

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

**BRINDABELLA CHRISTIAN EDUCATION LTD ACN 100 229 669 v
RESPONDENT XD 561 of 2021 (Civil Dispute) [2022] ACAT 37**

XD 561/2021

Catchwords: **CIVIL DISPUTE** – Australian Consumer Law – unfair contract terms – whether payment of fees in lieu of notice term in enrolment contract was unfair – whether the contract was a standard form contract – whether the contract was a consumer contract – whether the term was reasonably necessary in order to protect the legitimate interests of the school

Legislation cited: *ACT Civil and Administrative Tribunal Act 2008* ss 6, 7
Australian Consumer Law ss 2, 23, 24, 25, 26, 27, 39
Fair Trading (Australian Consumer Law) Act 1992 ss 6, 7

Cases cited: *Mathews v University of Queensland* [2002] FCA 414
Wright v Christ College Trust [2006] TASSC 107
Hearn v O'Rourke [2003] FCAFC 78
Ferme & Ors v Kimberly Discovery Cruises Pty Ltd [2015] FCCA 2384
Diab v NRMA [2014] NSWCCPD 72

Tribunal: Senior Member E Ferguson

Date of Orders: 5 May 2022

Date of Reasons for Decision: 5 May 2022

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) **XD 561/2021**

BETWEEN:

BRINDABELLA CHRISTIAN EDUCATION LTD (ACN 100 229 669)
Applicant

AND:
XD 561 of 2021
Respondents

TRIBUNAL: Senior Member E Ferguson

DATE: 5 May 2022

ORDER

The Tribunal finds that:

1. The notice term at clause 25(c) of the enrolment agreement is void as unfair pursuant to section 23(1) of the Australian Consumer Law.

The Tribunal orders that:

2. The application is dismissed.

.....
Senior Member E Ferguson

REASONS FOR DECISION

Introduction

1. The reasons below explain why the Tribunal has made the orders set out above. In the reasons below, a reference to ‘ACAT’ or ‘tribunal’ refers to the ACT Civil and Administrative Tribunal generally, whereas ‘Tribunal’ or the first person pronoun refers to the presently constituted Tribunal.

Suppression of children’s identity

2. At the commencement of the hearing I made the following order, which remains in force, in relation to identity of the respondents’ children:

Pursuant to s. 39 of the ACT Civil and Administrative Tribunal Act 2008, there is to be no publication of evidence or information contained in any document filed with the Tribunal or received in evidence by the Tribunal at the hearing of this matter that will reveal, or enable to be determined, the identity of or the personal information relating to the respondents’ children.¹

3. Consistent with this order, the parents’ names are not used in either the title or the body of this decision.

Introduction

4. In this application a school (**the school**) claimed school fees in lieu of notice from parents (**the parents**) who withdrew their children from the school. The school relied on the following provision (**the notice term**) of its enrolment agreement with the parents (**the contract**)²:

One full College term’s notice in writing to the Principal is required for the intended withdrawal of the child, otherwise a full term’s fees will be charged. The written notice must be received at the College by the first day of term. Any notice received after the first day of term will render parents/carers liable for the fees for that term and the subsequent term in lieu of notice.³

5. The parents withdrew their children from the school at the end of the 2019 school year without giving one full term of notice in writing. The parents say they advised the class teachers during the end of year meeting that the children

¹ 10 November 2021

² Enrolment Agreement between the school and the parents dated 5 December 2017

³ Enrolment Agreement between the school and the parents dated 5 December 2017, clause 25(c)

would not be returning to the school and subsequently filled in an online form and an email to the school's administration and enrolments office. It is not disputed that written notice was not provided in the stipulated time frame. The school claimed full fees for each child for the first term of 2020 pursuant to the notice term.

