



Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Birnie v. Sunwing Vacations Inc.*, 2020 BCCRT 1068

B E T W E E N :

HAILEY BIRNIE and CYNTHIA BIRNIE

APPLICANTS

A N D :

SUNWING VACATIONS INC./VACANCES SUNWING INC., FLIGHT
CENTRE TRAVEL GROUP (CANADA) INC., and BOBBI-JO ROBACK

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about the advertising of an all-inclusive Huatulco, Mexico vacation package. The applicants, Hailey Birnie and her mother Cynthia Birnie, say the respondents misrepresented the amenities offered by the hotel. The Birnies claim a total of \$2,688.37 for lost vacation time and additional expenses they incurred when switching to a different vacation hotel.
2. The respondent tour operator Sunwing Vacations Inc./Vacances Sunwing Inc. (Sunwing), advertised and provided the vacation package. The applicants bought the vacation package through the respondent travel agency Flight Centre Travel Group (Canada) Inc. (Flight Centre). The respondent Bobbi-Jo Roback was the travel agent who arranged the Birnies' trip.
3. Sunwing admits its website advertised the selected hotel included all meals buffet-style, non-motorized water sports, and an "included beach". However, Sunwing says there was no intentional misrepresentation and to the extent advertised amenities were not available, it was not so significant so as to warrant compensation. Flight Centre and Ms. Roback say they are not liable as they were simply a liaison in the vacation package sale.
4. Hailey Birnie represents the applicants. Sunwing is represented by JD. Flight Centre is represented by MH. Ms. Roback is self-represented.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

6. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In the circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me.
7. The CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
8. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.
9. Sunwing's "terms and conditions" that formed part of its contract with the Birnies says all claims can only be filed in Ontario courts. However, none of the parties objected to the CRT's jurisdiction. The Birnies entered into the contract from BC and one of them resides in BC. For the same reasons as set out in the non-binding but persuasive decision in *Smith v. Sunwing Vacations Inc. et al*, 2018 BCCRT 122, and in the absence of any objection, I find the CRT has jurisdiction over this dispute under its small claims debt and damages jurisdiction set out in section 118 of the CRTA.

ISSUE

10. The issue in this dispute is whether any of the respondents misrepresented the vacation package to the Birnies such that the applicants are entitled to compensation, and if so, what is the appropriate remedy.

EVIDENCE AND ANALYSIS

11. In a civil claim such as this, as the applicants the Birnies bear the burden of proof, on a balance of probabilities. I have only referenced the evidence and submissions as necessary to give context to my decision.

Background

12. Through Ms. Roback at Flight Centre, on March 3, 2018 the Birnies booked two 7-night all-inclusive vacations with round trip airfare and hotel transfers. The Huatulco, Mexico holiday was scheduled for March 27 to April 3, 2018. Sunwing was the holiday's tour operator. All of this is undisputed.

13. As referenced above, at issue is the fact that the booked hotel, the Holiday Inn Huatulco (Holiday Inn), did not have non-motorized water sports, buffet-style meals, and an included beach serviced by the hotel. The Birnies claim 2 days of lost vacation for their time at the Holiday Inn (\$823.33) plus the cost of their stay at a second hotel, the Barcelo, for the last 5 nights of their trip (\$1,862), plus \$3.04 for their taxi fare to get to the Barcelo.

14. The parties all agree:

- a. The cost of the 2 Holiday Inn vacation packages was \$1,235 per person and \$2,470 for two people.
- b. During the vacation, the Birnies contacted Ms. Roback and Sunwing to request a transfer from the Holiday Inn to a location that offered the amenities they expected.
- c. The Birnies stayed at the Holiday Inn for 2 nights before the transfer to the Barcelo.
- d. The applicants were charged an additional \$1,862 as the fee payable for their stay at the 2nd property. Ms. Roback submitted a reimbursement claim to Sunwing on the Birnies' behalf.

