



**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: 25/05/2020 09:15 AM

BETWEEN

NERITA SOMERS & ORS

Plaintiffs

and

BOX HILL INSTITUTE

Defendant

DEFENCE

Date of document: 25 May 2020
Filed on behalf of: The defendant

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Note: Headings and definitions from the plaintiffs' statement of claim dated 26 March 2020

(**SOC**) are used in this defence, unless the context indicates otherwise.

To the SOC, the defendant (**BHI**) says as follows:

A. PRELIMINARY

Group proceeding

1. It admits that it offered and enrolled students in the CPL Diploma, but otherwise does not admit paragraph 1.

The Defendant

2. It admits paragraph 2.
3. As to paragraph 3:
 - (a) it admits paragraph 3(a);
 - (b) it denies paragraph 3(b);
 - (c) it admits paragraph 3(c);
 - (d) it says further that on 18 December 2019 the Australian Skills Quality Authority (**ASQA**) decided to amend the scope of BHI's registration under the NVETR Act to take effect from 30 January 2020, later extended to 24 February 2020 (**ASQA decision**);
 - (e) on 7 February 2020 BHI applied for reconsideration of the ASQA decision;
 - (f) on 26 March 2020 the Plaintiffs commenced the present proceeding;
 - (g) on 30 April 2020 ASQA reconsidered and varied the ASQA decision, decided not to amend the scope of BHI's registration, and placed a condition on BHI's registration under the NVETR Act for the CPL Diploma with effect from 8 June 2020.

Particulars

The ASQA decision is contained in a letter from ASQA to BHI dated 18 December 2019.

The reconsideration decision is contained in a letter from ASQA to BHI dated 4 May 2020.

Soar

4. It denies paragraph 4, and says further that:
 - (a) pursuant to an Agreement to Provide Aviation Training Services dated 10 February 2016 BHI and Soar agreed to provide, inter alia, the CPL Diploma jointly to students, with the theory component to be provided by BHI and the practical flight training component to be provided by Soar (**Initial Agreement**);
 - (b) the Initial Agreement was varied by a deed between BHI and Soar dated 27 July 2017;
 - (c) a replacement agreement was executed by BHI and Soar on 20 December 2017 (**Agreement**);
 - (d) the Agreement was varied by a deed between BHI and Soar dated 11 May 2018;
 - (e) the theory component of the CPL Diploma was provided by BHI;
 - (f) the practical flight training component of the CPL Diploma was provided by Soar;
 - (g) the CPL Diploma involved the teaching of students with a view to students applying for a Recreational Pilot's Licence (**RPL**), then a Private Pilot's Licence (**PPL**) and then a Commercial Pilot's Licence (**CPL**);
 - (h) the CPL Diploma did not include provision of a RPL, PPL or CPL by BHI or Soar to students; and
 - (i) only CASA was and is empowered to grant a person a RPL, PPL or CPL, on application, pursuant to Part 61 of the *Civil Aviation Safety Regulations 1998* (Cth) (**Regulations**).
5. It admits paragraph 5.

CASA requirements for obtaining pilot's licences, ratings and endorsements

6. It admits paragraph 6, but otherwise refers to the Regulations (including reg 61.475) for their full terms and effect.
7. It admits paragraph 7, but otherwise refers to the Regulations (including reg 61.515) for their full terms and effect.
8. It admits paragraph 8, but otherwise refers to the Regulations (including reg 61.580) for their full terms and effect.
9. It admits paragraph 9, but otherwise refers to the Manual of Standards for its full terms and effect.
10. It admits paragraph 10, but otherwise refers to the Regulations for their full terms and effect.
11. It admits paragraph 11, but otherwise refers to the Regulations for their full terms and effect.
12. It admits it knew of the Regulations and their content, and therefore admits the allegations in paragraph 12.

VET FEE-HELP and VET Student Loans

13. It admits paragraph 13.

B. CONTRACT

Terms

14. It admits that, during the Relevant Period, it entered into contracts with students who enrolled in the CPL Diploma whereby it agreed to provide the theory component of units in the CPL Diploma into which those students enrolled, and otherwise denies paragraph 14.

