2017 ABPC 244
Alberta Provincial Court

Swan City Taekwon-Do Club v. Podolchyk

2017 CarswellAlta 1820, 2017 ABPC 244, [2017] A.W.L.D. 5176, [2017] A.W.L.D. 5177, 284 A.C.W.S. (3d) 82

Swan City Taekwon-Do Club operating as Tien Lung Taekwon-Do Club Grande Prairie also known as Tien Lung (Plaintiff) and Deanne Podolchyk (Defendant)

J.K. Sihra Prov. J.

Heard: June 12, 2017
Judgment: August 29, 2017
Docket: Grande Prairie 1602100058

Counsel: D. Laton, for Plaintiff
E. Compton, for Defendant

Subject: Contracts; Corporate and Commercial; Insolvency

Related Abridgment Classifications

Commercial law
VI Trade and commerce
VI.7 Consumer protection
VI.7.a General principles
Contracts
X Discharge
X.2 Cancellation
X.2.b Exercise of right of termination
X.2.b.iii Miscellaneous

Headnote

Commercial law --- Trade and commerce — Consumer protection — General principles

Plaintiff taekwon-do training facility offered "two-month" special — Plaintiff offered training programs after trial period that were three and four years long to facilitate attaining of black belt — Defendant was quoted price range of $145 to $175 per month per student after two-month special if she wanted to continue — Defendant and minor son commenced two-month special in December 2014; trial period ended February 2015 — On January 12, 2015, defendant signed agreements for herself and son, over four-year program, promising to pay tuition of $6,000 for herself; and $6,960 for her son — On January 14, 2015, defendant stated she wanted to cancel her membership but maintain that of her son — Cancellation clause in guarantee (on agreement) provided that 30 percent of remainder of contract would be owing plus $50 administration fee — Several exchanges followed; defendant did not make any payments — Plaintiff brought action for $13,050 representing balance of tuition owing under two contracts — Action allowed — Defendant repudiated both agreements and was ordered to pay plaintiff $13,050 plus pre-judgment interest of 28 percent — It was term of enrollment agreements that in event defendant defaulted on her payment obligations, entire balance of tuition became due and payable — It was term of enrollment agreements that if payments presented through or against accounts were returned payor would be charged return fee; defendant incurred additional unpaid charges of $90 — Defendant's evidence contained numerous internal inconsistencies and her evidence was unreliable — Defendant did not pursue formal cancellation procedure as outlined in guarantee, which was incorporated by reference — Defendant did not mention any reason for wanting to cancel her enrollment agreement other than purported exacerbates rotator cuff injury — This undermined her testimony that she had concerns about plaintiff in general terms of its treatment of students — There was no imbalance of power or undue influence, and defendant did not have any weakness that plaintiff attempted

to or did exploit — If defendant had any questions, she could simply have walked away without signing documents — No unfairness was created by fact that portions of agreements were already filled (such as names and monthly fees) and agreements were already signed by plaintiff's representative — Agreements did not include terms or conditions that were "harsh, oppressive or excessively one-sided" — Defendant freely and voluntarily executed enrollment agreements and there was no basis for rescission — Cancellation clause in guarantee was not penalty clause.

Contracts --- Discharge — Cancellation — Exercise of right of termination — Miscellaneous

Plaintiff taekwon-do training facility offered "two-month" special — Plaintiff offered training programs after trial period that were three and four years long to facilitate attaining of black belt — Defendant was quoted price range of $145 to $175 per month per student after two-month special if she wanted to continue — Defendant and minor son commenced two-month special in December 2014; trial period ended February 2015 — On January 12, 2015, defendant signed agreements for herself and son, over four-year program, promising to pay tuition of $6,000 for herself; and $6,960 for her son — On January 14, 2015, defendant stated she wanted to cancel her membership but maintain that of her son — Cancellation clause in guarantee (on agreement) provided that 30 percent of remainder of contract would be owing plus $50 administration fee — Several exchanges followed; defendant did not make any payments — Plaintiff brought action for $13,050 representing balance of tuition owing under two contracts — Action allowed — Defendant repudiated both agreements and was ordered to pay plaintiff $13,050 plus pre-judgment interest of 28 percent — It was term of enrollment agreements that in event defendant defaulted on her payment obligations, entire balance of tuition became due and payable — It was term of enrollment agreements that if payments presented through or against accounts were returned payor would be charged return fee; defendant incurred additional unpaid charges of $90 — Defendant's evidence contained numerous internal inconsistencies and her evidence was unreliable — Defendant did not pursue formal cancellation procedure as outlined in guarantee, which was incorporated by reference — Defendant did not mention any reason for wanting to cancel her enrollment agreement other than purported exacerbates rotator cuff injury — This undermined her testimony that she had concerns about plaintiff in general terms of its treatment of students — There was no imbalance of power or undue influence, and defendant did not have any weakness that plaintiff attempted to or did exploit — If defendant had any questions, she could simply have walked away without signing documents — No unfairness was created by fact that portions of agreements were already filled (such as names and monthly fees) and agreements were already signed by plaintiff's representative — Agreements did not include terms or conditions that were "harsh, oppressive or excessively one-sided" — Defendant freely and voluntarily executed enrollment agreements and there was no basis for rescission — Cancellation clause in guarantee was not penalty clause.

Table of Authorities

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Statutes considered:

Fair Trading Act, R.S.A. 2000, c. F-2

Generally — referred to

s. 1(1)(c) "consumer transaction" — considered

s. 1(1)(k) "services" (ii) — considered

s. 2.1 [en. 2005, c. 9, s. 3] — considered

s. 6 — considered

s. 6(1) "material fact" — considered

s. 6(2) — considered

s. 6(3) — considered
Societies Act, R.S.A. 2000, c. S-14
Generally — referred to

ACTION by plaintiff for payment of tuition owed by defendant for herself and her minor son following enrollment in plaintiff's taekwon-do program.

***J.K. Sihra Prov. J.*:**

Introduction

1 The Plaintiff, a taekwon-do training facility, is suing the Defendant for $13,050, representing the balance of tuition owing under two contracts for herself and her minor son.

2 Interest and costs are also sought.

The Evidence

3 At trial, Danielle Laton testified on behalf of the Plaintiff. The Defendant herself testified.

4 There were 24 exhibits at trial.

Issues

5 Was the Tien Lung Guarantee incorporated by reference into both contracts signed by the Defendant?

6 Was there a breach of one or more contract by either party?

7 Was one or both contracts rescinded by the parties?

8 If not, should one or both contracts be rescinded by the Court, in particular under the Fair Trading Act?

9 Is the cancellation clause in each contract actually a penalty clause?

Position of Plaintiff

10 The Plaintiff argues that:

> 1. The Defendant has defaulted on payment under the enrollment agreements she signed voluntarily of her own free will.
>
> 2. The Plaintiff has tried to mitigate its damages by advertising. However, the Plaintiff was counting on the fees due under the contracts signed by the Defendant, and it has been difficult to replace said monies.

11 Cases relied upon by the Plaintiff:

Ninpo Martial Arts Inc. v. Lepa, 2009 ABPC 251 (Alta. Prov. Ct.)

Position of Defendant

12 The Defendant argues that:

> 1. The Fair Trading Act applies to the subject contracts. As a result of the below, the contracts are unfair and ought to be cancelled pursuant to the Act.

a. Undue pressure or influence was placed upon the Defendant to enter into the contracts.

b. Re: Tien Lung Guarantee

i. The guarantee was not part of the written contracts when they were signed but was available elsewhere.

ii. The Defendant was not given a copy of the guarantee or told of its existence.

iii. The guarantee is misleading as it is not entitled as an agreement or a contract.

c. The Defendant was not asked whether or not she understood the contracts before signing them.

2. The below made it difficult for the Defendant to understand "the nature and language" of the contracts:

a. The font size of the print was very small.

b. A number of different agreements were brought together, and in a haphazard way.

c. Check boxes had already been checked off by the Plaintiff when the contracts were presented to the Defendant for her signature, so she did not have the opportunity to check off items herself.

d. The contracts had already been signed by representatives of the Plaintiff when the contracts were presented to the Defendant for her signature.

e. The Defendant did not have the ability to take the contracts away and review them before signing them.

3. Verbal abuse inflicted upon her son, Austin, by the instructors at the club constituted a breach of his contract

4. The Defendant was entitled to treat the contracts as "repudiatory" and rescind them based on the following:

a. Unsanitary conditions at the club resulted in the Defendant developing plantar's warts for which she had to seek medical attention. These prevented her from participating in any physical activity, let alone returning to the club.

b. Austin suffered "significant trauma due to the abuse of the instructors".

5. The Defendant asked for her contract to be cancelled two days after it was signed. The Defendant provided her intention to cancel Austin's contract after the alleged incident with his instructors. By doing this, the Defendant triggered the cancellation process although she did not follow the strict cancellation procedure.

a. The cancellation fee under each contract is a penalty clause. However, the common law does not allow penalty clauses.

