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

**District Court** **[2019] NZDT 1338**

**APPLICANT** **TG**

**RESPONDENT** **H Ltd**

**The Tribunal orders:**

1. H Ltd is the owner of the mare "*K*".

2. H Ltd is to pay to TG the sum of $1,805.36 on or before Friday, 15 November 2019.

**Reasons**

1. In January 2015, TG paid a stud fee of $2,702.50 to H Ltd (the company) for a service by the stallion "*D*" for her mare "TT" ("*T*"). The semen was shipped to a stud in Palmerston North for insemination. *T* did not fall pregnant. Since then, the company has supplied two other mares ("*N*" and "*K*") both of which were thought to be carrying a *D* foal. However, despite a total of four attempts at obtaining a pregnancy, no mare produced a foal.

2. TG filed a claim seeking a $15,000.00 contribution towards the costs she incurred in attempting to obtain a *D* foal. The company filed a counterclaim seeking almost $15,000.00 in agistment costs for *K* when she returned for a second insemination in 2017.

3. The issues to be resolved are:

   (a) Has the company breached the "live foal guarantee" in its breeding contract?

   (b) Was *K* of acceptable quality and as described?

   (c) If not, is TG entitled to any compensation?

   (d) Is TG liable for agistment costs for K?

**Has the company breached the "live foal guarantee" in its breeding contract?**

4. TG has paid a service fee under a contract that contains what is described as a "live foal guarantee". However, she has not received a "live foal".

5. I find that the company has not breached its live foal guarantee. This is so for the following reasons.

6. The term "live foal guarantee" is a phrase that is used by the breeding industry to mean different things in different contracts. A stud farm supplies semen, but there is much that can go wrong in a

breeding programme. Each contract shares the breeding risk on its own terms, and service fees are priced accordingly. Some breeding contracts promise a live foal on the ground, putting most of the risk on the stud. Others only go so far as promising, upon failure, to provide one free return to the stallion the following year, putting most of the risk on the breeder. These are just two of a number of ways in which the risks can be shared. The term "live foal guarantee" is used to express the fact that there is some sharing of the risk, but it does not always guarantee a live foal.

7. The company advertised the "*D*" service fee as being *"$2,000.00 plus GST – LFG*". A reader of that advertisement would then need to check the contract to find out what they were purchasing. In this case, the guarantee was limited to the following circumstances:

> 4. Live Foal Guarantee – a live foal free return will be made to the owner provided that,
>
> A. All fees are paid on collection of mare from stud
> B. That a veterinary certificate of barreness is produced
> C. That the foal does not live for more than 24 hours
> D. The mare remains on your property or as arranged with management prior to service
> E. The owner has not been negligent in the management of the mare during the pregnancy.
> F. Free return applies for the following season only

8. The contract as a whole was unsophisticated and poorly constructed. Words were missing or misspelled and for a contract designed to allocate risk in a specific way, it left room for dispute. Nonetheless, the parties signed it, and both had a similar understanding of what the guarantee meant. This guarantee was of the type that did not promise a live foal, and therefore both the acronym used in the advertisement, and the heading of the clause in the contract were, on their own, misleading. So also were the words "live foal free return" in the opening words of the clause. To the uninitiated, it might appear that the free return existed until a live foal resulted.

9. A contract that contains an ambiguity is construed by reference to what an objective third party would consider it meant, having regard to the context in which the contract is made. In this case, whilst noting the unsatisfactory drafting of the contract, and the potential to mislead with the use of the words "live foal" of clause 4, I find that the clause would be interpreted by a reader as meaning that the company would provide free returns within the season of purchase (as is standard industry practice), and then a free return the following season if no live foal was produced. The words "live foal free return" refer to the attempt to get a live foal, not the guarantee of one. There is no mention of free returns within the initial season, but the company explained that this would be offered, as the intention is to at least obtain a pregnancy in that season. However, the company's contractual obligation the following season is only to provide a free return for that next season.

10. A "season" is not a calendar year, but starts in August when mares come into season, and finishes in early autumn.

11. The opening words state "a" free return, but clause 4F states "Free return" without mentioning just one. The company believed it was only to provide one in the second season. This is open to debate, but in the end, the company provided a free return in the second season, and then a third return (in the third season) upon the order of the DT from November 2016. When *K* failed to fall pregnant, it then offered another mare in foal to *D* (which would be a fourth free return in the third season), but this offer was declined. This exceeds the requirement to provide free return(s) in the following (second) season.

