
Toner	Trevor Phillip	Secretary	17/09/1993	23/12/2005	Secretary	01/07/1991	23/12/2005

## **Schedule 2: Aveo Villages**

1	<u>AEH</u>	<u>FPAC</u>	<u>Aveo Albany Creek</u>
2	<u>AEH</u>	<u>FPCF</u>	<u>The Clayfield</u>
3	<u>AEH</u>	<u>FPCLEV</u>	<u>Aveo Cleveland</u>
4	<u>AEH</u>	<u>FPDRK</u>	<u>Aveo Durack</u>
5	<u>AEH</u>	<u>FPTAR</u>	<u>Aveo Taringa</u>
6	<u>AOG</u>	<u>AMIT</u>	<u>Aveo Amity Gardens</u>
7	<u>AOG</u>	<u>BRID</u>	<u>Aveo Bridgeman Downs</u>
8	<u>AOG</u>	<u>CBUSBG</u>	<u>Aveo Bayview Gardens</u>
9	<u>AOG</u>	<u>CBUSLG</u>	<u>Aveo Lindfield Gardens</u>
10	<u>AOG</u>	<u>CBUSPG</u>	<u>Aveo Peninsula Gardens</u>
11	<u>AOG</u>	<u>CLEV</u>	<u>Aveo Cleveland Gardens</u>
12	<u>AOG</u>	<u>CREST</u>	<u>Aveo Crestview</u>
13	<u>AOG</u>	<u>DERW</u>	<u>Aveo Derwent Waters</u>
14	<u>AOG</u>	<u>DOM</u>	<u>Aveo The Domain</u>
15	<u>AOG</u>	<u>GLYN</u>	<u>Aveo Glynde Lodge</u>
16	<u>AOG</u>	<u>GULF</u>	<u>Aveo Gulf Point</u>
17	<u>AOG</u>	<u>HAMP</u>	<u>Aveo Hampton Heath</u>
18	<u>AOG</u>	<u>ISLNDPT</u>	<u>Island Point</u>
19	<u>AOG</u>	<u>LEAB</u>	<u>Aveo Leabrook Lodge</u>
20	<u>AOG</u>	<u>LEIS</u>	<u>Aveo Leisure Court</u>
21	<u>AOG</u>	<u>LIND</u>	<u>Aveo Lindsay Gardens</u>
22	<u>AOG</u>	<u>MANL</u>	<u>Aveo Manly Gardens</u>
23	<u>AOG</u>	<u>MAPL</u>	<u>Aveo Maple Grove</u>
24	<u>AOG</u>	<u>MING</u>	<u>Aveo Mingarra</u>

25	<u>AOG</u>	<u>MINK</u>	<u>Aveo Minkara Resort</u>
26	<u>AOG</u>	<u>MVRV</u>	<u>Aveo Mountain View</u>
27	<u>AOG</u>	<u>NRCAK</u>	<u>Aveo Ackland Park</u>
28	<u>AOG</u>	<u>NRCAS</u>	<u>Aveo Aspley Court</u>
29	<u>AOG</u>	<u>NRCCS</u>	<u>Aveo Carisfield</u>
30	<u>AOG</u>	<u>NRCCY</u>	<u>Aveo Carindale</u>
31	<u>AOG</u>	<u>NRCFH</u>	<u>Aveo Fulham</u>
32	<u>AOG</u>	<u>NRCKP</u>	<u>Aveo Kings Park</u>
33	<u>AOG</u>	<u>NRCMP</u>	<u>Aveo Melrose Park</u>
34	<u>AOG</u>	<u>NRCNH</u>	<u>Aveo The Haven</u>
35	<u>AOG</u>	<u>NRCRB</u>	<u>Aveo Robina</u>
36	<u>AOG</u>	<u>NRCRP</u>	<u>Aveo Robertson Park</u>
37	<u>AOG</u>	<u>NRCRV</u>	<u>Aveo Riverview</u>
38	<u>AOG</u>	<u>NRCSE</u>	<u>Aveo Manor Gardens</u>
39	<u>AOG</u>	<u>NRCSG</u>	<u>Aveo Sunnybank Green</u>
40	<u>AOG</u>	<u>NRCTB</u>	<u>Aveo The Braes</u>
41	<u>AOG</u>	<u>PARKL</u>	<u>Aveo Newmarket</u>
42	<u>AOG</u>	<u>PARKS</u>	<u>Aveo The Parks</u>
43	<u>AOG</u>	<u>PERE</u>	<u>Aveo Peregrin Springs</u>
44	<u>AOG</u>	<u>SOUTHP</u>	<u>Aveo Southport Gardens</u>
45	<u>AOG</u>	<u>TRQG</u>	<u>Aveo Tranquility Gardens</u>
46	<u>AOG</u>	<u>WESTP</u>	<u>Aveo Westport</u>
47	<u>RVG</u>	<u>GANFB</u>	<u>Fernbank</u>
48	<u>RVG</u>	<u>GANMG</u>	<u>Aveo Mosman Grove</u>
49	<u>RVG</u>	<u>GANMM</u>	<u>The Manors Of Mosman</u>
50	<u>RVG</u>	<u>GANPITT</u>	<u>Pittwater Palms</u>
51	<u>RVG</u>	<u>RSABAY</u>	<u>Aveo Concierge Bayside</u>
52	<u>RVG</u>	<u>RSABEN</u>	<u>Aveo Bentleigh</u>