6. I heard this matter over two days, 10 November 2021 and 21 January 2022. The school was represented by its lawyer. The parents were not legally represented and only the father attended the hearing.
7. The parents argued that the notice term was unfair in various ways and therefore should not be enforced against them. The relevant question for the Tribunal to determine was whether the notice term was void as unfair pursuant to section 23(1) of the Australian Consumer Law (**the ACL**)⁴.
8. The school also submitted that the parents were bound by a partial admission of liability made in a document filed by them in the proceedings.
9. On the first day of the hearing, I adjourned the matter part heard and asked the parties to provide to each other and to the Tribunal written submissions and evidence in relation to whether the notice term was void as unfair pursuant to section 23 of the ACL.⁵ When the hearing resumed both parties had filed material as directed. After hearing further evidence and argument I reserved my decision.

Summary of decision

10. I have decided that the parents' apparent admission of partial liability was not binding on them as it was only intended to operate as a conditional offer of

⁴ The *Fair Trading (Australian Consumer Law) Act 1992*, section 6(a) relevantly includes the Australian Consumer Law at Schedule 2 to the *Competition and Consumer Act 2010 (Cth)*, and section 7 of the *Fair Trading (Australian Consumer Law) Act 1992* permits it to be referred to as the Australian Consumer Law (ACT)

⁵ Orders of the tribunal 11 November 2021:

Order 3: By 24 November 2021 each party shall provide the tribunal and the other party with any further submissions and evidence they intend to rely on at the hearing only in relation to the issue of whether the "payment in lieu of notice" term in the enrolment agreement is void as unfair pursuant to s.23 of the *Australian Consumer Law*.

Order 4: The parties' written submissions shall not exceed three (3) A4 pages in standard font.

settlement. I further found the notice term, upon which the school founded its claim, void as unfair pursuant to section 23 of the ACL. Accordingly, I dismissed the application.

Partial admission of liability?

11. The school claimed \$3,785.20 plus costs and interest.⁶ It submitted that during proceedings the parents had admitted liability to the extent of \$1,900, in one of the three responses they filed, and that they were bound by that admission. Accordingly, the school asserted the amount in dispute at the date of the hearing was \$1,885.20.
12. The father told the Tribunal that the admission of partial liability was intended as an offer to fully settle the applicant's claim for \$1,900 and was conditional upon the applicant's acceptance. As the school pursued its original claim in full the offer lapsed.
13. The apparent admission was made in the following procedural context:
 - (a) On 20 July 2021 the parents filed their 'first' response to the application in which they denied liability completely and provided particulars of their grounds including "Having the ambiguous clauses in the contract should not allow the school or lawyers to exploit the families."
 - (b) On the 19 August 2021 the parties did not resolve their dispute at a preliminary conference and the tribunal made directions to prepare the matter for hearing. Those directions did not give the respondents leave to file an amended response.
 - (c) On 6 September 2021 the parents filed a second response without leave in which they made a partial admission of liability in the sum of \$1,900. The response did not explain why the partial admission was made but stressed the alleged unfairness of the notice term.
 - (d) On 10 November 2021, on the first day of the hearing, the father orally retracted the admission made in the second response which, he alleged, was made in response to intimidation by the applicant's lawyers in

⁶ Civil dispute application filed 3 June 2021

correspondence. On that day I found there was no basis for this allegation but deferred my decision on whether the admission was binding on the parents. I did not give the parents leave to leave to file an amended response. The hearing was adjourned to 21 January 2022.

- (e) On 24 November 2021 the parents filed a third response, again without leave, in which they denied liability in full.
- (f) On 21 January 2022, on the second hearing day, I found that the partial admission made in the second response was not binding for the following reasons:
 - (i) I only admitted the first response in which liability was denied – because the subsequent two were filed without leave of the Tribunal. Nevertheless it is not in dispute that the parents had apparently made a written admission of partial liability.
 - (ii) The apparent admission is not explained in the document and is at odds with the parents’ otherwise consistent and vigorous denial of all liability.
 - (iii) I accepted the father’s explanation that he intended the apparent partial admission to operate as a conditional settlement offer and that he did not understand the difference between a without prejudice offer to settle and a binding admission of liability.
 - (iv) It is not unusual for unrepresented parties to misunderstand the legal process and this is not necessarily fatal to their case. The Tribunal exercises special care to mitigate the disadvantage that self-represented parties who are not lawyers may have in presenting their case, subject to the necessity that the other party knows in advance the case against them.⁷
 - (v) In exercising its functions under this Act, the tribunal must:
 - (a) *seek to ensure the procedures of the tribunal—*