12. I have had regard to whether the term "LFG" in the advertisements, "live foal guarantee" in the heading and "live foal free return" were misleading and created a reasonable expectation of a live foal for the price paid. I am not persuaded that this is the case. I am satisfied that it is expected that a live foal guarantee can take many different forms, and the actual form taken in the contract was sufficiently clear. A written contract was provided and signed that customers would be assumed to have read. This clearly states that there are one or more free returns if a live foal does not eventuate. This clearly puts the eventual risk of a failure on the breeder, not the stud.

13. In summary, the company provided the following opportunities to achieve a foal under the contract:

| Date | Breeding Season | Return | *T* | *N* | *K* | 10yr TB Mare to be AI-ed | Outcome |
|---|---|---|---|---|---|---|---|
| January 2015 | First | Semen provided | (AI by CM) | | | | Failed (January) |
| March 2015 | First | First free return | | Purchased for $7,000 5/3/15 (AI 8/3/15) | | | Lost the pregnancy some time before 06/06/15 |
| January 2016 | Second | Second free return | | | Purchased in January 2016 in-foal for $2,300 (AI 30/11/15) | | Lost the pregnancy after 5/12/15 |
| ***November 2016*** | **Third** | ***DT Order made*** | | | | | ***Semen to be provided*** |
| December 2016 | Third | Third free return | | | K sent back for AI | | Lost the pregnancy at 39 days Feb 2017 |
| March 2016 | Third | Fourth free return | | | | Offered | Offer declined |

14. I have had regard to concerns that were raised by TG about the initial service to *T*. TG elected to contract the services of CM for the AI. TG was concerned that the company had never freighted the semen to CM. She believed that the mare had never been inseminated but had been used as a pleasure horse whilst at the property, and that there had been a conspiracy to obtain the horse by purchase upon a failure of the AI. However, the company produced a freight docket which established that the semen was air freighted to CM. Any concerns about the AI process from that point lie with CM, not the company.

15. I have also had regard to concerns raised by TG about the first free return to *N*. The company had a duty under the Consumer Guarantees Act 1993 to provide its breeding services with reasonable care. The mare was not inseminated until after purchase (in early March), and no scan was provided to TG to establish it was in foal. In April, when TG was overseas, the mare was sent without notifying TG from the company's property in Canterbury to a transporter's property in Otaki. The mare was not delivered to TG until June. It was possible, although not proved, that the mare's handling in the interim could have contributed to the loss of any pregnancy. Given the lack of paperwork and the lack of communication about transporting *N*, it was not open to the company to claim that the live foal guarantee had expired through the purchase of *N*, or to rely on any of the conditions attached to that guarantee in the contract to deny its application. TG had not produced a "certificate of barrenness", but it was clear that *N* had no foal (condition 4B). The company would also not be able to establish that the loss of the pregnancy was as a result of any failure of the mare to live at TG's property (condition 4D) or through any negligence on the part of TG (condition 4E).

16. In any case, the company took the view (correctly) that the live foal guarantee still gave TG the right to another free return the following season. In November 2015, TG sought a refund of her stud fee, but the contract provided for a free return, not a refund. A refund could only be due upon a breach being established under the contract or CGA.

17. I have had regard to whether the second free return (the purchase of *K*) was a "qualifying" return, or whether it failed to be so given the way it was managed. *K* was purchased already in foal. When *K* arrived at TG's on 22 January 2016, she came with no serving certificate, despite an assurance that this would be provided at the time of sale. TG emailed again in April to get the certificate, and on 14 April, advised she had had a pregnancy test which confirmed that *K* was not in foal. The company replied that it wanted a confirmed scan to prove this. The company also stated that *K* was 120 days in foal when she left (suggesting a service date around 22 September

2015). The company promised a certificate would be sent the following day. No certificate was sent. Later, on 20 May 2016, the company advised that the AI date had in fact been 10 November 2015, and that *K* had been scanned in foal on 28 November 2015 and had a heartbeat check on 5 December 2015. Based on this information, *K* would have been 71 days in foal when she left. Again, no certificate was sent. A service certificate was not produced until Tribunal proceedings began in August 2016. Such a certificate is of little value in proving a successful AI. The company completed the AI itself, and in certifying this was therefore doing no more than providing formal confirmation of the date of its own actions. The certificate was not independent proof of success. However, the lack of a certificate and the discrepancy in advised service dates did give rise to a suspicion on the part of the TG that AI never took place.

