



**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST**

Case: S ECI 2020 01535
S ECI 2020 01535
Filed on: 31/08/2020 04:19 PM

BETWEEN

NERITA SOMERS (and others named in the Schedule)

First Plaintiff

and

BOX HILL INSTITUTE

First Defendant / Defendant by Counterclaim

and

GOBEL AVIATION PTY LTD (t/as Soar Advanced Flight Training)

Second Defendant / Plaintiff by Counterclaim

**SECOND DEFENDANT'S
DEFENCE TO THE FIRST DEFENDANT'S AMENDED THIRD PARTY NOTICE
AND COUNTERCLAIM AGAINST THE FIRST DEFENDANT**

Date of document: 31 August 2020
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Note: Headings from the first defendant's amended statement of claim on the third party notice dated 7 August 2020 (**BHI SOC**) and the definitions from the plaintiffs' amended

statement of claim dated 3 August 2020 (**ASOC**) and the BHI SOC are used in this defence and counterclaim, unless the context indicates otherwise. The second defendant is referred to as **Soar** or **SAFT**. The *Civil Aviation Safety Regulations* 1998 (Cth) in force from time to time in the relevant period are referred to as **the Regulations**.

DEFENCE

In response to the BHI SOC, the second defendant (**Soar**) says as follows:

A PRELIMINARY

1. It admits paragraph 1, and says further as set out below.
 - 1.1 The CPL Diploma consisted of two substantially equivalent courses, each accredited by the Australian Skills Quality Authority (**ASQA**) under the NVETR Act, being:
 - (a) AVI50215 – Diploma of Aviation (Commercial Pilot Licence – Aeroplane), which expired on 11 August 2019; and
 - (b) AVI50219 – Diploma of Aviation (Commercial Pilot Licence – Aeroplane), which succeeded and replaced the previous course on 12 August 2019.
 - 1.2 At all material times, BHI:
 - (a) was a registered training organisation (**RTO**) under s 17 the NVETR Act, with the CPL Diploma within its scope of registration; and
 - (b) was the provider of the CPL Diploma.
 - 1.3 The CPL Diploma was structured in three consecutive ‘clusters’ of units, with the course fees payable in three consecutive instalments by the census date for each cluster.
 - 1.4 The completion of the CPL Diploma at the conclusion of Cluster Three involved the completion of the requirements under Subpart 61.I of Part 61 of the Regulations (**the CASA CPL Requirements**) to support an application to CASA for the grant of a commercial pilot licence (**CPL**) under r 61.150 of Part 61 of the Regulations.
 - 1.5 The students were also eligible at the completion of Clusters One and Two to obtain, respectively:
 - (a) in Cluster One, a RA-Aus recreational pilot certificate (**RPC**) as described in s 2.07, cl 1, of the RA-Aus Operations Manual, which could be converted to a CASA RPL pursuant to r 61.480 of the Regulations; and
 - (b) in Cluster Two, a RA-Aus RPC with a cross-country endorsement, as described in s 2.07, cl 11, of the RA-Aus Operations Manual, which could be converted to

a CASA RPL with a navigation endorsement pursuant to r 61.500(5) of the Regulations.

- 1.6 In the period from 10 February 2016 to 26 March 2020 (**the Soar flight training period**), Soar:
 - (a) was an authorised Part 141 operator within the meaning of r 141.015 of the Regulations;
 - (b) on that basis, was authorised to conduct Part 141 flight training in an aircraft or flight simulation training device, including for the grant of a CPL under Part 61 of the Regulations: rr 141.015, 141.050; and
 - (c) provided Part 141 flight training to BHI's students enrolled in the CPL Diploma.
2. It admits paragraph 2.
3. It does not plead to paragraph 3, as it is of a summary nature only and does not contain any allegations against it, but refers instead to the matters pleaded below.
4. It does not plead to paragraph 4, as it is of a summary nature only and does not contain any allegations against it, but refers instead to the matters pleaded below.

