IN THE MATTER OF AN ARBITRATION
PURSUANT TO THE ARBITRATION VICTORIA ARBITRATION RULES 2022

BETWEEN

Claimant

- and -

Respondent

Partial Award

(Award on all matters save for interest and costs)

2 October 2023

Arbitral Tribunal: Adam Rollnik – Sole Arbitrator

16th floor | room 11 | Owen Dixon Chambers West | 525 Lonsdale St | Melbourne Vic 3000

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A. The Parties

1. The **Claimant** is [redacted] of [redacted] Melbourne, Victoria 3000.

2. The Claimant was represented in the arbitration proceedings by [redacted] [redacted]. At the

substantive hearing, held on 4 August 2023, the Claimant was also represented by Christopher [redacted] of Counsel.

3. The **Respondent** is the [redacted] [redacted] of [redacted] Carlton, Victoria 3053.

4. The Respondent is represented in these proceedings by [redacted] [redacted]. At the substantive hearing on 4 August 2023, the Respondent was also represented by [redacted] of Counsel.

B. The Dispute

5. The Claimant (trading as [redacted]) is a company carrying on business as a provider of professional [redacted] services.

6. The Respondent is a company carrying on business as a [redacted] Training Organisation within the meaning of the [redacted] [redacted]), and it trades or has traded under the names:

    (a) [redacted];

    (b) [redacted];

    (c) [redacted]; and

    (d) [redacted].

7. The dispute is about the Respondent's liability (or alleged liability) to the Claimant for the payment of commission fees (on students referred by the Claimant to the Respondent) and the quantum of the fees (if any) that are outstanding and payable by the Respondent to the Claimant.

8. The parties agree that they entered into written contracts in connection with the referral of students and the payment of commission fees:

(a) on or about 8 January 2018 (**2018 Agreement**);[1] and

(b) on the same or similar terms on or about 15 January 2019 (**2019 Agreement**).[2]

9. Importantly, the Claimant alleges, and the Respondent denies, that a further contract was entered into on 28 January 2020 (**2020 Agreement**). Whether there was, in fact, a 2020 Agreement is one of the issues for determination in this arbitration.

10. By its points of claim,[3] the Claimant alleged, in summary, that:

(a) it provides corporate and individual ██████ services;

(b) it entered into three agent agreements with the Respondent ██████████████ ████████████████████) as follows:

(i) 2018 Agreement;

(ii) 2019 Agreement;

(iii) 2020 Agreement;

(together, the **Agreements**);

(c) under the Agreements, the Claimant enrolled (or facilitated the enrolment of) students into the Respondent's courses[4] and, upon the payment of fees by the students to the Respondent,[5] the Respondent agreed to pay the Claimant commission, at the rate of 35%, on the tuition fees paid by the students to the Respondent;

(d) in breach of the Agreements, the Respondent failed to pay commission for 28 students; and

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[1] Accepted by the Respondent's counsel at the substantive hearing on 4 August 2023.
[2] Accepted by the Respondent's counsel at the substantive hearing on 4 August 2023.
[3] I.e., the statement of claim filed in the County Court dated ███████ in proceeding ███████, which stood as the Claimant's points of claim in the arbitration.
[4] Points of claim, paragraph 8.
[5] Points of claim, paragraph 7(e).

(e) the quantum of the commission fees outstanding is $143,761.35.

11. By its points of defence,[6] the Respondent, among other things, did not admit the Agreements as pleaded but acknowledged making payments of commission to the Claimant in the period January 2018 to April 2020.

12. Further, the Respondent pleaded that despite the Claimant alleging that it was a term of the Agreements that the Respondent would pay commission on paid tuition fees, the sums claimed by the Claimant were not calculated pursuant to paid tuition fees, and on this basis, the Claimant's claim was an abuse of process and should be struck out. This abuse of process defence was not pressed at the substantive hearing.

Issues to be decided in this arbitration

13. Notwithstanding the parties' pleaded positions in the points of claim and the points of defence, the matters in dispute crystallised prior to and at the substantive hearing (held on 4 August 2023) to a number of discrete issues which fall to be decided. In the Claimant's written submissions dated 11 August 2023 (**Claimant's closing submissions**), the Claimant stated:

> [7] "The issues in dispute, for consideration by the Arbitrator, are:
>
> (a) whether the 2020 Agreement was valid and in force;
>
> (b) whether any commission is payable under the Agreements for the five student referrals disputed by the Defendant; and
>
> (c) whether any amounts should be deducted for payments made to Ms ██████ in her personal capacity, by the Defendant."

[6] I.e., the defence filed in the County Court dated ██████████ in proceeding ██████████, which stood as the Respondents points of defence in the arbitration.

14. The Respondent agreed with subparagraphs (a) and (b) above and characterised subparagraph (c) in slightly wider terms.[7] In any event, the parties essentially agreed as to the issues for determination.

15. The Respondent maintained that it was not liable to pay the Claimant any amount on account of the Claimant's claim. In other words, it denied liability on the footing that, among other things, the Claimant had not proved its claim. Nevertheless, in relation to the issue of quantum, the parties agreed at the substantive hearing[8] to use a document entitled the "█████ *Commission Report*", which was prepared by the Respondent, as the basis for calculating the quantum of (any) fees owing.

16. In the Claimant's closing submissions,[9] the Claimant submitted that it was entitled to payment of $68,194.80.[10] In contrast, the Respondent submitted that the Claimant's claim should be dismissed, and the Claimant should be ordered to pay the Respondent $43,398.96 by way of set off.

C. Arbitration Agreement

17. The arbitration agreement entered into by the parties (dated 7 February 2023) is exhibited to the orders made by the County Court of Victoria on ████████ 2023 (**Orders**) in proceeding ████████ (**County Court Proceeding**). Pursuant to the Orders, and by the consent of the parties as set out in the signed arbitration agreement, the dispute the subject of the County Court Proceeding (**Dispute**) was referred to me, Adam Rollnik, as the sole Arbitrator to determine the dispute pursuant to the Arbitration Victoria Rules (dated 16 May 2022) (**Rules**).[11]

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[7] The Respondent said in its written closing submissions, paragraph 1, that the arbitral tribunal needed to "*balance any commission said to be owing by the Respondent… as against payments for commission already made*…" and determine the correct method of calculating commission.

[8] Conducted in person over the course of 1 day on 4 August 2023.

[9] At [17].

[10] In other words, while the Claimant pleaded an entitlement to payment of $143,761.35, in its closing submissions, it sought payment of and had reduced its claim to the reduced amount of $68,194.80.

[11] A copy of the Rules can be found here: www.arbitrationvictoria.com

18. I wrote to the parties on 7 February 2023 and accepted my appointment as Arbitrator to arbitrate the Dispute pursuant to the Rules and subject to the *Commercial Arbitration Act 2011* (Vic). A copy of the Orders, which include the agreement to refer the Dispute to me as Arbitrator, is exhibited to this Partial Award as **Exhibit A**.

19. The place of arbitration is Melbourne, Victoria, Australia; the governing law of the arbitration is the law of Victoria, Australia, and the law of the contract is Victorian law. (The parties agreed upon these matters at the first directions hearing, and this agreement is recorded in Procedural Order No. 1 – see Exhibit B to this Partial Award).

20. I note that neither party objected to my appointment as Arbitrator, and my appointment is consistent with the parties' written agreement and the orders of the County Court of Victoria.

D. Procedural history

21. On 10 February 2023, I wrote to the parties by email and advised them that a preliminary hearing, (or directions hearing), would be held on 14 February 2023 remotely by Zoom. A hearing took place as scheduled, and the parties' lawyers both appeared (Mr ████ for the Claimant and Mr █████ for the Respondent). At the conclusion of the hearing, Procedural Order 1 was made by consent.

22. Additional Procedural Orders were made as described in paragraphs 30-32 below.

23. By consent, and as set out in the Procedural Orders, the parties agreed, among other things, as follows:

    (a) I am appointed as the sole Arbitrator of the dispute.

    (b) The law of the contract is the law in Victoria, Australia.

    (c) The seat of the arbitration is Melbourne, Victoria, Australia.

(d) The parties shall conduct themselves consistently with the efficient use of time and resources and with the objects of the Rules and the Arbitration Victoria User Manual 2022.[12]

(e) Neither party requested leave for expert witnesses.

(f) The statement of claim dated (filed in the County Court Proceeding), shall stand as the Statement of Case in the Arbitration.

(g) The defence, dated (filed in the County Court Proceeding), shall stand as the Statement of Defence in the Arbitration.

(h) Each party shall file and serve witness statements (on the dates set out in Procedural Order 1, and as extended in later Procedural Orders) setting out the evidence upon which the party relies and each witness shall be made available for cross-examination.

(i) Any application for disclosure of documents is to be made by 6 March 2023 and extended to 21 April 2023 (by consent).

(j) A one-day hearing is to be held in person at Level 11, Owen Dixon Chambers West, 525 Lonsdale Street, Melbourne, Victoria 3000, on 28 April 2023 (extended by consent to 4 August 2023), with the hearing to be held on "stop-clock" basis with equal time allocated to each party.

24. Among other documents, the following documents were filed, served and relied on by the parties:

(a) **Claimant**:

(i) Three witness statements of dated as follows: 17 April 2023; 16 June 2023; and 3 August 2023;

(ii) Claimant's Closing Submissions dated 11 August 2023;

[12] A copy of the user manual can be found here: www.arbitrationvictoria.com

(iii) Claimants' Closing Submissions in Reply dated 22 August 2023;

(b) **Respondent**:

(i) Two witness statements of [redacted] dated as follows: 2 June 2023 and 17 July 2023;

(ii) Respondent's Opening Submissions dated 3 August 2023;

(iii) Respondent's Closing Submissions dated 17 August 2023.

25. In making this Award, I have read and reviewed the documents set out above, along with a number of other documents that were also filed, served and relied on in the proceeding, which I have also considered in making this award.

26. I note that both parties relied on an Excel spreadsheet entitled the "[redacted] *Commission Report*", which was provided by the Respondent in response to the Claimant's request for disclosure of documents made on or about 27 July 2023. This document is discussed in these reasons in further detail below.

E. 3 August 2023 Application for disclosure and to adjourn the substantive hearing

27. On 3 August 2023, the day before the day scheduled for the final substantive hearing, I heard an application by the Claimant for an adjournment to the substantive hearing, and for orders for discovery (disclosure) of documents.

