



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

Case: S ECI 2020 04339

Filed on: 12/03/2024 03:57 PM

No. S ECI 2020 04339

B E T W E E N

PAUL ALLEN

First Plaintiff

and

MONIKA ALLEN

Second Plaintiff

-and-

G8 EDUCATION LIMITED (ACN 123 828 553115-832-963)

Defendant

**THIRD ~~SECOND~~ FURTHER AMENDED WRIT**

*Third further amendment pursuant to  
the orders made by the Honourable Justice M Osborne 8 March 2023*

Date of Document: 12 March 2024

Solicitors Code: 339

Filed on behalf of: Plaintiffs

DX: N/A

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TO THE DEFENDANT

TAKE NOTICE that this proceeding has been brought against you by the plaintiffs for the claim set out in this writ.

IF YOU INTEND TO DEFEND the proceeding, or if you have a claim against the plaintiffs which you wish to have taken into account at the trial, YOU MUST GIVE NOTICE of your intention by filing an appearance within the proper time for appearance stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by –

- (a) filing a "Notice of Appearance" in the Prothonotary's office, Level 2, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and
- (b) on the day you file the Notice, serving a copy, sealed by the Court, at the plaintiffs' address for service, which is set out at the end of this writ.

IF YOU FAIL to file an appearance within the proper time, the plaintiffs may OBTAIN JUDGMENT AGAINST YOU on the claim without further notice.

\*THE PROPER TIME TO FILE AN APPEARANCE is as follows –

- (a) where you are served with the writ in Victoria, within 10 days after service;
- (b) where you are served with the writ out of Victoria and in another part of Australia, within 21 days after service;

- (c) where you are served with the writ in Papua New Guinea, within 28 days after service;
- (d) where you are served with the writ in New Zealand under Part 2 of the Trans-Tasman Proceedings Act 2010 of the Commonwealth, within 30 working days (within the meaning of that Act) after service or, if a shorter or longer period has been fixed by the Court under section 13(1)(b) of that Act, the period so fixed;
- (e) in any other case, within 42 days after service of the writ.

FILED

.....  
PROTHONOTARY

THIS WRIT is to be served within one year from the date it is filed or within such further period as the Court orders.

1. Place of trial – Melbourne.
2. Mode of trial – Judge.
3. This writ was filed for the plaintiffs by Slater & Gordon as solicitors for the plaintiffs.
4. The address of the plaintiffs is as follows [REDACTED].
5. The address for service of the plaintiffs is: c/- Slater & Gordon, 485 La Trobe Street, Melbourne VIC 3000.
6. The email address for service of the plaintiffs is: [Emma.PC@slatergordon.com.au](mailto:Emma.PC@slatergordon.com.au)
7. The addresses of the defendant is as follows: 159 Varsity Parade, Varsity Lakes QLD 4227

**THIRD SECOND FURTHER AMENDED STATEMENT OF CLAIM**

**Third further amendment pursuant to  
the orders made by the Honourable Justice M Osborne 8 March 2023**

**A INTRODUCTION**

**A.1 The Plaintiffs and the Group Members**

1. This proceeding is commenced as a group proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) by the Plaintiffs on ~~his~~their own behalf and on behalf of all persons who:

- (a) entered into a contract (whether by themselves or by an agent or trustee) to acquire an interest in fully paid ordinary shares in the Defendant (**G8 Shares**) during the period between 23 May 2017 and 23 February 2018 (inclusive) (**Relevant Period**);
- (b) have suffered loss or damage by reason of the conduct of the Defendant (**G8**) pleaded in this Statement of Claim; and
- (c) were not during any part of the Relevant Period, and are not as at the date of this Writ, any of the following:
  - (i) a related party (as defined by s 228 of the *Corporations Act 2001* (Cth) (**Corporations Act**) of G8;
  - (ii) a related body corporate (as defined by s 50 of the *Corporations Act*) of G8;
  - (iii) an associated entity (as defined by s 50AAA of the *Corporations Act*) of G8;
  - (iv) an officer or a close associate (as defined by s 9 of the *Corporations Act*) of G8;
  - (v) a Justice or the Chief Justice of the Supreme Court of Victoria, or a Justice or the Chief Justice of the High Court of Australia,

**(Group Members).**

2. The Plaintiffs acquired an interest in G8 Shares during the Relevant Period.

**Particulars**

- i) *Details of the particular acquisitions of G8 Shares by the Plaintiffs are set out below:*

<b>Date</b>	<b>Transaction type</b>	<b>Number of G8 Shares</b>	<b>Price</b>
18/07/2017	Buy	7,810	\$3.83

3. Immediately prior to the commencement of this proceeding, there were more than seven Group Members.

## **A.2 The Respondent**

4. G8 is and at all material times was:
  - (a) incorporated pursuant to the Corporations Act and capable of being sued;
  - (b) a person within the meaning of s 1041H of the Corporations Act; and
  - (c) a person within the meaning of s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).

## **B G8'S BUSINESS**

### **B.1 G8's Business Operations**

5. G8, at all material times, carried on business as a provider of early childhood education and care:
  - (a) in Victoria, and the rest of Australia, operating more than 400 early learning centres (**G8 Centres**); and
  - (b) in Singapore.

### **B.2 The regulatory environment applicable to G8**

#### **B.2.1 The Framework**

6. At all material times, early learning centres in Australia, including G8 Centres, were regulated by the National Quality Framework (**National Quality Framework**) which comprised:
  - (a) the *Education and Care Services National Law* set out in:
    - (i) the Schedule to the *Education and Care Services National Law Act 2010* (Vic) (**VIC Act**), as applicable pursuant to:
      - (A) section 4 of the *Children (Education and Care Services National Law Application) Act 2010* (NSW) (**NSW Act**);
      - (B) section 6 of the *Education and Care Services National Law (ACT) Act 2011* (**ACT Act**);

- (C) section 4 of the *Education and Care Services (National Uniform Legislation) Act 2011* (**NT Act**);
- (D) section 4 of the *Education and Care Services National Law (Application) Act 2011* (**TAS Act**);
- (E) section 4 of the *Education and Care Services National Law (Queensland) Act 2011* (**QLD Act**);
- (ii) Schedule 1 to the *Education and Early Childhood Services (Registration and Standards) Act 2011* (SA) (**SA Act**), as applicable pursuant to s 10 of SA Act; and
- (iii) the Schedule to the *Education and Care Services National Law (WA) Act 2012* (WA) (the **WA Act**), as applicable pursuant to s 4 of the WA Act, (the **National Law**);
- (b) the *Education and Care Services National Regulations* set out in:
  - (i) the *Education and Care Services National Regulations* (NSW) (**NSW Regulations**), as applicable pursuant to:
    - (A) s 19 of the NSW Act;
    - (B) ss 301 and 302 of the Schedule to the VIC Act;
    - (C) ss 301 and 302 of Schedule 1 to the SA Act;
  - (ii) the *Education and Care Services National Regulations 2012* (WA) (**WA Regulations**) as in force by s 17 to the WA Act and s 301 of the Schedule to the WA Act; and
- (c) the *National Quality Standards* set out in:
  - (i) Schedule 1 of the NSW Regulations; and
  - (ii) Schedule 1 of the WA Regulations, (the **National Quality Standards**).

7. At all material times, the National Quality Standards:

- (a) set a national standard for the provision of childcare; and

- (b) prescribed the minimum number of childcare workers, known as educators (**Educators**), to educate and care for children at an early education centre (**Educator Ratio Requirement**).

**Particulars**

- i) *Division 3, ~~section~~ 123 of the National Quality Standards;*
- ii) *Part 7.2, Division 2, s 260 of the NSW Regulations (the ACT-specific ratios);*
- iii) *Part 7.3, Division 2, s 271 of the NSW Regulations (the New South Wales-specific ratios);*
- iv) *Part 7.5, Division 3, Subdivision 1, s 300 of the NSW Regulations (the Queensland-specific ratios);*
- v) *Part 7.7, Division 2, s 342 of the NSW Regulations (the Tasmania-specific ratios);*
- vi) *Part 7.8, Division 1, s 357 of the NSW Regulations (the Victoria-specific ratios); and*
- vii) *Part 7.9, Division 2, s 369 of the NSW Regulations (the Western Australia-specific ratios).*

8. An exemption to the Educator Ratio Requirement applied at all material times in Western Australia and South Australia and from 1 October 2017 in Queensland and Tasmania, allowing Educators at early education centres in those States to take short breaks without being backfilled (**Ratio Exemption**).

**Particulars**

- i) *Chapter 4, Part 4.4, regulation 123(2A) of the WA Regulations;*
- ii) *Regulation 299F of the NSW Regulations;*
- iii) *Regulation 325A of the NSW Regulations; and*
- iv) *Regulation 342A of the NSW Regulations.*

### ***B.2.2 The Authority and the Backfilling Guidance***

9. At all material times, the Australian Children’s Education & Care Quality Authority (the **Authority**):
- (a) was an independent statutory authority established under Part 11 of the National Law; and
  - (b) had the following functions, among others:
    - (i) to guide the implementation and administration of the National Quality Framework and to monitor and promote consistency in its ~~implantation~~ implementation and administration;
    - (ii) to establish consistent, effective and efficient procedures for the operation of the National Quality Framework;
    - (iii) to keep national information on the assessment, rating and regulation of education and care services;
    - (iv) in conjunction with the regulatory authorities, to educate and inform education and care services and the community about the National Quality Framework; and
    - (v) to publish guides and resources—
      - (A) to support parents and the community in understanding quality in relation to education and care services;
      - (B) to support the education and care services sector in understanding the National Quality Framework; and
      - (C) to publish practice notes and guidelines for the application of the National Law.

#### **Particulars**

- i) Sections 224 and 225 of the National Law.*
10. On or around November 2011, the Authority published the ‘Guide to the Education and Care Services National Law and the Education and Care Services National Regulations 2011’ (**Guide**).

11. The Guide was prepared by the Authority following conferral with the regulatory authorities for each State.

#### **Particulars**

- i) The conferral is to be inferred from the matters pleaded in paragraph 12 below.*

12. The Guide stated:

The National Regulations require the educator to child ratio to be maintained at all times. However, it is recognised that backfilling educators in centre-based services while they are on short breaks is difficult. The approach of regulatory authorities will be to allow each educator to take up to 30 minutes off the floor per day without being backfilled—for example, for personal hygiene, meal breaks or to take personal phone calls—without the service being in breach of prescribed ratio requirements. At all times the overarching consideration must be the needs of the children and adequate supervision must be maintained at all times

(the **Backfilling Guidance**).

#### **B.2.3 Revocation of the Backfilling Guidance**

13. In November 2014, following industry and community consultation, the Council of Australian Governments Education Council (**Education Council**) released a Regulation Impact Statement for proposed options for changes to the National Quality Framework (**2014 Regulation Impact Statement**).
14. By proposal 8.4.2 of the 2014 Regulation Impact Statement, the Education Council recommended that the Backfilling Guidance be amended to make clear that service providers must meet the Educator Ratio Requirement at all times, subject to jurisdiction-specific transitional arrangements.
15. In January 2017, following further consultation, the Education Council made a decision to revoke the Backfilling Guidance (**Guidance Revocation**).

#### **Particulars**

- i) Decision Regulation Impact Statement for changes to the National Quality Framework, January 2017 (**February Decision Statement**), pp 116-118.*



16. On 1 February 2017, the Authority published a newsletter entitled ‘ACECQA Newsletter Issue 2 2017’ (**February Newsletter**).
17. By the February Newsletter, the Authority:
  - (a) reported that the Australian state and territory education Ministers had agreed to changes to the National Quality Framework; and
  - (b) referred, and contained a link, to an online statement of the Education Council entitled ‘Ministers agree to changes to the National Quality Framework’ dated 13 February 2017 (**February Online Statement**).
18. The February Online Statement contained a link to:
  - (a) the February Decision Statement; and
  - (b) a summary document entitled ‘Changes to the National Quality Framework’ (**February Summary**).
19. The February Decision Statement and the February Summary reported the Guidance Revocation.

