



(Disputes Tribunal Act 1988)  
**ORDER OF DISPUTES TRIBUNAL**

**District Court**

**[2020] NZDT 1312**

**APPLICANT      NT**

**RESPONDENT    HS**

**The Tribunal orders:**

1. HS is to pay to NT the sum of \$742.00 on or before 20 November 2020.

**Reasons**

1. On 11 November 2019, NT purchased an 8-year old racehorse called "A" from a syndicate of which HS is a part. The sale took place on the online auction website of "[redacted]". The purchase price was \$1,840.00. After selling costs retained by the auction house, HS received \$1,600.00.
2. Shortly after arrival the horse was found to be lame. It took some time for the horse to recover.
3. NT seeks a refund of the horse, plus remedial costs, or alternatively, remedial costs, plus training fees to bring the horse back into work.
4. The issues to be resolved are:
  - (a) Does the Consumer Guarantees Act 1993 apply to the sale?
  - (b) Was the horse of acceptable quality and fit for purpose, as those terms are defined in the CGA?
  - (c) Are both parties "in trade"?
  - (d) If so, did clause 7.9 of the [redacted] conditions of sale meet the contracting out requirements of s43 of the CGA?
  - (e) If not, how much compensation can be claimed?

**Does the Consumer Guarantees Act 1993 apply to the sale?**

5. The CGA applies where a person in trade supplies "goods" that are ordinarily acquired for personal, household or domestic use. The High Court has interpreted "ordinarily" to mean that it would "not be idiosyncratic" to buy the goods for personal use.
6. It is not uncommon for people to own racehorses for personal use, whether they race them through a trainer, or own them for other purposes.
7. A racehorse would therefore normally be considered a "consumer" good to which the Consumer Guarantees Act 1993 (CGA) applies.

8. Consequently, the starting point is that the statutory guarantees set out in that Act apply. If both parties are in trade, they may agree to contract out of those guarantees.
9. The “[redacted]” website is an online auction house. When the CGA was first enacted, it did not apply to sales by auction. However, the Act was amended some years ago to now apply to this type of sale.

**Was the horse of acceptable quality and fit for purpose, as those terms are defined in the CGA?**

10. The test for acceptable quality is whether a reasonable consumer would consider the horse was acceptable, having regard to the price paid, the nature of the vendor and the context in which the horse was supplied, any statement made about the horse, and all other relevant circumstances of the supply (s7).
11. The test for fitness for purpose is whether the horse was reasonably fit for racing, unless the circumstances show that the purchaser did not rely on the supplier’s skill and judgement in making that determination (s8).
12. I am satisfied that the horse was not of acceptable quality, but only in relation to the immediate lameness experienced shortly after arrival. This is so for the following reasons:
  - (a) In terms of the future prospects of “A” as a racehorse, a reasonable consumer would expect that they were purchasing nothing more than a chance. The auction was for an older racehorse that a partnership was selling. The horse was known to have “wear and tear”. The horse was sold with no reserve, and the price paid, for a pedigree racehorse for which the vendors had paid six figures, was a bargain basement price. NT did not get the horse vetted or inspected before he purchased it. He knew it had raced in September 2019 and had been placed in that race. However, it was 8 years old, and clearly the partnership that was selling it did not consider it worth retaining.
  - (b) However, whilst NT was purchasing a chance, he could reasonably expect that the horse would have feet in a condition that could render him at least rideable. NT has presented a vet report, farrier report, and the evidence of BC, to confirm that the horse’s feet were in poor condition, and inflamed, and that it took remedial work, vet bills and many weeks of rest for the horse to recover. These factors do not relate to the usefulness of the horse as a racehorse, but simply as a horse for any purpose. The inflammation and extent of the issues were such, and arose so quickly, that I consider it probable that this lameness must have related to a pre-existing condition, or the state of the horse’s feet, at the time of the sale.
  - (c) HS has stated that the lameness that arose occurred after arrival, and that the horse left his property in excellent condition. However, given the state of the feet, as described by the farrier, and the speed with which the condition emerged, I was not able to make that finding. HS also put any lameness issues down to the “wear and tear” he had previously advised was present. However, I find that the lameness was a specific injury or defect and could not be categorised as wear and tear. The horse could not have been raced or tread-milled in that condition.
  - (d) NT notes that he observed the presence of injection sites on the horse and has concerns that there could be a history of, or a risk of the emergence of, an underlying arthritis. However, NT did not present any x-rays or vet reports to establish any such underlying condition, or any link between that condition and an inability to race in the future. The risk of such a condition emerging is part of the risk he took in buying a chance. As it currently stands, NT reports that the horse has recovered from its lameness and it may well be able to be readied for racing.
  - (e) NT is concerned that the horse also did not meet the test of fitness for purpose in s8. He recalls being advised that the horse was in work and ready to race. I was unable to make a finding about what NT was told. The advertisement made no statement about the current fitness or prospects of the horse. No other conversation was recorded. The terms of sale specifically recorded that the purchaser was to satisfy themselves as to suitability. NT has

submitted an email he received from NS after the horse left that it had been tread-milled in the weeks prior to departure, and that the horse had stopped full work not long after it last raced on 29 September 2019. This statement was made after purchase and could therefore not be submitted as direct proof of what HS had told NT prior to purchase. I accept that I could infer from the email that HS may well have said the horse was ready to work. In the end, nothing turns on this, as NT has purchased a racehorse as a chance that can still be tried out as a racehorse.