28. The application was heard remotely by Zoom, with the Claimant appearing by its Solicitor, Mr [redacted] and the Respondent appearing by its Counsel, Mr [redacted]

29. I denied the application for further discovery and I denied the application to adjourn the substantive hearing. Below is a chronology of events and my reasons for denying the applications.[13]

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[13] I note that the parties solicitors had adopted the use of first names (rather than surnames) in correspondence between themselves, and I adopted that approach also in my correspondence with the parties' solicitors.

Chronology of events and reasons for denying the 4 August 2023 application for adjournment and for discovery

30. During the course of the Arbitration and prior to the substantive hearing, which took place in person on 4 August 2023 at level 11 Owen Dixon Chambers West, 525 Lonsdale Street, Melbourne, Victoria, I made 5 written Procedural Orders as follows:

    (a) Procedural Order 1 dated 14 February 2023;

    (b) Procedural Order 2 dated 18 April 2023;

    (c) Procedural Order 3 dated 31 May 2023;

    (d) Procedural Order 4 dated 20 June 2023;

    (e) Procedural Order 5 dated 28 July 2023.

31. A copy of each of Procedural Orders 1-5 (together, the **Procedural Orders**) is attached at **Exhibit B** to this Partial Award.

32. Each of the Procedural Orders was made with the consent of both parties. In each case, there was either a directions hearing before making the Procedural Orders (conducted remotely by Zoom, at which the parties' lawyers appeared and made submissions); or there was correspondence between the parties and me, and orders were agreed on the papers thereafter.

33. In all cases, I provided the Procedural Orders to the parties in draft to ask for comment from them and to confirm that they agreed to the orders before they were made by me. In each case, both parties agreed to the Procedural Orders before I finalised and signed them.

34. Pursuant to Procedural Order 1 (among other things):

    (a) the hearing of the substantive dispute was scheduled to take place on 28 April 2023 in person for 1 day on a stop-clock basis; and

(b) the parties were required (by order 24 of Procedural Order 1) to make any application for disclosure of documents by **6 March 2023**.

35. Thereafter, the date for any application for disclosure of documents was amended by Procedural Order 2, such that any application for disclosure had to be made by **21 April 2023**. That date of 21 April 2023 was not thereafter amended, and the parties were therefore required to (and agreed to) make any application for disclosure of documents by 21 April 2023. No applications for disclosure were made by 21 April 2023.

36. Procedural Order 2 also amended (by consent) the date for the hearing of the substantive dispute to **26 June 2023** for 1 day.

37. Procedural Order 3 was made on 31 May 2023, and the substantive hearing date was confirmed.

38. Procedural Order 4 was made on 20 June 2023, and the date for the substantive hearing was amended (by consent) to **4 August 2023** for 1 day.

39. On 27 July 2023, a "pre-trial" directions hearing was held (a week and a day from the date scheduled for the substantive hearing – 4 August 2023). This 27 July 2023 hearing was heard by me remotely by Zoom and Mr [redacted] appeared for the Claimant, and Mr [redacted] appeared for the Respondent (as was the usual practice). At this hearing, by consent, programming orders were made, and the following additional orders were made by consent:

    (a) Leave was granted:

        (i) *nunc pro tunc* to the Respondent to file and serve a supplementary witness statement from [redacted] (which had already been filed and served on 17 July 2023);

        (ii) to the Respondent to file a further spreadsheet on 27 July 2023; and

    (b) the *Respondent will seek to provide* certain further documents described as:

        (i) the student course variation report (by 12 noon on 28 July 2023); and

(ii) *a Xero (or similar) accounting report from early 2018 showing payments received by the Respondent (by 12 noon on 31 July 2023).*

40. The orders described above are set out in Procedural Order 5, made on 28 July 2023.

41. In relation to the documents described in subparagraph 39(b) above, the orders were made in those terms (i.e., "*the Respondent will seek to provide*") because the application for discovery was made on 27 July 2023 without notice, it was made *viva voce* by Mr ████ for the Claimant at the directions hearing on 27 July 2023, it was made without supporting evidence, and Mr ████ for the Respondent stated in oral submissions in response to Mr ████ application words to the effect that he wished to assist, but that he had no instructions (in other words, he did not know if the identified documents were in the possession of the Respondent) but anticipated that his client the Respondent would probably be able to provide documents of the description sought.

42. In response to the parties' submissions, I indicated at the hearing on 27 July 2023 that I intended to make orders in the form set out in paragraph 39 above (and as ultimately made). Mr ████ stated at the hearing that he was content with that approach, and he later confirmed that he was content with the (written) content of Procedural Order 5, which I circulated in draft before finalising it.

43. On Monday 31 July, at 4.11 pm, Mr ████ the Claimant's solicitor, sent me an email (copied to the Respondent) in which he said:

> "Dear [Mr Rollnik],
>
> By way of update, the respondent failed to comply with Procedure Order 5, dated 28 July 2023 and did not provide any of the required information.
>
> We understand that the respondent has engaged a [sic] Counsel, and our Counsel ████, should contact him to discuss the further progress of this matter.
>
> Thank you,
>
> Kind Regards,

[redacted]”

44. I responded to Mr [redacted] (copy to Mr [redacted] later that day at 5.30 pm by email as follows:

“Dear [Mr [redacted]

Thank you for your email.

As you know, the parties have liberty to apply.

Kind regards”

45. On Tuesday, 1 August 2023, at 10.33 am Mr [redacted] (solicitor for the Claimant) sent an email with two attachments to Mr [redacted] (solicitor for the Respondent), copied to me, which stated:

“Dear [redacted]

We refer to the [redacted] report and Xero statement provided by you.

Please note both [sic] the information is incomplete. The [redacted] report provided by your client [is] missing the crucial information.

We are enclosing a [redacted] sample generated from [redacted] and highlighted in yellow for the missing information. The [redacted] column should contain the following information:

1. Reason for cancellation

2. Date of cancellation

3. Person responsible for cancellation

4. Comment for COE cancellation

We are also enclosing a copy ████ quick reference guide for your client's reference.

Furthermore, the Xero statement provided by you does not reflect any copy of the invoices raised. Kindly provide us with the copy of all the invoices raised for each student.

We also refer you to our offer dated 28 July 2023 and extend the same till 5 pm today. It will be highly appreciated if you can respond to this correspondence on priority."

46. Then, on Wednesday, 2 August 2023, at 12.41 pm, two days before the date scheduled for the substantive hearing, I received the following email from Mr █████ copied to the Respondent:

Dear [Mr Rollnik],

We refer to our previous correspondence dated 31 July 2023.

As you are aware of the respondent's failure to comply with Procedural Order No 5, we are unable to finalise our client's witness statement and Tribunal book.

The respondent has only provided incomplete information and either failed or ignored to provide any response to our request for the complete information. In this case, we inform you that the matter is not ready to be heard on 4 August 2023.

We have made attempts to reach the respondent's solicitor to seek the requested information but no information [has been] provided to date.

We have proposed the following minutes of orders to the respondent today in [the] morning and also tried to reach ████ [███████ but received no response till now:

1. Respondent provide all the requested information pursuant to order 5, by 4 pm Friday, 4 August 2023.

2. Applicant submits a witness statement by 4 pm, Friday, 11 August 2023.

3. Applicant provides opening submission by 4 pm, 15 August 2023.

4. Respondent submits reply submission by 4 pm, Friday, 18 August 2023.

5. The applicant submits Tribunal book by 21 August 2023.

6. the arbitration hearing to be listed any next available date after 22 August 2023.

We are available to attend a direction hearing to deal with the issues any time till 7 pm today or any time convenient to you tomorrow.

Should you have any further queries, please feel free to contact us via email or phone."

47. Given that the substantive hearing was scheduled for 4 August 2023, I understood the Claimant's email above to be an application to adjourn the substantive hearing and for orders for further disclosure of documents. After ascertaining the availability of the parties, I scheduled a hearing of the application for 1.15 p.m. the next day, on 3 August 2023, by Zoom. Mr ███ appeared for the Claimant, and Mr ████ ██████ (of counsel) appeared for the Respondent at the hearing of the application, which took place as scheduled.

48. At the hearing, Mr ███ made oral submissions and sought orders to adjourn the substantive hearing (set down for the next day, 4 August 2023, at 10 a.m.), and he sought orders for discovery and subpoenas. He said he needed to make more inquiries and that the documents provided by the Respondent (earlier in the week, in response to Procedural Order 5) were deficient; he said columns had been deleted from a spreadsheet, and he said that counsel availability (for the hearing tomorrow) is an issue.

49. Mr ███ further submitted that the parties are not ready to proceed tomorrow and that his failure to file the further witness statement which he intended to file and his failure to

prepare a draft trial book was caused by or was related to the supplementary witness statement that was filed by the Respondent [by consent] on 17 July 2023.

50. Mr ▇▇▇ said that while the witness statement from the Respondent was provided to him on 17 July 2023 [it was filed with the Tribunal on that date as well], he had not considered it in detail until 27 July 2023, at which time he had shared it with his counsel. Mr ▇▇▇ said, in effect, that after considering the new witness statement (received on 17 July 2023 and considered by the Claimant on or about 27 July 2023), his client's counsel, Mr ▇▇▇ ▇▇▇ expressed his "unavailability" to deal with the matter because of the "tight timetabling". I understood Mr ▇▇▇ submission to be that Mr ▇▇▇ had advised, after being shown and having considered the witness statement on or about 27 July 2023 (10 days after the witness statement was filed and served), that he was not available to continue with the matter.

51. Mr ▇▇▇ did not make any submissions about any steps that the Claimant may or may not have taken to brief alternative counsel after Mr ▇▇▇ indicated, on or about 27 July 2023, that he was unavailable to appear at the substantive hearing. Mr ▇▇▇ did not explain why the Claimant had taken no steps to consider and deal with any issues that may have arisen from the statement served on 17 July 2023 until ten days later, on 27 July 2023.

52. Mr ▇▇▇ submitted that the witness statements[14] have different figures and that he needs to make more inquiries. He said important information had not been provided by the Respondent. He submitted that there is no prejudice to the Respondent if the matter is adjourned. He did not explain why there had not been any application for discovery in line with the agreed Procedural Orders or within a reasonable time of the scheduled final hearing.

53. ▇▇▇ ▇▇▇ for the Respondent, opposed the application to adjourn and for further discovery. He stated that, in summary:

    (a) The Claimant had had sufficient time to present its case;

[14] I understood Mr ▇▇▇ reference to the "*witness statements*" to be those filed and served by the Respondent.