6. The Defendant was entitled to pay in installments under the contracts. Therefore, she did not receive a substantial benefit from the arrangement.

7. The Plaintiff did not endure a hardship. There was ample space in the classes for other students.

13 Cases relied upon by the Defendant:

Brown v. Graul, 2006 ABPC 359 (Alta. Prov. Ct.)

R. v. Schulz (2003), 331 A.R. 96 (Alta. Prov. Ct.), para. 58

Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co. (1914), [1915] A.C. 79 (U.K. H.L.)

Relevant Viva Voce Evidence of the Plaintiff

14 The Plaintiff is incorporated under the Societies Act, and is a non-profit society offering black-belt training in taekwon-do.

15 The Plaintiff operates a club in Grande Prairie, Alberta. There are two other clubs in Edmonton, Alberta. The clubs share administration to keep their costs down.

16 Ms. Laton is Director of Student Finances with the Plaintiff, and has authority to bind the Plaintiff. She has worked for the Plaintiff for nine years.

17 The Plaintiff does not use direct salespeople, nor does it use door-to-door marketing.

18 To introduce people to its facility and programs, the Plaintiff offered a "two-month special" at the Grande Prairie club which included an orientation, registration, tour, lesson, free uniform, and classes for two months for $89.99 per person. Classes were two nights a week, Mondays and Wednesdays from 6:15 PM to 7:30 PM.

19 After concluding that two-month "trial period", students were given the opportunity to sign up for a longer program.

20 Obtaining a black belt takes three to four years. Therefore, the Plaintiff offers training programs after the trial period that are three and four years long to facilitate the attaining of a black belt.

21 On November 25, 2014, there was a telephone conversation between the Plaintiff's staff, Melissa Kean and the Defendant. The Plaintiff recorded this phone conversation as per its practice. A transcript of the recorded phone conversation was made Exhibit 4 at the within trial.

22 In that phone conversation, the Defendant asked about prices. She was quoted a price range of $145 to $175 per month per student after the two-month special if she wanted to continue.

23 The Defendant in the phone conversation referred to Austin having "started at a different one in town", presumably another taekwon-do facility, and his month being done at the beginning of December.

24 The Defendant had a choice of coming in in December or that very day. She wanted to come in the same day, and set up an orientation appointment for that evening.

25 In the phone call, Ms. Kean indicated that the actual first class would be on December 1 st .

26 The orientation process is as follows: Clients usually come in to the front desk. They are given the student agreement and release to read and sign. The registration paperwork is completed. Clients then pay the registration fee. The client is sized for a uniform. The client changes into the uniform The client gets his or her photograph taken. He or she is taken on a tour of the facility. The client meets with instructors. The client then participates in a 20-minute taekwon-do lesson, possibly including a "board break".

27 Upon coming in for her orientation appointment, the Defendant registered for the two-month special and signed the paperwork, the Student Agreement and Release, with respect to both herself and her son, Austin Baerg, born April 11, 2007, age 7 at the time (Exhibits 2 and 3). The Defendant also paid for both specials.

28 The Student Agreement form has pre-printed portions as well as spaces for handwritten portions. For Austin's Student Agreement, for the "Start Date", it is handwritten "12/01/14", and "02/28/14" (sic) for the "End Date". The equivalent portion of the Defendant's Student Agreement is blank.

29 For Austin's Student Agreement, next to the pre-printed part that says, "Previous Martial Arts Training", it is handwritten "Horangi — 1 month".

30 For Austin's and the Defendant's Student Agreement, in response to the pre-printed part that asks,

a. "Are you in good health with no physical problems?",

b. "Can you take lessons an average of twice per week?", "yes" is checked off.

31 For the Defendant's Student Agreement, there is a pre-printed question, "Can you afford to budget between $ ..... and $ ..... per month for lessons?", and the sums of $100 and $150 are handwritten respectively in the foregoing blanks, and "yes" is checked off in handwriting.

32 The Defendant and Austin proceeded to commence with the two-month special on December 1, 2014. That trial period ended on February 28, 2015. The two-month special trial period was actually longer than two calendar months to reflect that the Grande Prairie club was closed over the Christmas season. The classes for the Defendant and Austin were two nights per week, on Monday and Wednesday.

33 The timing of signing up for a longer program agreement is up to each client. There was a discount offered by the Plaintiff for signing up for a longer program within the first month of the trial period.

34 Even if signing up for a longer program occurred within the trial period, as the Defendant did, the student is still entitled to completion of the trial period.

35 On January 9, 2015, the Defendant had a phone conversation with Mrs. Bilyea, the membership director. Based on that conversation, paperwork, was drawn up by the Plaintiff. In general, once a client selects a particular program, corresponding paperwork is prepared by the Plaintiff for the client's signature. The client is under no obligation to sign said paperwork however.

36 An email was sent to the Defendant on January 9, 2015 advising that the enrollment paperwork, based on the programs selected by the Defendant, were at the club's front desk and that the Defendant could come in and sign at a time convenient to her.

37 After the email from the Plaintiff, the Defendant telephoned and spoke with Melissa Keane at about 2:55 PM. The Defendant indicated that she would come in to do the paperwork and pay the fees on the following Tuesday.

38 On January 12, 2015, the Defendant came into the club and was provided the paperwork. The Defendant signed both agreements. (Exhibits 7 and 8) This meant she was enrolling in a "Masters Club" membership for each of herself and Austin, which is a four-year program.

39 Each pre-printed Enrollment Agreement is one page in length. Paragraph 2 of the Agreement reads, "The Student/Parent/Guardian/Payor understands that the tuition is arranged to be paid in full in monthly installments and is not affected by the student's training schedule and/or attendance."

40 Each Enrollment Agreement also provides:

a. Para. 6: It is agreed that paragraphs 5 through 11 inclusive of the Student Agreement dated 11/25/2014 and the Release dated 11/25/2014 form part of this agreement and are hereby incorporated specifically by reference herein.

b. Para. 7(h): If payments presented through/against accounts are returned unpaid by the payor's financial institution, the payor will be charged a $30.00 return item fee.

c. Para. 7(i): All payments in arrears shall bear interest at the rate of 28% per annum until paid in full. In the event that Payor is in default of his/her payment obligations hereunder then the entire balance of the tuition specified herein shall immediately become due and payable.

d. Para. 7(k): The Payor agrees to pay Tien Lung and/or its agents, all costs and expenses incurred by Tien Lung and/or its agents in enforcing any provisions of this agreement, on a solicitor and his own client basis.

e. Para. 7(l): The provisions of the "Tien Lung Guarantee" form part of this agreement. ("Yes" is checked off electronically on each Enrollment Agreement signed by the Defendant.) In the event that the "Tien Lung Guarantee" does form part of this agreement, the benefits conferred thereon to the Payor shall only be applicable if the Payor is not in default under any of the provisions of this agreement.

41 With respect to the Tien Lung Guarantee:

a. Cancellation options came with the program that the Defendant chose. Other programs do not come with the guarantee, and therefore the cancellation option is not available either. The same agreement forms are used for other programs, with the appropriate checkboxes checked off.

a. According to 1(b)(ii) of the Tien Lung Guarantee (Exhibits 7 and 8), "Cancellation of memberships with more than three (3) months remaining requires the payment of thirty (30%) per cent of the remainder of all unpaid dues and a fifty ($50.00) dollar service fee, or three (3) months dues and a fifty ($50.00) dollar service fee, whichever is greater".

b. According to 1(c) of the Tien Lung Guarantee, "The Payor recognizes that Tien Lung has provided a reduced payment option in the case of a cancellation of membership by the Payor. The Payor agrees if the Payor does not fulfill the entire cancellation procedure and if Tien Lung is forced to take further legal action then the Payor agrees that they will be immediately responsible to pay for the entire remainder of the original tuition amount and that the reduced payment options offered in section 1(b) will no longer apply nor be available."

c. Ms. Laton testified that the Tien Lung guarantee is not written into the agreement due to space.

d. Ms. Laton testified that it is standard practice that the Tien Lung guarantee is given to clients with the enrollment agreement before they sign. Ms. Laton herself did not give the agreement to the Defendant. However, Ms. Laton produced the New Member Checklist - Masters Club (see Exhibit 23) prepared by and bearing the name of a former employee of the Plaintiff, Ms. Goldsack, where "guarantee folder" is specifically ticked off, indicating that it was given to the Defendant for both herself and Austin.

e. On each enrollment agreement, there is a clause just above the spot for signature which states, "I/We have read, understand and agree to abide by the above terms and conditions and have received a copy of this agreement".