15. It denies paragraph 15, and says further that:
- (a) whether any student could successfully complete each unit in the CPL Diploma or meet the CASA CPL Requirements was dependent on each individual student's performance;
 - (b) by its nature as a course of study there was no guarantee that all students would pass each unit in the CPL Diploma, or would successfully obtain a RPL, PPL or CPL on application to CASA; and
 - (c) only CASA was empowered to grant a RPL, PPL or CPL, on application, to any of the students enrolled in the CPL Diploma.

Breach

Aeronautical knowledge – materials, examination standards, monitoring systems

16. It denies paragraph 16.
17. It denies paragraph 17.
18. It denies paragraph 18.

Aeronautical knowledge – the RPL Short-Cut

19. It denies paragraph 19, and says further that:
- (a) the holder of a pilot certificate (**PC**) was entitled to apply to CASA for a RPL pursuant to reg 61.480, and was required to successfully complete a flight review pursuant to reg 61.745, of the Regulations; and
 - (b) as such, it was open to students to first obtain a PC and then apply to CASA for a RPL.
20. It denies paragraph 20.
21. It denies paragraph 21.

Flight training – instructors, aeroplanes, monitoring systems

22. It denies paragraph 22, and says further that Soar was required under the Initial Agreement and the Agreement to engage flight instructors.
23. It denies paragraph 23, and says further that:
- (a) Soar was required under the Initial Agreement and the Agreement to engage flight instructors; and
 - (b) Soar engaged properly qualified flight instructors.
24. It cannot plead to paragraph 24 as it contains no allegations against it, and says further that paragraph 24 is liable to be struck out.
25. It denies paragraph 25, and says further that:
- (a) BHI did not have any aeroplanes;
 - (b) aeroplanes for flight training by students were provided by Soar;
 - (c) the majority of students enrolled in the CPL Diploma were part-time students.
26. It denies paragraph 26.

Conclusion

27. It denies paragraph 27.
28. It denies paragraph 28.

C. AUSTRALIAN CONSUMER LAW GUARANTEES

29. As to paragraph 29, it:
- (a) denies it agreed to provide the CPL Course (as defined in paragraph 15(a) of the SOC, by reference to the definitions in paragraphs 1 and 8 of the SOC);
 - (b) does not admit the Plaintiffs and Group Members were consumers within the meaning of section 3(3) of the *Australian Consumer Law (Victoria)*;

- (c) denies the CPL Diploma was provided to students in trade or commerce within the meaning of section 2(1) of the *Australian Consumer Law (Victoria)*; and
- (d) otherwise denies paragraph 29.

Statutory Guarantees

- 30. It denies paragraph 30.
- 31. It denies paragraph 31.
- 32. It denies paragraph 32.
- 33. It denies paragraph 33.

D. NEGLIGENCE

Duty

- 34. It admits paragraph 34, but otherwise refers to the ETR Act for its full terms and effect.
- 35. It admits paragraph 35, but otherwise refers to the ETR Act for its full terms and effect.
- 36. It admits paragraph 36.
- 37. It admits paragraph 37, but otherwise refers to the ETR Act for its full terms and effect.
- 38. It admits paragraph 38.
- 39. It denies paragraph 39.
- 40. It denies paragraph 40.
- 41. It denies paragraph 41.
- 42. As to paragraph 42, it:

- (a) does not admit paragraph (a);
 - (b) denies paragraph (b);
 - (c) denies paragraph (c); and
 - (d) otherwise denies paragraph 42.
43. It denies paragraph 43.
44. It denies paragraph 44, and says further that:
- (a) the duty alleged is a duty to avoid pure economic loss to students;
 - (b) it relies upon Part XII of the *Wrongs Act 1958* (Vic);
 - (c) it relies upon, inter alia, the statutory scheme created by the ETR Act together with the NVETR Act, the *Higher Education Support Act 2003* (Cth) and the *VET Student Loans Act 2006* (Cth).