(b) The Tribunal was obliged to hear and determine the matter in a fast, final and fair way, in accordance with the Arbitration Victoria Rules;

(c) The Claimant needed to prove its case, and if it had failed to apply for discovery within the time allowed, then it could not now seek to blame the Respondent if it lacked information to prove its case;

(d) The Claimant would be prejudiced by any delay.

54. Mr ▇▇ made submissions in reply along the lines of his primary submissions.

55. I carefully considered the Claimant's application, including the procedural history, the parties' submissions and my obligations under the Rules. I determined to dismiss both the application for further discovery, and the application for an adjournment of the substantive hearing for the reasons explained below.

56. First, there was no satisfactory reason given by the Claimant for its failure to seek discovery in line with the agreed Procedural Orders[15] (or within a reasonable time of the date scheduled for the final hearing) and to order discovery at this stage (on 3 August 2023, the day before the date scheduled for the substantive hearing) would likely cause the Respondent prejudice[16] and would lead to the substantive hearing being vacated.

57. The Claimant had been on notice of the trial date for months but did not seek discovery when it had an opportunity to do so in line with the Procedural Orders. Further, the Claimant had been served with the Respondent's further witness statement (filed and served by consent) on 17 July 2023. If, after receiving that statement, the Claimant believed that further discovery was needed, it could and should have made an application for discovery on notice (supported by evidence if required) well before the hearing. It could have done so. No explanation was offered for its failure to do so.

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[15] As agreed by the parties and as recorded in the Procedural Orders, any application for disclosure of documents was to be made by 6 March 2023 extended to 21 April 2023 (by consent).

[16] While the Respondent did not identify any particular prejudice, I understood the Respondent's submission to be that prejudice would result from the additional time and cost that would inevitably result from any orders for discovery at this late hour, which would lead to the rescheduling of the substantive hearing to a later date.

58. Finally, given the time between 27 July 2023, when the Claimant's Counsel, Mr [redacted] indicated his unavailability to continue with the brief, and the hearing date, 4 August 2023, it appeared to me that the Claimant had sufficient time to brief alternative counsel (for a one-day hearing) but took no steps to do so. The Claimant's (unexplained) decision not to involve its usual counsel until 27 July 2023, ten days after receipt of the 17 July 2023 witness statement, and its decision not to take steps on and from 27 July 2023, to brief alternative counsel if its preferred counsel was not available (because of "*tight timetabling*") is, in my view, not a satisfactory reason for the adjournment of the substantive hearing, taking into account the rights of the Respondent to have the matter determined on the agreed hearing date.

59. This is especially so given that the Respondent opposed the application, and I am bound to give consideration to the Rules under which the parties agreed to operate – particularly the principal objective of the Rules, which is to provide *fast, final and affordable arbitration*, considering the amounts in dispute and the complexity of the facts involved. This case is not particularly complex (although it does involve a number of issues, including issues of credit). Legally, it is a straightforward contract case involving matters of credit and a dispute about quantum. There is no expert evidence. There is one witness for each party and five relatively short witness statements plus exhibits. The main issues are whether an entitlement to payment exists and, if so, the quantum of the entitlement. The amount claimed (in the points of claim) of $143,761.35 is a reasonably significant amount that I have also taken into consideration.

60. Given the lack of any reasonable explanation for the Claimant's failure to seek discovery sooner, and its lack of any explanation to take steps to brief alternative counsel, and considering the rights of the Respondent and the parties' agreement to arbitrate pursuant to Rules which mandate an expedited timetable, in the exercise of my discretion, after hearing from the parties, I determined to dismiss the applications to adjourn and for further discovery. In my view, the parties have had a reasonable opportunity to present their case, including time to seek discovery (disclosure of documents). There was nothing outside of the Claimant's control that explained its delay.

61. Despite my dismissal of the application, at the hearing, Mr ████ made a further oral submission seeking to adjourn the hearing until next week (i.e., he now sought to adjourn the substantive hearing, but without any orders for discovery and the like). He said that his client's Counsel, Mr █████ was not available for the hearing tomorrow and that his client would be prejudiced if the hearing went ahead.

62. Mr █████████ opposed the further adjournment application (after obtaining instructions) and submitted that both he and his client were not available for any trial next week and that the Respondent would suffer prejudice because of any delay, given that the hearing would need to be adjourned for a significant period.

63. In circumstances where:

    (a) The Claimant had received the Respondent's further witness statement on 17 July 2023 but had apparently not take steps to seek counsel's input on the statement until 10 days later, on 27 July 2023, without explanation;

    (b) The Claimant's preferred counsel had, on 27 July 2023, indicated that he was unavailable for the 4 August 2023 hearing;

    (c) The reason given for counsel's unavailability was because of "tight timetabling", and (in my view) that was not a reason outside of the Claimant's control given that the timetabling had not changed (in Procedural Order 4, dated 20 June 2023, I ordered, by consent, that the dispute be set down for the substantive hearing on 4 August 2023, and that date had not changed);[17]

    (d) The Respondent, and its counsel, were not available next week (so the substantive hearing could not be heard next week, in line with the Claimant's further application to adjourn);

[17] In other words, this was not a case, for example, where counsel had been involved for many months and had become ill a week from the substantive hearing. This was, instead, a case where the availability or unavailability of preferred counsel was within the Claimant's control.

(e) There was no reason given why alternative counsel had not been briefed once it became apparent that the Claimant's preferred counsel was not available (nor was any explanation given of any steps taken to brief alternative counsel);

(f) The parties had agreed to arbitrate under the Arbitration Victoria Rules, which require, among other things:

> "7. The principal objective of these Rules is to provide fast, final and affordable arbitration, taking account of the amounts in dispute and the complexity of the facts or issues involved.;
>
> …
>
> 51. Unless the parties otherwise agree or the arbitrator otherwise orders, the Arbitrator must direct that the substantive hearing be heard as soon as reasonably practicable and that such hearing shall be completed no later than 90 days from the commencement of the arbitration."

(g) The Claimant has been given a reasonable opportunity to present its case, including the opportunity to brief counsel at an early stage, and to seek orders for discovery well prior to the hearing,

in the exercise of my discretion, I dismissed the further application for an adjournment of the substantive hearing.

64. There was nothing in the oral submissions put to me by the Claimant (and there were no written submissions and no affidavit or other evidence put before the Tribunal for the purposes of the application), to suggest that the reason for the situation (no counsel briefed for the hearing) was anything other than a failure to take steps to brief counsel in good time. Taking into account the following matters:

(a) the terms of section 1AC of the *Commercial Arbitration Act 2011* (Vic);

(b) the Rules that require "*fast, final and affordable arbitration*" and to have the substantive hearing heard *as soon as reasonably practicable*;

(c) the time already taken since the first Procedural Order, which was made on 14 February 2023, and the opportunities the parties have had to date to prepare the matter for the substantive hearing, and

(d) the Respondent's opposition to any adjournment (and its unavailability for any hearing next week),

I dismissed the application to adjourn.

F. 4 August 2023 – The substantive hearing

65. The substantive hearing took place on 4 August 2023 from 10 am until (approximately) 4 pm, at which time the hearing concluded (save for written closing submissions which were provided at a later date) on all matters except interest and costs. The hearing had been scheduled to conclude at 5 pm, so further time was available, but each party had nothing further to add by 4 pm so the hearing was closed at that time.

66. The following people were in attendance at the hearing, which was conducted in person at level 11, 525 Lonsdale Street, Melbourne, Victoria, 3000.

Clamant	**Respondent**
[redacted] (Counsel)	[redacted] (Counsel)
[redacted] (Solicitor)	[redacted] (Solicitor)
[redacted] (Solicitor)	[redacted] (witness)
[redacted] (witness)	[redacted]
[redacted] (Ms [redacted] husband)	

Claimant's further application to adjourn

67. At the substantive hearing on 4 August 2023, the Claimant appeared by its counsel, Mr [redacted] [redacted], and the Respondent appeared by its counsel, Mr [redacted] [redacted].

68. At the commencement of the substantive hearing, the Claimant sought an adjournment of the hearing (to another day) on the basis that the Respondent had failed to comply with orders for discovery made in Procedural Order 5. The Respondent opposed the application for an adjournment.

69. Mr [redacted] made submissions on the Claimant's behalf. He said, in summary:[18]

    (a) that the information as to fees paid to the Respondent was information in possession of the Respondent;

    (b) that information was not provided by the Respondent until 31 July 2023, one business day late (considering the orders made in Procedural Order 5);

    (c) the information that was provided by the Respondent was incomplete, and a table [spreadsheet] that was provided by the Respondent in response to the order for discovery had a number of columns deleted;

    (d) the Claimant relied on standard discovery being provided;

    (e) the Claimant cannot know what commission fees were payable to it because the information provided by the Respondent was inaccurate;

    (f) the Claimant needed to issue subpoenas to obtain further information;

    (g) costs will be an adequate remedy for any delay.

70. Mr [redacted] made submissions on the Respondent's behalf. He said, in summary:

[18] I note that Mr [redacted] did **not** make submissions to the effect that he had had insufficient time to prepare for the hearing. Further, Mr [redacted] appeared to me to be fully across the facts, matters and issues in the dispute, and to my observation, Mr [redacted] was fully prepared for the hearing.

(a) The application was a re-hash of yesterday's application to vacate, which had already been denied;

(b) The proceeding was originally commenced in June 2022 [in the County Court], and the Claimant has had since that time ample opportunity in Court (after proceedings were commenced), and in this Arbitration to make an application for discovery or for subpoenas but has not done so;

(c) No reason has been given by the Claimant for its failure to seek discovery or subpoenas;

(d) Standard discovery rules do not apply;

(e) There is no right to discovery in the arbitration, and the Claimant has had ample opportunity to apply for discovery and subpoenas but has not done so;

(f) The Respondent will be prejudiced by delay and the High Court in *Aon Risk Services Australia Ltd v Australian National University* has made it clear that costs are not an adequate remedy for delay.

71. Mr ███ made submissions in reply to the effect that the information required (as to the receipt of fees from students) was in the Respondent's possession, and the Claimant needs that information, and in the circumstances, it was appropriate to adjourn.