18. TG made much of evidence from other breeders that it was standard practice to provide a 42-day scan to confirm a pregnancy before sending a mare back to the owner. Whilst it is clear that this is part of some arrangements, it was not a condition in the contract TG signed. It becomes a matter of law as to whether such a condition is implied either by industry custom under the common law or by a requirement to provide the service with reasonable care (s28 CGA). Such a specific requirement could not be overlaid into the contract without more evidence from the industry that this would be so well known that it would go without saying, or that no competent breeder would operate without it.

19. The next question is therefore whether the company was failing to carry out its AI procedures adequately. The onus was on TG to prove that it was not. The company is a recognisable brand in the marketplace providing semen for high end stallions. Mr G of the company spoke of his expertise and 19 years of experience as a qualified AI technician. TG has had previous successful arrangements with the company. In the absence of better evidence of a failure in the AI process, no finding could be made that any of the free returns were not properly performed.

20. In any case, as a result of the Tribunal proceedings in 2016, the company provided a further free return (the third free return). *K* fell pregnant on that return but lost the pregnancy at 39 days. At that point, the company suggested it would swap *K* for another 10-year old thoroughbred mare that could be inseminated at no extra cost (this would have been a fifth service, or fourth free return). TG declined this offer and sought a refund and compensation.

21. In summary, the Company has met its contractual obligation in clause 4 to provide free return(s) into the second (and then third) season and has thus met its “live foal guarantee”. It was required to provide free returns (one or more) into the second season and had provided free returns into the third season as a result of failures in the second season to which it may have contributed. The company even offered a fourth in that third season. There was no benefit to the company to provide a service that failed, particularly given that it took the view that it remained obliged to keep providing solutions. I was not able to make findings of any ulterior motive, incompetence or bad faith.

22. The contract TG signed provides no guarantee of a foal, nor of a pregnancy. Its value lies only in the statistical probability of success from free returns over two seasons. The risk of failure beyond that lies with the breeder. It would be highly unlikely for a breeder to lose so many pregnancies. However, it is possible this would occur, and without proof of a failure by the company, the risk of not achieving a live foal under the contract falls on TG.

**Was “*K*” of acceptable quality and as described?**

23. Whilst it has been established that the company provided sufficient free returns under clause 4, that is not the end of the matter.

24. The company elected to sell mares to TG as a means of providing its free returns. The company had a duty to ensure that the mares were of acceptable quality, fit for purpose and as described (ss 6-9 CGA, s35 Contract and Commercial Law Act 2017 (CCLA), ss9,10 Fair Trading Act 1986)).

25. TG did not pursue a claim for breach of these requirements in relation to *N*. *N* was a young well bred mare that had a value as a showjumper in her own right. TG kept *N* for some time after it was clear she was not pregnant and sold her as a showjumper. Whilst she incurred costs in the upkeep of *N* and upon her sale, TG had not bought *N* "in foal", and took the breeder's risk of a failure once AI took place. Whilst there were concerns over her failure to produce a foal, the actual cause of this remained unknown, and were addressed as discussed above by a further free return that was provided under the contract.

26. In January 2016, the company suggested TG take that free return by buying *K*.

27. Whilst *K* was getting on in years, there was insufficient evidence presented to establish that *K* could not be successfully used as a broodmare, or that the price paid for her did not reflect her value as such. *K* was a healthy and attractive mare that had recently produced a foal and it was not established that she was incapable of this. When negotiating the purchase, TG was advised by the company that it had purchased the mare for $2,000.00. TG presented evidence which suggested that in fact the previous owner had given the mare to the company. However, this evidence was disputed, and was insufficient to prove any misrepresentation regarding value.

28. However, I find that *K* was not as described. During the negotiations in January 2016, *K* was described as a 15-year old 16.1hh mare that was already in foal to *D*. When *K* arrived on 22 January 2016, she did not appear to TG to be in foal, or to be 16.1hh. TG noted that it appeared to her as if *K* had recently had a foal, and she came into season in early March, establishing that she could not be pregnant. *K* never went on to produce a foal. The company reports that it undertook a heartbeat check to confirm a pregnancy on 5 December 2015, but the negotiations took place around 15 January 2016, and the company provided no scan to prove the pregnancy still existed at that time. Whilst the failure of a pregnancy is a breeder's risk under the contract, it becomes a stud risk when there is a contract for sale of a mare that is said to be already in foal. *K's* status as "in foal" was a condition of the contract. The lack of a serving certificate that was promised, the discrepancy in serving dates, and the speed with which it became clear that K was not pregnant, created an inference that in fact *K* was not pregnant when she arrived. This creates an evidential onus for the company to provide proof to the contrary by providing a veterinary scan before she left, or other independent verification. This was not able to be produced, as it was not a term of the breeding contract to provide this evidence. Whilst this creates risk for the breeder supplying their own mare (e.g., *T*) or buying it before the AI takes place (e.g., *N*), this creates a risk for the stud where pregnancy is a condition of the purchase.