42 Ms. Laton testified that if the Defendant had questions about the agreements, that at the front desk of the Grande Prairie club, the Defendant would have been allowed to speak on the direct phone line to Ms. Laton, the membership director or someone else at one of the Edmonton clubs. If no one was available to answer the Defendant's questions, she could have simply refused to sign the agreements.

43 On January 13, 2015, the Defendant bought sparring gear for herself and Austin.

44 On January 14, 2015, Ms. Laton received an email from the Defendant stating that she could not justify being in taekwon-do, and that she wanted to cancel her membership, although Austin would maintain his membership. (Exhibit 9)

45 On January 18, 2015, the Defendant sent another email stating that she knew that any contract can be cancelled within 5 days of signing, and repeating that she wanted her contract cancelled. (Exhibit 11)

46 On January 19, 2015, Ms. Laton responded via email to the Defendant (Exhibit 10), outlining the Defendant's transfer, volunteer, and cancellation options pursuant to her enrollment agreement.

47 The Defendant emailed a response query on January 19, 2015, "Who do I forward my doctors (sic) note to then? I have an injured rotator cuff and will not be participating. If you do not cancel mine I will be calling my credit card company." (Exhibit 11)

48 In her email to the Defendant on January 20, 2015, 4:41 PM, Ms. Laton outlined the Defendant's options as per the signed agreement. She also pointed out, "As you know, if you do default on your payment obligations then the entire amount of the tuition will become due and payable." (Exhibit 12)

49 In her email to the Defendant on January 20, 2015, 4:42 PM, Ms. Laton again outlined the Defendant's options for cancellation, transfer or extension. Ms. Laton advised the Defendant about her membership extension option, which entails putting one's membership "on hold" for a time, and extending the expiry date on the membership. Although that would have still meant the Defendant incurring the membership expense, it meant that she would have the benefit of the membership when hopefully any health issues subsided. Ms. Laton also outlined the availability of a modified program to accommodate the Defendant's purported injury. (Exhibit 12)

50 The Defendant emailed on January 20, 2015, 4:53 PM, indicating that she had had the injury for a year, and that "[m]y doctor told me to try TKD. It's not helping. He told me to quit! Like I asked before, who do I send his letter to? I'm not extending it, I'm not transferring it!!! I want it cancelled. After the first night of sparring and signing I emailed you telling U to cancel. I don't care about a guarantee. Buyers (sic) protection. I can cancel." (Exhibit 12)

51 The Defendant emailed on January 20, 2015, 4:55 PM and said, "I can forward you my lawyers (sic) contact info. I have already spoken to him." (Exhibit 11)

52 In her email to the Defendant on January 20, 2015, 5:07 PM, Ms. Laton advised that the Defendant could start the cancellation process by picking up and completing a cancellation form from the front desk. (Exhibit 12)

53 In her email on January 20, 2015, 5:59 PM, Ms. Laton declined to speak to the Defendant's lawyer at that time. She outlined the background of how the Defendant came to sign her agreement, and pointed out that the Defendant herself selected the membership she wanted, and chose to sign up for the lengthier program after attending taekwon-do for over a month. (Exhibit 11)

54 The Defendant sent another email on January 20, 2105, 6:55 PM, suggesting that she wanted to transfer her membership to her other son, Ethan. (Exhibit 11)

55 Ms. Laton emailed the Defendant back on January 20, 2015, 7:35 PM, with information on how to effect the transfer of the Defendant's membership to Ethan. (Exhibit 11)

56 The Defendant emailed on January 20, 2015, 7:52 PM, asking if she was allowed to just do the fitness classes, or pay to do that, and have Ethan take over her lessons. (Exhibit 11)

57 Ms. Laton emailed the Defendant back on January 20, 2015, 8:02 PM advising that the Defendant would not be able to split her membership with Ethan. (Exhibit 11)

58 In her email on January 20, 2015, 8:14 PM, the Defendant referred to the fact that she owns three companies, and therefore did not have much time to volunteer to defray the cost of membership fees. (Exhibit 11)

59 Ms. Laton emailed the Defendant back on January 21, 2015, 12:43 PM providing more information about volunteering. (Exhibit 11)

60 In her email on January 22, 2015, 7:53 PM, the Defendant stated, "I won't continue. Ethan can. Tonight they told me to call now so that he can be on the list for monday (sic)." (Exhibit 11)

61 Ms. Laton emailed the Defendant back on January 26, 2015, 8:33 PM, advising that Ethan would not be able to start until at least March 2015, and that an Application for Transfer form would need to be completed. (Exhibit 11)

62 In Ms. Laton's belief based upon her interactions and correspondence with the Defendant, the Defendant understood her options and was not surprised or confused about them.

63 The Plaintiff had a problem with processing the transfer of the Defendant's membership to the Plaintiff as the Defendant had specified another individual, Nolan Baerg, as the payor of the transferred membership, and the Plaintiff was unable to get a hold of him to finalize the membership transfer. Ms. Laton attempted to contact the Defendant to see if the Defendant could get Mr. Baerg to complete the transfer. However, Ms. Laton did not hear anything back from the Defendant.

64 Ms. Laton works in Edmonton. She did not observe either the Defendant or Austin attending classes firsthand. Instructors take attendance of students on a form each day in class, then the data is entered into a computer. Ms. Laton is not responsible for entering the attendance information into the computer. However, she prepared the attendance record she referred to in Court and compared it to the physical attendance records. According to the Plaintiff's class attendance records, the Defendant attended from December 1, 2014 until January 15, 2015, and Austin attended December 1, 2014 until March 12, 2015.

65 According to the Defendant's enrollment agreement (Exhibit 7), by signing, the Defendant promised to pay the total tuition of $6,000 in 48 fixed monthly installments of $125 (which was the early bird rate) with the first monthly installment being due on March 5, 2015.

66 According to Austin's enrollment agreement (Exhibit 8), by signing, the Defendant promised to pay the total tuition of $6,960 in 48 fixed monthly installments of $145 with the first monthly installment being due on March 5, 2015.

67 Pursuant to the signed enrollment agreements, payments for the Defendant's and Austin's tuition were to be paid on the Defendant's credit card number as provided by her.

68 Commencing on March 5, 2015 as per the enrollment agreements, the Plaintiff attempted to receive payments from the Defendant for the memberships for the Defendant and Austin. However, payments on the Defendant's credit card number for the Defendant's and Austin's memberships were declined. No payments at all were received from the Defendant for the two enrollment agreements.

69 Ms. Laton advised in an email to the Defendant dated April 29, 2015 that if Ms. Laton did not hear from the Defendant by May 8, 2015, it would be assumed that the Defendant no longer wished to transfer her membership.

70 Ms. Laton did not hear from the Defendant despite emails and letters until September 7, 2015 advising the Defendant that as payments were not being made on the two memberships, both accounts were in arrears, and asking the Defendant to contact the Plaintiff.

71 On September 7, 2015, Ms. Laton sent the Defendant a letter stating that if she did not make satisfactory payment arrangements or pay the outstanding balances on the two memberships by September 30, 2015, the two memberships would be suspended, and 28% per annum interest would be levied on the outstanding balances until paid in full. The suspension was pursuant to clause 7(i) of the enrollment agreements.

72 The balances owing are shown in Exhibit 17.

73 Ms. Laton still did not hear from the Defendant. The Plaintiff therefore filed a Civil Claim on November 19, 2015.

74 The first time that the Plaintiff heard of verbal abuse on the part of its instructors being alleged by the Defendant was in her filed Dispute Note filed on January 29, 2016.

75 So far as Ms. Laton knows, there was no abuse inflicted on any of their students. She acknowledges that some children do not like loud voices. In the classes, the instructors have to speak loudly as they have to be heard above the music. If a microphone system is being used, it can be quite loud, depending on the setting. Ms. Laton was not present to observe this firsthand.

76 Upon reviewing the Dispute Note was also the first time that the Plaintiff became aware that the Defendant and Austin developed plantar's warts.

77 The Plaintiff tried to mitigate its losses due to the Defendant's failure to pay the membership fees. The Plaintiff advertises and markets its services through various means. The Plaintiff's classes in question were not full, and the Plaintiff does not have a wait list.

Relevant Viva Voce Evidence of the Defendant

78 The Defendant and her son were in the beginners' class during the two-month special or trial period. Those classes were fun and they thoroughly enjoyed them.

79 The Defendant is not sure of the position of Mr. and Mrs. Martinez at the club in Grande Prairie, but thinks they may have been the managers. The Defendant described this couple as being "great".

80 However, during the trial period:

a. One night, mother and son were late, and felt embarrassed and humiliated in front of everyone.

b. Once a larger boy was perspiring and practically in tears doing burpees and push-ups, but he was "[pushed]" to keep going. The Defendant described the incident as awful. She admitted that she knew that such a situation could arise in classes after the beginners' class. She admitted, "Kids can cry anywhere, yes, I do know this."

c. The Defendant had observed people being "forced" to do specific exercises and if they didn't, they would get in "trouble".

d. There was more than one child crying every night that the Defendant went to class.

e. Instructors would be yelling for no reason. There was no music in the classes Austin and the Defendant attended. The main thing that the instructors would yell was "Yes, sir!" to the children. Also, if a student didn't "know a move" you would be "in trouble".