B CONTRACTS BETWEEN BHI AND SOAR

5. As to paragraph 5:
 - (a) it admits entering into the Initial Agreement and will rely on its full terms and effect;
 - (b) it denies that the effect of the Initial Agreement was to provide for the joint provision of the CPL Diploma by BHI and Soar;
 - (c) it otherwise denies the allegations, and says further as set out below.
- 5.1 The CPL Diploma was a course provided by BHI alone, and for which BHI was the provider registered under the NVETR Act.
- 5.2 In BHI's provision of the CPL Diploma to its students:
 - (a) BHI provided to its students enrolled in the CPL Diploma both the theory component and the practical flight training component of that course;
 - (b) it provided the practical flight training component through Soar, in Soar's capacity as a Part 141 flight training operator (or equivalent under its earlier AOC).
- 5.3 The recitals to the Initial Agreement provided relevantly as follows:

- (A) *SAFT is a provider of aviation training services.*
- (B) *BHI is a registered training organisation that offers aviation training courses.*

5.4 The Initial Agreement contained, among other things, the following terms (adopting the definitions used therein):

- (a) The following definitions apply in this agreement:
 - (i) **AQF** means the Australian Qualifications Framework as defined in Schedule 1 to the *Higher Education Support Act 2003* (Cth): cl. 1.1.
 - (ii) **ASQA** means the Australian Skills Quality Authority, being the body established by section 155 of the NVETR Act: cl. 1.1.
 - (iii) **Objectives** means, among other things, to allow SAFT to focus more on the aviation training/practical side of delivery.
 - (iv) **Services** means the practical flight training services to be provided by BHI and SAFT to Students under this document, including the services described in Schedule 2, being curriculum developed in line with CASA regulatory standards.
 - (v) **Student** means a BHI-enrolled student who is receiving, or is eligible to receive, educational services provided by SAFT.
 - (vi) **Student Categories** means the following categories:
 - 1. Domestic students - full fee-paying (Victoria and New South Wales).
 - 2. Domestic students - VET Fee-Help and/or government funded (Victoria and New South Wales).
 - 3. International students - full fee paying (Victoria and New South Wales).
 - (vii) **Training Programs** means the aviation training programs, as set out in item 3 of Schedule 1, being:
 - 1. AVI50215 – Diploma of Aviation (Commercial Pilot Licence – Aeroplane); and
 - 2. AVI50415 – Diploma of Aviation (Instrument Flight Operations).
- (b) BHI will engage suitably qualified SAFT instructors as casual employees of BHI for delivery of the theoretical aspects of the Training Programs: cl. 3.1(a).

- (c) SAFT undertakes to provide suitably qualified training instructors to deliver the practical aspects of the Training Programs and to perform the Services for the Term upon the terms and conditions of the Initial Agreement: cl. 3.1(b).
- (d) The relationship of BHI and SAFT under the Initial Agreement is that of principal and independent contractor: cl. 3.2.
- (e) In exercising their rights and performing their obligations under the Initial Agreement, the parties agree at all times to act in good faith: cl. 3.6.
- (f) Within 30 Business Days of the Commencement Date, the parties will develop and agree a training and assessment strategy to provide for the joint delivery of the Training Programs under this document that aligns with (i) the AQF; (ii) RTO Standards; (iii) ESOS Legislation; and (iv) CASA requirements: cl. 6.2(a).
- (g) SAFT must assist BHI with the development of the Training and Assessment Strategy, as and when requested by BHI: cl. 6.2(b).
- (h) BHI is responsible for (i) all administration services relating to the fee-help admission and enrolment of Students in the Training Programs; and (ii) collecting fees from Students and providing all other support for Students as required: cl. 7.1(b).
- (i) As part of the enrolment process for each Student, BHI must confirm the relevant Student Category of each Student, each Student's eligibility to enrol in the relevant Training Program, and each Student's eligibility to obtain Skills First funding and/or VET Student Loan funding for the relevant Training Program: cl. 7.1(c)(ii).
- (j) BHI will be responsible for managing course planning, scheduling and timetabling for all Training Programs: cl. 7.4(a).
- (j) SAFT must provide the Services during the Term in accordance with the Initial Agreement including but not limited to the obligations set out in Schedule 4 – Responsibility Matrix: cl. 8.1(a).
- (k) SAFT must ensure that:
 - (i) it has sufficient staff to carry out the Services and to provide aviation practical training to BHI students as contemplated by cl. 8.2(b)(i); and
 - (ii) all SAFT Staff engaged to carry out the Services or provide aviation theory training to BHI under cl. 8.2(b)(i) are properly trained and qualified, at SAFT's cost.