⁷ *Mathews v University of Queensland* [2002] FCA 414 per Spender J at [5]

- (i) *are as simple, quick, inexpensive and informal as is consistent with achieving justice; and*
 - (ii) *are implemented in a way that facilitates the resolution of the issues between the parties so that the cost to the parties and the tribunal is proportionate to the importance and complexity of the subject matter of the proceeding; and*
 - (b) *observe natural justice and procedural fairness.*⁸
- (vi) The objects of the tribunal include ensuring that applications to the tribunal are resolved as quickly as is consistent with achieving justice.⁹
- (vii) Consistent with its statutory objects and purposes, the tribunal seeks to hear and resolve genuine issues in dispute rather than exclude them from consideration, subject to considerations of natural justice and procedural fairness. In my view the applicant suffered no disadvantage as a result of the inconsistency in the documents filed by the parents.
14. When reviewing the file after the hearing I noted that in the father's email to the tribunal and the school's solicitor, to which the second response was attached, he made clear its intended effect by saying, "attached herewith is the response form, with an offer to settle before the next hearing date. Please advise?" This email was not drawn to my attention at the hearing and so did not inform the decision I made on the day but serves to support it.

Unfair contract terms under the ACL

15. Part 2-3 of the ACL provides a legislative scheme to protect consumers and small businesses from unfair contract terms. The key provision is section 23(1) which provides:

- (1) *A term of a consumer contract or small business contract is void if:*
 - (a) *the term is unfair; and*
 - (b) *the contract is a standard form contract.*

⁸ *ACT Civil and Administrative Tribunal Act 2008* section 7

⁹ *ACT Civil and Administrative Tribunal Act 2008* section 6(c)

Is the enrolment contract a consumer contract to which Part 2-3 of the ACL applies?

16. The school submitted that the enrolment contract was not a consumer contract within the meaning of section 23(3).
17. Section 23(3) relevantly provides that a consumer contract for the purposes of section 23(1) is a contract for:

- (a) *a supply of goods or services;*
 (b) *.....*

to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

18. A ‘service’ is relevantly defined in section 2 of the ACL to include:

- (a) *any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce; and*
- (b) *without limiting paragraph (a), the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:*
- (i) *a contract for or in relation to the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction;*

but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.

Trade or commerce?

19. The school argued that the law was unsettled regarding whether a contract for educational services fell within the definition of a consumer contract under consumer protection laws.¹⁰ It cited the decision of the Federal Court in *Mathews*¹¹ in support of the proposition that, “Courts have held the view that the provision of educational services, and in particular, academic performance, was not conduct engaged in ‘in trade or commerce’”.¹²
20. Mr Mathews claimed that the university had falsely represented that its internal appeal committee would fairly and expeditiously address all of his concerns

¹⁰ Applicant’s submission filed 25 November 2021 at [8]

¹¹ *Mathews v University of Queensland* [2002] FCA 414 at [23]

¹² Applicant’s submission filed 25 November 2021 at [8]

regarding alleged improper actions by the University and its staff, for whom the University was vicariously liable, with respect to the assessment of his academic achievement.¹³

21. He argued that the representation made on behalf of the University contravened the prohibition against misleading and deceptive conduct in section 52 of the *Trade Practices Act 1974* (Cth), and that he suffered loss as a result. He sought orders for ordinary and exemplary damages. The Federal Court struck out Mr Mathew's application because he could not establish essential elements of his case, namely that the representation was made in trade or commerce and that he had suffered a compensable loss as result of it.
22. Spender J observed by way of obiter that, "there is a question as to the jurisdiction of the court in questions of academic assessment."¹⁴ He referred to New Zealand and United Kingdom authorities for the proposition that it is not the role of the court to make academic judgments where a university had an agreed dispute resolution procedure. But went on to determine the case on a different basis, which he explained as follows:

Accepting for the purposes of the strike-out application that the University is a corporation, the representation alleged in par 6 of the Amended Statement of Claim, assuming as one does on such an application as the present that it was in fact made, cannot in my opinion be said to have been made "in trade or commerce." Further and more importantly, Mr Mathews has not identified any loss or damage suffered by him "by the alleged contravening conduct". This is an essential element of the cause of action he seeks to propound.¹⁵

...

