ACT CIVIL & ADMINISTRATIVE TRIBUNAL

MIRARABSHAHI v FB MARKETS PTY LTD ACN 627 763 320 (Civil Dispute) [2020] ACAT 109

XD 132/2020

Catchwords: **CIVIL DISPUTE** – unsolicited consumer agreement – contract to supply software for purpose of currency trading - application for refund – contravention of requirement for provision of information prior to making the agreement – contravention of prohibition to supply goods or receive payment prior to expiry of statutory period – extension of termination period – notice to terminate given within extended termination period – statutory obligation to refund engaged – refund ordered

Legislation cited: *Australian Consumer Law* (Cth) ss 69, 70, 71, 72, 76, 82, 83, 84, 86
Fair Trading (Australian Consumer Law) Act 1992 ss 6, 7

Subordinate Legislation cited: *Competition and Consumer Regulations 2010* ss 83, 84

Cases cited: *ACCC v Origin Energy Electricity Ltd* [2015] FCA 278
Australian Competition and Consumer Commission v Unique International College [2017] FCA 727

Tribunal: Presidential Member G McCarthy

Date of Orders: 14 December 2020
Date of Reasons for Decision: 14 December 2020

AUSTRALIAN CAPITAL TERRITORY
CIVIL & ADMINISTRATIVE TRIBUNAL **XD 132/2020**

BETWEEN:

PEYMAN MIRARABSHAHI
Applicant

AND:

FB MARKETS PTY LTD ACN 627 763 320
Respondent

TRIBUNAL: Presidential Member G McCarthy

DATE: 14 December 2020

ORDER

The Tribunal orders that:

1. The respondent is to pay the applicant the sum of $15,014.85 within 28 days from the date of the order, comprised of:
   (a) a refund of the goods purchased ($14,300);
   (b) the filing fee ($159.50); and
   (c) interest in the sum of $555.35.

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Presidential Member G McCarthy

REASONS FOR DECISION

1. The respondent, FB Markets Pty Ltd, holds itself out as a software development company for currency trading. As part of its business, it sells licences to operate a software program described as Alpha FX that 'pairs' one currency with another and tracks their value, relative to each other, according to movements on currency markets. For example, the software can 'pair' the Australian dollar with the New Zealand dollar and then track changes in the value of one currency relative to the other. It can operate multiple pairs of currencies and track changes in the value of one currency in each pair relative to the other.

2. The software is an investment tool. As I understood it, a user of the software places cash with a foreign-exchange broker and then uses the software to provide automated directions to the broker to buy or sell one currency or the other in a pair according to rises or falls in the value of one currency relative to the other. The user of the software (in this case, the applicant) 'sets' the points in the software at which a rise or fall will prompt an automated direction to the broker.

3. The respondent sells the Alpha FX software program to investors.

4. On 30 October 2019, the applicant, Mr Mirarabshahi, received a telephone call from Tracey McClennan who was "a telemarketer in an appointment centre"[1] for the respondent. Mr Peters, on behalf of the respondent, said that this occurred as part of the respondent's campaign for the sale of its automatic currency trading software.[2]

5. Ms McClennan gave evidence at the hearing. She explained that the applicant's name came up on her "autodialler",[3] which suggested that the applicant had in some way shown an interest "in some type of investment", noting that "ours is currency trading."[4] Ms McClennan could offer no other information about how the applicant's name and telephone number came to be on her autodialler.

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[1] Transcript of proceedings 13 August 2020, page 47, lines 37-38
[2] Transcript of proceedings 13 August 2020, page 97, lines 35-36
[3] Transcript of proceedings 13 August 2020, page 49, line 32
[4] Transcript of proceedings 13 August 2020, page 48, lines 5-6

6. The applicant received Ms McClennan's call at 2:52pm. The applicant was busy at the time Ms McClennan rang, and requested a call back after 6:00pm.[5] Later that day, Ms McClennan called the applicant back as requested.[6] In that further call, the applicant expressed interest in the respondent's software program and requested more information.