29. Photographs were also produced which tended to suggest that *K* was not 16.1hh. Photos taken alongside other horses, and statements made by others, supported the view that she was closer to 15.2hh. This is a significant discrepancy in breeding terms, given that height is an important factor. The company disputed the claim that the mare was 15.2hh but did accept the height given was only an approximation. However, TG did not provide any official measurement, and as the inability to prove pregnancy was sufficient to establish this part of the claim, the issue of height has not been determinative of the outcome.

30. As the mare was not proved to be pregnant, I am satisfied that not only was there a breach of the requirement to comply with description (s9 CGA), but a reasonable consumer would also have considered this a defect in the circumstances, and the horse therefore to be not of acceptable quality (s7 CGA). This is particularly so in light of the circumstances of her purchase. *K* was only bought to take advantage of the final season of free returns, having failed to obtain pregnancies for *T* and *N*. I am also satisfied that the representation of pregnancy was a statement upon which TG relied under general principles of contract law (s35 CCLA). Furthermore, as the company was in trade, any unintentional error it makes in describing the characteristics of its horses also gives rise to remedies under the FTA. In other words, TG became potentially entitled to a suite of remedies when *K* arrived.

**Is TG entitled to any compensation?**

31. TG first sought compensation at the end of May 2016. By then, TG had tried three times for a pregnancy and bought and maintained two horses. She estimated her costs associated with the exercise at approximately $15,000.00, and sought to return the two mares and obtain this sum in compensation. The company considered TG's losses to be normal breeder's risk, and rejected her claim. TG filed proceedings.

32. It has been determined above that, but for the sale of *K* on the condition she was pregnant, TG's losses would have been breeder's risk under the contract. However, under the CGA, the failure of *K* to be in foal was a "substantial" breach (s21 CGA). A reasonable consumer would not have proceeded to buy her if they had known. This brings with it a right to reject the goods (s22) and obtain a refund, plus consequential losses (e.g., transport costs, maintenance costs). TG did not exercise her right to reject for four months (May 2016). The right to reject must be exercised within a reasonable time (s20). In this case, I consider four months is reasonable, particularly given that TG was waiting for the breeding certificate from the company to get a specific pregnancy test that could only be done 100 days after insemination. The company was insisting at that time to provide proof that there was no pregnancy. I therefore find that the TG had a right to a refund in May 2016 for *K*.

33. However, in the initial Tribunal proceedings in November 2016, the Tribunal elected to address the situation not by allowing a rejection of *K*, but by ordering a repeat supply of semen. This semen could have been used in any suitable mare and inseminated by any suitably qualified technician. However, TG decided to use *K* again for this repeat supply and sent her to the company for the AI. Whilst the use of *K* was somewhat inevitable given the Tribunal had not confirmed a right to reject her, the use of the company for the AI was elective. *K* was sent back to the company on 6 December 2016. The AI was initially successful. However, the pregnancy failed at the end of March 2017. The failure of *K* to retain the pregnancy the second time (being the third free return) was not a breach of any guarantee, but simply breeders risk under the original contract. However, as the Tribunal order had not contemplated another failure and the referee considered further rights should be explored, a rehearing was granted.

34. The case was reheard in 2017, and compensation was awarded to the company for agistment. However, the outcome was successfully appealed. Now that the matter is being reheard a third time, consideration needs to be given to what the position was at the time of the original hearing (a right to reject from May 2016) but subject to the actual steps then taken (an elective use of the rightfully rejected goods from December – March).

35. As a result of the right to reject, TG had a right to a refund for *K*, plus her consequential losses that are reasonably foreseeable as liable to result (s18(4)). Whilst the subsequent use of *K* for a third return was inconsistent with a rejection, this only arose as a result of an order of the Tribunal that did not recognise the rejection and was then set aside. Consequently, at the end of *K's* use for the purposes of that first order, the justice of the matter requires the original right to reject to be recognised.

