

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *McQuillan v Prow* [2021] QCAT 52

PARTIES: **MR KEVIN MCQUILLAN T/AS A-MAC GRAZING
CO.**
(applicant)

v

MS MEGAN PROW
(respondent)

APPLICATION NO/S: T 3/20

MATTER TYPE: Other minor civil dispute matters

DELIVERED ON: 18 February 2021

HEARING DATE: 7 January 2021

HEARD AT: Tully

DECISION OF: Magistrate McLennan

ORDERS: **The Tribunal allows the Application and orders the Respondent pay the Applicant the sum of \$9612.70 forthwith.**

CATCHWORDS: Private sale of horse. Sale by Description. Misrepresentation.

REASONS FOR DECISION

Application

- [1] The Applicant claims the purchase price of a horse, expenses, and return of the horse to the Respondent.
- [2] Prior to the hearing the Applicant was granted leave to be represented by her solicitor, Mr Peter Skewes. They attended the hearing via conference telephone. The Applicant appeared in person.

RELEVANT UNDISPUTED FACTS

- [3] On 29 February 2020, the Respondent purchased a seven-year-old stockhorse ('the horse') from a third party.
- [4] Between March and August 2020 there were various government restrictions on activity due to Covid-19. These restrictions included cancellation of horse-riding events.
- [5] On 13 August 2020, the Respondent advertised the horse for sale on Facebook. There were four photographs and a video with the wording of the advertisement, featuring a fit, healthy looking horse depicted variously in the paddock, in water,

being ridden under saddle and a video of the horse being lunged. The advertisement read:

D.O.B 07.11.13 14.3hh unmeasured

Regal Oak is a well mannered gelding who is bred to work cattle with a good foundation both on the ground and under saddle. Docs Freckles Oak features heavily in his bloodlines. He has done campdraft/horsemanship clinics and steady mustering. Exposure to helicopter, bikes and dogs. He rates and tracks his cattle.

Serious enquiries only.

\$4950

Located Barcaldine/Blackall

- [6] None of the photographs were recent or taken by the Respondent, the advertisement in full was copied from a post of the previous owner, except that the Respondent added the last sentence to the wording.
- [7] On 13 August 2020, the Respondent agreed to purchase the horse. On that day there were online and telephone discussions between the parties. The Respondent accepted at hearing that when asked whether the horse had any injuries she told the Applicant 'no', despite the fact that the horse had three sizable scars, including a significant scar on his OS hindlimb.
- [8] Messages on the day of purchase include the following:
- RESPONDENT: "Do you follow Clinton Anderson? That's really random sorry but if you are a fan you are going to love my boy so much he is so well trained."
- APPLICANT: "From America, yes he looks so great"
- RESPONDENT: "He is Australian but yes he is in America now. He (the horse) can do all of Clinton Andersons groundwork it would be worth you checking him out to see what Regal is capable of."
- [9] On 19 August 2020 the horse was picked up from the Respondent by a horse transport service and delivered to the Applicant on 26 August 2020.
- [10] After arrival, the horse was spelled for a week and then ridden two or three times. On the second or third ride it became clear to the Respondent the horse had serious problems with his OS hindlimb. The Applicant had the horse assessed by Michelle Bolch of Remtech Equine. She provided a report which states relevantly as follows:

17/(9)/2020 - ... Initial observations upon arrival indicated obvious OS hindlimb lameness, OS hind toe dragging and hip hiking indicative of lameness.

19/(9)/2020 – Unusual presentation of OS hind long extensor tendon...Hip hiking at walk and trot. A degree of difficulty with backing on OS hind...

23/(9)/2020 – Horse slightly more comfortable no improvement to lameness. Hock flexion test positive to lameness...unable to engage OS hind for impulsion...Compensatory issues in play, lack of topline muscling evident also.

26/(9)/2020 - ...Lameness issues exceeded scope of practice. (Referred to Vet).