7. On 1 November 2019, the applicant received another call, this time from Mr Kalvin McDonald who was a sales representative on behalf of the respondent. By arrangement, on 9 November 2019 the applicant and Mr McDonald had a long conversation about the Alpha FX program at the end of which the applicant agreed to a trial usage of the software. This entailed the applicant opening an account with the respondent, installing the software in the applicant's personal computer, the applicant opening an account with Charterprime (being the currency broker suggested by the respondent and accepted by the applicant) and the applicant depositing $1,000 into the broker's account to facilitate automated currency trades as directed by the software. The applicant's account started trading on 6 December 2019.

8. Mr McDonald gave evidence that the applicant was impressed with the net gains he was making from currency trading using the software during the trial and wanted to purchase the software immediately in order to continue trading. Mr McDonald offered two packages: six currency pairs for $9,900 and 13 currency pairs for $14,300. The applicant chose the latter package.

9. Mr McDonald said (and I accept) that the applicant was anxious to purchase the software and to set up further currency trading as quickly as possible because he was leaving on 16 December 2019 to go on a cruise ship for a holiday and did not want to miss out on money he could make from currency trading whilst holidaying on the ship.

10. In accordance with the applicant's wishes, on 13 December 2019 Mr McDonald sent the applicant a proposed contract with the respondent for the purchase of the Alpha FX program comprised of 13 pairs (being 11 currency pairs and 2

[5] Transcript of proceedings 13 August 2020, page 8, lines 4-5
[6] Transcript of proceedings 13 August 2020, page 47, lines 15-19

commodity pairs, being gold and oil) for a purchase price of $14,300. He did so under cover of an email sent on 13 December 2019 at 1:30pm.[7] The terms of the proposed contract were brief. They were as follows:

1. *I, the buyer, hereby agree to purchase the Alpha FX (13 Pairs - See Attachment) software program from FB markets Pty Ltd for the price of* ***$14,300 incl GST****.*

2. *Software fees do not include trading funds.*

3. *The Buyer will be required to:*

   a. *Download Meta Trader 4 (MT4)*

   b. *Open an account with a compatible broker that utilises MT4*

4. *FB Markets Pty Ltd will provide the following:*

   a. *Entry to the trading Program and software package*

   b. *Ongoing customer services*

   c. *Regular updates of new trading strategies and software packages.*

5. *The contract for the sale of the Alpha FX software program comprises all the terms of the agreement. No refunds we made to the buyer. The parties acknowledge that no other representations, provisions or incentives made by any salesperson, agent or independent contractor form a part of this contract.*

6. *The buyer fully understands that there are inherent risks associated with derivative market trading.*

7. *The client understands that due to restrictions under the Australian Consumer Law, s 82, it is unlawful for FB Markets to provide goods and/or services until the expiration of a 10 business day cancellation period. All services provided to the client will commence 10 business days after this agreement is received.*

8. *In compliance with Australian Consumer Law, s86, all payments are not due until 10 business days after this agreement. Important Notice to Consumer: You have the right to cancel this agreement within 10 business days from and including the day after you received this agreement.*

9. *This is a lifetime agreement.*

[7] Exhibit A8

> *The Client fully understands that there are risks associated with trading. Past performance figures that may have been discussed have no reflection on what may happen in the future. We make no false promises that we would find difficult to sustain, both in the long and short term, and most importantly, we do not want you as our valued client to have a totally unrealistic expectation of this product.*
>
> *The Alpha FX Program is a derivative market program. It is not a program for quick and certain wealth. The seller is proud of the product but cautions the valued client from holding unrealistic expectations. Investment in derivative markets included* (sic) *the necessity for able risk-management. The prudent investor measures investment, risk and reward.*

11. A computer-generated bank receipt confirms that the applicant paid $14,300 to the respondent on 13 December 2019 at 1:39pm.

12. The applicant signed the proposed contract in the form that it was sent and returned it to the respondent by email sent on 13 December 2019 at 1:45pm (**the contract**)[8] - 15 minutes after he received it.

13. Notwithstanding clause 7 of the contract, in response to the applicant's wish to commence trading before he went on the cruise ship, on or about on 16 December 2019 the respondent accepted the applicant's money and activated the software.[9]

14. The applicant gave evidence that he became dissatisfied with the Alpha FX program, despite efforts by the respondent's customer service staff to assist him.