36. It should also be noted that in remedies under the FTA, which apply equally to this case, the Tribunal has the ability to declare a contract or any collateral arrangement void from the start, or from another date, order a refund of money and return of property, or award compensation (s43(3)). Conceptually, the same outcome can be achieved by treating consequential losses as general compensation, and considering the contracts void between the parties from March 2017. Either way, TG ought to be able to recover her costs of owning *K* and bring that ownership to an end.

37. *K* was found to have lost her pregnancy on or about 20 March 2017, and TG immediately reiterated her intention, first advised in May 2016, to reject *K*. The mare was at the company's property in March 2017 and has remained there since. The date of rejection should be taken as May 2016 (but for the recognition of costs incurred by the company which are dealt with below). This enables TG to be paid a refund for *K*, plus her consequential losses from having purchased her. These include the sum claimed for her transport north when she was purchased ($345.00), the cost of her pregnancy tests ($180.43), the cost of her worming treatments ($42.89), and a contribution towards

the cost of her feed (bearing in mind she is kept on a lifestyle block, and calculated with reference to the hay and feed supplies listed for 21/1/16-5/12/16) ($1,139.29)).

38. TG sought a cost of $60.00 per week for the period she looked after *K* on the basis that this was her agistment fee for grazers, and that she had one horse less on her property as a result of *K* being there. It is too uncertain to value the claim based on the loss of an opportunity. Only direct costs could be recovered. Even direct costs are open to debate. Whilst accepting that actual costs may well have been higher, the sum awarded is a conservative assessment of consequential losses incurred from maintaining *K* based on the information that was presented.

39. In summary, the sum of $3,784.29 is awarded to TG, being a refund on the purchase price ($2,300.00) plus a contribution towards the costs claimed for transporting and caring for *K* ($1,707.61).

**Is TG liable for agistment costs for K?**

40. TG returned *K* to the company for a further insemination as a result of the first Tribunal order. The company accepted the role of undertaking the AI solely on the basis that TG sign a new contract for the costs of AI and agistment on the company's usual terms. TG agreed to this, and the process for inseminating *K* began.

41. As TG elected to use the company for the AI, and agreed to pay for this service, these costs should be recoverable up until it was clear that *K* was not pregnant, and was again rejected (20 March 2019). These costs total $2,202.25, and are made up of grazing for 105 days ($1,449.00) plus maintenance and AI costs ($753.25).

42. The net effect of these awards is as follows:

| Description | Amount | TG | H Ltd |
|---|---|---|---|
| Refund for *K*<br>*plus* Transport and costs | 2,300.00<br>1,707.61 | **$4,007.61** | |
| *Less*:<br><br>Agistment for *K*<br>6/12/16-20/3/17<br>(105 days @ $12.00 + GST)<br><br>Costs and AI | 1,449.00<br><br>753.25 | | **$2,202.25** |
| **Net award to TG** | | **$1,805.36** | |

43. The company sought grazing costs up to the date of the final hearing in October 2019 (which amounted to a claim of almost $15,000.00. The company was concerned that it has cared for *K* over this time and not been able to use her. However, given the findings above that *K* was lawfully rejected, these costs are not recoverable.

44. Furthermore, as a result of a Tribunal order in the second proceedings in 2017, ownership of *K* was vested in the company. Whilst that order was eventually set aside, there was never any prospect that TG would claim an ownership interest in *K*. The company's view that it was unable to use her is not sustainable as a basis for claiming costs.

45. The company was concerned that TG had damaged its reputation in talking to others about her experiences under the contract and sought a reflection of this loss in its claim. This aspect of the claim is a matter outside the jurisdiction of the Tribunal.

**Conclusion**

46. The company fulfilled its obligations as a supplier of semen under the breeding contract, providing as many free returns as were stipulated by the contract for TG to attempt to get a live foal. The company is able to claim the grazing and AI fees for the final attempt until the point this was known to be unsuccessful.

47. However, during this process, it has been determined on the balance of probabilities that *K* was sold to TG on the basis that the mare was "in foal", when this was not the case. This gives TG a right to a refund of her purchase price for that mare and consequential costs.

48. The net effect of these awards is that the company is confirmed to be the owner of *K* but is liable to pay the sum of $1,805.36 to TG as a contribution to the costs associated with her purchase.

**Referee:**

**J Robertshawe**

**Date:** **25 October 2019**

# 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 or a mistake was made.

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 outside of time, 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.

**Ground for Appeal**
There is only one ground for appealing a decision of the Tribunal. This is that 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.

A Notice of Appeal may be obtained from the 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, and 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.