53	<u>RVG</u>	<u>RSADOM</u>	<u>Domaine</u>
54	<u>RVG</u>	<u>RSATOO</u>	<u>Toorak Place</u>
55	<u>RVG</u>	<u>RSAVER</u>	<u>Aveo Veronica Gardens</u>
56	<u>RVG</u>	<u>ZIGBG</u>	<u>Aveo Botanic Gardens</u>
57	<u>RVG</u>	<u>ZIGBP</u>	<u>Aveo Banora Point</u>
58	<u>RVG</u>	<u>ZIGCD</u>	<u>Aveo Camden Downs</u>
59	<u>RVG</u>	<u>ZIGCT</u>	<u>Aveo Cherry Tree Grove</u>
60	<u>RVG</u>	<u>ZIGEP</u>	<u>Aveo Edrington Park</u>
61	<u>RVG</u>	<u>ZIGFC</u>	<u>Aveo Fountain Court</u>
62	<u>RVG</u>	<u>ZIGHG</u>	<u>Hunters Green</u>
63	<u>RVG</u>	<u>ZIGKG</u>	<u>Aveo Kingston Green</u>
64	<u>RVG</u>	<u>ZIGOT</u>	<u>Aveo Oak Tree Hill</u>
65	<u>RVG</u>	<u>ZIGP</u>	<u>Aveo Pinetree</u>
66	<u>RVG</u>	<u>ZIGR</u>	<u>Aveo Roseville</u>
67	<u>RVG</u>	<u>ZIGS</u>	<u>Aveo Sunbury</u>
68	<u>RVG</u>	<u>ZIGSG</u>	<u>Sackville Grange</u>
69	<u>RVG</u>	<u>ZIGSP</u>	<u>Aveo Springthorpe</u>