I have not approached these proceedings on the basis of an absence of jurisdiction for the Court to review matters of academic assessment in respect of which avenues of internal review are available to a student of the University. I have addressed the matter more broadly and on the acceptance of what is pleaded in the Amended Statement of Claim. In respect of many of the claims, the difficulty, which is fatal in my assessment, is that there is no basis pleaded on which it can be argued that the loss or damage claimed is a consequence of the breach of

¹³ *Mathews v University of Queensland* [2002] FCA 414 per Spender J at [8]

¹⁴ *Mathews v University of Queensland* [2002] FCA 414 at [25]

¹⁵ *Mathews v University of Queensland* [2002] FCA 414 at [10]

*contract or other causes of action pleaded in the Amended Statement of Claim.*¹⁶

23. The school conceded that, unlike *Mathews*, the dispute in this case was about the school fees rather than the educational services provided or the assessment of academic performance. It submitted that:

*on their face, matters concerning school fees are more likely to be matters involving an engagement in trade or commerce. However to determine if the Contract is a commercial contract for the purposes of s 23 of the ACL, the Contract must be considered in its entirety.*¹⁷

24. The meaning of the term ‘trade and commerce’ in equivalent provisions of the now repealed *Trade Practice Act 1974* was considered by Dowsett J in *Hearn v O’Rourke* who said:

*The correct approach is to determine whether or not the relevant conduct, can, according to ordinary usage, be described as having occurred in the course of dealings ‘...which, of their nature, bear a trading or commercial character.’*¹⁸

25. Recent decisions have recognised the essentially commercial nature of the provision of education in return for the payment of fees. As Tennent J observed in *Wright v Christ College Trust*¹⁹:

*The [school] operates a business. It enters into contracts with parents to provide a service and parents agree to pay fees for that service.*²⁰

26. I accept the logic of her Honour’s observation. I am satisfied the enrolment contract was for the provision of educational services in trade or commerce.

Services not for personal use of the parents

27. In the alternative the school argued that the educational services supplied by the school were not for the personal use of the persons who acquired them but

¹⁶ *Mathews v University of Queensland* [2002] FCA 414 at [27]

¹⁷ Applicant’s submissions filed 25 November 2021 at [8]

¹⁸ *Hearn v O’Rourke* [2003] FCAFC 78 at [29]

¹⁹ [2006] TASSC 107. See also by way of example *Zhang v Kilmore International School* [2007] VCAT 1977 in which VCAT considered an application by a parent against a school under the now superseded unfair consumer terms provisions of the *Fair Trading Act 1998* (Vic).

²⁰ [2006] TASSC 107 per Tennent J at [22]

rather for that of their children and therefore the second limb of section 23(3) was not satisfied.²¹

28. I did not accept the logic of that argument. Section 23(3) only requires that the services be acquired “wholly or predominantly for personal, domestic or household use or consumption”. It does not require that they be for the personal use of the individual who acquires them, although clearly it must be for the personal or domestic or household use or consumption of someone. The interpretation proposed by the applicant is not consistent with the natural meaning of the words used.
29. The language of section 23(3) is sufficiently broad to include services a parent may acquire for the use of their minor children. It is the parent and not the child who is a party to such a contract. If the applicant’s argument were accepted then whenever a parent bought services or goods for the personal use of their child, be that orthodontic services or school shoes, they would be denied the protection of section 23. It is not plausible that such transactions were intended to be excluded from the operation of section 23.
30. I was satisfied that the enrolment contract was a contract for the supply of services within the meaning of section 23(3) to the parents for the use of their children. The enrolment contract was a consumer contract because it satisfied all relevant criteria set out in section 23(3).

Was it a standard form contract under section 27 of the ACL?