- [11] The horse was then transported to the Townsville Vet Clinic where they conducted a lameness examination, radiography and tendon ultrasound. Their clinical notes from 6 October report:
- (a) Enlarged RH long digital extensor tendon and scars dorsal R hock...plantar R hock over gastroc tendon.
 - (b) Radiography revealed osteophyte formation over the TMT joint on the right hock, with dorsoproximal MT3 mild narrowing of the TMT joint consistent with OA (osteoarthritis) of the TMT joint; and
 - (c) The ultrasound revealed an enlarged long digital extensor tendon. 3. 25cmsq at M12 with mixed ethnogenicity and adhesions. DX: Hock OA, old scar dorsal hock with long digital extensor tendonitis and adhesions.
- [12] Dr Justin Nicholls, Veterinary Surgeon from Tropical Vets Innisfail, gave evidence. He said a horse that develops osteoarthritis in the hock will show some degree of lameness, from subtle to more serious. However, the osteoarthritis in this case was compounded by the presence of inflammation and ongoing changes and degeneration of the tendon on the front of the hock. There was an old scar on the leg. (These conditions will herein be referred to as 'the injury'.) Dr Nicholls said it is possible, but unlikely, injury would not have been obvious. He later said that the injury (the OA to the hock compounded with the damage to the tendon) must have been obvious for some period of time.
- [13] Dr Nicholls said it is clear the horse had some injury or ongoing damage in the leg at some point, from a few months to a few years prior (to the radiography). The narrowing is a sign the injury was old. The degenerative changes are also indicative of an older injury, as is the progressive loss of cartilage and the compression of bones. Digital tendonitis and adhesions take weeks and months to develop, but this coupled with the presence of osteoarthritis and osteophytes show this is an older injury of many months to years.
- [14] Dr Nicholls said that it is likely the horse did not show signs of lameness for the first ride or two with the Applicant because it had been spelled.
- [15] The report from Michelle Bolch confirms this injury was older, and occurred prior to purchase. The symptoms were obvious. She says there was a lack of evident topline musculing indicative of compensatory issues in play – in other words, this is an injury which over time has resulted in disuse of that region (less use of that leg) which has eventually reduced the muscle tone.
- [16] Dr Nicholls said he would not recommend that the horse do any of the things listed in the Respondents advertisement on Facebook, including mustering cattle or campdraft/horsemanship clinics. Nor is the horse capable of activities such as undertaking Clinton Anderson's groundwork. The horse is only suitable to be ridden at a walk.

DISCUSSION OF THE EVIDENCE

- [17] During the hearing, all parties and Dr Nicholls gave evidence. There were also documentary material and submissions before the Tribunal.

[18] The submissions of the Respondent state in part:

5. ... The Respondent states that the only representation she made to the Applicant was that the horse was not injured in the time that she had him namely approximately six (6) months.

This contention is clearly not the case. The Applicant admitted at hearing she was specifically asked prior to purchase if the horse was injured and replied no. The wording of her advertisement, accompanying photographs, video, and messages show she did represent the horse as healthy and uninjured.

[19] The Tribunal finds the Respondent was aware of the symptoms of the injury at the time she advertised the horse for sale, given the following facts:

- The large scar over the area of the injury;
- The evidence of the Applicant and the report of Ms Bolch – the horse was displaying obvious symptoms of lameness very soon after purchase;
- Ms Bolch's observations as to the lack of musculature in the region of the injury indicates the horse had been compensating, in other words, his gait would have reflected the symptoms of injury for quite some time;
- The Respondent on sold the horse within a short period after purchase, factoring in the Covid shutdown. She sold the horse in August 2020, just as horse eventing was restarting (of course, on its own without other factors it is not determinative);
- There were inconsistencies in the Respondents evidence. For example, the Respondent said that one of the reasons she sold the horse was because he wasn't being used. However, the Respondent then told the Tribunal she used the horse as a pleasure horse on a semi-regular basis, trail riding (10 kilometres) and arena work;
- The Respondent's evidence did not contain an unequivocal denial of knowledge of the injury. Perhaps it is a matter of semantics, but it is notable (particularly in light of the expert evidence and the incontrovertible scarring) that nowhere did she actually say that she did not notice any symptoms of the injury, nor does she clearly assert that she believed his condition was as advertised. Instead she equivocates. For example, in her Response filed 16 November, 2020, she states:
 1. The risk is attached to the Applicant from the date of purchase.
 2. Applicant Beware- The onus is on the Applicant to inspect the horse before he purchased it...
 3. The problems alleged with this horse were not known to me and could not have been known unless the horse had an Ultra Sound done. This is stated in the Report provided by the Applicant; therefore this identifies the horse was in sound condition in my

care. I never had to attend on a Vet for the issues alleged therefore I cannot provide a Vet History Report for this horse.

4. I was not aware of the alleged problems with the horse as per my above statement.

It is entirely disingenuous to suggest she couldn't have known about the problems unless an ultrasound was done, she may not have known the exact diagnosis, but the symptoms would have alerted her to the injury.