- (f) I accept that a year has now passed, and that this may affect the likelihood of success on the race track. However, a witness for NT, Mr C, advised that the initial lameness issues were resolved after 8 weeks. NT recalls these continuing for a further 4-6 weeks. Either way, the delay since then has been caused by the decision by NT not to work the horse pending an outcome of these proceedings, and no doubt, lockdown has played a part. Either way, that delay occurs at the risk of NT, as it was his election not to work the horse, not HS. HS had no control over the decision made to spell the horse, nor over the lack of racing prospects over lockdown.
- (g) In summary, now that the horse has recovered, and since it recovered, NT has had a horse that is of acceptable quality (this being tempered in the context of this purchase by the need for the horse to only produce a chance, rather than an actual outcome, and that it may turn out to have wear and tear that inhibits or entirely negates its prospects as a racehorse).

#### **Are both parties “in trade”?**

13. HS states that clause 7.9 of the [redacted] terms is a defence to any CGA claim. Clause 7.9 provides:

#### ***Fitness for purpose***

*You as a Buyer acknowledge, subject only to the limited warranties expressed in these Terms and Conditions:*

*(a) The purchase is made solely in reliance upon Your own:*

- (i) Enquiries and inspection; and*
- (ii) Skill and judgement.*

*(b) That no guarantee, representation or warranty of any kind is made or given as to the fitness for purpose, soundness, condition or other quality of any Lot sold, either by:*

- (i) The Seller or*
- (ii) By Us and,*
- (iii) All implied conditions and warranties, guarantees, rights or remedies statutory or otherwise, including, but not limited to, any warranties of merchantability and fitness for a particular purpose are hereby excluded to the maximum extent permitted by law.*

*(c) It is Your responsibility as a prospective Buyer to arrange for any veterinary inspection or inquiry that You may require and You assume all consequences and risk from failure to do so.*

*(d) You have not relied on any statement made by or on behalf of the Seller or by Us in relation to any Lot.*

14. I find that this clause is not a defence to the claim. Whilst the nature of the sale forms part of the context that is taken into account in determining the chance that was purchased, it is not possible for HS to contract out of the CGA unless NT is himself in trade (s43). This is reflected in the wording of clause 7.9, which contracts out only *"to the maximum extent permitted by law"*. When HS is using the [redacted] website site to sell to non-trade purchasers, he must ensure his horses are of acceptable quality, and if any advice is relied upon as to fitness for purpose, then this test must also be met. The CGA warranty given may be very limited, given what a reasonable purchaser would expect in this context, and any guarantee would not extend in a case such as this to providing any warranty over future prospects of success. However, the CGA guarantees would at least cover any immediate injury, and therefore covers the state of the horse's feet on arrival.

15. I find that NT is not "in trade". This is so for the following reasons:

(a) The Act defines "trade" as any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services. The term "business" is defined as any undertaking, whether carried on for gain or reward or not, or any undertaking in the course of which goods or services are acquired or supplied, whether free of charge or not. The term "undertaking" has been interpreted to mean a project or enterprise organised and directed towards an end result, as opposed to a series of unrelated actions. A pattern of related commercial transactions is required or, at least when a person's regular occupation, profession or trade is involved, the supply needs to be for business purposes.

(b) NT is a [redacted] by profession and only trains as a side line for a hobby. He has had three horses of late, with only one in work at any time. He has invited friends to be part owners to help cover costs, but he does not charge a training fee. His returns, if he gets any, come from taking a 50% share of winnings. He holds a Class C trainer's licence, but on its own it was not established by HS's evidence to put NT into the category of being a trainer who was in business. NT is not registered for GST, does not have staff or a company, and does not participate to a sufficient degree, or in a sufficient number of transactions in the industry to meet the test of being involved in an enterprise, or undertaking that would amount to being "in trade".

16. Consequently, clause 7.9 of the Gavelhouse auction site was inadequate to entirely contract out of the CGA.

### **How much compensation can be claimed?**

17. A consumer who has bought defective goods is required to make contact with the supplier and seek a solution. If a remedy is not forthcoming, then, if the issue can be fixed, the consumer is entitled to remedy the problem themselves and seek compensation for the cost of doing so.

18. In addition, they can seek consequential losses. However, this right is subject to the usual rules of foreseeability, and mitigation.

19. If the problem is serious enough to be "substantial" as that term is defined in the Act, then the consumer can seek a refund, and reject the goods. However, this must be done within a reasonable time (s20).

20. In this case, I find that NT is entitled to direct costs incurred of \$742.00. This is made up of \$167.00 in vet fees, \$225.00 in farrier costs, and \$350.00 spent on other treatments. The latter is discounted from the \$550.00 claimed for lack of the actual invoices to show the treatments purchased, although it was accepted from the evidence that some were required.

21. Grazing costs are not awarded as a consequential loss. A horse kept for any reason incurs a grazing cost. The horse would have needed to be grazed whether it was being brought into work,

or spelled, and it would not have been able to race straight away, even if it had been sound. I was unable to make a finding that the horse was lame for more than 8 weeks, as this was Mr C's evidence. After that time, the horse could have been re-purposed, sold, or trained. It is a pleasant type in appearance and well bred. NT has elected to keep him, but this cannot be at HS's expense.

22. I do not consider that the lameness on arrival gave NT a right of rejection. The lameness was an inconvenience and a disappointment, but those who buy old racehorse sight unseen need to have a degree of robustness about what they can put up with. The lameness was relatively short term. I was unable to make a finding that the horse has been sold as ready to race, or that it cannot now be made ready to race (albeit with a risk of wear and tear that will prevent or inhibit this). In any case, any right of rejection needs to be exercised within a reasonable time (s20). When dealing with animals, this time period is short. A letter was sent in early January rejecting the horse. Any such action needed to be taken as soon as possible after the horse arrived.

### **Conclusion**

23. NT is entitled to a contribution to the costs he incurred when he discovered a specific and serious lameness shortly after "A" arrived.

24. These costs are calculated at \$742.00.

**Referee:**

**J Robertshawe**

**Date: 21 October 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>.