81 The Defendant confirmed that even after the above issues, she still signed up for four year memberships.

82 The Defendant testified that she "just knew" that she needed to sign the agreements before she and Austin could continue on onto the next class. She was also told of the need to buy sparring equipment.

83 She says that she did not think it was an option to continue in the beginner's class they had already graduated from.

84 She testified that her trial period ended at the end of February 2015. She was under the impression that she was paid up until March. The new payments were not to commence until March 5, 2015.

85 The Defendant confirmed that she knew the agreements were waiting for her signature as Ms. Laton sent her an email on January 9, 2015 advising her of that. The Defendant testified that she is not saying that she did not know that the contracts were drawn up. She admitted that she had a phone conversation with the membership director, and they went over the options.

86 The Defendant also testified that although she knew the contracts were there, she did not know that she had to sign them.

87 The Defendant saw the enrollment agreements for the first time on January 12, 2015. Parts of the agreements were already filled out when they were handed to the Defendant. The Plaintiff's representatives had already signed the contract.

88 The Defendant testified that she has owned a company for 18 years. The Defendant admits that she knows how to read, but she says that nobody went over the contracts with her, and no one asked whether she understood the terms or if she had questions.

89 She admits that she did understand that the documents were contracts. She testified that she found the contracts hard to understand however. There were terms that were difficult to follow. There were a lot of words that can be hard to understand. The Defendant says she understood "the months" and how much was due. She denies that she understood the contracts word for word. In cross-examination, the Defendant confirmed that she understood everything that was in the contract.

90 She was not told that there were terms and conditions outside of the contracts. She said she was not made aware of the Tien Lung guarantee at the time. There was no reference made to the guarantee except for the checklist but she says that she did not notice that that night. She did not have an option to alter the provisions, including checking no, to the Tien Lung guarantee. There was no package that was given to the Defendant on January 12, 2015. Ms. Laton referred to it however in emails after January 14, 2015.

91 She was not told that she could take the agreements away to review them before signing them.

92 The Defendant testified that she had questions about the enrollment agreements on January 12, 2015. However, she says she could not get any answers. The employee at the club was very young and was not able to answer the Defendant's questions. The Defendant felt that asking her further questions was pointless.

93 The Defendant claims that representatives at the Grande Prairie club available to be spoken to do not speak English. Therefore, discussing the agreements with them would not have been possible.

94 Anytime that the Defendant says that she had questions, she was directed to phone one of the Plaintiff's representative in Edmonton. The Grande Prairie club employee did try to phone the Edmonton office on the night of January 12, 2015 but there was no answer.

95 The Defendant admitted that whether or not she was going to sign the enrollment agreements was up to her.

96 The Defendant responded that nothing would have happened if she did not sign the contract other than that she and Austin would have gone home.

97 On January 12, 2015, the Defendant testified that she signed the agreements as Austin was sitting there, expecting to go to class. However, she also testified that on January 12, there was no class scheduled. She testified that there was a class scheduled either that night or the following night

98 She further testified that January 12, 2015 was their first night in the "completely different class with different surroundings, different instructor, different absolutely everything". However, she said the "idea" was the same. It's just

that the class was more intense. She later testified that it was 100% abuse "all the way around". She said that she felt out of her comfort zone. Also, she had gone there for fun, and the novice class was not fun.

99 The Defendant's doctor had advised her before she started that taekwon-do "might be fine but it might not be". During the beginners' class, she was fine as there were fewer burpees and push-ups required. The first night that the Defendant attended the novice class, her shoulder started irritating her. That was the original reason why she could no longer attend. She spoke to her doctor, who advised her not to continue with taekwon-do.

100 During her attendance at the club, both the Defendant and Austin developed a plantar's wart. She has been diagnosed with OCD, but the club was one of the few public places she went. In taekwon-do, one goes on the mats with bare feet. The pain in her ankle had started in the middle to the end of January. She did not go to the doctor's until February. The Defendant was troubled by her wart for a year. The wart was very painful, and it affected her gait and prevented her from running. She needed surgery to get her wart removed. Austin did not.

101 Exhibit 24 is a doctor's sick note dated April 4, 2016 indicating that the Defendant was unable to work from February 9, 2015 until an unspecified date for plantar's wart treatment. She says that the reason that she went to the doctor in 2016 is because she did not realize that she would have to go through with "the whole process" (i.e. the within litigation), and did not realize that she needed the doctor's note.

102 The Defendant would not address the possibility that she had gotten her plantar's wart elsewhere. She said she is not aware that the club's mats were cleaned daily as she did not see it happen.

103 During the trial period, Austin attended seven sessions. The Defendant believes that he attended three of the more advanced sessions of what she calls the "novice class".

104 The first two nights that they attended the novice class, Austin was scared that what was happening around him was going to happen to him. It seemed that one or two children would get singled out.

105 January 14, 2015 is when the Defendant emailed the Plaintiff to have her contract cancelled. The Defendant denied that she ever gave finances as a reason for wanting to cancel. The only time that she ever mentioned the financial aspect was in reference to both her sons as well as herself having memberships.

106 The Defendant testified that she does not recall the date of her last class as there was a lot of back and forth between her and Ms. Laton between January 12 and 20, 2015.

107 However, she also testified that January 15, 2015 was the last class that she attended. On January 20 or 21, 2015, she said that both she and Austin "were done". Austin went to one class without her. That is the class where he allegedly was verbally abused. The Defendant disagrees that Austin attended on January 22, February 3, and March 22. Also, she disagrees with what Ms. Laton said about one of them attending in December. She said that she and Austin always attended together except the last class.

108 When asked if the date of the incident with Austin was January 20, 2015, the Defendant said that she does not have the exact dates that they went in. She cited that she thought the class was January 22, or it was between January 20 to 22, so that was the date of the incident.

109 The Defendant spoke to Mr. Martinez at the club one night around January 19, 2015 about cancelling her membership. He suggested transferring her membership to Ethan, her other son. That was an option for the Defendant until the alleged incident concerning Austin.

110 The Defendant denies that it is her handwritten dates or signature on the Application for Membership Transfer (Exhibit 13). She said she is unsure whose signature appears on the document. The Defendant indicated that it was her handwriting on the form to a certain point, as she was going to have her membership transferred to Ethan. The

Defendant said that Ms. Laton had previously told her that she could not get a hold of anyone to sign the form, so the Defendant does not know how the form is signed now.

111 On January 20, 2015, the Defendant did not go that night to class with Austin because as far as she was concerned, she was done. She was still debating whether she would transfer her membership to her son, Ethan.

112 Up until the date of Austin's upset, he was attending novice classes, and everything was fine aside from some general anxiety on his part that "something bad" might happen to him.

113 To this day, the Defendant says she does not know what happened to upset Austin on the date of his last class. All that she knows is that Austin was crying and shaking when she picked him up after class, and did not want to return to taekwon-do.

114 Austin's life completely changed after that class. He began to claim stomach aches and showed major anxiety. He lost his self-esteem, and it appeared that he didn't want to try anything and risk failure. Even now, three years later, Austin is on medication due to his anxiety.

115 The Defendant did not at any point, either on the date her son was crying, or at a later date, attempt to find out from the Plaintiff what had happened to upset Austin. The reason she gave at trial was that "they don't speak English".

116 She later admitted that Mr. and Mrs. Martinez do speak English, but not very well. The instructor who taught Austin's class when the alleged incident occurred also spoke English. Despite this, she did not try to go talk to him to find out what had happened with Austin. The second reason given at trial for her failure to make inquiries was that the Defendant wanted nothing more to do with the Plaintiff.

117 The Defendant testified that her last email to Ms. Laton was her final email and she was not going to speak with Ms. Laton anymore, and the incident with Austin happened that evening.

118 After the incident with Austin, the Defendant admits that she did not communicate that she wanted to cancel her son's membership. Ms. Laton kept emailing the Defendant from January 12 to 20, 2015 advising that the Defendant had certain options with respect to her request to cancel her membership. However, none of those options appealed to the Defendant. She was so irate about the incident with Austin, if she had contacted Ms. Laton, she "probably would have lost it". Also, it was recommended to the Defendant by an unknown party to just stop all contact with the Plaintiff.

119 However, the Defendant says that she emailed Ms. Laton on January 20, 2015 advising that she was not interested in extending or transferring her membership. She testified that she did not even want her membership cancelled. She said she simply "wanted to be done". (Exhibit 12)

120 She testified that on January 20, 2015 by email she asked for Austin's contract to be cancelled. She was not interested in transferring the contracts to anyone as she would not recommend the program to anyone after what happened to Austin in the last class.