- (l) Without limiting cl. 8.2(a), SAFT must:
 - (i) provide and supervise flight instructor trainers against RTO Standards and CASA requirements; and
 - (ii) coordinate the professional development and currency of all flight instructor trainers,(cl. 8.2(b)).
- (m) BHI may direct SAFT to remove from the performance of the Services or from any activity connected with the Services, any person who, in the opinion of BHI acting reasonably (i) misconducts himself or herself in providing the Services; (ii) is incompetent or negligent in providing the Services; (iii) is otherwise undesirable to perform the Services: cl. 8.2(d).
- (n) SAFT represents and warrants that:
 - (i) in providing the Services under it will comply with all relevant laws and with all relevant industry standards;
 - (ii) in providing the Services it will comply with BHI's reasonable directions;
 - (iii) the Services will be provided to a high standard in accordance with best practice;
 - (iv) the Services will be performed by members of SAFT Staff who have appropriate qualifications and skills;
 - (i) the Services will be fit for the purpose required by BHI,(cl. 8.7).
- (o) BHI must:
 - (i) perform such obligations as are set out in the Initial Agreement, including but not limited to those set out in Schedule 4 – Matrix of Responsibilities;
 - (ii) in support of the delivery of theory training as part of the Training Programs (A) engage suitably qualified aviation trainers as are recommended by SAFT on such reasonable terms as BHI may decide, or other aviation trainers as recommended by SAFT; and (B) provide all facilities and resources which are reasonably required by those trainers to deliver the theory component of the Training Programs;
 - (iii) provide other facilities and resources relevant to a particular Student

Category, such as accommodation or social activities, as agreed by the parties;

- (iv) provide administration and supervision for Students, including monitoring of course progress, fee payments and PRISMS reporting, as relevant;
- (v) manage and report all funding and loan scheme administration requirements; and
- (vi) promoting the availability of the Training Program in accordance with cl 11.1,
(cl. 9).
- (p) Each party must notify the other party of any formal complaints it receives in respect of the Training Program: cl. 12(a).
- (q) BHI will have primary responsibility for managing student complaints and appeals in accordance with its usual processes: cl. 12(b).
- (r) Both parties must participate jointly in any complaints processes and hearings: cl. 12(c).
- (s) BHI must ensure that, throughout the Term, it complies with all required RTO Standards: cl. 13.1(a).
- (t) Each party must participate in validation of the Training Programs in accordance with the ASQA guidelines and the Responsibility Matrix at Schedule 4: cl. 13.2.
- (u) SAFT must indemnify BHI (and each of BHI's employees, officers and agents, for whom BHI holds the benefit of this indemnity in trust) against any loss, liability or damage whatsoever:
 - (i) connected with the Services (being the practical flight training services), including any loss, liability or damage caused by SAFT or its employees, agents, contractor and students in the course of the Services;
 - (ii) arising from any third party claim against BHI by any of SAFT's employees, agents, contractors or Students; or
 - (iii) incurred by BHI in connection with a breach of the Initial Agreement by SAFT,

except to the extent that the loss, liability or damage arises from a negligent act

or omission of BHI: cl. 16.2.

6. As to paragraph 6:

- (a) it admits entering into the Variation No 01 to Agreement to Provide Aviation Training Services dated 27 July 2017, save to say that it will rely on its full terms and effect;
- (b) it otherwise denies the allegations.

7. As to paragraph 7:

- (a) it admits entering into the Agreement (here called the **Second Agreement**), save to say that it will rely on its full terms and effect; and
- (b) it otherwise denies the allegations, and says further as set out below.

7.1 The recitals to the Second Agreement provided relevantly as follows:

(A) *SAFT is a provider of aviation training services.*

(B) *BHI is a registered training organisation that offers aviation training courses.*

...

(D) *This Agreement establishes the terms and conditions for the provision of the Training Programs by the parties, replacing the previous agreement between the parties dated 10 February 2016.*

7.2 The Second Agreement contained, among other things, the following terms (adopting the definitions used therein):

- (a) The following definitions apply in this agreement:
 - (i) **AQF** means the Australian Qualifications Framework as defined in Schedule 1 to the *Higher Education Support Act 2003* (Cth): cl. 1.1.
 - (ii) **ASQA** means the Australian Skills Quality Authority, being the body established by section 155 of the NVETR Act: cl. 1.1.
 - (iii) **Cluster** means a group of units that have a common Census Date.
 - (iv) **Cluster Census Date** means a common Census Date for all modules within a Cluster.
 - (v) **Navigation Cluster** means the navigation Cluster of a Training Program set out in Schedule 3.

