VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

CIVIL CLAIMS LIST **VCAT REFERENCE: C3094/2017**

CATCHWORDS

Unfair term – Australian Consumer Law sections 23, 24, and 250.

APPLICANT:	Bass Coast Resort Pty Ltd ACN: 154 420 881
RESPONDENT:	Success Resources Australia Pty Ltd ACN: 147 577 866
WHERE HELD:	55 King Street, Melbourne
BEFORE:	Deputy President I. Lulham
HEARING TYPE:	Civil Claims Hearing
DATE OF HEARING:	4 August 2017
DATE OF ORDER:	9 August 2017
DATE OF REASONS:	9 August 2017
CITATION:	Bass Coast Resort Pty Ltd v Success Resources Australia Pty Ltd (Civil Claims) [2017] VCAT 1217

ORDERS

1. The Tribunal declares that clause 3 of the terms and conditions in the parties' contract made on 30 November 2016 is unfair and void.

2. The Respondent shall pay the Applicant $3,995.00, and shall reimburse the filing fee on the application of $204.90.

3. Written reasons are provided at the Applicant's request.

I. Lulham
Deputy President

APPEARANCES:

For the Applicant:	Mr. J. Konynenburgh, director
For the Respondent:	Mr. C. Doran, company officer

REASONS

1. The facts were not in issue in this case. The parties agreed on the relevant chronology of events, and that their respective rights and liabilities turned on the "terms and conditions" contained in their contract. After I had stated my decision that the Respondent was liable to pay the Applicant, and set out my reasons, the Applicant asked for written reasons.

2. The Respondent is a promoter of events at which public speakers conduct seminars.

3. The Applicant conducts a business as a licensed estate agent, and Mr Joe Konynenburgh works in the agency. In the context of this case, the interests of Mr Konynenburgh and the Applicant are the same.

4. After attending a seminar/workshop with his wife in 2016 which they both found beneficial, Mr Konynenburgh booked to attend a seminar more specifically related to his real estate agency business. The seminar was to be given by a Mr Green from the United Kingdom, and was to take place in Melbourne on 16-18 January 2017.

5. Mr Konynenburgh booked to attend this seminar on 30 November 2016. A booking is made by the proposed customer, in this case Mr Konynenburgh, completing in handwriting a printed "order form" – which is a standard form document printed on the Respondent's letterhead –, inserting their name and address, the amount which is paid (which can be expressed as the entire fee, or as an amount plus the promise of further instalments), ticking a box next to the words "Terms and conditions: I have read and accepted the terms and conditions overleaf", and signing and dating the document.

6. Mr Konynenburgh paid the full fee of $3,995.00.

7. On 9 December 2016 Mr Green sent the Applicant an email, saying that he had to "postpone the Melbourne event to a later date to be confirmed in 2017". He offered to allow the Applicant to attend the same course in Sydney on 13-15 January 2017 and to receive from the Respondent a $500.00 rebate as a goodwill gesture for inconvenience, or alternatively to book a family member or current business partner in to the Sydney event for $995.00.

8. Mr Konynenburgh did not accept this offer, as the dates did not suit him.

9. Whilst this advice of the 'postponement' came directly from Mr Green, it was clearly given with the approval and knowledge of the Respondent, particularly

because it was expressed in terms of the Respondent making the $500.00 rebate if one of the offers was accepted.

10. There followed an exchange of emails between the Applicant and the Respondent (and not with Mr Green), in which the Applicant sought a refund and the Respondent refused.

11. The Respondent relies on three arguments in its quest to keep the Applicant's money:

    (i) Mr Konynenburgh declaring that he had read and understood the terms and conditions;

    (ii) that the Melbourne seminar was not cancelled, rather it was postponed; and

    (iii) clause 3 of the terms and conditions which is as follows

    We may change the Speakers, the Hours, the Dates and/or the Location of the Seminar Services for any reason by notifying you in writing of the change and detailing substitute Speakers, Seminar Hours, Dates and/or Location and:

    (a) we shall have no liability to you; and

    (b) you shall make no claim against us (including for a refund), in respect of the same.

