



Civil Resolution Tribunal

Date Issued: February 2, 2021

File: SC-2020-007465

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *McEwen v. Hotels.com, L.P.*, 2021 BCCRT 128

BETWEEN:

DAVID MCEWEN

APPLICANT

AND:

HOTELS.COM, L.P.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Eric Regehr

INTRODUCTION

1. On December 7, 2019, the applicant, David McEwen, booked 2 hotel rooms in Jamaica through the respondent online travel agency, Hotels.com, L.P. (Hotels.com). His stay was to start on March 15, 2020. On March 12, 2020, he cancelled the reservation because of the emerging COVID-19 pandemic by emailing Hotels.com. Hotels.com has refused to provide a refund because McEwen

sent his cancellation to an unmonitored email. Hotels.com says that the parties' contract says that a customer may cancel a reservation by phone or through an online portal. Mr. McEwen claims \$3,146.60, the amount he paid for the hotel rooms.

2. Mr. McEwen is self-represented. Hotels.com is represented by in-house counsel.

JURISDICTION AND PROCEDURE

3. 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). Section 2 of the CRTA states that 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 the dispute's parties that will likely continue after the CRT process has ended.
4. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.
5. Section 42 of the CRTA says 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.
6. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to pay money or to do or stop doing something. The tribunal's order may include any terms or conditions the CRT considers appropriate.

ISSUES

7. The issues in this dispute are:
 - a. Do the terms and conditions on Hotels.com's website form part of the parties' contract?
 - b. Did Mr. McEwen cancel the booking in accordance with the parties' contract?
 - c. Are the terms and conditions that limit Hotels.com's liability enforceable?

EVIDENCE AND ANALYSIS

8. In a civil claim such as this, Mr. McEwen as the applicant must prove his case on a balance of probabilities. While I have read all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.
9. As mentioned above, on December 7, 2019, Mr. McEwen booked 2 rooms for March 15 to 19, 2020, at a hotel in Jamaica. Mr. McEwen paid a total \$3,146.60 for the 2 rooms.
10. Hotels.com says that before confirming a reservation, all customers get to a "final booking" page. According to Hotels.com, the final booking page has a large "Book" link. Just above this link, in bold, are the words "Reservation Terms". Under this heading, there is the following sentence: "By clicking "Book", you agree you have read and accept our Terms and Conditions". The words "terms and conditions" link to another page, which contains the terms and conditions that Hotels.com says form part of the parties' contract.
11. The screenshot of the final booking page that Hotels.com provided is from January 2021. Hotels.com says that the final booking page has not materially changed since Mr. McEwen made his reservation. Mr. McEwen says that the final booking page is different, but he compares it to the confirmation email he received after making the reservation. I therefore find that Hotels.com's evidence about the contents of the final booking page as of December 2019 is uncontested, and I accept it. I find that

Mr. McEwen navigated through the final booking page before finalizing his hotel reservation.

12. After booking, Mr. McEwen received a confirmation email from confirmations@hotels.com. The email included a cancellation policy, which provided for “free cancellation” until 5:00pm Eastern time on March 13, 2020 (which would be 2:00pm Pacific time). The policy also said that there would be no refund for “no-shows”.
13. Near the top, the confirmation also said: “Need to make a change? Don’t worry, it’s quick and easy to amend or cancel your booking online”, followed by a link titled “Manage your booking”.
14. The confirmation email included a link to the terms and conditions. Under the heading “Changes or Cancellations”, the terms and conditions say: “You can change or cancel your lodging booking either online under your Reservations when signed into your Hotels.com account, or by calling our customer services number”.
15. On March 12, 2020, Mr. McEwen had to cancel his travel plans because of government restrictions on international travel due to the pandemic. Mr. McEwen says that he attempted to cancel the hotel reservation by phone, but “could not get through”. So, he sent an email to confirmations@hotels.com cancelling the reservation. In the email, Mr. McEwen requested that Hotels.com confirm the cancellation, but he never received a response.
16. Hotels.com says that it never received the email, but it does not dispute that Mr. McEwen sent it. Rather, Hotels.com says that confirmations@hotels.com is unmonitored.
17. Hotels.com argues that the terms and conditions set out the only 2 ways that a customer can cancel a reservation. Because Mr. McEwen attempted to cancel the reservation in an unauthorized way, he did not cancel the reservation in accordance with the parties’ contract, so he is not entitled to a refund. Mr. McEwen argues that it

is not his fault that Hotels.com did not monitor its emails. He says that Hotels.com must honour his cancellation email.