- (vi) **Objectives** means, among other things, to allow SAFT to focus more on the aviation training/practical side of delivery.
- (vii) **Operating Manual** means the document known as the Flight Training Programs Operating Manual created under clause 6.12 (and any revisions, amendments, updates or replacements for it), and which manual must include (inter alia):
1. criteria for Training Program selection.
 2. student enrolment and withdrawal procedures;
 3. criteria for the approval of teachers for practical flight training component of the Training Programs;
 4. completion and award requirements for Training Program and Students;
 5. the circumstances under which a Student can claim a refund; and
 6. a flight cancellation policy.
- (viii) **RA-Aus** means Recreational Aviation Australia Incorporated, an incorporated association that is the governing body for ultralight aircraft in Australia.
- (ix) **Services** means the practical flight training services to be provided by SAFT to Students pursuant to this Agreement, including the services described in Schedule 2, being the practical flight training component of the Training Programs.
- (x) **Student** means a BHI-enrolled student in a Training Program who is receiving, or is eligible to receive, educational services provided by SAFT.
- (xi) **Student Categories** means the following categories:
1. Domestic students - full fee-paying (Victoria and New South Wales).
 2. Domestic students - VET Fee-Help and/or government funded (Victoria and New South Wales).
 3. International students - full fee paying (Victoria and New South Wales).

- (xii) **Training Programs** means the aviation training programs, as set out in item 3 of Schedule 1, being:
1. AVI50215 – Diploma of Aviation (Commercial Pilot Licence – Aeroplane);
 2. AVI50415 – Diploma of Aviation (Instrument Flight Operations);
and
 3. AVI50516 – Diploma of Aviation (Flight Instructor).
- (b) BHI engages SAFT to provide the Services in respect of the Training Programs: cl. 2.1(a).
- (c) BHI is responsible for the delivery of the theoretical aspect of the Training Programs: cl. 2.1(b).
- (d) SAFT accepts the engagement and undertakes to provide suitably trained instructors to deliver the practical aspects of the Training Programs and to perform the Services for the Term upon the terms and conditions of this Agreement: cl. 2.1(c).
- (e) BHI must ensure that it engages sufficient instructors to deliver the theoretical modules to Students: cl. 2.1(d).
- (f) The relationship between BHI and SAFT is that of principal and independent contractor: cl. 2.3.
- (g) In exercising their rights and performing their obligations under the Second Agreement, the parties agree at all times to act in good faith: cl. 2.7.
- (h) BHI is responsible for (i) all administration services relating to the fee-help admission and enrolment of Students in the Training Programs; and (ii) collecting fees from Students and providing all other support for Students as required: cl. 5.2(b).
- (i) As part of the enrolment process for each Student, BHI must confirm the relevant Student Category of each Student, each Student's eligibility to enrol in the relevant Training Program, and each Student's eligibility to obtain Skills First funding and/or VET Student Loan funding for the relevant Training Program: cl. 5.2(c)(iv).
- (j) SAFT acknowledges and agrees that BHI shall make the final decision whether any application for recognition of prior learning and credit transfer should be accepted or rejected: clause 5.3(b).

