



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2020] NZDT 1328

APPLICANT MD

RESPONDENT KM Ltd

The Tribunal orders:

1. The ownership of the pony "A" is revested in KM Limited immediately.
2. KM Limited is to arrange for the collection of "A" from the property of MD as soon as possible, and in any event before 20 March 2020.
3. KM Limited is to pay to MD the sum of \$5,000.00 on or before 20 April 2020.

Reasons

1. In March 2019, MD purchased a pony called "A" from KM Limited for her daughter to ride for \$5,000.00.
2. In October 2019, Ms D filed a claim seeking a refund of the purchase price on the basis of a bucking habit that the horse had developed. Ms D also sought costs associated with the transport and upkeep of the pony. Ms M defended the claim on the grounds that Ms D had waited too long after the purchase to raise any concerns, that she had been advised of a previous tendency to buck, that she had caused an escalation in the issue by delaying any remedial work, and that Ms D had not viewed the horse, or properly explained to Ms M the purpose for which the pony was sought.
3. The issues to be resolved are:
 - (a) Did the Facebook advertisement accurately describe A for the purposes of the Fair Trading Act 1986?
 - (b) Was A of "acceptable quality" and "fit for purpose" as those terms are defined in the Consumer Guarantees Act 1993?
 - (c) If not, are the breaches substantial?
 - (d) If so, is Ms D able to reject the pony and get a refund, plus consequential losses?

Did the Facebook advertisement accurately describe A for the purposes of the Fair Trading Act 1986?

4. Ms M is in the business of selling horses on behalf of others. Whilst she did not own the horse, she took a schooling fee, advertised the pony, and a commission on its sale. She was therefore acting "in trade". Consequently, the Fair Trading Act 1986 applies to the sale.
5. By virtue of that Act, no person is to make any misleading representation that goods are of a particular kind, standard or quality (s13(a)). This provision applies to statements made regardless of the knowledge of the writer to the actual truth of the matter.
6. The Facebook ad to which Ms D responded stated that A was:

Well managed and produced she's the ideal School Mistress and while she's not a beginners pony if you have the basics in place she'll help you step right up the grades on the flat and jumping

7. I find that, unbeknownst to Ms M, this advertisement was misleading. Not long after the pony arrived, Ms D realised that the pony had a substantial bucking habit. Ms D's daughter fell off on a number of occasions, and one more experienced rider was bucked off and broke her ankle requiring surgery. This problem was not able to be resolved despite experiments with different gear, chiropractic treatment and other riders. Given this propensity, it could not be said that the pony was "the ideal School Mistress" that she was purchased to be. The pony was in fact unsafe.
8. I have had regard to Ms M's submission that the ad only stated the pony would be a good schoolmistress if it was well managed. However, I am not persuaded that the ad can or was intended to be read in this way. Other Facebook posts about the same pony described it as a "cool schoolmaster" without any conditions attached, and as a "type to learn the ropes on", and "cute and fun to have around nothing is a fuss". Whilst these words were not in the particular Facebook post produced by Ms D at the hearing, they are an indication that Ms M intended to describe A as a "school mistress" and did so in the words used. The words "and produced", which more commonly refer to the history rather than the new environment for the horse, further support this interpretation. I am satisfied that a reasonable member of the public reading the post would consider the pony was being sold as a schoolmistress, and that it had been well managed and produced to date.
9. I have had regard to Ms M's submission that Ms D's daughter was a beginner, and that the ad made it clear that the pony was not suitable for her. I have viewed videos of the daughter riding and am satisfied that her skills are beyond that of a beginner. The daughter was able to stay in the saddle for small bucks and was only dislodged by more significant bucking. Whilst she does not yet have an entirely independent seat, she can independently manage a horse in all three paces, and around a small round of jumps. She may be a novice, but she is able to enter small competitions. This was not her first experience of riding, and I am satisfied she is not a beginner. It was not possible for a novice rider to "*step right up the grades*" on a pony that dislodges its rider with such frequency.
10. I have had regard to Ms M's submission that Ms D's daughter's instructor was told of the bucking habit before the purchase. I am satisfied that Ms M did mention this to the instructor, on the basis that it was minor, occasional and did not dislodge the rider. This understated the problem that was soon to emerge. The previous owner had disclosed a prior tendency to buck to Ms M, but there was no mention in the ad, nor to Ms D directly. It is clear to me that Ms M did not consider the problem worth mentioning as she had no knowledge of the extent of the pony's propensity. The pony had only been in her care for approximately six weeks. Videos and photos of the pony during this time suggested that it behaved well. However, Ms M's lack of knowledge is no defence. Subsequent events proved that the advertisement was unfortunately misleading.
11. One of the most difficult aspects of any case of this nature is the fact that a horse can change in a new environment. The process of moving to a new environment is a stressful time for a horse, and they take time to settle. There can also be a number of reasons for bad behaviour. I set out below part of a letter written in support of Ms M by DX, who has an extensive background in riding that would qualify her as an expert in these matters:

"Generally, a pony's misbehaviour can evolve from poor feed, work or gear management. But as a mother and a coach, I have noticed subtle changes in a pony's behaviour often stem from a rider's inability to make the right responses to a pony's reaction. Ponies are quick to work out if their rider is being timid, unorganised, unbalanced, too relaxed or lack control. Ponies will often take advantage of a weak moment and then if bad behaviour isn't noticed or addressed, then these habits become harder to fix. It is very important that inexperienced parents seek help from a knowledgeable coach at every step of the way, to insure their training is on the right track. If serious problems occur in the first few rides, then it would look likely that the pony is not suitable for the standard of rider. But if habits occur over the following weeks or months, the owner needs to take responsibility for the pony's management, training and/or ability of the rider. I believe it is ignorant and unfair to point the blame at someone in the pony's past".

12. I have quoted this advice in full, as, in most circumstances, I would concur with its contents.
13. I have had regard to the argument in this case put forward by Ms M that the bucking behaviour was minimal in the past, has been allowed to occur under Ms D's management, and then got worse through mismanagement and delays in addressing the matter. On the evidence presented, I was not able to make a finding that Ms D was responsible, nor her daughter. Ms D appeared to have a good support network of capable instructors and is an experienced horse owner herself. I accept that A has taken advantage of Ms D's daughter, who is only a novice rider. A picked up on this within the first few weeks of ownership, putting this into the category explained above by Ms Wilson of an escalating fault.
14. The difficulty in this case for Ms M is that she advertised A as suitable as a school mistress (albeit not for a beginner). I do not accept that a pony that takes advantage of a novice rider in this manner is a school mistress. Whilst the bucking problem has worsened, the propensity clearly existed for A to take advantage of a rider, and this is not through any fault of Ms D. I am satisfied from the previous record of bucking, and the speed with which this started to present itself after the pony arrived, that this propensity existed at the time of sale and is not as a result of poor feed, work, or gear management. For these reasons, I am satisfied that the pony was misdescribed in the advertisement.
15. I note, and agree with, Ms X's comment in her letter that all parents should understand that pony riding is not going to be "plain sailing"; there are going to be "setbacks, injuries and disappointments". So too will there be for those in the business of selling horses on behalf. Words in an advertisement must turn out to be correct, and it is hard for someone acting as agent to know the full picture. It is clear from the evidence that Ms M is a reputable, experienced dealer, but in this case, her description of A was not borne out by the customer's experience. This case was not about considering whether either party was acting dishonestly, but simply to determine who was to bear the risk of the unknown propensity. In the absence of better evidence that Ms D was at fault for the behaviour that emerged, I am satisfied that the wording of the advertisement and the context of this sale placed that risk on Ms M.

Was A of "acceptable quality" and "fit for purpose" as those terms are defined in the Consumer Guarantees Act 1993?