121 The Defendant testified that she believes that after Austin's upset, she sent an email to Ms. Laton on January 21, 2015 saying that Ethan would take over her membership and continue with taekwon-do, but that the Defendant would not.

122 She admitted that she had asked Ms. Laton to get the transfer form drawn up for Ethan. However, after what happened to Austin, she decided that she was not going to transfer her membership to Ethan.

123 She testified that unfortunately, she and her son were not able to continue with taekwon-do as the Plaintiff did not live up to its side of the agreement, namely teaching children with dignity and respect. Austin will forever be changed due to whatever it was that happened at the club. Also, the club was not sanitary. Furthermore, she thinks that she has paid enough.

124 The Defendant was asked by Ms. Laton why she didn't simply cancel the memberships according to the terms of the contracts that she signed. The Defendant replied incredulously, "And pay 30 percent of what's owing, so $2,000 each for five classes?!"

CASE LAW

Incorporation by Reference

125 In *Park Avenue Flooring Inc. v. EllisDon Construction Services Inc.*, 2015 ABQB 478 (Alta. Q.B.), the Court noted the following on the topic of incorporation by reference:

> 286 While the cases discussed above can be distinguished on the basis of the wording of the referential clauses, in that they more clearly incorporate the subcontracts into the main contract, they do provide general guidance on questions of referential incorporation, including that:
>
> • a) Each case must be separately considered to determine the precise purpose and extent to which it is desired to incorporate the term or terms of the main contract (Union Pacific at para 29);
>
> • b) Questions of interpretation are done on a case-by-case basis in an endeavour to ascertain the parties' objective intentions to be derived from the language used in the contracts (Union Pacific at para 29);
>
> • c) If there are inconsistences between a prime and subcontract, those inconsistences and the extent to which the terms of the prime contract have been incorporated by reference, is a question of the interpretation of the subcontract (Online Constructors at para 17);
>
> • d) If the incorporating wording is ambiguous, the doctrine of *contra preferentem* would apply against the drafter (QQR at para 27); and
>
> • e) care must be taken to ensure that such incorporation by reference does not result in inconsistencies between the express terms of the subcontract and the terms of the prime contract so incorporated. The resolution of any such inconsistencies, and the extent to which the terms of the prime contract have been incorporated by reference, is in every case a question of construction of the subcontract (Goldsmith).

126 From a review of the case law, it appears that if incorporation by reference of a document external to a contract is not clear and unmistakable, a court might hold that the extrinsic document is not part of the contract.

Undue Influence

127 *Jonasson v. Jonasson*, [1995] B.C.W.L.D. 1509 (B.C. S.C.) [1995 CarswellBC 1499 (B.C. S.C.)] canvassed the law in respect to undue influence, coercion and intimidation. At page 9 of the decision, Errico, J. quotes Crocket, J. in the decision of *McKay v. Clow*, [1941] S.C.R. 643 (S.C.C.). Justice Crocket quoted from page 103, Volume 29 of Am. & Eng. Enc. Of Law [2nd ed] when he stated:

> The extent or degree of the influence is quite immaterial, for the test always is: Was the influence, whether slight or powerful, sufficient to destroy free agency, so that the act put in judgment was the result of the domination of the mind of another rather than the expression of the will and mind of the actor?

128 Justice Crocket established as well that the burden of proving undue influence is upon the person alleging it.

129 As per *Hittinger v. Turgeon*, 2005 ABQB 257 (Alta. Q.B.):

> 51 It has long been recognized that in some circumstances there may be a presumption of undue influence arising from the relationship between the parties. In such circumstances, the evidentiary burden of proof shifts to the

> party seeking to uphold the agreement to show that there was no exercise of undue influence. Thus, unless there is a presumption of undue influence, the Defendant carries the burden of proving that he was subjected to undue influence as a result of which he executed the Agreement.

130 In *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.), the Supreme Court of Canada noted that a special relationship must be shown to exist between the parties for the presumption of undue influence to arise. What constitutes a special relationship is not clear. The *sine qua non* however is that one party, in the course of the relationship, develops a dominating influence over another.

Unconscionability

131 Even in the absence of undue influence, there is still jurisdiction to grant relief against unconscionable bargains. (*Hittinger v. Turgeon*, 2005 ABQB 257 (Alta. Q.B.), para. 87)

132 In *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 (S.C.C.), the Court noted at para. 30:

> An unconscionable transaction arises in contract law where there is an overwhelming imbalance in the power relationship between the parties.

133 The Court noted in *Hittinger v. Turgeon*, 2005 ABQB 257 (Alta. Q.B.):

> 115 The test in the case law is whether the bargain shocks the conscience of the Court. The case law is replete with references to the need to maintain the integrity of contracts and that Courts will not intervene to set aside hard bargains except in the most exceptional circumstances. *Baxter v. Rollo* (1912), 5 D.L.R. 764 (B.C. S.C.):
>
> > The authorities go to shew that specific performance will not be refused on the ground of inadequacy of consideration unless the disparity in price is so great as to shock the conscience and constitute in itself a badge of fraud. ...

134 The test for unconscionability was recently stated by the Alberta Court of Appeal in *Cain v. Clarica Life Insurance Co.*, 2005 ABCA 437, 384 A.R. 11 (Alta. C.A.) at para. 32 as requiring:

> 1. A grossly unfair and improvident transaction;
>
> 2. The victim's lack of independent legal advice or other suitable advice;
>
> 3. An overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
>
> 4. The other party's knowingly taking advantage of this vulnerability.

Repudiation

135 Repudiation of a contract occurs when a party to the contract refuses to perform his or her obligations under the contract prior to the date set for performance: *Inmet Mining Corp. v. Homestake Canada Inc.*, 2002 BCSC 61 (B.C. S.C.), at para. 39. Repudiation also occurs where a party indicates by words or conduct that he or she no longer intends to honour their obligations under the contract or be bound by its provisions: *216927 Alberta Ltd. v. Fox Creek (Town)*, [1990] 3 W.W.R. 321 (Alta. C.A.), at 324.

136 Repudiation is more easily inferred where a party expressly refuses to take appropriate remedial measures in order to comply with the terms of the contract: *Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd.* (1961), [1962] 1 All E.R. 474 (Eng. C.A.), at 479.

137 It is up to the court to decide what is material in a contract. In deciding what terms are material such that their breach constitutes repudiation, the subjective views of the parties are important, but not determinative: *Inmet Mining Corp. v. Homestake Canada Inc.*, 2002 CarswellBC 53, 2002 BCSC 61, 99 B.C.L.R. (3d) 93 (B.C. S.C.), at para. 126. The Court noted in Inmet:

> [127] There is an important distinction to be made between the tests for materiality that the courts have applied in cases of legislated disclosure, such as that found in the Securities Act, Real Estate Act, etc., and the test for materiality in a contract. In the former cases the tests have to be more objective because the legislation is aimed at protection of the general public. It would be impossible to know what would affect the mind of every purchaser. By contrast, the parties to a contract have the opportunity to tailor make their own terms and a purchaser is able to build in its own protections. In a contract, the court is bound to use a more subjective standard in determining what was material and adverse to a particular purchaser's decision to buy.

138 A "repudiatory breach" is a breach of contract that gives the aggrieved party the right to choose either to end the contract or to affirm it. In either case, the aggrieved party may also claim damages.

139 Where both parties have breached their contractual obligations, the contract continues to subsist, and neither party is relieved of their contractual obligations: *Norfolk v. Aikens* (1989), 41 B.C.L.R. (2d) 145, 1989 CarswellBC 221 (B.C. C.A.); *Shaw Industries Ltd. v. Greenland Enterprises Ltd.* (1991), 54 B.C.L.R. (2d) 264, 1991 CarswellBC 901 (B.C. C.A.); *Basra v. Carhoun* (1993), 82 B.C.L.R. (2d) 71, 1993 CarswellBC 208 (B.C. C.A.); *Abramowich v. Azima Developments Ltd.* (1993), 86 B.C.L.R. (2d) 129, 1993 CarswellBC 348 (B.C. C.A.).

Rescission

140 The Defendant wants the enrollment agreements she entered into with the Plaintiff to be treated as nullities, and be restored to the position she was in before the contracts were signed. This entails rescinding the contracts, or setting aside or cancelling them.

141 There are basically two types of rescission. The first type, "common-law rescission", does not require Court intervention, and is available where the contract has a clause which makes it voidable at one party's option.

142 Common law rescission is also available in the following instances, representing the legal bases to cancel a contract:

> a. Misrepresentation — Where a false statement of fact was made by one of the parties to the other for the purpose of inducing that other party to enter into the agreement. If the misrepresentation is of a material fact, it makes the contract voidable.
>
> b. Mistake — Where one or more of the parties had an incorrect understanding of what the contract was about.
>
> c. Duress and undue influence — When one party compels or threatens the other to enter into the agreement against that party's will.
>
> d. Incapacity — Those entering into an agreement must have the legal capacity with regard to age, mental capacity and authority.
>
> e. Illegality - A contract can be illegal if it violates a law.