- (k) BHI is responsible for course planning, scheduling and timetabling for all Training Programs and setting the Census Dates: clause 5.4(a).
- (l) BHI is responsible for ensuring all Training Programs are accredited and recognized by the relevant Government authorities to permit the recruitment and enrolment of students in Training Programs: cl. 5.4(c)(iii).
- (m) SAFT must at all times ensure that it has no outstanding CASA or RA-Aus non-compliance items beyond the due dates for the required compliance or rectification: clause 6.1(a)(i).
- (n) SAFT must do all things reasonably necessary to assist BHI in its compliance with its ASQA requirements in respect of the Training Programs: clause 6.1(a)(ii).
- (o) SAFT must provide the Services during the Term in accordance with this Agreement and as approved by BHI including but not limited to:
 - (i) deliver all practical training aspects of the Training Programs;
 - (ii) deliver comprehensive pre-flight and post-flight briefings to Students;
 - (iii) provide all reasonable assistance to enable Students to pass a module, including allowing Students one opportunity to re-sit a failed practical exam or test;
 - (iv) maintain up to date Student records in accordance with ASQA and CASA requirements,
(cl. 6.1(b)).
- (p) Notwithstanding any other provision of this Agreement, SAFT is obligated to provide the Services for (i) the term of each Training Program (described in Schedule 3) as set out in the Operating Manual and (ii) only for the designated flying hours for each Student per Cluster as set out in Schedule 3: cl. 6.1(d).
- (q) SAFT will allow a grace period of one (1) month beyond the Cluster completion date. If a Student does not complete their flying hour allocation by end of the grace period, SAFT will have no further obligation to provide training services to the Student: cl. 6.1(d)
- (r) SAFT must comply with the obligations described as “Third Party Responsibility” set out in Schedule 5 – Responsibility Matrix: cl. 6.1(f).
- (s) SAFT must ensure that:

- (i) it has sufficient staff to carry out the Services and to provide aviation practical training to Students as contemplated by clause 6.2(b)(i); and
 - (ii) all SAFT Staff engaged to carry out the Services are properly trained and qualified, at SAFT's cost,

(cl. 6.2(a)).
- (t) Without limiting clause 6.2(a), SAFT must:
 - (i) provide and supervise flight instructor trainers who meet CASA requirements; and
 - (ii) coordinate the professional development and currency of all flight instructor trainers,

(cl. 6.2(b)).
- (u) BHI may direct SAFT to remove from the performance of the Services or from any activity connected with the Services, any person who, in the opinion of BHI acting reasonably (i) misconducts himself or herself in providing the Services; (ii) is incompetent or negligent in providing the Services; (iii) is otherwise undesirable to perform the Services: cl. 6.2(e).
- (v) SAFT represents and warrants that:
 - (i) in providing the Services under this Agreement it will comply with all relevant laws and with all relevant industry standards;
 - (ii) in providing the Services it will comply with BHI's reasonable directions;
 - (iii) the Services will be provided to a high standard in accordance with best practice;
 - (iv) the Services will be performed by SAFT Staff who have appropriate qualifications and skills;
 - (v) the Services will be fit for the purpose required by BHI.

(cl. 6.7).
- (w) SAFT will develop the Operating Manual with input from BHI within 12 months of the Commencement Date and, unless and until varied as agreed by the parties, the Operating Manual will include those items set out in Schedule 7: cl. 6.12(e).
- (x) SAFT and BHI must comply with the Operating Manual in relation to:

- (i) the provision and receipt of the Services;
 - (ii) the administration of students enrolled in a Training Program; and
 - (iii) provision of the Training Program.
- (cl. 6.12).
- (y) BHI must:
- (i) perform such obligations as are set out in this Agreement, including but not limited to, those described as “RTO Responsibility” in Schedule 5 – Matrix of Responsibilities;
 - (ii) in the delivery of theory component of the Training Programs (A) engage suitably qualified aviation trainers on such reasonable terms as BHI may decide and (B) provide all necessary facilities, materials and resources which are required by those trainers to deliver the theory component of the Training Programs and for the proper performance of BHI’s obligations under this Agreement;
 - (iii) prepare all teaching materials, examinations and assessments required for the theory component of the Training Programs;
 - (iv) use its best endeavours to provide sufficient access to Federal Government income contingent loans to provide for the Minimum Number of Students. Notwithstanding that there may be insufficient access to Federal Government income contingent loans to provide for the Minimum Number of Students, the balance of BHI’s obligations continue and this clause 7.1(d) does not give rise to a right to terminate under this Agreement;
 - (v) maintain the Training Programs on scope;
 - (vi) manage and report all funding and loan scheme administration requirements;
 - (vii) maintain its compliance with all ASQA requirements;
 - (viii) promote the availability of the Training Programs in accordance with clause 9;
 - (ix) notify SAFT within three (3) Business Days where a Student has deferred or withdrawn from any part of a course; and
 - (x) provide SAFT with a list of Students currently enrolled in a Training

Program by module on a monthly basis,

(cl. 7.1)

