



IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS LIST

Case: S ECI 2020 04339
Filed on: 30/05/2022 02:23 PM

No. S ECI 2020 04339

BETWEEN

PAUL ALLEN

First Plaintiff

AND

MONIKA ALLEN

Second Plaintiff

AND

G8 EDUCATION LIMITED (ACN 123 828 553)

Defendant

Date of Document: ~~26 March 2021~~ 30 May 2022

Filed on behalf of: The Defendant

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DEFENCE TO THE SECOND FURTHER AMENDED STATEMENT OF CLAIM

Filed pursuant to the orders of the Honourable Justice Nichols made 6 May 2022

NOTE: Unless otherwise stated, a defined term in this Defence has the same meaning as assigned to it in the Second Further Amended Statement of Claim dated ~~26 February 2021~~ 6 May 2022 (**2FASOC**).

NOTE: Headings and sub-headings utilised in the 2FASOC have been replicated in this Defence. The defendant does not make any admissions by use of these headings.

In answer to the 2FASOC, the defendant says as follows.

A. INTRODUCTION

A.1 The Plaintiffs and the Group Members

1. It does not plead to paragraph 1 as it contains no allegation against it.
2. It admits paragraph 2.
3. It:
 - (a) denies that any person referred to in paragraph 1(a) of the 2FASOC suffered loss or damage by reason of the matters pleaded in paragraph 1(b) of the 2FASOC; and
 - (b) otherwise does not know and therefore cannot admit paragraph 3.

A.2 The Defendant

4. It admits paragraph 4.

B. G8'S BUSINESS

B.1 G8's business operations

5. It admits paragraph 5.

B.2 The regulatory environment applicable to G8

B.2.1 The framework

6. As to paragraph 6, it:
 - (a) admits that:
 - (i) the Schedule to the *Education and Care Services National Law Act 2010* (Vic);
 - (ii) Schedule 1 to the *Education and Early Childhood Services (Registration and Standards) Act 2011* (SA); and

- (iii) the Schedule to the *Education and Care Services National Law (WA) Act 2012* (WA);

(collectively, the **Education and Care Services National Law**) regulated the provision of an “education and care service” (within the meaning of those laws) during the period 23 May 2017 to 23 February 2018 inclusive (the **Relevant Period**) in the following jurisdictions:

- (iv) as to the schedule to which subparagraph (a)(i) above refers, in Victoria, New South Wales, the Australian Capital Territory, the Northern Territory, Tasmania, and Queensland;

Particulars

Education and Care Services National Law Act 2010 (Vic), s 4; *Children (Education and Care Services National Law Application) Act 2010* (NSW), s 4; *Education and Care Services National Law (ACT) Act 2011* (ACT), s 6; *Education and Care Services (National Uniform Legislation) Act* (NT), s 4; *Education and Care Services National Law (Application) Act 2011* (Tas), s 4; *Education and Care Services National Law (Queensland) Act 2011* (Qld), s 4.

- (v) as to the schedule to which subparagraph (a)(ii) above refers, in South Australia; and

Particulars

Education and Early Childhood Services (Registration and Standards) Act 2011 (SA), s 10.

- (vi) as to the schedule to which subparagraph (a)(iii) above refers, in Western Australia;

Particulars

Education and Care Services National Law (WA) Act 2012 (WA), s 4.

- (b) admits that:

- (i) the *Education and Care Services National Regulations* as published on the NSW Legislation website; and

- (ii) the *Education and Care Services National Regulations 2012* (WA);
- (collectively, the **Education and Care Services National Regulations**) regulated the provision of an “education and care service” (as defined in the Education and Care Services National Law) during the Relevant Period in the following jurisdictions:
- (iii) as to the regulations to which subparagraph (b)(i) refers, in Victoria, New South Wales, the Australian Capital Territory, the Northern Territory, Tasmania, Queensland, and South Australia; and

Particulars

Schedule to the *Education and Care Services National Law Act 2010* (Vic), ss 301 and 302, which provisions were applicable in Victoria, New South Wales, the Australian Capital Territory, the Northern Territory, Tasmania, and Queensland by virtue of the statutory provisions identified in the particulars to paragraph 6(a)(iv) above.

Schedule 1 to the *Education and Early Childhood Services (Registration and Standards) Act 2011* (SA), ss 301 and 302, which provisions were applicable in South Australia by virtue of the statutory provision identified in the particulars to paragraph 6(a)(v) above.

- (iv) as to the regulations to which subparagraph (b)(ii) refers, in Western Australia;

Particulars

Schedule to the *Education and Care Services National Law (WA) Act 2012* (WA), s 301, which provision was applicable in Western Australia by virtue of the *Education and Care Services National Law (WA) Act 2012* (WA), s 4.