31. Section 23(1) only applies to a term in a standard form contract. Section 27 establishes the basis for determining whether or not a contract is standard form contract.
32. Section 27(1) provides that:

If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.

²¹ Applicant’s written submissions filed 25 November 2021 at [7]

33. Neither party addressed this criterion in their written submissions. However, in my view it could be inferred from the terms of the parents' response that they regarded it as standard form contract which they had no opportunity to negotiate. At the hearing the father referred to the contract as a "stock standard"²² contract that applied to every parent regardless of their circumstances. He also responded to my question as to whether the parents had an opportunity to negotiate the terms, "Absolutely. There was no opportunity to take it or leave it."²³ By which I understood him to mean that that there was no opportunity for the parents to negotiate the terms of the contract and they just had to take it or leave it. The school's lawyer on behalf of the school neither admitted nor denied that the enrolment contract was a standard form contract.
34. If it is not alleged that the contract is a standard form contract then the Tribunal is required to take into account the following mandatory considerations set out in section 27(2) to determine the question.
- (2) *In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:*
- (a) *whether one of the parties has all or most of the bargaining power relating to the transaction;*
 - (b) *whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;*
 - (c) *whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in section 26(1)) in the form in which they were presented;*
 - (d) *whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in section 26(1);*
 - (e) *whether the terms of the contract (other than the terms referred to in section 26(1)) take into account the specific characteristics of another party or the particular transaction;*
 - (f) *any other matter prescribed by the regulations. (No other matter was prescribed by the regulations)²⁴*

²² Transcript of proceedings 10 December 2021, page 7

²³ Transcript of proceedings 21 January 2022, page 46

²⁴ *Australian Consumer Law* section 27(2)

35. Although I concluded that the statements made by the father satisfied section 27(1) in any event I was satisfied that the contract was a standard form contract under section 27(2). I accepted that the parents would not have any say in the terms of the contract which was drafted by the school and offered to them on a take it or leave it basis.

Was the notice term unfair?

36. To be unfair for the purposes of section 23(1) of the ACL, a term of a consumer contract must meet all the following criteria under section 24(1):

- (a) *it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and*
- (b) *it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and*
- (c) *it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.*

37. The following sub sections of section 24 clarify what is required to establish each criteria:

- (2) *In determining whether a term of a contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:*
 - (a) *the extent to which the term is transparent;*
 - (b) *the contract as a whole.*
- (3) *A term is transparent if the term is:*
 - (c) *expressed in reasonably plain language; and*
 - (d) *legible; and*
 - (e) *presented clearly; and*
 - (f) *readily available to any party affected by the term.*
- (4) *For the purposes of subsection (1)(b), a term of a contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.*

When is unfairness assessed?

38. It is well established that unfairness for the purposes of section 23(1) is assessed at the time the contract is formed. Jarrett J in *Ferme & Ors v Kimberly Discovery Cruises Pty Ltd*²⁵ clearly explained why as follows:

- (a) *Section 23(1) is concerned with whether the relevant term is void. Ordinarily, as a matter of the law of contract, a term that is void, is void ab initio. It is usually void for reasons that have occurred before or at the time of the formation of the contract and whether a term or a contract is void is independent of any election of the parties to the contract. A contract is voidable, generally speaking upon a party to the contract – the innocent party – electing for it to be so. That election must necessarily occur after the contract has been formed;*
- (b) *Section 24(1)(a) requires a prospective inquiry – “A term of a consumer contract is unfair if . . . it would cause a significant imbalance in the parties’ rights and obligations arising under the contract”. The subsection does not provide that a term is void if it did cause a significant imbalance between the rights of the parties. That it did cause such an imbalance might be relevant (such matters might be taken into account perhaps under s.24(2) - a court may take into account such matters as it thinks relevant), but the subsection expressly contemplates a prospective inquiry to ascertain the existence of the first element of unfairness;*
- (c) *so too, ss.24(1)(b) and 24(1)(e) contemplate a prospective inquiry; and*
- (d) *the text of s.24, more generally, focusses attention upon the term sought to be impugned. It does so by directing attention to the form of the contract, the language of the term, whether it is transparent, the place of the term in the overall contract and the effect of the term – what work it would do in the context of the contract as a whole.*