- (z) BHI represents and warrants, inter alia, that:
 - (i) in performing its obligations under this Agreement it will comply with all relevant laws and with all relevant industry standards: cl. 7.2(a);
 - (ii) BHI's obligations under this Agreement will be performed by BHI staff who have appropriate qualifications and skills: cl. 7.2(b).
- (aa) Each party must immediately notify the other party in writing of any complaint it receives in respect of the Training program or delivery thereof: cl. 10.1(a).
- (bb) BHI will have primary responsibility for managing complaints and appeals in accordance with its student complaints resolution policy and procedures: cl. 10.1(b).
- (cc) Both parties must participate jointly in any complaints processes and hearings: cl. 10.1(c).
- (dd) SAFT must obtain BHI approval in writing prior to taking any action in relation to a complaint or suspending any Student from flying. SAFT must provide details / grounds to justify the action or suspension requested: cl 10.1(d).
- (ee) BHI must ensure that, throughout the Term, it complies with all required RTO standards and requirements: cl. 11.1.
- (ff) Each party must participate in validation of the Training Programs in accordance with the ASQA guidelines and the Responsibility Matrix at Schedule 5: cl. 11.2.
- (gg) SAFT acknowledges and agrees that BHI is responsible for determining the Course Price: cl. 12.7(a).
- (hh) SAFT must indemnify BHI (and each of BHI's employees, officers and agents, for whom BHI holds the benefit of this indemnity in trust) against any loss, liability or damage whatsoever:
 - (i) connected with the Services (being the practical flight training component of the Training Programs), including any loss, liability or damage caused by SAFT or SAFT Staff in the provision of the Services;
 - (ii) arising from any third party claim against BHI by any of SAFT's Staff; or
 - (iii) incurred by BHI in connection with a breach of this Agreement by SAFT,

except to the extent that the loss, liability or damage arises from a negligent act or omission or wilful misconduct of BHI or its employees, agents and contractors: cl. 14.1.

- (ii) SAFT releases BHI from any liability whatsoever, however arising, in relation to the provision of the Services under this Agreement except to the extent that the loss, liability or damage arises from a negligent act or omission or wilful misconduct of BHI or its employees, agents and contractors: cl. 14.3.¹
- (jj) SAFT's total aggregate liability arising under or in connection with this Agreement is limited to \$20 million: cl. 14.4.
- (kk) Schedule 4 stated SAFT's Key Performance Indicators (**KPIs**) for both safety compliance and Licence Pass Rates.

8. As to paragraph 8:

- (a) it admits entering into the Deed of Variation of Agreement to Provide Aviation Training Services (**the Second Variation**), save to say that it will rely on its full terms and effect; and
- (b) it otherwise denies the allegations, and says further as set out below.

8.1. The Second Variation inserted, among other things, the following terms into the Second Agreement (adopting the definitions used therein):

- (a) BHI acknowledges that Students enrolled in a Training Program will be required to comply with SAFT's code of conduct (**SAFT Code of Conduct**): cl. 5.6(a).
- (b) Notwithstanding any other provision of the Second Agreement, if at any time SAFT reasonably believes that a Student is a safety risk or has repeatedly or in serious breach of the SAFT Code of Conduct (sic), BHI acknowledges and agrees that SAFT may (at its discretion) suspend the Student from flying: cl. 5.6(c).
- (c) SAFT will, within 14 days of the end of each Eligible Period (every 6 months), prepare and submit a report to BHI which sets out: (i) the number of hours flown in that Eligible Period; (ii) the number of Incidents (if any) that occurred in that Eligible Period; (iii) the number of Students undertaking licence tests; (iv) the number of Students successfully passing the licence test and obtaining a licence; (v) SAFT's assessment of KPI 1 and KPI 2 for the Eligible Period determined in accordance with Schedule 4: cl 6.13.

¹ This cl. 14.3 was subsequently amended by the Second Variation, dealt with below.

- (d) SAFT releases BHI from any liability whatsoever, however arising, in relation to the provision of the Services under this Agreement except to the extent that the loss, liability or damage arises from a negligent act or omission or wilful misconduct of BHI or its employees, agents and contractors, provided however that the foregoing general release shall not apply to this Agreement, or the transactions contemplated hereby, and shall not affect each Party's right to enforce this Agreement or any other agreement contemplated hereby in accordance with its terms: cl. 14.3 (replacing the previous cl. 14.3).
- (e) The Second Variation amended SAFT's table of KPIs as set out in Schedule 4 of the Second Agreement.