#### **Particulars**

- i) February Decision Statement, pp 116-118.*
    - ii) February Summary, p 15.*
20. On 1 April 2017, the Authority published a newsletter entitled ‘ACECQA Newsletter Issue 4 2017’ (**April Newsletter**).
21. The April Newsletter contained links to resources regarding changes to the National Quality Framework, including an information sheet explaining the revised National Quality Standard and other changes from 1 February 2018 (the **April ACECQA Information Sheet**).
22. The April ACECQA Information Sheet referred to the Guidance Revocation:

There will be no changes to the general provisions in the National Law or National Regulations concerning educator breaks. South Australia retains an existing jurisdiction specific provision for educator breaks. This provision will also be adopted in Tasmania and Western Australia. The existing jurisdiction-specific provision for declared approved services in Queensland will be expanded to apply to all approved services in Queensland. Current sector guidance on

educator breaks will be removed and replaced with guidance referring services to jurisdiction-specific provisions.

23. In October 2017, the Authority published the ‘Guide to the National Quality Framework’ (**October Guide**).

24. The October Guide incorporated the Guidance Revocation and stated:

The National Regulations require the educator to child ratio to be maintained at all times no matter what activity the children or the educators at the service are undertaking. Some jurisdictions have specific requirements which override these ratio requirements prescribed in the National Law when educators are taking short breaks and are not working directly with children (Queensland, Tasmania, South Australia and WA).

#### **Particulars**

*i) October Guide, p 433.*

### **B.3 The market disclosure regime governing G8**

25. At all material times:

- (a) G8 was included in the official list of the financial market operated by the Australian Securities Exchange (**ASX**); and
- (b) G8 Shares were:
  - (i) ED securities for the purpose of s 111AE of the Corporations Act, and quoted ED securities within the meaning of s 111AM of the Corporations Act; and
  - (ii) able to be purchased and sold by investors and potential investors in G8 Shares (**Affected Market**) on the financial market operated by the ASX under the ticker “GEM”;

26. G8 is and was at all material times:

- (a) a public company within the meaning of s 9 of the Corporations Act;
- (b) a listed disclosing entity within the meaning of s 111AC(1) of the Corporations Act;
- (c) a listed disclosing entity within the meaning of s 111AL(1) of the Corporations Act;

- (d) subject to and bound by the Australian Stock Exchange Listing Rules (**ASX Listing Rules**); and
- (e) obliged by ss 111AP(1) and/or 674(1) of the Corporations Act and/or ASX Listing Rule 3.1 to, once it is, or becomes aware of, any information concerning G8 that a reasonable person would expect to have a material effect on the price or value of G8 Shares, tell the ASX that information immediately (unless the exceptions in ASX Listing Rule 3.1A apply) (**Continuous Disclosure Obligations**).

#### **B.4 Directors and officers of G8**

##### ***B.4.1 Key personnel at G8***

27. Mr Gary Carroll (**Carroll**) was from 1 January 2017 to the date of the commencement of this proceeding:

- (a) the Managing Director and Chief Executive Officer of G8; and
- (b) an officer of G8 within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.

28. Ms Sarah Zeljko (**Zeljko**) was from 16 January 2017 to 24 April 2018:

- (a) the Company Secretary of G8;
- (b) the General Counsel of G8; and
- (c) an officer of G8 within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.

29. Ms Sharyn Williams (**Williams**) was from 6 February 2017 to the date of the commencement of this proceeding:

- (a) the Chief Financial Officer of G8; and
- (b) an officer of G8 within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.

29A. Mr Jason Ball (**Ball**) was from 26 June 2017 to 2 February 2021:

- (a) the General Manager of Operations of G8; and
- (b) an officer of G8 within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.

29B. Mr Jason Roberts (**Roberts**) was from 1 January 2017 to 18 January 2018:

- (a) the General Manager - Development of G8; and
- (b) an officer of G8 within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.

**B.4.2 Directors of G8**

30. Mr Mark Johnson (**Johnson**) was from 1 January 2016 to the date of the commencement of this proceeding:

- (a) the Chairman of G8;
- (b) a member of G8's Audit and Risk Management Committee; and
- (c) an officer of G8 within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.

31. Mr Christopher Scott (**Scott**) was:

- (a) from 25 March 2010 to 31 December 2016, the Managing Director of G8;
- (b) from 1 January 2017 to 29 May 2017, an executive director of G8; and
- (c) at all material times, an officer of G8 within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.

32. Mr Brian Bailison (**Bailison**) was:

- (a) from 25 March 2010 to 20 May 2020, an independent non-executive director of G8;
- (b) from 25 March 2010 to 13 May 2020, the Chair of G8's Audit and Risk Management Committee; and
- (c) at all material times, an officer of G8 within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.

33. Mr Matthew Reynolds (**Reynolds**) was:

- (a) from 17 March 2015 to 31 August 2017, an independent non-executive director of G8; and
- (b) at all material times, an officer of G8 within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.

34. Ms Susan Forrester (**Forrester**) was:
- (a) from 1 November 2011 to the date of the commencement of this proceeding, an independent non-executive director of G8; and
  - (b) at all material times, an officer of G8 within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.
35. Mr David Foster (**Foster**) was:
- (a) from 1 February 2016 to the date of the commencement of this proceeding, an independent non-executive director of G8;
  - (b) from 1 February 2016 to the date of the commencement of this proceeding, a member of G8's Audit and Risk Management Committee; and
  - (c) at all material times, an officer of G8 within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.

35A. Ms Margaret Zabel (**Zabel**) was:

- (a) from 1 September 2017 to the date of the commencement of this proceeding, an independent non-executive director of G8;
- (b) at all materials times an officer of G8 within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.

35B. Ms Julie Cugin (**Cugin**) was:

- (a) from September 2017 to the date of the commencement of this proceeding an independent non-executive director of G8;
- (b) at all materials times an officer of G8 within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12.

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

36. By reason of the matters pleaded in paragraphs 27 to 35 above, any information of which any or all of:
- (a) Carroll;
  - (b) Johnson;
  - (c) Scott;

- (d) Bailison;
- (e) Reynolds;
- (f) Forrester; ~~and/or~~
- ~~(g) Foster;~~
- ~~(h) Zabel; and~~
- ~~(g)(i) Cugin.~~

(together, **G8 Board**) became aware, or which ought reasonably to have come into his or her possession in the course of the performance of his or her respective duties as an officer of G8, was information of which G8 was aware (as awareness is defined in ASX Listing Rule 19.12).

37. By reason of the matters pleaded in paragraphs 27 to 29 above, any information of which any or all of:

- (a) Carroll;
- (b) Zeljko; and/or
- (c) Williams,

(together, **G8 Officers**) became aware, or which ought reasonably to have come into his or her possession in the course of the performance of his or her respective duties as an officer of G8, was information of which G8 was aware (as awareness is defined in ASX Listing Rule 19.12).

## **C MISLEADING OR DECEPTIVE FORECAST**

### **C.1 CY17 Forecast Representation**

38. On 23 May 2017, G8 published and lodged to the ASX an announcement entitled ‘Approximately \$100m fully underwritten Institutional Placement to fund growth opportunities and update on CIPI Placement’ (**23 May 2017 Announcement** [ASX.5001.0039.0001](#)).

39. By the 23 May 2017 Announcement [ASX.5001.0039.0001](#), on and from 23 May 2017, G8 represented to the Affected Market that G8:

- ~~(a) \_\_\_\_\_ would or was likely to achieve; further, and alternatively,~~
- ~~(b) \_\_\_\_\_ forecast.~~

-EBIT in CY17 of around mid to high \$170's million (the **CY17 Forecast**) (the **CY17 Forecast Representation**).

### **Particulars**

*The representation was partly express and partly to be implied. It is contained in (and to be implied from) the 23 May 2017 Announcement, at p 1, which stated in writing that "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."*

40. The CY17 Forecast Representation was a representation as to a future matter and the Plaintiffs ~~rely~~ rely on s 12BB of the ASIC Act and s 769C of the Corporations Act.
41. G8 did not, at any time prior to 23 February 2018 make any statement which fully corrected, qualified or contradicted the CY17 Forecast Representation.
42. The CY17 Forecast Representation was a continuing representation throughout the Relevant Period.

### **Particulars**

- i) *The CY17 Forecast Representation was of its nature likely to be continuing unless and until information was published to the Affected Market which corrected or qualified them.*
- ii) *Paragraph 40 is repeated.*

## **C.2 May 2017 true position and knowledge**

### **C.2.1 G8's Business earnings**

43. At all material times, the earnings of G8's ~~B~~business ~~was~~ were sensitive to changes in:
  - (a) occupancy levels, with:
    - (i) occupancy being the key driver of earnings;
    - (ii) an approximate 70% occupancy level being the target break-even point for an early learning centre;

(iii) approximate occupancy levels of 80% and above being targeted for profitable early learning centres; and

(iv) increased supply in the market for early learning centres placing downward pressure on occupancy,

(the **Occupancy Sensitivities**);

(b) costs, with:

(i) the majority of G8's costs being fixed; and

(ii) the largest component of costs being employee wages.

(the **Cost Sensitivities**).

### **Particulars**

i) *As to the matters pleaded in subparagraph (a) above, the Plaintiffs ~~rely~~ rely upon:*

A) *the report prepared by Urban Economics entitled 'Demographic and Development Impact Analysis: Queensland Childcare Centres', dated August 2017, p 4;*

B) *G8's statements in its 2017 Annual Report, which was published and lodged to the ASX on 26 February 2018, that "economic occupancy levels represented the key to financial success for the Group given the largely fixed cost-base of its child care centres", p 68; that record levels of supply had negatively impacted occupancy levels across the market, p 14; that there was a "supply overhang in many areas throughout Australia", p 17;*

C) *G8's statements in its 2018 Annual Report, which was published and lodged to the ASX on 25 February 2019, that significant increases in supply over recent years had had a significant impact on both the market and G8's occupancy rates and Group profits, p 18; ~~and~~*



D) The report prepared by Urban Economics entitled 'Occupancy and Performance Appraisal: Early Childhood Education and Care Sector', dated December 2018, p 8;

Ð)E) G8's 2017 Budget Presentation identified that a ±1% occupancy would affect EBIT by ±\$3.8m; G8's 2017 Budget identified that ±1% centre wage expense would affect EBIT by ±\$4.3m (GEM.5017.0107.4524 [.4524 and .4538]);

F) A difference of 1% in rolling 12 month occupancy would in fact lead to approximately a \$10 million change in revenue (Email from Williams (4 December 2017) GEM.5006.0023 .8444); and

G) G8's 2017 Budget Presentation included an assumption that G8 would achieve 80% long day care occupancy (LDC) in 2017 (in accordance with the annual seasonal trend) (GEM .5017.0107.4524 [.4530]).

H) The major determinant of revenue in the operation of childcare centres is occupancy (Expert Witness Outline of Paul Gwilym (10 July 2023) [31], [34], [35]).

I) G8's earnings were sensitive to occupancy for the additional reason that a decrease in revenue would equate to a less efficient staff ratio (Expert Witness Outline of Paul Gwilym (10 July 2023) [190](a)) A less efficient staff ratio creates wage inefficiencies.

J) The costs of operating a portfolio of childcare centres are largely fixed. Educator wages, the largest cost of operating childcare centres, are a semi-variable cost when compared to revenue. Wage costs do not vary directly in proportion to variation in revenue (occupancy), because the wages payable to Educators are mandated by the Children's Services Award and staffing levels are determined by the Educator Ratio Requirement. (Expert Witness Outline of Paul Gwilym (10 July 2023) [45]-[47], [112]-[114]); and

K) *G8's budgeting process determined its wage budget with reference to its revenue budget (wages as a percentage of revenue) (Budget Guidance CY17 (8 August 2016) GEM .5004.0001.0046 [.0049]; CY2017 Budget Presentation, GEM.5003.0001.2960 [.2961], [.2963]).*

ii) *As to the matters pleaded in subparagraph (b) above, the Plaintiffsrely upon:*

A) *G8's statements in its 2017 Annual Report, which was published and lodged to the ASX on 26 February 2018, that its child care centres had largely fixed cost-bases (p 68) and that employee wages comprised the largest of the company's expenses, p 54; and*

B) *G8's statements in its 2018 Annual Report, which was published and lodged to the ASX on 25 February 2019, that employee wages were the largest of ~~the~~ G8's expenses in 2017, p 49.*

iii) *The Plaintiffsrely on the matters set out in paragraph 86, below and the fact that in CY17:*

A) *A difference in occupancy from CY16 to CY17 of 2.7% accounted for an impact of approximately \$8-10 million on EBIT; and*

B) *An increase in temporary agency labour had an impact of approximately \$3 million on EBIT.*

44. Only G8 knew the detail of and with precision the likely impact of the Occupancy Sensitivities and Cost Sensitivities on its earnings.