72. After considering the application, and largely for the reasons set out in paragraphs 30-64 above (which I repeat), I dismissed the Claimant's application to adjourn and ordered that the hearing proceed. In summary, the parties agreed to resolve the dispute by recourse to arbitration before me under the Arbitration Victoria Rules. There is no right, under the Rules, for discovery. Nevertheless, orders were made, by consent, on two occasions for applications for discovery to be made within the timeframes agreed by the parties. No applications for discovery were made within the time allowed. No reason was given by the Claimant as to why an application was not made within the time allowed or even why an application was not made a reasonable time before the hearing. When an application for discovery was finally made by the Claimant (on 27 July 2023), orally,

without notice (and without any supporting evidence), orders were made by consent that the Respondent would "*seek to provide*" the documents sought. Finally, a further application was made by the Claimant two days before the substantive hearing, which application was heard the day before the substantive hearing, for additional orders for discovery and for an adjournment. In the exercise of my discretion, considering the matters above, and in light of the Rules, which have as their principal objective "*fast, final and affordable arbitration, taking into account the amounts in dispute and the complexity of the facts or issues involved",* and the requirement that the hearing take place, *"as soon as reasonably practicable*", I dismissed the application.

73. Thereafter, the hearing was adjourned for a short time while counsel conferred (for approximately 25-30 minutes). After that short adjournment, the parties' counsel agreed that the hearing could and would proceed (including by reference to the documents already provided by way of discovery by the Respondent) and that the Claimant would be amending the claimed amount to $88,113.45.[19]

74. The parties agreed:

    (a) that the Claimant was entitled to a commission only on the basis of fees actually paid to the Respondent; and

    (b) to adopt an Excel spreadsheet entitled the "[redacted] *Commission Report*", prepared by the Respondent, as representing the fees actually paid by students to the Respondent.

75. In other words, the [redacted] Commission Report would be a platform from which the parties' competing positions on quantum could be evaluated.

76. I note that Mr [redacted] for the Respondent, despite agreeing to the above, also submitted that his client did not accept liability and was putting the Claimant to proof.

[19] This amount was later amended in the Claimant's written closing submissions dated 11 August 2023 to $68,194.80 plus GST.

The evidence

77. The Claimant relied on, among other things, the evidence of Ms ███. Her evidence was contained in three witness statements dated 17 April 2023; 16 June 2023; and 3 August 2023.

78. Ms ███ was cross-examined by Mr ███ for the Respondent.

79. The Respondent relied on, among other things, the evidence of Mr ███. His evidence was contained in two witness statements dated 2 June 2023, and 17 July 2023. He also prepared the ███ Commission Report spreadsheet.

80. Mr ███ was cross-examined by Mr ███ for the Claimant.

Assessment of witnesses

81. This case turns, to a large extent, on the testimony of the witnesses. Accordingly, I set out below my assessment of the witnesses whom I closely observed at the (in-person) arbitral hearing on 4 August 2023. There was one witness for each party, and both witnesses were cross-examined.

82. During the cross-examination of each witness, I had a good opportunity to observe their demeanour and to consider their evidence and their responses to questions put to them (including their response to contemporaneous documents which at times were adverse to the party for whom they were giving evidence).

83. There was no transcript or other recording made of the substantive hearing. Neither party requested such a transcript nor took any steps for one to be prepared.

The Claimant's witness – ███

84. Ms ███ provided 3 witness statements on behalf of the Claimant.

85. After observing Ms ███ during cross-examination, and after reviewing her written witness statements, I find that Ms ███ in some respects, was not a witness of truth.

Where her evidence conflicts with Mr ███ evidence, I generally prefer Mr ███ evidence.[20] I explain my reasoning for this finding below.

86. ███ gave evidence that, in some instances, appeared implausible, was not supported by contemporaneous documents, and was self-serving.

87. For example, one of the issues in the arbitration was accounting for payments made by the Respondent to the Claimant. That is, the Respondent points to (what it says are) commission payments that were (allegedly) made by the Respondent to the Claimant and which the Respondent says reduced (offset) any liability that the Respondent has to the Claimant. In response, the Claimant says "no", those payments made by the Respondent to the Claimant or Ms ███ (or some of them) were made on account of the repayment of a loan of $███ that Ms ███ made (personally) to the Respondent. In other words, money that the Respondent says were commission payments made by it to the Claimant are said by the Claimant (███), to be, instead, monies paid to Ms ███ in repayment of a $███ loan.

88. In her witness statement of 17 April 2023, Ms ███ (in paragraph 8) says that she personally loaned money to the Respondent and was partially repaid in the financial year 2019-2020. In support of that contention, she exhibits a receipt from ███ showing a $███ payment to the Respondent with the notation "███ *Loan Money*". ███ ███ is Ms ███ husband. However, in cross-examination, Ms ███ could not provide any details of this $███ loan that she allegedly made. She could not explain what the loan was for, did not provide any written record of the loan, did not know about the terms of the loan, could not say what the interest rate (if any) was, and had no knowledge of any agreed repayment terms or when it was required to be repaid.

[20] However, as I explain further below, in relation to some matters, I considered that Ms ███ gave truthful evidence, and in these instances, Mr ███ did not provide direct evidence to rebut Ms ███ evidence (instead referring to solicitor's correspondence). Accordingly, in these instances, I have accepted Ms ███ evidence.

89. In other words, Ms could not shed any light on the details of this $ "*loan*" nor point to any contemporaneous document in support of the alleged loan. Ms said that the loan was handled by her husband but could say nothing more about it.

90. In my view, Ms did not provide candid evidence in relation to this (alleged) loan. As noted above, the notation on the document shows the money was " ". I do not accept that Ms loaned money to the Respondent as stated in her evidence. Her inability to shed any light on the loan at all, and the contemporaneous notation on the receipt suggest that the payment of $ to the Respondent was not a loan from Ms

91. At one point when she was being cross-examined, Ms broke down and started crying. The hearing was adjourned in order to allow Ms some time to regain her composure. The fact that a witness breaks down, emotionally, during cross-examination does not, of itself, mean that the witness is being untruthful. There may be many reasons for a witness to break down; cross-examination is inherently stressful. However, that said, while the questions put to Ms challenged her evidence, it appeared to me that the reason (or a reason) why she broke down was because she was unable to give any reasonable response to the questions put to her (based on contemporaneous documents that were contrary to her evidence) and this inability to answer the questions were causing her stress.

92. Ms also gave evidence in her witness statement that she was employed by the Respondent during the 2017 to 2018 financial year. In her witness statement, she does not say what work she undertook while employed. She exhibits a PAYG pay slip in support of her contention (which shows on its face that she was paid $ for the year).

93. Mr refutes that Ms worked for the Respondent. He says (in his first witness statement), among other things, that he worked for the Respondent since 2017 and that Ms did not work for the Respondent during this time – he did not see her, and she had no job or role to undertake at the Respondent. He also gave evidence that Ms worked for trading as during the

time Ms ██████ said she worked for the Respondent, and, in addition, that she ran her own ████████ business at the time she claimed to be working at the Respondent.

94. Ms ██████ provided a statement in response to the allegations (summarised above) made by Mr █████ However, in response to the allegations, Ms ██████ did not provide any substantive response to (i.e., she provided no substantive evidence about) the allegations that:

(a) Mr █████ never saw her working for the Respondent during this time (the 2017 to 2018 financial year);

(b) she had no role/job to undertake for the Respondent during this time (the 2017 to 2018 financial year);

(c) she was instead employed by ████████████████████ trading as ██████████████ ██████ during this time (the 2017 to 2018 financial year);

(d) She ran her own ████████ business during this time (the 2017 to 2018 financial year).

95. If Ms ███████ position was that she denied the allegations made by Mr █████ in his evidence (given that the parties were, at all times, legally represented), then I would have expected Ms ██████ to have expressly denied the allegations in her written evidence, and to have given her version of events (if what Mr █████ said was in contest). She did not do so. Ms ██████ did not, in her written evidence, provide a substantive response to the matters put against her, which I have summarized in paragraph 93 above.[21]

96. In cross-examination, Ms ██████ was also shown a pay slip that had been uncovered by Mr █████ (in his review of the Respondent's computer records), which showed, on its

[21] For example, in paragraphs 46 to 49 of his evidence in his first witness statement, Mr ████ said that since 2017 he did not see Ms █████ working at the Respondent, and that she had no role at the Respondent which would entitle her to wages, and that at the time she claims to have been working at the Respondent, she ran her own ███████ business. In response, Mr █████ said, "*…I again reiterate my position with* [the Respondent] *was genuine, and I received wages for the same*." No attempt was made by Ms █████ to explain what work she did for the Respondent, why she was not seen in the Respondent's offices, and if the allegation about her running her own ███████ business was correct. In short, there was no substantive engagement with the allegations put against her.

face, that Ms [redacted] was employed by [redacted] trading as [redacted] [redacted] during the 2017-2018 financial year. Mr [redacted] said [redacted] [redacted], trading as [redacted], was another [redacted] training organization) [redacted] operated by Mr [redacted] (Ms [redacted] husband) and other partners. This pay slip showed, on its face, that Ms [redacted] was paid an annual salary of $[redacted] during the 2017 to 2018 financial year.

97. Ms [redacted] denied any knowledge of the pay slip, although she acknowledged that it was made out to her and that the superannuation account identified in the pay slip was hers. In relation to this pay slip, and Ms [redacted] evidence, I formed the view that she was telling the truth from her demeanour and response to the questions. She had no knowledge of this pay slip.

98. I need not make any express finding as to whether Ms [redacted] was employed by [redacted] [redacted] trading as [redacted] during the 2017 to 2018 financial year. However, Ms [redacted] could not explain the pay slip (because she had no knowledge of it). Her evidence was that it was "*not my pay slip*". As I say, in this instance, I accept her evidence in this regard.

99. However, what this [redacted] pay slip suggests to me is that Ms [redacted] own reliance on the pay slip referred to in paragraph 7 of her first witness statement, which purports to show that Ms [redacted] was employed by the Respondent in 2017-2018, cannot be relied on to support her contention that she was employed by the Respondent during that time. In short, the historical records of the Respondent do not necessarily provide a sound basis for making findings of fact.

100. The fact that:

   (a) Ms [redacted] provided no substantive response in her written evidence to the allegations made by Mr [redacted] (summarized in paragraph 93 above), whether by way of substantive written response or otherwise (i.e., not even a bare denial in some instances);

(b) Ms ██ provided no contract of employment (or other contemporaneous evidence, apart from the pay slip) in support of her contention that she was employed by the Respondent;

(c) Ms ██ provided no bank statements or other records of payments made to her on account of her (alleged) employment by the Respondent; and

(d) Ms ██ gave no evidence of exactly what she did when she was purportedly. employed by the Respondent,

leads me to conclude, and I so find, that Ms ██ was not employed by the Respondent as she alleged in her evidence.