9. As to paragraph 9:

- (a) it admits paragraph 9(a); and
- (b) it denies paragraph 9(b), and refers to paragraph 5 above.

C PROPORTIONATE LIABILITY

10. As to paragraph 10, while maintaining its denial of liability in respect of the Plaintiffs' claims, it admits that the claims of the Plaintiffs and the Group Members in the proceeding are apportionable claims within the meaning of s. 24AF of the Wrongs Act.

Alleged breach of guarantees under the Australian Consumer Law (Victoria) by Soar

11. It denies paragraph 11, and refers to paragraphs 27, 59 and 60B to 60J of its defence to the ASOC.

Alleged negligence by Soar

12. It denies paragraph 12, and refers to paragraphs 59 and 60K to 60T of its defence to the ASOC.

Alleged misleading or deceptive conduct by Soar

13. It denies paragraph 13, and refers to paragraphs 59, 60U and 60V of its defence to the ASOC.

Conclusion as to proportionate liability

14. As to paragraph 14, it:

- (a) repeats the matters stated in paragraphs 10 to 13 above, and in paragraph 60W of its defence to the ASOC; and
- (b) otherwise denies the allegations.

15. As to paragraph 15, it:
- (a) refers to and repeats the matters pleaded in paragraphs 10 to 14 above;
 - (b) refers to the matters stated in paragraph 65 of its defence to the ASOC;
 - (c) says further that it is not liable for any more than the amount reflecting that proportion of the loss or damage claimed by the Plaintiffs and Group Members that this Court considers just having regard to the extent of Soar's responsibility for the loss or damage, and judgment must not be given against Soar for more than that amount;
 - (d) denies that it owes any liability to the Plaintiffs or the Group Members, and it does so on the grounds set out in its defence to the ASOC; and
 - (e) otherwise denies the allegations.

D BHI'S ALTERNATIVE CLAIM FOR CONTRIBUTION UNDER PART IV OF THE WRONGS ACT

16. As to paragraph 16, if BHI is liable to any of the Plaintiffs or Group Members for any damage for claims that are not apportionable claims within the meaning of section 24AH of the Wrongs Act (which is denied), Soar:
- (a) refers to and repeats paragraph 15 above;
 - (b) says that BHI is not entitled to recover contribution from Soar pursuant to Part IV of the Wrongs Act in respect of damage for which BHI is solely liable to the Plaintiffs or Group Members;
 - (c) says that BHI is solely liable to the Plaintiffs or Group Members in respect of damage arising from all matters save for those matters connected with Soar's provision of practical flight training services to BHI's enrolled students pursuant to the Initial Agreement (as varied) and the Second Agreement (as varied);
 - (d) otherwise denies paragraph 16.

E ALLEGED BREACH OF CONTRACT BY SOAR

17. It admits paragraph 17, save to say that it will rely on the Initial Agreement for its full terms and effect, and refers to the matters stated in paragraph 5 above.
18. It admits paragraph 18, save to say that it will rely on the Second Agreement for its full terms and effect, and refers to the matters stated in paragraph 7 above.
19. It denies paragraph 19, and:
- (a) refers to and repeats paragraphs 45, 47, 60F to 60I and 60R of its defence to

the ASOC;

- (b) says further as set out below;
- (c) reserves the right to plead further to this breach allegation following the identification of material facts by the Plaintiffs and Group Members as well as BHI.

20. As paragraph 20:

- (a) it refers to and repeats to paragraph 19 above; and
- (b) it otherwise denies the allegations, and says further as set out below.