- (c) admits that, during the Relevant Period, there was a schedule to the Education and Care Services National Regulations entitled “National Quality Standard”;

Particulars

Education and Care Services National Regulations as published on the NSW Legislation website, Schedule 1;

Education and Care Services National Regulations 2012
(WA), Schedule 1.

- (d) says that, during the Relevant Period, the provision of “education and care services” (as defined in the Education and Care Services National Law) at early learning centres in Australia operated by the defendant was subject to the Education and Care Services National Law and the Education and Care Services National Regulations as those laws applied in the relevant jurisdiction within Australia;
- (e) says further that it relies on the full terms and effect of the Education and Care Services National Law and the Education and Care Services National Regulations; and
- (f) otherwise denies the paragraph.

7. As to paragraph 7, it:

- (a) admits that, during the Relevant Period, the schedule to the Education and Care Services National Regulations entitled “National Quality Standard” contained various standards, broken down into elements, against which the provision of an “education and care service” (within the meaning of the Education and Care Services National Law) was to be assessed, but otherwise does not admit subparagraph (a);
- (b) denies subparagraph (b) and says that, during the Relevant Period:
 - (i) one of the elements of one of the standards set out in the schedule to the Education and Care Services National Regulations entitled “National Quality Standards” referred to the maintenance of educator to child ratios at all times, but this did not prescribe the minimum number of educators required to educate and care for children at an early education centre;

Particulars

Education and Care Services National Regulations as published on the NSW Legislation website, Schedule 1, Standard 4.1, Element 4.1.1; *Education and Care Services National Regulations 2012* (WA), Schedule 1, Standard 4.1, Element 4.1.1.

- (ii) instead, the Education and Care Services National Law required an approved provider of an education and care service and a nominated supervisor of an education and care service to ensure that, whenever children were being educated and cared for by that service, the relevant number of educators educating and caring for the children was no less than the prescribed number; and

Particulars

Schedule to the Education and Care Services National Law Act 2010 (Vic), s 169(1) and (3). Schedule 1 to the Education and Early Childhood Services (Registration and Standards) Act 2011 (SA), s 169(1) and (3). Schedule to the Education and Care Services National Law (WA) Act 2012 (WA), s 169(1) and (3).

- (iii) provisions within the main body of the Education and Care Services National Regulations, not the schedule entitled “National Quality Standard”, then set out how that prescribed number was to be calculated, which calculation was not uniform across all jurisdictions in Australia.

Particulars

Education and Care Services National Regulations as published on the NSW Legislation website, rr 123, 260, 271, 289, 298, 320, 323, 341, 342, 346, and 357; Education and Care Services National Regulations 2012 (WA), rr 123, 369.

8. As to paragraph 8, it:

- (a) says that, during the Relevant Period, the *Education and Care Services National Regulations 2012 (WA)* prescribed when an educator was to be included in the calculation of educator to child ratios applicable in Western Australia;

Particulars

Education and Care Services National Regulations 2012 (WA), rr 122 and 123(2A).

- (b) says that, during the Relevant Period, the *Education and Care Services National Regulations* as published on the NSW Legislation website set out circumstances

in which educator to child ratios applicable in South Australia were taken to have been met;

Particulars

Education and Care Services National Regulations as published on the NSW Legislation website, r 325A.

- (c) says that, from 1 October 2017 to the end of the Relevant Period, the *Education and Care Services National Regulations* as published on the NSW Legislation website set out circumstances in which educator to child ratios applicable in Queensland and Tasmania were taken to have been met; and

Particulars

Education and Care Services National Regulations as published on the NSW Legislation website, rr 299F, 342A.

- (d) otherwise denies the paragraph.

B.2.2 The Authority and the Backfilling Guidance

9. It admits paragraph 9.
10. It admits paragraph 10.
11. It does not know and therefore cannot admit paragraph 11.
12. Subject to relying on the full terms and effect of the document there referred to, it admits paragraph 12.

B.2.3 Revocation of the Backfilling Guidance

13. As to paragraph 13:
- (a) save to say that the Education Council released a document entitled "*Regulation Impact Statement for proposed changes to National Quality Framework, COAG Consultation Regulatory Impact Statement November 2014*" (**the 2014 Consultation RIS**), it admits the paragraph; and
- (b) says further that:

- (i) the purpose of the 2014 Consultation RIS was to outline potential policy options for report, and serve as a basis for the consultation process discussed in Chapter 5;
- (ii) that the 2014 Consultation RIS identified that at that stage, it was not possible to definitively identify the best options.