101. Where Ms ██ evidence conflicts with Mr ██ unless her evidence is corroborated by reliable contemporaneous (or other) documentary evidence, I generally prefer the evidence of Mr ██

The Respondent's witness – Mr ██

102. The Claimant attacked the credibility of Mr ██ and submitted that his evidence should be rejected. The main thrust of the attack was that Mr ██ had deleted columns from the ██ Report that had been provided by Mr ██ (by way of discovery) for the Respondent.

103. The Claimant, in its closing submissions, described the ██ system as follows:

> [22] The ██ system is owned and maintained by the ██ ██ for the purposes of administering the ██ ██. ██ provides means for education and training providers to comply with legislative requirements, including by issuing bona fide ██ as 'evidence of enrolment' in a registered full-time course, ██ ██.

[23] Section states that "

) [emphasis added]." [footnotes omitted]

104. The Claimant submitted that documents discovered by Mr (for the Respondent) should have but did not include start dates or end dates of courses set out in columns Z and AA of the Report; and that Mr had deleted entire columns in the report including those headed "" and "", which related to the reasons that the enrolled students changed courses or unenrolled from courses.

105. Mr was questioned about some of these matters during cross-examination. In relation to the start dates and end dates, Mr said in cross-examination that these dates are only included in the reports in certain circumstances and are not included in the report unless are provided. and given that the includes the notation "*no*" – indicating no was provided – this means that there is no start date or end date in the report. Mr said the start date and end date were not deleted or removed because those dates were never part of the report. This response by Mr in relation to start dates and end dates was not challenged by the Claimant (in cross-examination or in closing submissions), and I accept Mr explanation.

106. In relation to the and columns of the Report, Mr acknowledged that the information in these columns was deleted. He said that the information in those columns contained personal student information concerning reasons why students changed courses, including pregnancy and the like. He also said that the deleted personal student information is unrelated to fees paid. Again, I accept Mr evidence.

107. In the Claimant's closing submissions dated 8 August 2023, it submitted that: Mr did not notify the Claimant or the Tribunal that he had deleted the personal student

information; that his deletion of titles of columns indicated a mischievous intent; and his lack of a credible response to the start date / end date issue, should lead me to disbelieve Mr [redacted] evidence. I do not accept those submissions.

108. Mr [redacted] responses appeared reasonable to me, he answered questions put to him in a considered way, there was nothing put in opposition (by way of contemporaneous, or otherwise relevant, documents) which showed that his answers were false, and there was no good reason for Mr [redacted] (i.e., no identified motive for him) to delete the information with regard to the matters in issue. As explained by the Respondent (in its written closing submissions), and which I accept:

> "… none of the data the Claimant complains that Mr [redacted] 'deliberately deleted' is relevant to calculating commission based on fees paid. As the Respondent has repeatedly told the Claimant – and the Claimant ultimately accepted on the day of the arbitration by abandoning/amending its claim for commission on any other basis – commission can only be validly calculated as a percentage of fees paid by students. The Agreements also clearly stipulate that commission is payable on "cleared funds paid as tuition fee" (Refer Item 3 of Schedule 1 of 2018 Agent Agreement). Thus, the date at which students enrolled (or indeed, took up healthcare cover, or the reasons why students may have discontinued, etc) is entirely irrelevant to determining fees students actually paid to [redacted] to calculate commission payable."

109. For these reasons, I accept Mr [redacted] evidence and I do not accept the Claimant's attack on his credibility.

Application to re-open the Arbitration

110. Finally, in its written closing submissions dated 11 August 2023, the Claimant submitted:

> [28] The failure of the Defendant to properly provide this information [i.e., the [redacted] and [redacted]], despite the [redacted] Report being provided pursuant to the Order 5 of the arbitration orders dated 28 July in these proceedings,

prejudiced the ability of the plaintiff to pursue their claim for an additional $[redacted] of additional payable commission in these proceedings.

[29] [redacted] [the Claimant] notes that section 58 of the Arbitration Victoria Rules 2022 states that "*the Arbitrator may on its own motion or upon application of a Party, decide to re-open the arbitral proceedings at any time before the Final Award is made, **provided exceptional circumstances** exist* [emphasis added]".

111. The Claimant then submitted that the Respondent, by deleting "*critical evidence*", prejudiced the Claimant's ability to pursue payment for an additional $[redacted] in additional commission originally claimed and that this conduct constituted exceptional circumstances and that a further hearing only on the additional commissions claimed should be scheduled.

112. I have carefully considered this application, and it is denied for the following reasons.

113. I do not find that the deletion of the [redacted] and [redacted] amounted to the deletion of critical evidence. In fact, I expressly find that the [redacted] and [redacted] were not critical evidence and, in fact, were largely irrelevant, as explained in paragraph 108 above. Given that the evidence was largely irrelevant in any event, and given that it would not assist the Claimant in prosecuting claims for additional funds, the deletion of the information does not prejudice the Claimant, and no exceptional circumstances exist.

G. Issues for determination

114. The issues identified by the parties for determination are set out in paragraph 13 above.

115. The first question that the parties have identified that needs to be determined is the validity or otherwise of the 2020 Agreement.

First issue: validity of the 2020 Agreement

116. A copy of the 2020 Agreement was Exhibit 12 to Ms ██████ witness statement dated 17 April 2023. Ms █████ gave evidence that a signed copy of the 2020 Agreement (signed by ██████████ on behalf of the Respondent) was provided by Mr ████ (of the Respondent) to her, in person, at a meeting in or about the end of March 2020.

117. Mr █████ on the other hand, denies he met with Ms █████ as alleged at the end of March 2020, he denies he gave Ms █████ a signed copy of the 2020 Agreement, he denies the 2020 Agreement was agreed, and he denies that the 2020 Agreement was signed by ██████████. He says that the signature, which appears to be that of ██████████ on the 2020 Agreement, is completely different to the signature of ██████████ that he has otherwise observed (and he put in evidence a number of documents showing ███████████ signature on other occasions which, I observe, appear to be completely different to the signature relied on by the Claimant). He also says he has checked his diary, and there was no meeting recorded (or anticipated) with Ms █████ at the time alleged, and that, if he had met Ms █████ he would have made a note of it in his diary, which is his usual practice. He put his diary into evidence, and no meeting with Ms █████ was noted during the relevant period in his diary.

118. No handwriting expert was called by either party. The Claimant, in its submissions, notes that the Respondent did not call a handwriting expert. The Claimant did not assert in its submissions that an adverse inference should be drawn against the Respondent for failing to call a handwriting expert. I do not draw such an inference, but I do take into account the fact that no handwriting expert was called by the Respondent.

119. ██████████, the purported signatory to the 2020 Agreement, was also not called by the Respondent to give evidence about the signature. The Claimant submits an adverse inference should be drawn that Ms █████ evidence would not have assisted the Respondent. Mr ████ said in his evidence that he has tried to but was unable to contact Ms ███ (a former employee of the Respondent), and so the Respondent could not take further steps to call Ms ███ as a witness. I accept Mr █████ evidence. Accordingly,

I do not draw any adverse inference from the failure to call [redacted] as a witness in the arbitration.

120. The Claimant also submits that the Respondent should have called [redacted] [redacted] as a witness. [redacted] [redacted] appears to have been an administration officer working for the Respondent (there are email communications in the evidence between Ms [redacted] and [redacted] [redacted] in relation to student referrals). The 2020 Agreement, which on its face appears to contain the signature of [redacted] [redacted] includes what appears to be the signature of "[redacted] as a witness to [redacted] [redacted] signature. The Claimant submits that I should draw an adverse inference "*that she* [[redacted] [redacted] *likely would not have testified against her valid witnessing of the 2020 Agreement*". The Claimant raised this point in its closing submissions dated 11 August 2023, and the Respondent did not address the point in its written submissions in response.

121. I accept that I have the discretion to draw an adverse inference in the circumstances.[22] However, after carefully considering the totality of the evidence, including that set out in paragraph 135 below, I do not exercise my discretion to draw such an inference. Nevertheless, even if I was prepared to draw such an inference (adverse to the Respondent), it would make no difference to my findings. This is because Mr [redacted] gave evidence, which I accept, that no meeting took place between him and Ms [redacted] and that the hard copy of the 2020 Agreement (relied on by the Claimant) was never given to Ms [redacted] as alleged. In other words, even if it was signed by [redacted] [redacted] (which I do not accept, as explained below), the signed agreement was not communicated to the Claimant as alleged. Without communication of acceptance, there can be no meeting of the minds and no binding agreement created.

122. Finally, the Claimant points to *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 as authority for the proposition that post-contractual conduct can be relied on in support of a contention that a contract was formed. I accept that general proposition, which was not cavilled with by the Respondent. In particular, the Claimant relies on payments it says were made after 8 January 2020 to assert that this shows that

[22] *Ahuja Investments Limited v Victorygame Limited & Anor* [2021] EWHC 2382 (Ch) at [25].

the parties agreed that the 2020 Agreement was in force. On the other hand, the Respondent submits that only one payment was made post 8 January 2020, and that it should be given little weight in circumstances where Mr ████ (Ms █████ husband and a former director of the Respondent) remained actively involved in the business until at least September 2020.[23]

123. While I accept that post-contractual conduct is relevant to whether the 2020 Agreement was in fact agreed, I consider that, in this case, post-contractual conduct should be given little weight. This is because, first, I find that one payment only was made after 8 January 2020, as accepted by the Respondent. The Claimant in its submissions points to 5 payments it says were made after 8 January 2020. In fact (based on my review of the evidence) what the Claimant identifies is 5 students, and it points to various rows of the ████ Commission Report and it says that those rows show 5 payments were made for these students post 8 January 2020. The ████ Commission Report contains 5 tabs. The Claimant does not identify which tabs it is referring to when it says 5 payments were made. The "*Payment History*" tab does not identify any names and the rows referred to by the Claimant "*21, 24, 27, 22 and 23*" (in its submissions) show payments made in 2018/2019, so I assume that this tab is not the tab referred to by the Claimant. The other tabs of the ████ Commission Report do not identify any payment dates. From my review of the evidence relied on by the Claimant (i.e., the ████ Commission Report), it is not evident to me that 5 payments were made post-8 January 2020. Accordingly, I am not satisfied on my review of the evidence that payments were made post-8 January 2020 for the 5 students identified. I accept that one payment (only) was made post-8 January 2020 as accepted by the Respondent.