15. On 3 January 2020, the applicant sent an email to the respondent which relevantly stated:

> *I have been trying to contact you several times over the phone and nominated email address and no response yet. As the customer service was part of the agreement which has not been fulfilled so the agreement is terminated and I want full refund of $14300.*[10]

16. On 3 January 2020, the applicant sent another email to the respondent which stated:

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[8] Transcript of proceedings 13 August 2020, page 36, lines 20-46

[9] Transcript of proceedings 13 August 2020, page 26, lines 31-32. There was disputed evidence from the applicant that only 6 of the 13 pairs were activated, but it was not necessary to decide that issue for the purpose of this application

[10] Exhibit A4

> *BTW, the USB that I received doesn't have the software nor the instruction manual. Please arrange for refund ASAP*[11]

17. On 7 January 2020, the applicant sent two more emails contending that the respondent's telephone number "is not in service". He invited the respondent's "IT tech" to connect to his laptop and remove the software. He pressed for payment of the requested refund.[12]

18. On 8 January 2020, in yet another email, the applicant again pressed for a full refund and said that any future communication would be sent to different Commonwealth regulators.[13]

19. On 8 January 2020, someone from the respondent telephoned the applicant to discuss the applicant's concerns with the software, but the applicant maintained his request for a refund.[14]

20. On 3 February 2020, the applicant commenced proceedings in this Tribunal for recovery of the amount he paid for the software ($14,300), plus the filing fee ($159.50) plus interest. The applicant took a scattergun approach as to why he should receive a refund, alleging breaches of sections 18, 23, 24, 25, 29, 69, 70, 72, 76, 79, 82, 84, 86, 87 and 89 of the Australian Consumer Law (**the ACL**).[15]

21. The respondent denied liability on the basis that the applicant trialled the product, did not cancel in writing in the so-called 10 day cooling off period, continued to use the software and made a profit from using the software.

22. I begin with the applicant's claim under sections 69 – 89 of the ACL, which deal with rights and obligations in connection with an "unsolicited consumer agreement". That term is defined in section 69 of the ACL, the relevant part of which is as follows:

> *Meaning of unsolicited consumer agreement*

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[11] Exhibit A4
[12] Exhibit A4
[13] Exhibit A4
[14] Transcript of proceedings 13 August 2020, page 23, lines 10-27
[15] 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)*

*(1) An agreement is an **unsolicited consumer agreement** if:*

(a) it is for the supply, in trade or commerce, of goods or services to a consumer; and

(b) it is made as a result of negotiations between a dealer and the consumer:

(i) in each other's presence at a place other than the business or trade premises of the supplier of the goods or services; or

(ii) by telephone;

whether or not they are the only negotiations that precede the making of the agreement; and

(c) the consumer did not invite the dealer to come to that place, or to make a telephone call, for the purposes of entering into negotiations relating to the supply of those goods or services (whether or not the consumer made such an invitation in relation to a different supply); and

(d) the total price paid or payable by the consumer under the agreement:

(i) is not ascertainable at the time the agreement is made; or

(ii) if it is ascertainable at that time--is more than $100 or such other amount prescribed by the regulations.

*(4) However, despite subsections (1) and (3), an agreement is not an **unsolicited consumer agreement** if it is an agreement of a kind that the regulations provide are not unsolicited consumer agreements.*

23. For an unsolicited consumer agreement, a dealer has numerous obligations under sections 73-76 of the ACL regarding negotiation of the agreement. Sections 78 – 81 impose other requirements on a dealer and/or a supplier in relation to such an agreement.

24. A 'dealer' is defined in section 71 of the ACL as "a person who, in trade or commerce, enters into negotiations with a consumer with a view to making an agreement for the supply of goods or services to the consumer; or calls on, or telephones, a consumer for the purpose of entering into such negotiations; whether or not that person is, or is to be, the supplier of the goods or services". It follows that Ms McClennan and Mr McDonald were dealers for the purposes of section 71.

25. 'Negotiation', in relation to an agreement or a proposed agreement, is defined in section 72 of the ACL to include "any discussion or dealing directed towards the making of the agreement or proposed agreement".