Do the terms and conditions on Hotels.com's website form part of the contract between the parties?

18. Mr. McEwen argues that he is not bound by the terms and conditions because Hotels.com did not provide them until after he made the reservation. I have found that Hotels.com referred to the terms and conditions before Mr. McEwen finalized his reservation. The question is whether they form part of the parties' contract, even though Mr. McEwen did not review them or explicitly agree to them.
19. The general legal principle is that parties will not be bound by contractual terms that they did not agree to. In other words, just because a website operator has terms and conditions on their website does not necessarily mean that they are part of a contract with a visitor to the website. However, the visitor may be bound by the terms and conditions if the website operator took reasonable steps to bring them to the visitor's attention before the parties enter into a contract. If the website operator prominently displays the existence of terms and conditions and the visitor chooses not to review them, the visitor is deemed to accept them. See *Century 21 Canada Limited Partnership v. Rogers Communications Inc.*, 2011 BCSC 1196 and *Kobelt Manufacturing Co. Ltd. v. Pacific Rim Engineered Products (1987) Ltd.*, 2011 BCSC 224.
20. I find that the reference to the terms and conditions was prominently displayed on the final booking page. I find that Hotels.com reasonably brought the terms and conditions to Mr. McEwen's attention before he entered into a contract. At that point, he had not finalized his booking. Mr. McEwen did not read the terms and conditions, but I find he was still bound by them.

Did Mr. McEwen cancel the booking in accordance with the terms and conditions?

21. Mr. McEwen argues that it is not his fault that Hotels.com failed to monitor the email. He also argues that he tried to cancel the reservation by phone, as permitted by the terms and conditions, but was unable to reach anyone.
22. With respect to the first argument, Mr. McEwen essentially argues that because Hotels.com did not tell him that he could not cancel by emailing confirmation@hotels.com, it must be deemed to have received the email when it was sent. I disagree. I find that the terms and conditions are clear that the only permissible ways to cancel a reservation are by phone or through the online portal. I find that it is reasonable that Hotels.com would specify how a reservation may be cancelled since the cancellation policy is time sensitive.
23. As for Mr. McEwen's allegation about not being able to contact Hotels.com by phone, his evidence on this point is vague. He does not say how many attempts he made or how long he waited on hold before giving up. I note that he sent the cancellation email around 10:00pm on March 12, 2020, when he had until 2:00pm the next day to cancel. So, I find that Mr. McEwen has not proven that he was unable to cancel by phone before the deadline.
24. More importantly, Mr. McEwen does not explain why he did not use Hotels.com's online portal, which is prominently displayed in the confirmation email. Even if Hotels.com's phone system was so overwhelmed that Mr. McEwen could not use it, I find that he was still able to cancel through the online portal, as permitted by the parties' contract.
25. Therefore, I find that Mr. McEwen did not cancel the reservation in a way that the parties' contract allowed. I find that Hotels.com was under no contractual obligation to monitor confirmation@hotels.com for cancellations. As Mr. McEwen did not cancel the reservation, I find that Hotels.com properly treated him as a "no-show". I find that Mr. McEwen is not entitled to a refund.

26. Because of this conclusion, I find that I need not address the parties' further arguments. I dismiss Mr. McEwen's claim for a refund.

27. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. Mr. McEwen was unsuccessful so I dismiss his claim for CRT fees and dispute-related expenses. Hotels.com did not claim any dispute-related expenses or pay any CRT fees.

ORDER

28. I dismiss Mr. McEwen's claims, and this dispute.

Eric Regehr, Tribunal Member