Unfair Criterion 1: Is there a significant imbalance? – Section 24(1)(a)

39. The parents argued that the effect of the notice term, in the context of other provisions of the contract, was unfair because the school was able to unilaterally change essential terms such as fees without giving parents an opportunity to withdraw their child without penalty.²⁶

40. The school argued that the notice term would not cause a significant imbalance in the parties’ rights and obligations under the contract, and indeed that it favoured the rights of the parents over those of the school because only the

²⁵ [2015] FCCA 2384 at [58]

²⁶ See respondent’s written submissions filed 26 November 2021, page 1

parents had a right to unilaterally terminate the contract “for convenience”, whether upon payment of a fee or by giving prescribed notice.

Consideration

41. The school offers tuition from Kindergarten to Year 12. Parents sign the enrolment contract when their child first enrolls. The contract is not for a specified period such as a school year. I have set out below the relevant terms and their effect as I understand them.

Fees

24. I/We have read the Fee Schedule and agree to be responsible (when more than one person is signing this Form, both jointly and severally) for the payment of all College fees and charges as set out in the Fee Schedule.

42. The contract was signed in December 2017. The Fee Schedule attached to the contract set out the school’s fee structure for the 2017 academic year although the children started in the first term of the following year.
43. The fee schedule attached to the contract is incorporated by reference into the contract and establishes the upfront price payable by the parents under the enrolment contract.
44. The upfront price in a standard form consumer contract is the amount that the consumer agrees to pay under the contract, or to be paid for the supply, sale or grant under the contract.
45. The ACL defines ‘upfront price’, in the context of section 26 as follows:

Terms that define main subject matter of consumer contracts or small business contracts etc. are unaffected

(1) Section 23 does not apply to a term of a consumer contract or small business contract to the extent, but only to the extent, that the term:

- (a) defines the main subject matter of the contract; or*
- (b) sets the upfront price payable under the contract; or*
- (c) is a term required, or expressly permitted, by a law of the Commonwealth, a State or a Territory.*

- (2) *The upfront price payable under a contract is the consideration that:*
- (a) *is provided, or is to be provided, for the supply, sale or grant under the contract; and*
 - (b) *is disclosed at or before the time the contract is entered into;*
- but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.*

46. Clause 25 of the contract, which includes the notice term, is set out in full below:

25. *I/we agree that:*

- a) *the Administration Fee paid by me/us is not refundable;*
- b) *all College fees are payable within two weeks of issue of each fee statement;*
- c) *one full College term's notice in writing to the Principal is required for the intended withdrawal of the child, otherwise a full term's fees will be charged. The written notice must be received by the College by the first day of the term. Any Notice received after the first day of term will render parents/carers liable for that term and the subsequent term in lieu of notice.*

47. The school reserved its right to unilaterally vary terms of the enrolment contract as follows:

Enrolment Policy

2. *I/We have read the Enrolment policy and agree to comply with the Enrolment Policy, and to any variations of the Enrolment Policy from time to time.*

Curriculum

3. *I/We have read the College Prospectus and in particular, the section headed "the College Curriculum", "The Christian Life of the College", and Enrolment, Entry and Fees" and agree to confirm [sic] to the policies and rules of the College set out in the Prospectus and to such variations of those policies once such variations have been published in either the Weekly Newsletter or Future Editions of the Prospectus.²⁷*

48. I was satisfied that the combined effect of the above terms is that the school can unilaterally vary fees or curriculum by publishing such variation without prior notice and without giving parents an opportunity to withdraw their child from

²⁷ Contract page 1 at [3]-[4]

the school without penalty. Parents who find the changes unacceptable must pay at least one and possibly two term's fees following the variation, depending on when it takes effect.

49. I was not convinced by the school's argument that the notice term was for the convenience of the parents for the following reasons:

(a) A parent can exercise their legal parental responsibility by making educational choices for their children, including whether to enrol, or continue to enrol them in a particular school. The right to exercise that responsibility is not dependent on establishing a breach of contract by the school.

