



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2020] NZDT 1324

APPLICANT **TT**

RESPONDENT **KU**

The Tribunal orders:

1. KU is to pay to TT the sum of \$5,320.00 on or before 30 September 2020.
2. TT may keep or sell the pony "A" as she sees fit.

Reasons

1. In June 2019, Ms T purchased a four year old pony "A" from Ms U for \$6,500.00. The pony was purchased for her daughter to ride.
2. The pony turned out to be unsuitable for Ms T's daughter. Ms T seeks a refund of the purchase price and wishes to return the pony.
3. Ms U defends the claim on the basis that the pony was sold on behalf of a friend as a private sale, the pony was correctly described in the advertisement, and any issues that Ms T has experienced are as a result of the manner in which the pony has been maintained, ridden and/or fed.
4. The issues to be resolved are: (a) Was the pony sold "in trade"? (b) If so, is the pony of acceptable quality and fit for purpose? (c) If not, does Ms T have a right to reject the pony? (d) If not, how much compensation is due?

Was the pony sold "in trade"?

5. I find that the pony was sold "in trade" as that term is defined in the Consumer Guarantees Act 1993.
6. 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.
7. 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.
8. 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. However, a business does not need to be profit making. For example, if a company owns and manages a yacht for its owner, for example, the company need not engage in transactions for monetary gain for it to be classified as a business.

9. Ms U explained that she was selling "A" on behalf of a friend, BC, and that she took a fee of 10% on the sale. Ms U has various enterprises related to horses (including offering a stallion for service and competing on her own horses for future sale). She explained that she sells horses on behalf of others as a "sideline", and has done so for about 10 years. Previous clients wrote references in support of her honesty and expertise in the industry. Ms U had two other horses for sale on behalf at the same time, one of which was withdrawn on the day. Ms T and her daughter therefore considered two horses to purchase when they came to see "A", both of which were offered by Ms U on behalf. Ms T paid Ms U for the horse, not Ms C. All of this creates a picture of an "undertaking" or "business".
10. Ms U advised that the 10% fee she took was not money that went through her business account, as it was paid into her personal account. She therefore stated that this was not a deal that was done in trade. However, the particular bank account into which the money was paid is not a matter that determines the substance of the transaction. As Ms U is experienced in the business of selling on behalf for a fee, and was doing so at the time, this was a deal done "in trade". It does not matter that Ms C was a private seller. Once a private seller uses an agent to sell who themselves is in trade, the transaction as a whole becomes a sale "in trade".
11. As a result, the transaction was subject to the statutory guarantees set out in the CGA.

Is the pony of acceptable quality and fit for purpose?

12. As the CGA applied, the pony was required to be of acceptable quality and fit for purpose.
13. The test for acceptable quality is whether a reasonable consumer would consider the pony 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).
14. The test for fitness for purpose is whether the horse was reasonably fit for use by Ms T's daughter, unless the circumstances show that the purchaser did not rely on the supplier's skill and judgement in making that determination (s8).
15. I am satisfied that the pony did not meet the test of acceptable quality. A reasonable consumer would not have been satisfied with having paid \$6,500.00 for a young green pony that proceeded to behave in the manner experienced by Ms T upon its delivery. As this guarantee was not met, I do not need to consider the further test of fitness for purpose, and whether there was any reliance on Ms U's assessment of suitability.
16. Ms T's daughter managed to ride the pony on the first day after it had arrived, but after that, the pony bolted, bucked, and exhibited other dangerous behaviour. The pony had been advertised as follows:

This little guy is the easiest to have around and do anything with, absolute gentleman in every way absolutely anyone can ride him...

"A" would suit anyone and I mean anyone, he would suit a happy hacker to someone wanting to compete

He is bold, easy to ride, no vices

He has a heap of ability and will excel in any discipline."

17. Ms T viewed the pony, and her daughter had a successful ride in an arena on the day it was viewed before purchase. However, it was not possible in this setting to see the potential the pony had to act as it then did. Ms U had pointed out that the pony was nervous when being mounted

and had exhibited this behaviour on the day it was viewed. However, this behaviour was not an adequate indication of what then occurred.

18. Ms U did not know the pony well and was only selling it on behalf. It had come into her possession some six to eight weeks prior, by way of an exchange with another horse, and had been given to Ms C as payment for a debt. It therefore had been ridden by Ms C's daughter. Photos were provided of the daughter on the pony at pony club, and out and about. However, again, this evidence did not detract from clear evidence of the experience that Ms T had had once the pony was transported to [redacted].
19. Ms U stated that the pony was most likely grass affected, and that his feed was out of her control. It is always possible for environmental factors to impact on behaviour. However, the sale occurred in winter, before any spring flush, and the behaviour was exhibited, and reported, almost immediately. The pony was very young, and green. I am satisfied that the pony was most likely to have had an unknown propensity to act in this way and did not do so as a result of environmental factors at Ms T's property. The pony could not then be said to "suit anyone", or to have no vices. Its propensity to buck and bolt may not have been known to Ms U, or Ms C, as they had only had him for a short time. When the propensity was revealed, the basis upon which the pony was sold was no longer valid.
20. In summary, I am satisfied that the pony was unsafe for Ms T's daughter to ride and is not of acceptable quality.
21. It is worth noting that, had Ms U not been in trade, the wording of the advertisement would have been considered a misrepresentation, and therefore the same outcome would have been reached (s35 Contract and Commercial Law Act 2017). A seller in a private deal must ensure any wording in an advertisement is correct. Sellers are liable for damages where misrepresentations are established, even if they have acted without knowledge of the error.

If not, does Ms T have a right to reject the pony?

22. Despite the pony being established to be not as advertised, and not of acceptable quality, it is not now possible for Ms T to get an order enabling her to return him to [redacted].
23. If a consumer wishes to reject goods, they must do so within a reasonable time (s20). In cases concerning horses, this must be done quickly after the sale, and as soon as problems emerge. The value of the horse decreases fast, and as a rejection entitles a full refund, the seller is entitled to a quick return if they are to repay in full.
24. Ms T did send the pony back to Ms U about 6 weeks after she purchased it to attempt to sell it again on her behalf, and had it remained there, it would be considered rejected, with a right to a full refund. However, about two months later, Ms T asked for the pony to be returned back to her. At that point, it could not be said that the pony had been rejected. Ms T filed this claim in November 2019, once the pony was back at her place, but by then, it was too late to exercise the right of rejection in these circumstances.

How much compensation is due?

25. Ms T is therefore left in the same position she would have been in had the sale not been in trade. In other words, her right is one of damages. Ms T is entitled to reasonably foreseeable losses incurred as a result of the sale (s18), albeit with a deduction for the current value of the pony.
26. Ms T has incurred the purchase price (\$6,500.00), plus the transportation of the pony from [redacted] after purchase (\$700.00). Ms T has also paid \$30.00 per week in grazing. For the period from purchase to its first return to [redacted], this would have cost approximately \$120.00.
27. Ms T has paid grazing again since the pony was returned, but as the pony was returned at her request, no further grazing costs, or the transportation of it back to [redacted] can be brought into account. Ms U had paid for the transport back to [redacted].

28. Consequently, the recoverable losses are as follows:

| | |
|-----------------------------------|-----------------|
| Purchase price | 6,500.00 |
| Transport | 700.00 |
| Contribution to grazing | 120.00 |
| Less value (as assessed by Ms TT) | <u>2,000.00</u> |
| | \$5,320.00 |

Referee:

J Robertshawe

Date: 9 September 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>.