### **C.2.2 Educator Ratio Effects and the Ratio Financial Effects**

45. By reason of the matters pleaded in paragraphs 13 to 20, by no later than 23 May 2017:

- (a) it was the fact;
- (b) it was likely; and, or alternatively,
- (c) there was a material risk,

that G8 Centres in New South Wales, ~~and Victoria and South Australia:~~

- (d) would be required to adhere to the Educator Ratio Requirement;
  - (e) as a result of the matters pleaded in subparagraph (d), above, would be required to employ extra staff to cover the Educators on break (that is, backfill); and
  - (f) as a result of the matters pleaded in subparagraph (e), above, would have higher operating costs than if the Backfilling Guidance {and/or the Ratio Exemption} applied
- (the **Educator Ratio Effects**).

46. By reason of the combined effect of the Cost Sensitivities and the Educator Ratio Effects, by no later than 23 May 2017:

- (a) it was the fact;
- (b) it was likely; and, or alternatively,
- (c) there was a material risk,

that G8's EBIT for CY17 would be materially adversely impacted (the **Educator Ratio Financial Effects**).

47. By no later than 23 May 2017, G8 knew or ought to have known information being:

- (a) the Educator Ratio Effects; and/or
- (b) the Educator Ratio Financial Effects.

#### **Particulars**

- i) Each of the G8 Officers and members of the G8 Board knew or ought reasonably to have been aware of this information in the performance of their duties.*
- ii) Further, the G8 Board knew or ought reasonably to have been aware of this information, because the G8 Officers knew or ought reasonably to have been aware of that information in the performance of their duties and ought to have advised the G8 Board of that information.*
- iii) The matters pleaded at paragraphs 13 to 22 were matters of public knowledge.*

- iv) *The Cost Sensitivities were matters within the knowledge of G8.*
- v) *In the ordinary course of their duties, the G8 Officers and G8 Board would have received (and did receive) and analysed the information set out above.*
- vi) *The Plaintiffs rely upon the fact that on 13 February 2017 G8 was alerted to the February Decision Statement (email to General Manager of Development Roberts (13 February 2017) GEM.5008.0046.8159; email forwarded to General Manager of Operations Mr Terry King (14 February 2017) GEM.5010.0002.4452).*
- vii) *On 14 February a representative of the Victorian Department of Education and Training emailed G8 Compliance Coordinator Sonia Palmer seeking a G8 contact to “attend a stakeholder forum about the pending changes to the National Quality Framework” (GEM.5010.0002.5233);*
- viii) *On 15 February 2017 G8 Compliance Coordinator Sonia Palmer emailed Mr King an invitation to a Victorian Department of Education and Training briefing session on the National Quality Agenda review and changes to the National Quality Framework, stating that she had sent and RSVP on his behalf (GEM.5007.0001.4633). Ms Palmer forwarded via email these documents and the invitation to General Counsel and Company Secretary Sarah Zeljko, attaching the Education Council’s January 2017 Decision Regulation Impact Statement for changes to the National Quality Framework (GEM.5007.0001.4634; GEM.5007.0001.4667);*
- ix) *On 17 March 2017, the Early Childhood Education Directorate emailed G8 Operations Manager Yvonne McDermott a newsletter, which confirmed that changes to the NOF would come into force from October 2017 (GEM.5026.0017.3544);*
- x) *On 15 August 2017, G8 Business Systems Manager Martyn Wright emailed General Manager of Operations Jason Ball stating that G8 “Received advice from Regulator of NOF (framework) changes from 1 Oct 2017” in May 2017 (GEM.5007.0004.0520);*

~~xi) v)ii) Further particulars may be provided following discovery.~~

48. The CY17 Forecast:

- (a) did not incorporate, adequately incorporate or make any genuine assessment of:
  - (i) the Educator Ratio Effects; and, or alternatively,
  - (ii) the Educator Ratio Financial Effects;
- (b) further or alternatively, was based on assumptions that did not or did not adequately incorporate:
  - (i) the Educator Ratio Effects; and, or alternatively,
  - (ii) the Educator Ratio Financial Effects; and, or alternatively,
- (c) assumed that:
  - (i) the Educator Ratio Effects; and, or alternatively,
  - (ii) the Educator Ratio Financial Effects,did not exist or would not eventuate.

#### **Particulars**

- i) The Plaintiffs refer to the matters pleaded in paragraph 86 below.*
- ii) The Plaintiffs refer to G8's statement on 4 December 2017 that its CY17 forecast was based on an "expectation" that the "current structure" in relation to staffing ratios during breaks in NSW, SA and VIC would extend until the end of 2019.*

~~iii) *iii) The Plaintiffs also rely on the 17 May 2017 Board Papers (GEM.5000 .0001.3550 [.3594]) which record that the CY17 Forecast was premised upon an assumption that "wage hours per booking reduced from July from 1.8 to 1.77. This equates to 8.8hours/centre/week at an estimated saving of \$6.5m".*~~

~~iii)iv) Further particulars may be provided after discovery.~~

### C.2.3 Lower Occupancy Levels and Lower Occupancy Financial Effects

49. By no later than 23 May 2017, there was a general oversupply of early education centres in Australia (the **Oversupply**).

#### Particulars

- i) *During the period 1 January 2017 to 31 March 2017, 113 new childcare centres opened, constituting an approximate 1.6% increase in total supply, compared to the 70 centres opened in the previous calendar period and the 61 centres opened in October to December 2016 (Canaccord, Australian Equity Research report entitled 'Supply becoming too demanding?' dated 2 May 2017 (2 May 2017 Canaccord Report), p 1); and*
- ii) *Analysts were concerned about the oversupply of childcare centres and G8's declining occupancy rates to 78% as at the end of April 2017, the lowest the company had reported since 2011: MorningStar Equity Research, analyst report entitled 'G8 Education's FVE Cut 11% to AUD4.00 Due to Long-Term Competitive Pressures' dated 24 May 2017.*
- iii) *Supply of childcare centres and LDC places had been increasing from the beginning of 2015 (spreadsheet of data underpinning G8 Board Strategy Day Presentation (13 September 8 November 2016) GEM.5006.002.8179, sheet entitled 'supply').*
- iv) *An increase in supply in the 12 months prior to May 2017 coincided with an approximately 10% drop in demand (Due Diligence Questionnaire (May 2017) GEM.5006.0011.0138 [.0144]). G8 attributed most of its decline in 'portfolio occupancy' to this factor (Due Diligence Questionnaire (22 May 2017) GEM.5006.0011.0138 [.0146]).*
- v) *Oversupply had emerged in ACT, inner Sydney CBD and Sydney's Northern Beaches (Due Diligence Questionnaire (22 May 2017) GEM.5006.0011.0138 [.0145]). G8 attributed most of its decline in 'portfolio occupancy' to this factor (Due Diligence Questionnaire (22 May 2017) GEM.5006.0011.0138 [.0146]).*

vi) New supply, including in the context of demand contracting, was identified as a threat and “critical issue” by G8’s Board at its September~~November~~ 2016 strategy day (G8 Board Strategy Day Presentation (13 September~~8 November~~ 2016) GEM.5006.0002.8157 [.8161 to .8162]).

vii) The particulars to paragraph 43 are repeated.

50. Further and alternatively, by no later than 23 May 2017:

- (a) a significant proportion of new early education~~s~~ centres were opened in close proximity to G8 Centres; and
  - (b) by reason of the matters pleaded in subparagraph (a) above, G8 faced increased downward pressure on:
    - (i) its occupancy rate; and, or alternatively,
    - (ii) its ability to increase prices,
- (the **Effect of Oversupply**).

#### Particulars

i) As to the matters in subparagraph (a) above, the Plaintiffs ~~rely~~rely upon the fact that:

A) 45 of the 113 new early education centres opened during the period 1 January 2017 to 31 March 2017, were located within a 3km radius of a G8 Centre, and 20 were located within 2km (2 May 2017 Canaccord Report, p 1).

B) 20 of the 72 ~~the~~ new early education centres opened during July to September 2017, 14 were located within a 2km radius of a G8 Centre, and this was “reasonably consistent with previous data” (Canaccord, Australian Equity Research report entitled ‘Childcare’ dated 25 October 2017 (**25 October 2017 Canaccord Report**), pp 1 and 4).

ii) As to the matters in subparagraph (b) above, the Plaintiffs ~~rely~~rely upon the 25 October 2017 Canaccord Report, p 4.

~~iii) The particulars to paragraphs 43 and 49 are repeated.~~

~~ii)iv) Further particulars may be provided following discovery.~~

51. By no later than 23 May 2017, G8's occupancy levels were:

- (a) significantly lower in the period of January 2017 to April 2017 than in the corresponding period in CY16, and-or alternatively,
- (b) likely to remain for the rest of CY17 at levels below the corresponding periods in CY16, similar to those experienced in (a) January 2017 to April 2017,

(the Lower Occupancy Levels).

### Particulars

i) ~~The Plaintiffs rely~~ upon the fact that during January 2017 to April 2017, G8's ~~weekly~~ occupancy levels were on average ~~3.78% 5.88 percentage points~~ lower than they had been during January 2016 to April 2016 (GEM.5006.0010.0876). ~~This is to be inferred from the fact that:~~

~~A) G8's occupancy rate for CY16 was 79.66% (G8 presentation published and lodged with the ASX on 20 February 2017 entitled 'Full Year Results Presentation Year Ended 31 December 2016', p 7).~~

~~B) G8 reported that on a rolling 12 month basis, G8's like-for-like occupancy as at the end of April 2017 was 77.7% (23 May 2017 Announcement, ASX.5001.0039.0001 p 1).~~

ii) ~~Alternatively, the Plaintiffs rely~~ on the fact that G8's like-for-like occupancy as at the end of April 2017 was 77.7% which was down 3.4% from the prior corresponding period (23 May 2017 Announcement ASX.5001.0039.0001).

iii) ~~The Plaintiffs also rely~~ upon:

A) the Oversupply; ~~and~~

B) the Effect of Oversupply;



- C) *the fact that in January to April 2017 G8's actual LDC and 'vacation care' (VAC) occupancy were below budget in each month (Centre occupancy spreadsheet LDC & VAC (10 May 2017) GEM.5008.0064.0191);*
- D) *the fact that the LDC occupancy levels for each week of CY17 to 23 May 2017 were behind the occupancy levels for the corresponding period in CY16. (GEM.5006.0017.2250);*
- E) *the fact that on 6 March 2017 Mr Terry King (the General Manager of Operations) reported to Mr Gary Carroll (CEO) that the seasonal downward trend in the first 7 weeks of 2017 was below that of 2016, and this was despite a re-enrolment initiative which had been implemented from Q4 2016. (GEM.5005.0004.0853, GEM.5005.0004.0854 [.0859]);*
- F) *the fact that there had been a downward trend in G8's occupancy levels in 2015 and 2016 (CY17 Budget (8 December 2016) GEM.5017.0107.4524 [.4530]; G8 Board Strategy Day Presentation (13 September~~8 November~~ 2016) GEM.5006.0002.8157 [.8160], and underpinning spreadsheet GEM.5006.0002.8179, sheet entitled 'occupancy'), and the trend continued into the first four months of 2017 (GEM.5006.0012.1334, graph on sheet entitled 'All Centres LDC & VAC'), forwarded by a G8 Assistant Accountant to Williams and Carroll GEM.5006.0012.1332);*
- G) *Occupancy in the childcare industry follows a seasonal pattern (Expert Witness Outline of Paul Gwilym (10 July 2023) [40]-[42]);*
- H) *Occupancy in G8's portfolio of centres followed a seasonal pattern (G8 Board Strategy Day Presentation (13 September 2016) GEM.5006.0002.8157 [.8160]; Expert Witness Outline of Paul Gwilym (10 July 2023), [146]; Expert Witness Outline in Reply of Paul Gwilym (15 February 2024) [50]- [55]).*
- I) *The seasonal pattern of occupancy in G8's portfolio of centres in any given year is highly correlated to the pattern in the*

previous year (G8 Board Strategy Day Presentation (13 September 2016) GEM.5006.0002.8157 [.8160]; Expert Witness Outline in Reply of Paul Gwilym (15 February 2024) [53]- [55]).