(b) The purpose of the notice term is to protect the interests of the school in the event of the parent exercises their right to withdraw their child by requiring notice or payment in lieu of notice. It is for the school's benefit, not the parents.

(c) The argument fails to take account of the operation of the notice term in the context of the contract, and in particular, its interaction with other terms which permit the school to unilaterally vary the terms of enrolment.

50. I was satisfied that the notice term, in the context of the contract, would cause significant imbalance in the parties' rights and obligations arising under the contract as required by section 24(1)(a) because it has the effect of permitting the school, but not the parents, to vary the terms of the contract; and of permitting the school to alter the upfront price payable under the contract without giving the parent a corresponding right to terminate the contract.

51. Section 25, without limiting section 24, provides examples of the kinds of terms of a consumer contract or small business contract that may be unfair, including the following two examples which, in my view, describe the notice term:

(d) *a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;*

- (f) *a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;*

Transparency

52. The parents argued that although the notice term when read in isolation was clear, its effect in combination with other terms of the contract was not. They submitted that the contract:

- *Does not make it clear that the relationship between the school and the parents is [an] ongoing one;*
- *Does not expressly state that the contract would continue in force beyond the end of the academic year unless subsequent steps were taken are [sic] the end of each academic year;*
- *School fees are increased every year and forced upon parents to agree, which is suggestive of a series of annual contracts, rather than one underlying one.*²⁸

53. I accept the logic of each of these submissions. The ongoing nature of the contract is not expressly stated and cannot be clearly inferred from its terms. The restriction of the parents right to withdraw without penalty if the school varies the terms of the contract puts them at a significant disadvantage and therefore must be explicitly stated. I do not think that the effect of the notice term, in the context of the contract, was sufficiently transparent.

54. As the time for assessing fairness, including transparency, is at the formation of the contract I did not need to consider whether the parents did or should have eventually become aware from experience that the contract continued from year to year without being renewed. Nor do I need to determine whether their eventual decision to withdraw their children was motivated by the school varying the terms of enrolment.

Unfair Criterion 2: Is the term reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term – section 24(1)(b)

55. The notice term is for the benefit of the school and hence it is for it to establish that it is reasonably necessary in order to protect its legitimate interests.²⁹

²⁸ Respondents' written submissions filed on 26 November 2021 at [7]

Genuine pre-estimate of loss or penalty?

56. To be reasonably necessary the notice term must, amongst other things, reflect a genuine pre-estimate of the school's loss in the event a child is withdrawn, rather than imposing a penalty upon the parents.
57. The school's chairman of the school board gave evidence by sworn affidavit and was cross examined at the hearing on 21 January 2022. Although he did not expressly agree with the father's description of the enrolment contract as a "rolling contract" his evidence made clear that the school regarded it as such, subject to a parent's right to withdraw their child in accordance with the notice term.
58. The chairman of the school board explained that the school expected that all its students would attend until the conclusion of their studies in Year 12. If an individual child were withdrawn from the school without notice the school may be unable to replace them with a new student at the same year level in a timely way. In the meantime, the school would have to pay for resources committed to the first child without the benefit of the school fees and government funding associated with their enrolment. The school sought to mitigate this potential loss by the requiring one term's school fees in lieu of notice, which he described as the "bare minimum" required for this purpose.
59. The chairman of the school board told the Tribunal that both the Commonwealth and ACT governments contribute to the school's funding. For the purposes of determining a school's needs, and hence funding levels, a government census of enrolment numbers is conducted twice a year, in August and February.
60. He described the school's planning process as follows:

...we settle our teacher numbers, budget all classes, set out all of the class alignments in terms of, you know where the classes are running and the curriculum. That all happens in Term 4 of the year so that's why we

²⁹ *Australian Consumer Law* section 24(4)

*expect our parents to tell us at the start of Term 4 what their intentions are and it has nothing to do with telling us in January....it's too late.*³⁰