26. Section 82 of the ACL sets out different grounds on which a consumer[16] under an unsolicited consumer agreement may terminate the agreement and the timeframes within which the consumer may do so.

27. Section 84 the ACL provides that if an unsolicited consumer agreement is terminated in accordance with section 82:

> *...the supplier under the agreement must, immediately upon being notified of the termination, return or refund to the consumer under the agreement any consideration (or the value of any consideration) that the consumer gave under the agreement or a related contract or instrument.*

28. The first question was whether the contract was an unsolicited consumer agreement. The applicant alleged it was, and the respondent that it was not.

29. Pursuant to section 70 of the ACL, where the applicant alleges that the contract is an unsolicited consumer agreement it is "presumed" to be an unsolicited consumer agreement if no other party proves that it is not. In other words, under section 70, the onus was on the respondent to prove that the contract was not an unsolicited consumer agreement.[17]

30. Mr Peters, on behalf of the respondent, said (and I accept) that on 7 December 2017 the applicant "opted into an email for options of looking for ways to increase his residual income".[18] Mr Peters explained that the respondent "purchases leads", meaning (as I understood it) lines of enquiry to possible purchasers of its product, from a lead broker agency. It seems that, by this means, the respondent obtained details about the applicant (arising from his enquiry in 2017) which led to Ms McClennan telephoning the applicant on 30 October 2019.

31. Mr Peters described Ms McClennan as the "original telemarketer."[19] He properly accepted that her first call to the applicant was "unsolicited.[20] He submitted, nevertheless, that the contract was not an unsolicited consumer

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[16] A 'consumer' is defined in section 3 of the ACL. The applicant was a consumer in relation to his purchase of the Alpha FX software program.
[17] *ACCC v Origin Energy Electricity Ltd* [2015] FCA 278 at [17]
[18] Transcript of proceedings 13 August 2020, page 97, lines 31-34
[19] Transcript of proceedings 13 August 2020, page 107, lines 15-16
[20] Transcript of proceedings 13 August 2020, page 99, lines 19-21; page 107, lines 15-16

agreement because, from the point in time when Ms McClennan contacted the applicant, the applicant positively pursued further communication with representatives of the respondent by means of telephone appointments on agreed times and dates. To use his phrase, "they were all agreed call-backs."[21] The applicant contended that only some of the call-backs were agreed, but nothing turns on this.

32. Mr Peters also relied on the fact that the applicant could, at any time, have chosen not to proceed with the proposed purchase of the software but did not do so. This is consistent with an email that the respondent sent to the applicant on 1 November 2019 in relation to the proposed trial of the software in which the respondent wrote:

> *Remember, this is just a trial and you are not obliged to continue further if you are not satisfied with any aspect of the services provided. All profits generated throughout the course of the trial will remain in your account and you are free to withdraw your funds at any time.*

33. Mr Peters relied on the fact that the applicant chose to continue with the installation of the software and, by his own admission, "received financial benefit to the value of $252 in a short period of time".[22] Why the applicant's receipt of the financial benefit had any bearing on the character of the contract was not explained.

34. I was not persuaded by Mr Peters' submission, as I needed to be under section 70, that the contract is not an unsolicited consumer agreement.

35. First, the respondent (appropriately) did not dispute that paragraphs 69(1)(a) and (d) of the ACL are met.

36. Regarding paragraphs 69(1)(b) and (c) of the ACL, it should first be noted that "the dealer" in paragraphs 69(1)(c) is a reference to the "dealer" in paragraph 69(1)(b). It follows that all the negotiations by telephone between the applicant and Mr McDonald are without consequence, for the purposes of section 69 of the ACL, because, I accept, none of those telephone calls was unsolicited.

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[21] Transcript of proceedings 13 August 2020, page 107, lines 37
[22] Transcript of proceedings 13 August 2020, page 13, lines 36-38; page 107, line 41

37. I was also prepared to accept that no call, save for the first call from Ms McClennan at 2:52pm on 30 October 2019, was unsolicited. The question is whether that call was enough to satisfy paragraphs 69(1)(b) and (c), noting that Mr Peters properly accepted that the applicant did not invite Ms McClennan to make that telephone call.

