

IN THE SUPREME COURT OF VICTORIA
COURT OF APPEAL

NO CIV 265 OF 2016

BETWEEN:

**MARIE HENDERSON BY HER LITIGATION GUARDIAN MICHAEL
HENDERSON**

(APPELLANT)

and

GYMFIT PTY LTD

(RESPONDENT)

RESPONDENT'S OUTLINE OF SUBMISSIONS

SENIOR COUNSEL XXX

JUNIOR COUNSEL XXX

INSTRUCTING SOLICITOR XXX

Summary of Submissions

- 1. GymFit Pty Ltd did not engage in unconscionable conduct contrary to s 21 of the *Australian Consumer Law*.**
- 2. Clause 4 was not an unfair term contrary to s 23 of the *Australian Consumer Law*.**

1. GymFit Pty Ltd did not engage in unconscionable conduct contrary to s 21 of the *Australian Consumer Law*.

1.1. GymFit Pty Ltd accepts that the transaction is within the parameters of a consumer contract ‘in trade of commerce’.

- *Australian Consumer Law* ss 21(1).
- *Concrete Constructions Group Pty Ltd v Nelson* (1990) 169 CLR 594, 614.

1.2. Ms Henderson’s circumstances were not reasonably foreseeable at the time of the alleged contravention, and must not be taken into account.

- *Australian Consumer Law* ss. 21(3)(a), 22(1)(c).

1.2.1. It was neither known, nor taken advantage of, that Ms Henderson did not understand the documents relating to the services being provided by GymFit Pty Ltd.

- *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 406.
- *Australian Competition & Consumer Commission v Radio Rentals Limited* (2005) 146 FCR 292, 298 [21], 322 [157], 327 [173].
- *Tonto Home Loans v Tavares* [2011] NSWCA 389, 127.

1.2.2. GymFit Pty Ltd’s actions are not subject to a moral taint.

- *Australian Competition & Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.
- *Director of Consumer Affairs Victoria v Scully & Anor* [2013] VSCA 292.

1.2.3. Wilful blindness and constructed knowledge on behalf GymFit Pty Ltd is not evidenced on the facts.

- *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 436-438.
- *Australian Competition & Consumer Commission v Radio Rentals Limited* (2005) 146 FCR 292, 297-298.

- *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 406.

1.3. GymFit Pty Ltd's conduct was not in opposition to societal norms and acceptable community values.

- *Australian Competition & Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90, [23], [74]-[78].

1.3.1. GymFit Pty Ltd did not engage in actions outside common selling requirements or engage in deception.

- *Australian Competition & Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90 [10-13].
- *Australian Competition & Consumer Commission v Lux Pty Ltd* [2004] FCA 926.
- *Tonto Home Loans v Tavares* [2011] NSWCA 38.
- *Australian Competition & Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* (2000) 104 FCR 253.

2. Clause 4 was not an unfair term contrary to s 23 of the *Australian Consumer Law*.

2.1. The term is reasonably necessary in order to protect the legitimate interests of GymFit.

- *Australian Consumer Law* s 24(1)(b).
- *Ferme & Ors v Kimberley Discovery Cruises Pty Ltd* [2015] FCCA 2384, [71]-[81].

2.1.1. The term is necessary to sustain the business of GymFit.

2.1.2. The \$75 weekly fee is not a penalty, the potential loss which flows from a breach of the contract warrants the fees charged.

- *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28.

2.1.3. The term is within regular business practice of businesses modelled on membership agreements.

- *Australian Consumer Law* s 24(1)(c).
- *Australian Competition & Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90.

- *Australian Competition & Consumer Commission v Radio Rentals Limited* (2005) 146 FCR 292.

2.2. The term does not cause detriment or significant imbalance in the parties rights and obligations arising under the contract.

2.2.1. In application of the term does not cause detriment to the appellant.

- *Australian Consumer Law* s 24(2)(a), 24(3).

2.2.2. No significant imbalance is caused by the term.

- *Australian Consumer Law* s 24(1)(a).
- *Director-General of Fair Trading v First National Bank PLC* [2002] 1 AC 48, [17].
- *Australian Competition & Consumer Commission v ACN 117372915 Pty Ltd (in liq) (formerly Advanced Medical Institute Pty Ltd)* [2015] FCA 368, [950].

2.3. The term is transparent.

- *Australian Consumer Law* s 24(2)(a), 24(3).

2.3.1. The term can be understood by the reasonable person.

AUTHORITIES CITED

A - Cases

Australia:

Australian Competition & Consumer Commission v ACN 117372915 Pty Ltd (in liq)

(formerly Advanced Medical Institute Pty Ltd [2015] FCA 3

Australian Competition & Consumer Commission v C G Berbatis Holdings Pty Ltd (2003)

214 CLR 51

Australian Competition & Consumer Commission v Lux Distributors Pty Ltd [2013] FCAFC
90

Australian Competition & Consumer Commission v Lux Pty Ltd [2004] FCA 926

Australian Competition & Consumer Commission v Radio Rentals Limited (2005) 146 FCR
292.

Australian Competition & Consumer Commission v Simply No-Knead (Franchising) Pty Ltd
(2000) 104 FCR 253

Concrete Constructions Group Pty Ltd v Nelson (1990) 169 CLR 594

Director of Consumer Affairs Victoria v Scully & Anor [2013] VSCA 292

Ferne & Ors v Kimberley Discovery Cruises Pty Ltd [2015] FCCA 2384

Garcia v National Australia Bank Ltd (1998) 194 CLR 3

Kakavas v Crown Melbourne Ltd (2013) 250 CLR 392

Paciococco v Australia and New Zealand Banking Group Limited [2016] HCA 2

Tonto Home Loans v Tavares [2011] NSWCA 389

United Kingdom:

Director-General of Fair Trading v First National Bank PLC [2002] 1 AC

B - Legislation

Australian Consumer Law (contained in schedule 2 of the *Competition and Consumer Act* 2010)