61. The father put the proposition to the chairman of the school board that given the above timeframes the impact on the school of withdrawing a child at the end of an academic year was less than if the child was withdrawn in the middle of the year. As I understood it his argument was as follows:
- (a) If a child were withdrawn at the end of the academic year the school had an opportunity to incorporate that information into its term 4 planning and adjust its expenditure accordingly for the following year. The February census would capture enrolment numbers at the beginning of the academic year for the purposes of determining government funding.
 - (b) Whereas if a child were withdrawn in the middle of the year, for example before the August census, the school may suffer both a loss of anticipated funding and school fees at a time when it had already committed to expenditure for the balance of the year.
62. The father's submission was not clearly rebutted by the chairman of the school board, and I accepted the logic of it.

Consideration

63. The potential cost to the school of a child being withdrawn depends on a variety of factors, including at what stage of the school year the child is withdrawn, and whether new students can be quickly enrolled at same year level. It is by necessity incapable of precise estimation, and one term's fee may be a reasonable estimate to cover all contingencies. However, the question of whether the notice term is reasonably necessary for the purposes of section 24(1)(b) must be considered in light of its effect in the context of the contract as a whole.
64. Courts have considered the term 'reasonably necessary' in the context of medical treatment in several cases and found that the term 'reasonably' moderates the absolute meaning of necessary so that an action can be

³⁰ Transcript of proceedings on 21 January 2021, page 71

‘reasonably necessary’ if it is necessary in the circumstances even if not strictly indispensable.³¹

65. A narrow construction of the term ‘reasonably necessary’ in section 24(1)(b) could mean that the respondent’s legitimate ends justified unreasonable, yet necessary, means. Such an interpretation would be contrary the intent of the legislation which is to protect consumers against unfair business practices. In my view ‘reasonably necessary’ in the context of section 24(1)(b) must mean the use of the impugned term is both reasonable and necessary. Black’s Law Dictionary³² defines ‘reasonable’ as “Fair, proper, or moderate under the circumstances.”
66. The notice term operates in the context of a rolling contract which permits the school to unilaterally vary the terms of the contract, including fees, without giving the parents a right to terminate without penalty. In my view such a model is neither reasonable nor necessary.
67. The legitimate interest of the school in forward planning are capable of being balanced with the rights of the parents by requiring the school to notify parents in advance of changes to the terms of enrolment for the following year; and requiring parents to notify the school by a specified date in term 4 if they accept those terms and intend their children to return the following year so as to allow the school to undertake necessary planning.
68. The school would have sufficient time to plan allocation and teaching resources for the following year and could thus mitigate any loss occasioned by the termination of the contract. The notice term could still reasonably be applied to children withdrawn during the course of the school year after resources based on student numbers for that year had been committed.
69. Both parties referred to examples of what they said were equivalent notice terms in other private school enrolment contracts in Canberra. In general, what other schools do is of no relevance in determining the fairness of the contract in this

³¹ See *Diab v NRMA* [2014] NSWWCPCD 72 for a summary of authorities at [76]-[91]

³² thelawdictionary.org

case. Further, the effect of the examples could not be reliably understood as they were not given in the context of the entire enrolment contract. However, it is of interest that at least one of the examples the school provided appeared to only require the parents to give notice if they withdrew their child during, rather than at the end of the school year.

70. I found that the school failed to establish that the notice term, in the context of the contract, was either reasonable or necessary to protect its legitimate interests, accordingly I found the second criterion of unfairness established.

Criterion 3: it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on – section 24(1)(c)

71. The third criterion, while as essential as the other two, is the easiest to satisfy. If the notice term were relied upon the parent would suffer detriment because they would be required to pay school fees for a service that they neither wanted nor received. The extent of detriment suffered by the parents in this case is immaterial.

Conclusion

72. For the reasons stated above I found the notice term, upon which the school's claim was founded, void pursuant to section 23(1) because it was both a term of a standard form consumer contract and unfair. Accordingly, I dismissed the application.

.....
Senior Member E Ferguson

Date(s) of hearing: 10 November 2021 & 21 January 2022
Solicitors for the Applicant: Mr S Coyle, HWL Ebsworth Lawyers
Respondent: In person