14. As to paragraph 14, it:

- (a) says that the 2014 Consultation RIS set out proposed options for changes (as admitted in paragraph 13 above), not recommendations;
- (b) admits that paragraph 8.4.2 of the 2014 Consultation RIS stated:
"It is proposed that guidance on educator breaks is amended to make clear that service providers must comply with their legal obligations and must meet prescribed ratio requirements at all times, subject to jurisdiction-specific transitional arrangements";
- (c) says further that it relies on the full terms and effect of the 2014 Consultation RIS; and
- (d) otherwise denies the paragraph.

15. As to paragraph 15, it:

- (a) says that the purpose of the Decision Regulation Impact Statement for changes to the National Quality Framework January 2017 (**Decision RIS**) was to recommend preferred options for improving the National Quality Framework for Early Childhood Education and Care;

Particulars

Decision RIS, page ii.

- (b) admits that, in January 2017, following further consultation, the COAG Education Council proposed that the wording of the Backfilling Guidance be amended;
- (c) says that, in February 2017, the Australian Children's Education & Care Authority published an information sheet entitled "Changes to the National Quality Framework";

- (d) says that no change to the Backfilling Guidance was in fact made until October 2017; and
 - (e) otherwise denies the paragraph.
- 16. It admits paragraph 16.
- 17. Save to say that the Backfilling Guidance was not referred to in the February Newsletter and that it must be read in the context of the Decision RIS, it admits paragraph 17.
- 18. It admits paragraph 18.
- 19. As to paragraph 19, it:
 - (a) refers to and repeats paragraph 15 above;
 - (b) says further that the February Online Statement is to be read in the context of the Decision RIS; and
 - (c) otherwise denies the paragraph.
- 20. It admits paragraph 20.
- 21. It admits paragraph 21.
- 22. It denies paragraph 22 and says that:
 - (a) the April ACECQA Information Sheet did not contain the passage quoted; and
 - (b) the April ACECQA Information sheet is to be read in the context of the Decision RIS.
- 23. It admits paragraph 23.
- 24. As to paragraph 24, it:
 - (a) admits that the Guide to the National Quality Framework dated October 2017 contained the words pleaded; and
 - (b) otherwise denies the paragraph.

B.3 The market disclosure regime governing G8

- 25. It admits paragraph 25.
- 26. As to paragraph 26, it:

- (a) admits subparagraph (a);
- (b) admits that it was a “disclosing entity” within the meaning of s 111AC(1) of the *Corporations Act 2001* (Cth) but otherwise denies subparagraph (b);
- (c) admits subparagraph (c);
- (d) admits subparagraph (d); and
- (e) says that:

- (i) at all material times, Listing Rule 3.1 provided:

“Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity’s securities, the entity must immediately tell ASX that information.”

- (ii) at all material times, Listing Rule 3.1A provided:

“Listing rule 3.1 does not apply to particular information while each of the following is satisfied in relation to the information:

3.1A.1 One or more of the following 5 situations applies:

- *It would be a breach of a law to disclose the information;*
- *The information concerns an incomplete proposal or negotiation;*
- *The information comprises matters of supposition or is insufficiently definite to warrant disclosure;*
- *The information is generated for internal management purposes of the entity; or*
- *The information is a trade secret; and*

3.1A.2 The information is confidential and ASX has not formed the view that the information has ceased to be confidential; and

3.1A.3 *A reasonable person would not expect the information to be disclosed.”; and*

(iii) otherwise denies subparagraph (e).

B.4 Directors and Officers of G8

B.4.1 Key personnel at G8

27. It admits paragraph 27.

28. It admits paragraph 28.

29. It admits paragraph 29.

29A. It admits paragraph 29A.

29B. It admits paragraph 29B.

B.4.2 Directors of G8

30. It admits paragraph 30.

31. As to paragraph 31, it:

(a) admits the allegations in sub-paragraphs (a) and (b)

(b) admits that Scott was an officer of the defendant at all material times until 29 May 2017; and

(c) denies that Scott was an officer of the defendant at any time after 29 May 2017.

32. As to paragraph 32:

(a) admits the allegation in sub-paragraph (a);

(b) save to say that Bailison was Chair of G8’s Audit and Risk Management Committee from 25 March 2010 to 20 May 2020, admits the allegation in sub-paragraph (b); and

(c) admits the allegation in sub-paragraph (c).

33. As to paragraph 33, it:

(a) admits the allegations in sub-paragraph (a);

- (b) admits that Reynolds was an officer of the defendant at all material times until 31 August 2017; and
- (c) denies that Reynolds was an officer of the defendant at any time after 31 August 2017.

34. It admits paragraph 34.

35. It admits paragraph 35.

35A. It admits paragraph 35A.

35B. It admits paragraph 35B.