- e. The parties disagree on whether the Birnies are entitled to the compensation they seek.
15. The Birnies did not submit a copy of the advertisement for the vacation package they bought, apart from one website screenshot that shows Sunwing said there was an “included beach” nearby. However, Sunwing submitted a copy of its brochure for “2017/2018”, which shows the Holiday Inn Huatulco is a 3-star “all inclusive” hotel. It also shows the Barcelo as a 4-star “plus” all-inclusive hotel, priced higher at \$1,695 per person. The brochure says right below the Holiday Inn description that all the “terms and conditions” on specified later pages apply. Sunwing submitted those terms and conditions (TOC) in evidence, and the Birnies did not dispute they applied to their holiday purchase. More on the TOC below.
 16. There is nothing in the brochure that says the Holiday Inn has buffet-style meals, non-motorized watersports, or an included/attached beach. However, Sunwing submitted a March 27, 2018 screenshot from its website that sets out an all-inclusive plan that included “all meals (buffet style)”, non-motorized water sports, tips and taxes. As noted, the Birnies submitted a website screenshot that says a beach is “included”.

The law: misrepresentation

17. The Birnies rely on section 74.01(1)(a) the federal *Competition Act*, which says a person engages in “reviewable” conduct if they supply or promote a product and makes a representation to the public that is false or misleading in a material aspect. The “review” refers to the federal Competition Tribunal. The Birnies argue that if a representation could influence a consumer to buy or use the advertised product or service, it is material. To determine if the representation is false or misleading, the Birnies say the courts consider the “general impression” it conveys (citing a Government of Canada printout within its pages under the Competition Bureau Canada). While the CRT does not have jurisdiction to conduct reviews under the *Competition Act*, I find that statute’s terms are similar to Sunwing’s obligations as set out in the common law, discussed further below.

18. Fraudulent misrepresentation occurs when a seller makes a representation of fact, the representation is false, the seller knew it was false or recklessly made it without knowing it was true or false, and the buyer is induced by the false representation to buy the item (see *Ban v. Keleher*, 2017 BCSC 1132). I find there is no evidence of fraudulent misrepresentation.
19. I turn then to negligent misrepresentation. A seller must exercise reasonable care to ensure representations are accurate and not misleading. A failure to exercise this reasonable care is negligent misrepresentation. If a buyer relies on that misrepresentation in making the purchase, the seller may be responsible for any losses arising from that misrepresentation (see *Queen v. Cognos Inc.*, 1993 CanLII 146 (SCC)).
20. In order to prove the tort of negligent misrepresentation, an applicant must establish the following elements as set out in *Cognos*:
 - a. There must be a duty of care,
 - b. The representation in question must be untrue, inaccurate, or misleading,
 - c. The respondent must have acted negligently in making the misrepresentation,
 - d. The applicant must have relied, in a reasonable manner, on the negligent misrepresentation, and
 - e. The reliance must have resulted in damages.
21. The leading decision for misrepresentation in a “spoiled vacation” case is *Jarvis v. Swans Tour Ltd.*, [1972] 3 W.L.R. 954 (C.A.). In *Jarvis*, the plaintiff was induced to purchase a holiday based on misrepresentations in the brochure issued by the defendant in that case. The court found that defendant liable because of the misrepresentation.

Claims against Flight Centre and Ms. Roback

22. It is not particularly disputed that Flight Centre and Ms. Roback did not advertise the vacation. Rather, they simply facilitated the booking once the Birnies made their selection after discussing options with Ms. Roback. I find the evidence, including text messages, show Ms. Roback and Flight Centre tried to assist the Birnies, both to assist with the move to the Barcelo hotel, and afterwards to try and get compensation from Sunwing. In addition, the Birnies' contract with Sunwing clearly states that if for any reason any travel supplier (such as Sunwing or the Holiday Inn) is unable to provide the contracted services, the Birnies' remedy lies against the travel supplier and not against Flight Centre (or Ms. Roback). The contract goes on to say that Flight Centre relies on the information provided by the travel suppliers to assist the Birnies to make an informed decision, but that Flight Centre cannot guarantee the accuracy of that information.
23. Given all the above, I find the Birnies have not proved either Flight Centre or Ms. Roback are responsible for their claimed losses. I dismiss the Birnies' claims against Flight Centre and Ms. Roback.