J) Given the seasonal pattern of occupancy in G8's portfolio of centres in any given year follows such a reliable pattern, once actual occupancy levels in the early months of a calendar year (January to April) are known, together those two pieces of information indicate the likely occupancy levels in the remaining months of the year (Expert Witness Outline in Reply of Paul Gwilym (15 February 2024) [63]).

~~and the particulars to paragraph 50.~~

iv) ~~Further particulars may be provided following discovery and expert evidence.~~

52. By reason of the combined effect of the Occupancy Sensitivities and the Lower Occupancy Levels, by no later than 23 May 2017:

- (a) it was the fact;
- (b) it was likely; and, or alternatively,
- (c) there was a material risk,

that G8's EBIT for CY17 would be materially adversely impacted (the **Lower Occupancy Financial Effects**).

#### **Particulars**

i) In each month from January to April 2017 inclusive G8's occupancy was below budget (the particulars to paragraph 51 are repeated).

ii) A decrease in revenue will result in a less efficient staff ratio (Expert Witness Outline of Paul Gwilym (10 July 2023) [190](a)).

iii) In each month from February to April 2017 inclusive, wages as a percentage of revenue was greater than budgeted (in February, wages were 2.8% overspent as a proportion of revenue (G8's Board Papers, 16 March 2017, GEM.5006.0006.3621 [.3651]; Expert

Witness Outline of Paul Gwilym (10 July 2023) [199](d); in March, wages were 4.86% overspent as a proportion of revenue (G8's Board Papers, 20 April 2017, GEM.5000.0001.0365 [.0395]; Expert Witness Outline of Paul Gwilym (10 July 2023) [200](c)); in April wages were 2.4% overspent as a proportion of revenue (G8 Board Papers, 17 May 2017, GEM.5001.0001.3550 [.3585] and in the CEO Report at [.3566.]

- iv) In the period from January to March 2017 inclusive G8's portfolio of centres achieved on average a wage efficiency at a level expressed as 2.09 wage hours per booking (GEM.5006.0008.1943; GEM.5006.0007.3045).
- v) In each month from January to April 2017 inclusive, G8's revenue was below its budget (G8's Board Papers, 14 February 2017, GEM.5000.0001.1371 [.1408]; G8's Board Papers, 16 March 2017, GEM.5006.0006.3621 [.3651]; G8's Board Papers, 20 April 2017, GEM.5000.0001.0365 [.0395]; G8 Board Papers, 17 May 2017, GEM.5001.0001.3550 [.3585]).
- vi) Particular iii) to paragraph 48 is repeated.

53. By no later than 23 May 2017, G8 knew or ought to have known information being:

- (a) the Lower Occupancy Levels; and/or
- (b) the Lower Occupancy Financial Effects.

#### **Particulars**

- i) *Each of the G8 Officers and members of the G8 Board knew or ought reasonably to have been aware of this information in the performance of their duties.*
- ii) *Further, the G8 Board knew or ought reasonably to have been aware of this, because the G8 Officers knew or ought reasonably to have been aware of that information in the performance of their duties and ought to have advised the G8 Board of that information.*
- iii) *The Lower Occupancy Levels were matters within the knowledge of G8 and some of these had been made public.*

iv) *The Occupancy Sensitivities were matters within the knowledge of G8.*

v) *In the ordinary course of their duties, the G8 Officers and G8 Board would have received and analysed the information set out above.*

vi) *The particulars to paragraphs 43 and 51 are repeated.*

vii) *Further particulars may be provided following discovery.*

54. Further or alternatively to paragraph 48, the CY17 Forecast:

- (a) did not incorporate, or did not adequately incorporate or made no genuine assessment of:
    - (i) the Lower Occupancy Financial Effects;
    - (ii) the Lower Occupancy Levels; and, or alternatively,
  - (b) was based on assumptions that did not incorporate or did not incorporate adequately:
    - (i) the Lower Occupancy Financial Effects;
    - (ii) the Lower Occupancy Levels; and, or alternatively,
  - (c) assumed that:
    - (i) the Lower Occupancy Financial Effects; and, or alternatively,
    - (ii) the Lower Occupancy Levels,
- did not exist or would not continue.

#### **Particulars**

i) *The Plaintiffs refer to the matters pleaded in paragraph 86 below.*

ii) *The Plaintiffs refer to the fact that:*

A) *G8's like-for-like occupancy on a 12 month rolling basis as at the end of April 2017 was already 3.4% down from the prior corresponding period ([23 May 2017 Announcement ASX.5001.0039.0001](#)); and*

B) *G8's reduction in forecast on 4 December 2017 was stated to be partly as a result of a "recent" slowing of occupancy growth with a reduction of 2.9% from CY16.*

iii) *It can be inferred that G8 assumed an increase in occupancy in the second half of CY17 over and above the upward seasonality trend anticipated each year from the baseline occupancy in January/February.*

iv) *The Plaintiffs also rely on the following matters:*

A) *on 5 May 2017, G8 Group Accountant Adam Hutchinson emailed Financial Controller Cherie Ford stating that he had prepared a draft forecast EBIT for CY17 of "~\$154m" (GEM.5008.0063.5190), and provided a link to a spreadsheet providing forecast EBIT for CY17 of \$152.39m (GEM.5017.0020.0601);*

B) *on 15 May 2017, at 1:50pm, G8 Group Accountant Adam Hutchinson prepared a draft forecast EBIT for CY17 of \$157.16m (GEM.5017.0013.4590);*

C) *on 15 May 2017, G8 prepared a forecast EBIT for CY17 of \$173.77m (GEM.5006.0010.0370), and such forecast was premised upon (inter alia):*

(i) *an underlying EBIT forecast weighted to the second half (1H17 \$61.3m and 2H17 \$112.5m); and*

(ii) *a change in forecasting approach from 'actuals x months + budget x months' to an 'assumptions based forecast' (GEM.5000.0001.3550 [.3592]);*

(iii) *an increase in the occupancy assumptions used in the draft forecasts identified in A) and B).*

D) *on 17 May 2017, G8 was informed that payment under the second tranche of a share placement with CFCG Investment Partners International (Australia) Pty Ltd would not be made on that day (GEM.5016.0001.0076 [.0078]);*

- E) on 18 May 2017, Mr Jules Cooper of Ord Minnett advised Carroll to “provide an update on occupancy, give a trading update and some clear guidance around FY17 (which is the markets [sic] issue) to bring consensus inline and the job is done and the market can look forward to FY19” (GEM.5006.0010.2375);
- F) on 18 May 2017, the first draft of the CY17 EBIT forecast to market was “underlying EBIT tracking in line with market consensus forecasts for the current period” (GEM.5006.0010.5394);
- G) on 21 May 2017 Mr Chris Scott (Executive Director of G8) proposed to provide a CY17 EBIT forecast by “determin[ing] what the market is expecting. And then tailor the message accordingly” (GEM.5006.0010.8174);
- H) between 21 May 2017 and 22 May 2017, G8 changed its proposed CY17 EBIT forecast to “high \$170’s million” (GEM.5006.0010.7890), then “mid-\$170’s million” (GEM.5005.0007.8642; GEM.5006.0010.8952), then finally to “mid to high \$170’s million” (GEM.5006.0010.9327; GEM.5005.0008.1253).
- I) From January 2017 to April 2017 G8’s actual and LDC and VAC occupancy were below budget in each month (Centre occupancy spreadsheet LDC & VAC GEM.5007.0003.6165).
- v) The Plaintiffs also rely on the 17 May 2017 Board Papers (GEM.5000.0001.3550 [.3594]) which record that the CY17 Forecast was premised upon assumptions that:
- A) “occupancy to close the gap on budget until August then perform at budget from thereon”.
- B) “May occupancy to grow 2% of prior month, June and July 3% growth”.

iii)vi) Further particulars may be provided following discovery.

#### **C.2.4 CY17 Forecast Information**

55. By reason of:

- (a) the Educator Ratio Financial Effects; and/or
- (b) the Lower Occupancy Financial Effects,

by no later than 23 May 2017:

- (c) G8 was not able to;
- (d) alternatively, it was likely, that G8 was not able to;
- (e) alternatively, there was a material risk that G8 was not able to,

achieve, and not able to come materially close to achieving, its CY17 Forecast (the **CY17 Forecast Information**).

#### **C.3 21 August 2017 Representations**

56. On 21 August 2017, G8 published and lodged to 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**).

57. By the 21 August 2017 Announcement, on and from 21 August 2017, G8 represented to the Affected Market that:

(a) \_\_\_\_\_ it would or was likely to achieve: further, and alternatively,

(b) \_\_\_\_\_ it forecast,

-EBIT in CY17 of around mid-\$170 million (**the August Forecast**) (the **21 August 2017 Representation**).

#### **Particulars**

*The representation was partly express and partly to be implied. It is contained in (and to be implied from) the 21 August 2017 Announcement which stated in writing at p 1 “we maintain our guidance for full-year underlying EBIT to be mid-\$170m”.*

58. The 21 August 2017 Representation was a representation as to a future matter and the Plaintiffs ~~rely~~ rely on s 12BB of the ASIC Act and s 769C of the Corporations Act.

59. G8 did not, at any time prior to 23 February 2018 make any statement which fully corrected, qualified or contradicted the 21 August 2017 Representations.
60. The 21 August 2017 Representation was a continuing representation throughout the Relevant Period.

#### **Particulars**

- i) *The 21 August 2017 Representation was likely to be continuing unless and until information was published to the Affected Market which corrected or qualified it.*
- ii) *Paragraph 58 is repeated.*

### **C.4 August 2017 True Position and Knowledge**

#### **C.4.1 Educator Ratio Effects and the Educator Ratio Financial Effects**

61. By no later than 21 August 2017:
- (a) the Educator Ratio Effects; and
- (b) the Educator Ratio Financial Effects,
- were continuing.

#### **Particulars**

- i) *The ~~P~~particulars to paragraphs 45 to 47 are repeated.*
- ii) *On 1 June 2017, G8 Compliance Manager Sonia Palmer emailed all G8 Operations Managers alerting them to changes to the NOF due to take effect from 1 October (GEM.5026.0014.9370).*
- iii) *On 15 August 2017, G8 Compliance Manager Sonia Palmer emailed Business Systems Manager Martyn Wright attaching a Powerpoint presentation outlining changes to the NOF due to take effect from 1 October (GEM.5025.0005.7190; GEM.5025.0005.7196).*
- iv) *By the end of July 2017, in no month of 2017 had G8's centres as a group on average achieved 1.8 wage hours per booking. To the end of March 2017 the average wage hours per booking across G8's portfolio of centres was 2.09 (GEM.5006.0008.1943; GEM.5006.0007.3045). By the end of June 2017, G8's average wage*



hours per booking was 1.89 (July 2017 Board Papers GEM.5008.0096.7428, [7460]). This is contrary to G8's forecasting assumption that 1.8 wage hours per booking would be achieved on average in May and June 2017, falling to 1.77 in July 2017 (15 May Re-budget Spreadsheet, GEM.5006.0010.0370, sheet 'ORGANIC', row 85 'Wages' forecast formula; May 2017 Board Papers GEM.5000.0001.3550 [.3594]).

v) Further particulars may be provided following discovery.

62. By no later than 21 August 2017, G8 knew or ought to have known information being:

- (a) the Educator Ratio Effects; and/or
- (b) the Educator Ratio Financial Effects.

#### **Particulars**

i) ~~The P~~particulars to paragraphs 45 to 47 are repeated.

63. The 21 August 2017 Representation:

- (a) did not incorporate, adequately incorporate or make any genuine assessment of:
  - (i) the Educator Ratio Effects; and, or alternatively,
  - (ii) the Educator Ratio Financial Effects;
- (b) further or alternatively, was based on assumptions that did not or did not adequately incorporate:
  - (i) the Educator Ratio Effects; and, or alternatively,
  - (ii) the Educator Ratio Financial Effects; and, or alternatively,
- (c) assumed that:
  - (i) the Educator Ratio Effects; and, or alternatively,
  - (ii) the Educator Ratio Financial Effects,did not exist or would not eventuate.