B.4.3 The knowledge of the officers of G8 is the knowledge of G8

36. As to paragraph 36, it:

- (a) refers to and repeats paragraphs 26(e)(i), 31(c) and 33(c) above;
- (b) says that at all material times Listing Rule 19.12 gave the expression “aware” the following meaning:

“an entity becomes aware of information if, and as soon as, an officer of the entity (or, in the case of a trust, an officer of the responsible entity) has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity.”;

- (c) says further that information which would have existed if certain business decisions had been made, or certain opinions had been formed, is not and was not information within the definition of “aware”; and
- (d) otherwise denies the paragraph.

37. As to paragraph 37, it:

- (a) refers to and repeats paragraph 26(e)(i);
- (b) refers to and repeats paragraph 36(b) and (c); and
- (c) otherwise denies the paragraph.

C MISLEADING OR DECEPTIVE FORECAST

C.1 CY17 Forecast Representation

38. It admits paragraph 38.

39. As to paragraph 39, it:

- (a) says that from time to time G8 issued earnings guidance statements to participants in the market, which provided guidance in relation to its then current expectation of its likely earnings for the current year (**Guidance Statements**);
- (b) says that Guidance Statements issued by G8 to participants in the market:
 - (i) were statements that were made by G8, and received by participants in the market, in the context of the documents in which they were contained;
 - (ii) were point-in-time assessments made and expressed in light of then prevailing conditions, expected annual phasing of revenue, facts, and matters known to G8; and
 - (iii) were consequently, as was apparent:
 - A. difficult matters of judgment on which reasonable minds might differ;
 - B. all the more difficult and uncertain the longer the temporal range under consideration; and
 - C. inherently susceptible to revision as circumstances changed and new or different information emerged which had the potential to affect G8's expected revenue and costs for the current year;
- (c) says that it issued revised guidance as and when it determined that it was sufficiently definite that the guidance previously issued would not be achieved;
- (d) says that by the 23 May 2017 Announcement it issued a Guidance Statement as follows:

“G8's trading performance for the 4 months to 30 April 2017 has continued to demonstrate the strength of G8's business, with forecast underlying EBIT in line with market consensus forecasts for FY2017 of around mid to high 170's million” (23 May 2017 Guidance Statement);

- (e) will rely on the full terms and effect of the 23 May 2017 Guidance Statement and the 23 May 2017 Announcement at trial; and
 - (f) otherwise denies the paragraph.
40. The defendant denies paragraph 40 and refers to and repeats paragraph 39 above.
41. As to paragraph 41, it:
- (a) refers to and repeats paragraph 39 above;
 - (b) says that, on 21 August 2017, it published and lodged with the ASX an announcement entitled “Financial results for the half-year ended 30 June 2017, and Update on Capital Management Strategy” (**21 August 2017 Announcement**);
 - (c) says that, on 4 December 2017, it published and lodged with the ASX an announcement entitled ‘Update on Trading Performance and Leadership Team Changes’ (**4 December 2017 Announcement**);
 - (d) says that prior to 21 August 2017 it was under no obligation to correct, qualify or contradict the 23 May 2017 Guidance Statement;
 - (e) will rely on the full terms and effect of the 23 May 2017 Announcement, the 21 August 2017 Announcement and the 4 December 2017 Announcement at trial; and
 - (f) otherwise denies the paragraph.
42. As to paragraph 42, it:
- (a) refers to and repeats paragraphs 39 and 41 above; and
 - (b) otherwise denies the paragraph.

C.2 May 2017 true position and knowledge

C.2.1 G8's business earnings

43. As to paragraph 43, it:

- (a) says that, during the Relevant Period:
 - (i) the occupancy level of early childcare centres operated by it was a factor that had the potential to affect its earnings;
 - (ii) the costs of operating early childcare centres operated by it and the costs of its business were factors that had the potential to affect its earnings; and
 - (iii) the cost of wages, in aggregate, was the largest component of its costs; and
- (b) otherwise denies the paragraph.

44. As to paragraph 44, it:

- (a) refers to and repeats paragraph 43 above; and
- (b) otherwise denies the paragraph.

C.2.2 Educator Ratio Effects and the Ratio Financial Effects

45. As to paragraph 45, it:

- (a) says that absent particularisation of the term “material risk”, the allegation in sub-paragraph 45(c) of the 2FASOC is vague and embarrassing;
- (b) under cover of that objection, says that, at all material times:
 - (i) the provision of education and care services at early learning centres operated by G8 was subject to the Education and Care Services National Law and the Education and Care Services National Regulations, including obligations therein in relation to educator to child ratios;
 - (ii) the guidance material to the Education and Care Services National Law and the Education and Care Services National Regulations did not, and was incapable of, altering obligations created by or arising under those laws;

- (iii) the guidance material to the Education and Care Services National Law and the Education and Care Services National Regulations did not purport to alter obligations created by or arising under those laws; and

Particulars

The defendant refers to text of the guidance material to the Education and Care Services National Law and the Education and Care Services National Regulations pleaded at paragraph 12 of the 2FASOC, particularly the first sentence, and to the text of the guidance material pleaded at paragraph 24 of the 2FASOC, particularly the first sentence.