Breach

45. It denies paragraph 45.
46. It denies paragraph 46.
47. It denies paragraph 47.
48. It denies paragraph 48.

E. UNCONSCIONABILITY

49. It denies paragraph 49, and says further that each student's statement of fees indicated the units into which the student was enrolled and billed fees.
50. As to paragraph 50, it:
- (a) refers to its denial of paragraph 49;
 - (b) denies paragraph 50;

- (c) says further that each student's statement of fees indicated the units into which the student was enrolled and billed fees; and
- (d) says further that the units into which students were enrolled were reported to the Commonwealth Department of Education, Skills and Employment (as it is now known) to facilitate payment to BHI.

51. It admits paragraph 51 but not the particulars thereto.

52. It denies paragraph 52.

53. It denies paragraph 53.

54. It denies paragraph 54.

F. MISLEADING OR DECEPTIVE CONDUCT

55. It denies paragraph 55.

56. It refers to its denial of paragraph 55, and therefore denies paragraph 56.

57. It denies paragraph 57.

58. It denies paragraph 58.

G. LOSS AND DAMAGE

59. It denies paragraph 59.

60. It does not admit paragraph 60.

H. COMMON QUESTIONS

61. As to paragraph 61, it:

- (a) admits paragraph (a), subject to any differences between the contracts entered into by each Group Member with BHI;
- (b) denies paragraph (b), as this is a question individual to each student;

- (c) denies paragraph (c), as this is a question individual to each student and the assumption is disputed;
- (d) denies paragraph (d);
- (e) admits that whether BHI set the theory examinations it administered at a standard comparable to the CASA Prescribed Knowledge Examinations is a common question of fact, and otherwise denies paragraph (e);
- (f) denies paragraph (f);
- (g) denies paragraph (g);
- (h) denies paragraph (h);
- (i) denies paragraph (i);
- (j) denies paragraph (j);
- (k) denies paragraph (k);
- (l) admits paragraph (l);
- (m) denies paragraph (m);
- (n) denies paragraph (n);
- (o) denies paragraph (o);
- (p) refers to its denial of paragraph (o), and therefore denies paragraph (p);
- (q) admits that there may be some principles for assessing any kind of loss suffered that are common to all Group Members, or sub-groups therein, but otherwise denies paragraph (q).

I. PROPORTIONATE LIABILITY DEFENCE

62. If (which is denied) BHI is liable to some or all of the Plaintiffs or Group Members, then the claims of the Plaintiffs and Group Members in this proceeding are apportionable claims within the meaning of s 28AF of the *Wrongs Act*.

63. If the guarantees alleged in paragraphs 30 and 32 of the SOC are proved, then Soar guaranteed to the Plaintiffs and Group Members that the supply of the practical flight training component of the CPL Diploma would be:
- (a) rendered with due care and skill; and
 - (b) fit for the purpose alleged in paragraph 31 of the SOC;
- (the Guarantees).**
64. If some or all of the allegations in paragraphs 19 to 27 of the SOC are proved, then Soar breached the Guarantees.
65. If the duty alleged in paragraph 44 of the SOC is proved, then Soar owed an equivalent duty of care to the Plaintiffs and Group Members.
66. If some or all of the breaches alleged in paragraphs 45(d)-(h) and 46 of the SOC are proved, then Soar breached its duty of care.
67. If the allegations of misleading or deceptive conduct by BHI in paragraphs 55 to 58 are proved, then Soar also engaged in the same misleading or deceptive conduct.
68. As a result of the above, Soar is a concurrent wrongdoer within the meaning of s 24AH of the *Wrongs Act*.
69. In the premises, and pursuant to s 24AI of the *Wrongs Act*:
- (a) BHI 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 BHI's responsibility for the loss or damage; and

(b) judgment must not be given against BHI for more than that amount.

Dated: 25 May 2020

M J Hooper

Lander & Rogers

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Lander & Rogers

Solicitors for the defendant