38. Regarding paragraph 69(1)(b), I acknowledge that the contract culminated from negotiations between the applicant and Mr McDonald, but those negotiations followed from the earlier discussion between Ms McClennan and the applicant. In other words, the earlier discussion set in train a process that resulted in the contract. It is also clear from the words "whether or not they are the only negotiations that precede the making of the agreement" at the close of paragraph 69(1)(b) that negotiations includes earlier negotiations between the consumer and a different dealer, and in this case Ms McClennan.

39. I am also satisfied, by the clear causal links between Ms McClennan's first unsolicited call to the applicant and all subsequent calls to or from the applicant, that the contract was made "as a result of negotiations" between Ms McClennan and the applicant, noting that 'negotiation includes "any discussion or dealing directed towards the making of the agreement". It is self-evident that Ms McClennan's discussion with the applicant during that first call was directed towards that purpose, even if the discussion did not progress in any substantive way.

40. I received very little evidence about what was discussed during the first call. In particular, I had no evidence about what Ms McClennan first said and who turned the conversation towards the prospect of making the contract. However, nothing turns on these issues. In *Australian Competition and Consumer Commission v Unique International College*[23], the Federal Court, per Perram J, said that for the purposes of paragraph 69(1)(b), it does not matter who initiated the negotiations: it is enough that the discussion was directed towards the making of the agreement.

[23] *Australian Competition and Consumer Commission v Unique International College* [2017] FCA 727 at [737]-[738]

41. Regarding paragraph 69(1)(c), it is self-evident that the applicant did not invite the dealer (meaning Ms McClennan in this case) to make her telephone call "for the purpose of entering into negotiations" relating to the supply of the software. It does not matter that Ms McClennan's initial telephone call was brief and did not progress beyond the applicant requesting a call-back to discuss the software further. The fact that the applicant (in relation to the first call) did not invite Ms McClennan to call him "for the purposes of entering of entering into negotiations relating to the supply" of the software is enough even if the applicant "motivated"[24] the sale after receiving that first call.

42. I also note that the contract refers to "restrictions" under section 82 of the ACL and what must be done to comply with section 86. Those sections apply only to unsolicited consumer agreements, which begged the question why the contract should not be regarded as an unsolicited consumer agreement. In response to the contract referring to these sections, Mr Peters said that "maybe from our end it wasn't worded the best possible way"[25] and that it "could be a mistake on our behalf".[26]

43. I can accept that the contract does not become an unsolicited consumer agreement simply because it refers to these sections, but their inclusion is a strong indicator that the respondent understood that the contract was an unsolicited consumer agreement: why else would they be included?

44. The next question was whether the respondent contravened any of the provisions governing an unsolicited consumer agreement. The applicant contended it breached section 76 of the ACL, which reads as follows:

> *Informing person of termination period etc.*
>
> *A dealer must not make an unsolicited consumer agreement with a person unless:*
>
> *(a) before the agreement is made, the person is given information as to the following:*
>
> *(i) the person's right to terminate the agreement during the termination period;*

[24] Transcript of proceedings 13 August 2020, page 108, line 4
[25] Transcript of proceedings 13 August 2020, page 108, lines 1 - 2
[26] Transcript of proceedings 13 August 2020, page 109, lines 1 - 2

> *(ii) the way in which the person may exercise that right;*
>
> *(iii) such other matters as are prescribed by the regulations; and*
>
> *(b) if the agreement is made in the presence of both the dealer and the person--the person is given the information in writing; and*
>
> *(c) if the agreement is made by telephone--the person is given the information by telephone, and is subsequently given the information in writing; and*
>
> *(d) the form in which, and the way in which, the person is given the information complies with any other requirements prescribed by the regulations.*

45. Referring to section 76, the applicant contended that "before the agreement" was made, he was not given the information described in section 76(a)(i) or (ii).[27]

46. There was no suggestion that the applicant received information of the kind described in section 76(a)(i) or (ii) other than by means of the information in the proposed contract. Two questions therefore arose: whether the applicant was given the information before the agreement was "made", and whether the information was of the kind required to be given under section 76(a)(i) and (ii).