- (iv) in the premises, the guidance material to the Education and Care Services National Law and the Education and Care Services National Regulations did not alter obligations in relation to educator to child ratios created by or arising under those laws; and

- (c) otherwise denies the paragraph.

46. As to paragraph 46:

- (a) it says that absent particularisation of the terms “material risk” and “materially adversely impacted”, the paragraph is vague and embarrassing;
- (b) under cover of that objection, it:
 - (i) refers to and repeats paragraphs 45 above; and
 - (ii) otherwise denies the paragraph.

47. As to paragraph 47, it:

- (i) refers to and repeats paragraphs 45 and 46 above; and
- (ii) otherwise denies the paragraph.

48. As to paragraph 48, it:

- (a) refers to and repeats paragraphs 39, 45 and 46 above;
- (b) says that G8 had systems in place for the preparation of a robust and detailed annual budget for CY2017;

- (c) says further that, in relation to CY2017, it undertook the budget process between around August 2016 to December 2016;

Particulars

The budget process for CY2017 included:

- A. a budget-preparation process for each of G8's 490 early childcare centres in Australia (**Centre Budget Process**);
- B. the Centre Budget Process involved budgeting expected revenue, including expected daily fees per place, occupancy, discounts, other income and corporate fees and funding and costs, including direct childcare costs and other monthly costs and employment costs;
- C. the Centre Budget Process involved apportioning revenue and costs over the 12-month period ending 31 December 2017 over each of the 12 months in the period, based on when revenue was expected to be received and when costs were expected to be incurred;
- D. once the Centre Budget Process was completed, a review process was undertaken by relevant area and regional managers responsible for each centre;
- E. following review, a consolidating process occurred at the group level (**Group Centres Budget Process**);
- F. separately, the department heads of each of G8's support office functions engaged in a budget process which budgeted expected costs, apportioned over the 12 months in the period ending 31 December 2017 (each a **Support Office Department Budget Process**);
- G. following the Support Office Department Budget Process, there was a review by the Chief Executive Officer;
- H. following review, a process occurred whereby other group-level charges such as interest and tax were consolidated into the Support Office Department Budget Process (**Group Support Office Budget Process**);
- I. these group-level budget processes were then subject to further layers of review by executives and the Board of Directors of G8; and

J. the budget for CY2017 was approved by the Board of Directors of G8 on 8 December 2016 (**CY2017 Budget**);

- (d) says further that it had processes in place to monitor its financial performance from time to time during the current financial year, including:
 - (i) a monthly process of financial reporting of actual monthly financial performance, including reporting to meetings of the Board of Directors of G8; and
 - (ii) a management tool of forecasting to compare the CY2017 Budget with actual results and update certain key assumptions before being reported to the Board for further consideration;
- (e) says further that it had processes in place to provide updates to the Board of Directors of G8 about the operational performance and initiatives being considered or implemented by management;
- (f) says further that, in or around May 2017, G8 management prepared a forecast (**May 2017 Forecast**);
- (g) says further that the May 2017 Forecast provided for a forecast underlying EBIT for CY2017 of \$173.768 million including the impact of Long Day Care Professional Development Programme (**LDCPDP**) funding;

Particulars

Board Submission entitled “Forecast and Consensus”

- (h) says further that the May 2017 Forecast was provided to the Board of Directors of G8 for consideration at the meeting of the Board of Directors of G8 held on 17 May 2017;

Particulars

Minutes of Meeting of Board of Directors held on 17 May 2017

- (i) says further that a CEO Update authored by Gary Carroll was provided to the Board of Directors of G8 for consideration at the meeting of the Board of Directors of G8 held on 17 May 2017 (**May 2017 CEO Report**);

Particulars

May 2017 Board Meeting – CEO Board Report

- (j) says further that, at the Board of Directors’ meeting on 17 May 2017, Gary Carroll provided detail regarding initiatives referred to in the May CEO Report, including occupancy initiatives, the wage hours per booking metrics, the new performance framework for operations and the recruitment of a new GM Operations (**May 2017 CEO Update**);

Particulars

Minutes of Meeting of Board of Directors held on 17 May 2017

- (k) says further that, having regard to at least the May 2017 Forecast, the May 2017 CEO Report, the May 2017 CEO Update, and the underlying EBIT forecast in the May 2017 Forecast, the 17 May 2017 Guidance Statement was considered by G8 to be, as and was ~~the~~ in fact, a reasonable assessment of G8’s anticipated earnings for CY2017;
- (l) says further that the matters set out in sub-paragraph (k) above enabled the Board of G8 to make an earnings assessment for CY2017 for the purpose of providing the 23 May 2017 Guidance Statement; and
- (m) otherwise denies the paragraph.