Claims against Sunwing

24. Sunwing advertised that a nearby beach, non-motorized water sports, and buffet-style meals were included as part of the "all-inclusive" package.
25. I find it is not sufficiently clear that an "included, nearby" beach meant a beach owned and serviced by the Holiday Inn. However, I find the Holiday Inn had no non-motorized watersports and no buffet-style meals, contrary to Sunwing's advertisement.
26. It is undisputed Sunwing owed its customers the Birnies a duty of care. At issue is whether the other elements of negligent misrepresentation are established.
27. Sunwing says as a tour operator it has no control over independent service providers like the Holiday Inn. Sunwing says it made "every effort" to ensure the

accuracy of the information contained in its advertisements at the time of the Birnies' travel.

28. Specifically, Sunwing says the Holiday Inn did not inform it that it had stopped serving buffet-style meals and says that the inclusion of non-motorized watersports was an unintentional error. I accept this evidence, as I have no evidence before me to the contrary. Here, I note that the Birnies say local Sunwing staff told them they knew the amenities were not at the hotel, but there is no witness statement in evidence. While the CRT has flexibility to accept hearsay evidence, I am not prepared to do so here without a more detailed description of what was said, by whom, and when.
29. Significantly, Sunwing relies on the TOC that its brochure expressly says apply. The Birnies did not address the TOC in evidence, although Sunwing argued its relevance at some length. I find the TOC formed part of the Birnies' contract with Sunwing.
30. In particular, under a heading "Accuracy of Information", the TOC says Sunwing cannot be responsible for any inaccuracies or omissions and its provided information is a "guideline only" and should be verified directly with other available sources. Under a heading, "Package Holiday Inclusions", the TOC says any features that are temporarily unavailable or have been permanently withdrawn for any reason have no cash value and are non-refundable. The TOC states, "these features can be changed by the hotel or Sunwing with or without prior notice". Under the heading "Sunwing Vacations' Responsibility", it says that Sunwing does not control the suppliers (like hotels) and so Sunwing cannot be held responsible for their performance or lack thereof. The TOC also has a "*force majeure*" clause, meaning Sunwing is not responsible for damages resulting from unforeseeable events. Finally, the TOC says Sunwing's liability is limited to the amount the Birnies paid Sunwing for the vacation package.
31. I find the TOC is determinative. I find the TOC made it clear that advertised amenities were not guaranteed and that Sunwing was not responsible for a change

in a supplier's services. In other words, I find the inaccuracies in Sunwing's advertising are accounted for by the TOC disclaimer that the advertising is a guideline only. I find this means there was ultimately no misrepresentation in the advertising, given the TOC. I note the Birnies do not explain why they did not verify the Holiday Inn's offerings through other sources like the Holiday Inn's own website.

32. In summary, on balance I find Sunwing is not liable for the inaccurate representation that the Holiday Inn had non-motorized watersports and buffet-style meals, given the TOC. Given this conclusion, I do not need to address the Birnies' damages claims in any detail or whether the Holiday Inn offered the Birnies buffet-style meals and non-motorized watersports after they complained on their first day.

33. Under section 49 of the CRTA and the CRT's rules, a successful party is generally entitled to the recovery of their CRT fees and reasonable dispute-related expenses. As the applicants were unsuccessful, I dismiss their claim for CRT fees and dispute-related expenses. The successful respondents did not claim CRT fees or dispute-related expenses.

ORDER

34. I order the Birnies' claims and this dispute dismissed.

Shelley Lopez, Vice Chair