47. The period between when the respondent sent the proposed contract and when the applicant signed and returned it was extremely brief. That is consistent with the evidence that the applicant was very firm in his wish to purchase the software as quickly as possible before leaving on his cruise. The period was brief, but that was the applicant's choosing. When he chose to sign and return the contract was entirely a matter for him. Regarding section 76(a), the contract was not "made" until the applicant signed and returned it. It follows that the respondent sent the proposed contract to the applicant "before" it was "made", meaning this aspect of section 76(a) was met.

48. The next question was whether the information in the proposed contracts of a kind that satisfied sections 76(a)(i) and (ii) of the ACL.

49. Regarding section 76(a)(i), what constitutes "the termination period" is set out in section 82. In the case of an agreement negotiated by telephone, such as this case, under section 82(3)(b), the termination period is ordinarily a period

[27] Transcript of proceedings 13 August 2020, page 91, lines 25-32

"starting on the day on which the agreement was made" and ending "at the end of the tenth business day after the day on which the consumer was given the agreement document relating to the agreement". How many days will make up the termination period will depend upon these variables and upon how many non-business days there are in the period commencing "after the day on which the consumer was given the agreement". Having regard to these variables, the so-called "10 day cooling off period" is a phrase that can easily confuse.

50. However, under section 82(3)(c), where there is a contravention of section 73 and/or section 75, the termination period is three months starting on the day after the day the agreement was made. Under section 82(3)(c), where there is a contravention of section 76 and/or section 86, the termination period is six months starting on the day after the day the agreement was made.

51. In this case, assuming the absence of a contravention of section 73, 75, 76 or 86, Mr Peters relied on clause 8 of the contract to submit that the respondent informed the applicant of his right to terminate the agreement during the termination period. I was prepared to accept that the "Notice to Consumer" in clause 8 correctly informed the applicant of the termination period, although there is a strong argument that the applicant should have been informed of the different termination periods that would arise if there were breaches of the ACL and the kinds of breaches that would cause a different termination period.

52. Regarding section 76(a)(ii), a dealer was required to inform the applicant about "the way in which" the applicant may exercise his right to terminate the contract. There is no statutory requirement regarding the manner in which a dealer may or must require a consumer to exercise their right to terminate, which gives flexibility on this issue. However, whatever way a dealer chooses, it must be stated. In this case, the contract says nothing at all about the way in which the applicant can exercise his right to terminate the contract. It follows that there was a contravention of section 76(a)(ii) of the ACL.

53. In my view, there was also a contravention of section 76(a)(iii), which requires a dealer to provide information about "other matters as are prescribed by the regulations." Regulation 83 of the *Competition and Consumer Regulations*

2010 prescribes information that must be provided for the purposes of section 76(a)(iii). It states:

> ***83 Information about termination period***
> *(1) For subparagraph 76(a)(iii) of the Australian Consumer Law, information about the prohibition in section 86 of the Australian Consumer Law is prescribed.*
>
> *(2) However, subregulation (1) does not apply if section 86 of the Australian Consumer Law does not apply to, or in relation to, the unsolicited consumer agreement.*
>
> *Note: Section 86 of the Australian Consumer Law may not apply to an unsolicited consumer agreement because of regulations made under section 94 of the Australian Consumer Law. For example, section 86 of the Australian Consumer Law does not apply to, or in relation to, agreements of a kind specified in regulation 89 and circumstances of a kind specified in regulations 88 and 95 of these Regulations.*

54. Referring to regulation 83, section 86(1)(a) of the ACL prohibits a supplier under an unsolicited consumer agreement from supplying the goods or services to be supplied under the agreement during the period "starting on the day on which the agreement was made" and ending "at the end of the tenth business day after the day on which the consumer was given the agreement document relating to the agreement". Section 86(1)(b) of the ACL prohibits a supplier from accepting any payment in connection with those goods or services during that period. Section 86(1)(c) of the ACL prohibits a supplier from requiring any payment in connection with those goods or services during that period.

55. Regulation 83(2) does not apply because section 86 applies to this unsolicited consumer agreement.

56. Clause 7 of the proposed contract gave the applicant information about the prohibition on the respondent from supplying the software "until the expiration of the 10 business day cancellation period", which is then explained to mean 10 business days after this agreement is received", but there is nothing in the proposed contract or elsewhere that informed the applicant prior to the contract being made about the prohibition on the respondent from accepting or requiring any payment during that period. It follows that there was a contravention of section 76(a)(iii).