C.2.3 Lower Occupancy Levels and Lower Occupancy Effects

49. As to paragraph 49, it:

- (a) says that the phrase “general oversupply” is vague and embarrassing; and
- (b) under cover of the foregoing objection, denies the paragraph.

50. As to paragraph 50, it:

- (a) says that subparagraph (a) is vague and embarrassing;
- (b) under cover of that objection, denies the paragraph.

51. As to paragraph 51, it:

- (a) refers to and repeats paragraph 48(b) to 48(j) above; and

(b) otherwise denies the paragraph.

52. As to paragraph 52:

(a) it says that, absent particularisation of the terms “material risk” and “materially adversely impacted”, the paragraph is vague and embarrassing; and

(b) under cover of that objection, it:

(i) refers to and repeats paragraph 51 above; and

(ii) otherwise denies the paragraph.

53. As to paragraph 53, it:

(a) refers to and repeats paragraphs 51 and 52 above; and

(b) otherwise denies the paragraph.

54. As to paragraph 54, it:

(a) refers to and repeats paragraphs 48(b) to 48(j), 51 and 52 above; and

(b) otherwise denies the paragraph.

C.2.4 CY17 Forecast Information

55. As to paragraph 55:

(a) it says that, absent particularisation of the term “material risk”, the paragraph is vague and embarrassing; and

(b) under cover of that objection, it:

(i) refers to and repeats paragraphs 46, 48(b) to 48(j) and 52 above; and

(ii) otherwise denies the paragraph.

C.3 21 August 2017 Representations

56. It admits paragraph 56.

57. As to paragraph 57, it:

(a) refers to and repeats paragraphs 39(a) to 39(c) above;

- (b) says that by the 21 August 2017 Announcement it issued a Guidance Statement as follows:

“The cost efficiencies established in 2H16 has continued in the current half-year, enabling the Group to generate good levels of profit growth despite the lower occupancy levels. After a slow start to the year, occupancy has been growing ahead of last year, and we are confident that the initiatives that we have in place will continue this trend for the remainder of the year. On this basis, we maintain our guidance for full-year underlying EBIT to be mid-170m” (21 August 2017 Guidance Statement);

- (c) will rely on the full terms and effect of the 21 August 2017 Guidance Statement and 21 August 2017 Announcement at trial; and
- (d) otherwise denies the paragraph.

58. It denies paragraph 58 and refers to and repeats paragraph 57 above.

59. As to paragraph 59, it:

- (a) refers to and repeats paragraph 57 above;
- (b) says that on 4 December 2017, it published and lodged with the ASX the 4 December 2017 Announcement;
- (c) says that prior to 4 December 2017 it was under no obligation to correct, qualify or contradict the 21 August 2017 Guidance Statement;
- (d) will rely on the full terms and effect of the 21 August 2017 Announcement and the 4 December 2017 Announcement at trial; and
- (e) otherwise denies the paragraph.

60. As to paragraph 60, it:

- (a) refers to and repeats paragraphs 57 and 59 above; and
- (b) otherwise denies the paragraph.

C.4 August 2017 True Position and Knowledge

C.4.1 Educator Ratio Effects and Ratio Financial Effects

61. As to paragraph 61, it:

- (a) refers to and repeats paragraphs 45 and 46 above; and
- (b) otherwise denies the paragraph.

62. As to paragraph 62, it:

- (a) refers to and repeats paragraphs 45 and 46 above; and
- (b) otherwise denies the paragraph.

63. As to paragraph 63, it:

- (a) refers to and repeats paragraphs 45 and 46 above;
- (b) refers to and repeats paragraphs 48(b) to 48(e) above;
- (c) says further that:
 - (i) ~~a forecast full year underlying EBIT of around mid-170 million~~ the 21 August 2017 Guidance Statement was considered by G8 to be, as was the fact, a reasonable assessment of G8's anticipated earning for CY2017, having regard to the following:

A. in or around August 2017, G8 management prepared a forecast excluding opportunities to be presented by management to the Board at the 17 August Board meeting for consideration (**August 2017 Forecast**);

B. the August 2017 Forecast provided for a forecast underlying EBIT for CY2017 of \$163.726 million including the impact of net LDCPDP funding;

Particulars

August 2017 Board Meeting – Finance Report

- C. the August 2017 Forecast was provided to the Board of Directors of G8 for consideration at the meeting of the Board of Directors of G8 held on 17 August 2017;

Particulars

Minutes of Meeting of Board of Directors held on 17 August 2017

- D. at the Board of Directors meeting on 17 August 2017, management presented to and identified for the Board a number of opportunities to increase the underlying EBIT above the August 2017 Forecast (**August 2017 CEO Update**).