## Particulars

- i) *The Plaintiffs refer to the matters pleaded in paragraph 86 below.*
- ~~ii)~~ *The Plaintiffs refer to G8's statement on 4 December 2017 that its CY17 forecast, which was repeated by the 21 August 2017 Representations, was based on an "expectation" that the "current structure" in relation to staffing ratios during breaks in NSW, SA and VIC would extend until the end of 2019.*
- ~~iii)~~ *The Plaintiffs also rely on the fact that the 17 August 2017 Board Papers record that the August Forecast was premised upon the assumption that "Wage hours per booking - needs to reduce from 1.89 to 1.80 in July then 1.77 hours per booking from August" (GEM.5000.0001.2537 [.2636]).*
- ~~iv)~~ *The 17 August 2017 Board Papers record that the actual wage hours per booking achieved in July 2017 was 1.88 (GEM.5000.0001.2537 [.2636]).*
- (v) *On 10 August 2017 G8 Group Accountant Adam Hutchinson prepared a draft forecast EBIT for CY17 of \$159.44m (GEM.5008.0077.8341) and stated such forecast could not be increased "without occupancy looking high compared to trends" (GEM.5008.0077.8339).*
- (vi) *The particulars to paragraph 61 are repeated.*
- ~~ii)v)~~ *Further particulars will be provided after discovery.*

### C.4.2 Lower Occupancy Levels and Lower Occupancy Financial Effects

64. Further and alternatively, by no later than 21 August 2017:

- (a) the Oversupply;
- (b) the Effect of Oversupply;
- (c) the Lower Occupancy Levels; and
- (d) the Lower Occupancy Financial Effects,

were continuing.

## Particulars

- i) ~~The P~~particulars to paragraphs 43 and 49 to 53 are repeated;
- ii) During the period 27 March 2017 to 19 June 2017, it was reported that there was low confidence around industry occupancy due to concerns around rapid expansion, currently low occupancy rates in some jurisdictions, and the impact ~~of~~ further future expansion would have on future supply conditions and therefore weakening occupancy (Australian Childcare Alliance, Rose Partners and Bank West for Business, industry survey report entitled 'National Childcare Barometer' dated June 2017);
- iii) On 21 August 2017, G8 published and lodged to the ASX an announcement entitled 'Financial results for the half-year ended 30 June 2017, and Update on Capital Management Strategy' which stated that price increases implemented by G8 had been more than offset by low occupancy, which was partly attributable to increased supply within the industry;
- ~~iv)~~ On 21 August 2017, G8 published and lodged to the ASX an announcement entitled 'G8 Education – Results Presentation – Half Year Ended 30 June 2017' which stated that its occupancy rate performance for 1H17 was down 3.41% against the prior corresponding period Presentation ([ASX.5001.0063.0001 \[.0004\]](#));
- ~~v)~~ From January 2017 to July 2017 G8's actual and LDC and VAC occupancy were below budget in each month (Centre occupancy spreadsheet LDC & VAC GEM.5007.0003.6165).
- ~~vi)~~ In June 2017 G8 achieved wage hours per booking of 1.89 (July 2017 Board Papers GEM.5008.0096.7428 [.7460]). In July 2017 G8 achieved wage hours per booking of 1.83 and the year-to-date average wage hours per booking achieved to the end of July 2017 was 1.89 (August 2017 Board Papers, GEM.5000.0001.2537 [.2638]).
- ~~iv)vi)~~ Further particulars will be provided after discovery.

65. By no later than 21 August 2017, G8 knew or ought to have known information being:

- (a) the Lower Occupancy Levels; and/or
- (b) the Lower Occupancy Financial Effects.

### Particulars

- i) *The ~~P~~articulars to paragraphs 43, 49 to 53 and 63 to 64 are repeated.*

66. Further or alternatively to paragraph 63, the 21 August 2017 Representations:

- (a) did not incorporate, or did not adequately incorporate or made no genuine assessment of:
    - (i) the Lower Occupancy Financial Effects;
    - (ii) the Lower Occupancy Levels; and, or alternatively,
  - (b) were based on assumptions that did not incorporate or did not incorporate adequately:
    - (i) the Lower Occupancy Financial Effects;
    - (ii) the Lower Occupancy Levels; and, or alternatively,
  - (c) assumed that:
    - (i) the Lower Occupancy Financial Effects; and, or alternatively,
    - (ii) the Lower Occupancy Levels,
- did not exist or would not continue.

### Particulars

- i) *The Plaintiffs refer~~s~~ to the matters pleaded in paragraph 86 below.*
- ii) *The Plaintiffs refer~~s~~ to:*
  - A) *G8's like-for-like occupancy on a 12 month rolling basis in 1H17 was already 3.4% down from the prior corresponding period ([23 May 2017 Announcement ASX.5001.0039.0001](#));*
  - B) *the Oversupply and the Effect of Oversupply were continuing;*
  - C) *despite the matters in (A) and (B), G8 stated that it maintained its guidance of full-year underlying EBIT of mid \$170 million based on a trend of occupancy growth since 30 June 2017 continuing; and*

- D) *G8's reduction in forecast on 4 December 2017 was stated to be partly as a result of a "recent" slowing of occupancy growth with a reduction of 2.7% from CY16.*
- iii) *It can be inferred that G8 assumed an increase in occupancy in the second half of CY17 over and above that arising from seasonality.*
- iv) *The Plaintiffs repeat particulars iv) and v) to paragraph 54.*
- iii)v) *The Plaintiffs also rely on the fact that the 17 August 2017 Board Papers (GEM.5000.0001.2537 [.2636]) record that the G8 prepared internal reforecasting in August 2017 that stated that in order for G8 to achieve \$173.7m underlying EBIT in CY17 there would need to be "occupancy growth ahead of prior year month on month growth: Jun 74.7%; Jul 76.6%; Aug 79.9%; Sep 82.8%; Oct 83.6%, Nov 84.6%, Dec 78.9%. This equates to increased net new bookings per day per centre".*
- (vi) *On 10 August 2017 G8 Group Accountant Adam Hutchinson prepared a draft forecast EBIT for CY17 of \$159.45m (GEM.5008.0077.8341), and stated such forecast could not be increased "without occupancy looking high compared to trends" (GEM.5008.0077.8339).*
- (vii) *The occupancy assumptions underpinning the 21 August 2017 Representations assumed month-on-month growth between August and November 2017 in excess of the month-on-month growth in August to November 2016 (the previous comparable period) and therefore also in excess of G8's seasonality (or in other words the seasonal pattern of occupancy in G8's portfolio of centres) (Expert Witness Outline of Paul Gwilym (10 July 2023), [345]). The seasonal pattern of occupancy in G8's portfolio of centres in 2016 at G8 was 99% correlated to the seasonal pattern in G8's portfolio of centres in 2015. The correlation between seasonality in 2016 and seasonality in 2017 was 98% (Expert Witness Outline in Reply of Paul Gwilym (15 February 2024, [53]).*
- (viii) *In its re-budget prepared on 15 August 2017, G8 assumed that on average across its portfolio of centres wage hours per booking of 1.77*

would be achieved in each remaining month of 2017 (August Board Papers, GEM.5000.0001.2537 [.2636]).

~~iv)vi) Further particulars will be provided following discovery.~~

#### **C.4.3 21 August Forecast Information**

67. By reason of:

- (a) the Educator Ratio Financial Effects; and/or
- (b) the Lower Occupancy Financial Effects,

by no later than 21 August 2017:

- (c) G8 was not able to;
- (d) alternatively, it was likely, that G8 was not able to;
- (e) alternatively, there was a material risk that G8 was not able to,

achieve, and not come materially close to achieving, the August Forecast (the **21 August Forecast Information**).

#### **Particulars**

- i) The 17 August 2017 Board Papers record that G8 had forecast EBIT in CY17 of \$163.7m (GEM.5000.0001.2537 [.2635;.2636]).

#### **C.5 Misleading or deceptive conduct**

##### **C.5.1 CY17 Forecast Representations**

68. By reason of the matters pleaded in paragraphs 48, 54, and/or 55, on and from 23 May 2017, in making the CY17 Forecast Representation, G8 engaged in conduct which was misleading or deceptive, or likely to mislead or deceive.

69. Further or alternatively, by reason of the matters pleaded in paragraphs 48, 54, and/or 55, on and from 23 May 2017, G8 did not have reasonable grounds for making the CY17 Forecast Representation, and accordingly, engaged in conduct that was misleading or deceptive, or likely to mislead or deceive.

70. Further or alternatively, by reason of the matters pleaded in paragraphs 48, 54, and/or 55, on and from 23 May 2017, in maintaining and/or failing to correct or qualify the CY17 Forecast Representation, G8 engaged in conduct which was misleading or deceptive, or likely to mislead or deceive.
71. The conduct pleaded in paragraphs 68, 69 and/or 70 was conduct engaged in by G8:
- (a) in relation to financial products (being G8 Shares), within the meaning of ss 1041H(1) and 1041H(2)(b) of the Corporations Act; and
  - (b) in trade or commerce, in relation to financial services within the meaning of s 12DA(1) of the ASIC Act.
72. By reason of the matters pleaded in paragraphs 68 and/or 69 and 71, on and from 23 May 2017, G8 contravened:
- (a) s 1041H of the Corporations Act; and, or alternatively,
  - (b) s 12DA(1) of the ASIC Act,
- (each being a **23 May 2017 Misleading Representation Contravention**).
73. By reason of the matters pleaded in paragraphs 70 and 71 on and from 23 May 2017, alternatively, G8 contravened:
- (a) s 1041H of the Corporations Act; and, or alternatively,
  - (b) s 12DA(1) of the ASIC Act,
- (each being a **23 May 2017 Misleading Silence Contravention**).

#### ***C.5.2 21 August 2017 Representations***

74. Further and alternatively, by reason of the matters pleaded in paragraphs 48, 54, 55, 63, 66 and/or 67, on and from 21 August 2017, in making the 21 August 2017 Representation, G8 engaged in conduct which was misleading or deceptive, or likely to mislead or deceive.
75. Further or alternatively, by reason of the matters pleaded in paragraphs 48, 54, 55, 63, 66 and/or 67, on and from 21 August 2017, G8 did not have reasonable grounds for making the 21 August 2017 Representation, and accordingly, engaged in conduct that was misleading or deceptive, or likely to mislead or deceive.
76. Further or alternatively, by reason of the matters pleaded in paragraphs 48, 54, 55, 63, 66 and/or 67, on and from 21 August 2017, in maintaining and/or failing to correct or qualify the 21

August 2017 Representation, G8 engaged in conduct which was misleading or deceptive, or likely to mislead or deceive.

77. The conduct pleaded in paragraphs 74, 75 and/or 76 was conduct engaged in by G8:
- (a) in relation to financial products (being G8 Shares), within the meaning of ss 1041H(1) and 1041H(2)(b) of the Corporations Act; and, or alternatively,
  - (b) in trade or commerce, in relation to financial services within the meaning of s 12DA(1) of the ASIC Act.
78. By reason of the matters pleaded in paragraphs 74 and/or 75 and 77 on and from 21 August 2017, G8 contravened:
- (a) s 1041H of the Corporations Act; and, or alternatively,
  - (b) s 12DA(1) of the ASIC Act,
- (each being a **21 August 2017 Misleading Representation Contravention**).
79. By reason of the matters pleaded in paragraphs 76 and 77 on and from 21 August 2017, alternatively, G8 contravened:
- (a) s 1041H of the Corporations Act; and, or alternatively,
  - (b) s 12DA(1) of the ASIC Act,
- (each being a **21 August 2017 Misleading Silence Contravention**).

## **D CONTINUOUS DISCLOSURE CONTRAVENTIONS**

### **D.1 Financial Impact Information**

80. By no later than 23 May 2017, alternatively, 21 August 2017, G8 was aware (within the meaning of ASX Listing Rule 19.12) of:
- (a) the Educator Ratio Financial Effects;
  - (b) the Lower Occupancy Financial Effects; and/or
  - (c) the CY17 Forecast Information, alternatively, the 21 August Forecast Information,
- (together and severally, the **Financial Impact Information**).