12. I reject the first two arguments. Because clause 3 is an unfair term, and therefore void, the fact that Mr Konynenburgh declared that he had read and understood it does not add anything to the matter. One possibility is that Mr Konynenburgh was comfortable about signing the contract because he knew clause 3 was void. Objectively, the December Melbourne seminar was cancelled, rather than being postponed.

13. Clause 3 exemplifies pure drafting overreach, because it purports to empower the Respondent to supply the opposite of what it contracted to supply. Any number of comedic examples would come to mind were clause 3 to have any effect.

14. Whilst the clause would undoubtedly be unenforceable at common law, the position is made even more clear by the *Australian Consumer Law*. It matters not that Mr Konynenburgh was going to attend the seminar but that his company, the Applicant, paid the fee because by 30 November 2016 section 23 of the *Australian Consumer Law* had been expanded, to apply to both "consumer contracts" and "small business contracts".

15. Section 23 is headed "Unfair terms of consumer contracts and small business contracts".

16. Sub sections 23(1) – (3) provide that a term of a consumer contract or small business contract is void if the term is unfair and the contract is a standard form contract. I have described the contract above, and there is no doubt that it is a standard form contract. Section 27 creates the rebuttable presumption that a contract is a standard form contract, and the Respondent has not presented any evidence which could rebut that presumption.

17. If Mr Konynenburgh was the contracting party, it would be a consumer contract. It seems that he issued this proceeding in the name of the Applicant, because it paid the fee to the Respondent and was the contracting party.

18. Sub section 23(4) defines "small business contract" as one where:

    (a) the contract is for the supply of goods or services, or the sale or grant of an interest in land; and

    (b) at the time the contract is entered into, at least one party is a business that employs fewer than 20 persons; and

    (c) either of the following applies:

        (i) the upfront price payable under the contract does not exceed $300,000.00;

        (ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed $1,000,000.00.

19. On the evidence before me, the contract between the Applicant and the Respondent was a small business contract.

20. Section 24(1) defines "unfair". Essentially a term is "unfair" if three elements exist: it causes a significant imbalance in the parties' rights and obligations; it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and it would cause significant detriment to a party.

21. There is no doubt that the term is unfair. The purported rights reserved to the Respondent render the obvious imbalance in the party's rights and obligations far more than "significant". They really purport to deprive the Applicant of any rights at all. The reservation of rights is not reasonably necessary to protect the Respondent's rights, and they would cause a significant detriment to the Applicant, because they would allow the Respondent to keep the Applicant's money without supplying anything of value to the Applicant.

22. Section 24(2) enables the Tribunal to consider the extent to which the term is “transparent”, when considering whether a term is unfair. “Transparent” is defined in sub section 24(4). I find that clause 3 is transparent, because it is expressed in plain language, was legible, presented clearly, and was readily available for Mr Konynenburgh to read. However this does not assist the Respondent, because the definition of “unfair” does not require the term to not be transparent. It is quite possible – as is the case here – for a transparent clause to be unfair.

23. Section 250 of the ACL empowers the Tribunal to declare a term to be an unfair term, and it is appropriate that the Tribunal does so in this case.

24. Accordingly, I will declare that clause 3 of the parties’ contract entered into on 30 November 2016 is an unfair term and is void, and because that clause was the sole ground on which the Respondent attempted to retain the Applicant’s money, I will order the Respondent to refund the money.

25. Having regard to s115B of the *Victorian Civil and Administrative Tribunal Act 1998*, and being satisfied that the Applicant has substantially succeeded in its claim, I will also order the Respondent to reimburse the Applicant the filing fee on this Application of $204.90.

I. Lulham
Deputy President

9 August 2017