Particulars

Minutes of Meeting of Board of Directors held on 17 August 2017

Gary Carroll, CEO, identified opportunities in addition to the August 2017 Forecast, which were presented and discussed at the Board of Directors' meeting, including:

- A. settlement of acquisitions of childcare centres;
- B. additional income from licence fees to be paid to G8 by CCLP Consulting Pty Ltd in relation to an exclusive broker licence that was under negotiation and expected to be completed prior to 31 December 2017;
- C. income from leasehold incentive payments for lease surrenders and lease extensions;
- D. depreciation savings following an internal review of the useful life of assets;
- E. reduction in expenses related to the long service leave provision following an internal review; and
- F. other cost savings from Support Office functions, including additional savings from repairs and maintenance, expenses to be reimbursed relating to development centres and marketing budgets.

(ii) the matters set out in sub-paragraph (i) above, enabled the Board of G8 to make an earnings assessment for CY2017 for the purpose of providing the 21 August 2017 Guidance Statement; and

(d) otherwise denies the paragraph.

C.4.2 Lower Occupancy Levels and Lower Occupancy Financial Effects

64. As to paragraph 64, it:

(a) refers to and repeats paragraphs 49, 50, 51, and 52 above; and

(b) otherwise denies the paragraph.

65. As to paragraph 65, it:

(a) refers to and repeats paragraphs 51 and 52 above; and

(b) otherwise denies the paragraph.

66. As to paragraph 66, it:

(a) refers to and repeats paragraphs 51, 52 and 63(b) to 63(c) above;

(b) otherwise denies the paragraph.

C.4.3 21 August Forecast Information

67. As to paragraph 67, it:

(a) says that absent particularisation of the terms “material risk”, the paragraph is vague and embarrassing; and

(b) under cover of that objection, it:

(i) refers to and repeats paragraphs 46, 52 and 63 above; and

(ii) otherwise denies the paragraph.

C.5 Misleading or deceptive conduct

C.5.1 CY17 Forecast Representation

68. As to paragraph 68, it:

(a) refers to and repeats paragraphs 39, 48, 54, 55, 57, 63 and 66 above; and

- (b) otherwise denies the paragraph.
69. As to paragraph 69, it:
- (a) refers to and repeats paragraphs 39, 48, 54, 55, 57, 63 and 66 above;
 - (b) otherwise denies the paragraph.
70. As to paragraph 70, it:
- (a) refers to and repeats paragraphs 39, 48, 54, 55, 57, 63 and 66 above; and
 - (b) otherwise denies the paragraph.
71. As to paragraph 71, it:
- (a) refers to and repeats paragraphs 68, 69, and 70 above; and
 - (b) otherwise denies the paragraph.
72. It denies paragraph 72.
73. It denies paragraph 73.

C.5.2 21 August 2017 Representations

74. As to paragraph 74, it:
- (a) refers to and repeats paragraphs 48, 54, 55, 57, 63, 66, and 67 above; and
 - (b) otherwise denies the paragraph.
75. As to paragraph 75, it:
- (a) refers to and repeats paragraphs 48, 54, 55, 57, 63, 66, and 67 above; and
 - (b) otherwise denies the paragraph.
76. As to paragraph 76, it:
- (a) refers to and repeats paragraphs 48, 54, 55, 57, 63, 66, and 67 above; and
 - (b) otherwise denies the paragraph.
77. As to paragraph 71, it:
- (a) refers to and repeats paragraphs 74, 75 and 76 above; and

(b) otherwise denies the paragraph.

78. It denies paragraph 78.

79. It denies paragraph 79.

D CONTINUOUS DISCLOSURE CONTRAVENTIONS

D.1 Financial Impact Information

80. As to paragraph 80, it:

(a) refers to and repeats paragraphs 46, 52, 55, and 67 above; and

(b) otherwise denies the paragraph.

D.2 Continuous Disclosure Contraventions

81. As to paragraph 81, it:

(a) refers to and repeats paragraphs 46, 52, 55, and 67 above; and

(b) otherwise denies the paragraph.

82. As to paragraph 81, it:

(a) refers to and repeats paragraphs 46, 52, 55, and 67 above; and

(b) otherwise denies the paragraph.

83. As to paragraph 83, it:

(a) refers to and repeats paragraphs 81 and 82 above; and

(b) otherwise denies the paragraph.

84. As to paragraph 84, it:

(a) refers to and repeats paragraphs 80 to 83 above; and

(b) otherwise denies the paragraph.