124. Second, in circumstances where there was, in effect, a sale of the business from Mr ████ and Ms ████ (the husband and wife team) on the one hand to Mr ███ (and associates) on the other, and where there were ongoing negotiations between the Claimant and Respondent about the 2020 Agreement leading up to March 2020, (when the Claimant says the 2020 Agreement was agreed) the fact that a commission payment

[23] Despite this submission, I could not find evidence of this alleged involvement (no particular evidence was referenced in the Respondent's submissions) and so I do not accept this submission of the Respondent.

was made is not overly significant in my view. It does not represent an ongoing course of conduct that might otherwise indicate that the 2020 Agreement was in fact agreed.

125. As I have said above, where the evidence of Mr ████ conflicts with that of Ms █████ I generally prefer Mr █████

126. Neither party put on evidence nor addressed me on whether ██████ ███ (identified as the "Marketing Manager") had the authority to bind the Respondent to the 2020 Agreement. Both parties took the position that if ██████ ███ signed the document, then that signature would bind the Respondent. Accordingly, I will adopt the same position adopted by both parties.

The authorities

127. It seemed to me at the hearing that the issue of the burden of proof may be relevant to my consideration of the evidence in relation to the 2020 Agreement, and I asked Counsel for the parties to address this in their written submissions. They both did so, and I am indebted to Counsel for their assistance. I am also mindful of my obligation to the parties to give each of them a fair hearing. In this regard, I have restricted my consideration of the authorities to those provided by the parties.

128. The Claimant relied on *Coshott Family Pty Ltd v Lyons* [2022] NSWCA 216, in which Kirk JA stated, at paragraph 18:

> "An oft-cited statement as to where the legal burden of proof will lie is that of Walsh JA in *Currie v Dempsey* (1967) 69 SR (NSW) 116 at 125, who said that it will lie on the claimant "*if the fact alleged (whether affirmative or negative in form) is an essential element in his cause of action, eg if its existence is a condition precedent to his right to maintain the action*" [emphasis added]. His Honour explained that if a point was a matter of "*avoidance*" of the claim then in general the legal burden will be on the defendant [emphasis added]".

129. The Claimant also relied on *MDN Mortgages Pty Ltd v Caradonna* [2010] NSWSC 1298 where Kirby J stated at [180]:

> "Was the defendant's signature on the Mortgage forged?
>
> The defendant, by her Defence, alleges forgery. She has the onus, on the balance of probabilities (*Sanpine Pty Ltd v Koompahtoo Local Aboriginal Land Council* [2005] NSWSC 365, per Campbell J at [170]–[178]; cf Sanchet v DPP (Cth) [2006] NSWCCA 291 and Ko*ompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61 ; (2007) 233 CLR 115 at 26)."

130. The Claimant also said that as *MDN Mortgages Pty Ltd v Caradonna* expressly sets out the relevant and considered authorities, it should be preferred to *White v Woodward* (referred to below). Finally, the Claimant said that only *MDN Mortgages Pty Ltd v Caradonna* is consistent with the High Court's decision in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 where Mason CJ, Brennan, Deane and Gaudron JJ state at 170–171:

> "[A]uthoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found' [emphasis added]. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct."

131. The Respondent for its part relied on *White v Woodward* [2020] VSC 258, where it was held that:

> [17] Self-evidently, [the plaintiff] bore the onus of proof in this proceeding. The critical allegation that was raised was the defendant's denial that he signed the contract. Effectively, he alleged that his signature was forged, although the proposition was put in the negative. [The plaintiff] must prove, on the balance of probabilities, that [the defendant] was a party to the contract. [The defendant] neither alleged, nor needed to prove, who forged his signature.

> [18] … I am satisfied that [the defendant] discharged an evidential onus by denying that he made the agreement alleged and denying that he signed the contract as alleged. The onus of proof does not shift from [the plaintiff], but the standard of proof may be qualified, having regard to the gravity of the questions to be determined.

132. The Respondent also said that whether the onus is discharged depends on all the evidence, including handwriting samples and contemporaneous documents and events, and relied on *Miles v Amos* [2021] NSWSC 38 where the Court said:

> [353] The issue of the authenticity of the Defendant's signatures … cannot be resolved in isolation and the conclusions reached on the authenticity of those signatures will also be based on findings concerning the reliability and credibility of the evidence of all of the witnesses, in the case.
>
> [354 The critical question is whether the Plaintiff, as the propounder of the [disputed document] established, on the balance of probabilities, that it is a document signed by the Defendant. …

133. As I said above, I am indebted to Counsel for their identification of the relevant authorities.

134. To the extent that there is any conflict between the authorities, I accept the Claimant's submission that *MDN Mortgages Pty Ltd v Caradonna* is to be preferred and that, in a case like this, the Respondent, having alleged (what amounts to) fraud, bears the burden of proof. I am also mindful of what the High Court had to say in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*, set out above.

135. For the reasons given below, I find that the Respondent has discharged its burden on the balance of probabilities and that the 2020 Agreement was not signed by the Respondent. In other words, I find that there was no 2020 Agreement agreed between the parties for the following reasons:

(a) **first**, generally speaking, for the reasons explained above, I prefer the evidence of Mr ██ to that of Ms ██ where their evidence is in conflict (and it is squarely in conflict in relation to the 2020 Agreement);

(b) **second**, the signature on the purported 2020 Agreement does not look anything like the signature of Ms ██ ██ as shown in other signature examples provided in the evidence (however, while this is a factor to consider, I give it little weight given that the ██ ██ was not called as a witness and I am not a hand-writing expert);

(c) **third**, there are no other contemporaneous (or other) communications (in particular, there are no email communications) between Ms ██ and Mr ██ (or between Ms ██ and Ms ██ ██ to indicate the 2020 Agreement was, in fact, agreed (this lack of contemporaneous documentary evidence to support the contention that the 2020 Agreement was agreed is a significant factor in my view);

(d) **fourth**, given that the parties were at loggerheads in relation to the proposed 2020 Agreement (the Claimant wanted the commission to be *plus GST* and the Respondent wanted the commission to be *GST inclusive*) as shown by the contemporaneous correspondence, if there was, in fact, a meeting of the minds on the issue, it is likely that there would be contemporaneous correspondence indicating such agreement (or indicating a proposed meeting to thrash out the issues between the parties) – but there was none;

(e) **fifth**, the circumstances where the alleged meeting took place, where Ms ██ said she received a hard copy of the signed 2020 Agreement, seem unlikely. Ms ██ in paragraph 17 of her first witness statement, says that in late March 2020, she telephoned Mr ██ and made an appointment to see him at the ██ ██ in ██ (up to this point, all correspondence about the 2020 Agreement had been by email). Ms ██ does not say why she asked for the meeting. She then says she met Mr ██ in the boardroom and inquired about the 2020 Agreement, to which he replied that it had already been signed and he then asked

the administration manager, Ms ███ to provide a copy of the signed 2020 Agreement to Ms ███ which she did. If the 2020 Agreement had already been signed, it might be expected that Mr ███ would have emailed it to Ms ███ earlier. Further, if the meeting was for the purpose of discussing the 2020 Agreement (to resolve the dispute as to whether the commission was GST inclusive or exclusive), why was there no discussion about the 2020 Agreement at the meeting?

(f) **sixth**, Mr ███ gave evidence that:

(i) he has no recollection of meeting Ms ███

(ii) at around the end of March 2020, the Respondent moved all its classes online because of Covid restrictions; and

(iii) his practice at the time was to record meetings in his hard-copy diary.

He said that if he met Ms ███ at the time, he would have included a note of the meeting in his diary. He produced his diary as an exhibit to his first witness statement, and there is no record of a meeting with Ms ███ in late March 2020 (although the diary records other meetings with other people). Mr ███ also gave evidence that no agreement had been reached with the Claimant in relation to the GST issue (which was the *bone of contention* between the parties), and so the 2020 Agreement had not been agreed.

136. For these reasons, I find that the parties did not agree upon the 2020 Agreement.[24]

Second issue: whether any commission is payable under the Agreements for the five student referrals disputed by the Defendant

137. The parties agree that the 2018 and 2019 Agreements were valid and effective.

[24] I note that in coming to this finding I have considered all the matters and the evidence put forward by the Claimant in relation to its contention that the 2020 Agreement was agreed.

138. I have found that the alleged 2020 Agreement was not executed and was not in force, and so had no effect. Apart from the claim under the contract, the Claimant makes no other claim for commission or other loss.

139. The 2018 Agreement ran from 8 January 2018 to 7 January 2019, and the 2019 Agreement ran from 8 January 2019 to 7 January 2020. Apart from the term, the 2018 and 2019 Agreements were in identical terms.

140. There was no agreement in place after 7 January 2020. Accordingly, any referrals after 7 January 2020 would not entitle the Claimant to any commission.

141. In paragraph 143 below, I set out the requirements in the Agreements that must be met for the Respondent to be liable to the Claimant for the payment of fees. I have numbered the bullet points in square brackets for ease of reference.

142. The issue between the parties (apart from the alleged 2020 Agreement) in relation to the entitlement to commission on the disputed students relates to item [1] below: *was the student recruited by the Claimant*? That is, the Respondent accepts that if the student was, in fact, recruited, then a *prima facie* entitlement to commission crystallises. In other words, items [2] to [5] below are not contested in that: the disputed students were enrolled in a program, they paid the fee, they commenced the program and were not fully refunded the program fee. Put differently, the matter in issue in relation to the *prima facie* entitlement to commission is whether the student was *recruited* by the Claimant.

143. The Agreements provide, under the heading "Agent's fees," as follows:

> "Subject to the other provisions of this clause, ███ [the Respondent] must pay the Agent's [the Claimant's] Fee for each student who:
>
> [1] Is recruited by [the Claimant];
>
> [2] Is enrolled in a Program; and
>
> [3] Has paid the Program Fee to [the Respondent]; and
>
> [4] Has commenced the Program; and

[5] Who has not, subsequent to commencing the program, been fully refunded the program fees.

An Agent is regarded as having recruited a student under this Agreement if the Agent [Claimant] submits the student's application for enrolment and that application also bears the Agent's [Claimant's] name. [emphasis added]

An Agent's Fee is not paid where the student applies to enrol directly to ███ [the Respondent]

No Agent's Fee is payable unless the Agent [Claimant] has submitted an invoice in a form approved by ███ [the Respondent].

███ [the Respondent] must pay fees payable under this clause within 30 days of receipt of a valid invoice from the Agent [Claimant]."