### **Schedule 3: ANSRV Office Bearers**

<u>Brown</u>	<u>Peter Ross</u>	<u>Director</u>	<u>20/03/2007</u>	<u>19/10/2012</u>	<u>Director</u>	<u>27/02/2003</u>	<u>14/09/2012</u>
<u>Godfrey</u>	<u>Lisa Mary</u>	<u>Secretary</u>	<u>19/09/2012</u>	<u>20/06/2014</u>	<u>Secretary</u>	<u>25/10/2012</u>	<u>20/06/2014</u>
<u>Grady</u>	<u>Geoffrey Earl</u>	<u>Director/CEO</u>	<u>09/10/2012</u>	<u>Current</u>	<u>Director</u> <u>Alternate Director</u> <u>Alternate Director</u>	<u>01/07/2013</u> <u>20/09/2014</u> <u>16/12/2008</u>	<u>Current</u> <u>14/10/2014</u> <u>04/03/2009</u>
<u>Guihot</u>	<u>Darryl Leonard</u>	<u>Director</u>	<u>20/12/2006</u>	<u>20/03/2007</u>	<u>Chief Financial Officer</u>	<u>[Not known to Applicants]</u>	
<u>Hunt</u>	<u>David Allan</u>	<u>Director</u>	<u>09/10/2012</u>	<u>Current</u>	<u>Chief Financial Officer</u>	<u>[Not known to Applicants]</u>	
<u>Moodie</u>	<u>Nicole Amanda</u>	<u>Secretary</u>	<u>20/06/2014</u>	<u>21/06/2017</u>	<u>Secretary</u>	<u>20/06/2014</u>	<u>21/06/2017</u>
<u>Pearson</u>	<u>Michael Paul</u>	<u>Secretary</u>	<u>16/05/2008</u>	<u>23/07/2009</u>	<u>Secretary</u>	<u>12/12/2005</u>	<u>29/05/2006</u>
<u>Shannon</u>	<u>Michael Barry</u>	<u>Secretary</u>	<u>29/06/2011</u>	<u>19/10/2012</u>	<u>Secretary</u>	<u>29/06/2011</u>	<u>25/10/2012</u>
<u>Stewart</u>	<u>Susan Elizabeth</u>	<u>Secretary</u>	<u>20/12/2006</u>	<u>29/06/2011</u>	<u>Secretary</u>	<u>29/05/2006</u>	<u>29/06/2011</u>

## **Glossary**

<i><u>DEFINED TERM</u></i>	<i><u>MEANING<sup>1</sup></u></i>	<i><u>PARA</u></i>
<b><u>1987 SA Act</u></b>	<u>Retirement Villages Act 1987 (SA)</u>	<u>3(a)(iv)</u>
<b><u>2016 SA Act</u></b>	<u>Retirement Villages Act 2016 (SA)</u>	<u>3(a)(v)</u>
<b><u>AEH</u></b>	<u>Aveo Healthcare Limited</u>	<u>2(h)</u>
<b><u>ANSRV</u></b>	<u>Aveo North Shore Retirement Villages Pty Ltd</u>	<u>71B</u>
<b><u>AOG</u></b>	<u>Aveo's ASX listing code</u>	<u>2(g)</u>
<b><u>ARE</u></b>	<u>Aveo Real Estate Pty Ltd</u>	<u>6A</u>
<b><u>ARE Appointment Agreements</u></b>	<u>Agreements appointing ARE as property agent in respect of Pre-AWIs</u>	<u>117</u>
<b><u>ARE Sub-Group Members</u></b>	<u>Subgroup of Freehold Group Members who sold their Pre-AWFI through ARE and paid a sales commission to ARE</u>	<u>6A</u>
<b><u>ARE's M/D Conduct</u></b>	<u>Misleading or deceptive conduct engaged in by omitting to disclose the lack of need to appoint an agent</u>	<u>130</u>
<b><u>ARE's Unconscionability</u></b>	<u>Unconscionable non-disclosure of the lack of need to appoint an agent, and requiring of payment from residents, by ARE</u>	<u>120</u>
<b><u>ARH</u></b>	<u>Aveo Retirement Homes Ltd</u>	<u>29</u>
<b><u>Available Levers</u></b>	<u>Circumstances and matters used to implement the Aveo Way Programme</u>	<u>166</u>
<b><u>Aveo Business</u></b>	<u>The business carried on by the Respondent</u>	<u>2(b)</u>
<b><u>Aveo Email Disclaimer</u></b>	<u>Disclaimer in email footers</u>	<u>72(a)(ii)</u>
<b><u>Aveo Managers</u></b>	<u>Corporate entities through which the Respondent has operated Retirement Villages</u>	<u>2(c)</u>
<b><u>Aveo Peregrin Springs</u></b>	<u>The Aveo Peregrin Springs Country Club</u>	<u>28</u>
<b><u>Aveo Trade Marks</u></b>	<u>Trade marks owned by the Respondent</u>	<u>2(d)</u>

<sup>1</sup> The definitions in this column are in some cases paraphrases, for the convenience of the reader. The actual definition is as in the paragraph of the pleading identified in the third column of this glossary.