16. Once again, as Ms M was an agent in trade, selling on behalf, she guaranteed that the pony was of acceptable quality and fit for purpose as those terms are defined in the Consumer Guarantees Act 1993.
17. For all the reasons set out above, I am satisfied that the pony was not of acceptable quality. A reasonable consumer would not be satisfied with paying \$5,000.00 for a pony with the propensity that emerged. It was not established that the matter was adequately disclosed, nor that the pony was given this propensity after it was purchased. The problem has worsened, but that is no defence to the claim, as the propensity existed at the point of sale.
18. Given these findings, I need not consider the second issue of "fitness for purpose", as the claim is made out on the guarantee of quality alone. However, it is noted that the pony would also have failed this test.

19. At no point did Ms M see Ms D's daughter riding A. Ms M also had Ms D sign a contract stating that "*The Buyer accepts the pony will be a suitable match based on the information supplied to the seller on the riding ability of the child*". It is not possible to contract out of consumer guarantees, but given that the pony was purchased sight unseen, it was unreasonable for Ms D to rely on Ms M's expertise to match A for her daughter. However, the pony must still be reasonably fit for any particular purpose that was made known as the purpose for which it was acquired, which was to provide a safe pony for a novice child to learn on and move up the grades. I am satisfied that the pony has not been suitable for a beginner (as advised) or for a novice (as I would class Ms D's daughter). It needs a confident firm hand and an ability to ride through its bucking propensity. This takes a level of experience and ability that is lacking in most riders that need a school mistress to take them up the grades.

Are the failures substantial?

20. I am satisfied that failures to meet the guarantees would be considered "substantial" as that term is defined in the Act. A failure is substantial if a reasonable consumer, fully acquainted with the issues, would not have purchased the pony had they known (s21).

21. This is not a hard test to meet when dealing with a pony that bucks.

Is Ms D able to reject the pony and get a refund, plus consequential losses?

22. The findings above entitle Ms D to reject the pony and get a refund.

23. I have had regard to the fact that Ms D did not seek a refund from Ms M for approximately 6 months. A right to reject may be lost if the delay is unreasonable (s20(1)(a)). I am satisfied in this case that the delay was bordering on being too long but was at the outside boundaries of the time allowed by the Act. A reasonable time is defined in s20(2) as a period from the time of supply in which it would be reasonable to expect the defect to become apparent having regard to the type of goods, the use to which they are put, the length of time for which it is reasonable for them to be used, and the amount of time which it is reasonable for them to be put before the defect becomes apparent. In this case, in dealing with a pony, it was reasonable and responsible to address all the possibilities identified by Ms X, as well as potential chiro issues, before reaching a realisation that the match was untenable. The period this took was reasonable in the circumstances.

24. I have also had regard to whether the right to reject has been lost because the pony has been damaged after delivery for reasons not related to its state or condition at the time of supply (s20(1)(c)). I agree with Ms M that the pony's behaviour may have become worse over time as it has learnt it can take advantage of its riders. However, given the history of bucking noted by previous owner, the speed with which this issue displayed itself, and the range of riders who had this experience, I am satisfied this was an unknown propensity that existed at the time of purchase. Therefore, any damage after delivery has been related to the pony's nature at the time of supply.

25. Ms D also sought consequential losses (e.g., transport north, vet bills, chiro costs, and the cost of care and feed). However, I consider these are not recoverable in this case. Ms D bought the pony sight unseen, and then elected to keep trying to sort out the issues that presented themselves when a right to a refund would most likely have existed from not long after purchase. The most directly related cost is the transport north, as the pony would most probably not have been purchased if it had not been advertised as a school mistress, and the owner's advice about the bucking habit was understated and not fully passed on. However, having regard to the time that has elapsed, the use of the pony over this period, and the choices made, it is considered that these consequential costs should not be included in the award.