57. Section 76(d), upon which the applicant also relied provides that the form in which the information is provided must comply "with any other requirements prescribed by the regulations." In this respect, regulation 84 of the *Competition and Consumer Regulations* provides further information about how the information must be provided. It states:

> ***84 Form and way of giving information about termination period***
>
> *For paragraph 76(d) of the Australian Consumer Law, information given in writing must be:*
>
> *(a) attached to the agreement or agreement document for the supply of goods or services; and*
>
> *(b) transparent; and*
>
> *(c) in text that is the most prominent text in the document, other than the text setting out the dealer's or supplier's name or logo.*

58. The applicant contended that the information was not "attached", in the sense of it being on a separate attached document rather than forming part of the proposed contract. I was not persuaded by this submission, but it was not necessary to decide this question in circumstances where I had found other contraventions of the ACL.

59. Under section 82(3)(d)(ii), the contraventions of sections 76(a)(ii) and (iii) cause the termination period to be six months starting on the day after the contract was made, meaning the period commencing 14 December 2019 and concluding on 13 June 2020.

60. In my view, the respondent also contravened section 86(1)(a), (b) and (c) of the ACL by supplying the software to the applicant within 10 business days after the contract was made and by accepting and requiring payment from the applicant within 10 business days after the contract was made for the purpose of activating the software.

61. It is not to the point that the applicant was asking, if not insisting, that the software be provided forthwith so that he could (he hoped) make money from currency trading whilst on his holiday. I could not find anything in the ACL that excuses a supplier from its obligations under section 86 where a consumer

requests supply of the goods earlier than the stated period or seeks to pay earlier than the stated period.

62. It would also appear that the respondent was well aware of its obligations under section 86 because, as mentioned, the first of the restrictions is set out in clause 7 of the contract (even if clause 7 incorrectly referred to section 82, not section 86).

63. The respondent's contraventions of sections 76 and 86 cause the termination period to be six months. Under section 82 of the ACL, the applicant was (within that termination period) entitled to terminate the contract "by indicating, in an oral or written notice" to the respondent, an intention to terminate the contract. The applicant did so in January 2020, well within six months from when the contract was made.

64. Under section 83, consequent upon the applicant's termination of the contract under section 82, the contract is "taken to have been rescinded by mutual consent".

65. Under section 84, "immediately upon being notified of the termination" within the termination period, the respondent was required to "return or refund" to the applicant any consideration that the applicant gave under the agreement, meaning, in this case, the payment of $14,300.

66. Where I have found by reference to the provisions governing unsolicited consumer agreements that the applicant is entitled to the relief he seeks, it is unnecessary for me to consider the applicant's further claims that the respondent engaged in misleading and deceptive conduct, contrary to sections 18 and/or 29 of the ACL, or that the contract was "unfair", contrary to sections 23, 24 and/or 25 the ACL.

67. I am prepared to say, however, that I found the applicant's arguments with reliance on these sections to be unconvincing. In particular, there was extensive and persuasive evidence that the respondent made every effort to respond to the applicant's queries and concerns about the software and to provide support regarding its use.

68. Likewise, it was disingenuous for the applicant to contend that it was "unfair" for the contract to state that there would be no refund or to allege that the respondent pursued him to pay $14,300 on the day the contract was emailed to him, or that he was not given an opportunity to read or review the contract, in circumstances where the applicant's wish to put the contract in place and to commence currency trading before he went on his cruise was the primary (if not sole) reason why the proposed contract was promptly provided by the respondent and executed by the applicant.

69. Where the applicant has succeeded in his primary claim, it follows that the respondent should also pay the filing fee ($159.50) and interest under rule 102 of the *ACT Civil and Administrative Tribunal Procedures Rules 2020* from the date on which the applicant filed his application to the date of the Tribunal's order ($555.35).

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Presidential Member G McCarthy

Date(s) of hearing 13 & 14 August 2020
Applicant: In person
Respondent: M Peters, authorised representative