143 The second type of rescission is "equitable rescission". Under this, a party asks the Court for relief from a contract where it would be inequitable to require the party to be bound. The court of equity upon hearing the evidence does what is "practically just". In this situation, the court essentially applies the rules of equity and determines whether a contract should not be allowed to stand and should be annulled.

144 As with common law rescission, the power of a court to rescind a contract on equitable grounds occurs in three cases. First, where the contract resulted from some fraud and as a result, the defrauded party mistakenly entered into the contract. Second, where the mistake was an innocent, non-fraudulent misrepresentation. Third, where the contract was obtained by some unconscionable acts which makes the entire agreement questionable. [Jeffrey Berryman, The Law of Equitable Remedies 2/e, (Toronto: Irwin Law, 2000); Jeff Levy, 'Contract Law: Rescission anyone?' online: https://levyzavet.com/contract-law-rescission-anyone]

145 The Provincial Court of Alberta is not a court of equity. As such, it does not have general powers to grant equitable remedies.

Non est factum

146 In *Upton v. Tribilcock*, 91 U.S. 45 (U.S. Sup. Ct. 1875), the Court noted:

> It will not do for a man to enter into a contract and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written.

147 It was the misfortune of a signer of an agreement if he misinterpreted the document or was careless in reading it. He was bound by the terms of the agreement. (*Cedar Village Building Materials Ltd. v. Janary Construction Inc.*, 1994 CarswellAlta 551 (Alta. Q.B.)

148 Any person who fails to exercise reasonable care in signing a document is precluded from relying on *non est factum* as against a person who relies upon that document in good faith and for value. (*Marvco Color Research Ltd. v. Harris*, [1982] 2 S.C.R. 774 (S.C.C.))

Penalty Clause

149 *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.* (1914), [1915] A.C. 79 (U.K. H.L.), is a leading case on penalty clauses. The relevant portions of this case are:

> Though the parties to a contract who use the words 'penalty' or 'liquidated damages' may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The court might find out whether the payment stipulated is in truth a penalty or liquidated damages
>
> . . .
>
> The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.
>
> The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach.

150 The Court in *H.F. Clarke Ltd. v. Thermidaire Corp.* (1974), [1976] 1 S.C.R. 319, 1974 CarswellOnt 253 (S.C.C.) considered whether stipulated damage clauses constitute an unenforceable penalty. The court declined to enforce the contractual formula fixing damages for breach of a covenant, ruling at paragraph 28:

> I regard the exaction of gross trading profits as a penalty in this case because it is, in my opinion, a grossly excessive and punitive response to the problem to which it was addressed; and the fact that the appellant subscribed to it, and may have been foolish to do so, does not mean that it should be left to rue its unwisdom. Snell's Principles of Equity (27th ed. 1973), at p. 535 states the applicable doctrine as follows:

> The sum will be held to be a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.

151 In *J.G. Collins Insurance Agencies v. Elsley*, [1978] 2 S.C.R. 916 (S.C.C.), at para 47, the Court noted:

> It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression.

152 At para. 53 of J.G. Collins Insurance Agencies, the Court indicated that, where a stipulated sum is a penalty, the plaintiff may only recover such damages as it proves, and the amount recoverable may not exceed the sum stipulated.

Credibility

153 The Supreme Court of Canada noted in *C. (R.) v. McDougall*, 2008 SCC 53 (S.C.C.):

> 85 The W. (D.) steps were developed as an aid to the determination of reasonable doubt in the criminal law context where a jury is faced with conflicting testimonial accounts. Lack of credibility on the part of an accused is not proof of guilt beyond a reasonable doubt.
>
> 86 However, in civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on the important issue in the case. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant as in this case. W. (D.) is not an appropriate tool for evaluating evidence on the balance of probabilities in civil cases.

154 The Court found Ms. Laton to be credible and reliable. There did not appear to be any internal inconsistencies in her evidence. The Defendant's evidence did contain a number of internal inconsistencies however, including the following.

> a. The Defendant initially testified that she did not know that she had to sign the agreements However, she contradicted this a couple of times in direct evidence. In cross-examination, she indicated that she knew full well that the contracts were waiting for her signature.
>
> b. The Defendant at first testified that she found the contracts hard to understand. In cross-examination, the Defendant confirmed that she understood everything in the contracts.
>
> c. She said she did not understand why the payments under the enrollment agreements were to commence in March. However, shortly thereafter she testified that her trial period ended at the end of February 2015 hence her payments started in March, because she was paid up until then.
>
> d. The Defendant seemed to suggest that she signed the contracts as her son was sitting there, expecting to go to class. However, shortly thereafter, she indicated that on January 12, 2015 when she signed the contracts, there was no class scheduled that night.
>
> e. She testified that January 12, 2015 was her and Austin's first night in the "completely different class". However, this contradicts the Defendant's testimony that there was no class scheduled on January 12.
>
> f. The Defendant testified that she does not recall the date of her last class. Elsewhere, she testified that January 15, 2015 was the last class that she attended. Yet, she claimed experiencing shoulder irritation on January 12, based on which she requested cancellation of her contract on January 14.

g. When asked if the date of Austin's upset was January 20, 2015, the Defendant said that she does not know the exact date. She cited that she thought that the class was on January 22, or it was between January 20 to 22, "so that was the date of the incident".

h. The Defendant claimed that people at the club did not speak English. She later admitted that Mr. and Mrs. Martinez do speak English, but not very well. She also admitted that the instructor who taught Austin's class when the alleged incident occurred also spoke English.

i. The Defendant testified that she believes that after the incident with Austin, she sent an email to Ms. Laton on January 21, 2015 saying that Ethan would assume her membership. She had earlier testified that after the incident, she had decided that Ethan would not be assuming her membership.

155 As between the two witnesses and also the documentary evidence, the following external inconsistencies were noted by the Court:

Ms. Laton's Testimony	***Defendant's Testimony***	***Exhibits***
[156] According to the Plaintiff's class attendance records, the Defendant attended from December 1, 2014 until January 15, 2015, and Austin attended from December 1, 2014 until March 12, 2015.	[157] January 15, 2015 was the last class that the Defendant attended. January 20 or 21, 2015 was Austin's last class. The Defendant disagrees that Austin attended class on January 22, February 3, and March 22. Also, she disagrees with what Ms. Laton said about one of them attending in December. She said they were always together except the last class.	
[158] Ms. Laton testified that it is standard practice that the Tien Lung guarantee is given to clients with the enrollment agreement before they sign. Ms. Laton herself did not give the agreement to the Defendant. However, the New Member Checklist - Masters Club (Exhibit 23) (dated January 12, 2015), and prepared by a former employee of the Plaintiff, Ms. Goldsack, shows the guarantee folder is ticked off, indicating that it was given to the Defendant for both herself and Austin.	[159] The Defendant was not made aware of the Tien Lung guarantee at the time of signing the agreements. There was no package that was given to the Defendant on January 12, 2015.	
[160] In the classes, the instructors have to speak loudly as they have to be heard above the music.	[161] There was no music in the classes the Defendant attended.	
	[162] On January 20, 2015 by email, the Defendant asked for Austin's contract to be cancelled.	[163] There was no email in the trial exhibits requesting cancellation of Austin's contract. Ms. Laton did not give evidence that the Plaintiff ever received notice of the Defendant's intention to cancel Austin's membership.

164 With respect to the foregoing external inconsistencies between the two witnesses, the Court is inclined to accept Ms. Laton's version of events. This is because of the multiple internal inconsistencies in the Defendant's evidence. Also, for

certain items in issue, Ms. Laton had the Plaintiff's business records and an explanation of how those were created. The Defendant was relying on her bare memory of the dates. In addition, at certain portions of her testimony, she would with confidence provide a date for some occurrence, but then later express uncertainty, and provide a range of dates instead.

165 In any event, in terms of substance, nothing really hinges on the specific dates that the Defendant and her son attended classes as the signed enrollment agreements specifically provide that fees are not dependent upon attendance. As well, on the issue of students being shouted at, the Defendant herself testified that, to this day, she does not know what happened to make Austin cry. Therefore, the suggestion that it was due to his instructor yelling at him is pure speculation.

166 Based on internal inconsistencies in her testimony, the Court finds the Defendant's evidence to be unreliable.

Findings of Fact

167 Notwithstanding that she might have had questions about the enrollment agreements for herself and her son, Austin, the Defendant proceeded to sign both enrollment agreements on January 12, 2015.

168 Student attendance did not affect liability for membership fees.

169 On January 14, 2015, the Defendant communicated to the Plaintiff her wish to cancel her agreement. She later cited the reason as being an exacerbated previous rotator cuff injury.