26. Ms M noted that, despite only receiving a commission, she has no right of recourse against the owner. This would be unusual for an agent acting on behalf of the owner, particularly given that Ms M is largely passing on the information she has received in her marketing of the pony. In any case, as the Consumer Guarantees Act places her in the position of a supplier, this is not a matter that can be brought into consideration, at least in relation to the right to a refund.

27. Ms M confirmed that, if an order was made for a refund, she would take the pony back, and that she is in a position to collect it after Horse of the Year (HOY) in March. A consumer is entitled to a return at the supplier's costs where the transport cost is significant (s22(2)(a)(ii)). The order gives Ms M some flexibility to have A transported earlier or bring her home after HOY. Ms D sought additional agistment costs if there was much further delay, but as she has the pony at her own property, and this is not a high cost time of the year to graze a pony, it is considered reasonable that no additional costs be added for the period it takes to collect her. It is in Ms M's interest to collect her sooner rather than later. This would give a greater chance of resale before the payment date arrives and minimises risk of additional costs or loss, given that ownership is now vested in the company. However, so long as the pony is collected by 20 March 2020, the specific return date will be at Ms M's election.
28. Given all the circumstances of the sale, the non-involvement of the owner and the length of time the pony has been at Ms D's property, Ms M has been given extended payment terms to provide the refund (by 20 April 2020). However, this date applies notwithstanding any inability to resell the pony by that date, or for that price, as the right to a full refund is triggered on rightful rejection. Additional time for full repayment has been allowed given the fact we are dealing with an animal that takes time to rehome, and in light of the extended period during which the pony has now been out of the hands of its owner and Ms M. It is hoped that the manner in which the Order is structured will provide the most likely success of an outcome that minimises further losses for either party and provides a suitable future for A.

Conclusion

29. For these reasons, KM Limited is to collect A by 20 March 2020 and provide a full refund of the purchase price by 20 April 2020.

Referee:

J Robertshawe

Date: 30 January 2020



Information for Parties

Rehearings

You can apply for a rehearing if you believe that something prevented the proper decision from being made: for example, the relevant information was not available at the time.

If you wish to apply for a rehearing, you can apply online, download a form from the Disputes Tribunal website or obtain an application form from any Tribunal office. The application must be lodged within 28 days of the decision having been made. If you are applying outside of the 20 working day timeframe, you must also fill out an Application for Rehearing Out of Time.

PLEASE NOTE: A rehearing will not be granted just because you disagree with the decision.

Grounds for Appeal

There are very limited grounds for appealing a decision of the Tribunal. Specifically, the Referee conducted the proceedings (or a Tribunal investigator carried out an enquiry) in a way that was unfair and prejudiced the result of the proceedings. This means you consider there was a breach of natural justice, as a result of procedural unfairness that affected the result of the proceedings.

PLEASE NOTE: Parties need to be aware they cannot appeal a Referee's finding of fact.

Where a Referee has made a decision on the issues raised as part of the Disputes Tribunal hearing there is no jurisdiction for the District Court to reach a finding different to that of the Referee.

A Notice of Appeal may be obtained from the Ministry of Justice, Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 28 days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 28 days if you have been granted an extension of time by a District Court Judge. To apply for an extension of time you must file an Interlocutory Application on Notice and a supporting affidavit, then serve it on the other parties. There is a fee for this application. District Court proceedings are more complex than Disputes Tribunal proceedings, and you may wish to seek legal advice.

The District Court may, on determination of the appeal, award such costs to either party as it sees fit.

Enforcement of Tribunal Decisions

If the Order or Agreed Settlement is not complied with, you can apply to the Collections Unit of the District Court to have the order enforced.

Application forms and information about the different civil enforcement options are available on the Ministry of Justice's civil debt page: <http://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt>

For Civil Enforcement enquiries, please phone 0800 233 222.

Help and Further Information

Further information and contact details are available on our website: <http://disputestribunal.govt.nz>.