## Particulars

- i) *Each of the G8 Officers and members of the G8 Board knew or ought reasonably to have been aware of the Financial Impact Information in the performance of their duties.*
- ii) *Further, the G8 Board knew or ought reasonably to have been aware of the Financial Impact Information, because the G8 Officers knew or ought reasonably to have been aware of the Financial Impact Information in the performance of their duties and ought to have advised the G8 Board of the Financial Impact Information.*
- iii) *The matters pleaded at paragraphs 13 to 22 were matters of public knowledge.*
- iv) *The Cost Sensitivities were matters within the knowledge of G8.*
- v) *The Lower Occupancy Levels were within the knowledge of G8 and some had been publicly disclosed.*
- vi) *The Occupancy Sensitivities were matters within the knowledge of G8.*
- vii) In the ordinary course of their duties, the G8 Officers and the G8 Board would have received and analysed the Financial Impact Information.*
- viii) The particulars to paragraphs 43 to 54 and 61 to 66 are repeated.*
- vii)xi) Further particulars will be provided following discovery.*

## D.2 Continuous Disclosure Contraventions

81. As at, and from 23 May 2017, alternatively, 21 August 2017, the Financial Impact Information was information that:
- (a) was not generally available within the meaning of s 674(2)(c)(i) of the Corporations Act; and
  - (b) a reasonable person would expect to have a material effect on the price or value of G8 securities within the meaning of ASX Listing Rule 3.1 and s 674(2)(c)(ii) of the Corporations Act.

### Particulars

- i) *the Educator Ratio Financial Effects incorporated the Cost Sensitivities, the detail and precision as to which was only within G8's knowledge;*
- ii) *the precise occupancy levels on and from 23 May 2017, alternatively, 21 August 2017, and the effect of those levels along with the Occupancy Sensitivities are matters which were only within G8's knowledge;*
- iii) *the CY17 Forecast Information incorporated sensitivities the detail and precision of which was only within G8's knowledge; and*
- iv) *as to materiality, the Plaintiffs refer to the fact that in CY17:*
  - A) *A difference in occupancy from CY16 to CY17 of 2.7% accounted for an impact of approximately \$8-10 million on EBIT;*
  - B) *An increase in temporary agency labour had an impact of approximately \$3 million on EBIT.*
- v) *The Plaintiffs also refer to the drop in share price referred to in paragraphs 83 to 88 below, following the corrective disclosures.*
- vi) ~~*Further particulars will be provided after discovery and expert evidence.*~~

82. By reason of the Continuous Disclosure Obligations, and the matters pleaded in paragraph 81, on and from 23 May 2017, alternatively, 21 August 2017, G8 became obliged immediately to tell the ASX the Financial Impact Information.
83. G8 did not inform the ASX of the Financial Impact Information immediately on 23 May 2017, alternatively, 21 August 2017, or at all during the Relevant Period.
84. By reason of the matters pleaded in paragraphs 80 to 83 above, G8 contravened s 674(2) of the Corporations Act and ASX Listing Rule 3.1 (each being a **Continuous Disclosure Contravention**).

## **E THE CORRECTIVE DISCLOSURES AND THEIR IMPACT**

### **E.1 December 2017 Disclosures**

85. On 4 December 2017, G8 published and lodged to the ASX an announcement entitled 'Update on Trading Performance and Leadership Team Changes' (**4 December 2017 Announcement**).

86. By the 4 December 2017 Announcement, G8 stated that:

- (a) G8 was forecasting an underlying EBIT in CY17 of around \$160 million; and
- (b) the reduction from the CY17 Forecast was driven by:
  - (i) a recent slowing of occupancy growth, with average like-for-like occupancy for CY17 forecast to be circa 77%, compared to 79.7% for CY16;
  - (ii) supply issues in areas such as Western Sydney, Gold Coast, East Brisbane and Inner Melbourne; and
  - (iii) a change in regulatory requirements in relation to staffing ratios during breaks in NSW, SA and Victoria, which took effect from 1 October 2017,

(the **4 December 2017 Disclosures**).

#### 86A The 4 December 2017 Disclosures partially:

- (a) corrected the:
  - (i) CY17 Forecast Representation; and
  - (ii) 21 August Representation;
- (b) disclosed the Financial Impact Information.

87. On and after 4 December 2017, following the 4 December 2017 Disclosures, the price of G8 Shares declined substantially.

#### **Particulars**

- i) On 4 December 2017, the price of G8 Shares declined by \$1.02 from \$4.42 at close of trade on 1 December 2017 to \$3.40 at the close of trade on 4 December 2017 (a decline of 23%).*

## **E.2 February 2018 Disclosures**

88. On 26 February 2018, G8 published and lodged to the ASX an announcement entitled ‘G8 Education Announces its Full Year Audited Results for the Financial Year Ended 31 December 2017’ (**26 February 2018 Announcement**).
89. By the 26 February 2018 Announcement, G8 stated that:
- (a) its underlying EBIT in CY17 was \$156 million; and
  - (b) market conditions were challenging during the year with significant levels of new supply and continued weak demand growth having an impact on occupancy levels,
- (the **26 February 2018 Disclosures**).
90. On and after 26 February 2018, following the 26 February 2018 Disclosures, the price of G8 Shares declined substantially.

### **Particulars**

- i) *On 26 February 2018, the price of G8 Shares declined by \$0.25 from \$3.15 at close of trade on 23 February 2018 to \$2.90 at close of trade on 26 Feb 2018 (a decline of 8%).*

## **F CONTRAVENING CONDUCT CAUSED LOSS**

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

91. The Plaintiff<sub>s</sub> and some Group Members entered into a contract to acquire an interest in G8 Shares in a market of investors or potential investors in G8 Shares:
- (a) operated by the ASX;
  - (b) regulated by, inter alia, ss 674(2) and 674(3) of the Corporations Act and ASX Listing Rule 3.1;
  - (c) where the price or value of G8 Shares would reasonably be expected to have been informed or affected by information disclosed in accordance with ss 674(2) and 674(3) of the Corporations Act and ASX Listing Rule 3.1;
  - (d) where material information had not been disclosed, which a reasonable person would expect, had it been disclosed, would have had a material adverse effect on the price or value of G8 Shares (namely the information the subject of the Financial Impact Information) (the **Continuous Disclosure Contraventions**);

- (e) where misleading or deceptive conduct had occurred, namely:
- (i) the 23 May 2017 Misleading Representation Contraventions (or any of them);
  - (ii) the 23 May 2017 Misleading Silence Contraventions (or any of them);
  - (iii) the 21 August 2017 Misleading Representation Contraventions (or any of them); and/or
  - (iv) the 21 August 2017 Misleading Silence Contraventions (or any of them),
- (individually, and in any combination, the **Misleading Conduct Contraventions**), that a reasonable person would expect to have a material effect on the price or value of G8 Shares insofar as, if they had not been made, no investors or potential investors in G8 Shares would have been in a position to read or rely upon them.

92. During the Relevant Period each or a combination of the Continuous Disclosure Contraventions and/or the Misleading Conduct Contraventions (each being a **Market Contravention**) caused or materially contributed to the market price of G8 Shares being greater than their true value and/or the market price that would have prevailed but for the Market Contraventions, from the respective dates that those Market Contraventions commenced, as pleaded in this Statement of Claim.

#### **Particulars**

*~~The extent to which the Market Contraventions caused the market price for G8 Shares to be greater than their true value and/or the market price that would otherwise have prevailed (that is, inflated) during the Relevant Period is a matter for evidence. Particulars are set out at Schedules A and B.~~*

93. The impacts on the price of G8 Shares pleaded in paragraphs 87 and/or 90 above:

- (a) was caused or materially contributed to by:
- (i) the market's reaction to the information respectively communicated to the Affected Market in the:
    - (A) 4 December 2017 Disclosures; and
    - (B) 26 February 2018 Disclosures,
- in the context of what had been communicated to the Affected Market prior to those announcements; and

- (ii) the Market Contraventions; and
- (b) would have occurred, or substantially occurred, earlier if:
  - (i) G8 had disclosed to the Affected Market the information that was the subject of Continuous Disclosure Contraventions; and/or
  - (ii) G8 had not engaged in the Misleading Conduct Contraventions.

### **Particulars**

~~*The extent to which price impacts resulted in inflation in and/or the removal of inflation from the price of G8 Shares, and the extent to which those impacts would have occurred at earlier points in time during the Relevant Period is a matter for evidence, particulars of which will be served immediately following the Plaintiffs' filing expert evidence.*~~

*Particulars are set out at Schedules A and B.*

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

94. By the 23 May 2017 Announcement [ASX.5001.0039.0001](#), G8 announced to the Affected Market that it was to conduct a fully underwritten institutional placement at a price of between \$3.10 and \$3.20 per new G8 Share, with approximately 31.3 to 32.3 million new G8 Shares to be issued to raise approximately \$100 million (**Institutional Placement**).
95. On 29 May 2017, G8:
- (a) successfully completed the Institutional Placement; and
  - (b) issued 31,250,000 G8 Shares at \$3.20 per share pursuant to the Institutional Placement.

### **Particulars**

- i) Institutional Placement Cleansing Notice.*
- ii) Appendix 3B published and lodged by G8 to the ASX on 25 May 2017.*

96. The Institutional Placement was undertaken:
- (a) at an offer price of \$3.20 per new G8 Share respectively, being prices fixed by reference to the market price of G8 Shares, which traded in a market with the features pleaded in paragraphs 91 and 92;

- (b) at a price which, by reason of the matters pleaded in sub-paragraph (a) would reasonably be expected to have been informed or affected by information disclosed in accordance with s 674(2) of the Corporations Act and ASX Listing Rule 3.1 (and by s 708A of the Corporations Act in respect of share issues such as the Institutional Placement);
- (c) was set in circumstances where material information had not been disclosed, which a reasonable person would expect, had it been disclosed, would have had a material adverse effect on the price or value of G8 Shares (namely the information the subject of the Continuous Disclosure Contraventions); and
- (d) was set in circumstances where the Misleading Conduct Contraventions had occurred, being conduct involving making, and failing to correct or qualify representations that a reasonable person would expect to have a material effect on the price or value of G8 Shares, in that if they had not been made no investors or potential investors in G8 Shares would have been in a position to read or rely upon them.

### **Particulars**

~~*The extent to which the Market Contraventions caused the offer price for G8 Shares under the Institutional Placement to be substantially greater than their true value and/or the price that they would have been offered had they been set by reference to the market price that would otherwise have prevailed (that is, inflated) is a matter for evidence, particulars of which will be served immediately following the Plaintiffs' filing expert evidence.*~~

*Particulars are set out at Schedules A and B.*

97. Paragraph 93 is repeated.

### **F.3 Reliance**

98. Further, or in the alternative to paragraphs 91 to 92, and 96 to 97 above:

- (a) the Plaintiffs and some Group Members would not have entered into the transactions pursuant to which they acquired an interest in G8 Shares if they had known the information the subject of the Continuous Disclosure Contraventions; and/or
- (b) the Plaintiffs and some Group Members relied on some or all of the Misleading Conduct Contraventions in entering into the transactions pursuant to which they acquired an interest in G8 Shares.

### **Particulars**

- i) *The Plaintiffs' would not have entered into the transactions pursuant to which they acquired an interest in G8 Shares had they known the information the subject of the Continuous Disclosure Contraventions and, they relied upon the Misleading Conduct Contraventions.*
- ii) *The identities of all those Group Members which or who would not have entered into the transactions pursuant to which they acquired an interest in G8 Shares, had they known of any or all of the information that was the subject of the Continuous Disclosure Contraventions and/or which or who relied on any or all of the Misleading Conduct Contraventions are not known within the current state of the Plaintiffs' knowledge and cannot be ascertained unless and until those advising the Plaintiffs' take detailed instructions from all Group Members on individual issues relevant to the determination of those individual Group Members' claims; those instructions will be obtained (and particulars of the identity of those Group Members will be provided) following opt out, the determination of the Plaintiffs' claim and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of those Group Members.*

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

99. By reason of the matters pleaded in paragraphs 91 to 92, 96 to 97 and/or 98 above, the Plaintiffs and Group Members have suffered loss and damage by and resulting from the Market Contraventions (or any one or combination of them).