<b><u>Aveo Villages</u></b>	<u>Retirement Villages operated by the Respondent in Australia and New Zealand</u>	<u>2(b)</u>
<b><u>Aveo Way Contract</u></b>	<u>The form of contract used as part of the Aveo Way Programme</u>	<u>17(d)</u>
<b><u>Aveo Way Interest</u></b>	<u>A 99-year leasehold interest in an Aveo Village purchased after the introduction of the Aveo Way Programme</u>	<u>3(e)</u>
	<u>See also <b>AWI</b></u>	
<b><u>Aveo Way Manager's No Worse Off Representation</u></b>	<u>Representation to the effect that the Luke Applicants and Freehold Group Members would be no worse off if they sold pursuant to the Aveo Way Programme</u>	<u>100</u>
<b><u>Aveo Way Manager's Unconscionability</u></b>	<u>Unconscionable conduct constituted by introducing and promoting the Aveo Way Programme</u>	<u>92</u>
<b><u>Aveo Way Manager's Unconscionable Omission</u></b>	<u>The unconscionable omission by Aveo to disclose that there was a lack of need to appoint an agent</u>	<u>95</u>
<b><u>Aveo Way Managers</u></b>	<u>Relevant Aveo Managers which have introduced and promoted the Aveo Way Programme in their Aveo Villages</u>	<u>91</u>
<b><u>Aveo Way Programme</u></b>	<u>Programme commenced to be designed and implemented in January 2014 to alter the terms of Management Agreements to be signed by incoming residents</u>	<u>16</u>
<b><u>Aveo Way System</u></b>	<u>The system of conduct constituted by the use of the Available Levers and other matters to achieve the Desired Result by the Mechanism</u>	<u>171</u>
<b><u>Aveo's Exercisable Option to Purchase</u></b>	<u>The fact of Aveo having an option to purchase in the case of certain residents' interests</u>	<u>79</u>
<b><u>Aveo's Unconscionable Omission</u></b>	<u>The unconscionable omission by Aveo to disclose that there was a lack of need to appoint an agent</u>	<u>80</u>
<b><u>AWI</u></b>	<u>A 99-year leasehold interest in an Aveo Village purchased after the introduction of the Aveo Way Programme</u>	<u>3(e), 17(b)</u>
	<u>See also <b>Aveo Way Interest</b></u>	

<b><u>Capital Appreciation Entitlement</u></b>	An entitlement to the benefit of any appreciation in the value of relevant land	<u>166(l)</u>
<b><u>Colombari Applicants</u></b>	<u>Third and Fourth Applicants</u>	<u>1A</u>
<b><u>Colombari Applicants' Management Agreement</u></b>	<u>Management agreement between Ms Colombari and ANSRV</u>	<u>71G</u>
<b><u>Colombari Estate</u></b>	<u>The estate of Joan Mary Colombari</u>	<u>1A(b)</u>
<b><u>Colombari Property</u></b>	<u>Independent Living Unit 308 in Aveo Bayview Gardens</u>	<u>1A(b)</u>
<b><u>deferred management fee</u></b>	<u>Fee payable by a resident on exit</u> <u>See also <b>DMF</b> and <b>exit fee</b></u>	<u>3(h)</u>
<b><u>Desired Result</u></b>	<u>The result of replacing Pre-AWIs (which had a Capital Appreciation Entitlement) with AWIs (which did not), at no expense to the Respondent</u>	<u>168(a)</u>
<b><u>DMF</u></b>	<u>Fee payable by a resident on exit</u> <u>See also <b>deferred management fee</b> and <b>exit fee</b></u>	<u>3(h)</u>
<b><u>Estate</u></b>	<u>The estate of Robert Colin Luke</u>	<u>1(a)</u>
<b><u>exit fee</u></b>	<u>Fee payable by a resident on exit</u> <u>See also <b>deferred management fee</b> and <b>DMF</b></u>	<u>3(h)</u>
<b><u>Form 6</u></b>	<u>Form prescribed under the <i>Property Occupations Act 2014 (Q)</i></u>	<u>48</u>
<b><u>Freehold Group Member Management Agreements</u></b>	<u>Management Agreements in re. the Luke Applicants and the Freehold Group Members</u>	<u>10</u>
<b><u>Freehold Group Members</u></b>	<u>Group represented by the Luke Applicants, who have or had a Pre-AWFI</u>	<u>4</u>
<b><u>Freehold Sales Sub-Group Members</u></b>	<u>Subgroup of Freehold Group Members who sold their interest after the introduction of the Aveo Way Programme</u>	<u>6</u>
<b><u>Ingoing Contribution</u></b>	<u>Interest -free loan to the Relevant Aveo Manager, repayable on exit</u>	<u>10A(a)(i)</u>
<b><u>lack of need to appoint an agent</u></b>	<u>The absence of a requirement for an agent if an interest were to be sold at market value</u>	<u>79</u>
<b><u>Leasehold Aveo Way Manager's No Worse Off Representation</u></b>	<u>Representation to the effect that the Colombari Applicants and Leasehold Group Members would be no worse off if</u>	<u>156</u>