E THE CORRECTIVE DISCLOSURES AND THEIR IMPACT

E.1 December 2017 Disclosures

85. Subject to relying on the full terms and effect of the 4 December 2017 Announcement, it admits paragraph 85.

86. As to paragraph 86, it:

(a) says that the 4 December 2017 Announcement contained the following statements (amongst others):

(i) “G8 is forecasting an underlying EBIT of around \$160 million for FY2017” (4 December 2017 Guidance Statement); and

(ii) “The reduction from the forecast provided to the market in August 2017 has been driven by the following key factors:

A. *A recent slowing of occupancy growth, with average like-for-like occupancy for FY2017 forecast to be circa 77%, compared to 79.7% for FY2016. Whilst the group has seen improvement in team turnover and initial small signs of recovery in Western Australia, these positives have been offset by market wide factors including:*

a. *Supply issues in areas such as Western Sydney, Gold Coast, East Brisbane and Inner Melbourne; and*

b. *Continuing sluggish wage growth and employment conditions in regions such as North Queensland.*

B. *A change in regulatory requirements in relation to staffing ratios during breaks in NSW, SA and Victoria, which took effect from 1 October. While G8 had been aware that current arrangements were due for review by regulators in a number of states, we expected other states to mirror Queensland by extending the current structures until the end of 2019. While the impact of such changes will be neutralised over the coming months as internal casual labour pools are increased and efficiencies are generated, the FY2017 impost of utilising temporary agency labour to meet immediate requirements is forecast to be approximately \$3 million”; and*

(b) subject to relying on the full terms and effect of the 4 December 2017 Guidance Statement and the 4 December 2017 Announcement, admits the paragraph.

86A. As to paragraph 86A, it:

(a) refers to and repeats paragraphs 39, 41, 42, 57, 59, 60 and 86 above; and

(b) otherwise denies the paragraph.

87. As to paragraph 87, the defendant:

(a) says that the opening, high, low and closing prices of G8 securities on the ASX on 4 December 2017 was follows:

Open	High	Low	Close
\$3.79	\$3.79	\$3.31	\$3.40

(b) otherwise denies the paragraph.

E.2 February 2018 Disclosures

88. It admits paragraph 88.

89. In relation to paragraph 89, it:

(a) will rely on the full terms and effect of the 26 February 2018 Announcement; and

(b) otherwise does not admit the paragraph.

90. As to paragraph 90, it:

(a) says that the opening, high, low and closing prices of G8 securities on the ASX on 26 February 2018 was follows:

Open	High	Low	Close
\$3.03	\$3.14	\$2.89	\$2.90

(b) otherwise denies the paragraph.

F CONTRAVENING CONDUCT CAUSED LOSS

F.1 Market-based causation (on-market acquisitions)

91. As to paragraph 91, it:

- (a) admits subparagraphs (a), (b), and (c) insofar as the allegations therein concern the plaintiffs during the Relevant Period; and
- (b) otherwise denies the paragraph.

92. It denies paragraph 92.

93. It denies paragraph 93.

F.2 Market-based causation (capital raising acquisitions)

94. Subject to relying on the full terms and effect of the 23 May 2017 Announcement to which the paragraph refers, it admits paragraph 94.

95. The defendant admits paragraph 95.

96. It denies paragraph 96 and refers to and repeats paragraphs 72, 73, 78, 79, 84, 91, and 92 above.

97. It denies paragraph 97 refers to and repeats paragraph 93 above.

F.3 Reliance

98. It denies paragraph 98.

F.4 Loss or damage suffered by the Plaintiffs and Group Members

99. It denies paragraph 99.

G ENTITLEMENT TO RELIEF

100. It denies paragraph 100.

101. It denies paragraph 101.

H COMMON QUESTIONS OF LAW AND FACT

102. It does not plead to paragraph 102 as it contains no allegation against it and the identification of common questions is properly a matter to be addressed following the close of pleadings and evidence.

103. It does not plead to paragraph 103 as it contains no allegation against it and the identification of common questions is properly a matter to be addressed following the close of pleadings and evidence.

104. It does not plead to paragraph 104 as it contains no allegation against it and the identification of common questions is properly a matter to be addressed following the close of pleadings and evidence.
105. It does not plead to paragraph 105 as it contains no allegation against it and the identification of common questions is properly a matter to be addressed following the close of pleadings and evidence.
106. It does not plead to paragraph 106 as it contains no allegation against it and the identification of common questions is properly a matter to be addressed following the close of pleadings and evidence.

Dated: ~~26 March 2021~~ 30 May 2022

R. G. CRAIG

J. A. FINDLAY

H. C. WHITWELL

A handwritten signature in black ink, appearing to read "Ben", written over a horizontal dotted line.

MinterEllison

Solicitors for the defendant