### **Particulars**

- i) *The loss suffered by the Plaintiffs will be calculated by reference to:*
  - A) *the difference between the price at which G8 Shares were acquired by the Plaintiffs during the Relevant Period and the true value of that interest; or*



- B) *the difference between the price at which the Plaintiffs<sub>s</sub> acquired G8 Shares and the market price that would have prevailed had the Market Contraventions not occurred; or*
- C) *alternatively, the days during the Relevant Period where the traded price of G8 Shares fell as a result of the disclosure information which had not previously been disclosed because of the Market Contraventions, and the quantum of that fall; or*
- D) *alternatively, the days after the Relevant Period when the traded price of G8 Shares fell as a result of the disclosure of information which had not previously been disclosed because of the Market Contraventions, and the quantum of that fall; or*
- E) *alternatively, the difference between the price at which G8 Shares were acquired by the Plaintiffs<sub>s</sub> and the price left in hand.*
- ii) *Further particulars in relation to the Plaintiffs<sub>s</sub>'~~s~~ losses ~~will be provided after the service of evidence in chief~~ are set out at Schedule C.*
- iii) *Particulars of the losses of Group Members are not known within the current state of the Plaintiffs<sub>s</sub>'~~s~~ knowledge and cannot be ascertained unless and until those advising the Plaintiffs<sub>s</sub> take detailed instructions from all Group Members on individual issues relevant to the determination of those individual Group Members' claims; those instructions will be obtained (and particulars of the losses of those Group Members will be provided) following opt out, the determination of the Plaintiffs<sub>s</sub>'~~s~~ claim and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of those Group Members.*

## **G ENTITLEMENT TO RELIEF**

100. By reason of the matters alleged in paragraphs 91 to 99 above, the Plaintiffs<sub>s</sub> and each of the Group Members are entitled to recover the amount of the loss and damage suffered by them

from G8 as a result of the conduct alleged in this statement of claim pursuant to s 1041I of the Corporations Act and/or s 12GF of the ASIC Act.

101. Further or alternatively, G8 is obliged pursuant to s 1317HA of the Corporations Act to compensate the Plaintiffs and Group Members for the damage that resulted from its contravention of s 674(2) of the Corporations Act.

## **H COMMON QUESTIONS OF LAW OR FACT**

102. When did the Defendant became aware (within the meaning of Listing Rule 19.12) of the CY17 Forecast Information?

103. Whether the CY17 Forecast Information was:

(a) material information; and

(b) not generally available,

within the meaning of ASX Listing Rule 3.1 or Chapter 6CA of the Corporations Act that the Defendant was obliged to disclose, but failed to disclose such that the Defendant contravened s 674(2) of the Corporations Act?

104. Whether the Defendant contravened section 1041H of the Corporations Act or section 12DA(1) of the ASIC Act or s 18 of the ACL by making, maintaining and/or failing to qualify:

(a) the CY17 ~~Guidance~~Forecast Representation; and

(b) the 21 August 2017 Representation.

105. Whether the Market Contraventions had the effect that the price of acquisition for G8 Shares was greater than their true value and/or the market price that would have prevailed but for the Market Contraventions and if so:

(a) whether statutory compensation is recoverable by the Plaintiffs and some or all of the Group Members?

(b) the correct measure of the statutory compensation for which the Defendant may be liable to the Plaintiffs and some or all of the Group Members?

106. Whether any, and if so what, relief other than monetary relief should be granted in favour of the Plaintiffs and some or all of the Group Members?

**AND THE PLAINTIFFS CLAIMS on their own behalf and on behalf of the Group Members:**

- A. A declaration that the Defendant contravened ASX Listing Rule 3.1 and section 674(2) of the Corporations Act by not informing the ASX immediately of the CY17 Forecast Information.
- B. An order pursuant to section 1317HA(1) of the Corporations Act that the Defendant pay compensation to the Plaintiffs and Group Members for damage caused by its contraventions of section 674(2) of the Corporations Act.
- C. A declaration that the Defendant engaged in conduct in contravention of:
  - (a) section 1041H(1) of the Corporations Act; and
  - (b) section 12DA(1) of the ASIC Act.
- D. An order pursuant to:
  - (a) section 1041I of the Corporations Act that the Defendant pay compensation to the Plaintiffs and Group Members for damage caused by the conduct of the Defendant in contravention of section 1041H of the Corporations Act.
  - (b) section 12GF of the ASIC Act that the Defendant pay compensation to the Plaintiffs and Group Members for damage caused by the conduct of the Defendant in contravention of section 12DA(1) of the ASIC Act.
- E. Interest pursuant to statute.
- F. Costs.
- G. Such further order as the Court determines is appropriate.

Dated: [12 March 2024](#)

*Slater and Gordon*

.....  
**Slater + Gordon**  
Solicitors for the Plaintiffs

F FORSYTH  
D J FAHEY  
[D SNYDER](#)  
[R T ZAMBELLI](#)

## ANNEXURE A – DEFINITIONS

- 2 May 2017 Canaccord Report** has the meaning set out in paragraph 49
- 21 August Forecast Information** has the meaning set out in paragraph 67
- 21 August 2017 Announcement** has the meaning set out in paragraph 56
- 21 August 2017 Misleading Representation Contravention** has the meaning set out in paragraph 78
- 21 August 2017 Representations** has the meaning set out in paragraph 57
- 21 August 2017 Misleading Silence Contravention** has the meaning set out in paragraph 79
- 23 May 2017 Announcement** has the meaning set out in paragraph 38
- 23 May 2017 Misleading Representation Contravention** has the meaning set out in paragraph 72
- 23 May 2017 Misleading Silence Contravention** has the meaning set out in paragraph 73
- 25 October 2017 Canaccord Report** has the meaning set out in paragraph 50
- 26 February 2018 Announcement** has the meaning set out in paragraph 88
- 26 February 2018 Disclosures** has the meaning set out in paragraph 89
- 2014 Regulation Impact Statement** has the meaning set out in paragraph 13
- 4 December 2017 Announcement** has the meaning set out in paragraph 85
- 4 December 2017 Disclosures** has the meaning set out in paragraph 86
- ACT Act** has the meaning set out in paragraph 6(a)(i)(B)
- Affected Market** has the meaning set out in paragraph 25(b)(ii)
- April ACECQA Information Sheet** has the meaning set out in paragraph 21
- April Newsletter** has the meaning set out in paragraph 20
- ASIC Act** has the meaning set out in paragraph 4(c)
- ASX** has the meaning set out in paragraph 25(a)
- ASX Listing Rules** has the meaning set out in paragraph 26(d)
- August Forecast** has the meaning set out in paragraph 57
- Authority** has the meaning set out in paragraph 9
- Backfilling Guidance** has the meaning set out in paragraph 12
- Bailison** has the meaning set out in paragraph 32
- Ball has the same meaning set out in paragraph 29A**
- Carroll** has the meaning set out in paragraph 27
- Cogin has the meaning set out at paragraph 35B**
- Continuous Disclosure Contravention** has the meaning set out in paragraph 84
- Continuous Disclosure Contraventions** has the meaning set out in paragraph 91(d)
- Continuous Disclosure Obligations** has the meaning set out in paragraph 26(e)
- Corporations Act** has the meaning set out in paragraph 1(c)(i)
- Cost Sensitivities** has the meaning set out in paragraph 43(b)
- CY17 Forecast** has the meaning set out in paragraph 39

**CY17 Forecast Information** has the meaning set out in paragraph 55

**CY17 Forecast Representation** has the meaning set out in paragraph 39

**Education Council** has the meaning set out in paragraph 13

**Educator Ratio Effects** has the meaning set out in paragraph 45

**Educator Ratio Financial Effects** has the meaning set out in paragraph 46

**Educator Ratio Requirement** has the meaning set out in paragraph 7(b)

**Educators** has the meaning set out in paragraph 7(b)

**Effect of Oversupply** has the meaning set out in paragraph 50(b)

**February Decision Statement** has the meaning set out in the particulars to paragraph 15

**February Online Statement** has the meaning set out in paragraph 17(b)

**February Newsletter** has the meaning set out in paragraph 16

**February Summary** has the meaning set out in paragraph 18(b)

**Financial Impact Information** has the meaning set out in paragraph 80

**Forrester** has the meaning set out in paragraph 34

**Foster** has the meaning set out in paragraph 35

**G8** has the meaning set out in paragraph 1(b)

**G8 Board** has the meaning set out in paragraph 36

**G8 Centres** has the meaning set out in paragraph 5(a)

**G8 Officers** has the meaning set out in paragraph 37

**G8 Shares** has the meaning set out in paragraph 1(a)

**Group Members** has the meaning set out in paragraph 1

**Guidance Revocation** has the meaning set out in paragraph 15

**Guide** has the meaning set out in paragraph 10

**Institutional Placement** has the meaning set out in paragraph 94

**Johnson** has the meaning set out in paragraph 30

**[Long Day Care](#)** *has the meaning set out at paragraph 43*

**Lower Occupancy Financial Effects** has the meaning set out in paragraph 52

**Lower Occupancy Levels** has the meaning set out in paragraph 51

**Market Contravention** has the meaning set out in paragraph 92

**Misleading Conduct Contraventions** has the meaning set out in the particulars to paragraph 91(e)

**National Law** has the meaning set out in paragraph 6(a)

**National Quality Framework** has the meaning set out in paragraph 6

**National Quality Standards** has the meaning set out in paragraph 6(c)

**NSW Act** has the meaning set out in paragraph 6(a)(i)(A)

**NSW Regulations** has the meaning set out in paragraph 6(b)(i)

**NT Act** has the meaning set out in paragraph 6(a)(i)(C)

**Occupancy Sensitivities** has the meaning set out in paragraph 43(a)

**October Guide** has the meaning set out in paragraph 23

**Oversupply** has the meaning set out in paragraph 49

**QLD Act** has the meaning set out in paragraph 6(a)(i)(E)

**Ratio Exemption** has the meaning set out in paragraph 8

**Relevant Period** has the meaning set out in paragraph 1(a)

**Reynolds** has the meaning set out in paragraph 33

**Roberts has the same meaning set out in paragraph 29B**

**SA Act** has the meaning set out in paragraph 6(a)(ii)

**Scott** has the meaning set out in paragraph 31

**TAS Act** has the meaning set out in paragraph 6(a)(i)(D)

**VAC has the meaning set out at paragraph 51(iii)(C)**

**VIC Act** has the meaning set out in paragraph 6(a)(i)

**WA Act** has the meaning set out in paragraph 6(a)(iii)

**WA Regulations** has the meaning set out in paragraph 6(b)(ii)

**Williams** has the meaning set out in paragraph 29

**Zabel has the meaning set out in paragraph 35A**

**Zeljko** has the meaning set out in paragraph 28

## SCHEDULE A

1. But for the Market Contraventions, G8 would have announced to the market that, having regard to ongoing labour costs (including wages and staffing requirements) and occupancy challenges (including supply and competition issues), G8 forecast its underlying EBIT in the 2017 calendar year to be:
  - (i) \$154.26 million, announced on 23 May 2017,  
\$152.45 million, announced on 15 June 2017,  
\$152.68 million, announced on 15 July 2017,  
\$142.76 million, announced on 15 August 2017,  
\$143.91 million, announced on 15 September 2017,  
\$140.98 million, announced on 15 October 2017,  
\$140.66 million, announced on 15 November 2017,  
\$139.13 million, announced on 15 December 2017,  
\$142.84 million, announced on 15 January 2018 (**First Counterfactual Disclosure**); alternatively
  - (ii) \$156 million, announced on 23 May 2017 (**Second Counterfactual Disclosure**); alternatively
  - (iii) \$160 million announced on 23 May 2017, followed by \$156 million announced on 4 December 2017 (**Third Counterfactual Disclosure**); alternatively
  - (iv) \$160 million, announced on 23 May 2017 (**Fourth Counterfactual Disclosure**); alternatively
  - (v) \$163.7 million, announced on 23 May 2017, followed by \$156 million announced on 21 August 2017 (**Fifth Counterfactual Disclosure**); alternatively
  - (vi) Commensurate with the CY17 Forecast of 23 May 2017, followed by \$163.7 million announced on 21 August 2017, followed by \$156 million announced on 4 December 2017 (**Sixth Counterfactual Disclosure**); alternatively
  - (vii) \$154.26 million, announced on 23 May 2017,

\$152.45 million, announced on 15 June 2017,

\$158.97 million, announced on 15 July 2017,

\$148.27 million, announced on 15 August 2017,

\$148.83 million, announced on 15 September 2017,

\$145.44 million, announced on 15 October 2017,

\$144.75 million, announced on 15 November 2017,

\$142.91 million, announced on 15 December 2017,

\$154.21 million, announced on 15 January 2018 (**Seventh Counterfactual Disclosure**).