they sold pursuant to the Aveo Way Programme

<b><u>Leasehold Aveo Way Manager's Unconscionability</u></b>	<u>Unconscionable conduct constituted by introducing and promoting the Aveo Way Programme</u>	<u>150</u>
<b><u>Leasehold Aveo Way Managers</u></b>	<u>Relevant Aveo Managers which have introduced and promoted the Aveo Way Programme in their Aveo Villages with Pre-AWLIs</u>	<u>149</u>
<b><u>Leasehold Capital Gain</u></b>	<u>Difference between Resale Value and Ingoing Contribution</u>	<u>10A(a)(ii)(B)</u>
<b><u>Leasehold Group Member Management Agreements</u></b>	<u>Management Agreements in re the Colombari Applicants and the Leasehold Group Members</u>	<u>10A</u>
<b><u>Leasehold Group Members</u></b>	<u>Group represented by the Colombari Applicants, who have or had a Pre-AWLI</u>	<u>4A</u>
<b><u>Leasehold No Worse Off Representation</u></b>	<u>Representation to the effect that the Colombari Applicants and Leasehold Group Members would be no worse off if they sold pursuant to the Aveo Way Programme</u>	<u>141</u>
<b><u>Leasehold Sales Sub-Group Members</u></b>	<u>Subgroup of Leasehold Group Members who sold their interest after the introduction of the Aveo Way Programme</u>	<u>6B</u>
<b><u>Luke Applicants</u></b>	<u>First and Second Applicants</u>	<u>1</u>
<b><u>Luke Applicants' Management Agreement</u></b>	<u>"Resident Contract" between Robert and Marjorie Luke and ARH</u>	<u>34</u>
<b><u>Luke Applicants' Sale Contract</u></b>	<u>Contract for sale dated 19 October 2015</u>	<u>64</u>
<b><u>Management Agreement</u></b>	<u>An agreement for the provisions of services by the Manager of a Retirement Village to a resident</u>	<u>3(c)</u>
<b><u>Manager</u></b>	<u>A person who manages the operations of a Retirement Village</u>	<u>3(b)</u>
<b><u>Mechanism</u></b>	<u>The mechanism used by the Respondent to achieve the Desired Result</u>	<u>168(b)</u>
<b><u>Ms Cox's AWI</u></b>	<u>Lease between ARH and Janice Cox</u>	<u>66(a)</u>
<b><u>No Worse Off Representation</u></b>	<u>Representation to the effect that the Luke Applicants and Freehold Group Members</u>	<u>82</u>