170 If Austin was crying after his last class, the Defendant took no steps, then or ever, to find out from the Plaintiff what had upset him.

171 Since there was no evidence before the Court as to the reason for Austin's upset, this does not constitute a breach of his contract by the Plaintiff.

172 At no time did the Defendant communicate to the Plaintiff that she wanted Austin's agreement cancelled in addition to her own.

173 There is no evidence that the Plaintiff was the cause of the Defendant's or Austin's plantar's warts. Such purported warts do not constitute a breach by the Plaintiff of either contract.

174 The Defendant did not pursue any of the options outlined in the enrollment agreement with respect to transfer, extension or cancellation of either membership.

175 In particular, the Defendant did not pursue the formal cancellation procedure as outlined in the Tien Lung Guarantee.

176 The Defendant breached her contractual obligations of payment under each agreement.

177 The Plaintiff attempted to mitigate its losses.

Analysis

Tien Lung Guarantee

178 The enrollment agreements make clear reference to the extrinsic Tien Lung Guarantee. Furthermore, it is mentioned in a fairly prominent position — directly above the signature line in the agreements.

179 The New Member Checklist — Masters Club (Exhibit 23) suggests that the Defendant was in fact given that guarantee upon the date of signing the agreements. Some doubt is cast upon the Defendant's assertion at trial that she did not receive the Tien Lung Guarantee. That is because nowhere in the emails that were made trial exhibits does the Defendant ask what the Tien Lung Guarantee is, or dispute being subject to the guarantee on the basis that she never

received it. Also, in testimony, she referred to not noticing the guarantee on the night of January 12, 2015, which leaves open the possibility that she *did* in fact receive the guarantee document but was not aware of same.

180 The Tien Lung Guarantee is in any event largely for the benefit of the signor as it affords options for getting "out" of the associated enrollment agreement. If the guarantee were not to apply, the Defendant would have had no option of cancelling the agreements she signed without having to pay the full contracted tuition. This Court finds that the enrollment agreements did indeed incorporate by reference the Tien Lung Guarantee.

181 In her emails that were made trial exhibits, the Defendant did not mention any reason for wanting to cancel her enrollment agreement other than a purported exacerbated rotator cuff injury. This undermines her testimony at trial that she had concerns at the time about the Plaintiff in general in terms of its treatment of students.

182 The Defendant did not cite the purported rotator cuff at the outset of her email contact with Ms. Laton requesting cancellation on January 14 and 18, 2015. If she had her health in mind in those emails, their wording is decidedly curious. In her January 14 email, she states "in thinking about this I can't justify being in TKD for myself". In her January 18 email, she refers to knowing that "any contract can be cancelled within 5 days of signing:" She only mentioned her rotator cuff in her January 19, 2015 email.

183 The Court also notes that her contention that she had this pre-existing injury is countered by her indication on the Student Agreement form that she had no health issue. (Exhibit 3)

184 The Defendant declined the possibility of a modified program or extending her membership that would work around any health limitations, suggesting she was not genuinely interested in continuing with taekwon-do training.

185 The timing of Austin's alleged upset is suspicious as it is said to have occurred when the Defendant was actively seeking a means to opt out of her contractual obligations. If the event with Austin did in fact occur, it would appear that the Defendant at the time would have eagerly seized on same and quickly brought it to the Plaintiff's attention as a reason to cancel Austin's enrollment agreement. However, the Defendant says she simply did nothing about Austin's upset — not in terms of notifying the Plaintiff about it, nor finding out the cause of it.

Applicability of Fair Trading Act

186 The Defendant did ask the other contracting party, the Plaintiff, to cancel or rescind the agreement pertaining to her membership. The Plaintiff responded that the Defendant could certainly do so, but pursuant to the terms of cancellation provided for in the signed contract. However, the Defendant evidently found cancellation via that route to be financially prohibitive. The Defendant is therefore asking the court to rescind both contracts.

187 The issues of rescission, undue influence, unconscionability and unfairness can be considered in the context of the Alberta *Fair Trading Act*. According to s. 1(1) of the *Act*:

> (c) "consumer transaction" means, subject to the regulations under subsection (2),
>
> > (i) the supply of goods or services by a supplier to a consumer as a result of a purchase, lease, gift, contest or other arrangement, or
> >
> > (ii) an agreement between a supplier and a consumer, as a result of a purchase, lease, gift, contest or other arrangement, in which the supplier is to supply goods or services to the consumer or to another consumer specified in the agreement
>
> . . .
>
> (k) "services" means, subject to the regulations under subsection (2), any service offered or provided primarily for personal, family or household purposes, including ...

(ii) a membership in any club or organization if the club or organization is a business formed to make a profit for its owners

188 Exhibit 1 is a Certificate of Incorporation indicating that "Swan City Taekwon-Do Club" was incorporated under the *Societies Act*. According to the Service Alberta website (*https://www.servicealberta.ca/Societies.cfm*), "Societies are similar to non-profit companies, and must direct any profits back into fulfilling the objectives of the organization."

189 Ms. Laton testified that the Plaintiff is a non-profit society. As such, membership in the Plaintiff's clubs does not appear to fall within the purview of "services" and "consumer transaction" as defined in the *Act*.

190 However, the Court is also mindful of s. 2.1 of the *Act*, which reads:

> In determining whether this Act applies to an entity or a transaction, a court or an appeal board must consider the real substance of the entity or the transaction and in doing so may disregard the outward form.

191 The "real substance" of the transaction between the parties in the case at bar does appear to include the type of dealings contemplated by the *Act*, and the Court is therefore prepared to proceed as if the legislation does apply to the within matter.

192 Next, the Court considers s. 6 of the *Act* with respect to "Unfair Practices". *Ninpo Martial Arts Inc. v. Lepa*, 2009 ABPC 251 (Alta. Prov. Ct.) is a case with similar facts to the case at bar. In that case, however, the Plaintiff-club was a business formed to make a profit for its owner. The Court there noted:

> 2 The contract is one governed by the Alberta *Fair Trading Act* so the issue of whether or not the Plaintiff engaged in an "unfair practise" as defined by that Act arises. It arises because if Plaintiff engaged in an "unfair practise", the Defendant would be entitled to cancel the transactions no matter what the contract provided with respect to termination.

193 The following is an excerpt from the Act relating explicitly to "unfair practices":

> 6(1) In this section, "material fact" means any information that would reasonably be expected to affect the decision of a consumer to enter into a consumer transaction.
>
> (1.1) It is an offence for a supplier to engage in an unfair practice.
>
> (2) It is an unfair practice for a supplier, in a consumer transaction or a proposed consumer transaction,
>
> (a) to exert undue pressure or influence on the consumer to enter into the consumer transaction;
>
> (b) to take advantage of the consumer as a result of the consumer's inability to understand the character, nature, language or effect of the consumer transaction or any matter related to the transaction;
>
> (c) to use exaggeration, innuendo or ambiguity as to a material fact with respect to the consumer transaction;
>
> (d) to charge a price for goods or services that grossly exceeds the price at which similar goods or services are readily available without informing the consumer of the difference in price and the reason for the difference;
>
> (e) to charge a price for goods or services that is more than 10%, to a maximum of $100, higher than the estimate given for those goods or services unless
>
> (i) the consumer has expressly consented to the higher price before the goods or services are supplied, or

(ii) if the consumer requires additional or different goods and services, the consumer and the supplier agree to amend the estimate in a consumer agreement;

(f) to charge a fee for an estimate for goods or services unless the consumer

(i) is informed in advance that a fee will be charged and informed of the amount of the fee, and

(ii) has expressly consented to be charged the fee.

(3) It is an unfair practice for a supplier

(a) to enter into a consumer transaction if the supplier knows or ought to know that the consumer is unable to receive any reasonable benefit from the goods or services;

(b) to enter into a consumer transaction if the supplier knows or ought to know that there is no reasonable probability that the consumer is able to pay the full price for the goods or services;

(c) to include in a consumer transaction terms or conditions that are harsh, oppressive or excessively one-sided;

(d) to make a representation that a consumer transaction involves or does not involve rights, remedies or obligations that is different from the fact.

194 Having considered all of the evidence, the Court has concluded that no presumption of undue influence applies. There was no special relationship between the parties. They were clearly arm's length business transactors with no previous dealings.

195 The Defendant is a young, seemingly healthy, English-speaking, literate adult who has owned one business for almost 20 years, and two other businesses for an unspecified duration. There was no evidence whatsoever going to show that the Plaintiff took advantage of the Defendant as a result of any vulnerability on her part, in particular, an inability to understand "the character, nature, language or effect" of the agreements. There was no imbalance of power, and the Defendant did not have any weakness that the Plaintiff attempted to or did exploit.