144. I address each of the 5 disputed referrals below and address the question of whether the 5 disputed students were recruited by the Claimant.

Student 1 – ███

145. The Claimant claims an outstanding commission payment for ███.

146. Ms ███ in her evidence, in paragraph 20 of her first witness statement, says that on 18 June 2018:

"I emailed documents of Mr ███ who was a new admission in ███ to Mr ███ the then director of [the Claimant] with a student application form of [the Claimant].

147. At this time, on 18 June 2018, the 2018 Agreement was in full force and effect.

148. Ms ███ attached a copy of the (signed) ███ application form to her evidence. The application form shows that the agent's details are "███". However, the application form also appears to show that another name, which cannot be

discerned, has been rubbed out or (partially) deleted, and the name "[redacted]" has been written over the top of the partially deleted other name.

149. Ms [redacted] also explained in her evidence that sometimes students completed the forms and detailed like the referring agent were not included (by omission).

150. Ms [redacted] was cross-examined about [redacted] and gave further evidence about her dealings with him during re-examination. Ms [redacted] was adamant in her oral evidence in cross-examination (and during re-examination) that she referred [redacted] on behalf of the Claimant and provided some evidence of her dealings with him. I closely observed Ms [redacted] evidence, and I accept it.

151. Mr [redacted] for the Respondent gives evidence in his witness statement in response dated 2 June 2023 that Mr [redacted] is, in fact, Ms [redacted] husband. (This was not stated by Ms [redacted] in her first witness statement). Mr [redacted] says that Mr [redacted] was one of four directors and the majority shareholder of the Claimant before it was acquired by the present shareholders and Mr [redacted] appointment as sole director. Mr [redacted] evidence in this regard is not disputed, and I accept it.

152. Mr [redacted] also provided a copy of the signed application form for [redacted] as part of his evidence. That application form has the same signature and otherwise contains the same details (except that the name of the applicant – "[redacted]", is not included in the "*personal details*" section of the form), but the name of the agent is "[redacted]" not "[redacted]". In its closing submissions, the Respondent says that the details of [redacted] have been erased or overwritten with the details of [redacted], so no commission is payable.

153. However, in his evidence in his witness statement, Mr [redacted] for the Respondent does not respond directly to Ms [redacted] evidence about the referral of [redacted]. Instead, Mr [redacted], in response to Ms [redacted] evidence of referral of [redacted], refers to his lawyer's evidence disputing the referral. In other words, in assessing this claim, I have Ms [redacted] evidence on the one hand, and Mr [redacted] reference to a letter from his lawyer on the other. Mr [redacted] does not state in his evidence that Mr [redacted] was not referred by the Claimant. In my view, a

reference to what his solicitor has said is not direct or probative evidence from Mr [redacted].

154. Accordingly, I accept Ms [redacted] evidence in circumstances where there is no direct evidence from Mr [redacted] to challenge or undermine Ms [redacted] evidence.

155. Accordingly, I find the Claimant has proved that it recruited Mr [redacted] and given that items [2]-[5] in paragraph 143 above are not contested, and given the 2018 Agreement was in force at the time, the Claimant is entitled to commission for Mr [redacted].

Student 2 – [redacted]

156. The Claimant claims an outstanding commission payment for [redacted].

157. Ms [redacted] in her evidence, in paragraph 21 of her first witness statement, says:

> "I got [redacted] enrolled into [redacted] at [the Claimant] on 28 March 2019."

158. At this time, on 28 March 2019, the 2019 Agreement was in full force and effect.

159. Ms [redacted] attached a copy of the (signed) [redacted] application form to her evidence. The application form shows that the agent's details are "[redacted] [redacted] – stamped on the form.

160. Ms [redacted] was also cross-examined about [redacted] and gave further (extensive) evidence about her dealings with him during re-examination. Ms [redacted] explained that she "*did the counselling for* [redacted] and that he was a family friend. I closely observed Ms [redacted] evidence, which was animated and quite passionate, and I accept it.

161. Mr [redacted] also provides a copy of the signed application form for [redacted] [redacted] as part of his evidence. That application form does not include any stamp that identifies [redacted] [redacted] as the referral agent.

162. In its closing submissions, the Respondent says that the Respondent had already received an application form (i.e., from a source other than the Claimant) and that the Respondent's email records show that this occurred. I have reviewed the evidence identified and relied on by the Respondent (the "*email records*"), and they do not appear to show what the Respondent submits (i.e., they do not show receipt of an earlier application form by the Respondent).

163. Mr [redacted] written evidence in response to Ms [redacted] was equivocal. He refers to a letter from his lawyers disputing that [redacted] was referred by the Claimant to the Respondent. He does not give evidence that directly challenges Ms [redacted] evidence.

164. In this case, I accept Ms [redacted] evidence, and there is no direct evidence from Mr [redacted] to dispute Ms [redacted] evidence. Accordingly, I find the Claimant has proved it recruited [redacted], and given that the 2019 Agreement was in force at the time, the Claimant is entitled to commission.

Student 3 – [redacted]

165. The Claimant claims an outstanding commission payment for [redacted].

166. Ms [redacted] in her evidence, in paragraph 22 of her first witness statement, says:

> "I emailed documents of [redacted] who was a new admission into [redacted] in [redacted]

167. Ms [redacted] included in her evidence a copy of an email dated 17 March 2020 and a copy of the (signed) [redacted] application form to her evidence. The application form shows that the agent's details are not included.

168. At this time, on 17 March 2020, there was no agreement between the parties for the commission payment. The Respondent has submitted, and I accept, that no commission is payable under the purported 2020 Agreement (the 2019 Agreement expired on

7 January 2020). Accordingly, the **claim is dismissed**. Nevertheless, for completeness, I set out my findings on the evidence in relation to the question of recruitment.

169. The Respondent submits that no agent details (or any stamp of [redacted]) were recorded on the application form and that this was a necessary condition of a referral.

170. I have reviewed the email from Ms [redacted] which attached all the relevant documents – including a photocopy of [redacted] passport, education documents, the "[redacted] *Form*," and other relevant documents. The email from Ms [redacted] includes the sign-off "[redacted]" and the words (in prominent blue typeface): "[redacted]".

171. The key issue is whether the student's application for enrolment also bears the Agent's [Claimant's] name.

172. In my view, in this case, the student's application for enrolment includes the covering email from Ms [redacted] which clearly bears the Agent's [Claimant's] name. The application for enrolment includes all the documents that comprise the application, not just the [redacted] *Form*. The purpose of the clause is to ensure that the referring Agent [Claimant] is properly identified. In this case, the Agent [Claimant] is properly identified because the Claimant's name is referred to in the covering email.

173. Accordingly, I find that the Claimant has proved its claim that [redacted] was referred by the Claimant. However, as stated in paragraph 168 above, the claim is **dismissed** as no agreement for the payment of commission was in force at the time of the referral

Student 4 – [redacted]

174. The Claimant claims an outstanding commission payment for [redacted].

175. Ms [redacted] in her evidence, in paragraph 23 of her first witness statement, says:

> "I emailed documents of [redacted] who was a new admission into Certificate [redacted] on 30 June 2020 to [the Respondent]"

176. On 30 June 2020, there was no agreement between the parties for the payment of commission. The Respondent submitted, and I accept, that no commission is payable under the purported 2020 Agreement (the 2019 Agreement expired on 7 January 2020). Accordingly, the claim is **dismissed**. Nevertheless, for completeness, I set out my findings on the evidence in relation to the question of recruitment.

177. Ms [redacted] included in her evidence a copy of an email dated 30 June 2020 and a copy of the (signed) [redacted] application form to her evidence. The application form shows that the agent's details are not included.

178. The Respondent submits that no agent details (or any stamp of [redacted]) were recorded on the application form and that this was a necessary condition of a referral.

179. I have reviewed the email from Ms [redacted] which attached the relevant documents for this application. For the reasons explained in paragraphs 169 to 172 above, I find that the Agent [Claimant] is properly identified (in the covering email) and, in reliance on Ms [redacted] evidence, the Claimant has proved that [redacted] was referred by the Claimant. However, as stated in paragraph 176 above, the claim is **dismissed** as no agreement for the payment of commission was in force.

Student 5 – [redacted]

180. In relation to [redacted], the Claimant relies on the following written evidence: a tax invoice dated 19 July 2019; a tax invoice dated 17 November 2019; and a tax invoice dated 6 January 2020. Unlike the other 4 students identified above, Ms [redacted] does not provide any emails or application forms or direct written evidence supporting the Claimant's claim.

181. Ms [redacted] in re-examination, said [redacted] was working at a farm and she suggested that [redacted] do a [redacted] course.

182. I accept that evidence. However, the Claimant's evidence is not sufficient to support the claim for commission for . Further, the Respondent has provided evidence (contemporaneous documents) which suggests that approached the Respondent directly, after which Mr then forwarded the application to his wife, Ms so that the Claimant could claim commission. I accept that evidence (in which case, no entitlement to commission arises because the student application was first made direct to the Respondent).

183. Accordingly, the claim for outstanding commission for is **dismissed**.

Summary of the second issue (recruitment of 5 disputed students)

184. In summary, the Claimant is entitled to the payment of commission for:

(a) Student 1 - ; and

(b) Student 2 – ,

and it has no entitlement to commission for other disputed students as claimed.

Third issue: commission payable and set off for payments made to Ms

185. The third issue, before quantum, is the issue of set-off. This issue is described by the Claimant as:

> Whether any amounts should be deducted for payments made to Ms in her personal capacity, by the Defendant.

And by the Respondent as:

> [balancing] any commission said to be owing by the Respondent, (or to as against payments for commission already made by and any commission retained (in breach of the Agreements).

186. I will determine the commission owing to the Claimant first, followed by the quantum of the set-off amount, as set out below.

187. Both parties have submitted that, in making my determination of the commission owing to the Claimant, I should have regard to, and base such a finding on, the ███ *Commission Report.* This is an Excel spreadsheet prepared by ███ of the Respondent and provided to the Claimant on 27 July 2023.

188. The ███ Commission Report spreadsheet has 5 tabs, 4 of which provide different alternatives as to money payable depending on findings made in the arbitration. The 4 tabs are entitled as follows:

(a) (**Tab 1**) "ALL – 18 19 excl 20&disputed";

(b) (**Tab 2**) "ALL – 18 19 20 and disputed";

(c) (**Tab 3**) "ALL – 18 19 & disputed excl 20";

(d) (**Tab 4**) "ALL – 18 19 20 excl disputed".