would be no worse off if they sold  
pursuant to the Aveo Way Programme

<b><u>NSW Act</u></b>	<i>Retirement Villages Act 1999 (NSW)</i>	<u>3(a)(i)</u>
<b><u>Pre-Aveo Way Freehold Interest</u></b>	A freehold interest in an Aveo Village before the introduction of the Aveo Way Programme  See also <b><u>Pre-AWFI</u></b>	<u>3(f)</u>
<b><u>Pre-Aveo Way Interest</u></b>	An interest that is a Pre-AWFI or a Pre-AWLI  See also <b><u>Pre-AWI</u></b>	<u>3(ga)</u>
<b><u>Pre-Aveo Way Leasehold Interest</u></b>	A leasehold interest or licence in relation to an Aveo Village before the introduction of the Aveo Way Programme  See also <b><u>Pre-AWLI</u></b>	<u>3(g)</u>
<b><u>Pre-AWFI</u></b>	A freehold interest in relation to an Aveo Village before the introduction of the Aveo Way Programme  See also <b><u>Pre-Aveo Way Freehold Interest</u></b>	<u>3(f)</u>
<b><u>Pre-AWI</u></b>	An interest that is a Pre-AWFI or a Pre-AWLI  See also <b><u>Pre-Aveo Way Interest</u></b>	<u>3(ga)</u>
<b><u>Pre-AWLI</u></b>	A leasehold interest or licence in relation to an Aveo Village before the introduction of the Aveo Way Programme  See also <b><u>Pre-Aveo Way Leasehold Interest</u></b>	<u>3(g)</u>
<b><u>Property</u></b>	<u>7/21 Gracemere Boulevard, Peregian Springs, Qld</u>	<u>1(b)</u>
<b><u>Qld Act</u></b>	<i>Retirement Villages Act 1999 (Qld)</i>	<u>3(a)(ii)</u>
<b><u>Relevant Aveo Manager</u></b>	The Aveo Manager for an Aveo Village	<u>3(d)</u>
<b><u>Relevant Aveo Manager's M/D Conduct</u></b>	Misleading or deceptive conduct engaged in by the making of the Aveo Way Manager's No Worse Off Representation	<u>104</u>
<b><u>Relevant Former Contract</u></b>	The contract that had been in place prior to an Aveo Way Contract	<u>17(e)</u>

<b><u>Relevant Leasehold Aveo Manager's M/D Conduct</u></b>	<u>Misleading or deceptive conduct engaged in by the making of the Leasehold Aveo Way Manager's No Worse Off Representation</u>	<u>160</u>
<b><u>Relevant Real Estate Agent</u></b>	<u>An entity related to a Relevant Aveo Manager appointed as real estate agent for the sale of a resident's interest</u>	<u>10(d)</u>
<b><u>Resale Value</u></b>	<u>The Ingoing Contribution of a new resident, or the fair market value of the unit at the time of exit, as otherwise agreed</u>	<u>10A(a)(ii)(B)</u>
<b><u>Retirement Village</u></b>	<u>Inclusively, a retirement village as defined in various State acts</u>	<u>3(a)</u>
<b><u>RV Acts</u></b>	<u>Retirement village acts in various State and Territory jurisdictions</u>	<u>3(a)</u>
<b><u>RVG</u></b>	<u>Retirement Villages Group</u>	<u>2(i)</u>
<b><u>RVGM</u></b>	<u>Retirement Villages Group Management Pty Ltd</u>	<u>2(i)</u>
<b><u>Standard Form Letter</u></b>	<u>Letter addressed to residents of Aveo Villages who were selling freehold interests</u>	<u>19(b)</u>
<b><u>System Group Members</u></b>	<u>Group represented by the Luke Applicants and the Colombari Applicants on behalf of people who (<i>inter alia</i>) held Pre-AWIs and are either a Freehold Sales Sub-Group Member or a Leasehold Sales Sub-Group Member</u>	<u>6C</u>
<b><u>Tas Act</u></b>	<u>Retirement Villages Act 2004 (Tas)</u>	<u>3(a)(vi)</u>
<b><u>Vic Act</u></b>	<u>Retirement Villages Act 1986 (Vic)</u>	<u>3(a)(iii)</u>
<b><u>Wabitsch's AWI</u></b>	<u>Lease between ANSRV and the Wabitschs</u>	<u>71V</u>