2. The market price of G8 shares that would have prevailed but for the Market Contraventions during the Relevant Period is set out:
  - (a) in respect of the First through Sixth Counterfactual Disclosures, at Exhibit 8 of the Expert Witness Outline of Dr Ramsey Zein (11 August 2023) as extracted at Schedule B; and
  - (b) in respect of the Seventh Counterfactual Disclosure, at Schedule B.









First Counterfactual Disclosure    Second Counterfactual Disclosure    Third Counterfactual Disclosure    Fourth Counterfactual Disclosure    Fifth Counterfactual Disclosure    Sixth Counterfactual Disclosure    Seventh Counterfactual Disclosure

Date	Closing Price <sup>1</sup>	Counterfactual Share		Counterfactual Share		Counterfactual Share		Counterfactual Share		Counterfactual Share		Counterfactual Share		Counterfactual Share		Counterfactual Share						
		Inflation <sup>2</sup>	Inflation <sup>3</sup>	Inflation <sup>3</sup>	Inflation <sup>4</sup>	Inflation <sup>5</sup>	Inflation <sup>6</sup>	Inflation <sup>7</sup>	Inflation <sup>8</sup>	Inflation <sup>8</sup>	Inflation <sup>8</sup>	Inflation <sup>8</sup>	Inflation <sup>8</sup>	Inflation <sup>8</sup>	Inflation <sup>8</sup>	Inflation <sup>8</sup>	Inflation <sup>8</sup>					
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(13)	(15)	(17)	(19)	(21)	(23)						
	(\$)	(%)	(\$)	(\$)	(%)	(\$)	(\$)	(%)	(\$)	(12)(\$)	(14)(\$)	(16)(%)	(18)(\$)	(20)(\$)	(22)(%)	(23)						
			= $[2]^*/[3]$	= $[2]^*/[4]$		= $[2]^*/[6]$	= $[2]^*/[7]$		= $[2]^*/[9]$	= $[2]^*/[10]$ (%)	= $[2]^*/[13]$	= $[2]^*/[15]$ (%)	= $[2]^*/[16]$ (%)	= $[2]^*/[18]$ (%)	= $[2]^*/[21]$	= $[2]^*/[22]$						
11-Jan-18	3.42																					
12-Jan-18	3.41	30.97%	1.06	2.36	5.94%	0.20	3.22	5.94%	0.20	3.22	0.00%	0.00	3.42	5.94%	0.20	3.22	5.94%	0.20	3.22	25.36%	0.87	2.55
15-Jan-18	3.44	30.97%	1.06	2.35	5.94%	0.20	3.21	5.94%	0.20	3.21	0.00%	0.00	3.41	5.94%	0.20	3.21	5.94%	0.20	3.21	25.36%	0.86	2.55
16-Jan-18	3.44	25.46%	0.88	2.56	5.94%	0.20	3.24	5.94%	0.20	3.24	0.00%	0.00	3.44	5.94%	0.20	3.24	5.94%	0.20	3.24	8.59%	0.30	3.14
17-Jan-18	3.41	25.46%	0.88	2.56	5.94%	0.20	3.24	5.94%	0.20	3.24	0.00%	0.00	3.44	5.94%	0.20	3.24	5.94%	0.20	3.24	8.59%	0.30	3.14
17-Jan-18	3.41	25.46%	0.87	2.54	5.94%	0.20	3.21	5.94%	0.20	3.21	0.00%	0.00	3.41	5.94%	0.20	3.21	5.94%	0.20	3.21	8.59%	0.29	3.12
18-Jan-18	3.45	25.46%	0.87	2.54	5.94%	0.20	3.21	5.94%	0.20	3.21	0.00%	0.00	3.41	5.94%	0.20	3.21	5.94%	0.20	3.21	8.59%	0.29	3.12
19-Jan-18	3.45	25.46%	0.88	2.57	5.94%	0.20	3.25	5.94%	0.20	3.25	0.00%	0.00	3.45	5.94%	0.20	3.25	5.94%	0.20	3.25	8.59%	0.30	3.15
22-Jan-18	3.43	25.46%	0.88	2.57	5.94%	0.20	3.25	5.94%	0.20	3.25	0.00%	0.00	3.45	5.94%	0.20	3.25	5.94%	0.20	3.25	8.59%	0.30	3.15
23-Jan-18	3.41	25.46%	0.87	2.56	5.94%	0.20	3.23	5.94%	0.20	3.23	0.00%	0.00	3.43	5.94%	0.20	3.23	5.94%	0.20	3.23	8.59%	0.29	3.14
24-Jan-18	3.41	25.46%	0.87	2.54	5.94%	0.20	3.21	5.94%	0.20	3.21	0.00%	0.00	3.41	5.94%	0.20	3.21	5.94%	0.20	3.21	8.59%	0.29	3.12
25-Jan-18	3.38	25.46%	0.86	2.52	5.94%	0.20	3.18	5.94%	0.20	3.18	0.00%	0.00	3.38	5.94%	0.20	3.18	5.94%	0.20	3.18	8.59%	0.29	3.09
29-Jan-18	3.28	25.46%	0.86	2.52	5.94%	0.20	3.18	5.94%	0.20	3.18	0.00%	0.00	3.38	5.94%	0.20	3.18	5.94%	0.20	3.18	8.59%	0.29	3.09
29-Jan-18	3.38	25.46%	0.84	2.44	5.94%	0.19	3.09	5.94%	0.19	3.09	0.00%	0.00	3.28	5.94%	0.19	3.09	5.94%	0.19	3.09	8.59%	0.28	3.00
30-Jan-18	3.38	25.46%	0.86	2.52	5.94%	0.20	3.18	5.94%	0.20	3.18	0.00%	0.00	3.38	5.94%	0.20	3.18	5.94%	0.20	3.18	8.59%	0.29	3.09
31-Jan-18	3.36	25.46%	0.86	2.50	5.94%	0.20	3.16	5.94%	0.20	3.16	0.00%	0.00	3.36	5.94%	0.20	3.16	5.94%	0.20	3.16	8.59%	0.29	3.07
1-Feb-18	3.37	25.46%	0.86	2.51	5.94%	0.20	3.17	5.94%	0.20	3.17	0.00%	0.00	3.37	5.94%	0.20	3.17	5.94%	0.20	3.17	8.59%	0.29	3.08
2-Feb-18	3.39	25.46%	0.86	2.53	5.94%	0.20	3.19	5.94%	0.20	3.19	0.00%	0.00	3.39	5.94%	0.20	3.19	5.94%	0.20	3.19	8.59%	0.29	3.10
3-Feb-18	3.32	25.46%	0.85	2.47	5.94%	0.20	3.12	5.94%	0.20	3.12	0.00%	0.00	3.32	5.94%	0.20	3.12	5.94%	0.20	3.12	8.59%	0.29	3.03
5-Feb-18	3.22	25.46%	0.82	2.40	5.94%	0.19	3.03	5.94%	0.19	3.03	0.00%	0.00	3.22	5.94%	0.19	3.03	5.94%	0.19	3.03	8.59%	0.28	2.94
6-Feb-18	3.25	25.46%	0.83	2.42	5.94%	0.19	3.06	5.94%	0.19	3.06	0.00%	0.00	3.25	5.94%	0.19	3.06	5.94%	0.19	3.06	8.59%	0.28	2.97
7-Feb-18	3.30	25.46%	0.84	2.46	5.94%	0.20	3.10	5.94%	0.20	3.10	0.00%	0.00	3.30	5.94%	0.20	3.10	5.94%	0.20	3.10	8.59%	0.28	2.97
8-Feb-18	3.30	25.46%	0.84	2.46	5.94%	0.20	3.10	5.94%	0.20	3.10	0.00%	0.00	3.30	5.94%	0.20	3.10	5.94%	0.20	3.10	8.59%	0.28	2.97
9-Feb-18	3.26	25.46%	0.83	2.43	5.94%	0.19	3.07	5.94%	0.19	3.07	0.00%	0.00	3.26	5.94%	0.19	3.07	5.94%	0.19	3.07	8.59%	0.28	2.98
12-Feb-18	3.22	25.46%	0.82	2.40	5.94%	0.19	3.03	5.94%	0.19	3.03	0.00%	0.00	3.22	5.94%	0.19	3.03	5.94%	0.19	3.03	8.59%	0.28	2.94
13-Feb-18	3.22	25.46%	0.82	2.40	5.94%	0.19	3.03	5.94%	0.19	3.03	0.00%	0.00	3.22	5.94%	0.19	3.03	5.94%	0.19	3.03	8.59%	0.28	2.94
14-Feb-18	3.21	25.46%	0.82	2.39	5.94%	0.19	3.02	5.94%	0.19	3.02	0.00%	0.00	3.21	5.94%	0.19	3.02	5.94%	0.19	3.02	8.59%	0.28	2.93
15-Feb-18	3.19	25.46%	0.81	2.38	5.94%	0.19	3.00	5.94%	0.19	3.00	0.00%	0.00	3.19	5.94%	0.19	3.00	5.94%	0.19	3.00	8.59%	0.27	2.92
16-Feb-18	3.26	25.46%	0.83	2.43	5.94%	0.19	3.07	5.94%	0.19	3.07	0.00%	0.00	3.26	5.94%	0.19	3.07	5.94%	0.19	3.07	8.59%	0.28	2.98
19-Feb-18	3.25	25.46%	0.83	2.42	5.94%	0.19	3.06	5.94%	0.19	3.06	0.00%	0.00	3.25	5.94%	0.19	3.06	5.94%	0.19	3.06	8.59%	0.28	2.97
20-Feb-18	3.25	25.46%	0.83	2.42	5.94%	0.19	3.06	5.94%	0.19	3.06	0.00%	0.00	3.25	5.94%	0.19	3.06	5.94%	0.19	3.06	8.59%	0.28	2.97
21-Feb-18	3.17	25.46%	0.81	2.36	5.94%	0.19	2.98	5.94%	0.19	2.98	0.00%	0.00	3.17	5.94%	0.19	2.98	5.94%	0.19	2.98	8.59%	0.27	2.90
22-Feb-18	3.17	25.46%	0.81	2.36	5.94%	0.19	2.98	5.94%	0.19	2.98	0.00%	0.00	3.17	5.94%	0.19	2.98	5.94%	0.19	2.98	8.59%	0.27	2.90
23-Feb-18	3.15	25.46%	0.80	2.35	5.94%	0.19	2.96	5.94%	0.19	2.96	0.00%	0.00	3.15	5.94%	0.19	2.96	5.94%	0.19	2.96	8.59%	0.27	2.88
26-Feb-18	2.90	0.00%	0.00	2.90	0.00%	0.00	2.90	0.00%	0.00	2.90	0.00%	0.00	2.90	0.00%	0.00	2.90	0.00%	0.00	2.90	0.00%	0.00	2.90

## SCHEDULE C

1. The loss suffered by the Plaintiffs is as follows:

<u>Counterfactual Disclosure</u>	<u>First</u>	<u>Second</u>	<u>Third</u>	<u>Fourth</u>	<u>Fifth</u>	<u>Sixth</u>	<u>Seventh</u>
<u>Loss</u>	<u>\$10,621.60</u>	<u>\$9,137.70</u>	<u>\$7,341.40</u>	<u>\$7,341.40</u>	<u>\$5,701.30</u>	<u>\$0</u>	<u>\$7,810.00</u>

where the amount of loss is calculated by multiplying:

- (a) the number of shares the plaintiffs purchased on 18 July 2017 (7,810 shares); by
- (b) the inflation (in \$ terms) for 18 July 2017 set out:
  - (i) in respect of the First through Sixth Counterfactual Disclosures, at Exhibit 8 of the Expert Witness Outline of Dr Ramsey Zein (11 August 2023) as extracted at Schedule B; and
  - (ii) in respect of the Seventh Counterfactual Disclosure, in Schedule B.