189. The parties agreed that I should find that one of Tabs 1-4 described above should apply, (amended as necessary on account of any factual findings), and that such a finding would provide a decision pathway to the amount payable.

190. The Claimant's position is that the scenario in Tab 1 applies. The Claimant says in paragraphs 15(a) and 16 and 17 of its Closing Submissions dated 11 August 2023, (in explanation of the ███ Commission Report's various tabs and other matters) as follows:

> "[15] (a) Scenario 1 (Tab 1): That the 2020 Agreement is valid and that all of the disputed referrals (namely ███ ███ (Disputed Referrals)) are payable by the Defendant. This scenario results in a total of $88,113.45 in commission payable;

Scenario 2 (Tab 2): That the 2020 Agreement was not valid and that none of the Disputed Referrals are payable. This scenario results in a total of $18,016.15 in commission payable;

Scenario 3 (Tab 3): That the 2020 Agreement was not valid, but that the Disputed Referrals are payable. This scenario results in a total of $32,704.95 in commission payable; and

Scenario 4 (Tab 4): That the 2020 Agreement is valid, but none of the Disputed Referrals are payable. This scenario results in a total of $62,812.65 in commission payable.

[16] The Defendant has subtracted a sum of $61,415.11 from each scenario to cover amounts it claims have already been paid. These amounts are detailed in Tab 5 of the ██ Commission Report. ██ agrees that the amount of $19,918.65 be rightfully deducted from the amounts owing, due to this amount already having been paid. However, ██ objects to the deduction of the further amount of $41,496.46, which the Defendant seeks to deduct due to payments previously made from the Defendant to Ms ██ in her personal capacity (Ms ██ Payments).

[17] ██ basis its claim on Scenario 1 of the ██ Commission Report, with a deduction of $19,918.65, for a total sum owing to ██ of $68,194.80."

191. The Respondent appeared to accept the general description above of each of the tabs in the ██ *Commission Report* and states in its closing submissions dated 17 August 2023 as follows:

[53] Consequently, the correct basis for reconciling commission is that set out at Tab 2 ("ALL – 18 19 excl 20&disputed") of the ██ Commission Report, based on ██ submissions that:

(a) no commission is payable under the alleged 2020 Agent Agreement, as it was never agreed nor executed by ██ or any of its representatives;

(b) the five 'disputed students' were not referred to [redacted] by [redacted] [redacted] and hence no commission is payable to [redacted] [redacted] for these students; and

(c) student fees retained by [redacted] [redacted] and funds paid to it and Ms [redacted] by [redacted] must be set-off against any claim of [redacted] [redacted]

192. Each of the 4 identified tabs in the [redacted] Commission Report spreadsheet has amounts identified as:

(a) "*Total Commission*" – which I understand is the amount payable by the Respondent to the Claimant if I make the findings that correspond with the assumptions underlying each tab (as described in paragraph 190 above); and

(b) "*Commission paid to* [redacted] *and* [redacted] – which I understand represents payments already made by the Respondent to the Claimant, which is to offset any Total Commission amount payable.

193. As noted in Halsbury's Laws:

> "The rationale of set-off is to avoid multiplicity of actions. Set-off operates, on principle, where there are, on each side of the account, what Cockburn CJ in *Stooke v Taylor* (1880) 5 QBD 569 (at p 575) referred to as "*liquidated debts, or money demands which can be readily and without difficulty ascertained*"."

194. The fact that there may be a set-off of amounts already paid by the Respondent to the Claimant is accepted by the Claimant (see paragraph 190 above, which sets out paragraph 17 of the Claimant's submissions). The question for me to determine is the quantum of the set-off.

195. The Claimant also submits that the Respondent has not made a counterclaim in the arbitration (which is correct), and so, no matter the value of any set-off, the Respondent has no entitlement to any payment from the Claimant. I accept that submission.

196. Given that I have found that the 2020 Agreement is not valid, I will use Tab 2 of the ████ Commission Report as the starting point for my determination (the basis for this Tab 2 is that the 2020 Agreement was not valid and none of the Disputed Referrals are payable).[25] On this basis, the starting point is that a total of $18,016.15 in commission is payable (as set out in the agreed ████ Commission Report). However, I will add commission payments for the two disputed students for whom I have found that commission was also payable:

   (a) Student 1 - ████, being the amount of $4,305 (taken from Tab 1 ████ Commission Report); and

   (b) Student 2 – ████, being the amount of $1,030 (taken from Tab 1 ████ Commission Report).

197. Accordingly, before any set-off is considered, the commission payable to the Claimant is $23,351.15 (the sum of $18,016.15 plus $4,305 plus $1,030).

The set-off

198. It is common ground between the parties that the Respondent has paid:

   (a) $19,918.65 to the Claimant on account of commission payments (which must be off-set against monies owed to the Claimant); and

   (b) $41,496.46 to Ms ████ personally (and the basis for these payments is disputed).

199. The Claimant agrees that $19,918.65 is to be rightfully deducted from the amounts owing, due to this amount already having been paid by the Respondent to the Claimant for commission.

200. The Respondent, on the other hand, says that all payments made to Ms ████ and to the Respondent, which total $61,415.11, should be set off against the commission otherwise owed. The Respondent has produced records to show that the payments were

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[25] Before considering the set-off, which is addressed below.

made to Ms ▇▇▇ I understand the Claimant does not dispute that the payments were made to Ms ▇▇▇ but instead, it says that save for $19,918.65 (paid to the Claimant), all the payments made by the Respondent to Ms ▇▇▇ (personally) are not recoverable.

201. The Claimant says that Ms ▇▇▇ is not a party to the proceedings (i.e., the arbitration), and any amount that the Respondent may wish to recover from Ms ▇▇▇ may only be recovered via proceedings against Ms ▇▇▇

202. The Respondent, on the other hand, says that the husband and wife team of Ms ▇▇▇ and Mr ▇▇▇ treated themselves and their controlled entities interchangeably and in essence, whether the payment was made to the Claimant or Ms ▇▇▇ makes no difference. It says all payments can and should be set off.

203. I accept the Claimant's submissions on this point and reject the Respondent's. The parties agree that the payments were made to Ms ▇▇▇ personally, and not to the Respondent. Ms ▇▇▇ and the Respondent are not the same legal person, and Ms ▇▇▇ is not a party to this arbitration. Accordingly, I will not allow any set-off for payments made to Ms ▇▇▇ personally.

204. In the result (and taking into account the set-off), I find that commission is payable from the Respondent to the Claimant in the amount of $23,351.15, less the $19,918.65 already paid to the Claimant (as agreed by the parties), which is to be deducted from the amounts owing.

205. On this basis, the amount payable by the Respondent to the Claimant in the arbitration is $3,432.50 (plus GST, as explained below).

H. GST

206. The Claimant submits that any payment due to it should be grossed up for GST. The Respondent has not disputed this submission. I accept the Claimant's submission and find that the amount payable to the Respondent should be grossed up by 10% for GST.

I. Other matters

207. During the course of this arbitration, a number of matters have been raised and developed during the course of counsels' written and oral submissions, which, as the evidence and the case have developed, and in the light of my findings, I find it unnecessary to record or address in this Award. The fact that they do not feature expressly in this Award does not mean that they have been overlooked.[26]

208. Finally, the Claimant submits that the Respondent exceeded the agreed page limit of 10 pages and that the eleventh (i.e., the final) page of the Claimant's submissions should be disregarded by the Tribunal. The Claimant says that it would be prejudiced if the Tribunal considers the eleventh page (because it says, in effect, that the Respondent seeks payment of $43,398.96 from the Claimant). However, as explained in paragraphs 198-205 above, I have accepted the Claimant's submission that there is no counterclaim and that no payment is due to the Respondent. Accordingly, there is no prejudice to the Claimant from my review of the 11th page. In any event, the Respondent, on page 11 of its closing submissions, did not raise a new issue (this issue payment of payment $43,398.96 from the Claimant was raised in the Respondent's written opening submissions at paragraphs 44 to 48), and in circumstances where the Claimant had the benefit of written closing submissions plus a reply[27] to the Respondent's written closing submissions there has been no prejudice.

J. Award

209. I have read the parties' pleadings and written submissions and written evidence, heard their oral evidence (including cross-examination) and oral submissions, and carefully considered the same. For the reasons stated above, in full and final settlement of all

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[26] For example, the Claimant submitted (Claimant's closing submissions at [55], [56]) that the failure by the Respondent to call an employee, '[redacted] to verify an email that person sent should lead to an adverse inference. I do not accept the submission but have not addressed it apart from this footnote.

[27] In relation to the parties' closing submissions, the parties agreed on the following page limits: Claimant 10 pages; Respondent in response 10 pages, Claimant in reply 3 pages. So, overall, the Claimant had an additional 3 pages in any event plus the last word.

claims and counterclaims in this arbitration, I make my partial award (on all matters save for interest and costs) as set out below.

210. The Tribunal declares and awards:[28]

(a) (**First issue**): The 2020 Agreement was not agreed upon and is of no force and effect.

(b) (**Second issue**): Commission is payable on 2 of the 5 disputed students being Student 1 - [redacted], and Student 2 – [redacted].

(c) (**Third issue**) The amount to be set off is the amount already paid to the Claimant (i.e., $19,918.65) and does not include amounts paid to Ms [redacted] in her personal capacity.

(d) The Respondent, [redacted], shall pay the Claimant, [redacted], the amount of **$3,432.50**, plus GST of **$343.25**, not later than the 30th day following the date of this Partial Award.

(e) This constitutes the Tribunal's Partial Award dealing with all matters save for interest and costs.

(f) The parties are directed to provide:

(i) written submissions (limited to 10 pages) and any evidence in support of any application for:

(A) the costs of County Court proceeding No. [redacted], pursuant to the orders of [redacted] made [redacted] [redacted] 2022; and

(B) the costs of the arbitration; and

[28] Subject to the payment of the Arbitrator's fees, this Award was prepared and ready for publication in the third week of September 2023. All outstanding fees were paid on 2 October 2023 and so this Award is published on 2 October 2023.

(C) interest,

by no later than 14 days after the date of this Partial Award;

(ii) thereafter, written submissions in reply (limited to 3 pages) within 5 days of receipt of the other party's submissions and evidence referred to in subparagraph (i) above.

(g) All other claims or counterclaims, if any, are dismissed.

Place of Arbitration: Melbourne, Victoria, Australia.

A Rollnik

____

Adam Rollnik
Sole Arbitrator

2 October 2023