

BETWEEN

ET
APPLICANT

AND

ETT
SECOND APPLICANT

AND

UG LTD
RESPONDENT

AND

UGG
SECOND RESPONDENT

Date of Order:

13 July 2016

Referee:

Referee Perfect

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the first respondent, UG Ltd, is to pay the sum of \$1147.50 directly to Mr ET and Mrs ETT on or before 3 August 2016.

The claim against the second respondent is dismissed.

Facts

[1] Mr ET and Mrs ETT chartered a boat from UG Ltd for 10 days. A storm seven days into the charter was causing Mrs ETT distress and after consultation with Mr UGG of UG Ltd about the forecast, it was decided that they would return to port. There was no discussion about a refund at that stage. There was never a contract with Mr UG personally so the claim against him is dismissed.

[2] Mr ET and Mrs ETT returned to port as discussed, three days before the end of the charter period. UG Ltd offered them a refund of the \$850.00 (the total charter fee was \$7650.00) and a dispute arose about the calculation of the refund, with Mr ET and Mrs ETT arguing that the correct figure should be \$1147.00, being 50% of the pro-rata fee for the unused three days. They claim that amount as a refund.

[3] UG Ltd contends that it is not contractually obliged to offer a refund and that its offer of \$850.00 was on a goodwill basis. It says that clause 14 in the written contract, 'cancellation due to weather', is intended to refer only to charters that have to be postponed or cancelled due to bad weather prior to departure, and that the reference to 50% of the charter fee was used as a basis on which to calculate a goodwill refund.

Issues

[4] The issues to determine are:

- Is UG Ltd contractually bound to offer a refund under clause 14 of their terms and conditions?
- If so, what is the correct calculation of a refund?

Is UG Ltd contractually bound to offer a refund under clause 14 of their terms and conditions?

[5] UG Ltd contends that clause 14 applies only to cancellations prior to departure and refer to the use of the wording "charter will be postponed to another suitable time" and "a

refund of 50% of the charter fee will be made”, pointing out that 50% of the charter fee would be half of \$7650.00, the full charter fee paid, which could not apply to this situation where over half the charter period had already elapsed.

[6] However, the clause is ambiguous and can reasonably be interpreted as Mr ET and Mrs ETT have interpreted it, to mean 50% of the remaining days’ fee when all the other conditions have been met (agreement by both parties, unsuitable boating weather etc) and, as it appears, UG Ltd applied it to reach its original offer of \$850.00.

[7] The clause could easily have reflected an intention to apply only to pre-departure cancellation if it used the wording ‘if a cancellation is made prior to departure’ in the opening sentence, but it does not do so. If it has to be inferred that only pre-departure cancellations are covered, then it can equally reasonably be inferred that reference to a refund means ‘of the remaining fee’.

[8] To resolve the ambiguity, I am guided by the doctrine of contra proferentem, that is, that the preferred meaning should be the one that works against the interests of the party who provided the wording. In this case, that party is UG Ltd and I therefore prefer the interpretation applied by Mr ET and Mrs ETT.

[9] The clause applies, because from both party’s accounts, there was a conversation between Mr ET and Mr UGG in which Mr UGG says he ‘suggested’ Mr ET and Mrs ETT return to port, and Mr ET is more of the view that Mr UGG ‘recommended’ the return. UG Ltd argues that it was always Mr ET’s call as the person in charge of the vessel. However, irrespective of that and regardless of Mr ET’s boating experience, what is relevant is that the party’s agreed that Mr ET and Mrs ETT would return to port because of the storm. There was never any argument about that from Mr UGG, in fact, Mr UGG says he suggested it, and this brings the situation within the ambit of clause 14 – ‘*if a cancellation is made in agreement by both parties, due to unsuitable boating weather...*’.

[10] Clause 14 carries on ‘*...if” after a cancellation, the hirer cannot commit to a suitable rescheduled booking within a 12-month period then a refund of 50% of the charter fee will be made*’. Mr ET and Mrs ETT say they ‘cannot commit’ because Mrs ETT does not wish to go out on the water again after her experience in the storm and the wording of the term allows for this situation. There are no requirements on the hirer to even provide a reason, the term

makes a refund entirely dependent on the hirer's ability or willingness to commit to a rescheduled booking.

[11] I therefore find that Mr ET and Mrs ETT are contractually entitled to a refund of 50% of the remaining days' charter fee.

If so, what is the correct calculation of a refund?

[12] UG Ltd has referred to prices quoted in September to Mr ET and Mrs ETT in response to an online enquiry from them. The email, dated 10 September 2015 says *'The cost is \$850.00 per 24-hour day for the first 7 days=\$5950. The cost for 10 days is \$7905.00.'* Mr ET and Mrs ETT says they have never received that email from UG LTD.

[13] The contract price to which the parties agreed is in the email dated 11 November 2015 which states *'A seven day hire in February will cost \$5500.00 plus fuel used. A ten-day hire will cost \$7650'*. UG Ltd argues that the September email, outlining the costs of the first seven days as \$850.00 per days applies, meaning that the contract price of \$7650.00 includes the first seven days at \$850.00, leaving the final three days to be charged at \$566.67 per day.

[14] Even if I accept that Mr ET and Mrs ETT received the September email, which they dispute, they have accepted a contract price of \$7650.00 for a ten-day hire, with no stipulation of some days being charged at a different rate to others. The total ten-day hire cost in the first email is a different amount so the wording cannot simply be transferred from one communication to another at another time.

[15] In addition, in November they were given two contract options, one for a seven-day hire and one for a ten-day hire. These are separate and Mr ET and Mrs ETT opted for the ten-day hire for a total price of \$7650.00. Their ten-day hire did not become a seven-day hire, with separate contractual terms, just because it ended part-way through. They entered into a contract for a ten-day charter hire for \$7650.00 and there is no contractual basis to do anything other than deem, for the purposes of a partial refund, that the charter fee was at the rate of \$765.00 per day.

Conclusion

[16] I therefore find that UG Ltd is liable to pay Mr ET and Mrs ETT a refund of 50% of 3x \$765.00, being the claimed amount of \$1147.50. Since the writing of this decision, it is now Disputes Tribunal Act 1988 does not allow for the award of filing fees so that part of the claim does not succeed.