20.1 In further answer to paragraph 20, it says as follows:

- (a) Soar is not liable to BHI in respect of BHI's liability to each of the Plaintiffs and Group Members in the proceeding (if any) where such liability arises from any of the following:
 - (i) the conduct of BHI's employees, agents or contractors;
 - (ii) the conduct of BHI relating to the performance of its obligations under the Initial Agreement and the Initial Agreement as varied, including the conduct relating to the performance of its obligations under clauses 7, 9, 12, and 13.1;
 - (iii) the conduct of BHI relating to the performance of its obligations under the Second Agreement and the Second Agreement as varied, including the conduct relating to the performance of its obligations under clauses 5, 7, 10, 11.1;
 - (iv) the conduct of BHI relating to the delivery of the theory component of the Training Programs (as defined in each of the agreements on which BHI relies);
 - (v) the conduct of BHI in discharging its obligations as a provider of regulated training under the NVETR Act (or failing to adequately do so), except insofar as its failure to do so was caused by any act or omission of Soar's in its delivery of the practical flight training component of the CPL Diploma;
 - (vi) the conduct of BHI in discharging its contractual or general law duties to its students (or failing to adequately do so), except insofar as its failure to do so was caused by any act or omission of Soar's in its delivery of the practical flight training component of the CPL Diploma;

- (vii) the conduct of BHI in contravention of the ACL; or
 - (viii) the conduct of BHI as alleged in paragraphs 16 to 27 and 45 to 52 of the ASOC;
- (b) Soar is not liable to BHI to pay BHI's legal costs in respect of its liability to the Plaintiffs and Group Members based on the conduct of BHI pleaded in subparagraph 20.1(a) above; and
 - (c) Soar's total aggregate liability under the Second Agreement may not exceed \$20 million.

Particulars

Clause 14.4 of the Second Agreement.

F CONTRACTUAL INDEMNITY CLAIM AGAINST SOAR

- 21. As to paragraph 21:
 - (a) it shall refer at trial to the full terms and effect of the Initial Agreement;
 - (b) it refers to and repeats paragraphs 19 to 20 above; and
 - (c) otherwise it admits the allegations.
- 22. As to paragraph 22:
 - (a) it shall refer at trial to the full terms and effect of the Agreement;
 - (b) it refers to and repeats paragraphs 19 to 20.1 above;
 - (c) otherwise it admits the allegations.
- 23. It denies paragraph 23, and says further that:
 - (a) it refers to and repeats paragraphs 19 to 22 above;
 - (b) Soar is not liable to indemnify any loss or damage caused (whether solely or as one of multiple independent or contributing causes) by BHI's own negligent acts or omissions (or those of its employees, agents or contractors, including any of BHI's theory instructors who were also employed in other capacities by Soar), including any breach by BHI of its obligations under the Initial Agreement or the Second Agreement; and
 - (c) its total aggregate liability under the Second Agreement will not exceed \$20 million.

Particulars

Clause 14.4 of the Second Agreement.

COUNTERCLAIM AGAINST THE FIRST DEFENDANT

24. Soar refers to and repeats the allegations set out in paragraphs 1 and 5 to 8 above, and also in paragraphs 14, 15, 16, 19, 20, 22, 23, 25, 26, 27, 31, 40, 42, 44, 59, 60K, 60O, 60U, 65 and 66 of its defence to the ASOC.

A DECLARATORY RELIEF

25. By reason of the matters referred to in paragraphs 1 and 5 to 8 above, Soar is entitled to declarations to the effect set out in subparagraphs 20.1(a), (b) and (c) above.

B ALTERNATIVE CLAIM FOR CONTRIBUTION UNDER PART IV OF THE WRONGS ACT

26. If Soar is liable to any of the Plaintiffs or Group Members for any damage for claims that are not apportionable claims within the meaning of s 24AF of the *Wrongs Act* (which is denied), then:

- (a) sections 23B and 24 of the *Wrongs Act* apply to such claims; and
- (b) by reason of the matters pleaded against BHI in the ASOC (if established), BHI is liable in respect of the same damage.

27. In the premises, Soar is entitled to recover an indemnity, alternatively contribution, from BHI in such amount as is found to be just and equitable having regard to the extent of Soar's responsibility for the damage.

AND SOAR CLAIMS

A. Declarations to the effect set out in subparagraphs 20.1(a), (b) and (c) above.

B. Costs.

31 August 2020

Robert Heath

Matthew Peckham



Maddocks Lawyers

Solicitors for Soar, the Second Defendant

SCHEDULE OF PARTIES

NERITA SOMERS

First Plaintiff

and

ADEL HASSANEIN

Second Plaintiff

and

MATTHEW LAMONT

Third Plaintiff

and

FELIX OULDANOV

Fourth Plaintiff

and

BOX HILL INSTITUTE

First Defendant

and

GOBEL AVIATION PTY LTD (t/as Soar Advanced Flight Training)

Second Defendant