196 If the Defendant found the print on the forms small, and this was problematic for her, she could have simply employed the use of a magnifying device, or declined to sign the agreements. Interestingly, all of the agreement is printed in small font. The bottom part of the form appears to be in very slightly smaller print. However, it cannot be said that some onerous clause is buried in the "fine print". The agreement is short, only one page in length. The print on the agreement might be small to facilitate fitting on a single page.

197 In the Court's view, the agreements are drafted in generally clear, plain language. If the Defendant had questions or any other concern, she could simply have walked away without signing the documents. If she wanted to take the documents away to consider them before signing them, she could have asked if that was allowed, and if not, refused to sign.

198 No unfairness was created by the fact that portions of the agreements were already filled in (such as names and monthly fees), and the agreements were already signed by a Plaintiff's representative upon the documents being presented to the Defendant. Presumably, this was done for convenience and efficiency. If the Defendant did not agree with anything in the agreement, including a checked off item, again, she did not have to sign.

199 Furthermore, there was no evidence showing that the Plaintiff exerted undue pressure or influence on the Defendant in signing any agreement. According to the Defendant's own evidence, the youthful employee at the club on the night of signing was barely helpful. This does not equate to a slick, high-pressure, forceful salesperson trying to close a deal at any cost.

200 Had the Defendant not signed the contracts on January 12, 2015, she admitted that the only consequence would have been that she and her son would have gone home. There was no exogenous compulsion in signing the agreements other than a reduced price on one membership. However, an "early bird special" of this nature is a common business incentive often equating to a win-win for the vendor and consumer, and which can hardly be characterized as an unfair business practice. Any haste in signing the agreements by the Defendant was self-imposed. She herself acknowledged that the trial period did not end until the end of February.

201 There was no reason for any of the Plaintiff's staff to ask the Defendant if she understood the agreements before signing them. She did not exhibit any issue (such as a language-barrier, advanced age, illness, etc.) which *may* have made such questioning appropriate. A printed declaration of understanding is included in the contracts above the spot for signature. Again, if the Defendant did not want to sign the agreements, she did not have to.

202 Furthermore, there was no evidence that the Plaintiff:

a) used "exaggeration, innuendo or ambiguity as to a material fact" with respect to the agreements;

b) charged a price that "grossly exceeds" the price for similar services;

c) charged a price that was more than 10% higher than the estimate given;

d) knew or ought to have known that:

a. the Defendant was unable to receive any reasonable benefit from the services; or

b. there was no reasonable probability that the Defendant was able to pay the full price for the goods or services.

203 The agreements in question here do not include terms or conditions that are "harsh, oppressive or excessively one-sided". On the evidence, the Court has to conclude that the agreements were not unconscionable in any aspect. It is a reflection of the world we live in that almost all extracurricular pursuits that people pursue for fun or exercise entail a cost that some may find expensive and others may find exorbitant. In general, consideration under a contract does not concern a Court. Belzil J noted:

> It is a fundamental principle of the law of contract that Courts will not inquire into the adequacy of consideration. Thus, a contract, otherwise valid, is not invalid merely because evidence establishes that the property could have been sold for more to a different buyer in different circumstances. In other words, there is no qualitative test for consideration: Chitty on Contracts, at para. 3-013 (*Hittinger v. Turgeon*, 2005 ABQB 257at para 99).

204 In any event, the evidence was that the Defendant made inquiry about membership pricing, and was not deterred by same, and so proceeded to sign the enrollment agreements upon the terms outlined. As she noted on Austin's Student Agreement (Exhibit 2) and referred to in the telephone conversation on November 25, 2014 (p. 3, Exhibit 4), Austin had been enrolled in another taekwon-do program before starting with the Plaintiff, so the Defendant would have had a sense of the cost involved based on prior experience.

205 As well, it is a common term of any gym-type membership that a person is liable for fees despite failure to attend classes. A gym or club still has overhead costs that it must defray despite members not showing up.

206 The Defendant denied that she ever gave finances as a reason for wanting to cancel. She testified that the only time that she ever mentioned the financial aspect was in reference to both her sons as well as herself having memberships. Therefore, it would be inappropriate for the Court to infer the price as being a reason why the agreements were "harsh, oppressive or excessively one-sided".

207 All that the Defendant was required to do under the two enrollment agreements was to make monthly payments for taekwon-do training for herself and Austin. If the Defendant encountered a health issue (the old rotator cuff injury), the agreement had options to accommodate this, namely transfer, extension, or cancellation. The last option permitted termination of the contract at a fraction of the original tuition. Hence, there was nothing at all harsh, oppressive, one-sided, or onerous about the agreements.

208 In the end result, that the Court concludes that the Defendant freely and voluntarily executed the enrollment agreements. If she signed the agreements despite having questions, the Plaintiff can hardly be held to blame for this. The said agreements do not shock the conscience of the Court. There is no basis for the enrollment agreements to be cancelled or rescinded based on the *Act* or any other common law ground.

Penalty Clause

209 Next for consideration is the cancellation clause in the Tien Lung guarantee, and whether that constitutes a penalty or is a genuine pre-estimate of damages. The cancellation clause in the Tien Lung guarantee provides that 30% of the remainder of the contract will be owing plus a $50 administration fee. Clearly, the amounts owing pursuant to the cancellation clauses are *less* than the total amounts agreed to in the agreements. That does not meet the definition of a penalty clause.

210 Also, as per the explicit terms of the agreements, it was within the contemplation of the parties and in accord with standard business practice, that a payment default by the Defendant would cause the Plaintiff to incur some administrative expenses.

211 Although the cancellation fee in the Tien Lung Guarantee is found by this Court *not* to be a penalty clause, such fee does not even apply in this matter. That is because the Defendant simply failed to follow the specific cancellation procedure outlined in the signed enrollment agreements.

Ruling

212 The Court finds that the Defendant, by her email communication with the Plaintiff requesting cancellation of her membership, and later failure to pay as promised on both memberships, repudiated both agreements. Neither party rescinded either of the enrollment agreements. The Defendant did not rescind the agreements as she did not do what was required of her as specified in the contracts for a formal cancellation despite the repeated email reminders from Ms. Laton.

213 The Tien Lung guarantee provides for the situation where the cancellation procedure is not followed — namely, a payor is precluded from terminating the contract on a discounted basis. Following the agreed-upon cancellation procedure would have permitted the Defendant to walk away from the agreements at a fraction of the full contracted tuition amount.

214 On the facts, there is no basis for the Court to rescind the enrollment agreements. The monthly tuition amounts payable under both enrollment agreements commenced being due and owing as of March 5, 2015 but the Defendant wholly defaulted under her obligation to pay same. Therefore, she is the one who has breached both contracts. As such, the Defendant is liable to the Plaintiff for the full amounts specified in the agreements that she signed of her own volition.

215 It appears to the Court that the Defendant had a classic case of "buyer's remorse". Evidently the Defendant had second thoughts about her contract soon after signing, and essentially wanted her, and eventually her son's, contracts "erased". However, it would seriously undermine commercial transactions if signatories to contracts were permitted to simply walk away with impunity from their agreed-upon obligations. The cornerstone of democratic free enterprise is that people are able to negotiate and incur their own legal obligations, but then must abide by those terms. The Defendant, as

an experienced business owner, should understand this. As such, the Court must hold the Defendant to her commitments under the signed enrollment agreements.

216 It was a term of the enrollment agreements that the Defendant would pay tuition of:

a) $6,960 for Austin through 48 consecutive monthly payments of $145, and

b) $6,000 for herself through 48 consecutive monthly payments of $125.

217 It was a further term of the enrollment agreements that in the event that the Defendant defaulted in her payment obligations, the entire balance of the tuition specified in the enrollment agreements became due and payable. The Defendant's default on her payment obligations under the two agreements has left a balance owing of $12,960. (Exhibit 17)

218 It was also a term of the agreements that if payments presented through or against accounts were returned unpaid by the payor's financial institution, the payor would be charged a $30 return item fee. The Defendant has incurred additional unpaid charges resulting from returned payments totalling $90.

219 The enrollment agreements provided for interest at the rate of 28% per annum.

220 The Court therefore orders judgement for the Plaintiff in the sum of $13,050, plus pre-judgement interest of 28% calculated from September 30, 2015 (which was the payment "deadline" as per the evidence), until the date of judgement.

221 The normal practice of this Court is to award costs based upon 10% of the claim. The Court notes the Order dated October 28, 2016, whereunder it was ordered by His Honor J. Watson that the Plaintiff shall pay $500 in costs plus the travel costs of the Defendant in the amount of $212.10. The total amount of $712.10 shall be set-off against the final costs that this Court orders. The parties may speak to the Court on the issue of costs by arranging a date with the Grande Prairie Judicial Assistant.

222 As the Plaintiff is unrepresented, the Clerk of the Court shall kindly prepare the judgement herein.

Action allowed.