- [20] The Tribunal is satisfied that, given the nature of the injury, the horse was at the time of purchase unable to perform the activities as advertised. The Tribunal is further satisfied that while the Respondent may not have been aware of the exact diagnosis, the symptoms of the injury would have been evident to her - the horse was lame. The Tribunal is further satisfied that had the Applicant been aware of the true condition of the horse he never would have purchased the horse.
- [21] The Respondent argued that the Applicant should have on sold the horse to mitigate his damages. The Respondent failed to provide any evidence as to the value of the horse in his true condition. The Respondent also suggested the horse would have value if sold to a knackery, but again failed to provide any evidence. In the absence of evidence, the Tribunal finds the horse is has minimal monetary value.
- [22] The Tribunal is satisfied that the Respondent advertised the horse as being capable of performing a variety of activities the Respondent knew or ought to have known the horse was unable to perform. The horse was only able to be ridden at a walk.

CONSIDERATION

- [23] The applicable legislation is the *Sale of Goods Act 1896* (Qld) ('the Act'). The Act applies to transactions between a seller and buyer, including (with some exceptions) private sales. Common law and equity principals also have application.
- [24] For the Act to apply, there must be a contract of sale, either oral or written – here there was an oral contract that the Applicant would purchase the horse from the Respondent for the sum of \$4950.
- [25] The Act operates to imply specific terms into contracts for the sale of goods. This means that even if they are not expressly included in the contract, they might still form part of a buyer's rights or obligations under the law.
- [26] A horse comes within the definition of *goods* in section 3 of the Act, which includes 'all chattels personal other than things in action and money, including emblements and things attached to or forming part of land which are agreed to be severed before sale under a contract of sale.'¹
- [27] The Act implies a condition that where there is a sale of goods by description, the goods will correspond with that description. Where the buyer relies on a description given by the seller, the goods must correspond with that description. Section 16 of the Act, *Sale by Description*.
- [28] Here, the Respondent seller (who resides in a remote region) advertised the horse for sale on Facebook and described him as being capable of working cattle, doing camp

¹ Jones & Ors v Samios & Ors [1985] QSC 77 at page 15.

draft and horsemanship clinics and mustering. The horse was priced at \$4950, the price (relatively high for this type of transaction) forming part of the description as indicative of his overall value. She told the Respondent upon enquiry that the horse had no injuries.

[29] Within a few rides, the Applicant found the horse was significantly different to that described as he was suffering symptoms of the injury and was only able to be ridden at a walk. As such his value was negligible. The Tribunal is satisfied the Respondent breached the condition of the contract between the parties, implied in accordance with section 16, in that the horse did not comply with the description.²

[30] The Respondent buyer seeks damages including the following:

- Refund of the purchase price of the horse: \$4,950.00
- Filing fee: \$ 125.40
- Cost of transporting horse to Applicant after purchase: \$ 880.00
- Refund of money paid to Ms Bolch, Remtech Equine: \$ 260.00
- Payment for transporting the horse to and from Remtech Equine (Tully to Mareeba and return): \$1,500.00
- Refund of money paid to Townsville Vet Clinic: \$1,097.30
- Payment for transporting the horse to and from Townsville Vet Clinic: \$ 800.00

[31] When there is a breach of warranty by the seller, or when the buyer elects to treat a breach of a condition on the part of the seller as a breach of warranty, the buyer is not entitled to reject the goods; but the buyer may seek damages for breach. Section 54 of the Act provides the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach. Further, pursuant to subsection (4), the fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent the buyer from maintaining an action for the same breach of warranty if the buyer has suffered further damage. In addition to the above, a complainant may be entitled to consequential losses provided they are not too remote, for example, additional costs incurred when attempting to mitigate the loss or in remedying the defect, and loss of use and loss of profit.

[32] Damages are also available at common law and equity for misrepresentation, given the Tribunal has found that the representation of the Respondent as to the fitness of the horse was made negligently or fraudulently. Schedule 3 of the QCAT Act provides the Tribunal with jurisdiction in a claim arising out of a contract. This includes a claim for liability in tort for pre-contract negotiations, given that here a contract has resulted.

[33] At common law, damages for breach of contract are as stated in *Johnson v Perez* (1988) 166 CLR 351, that the complainant is to be put so far as money can do it into the same position as if the damage had not occurred. The *Hadley v Baxendale*²⁶ rule of remoteness is that the complainant may recover damages under two limbs (1) “as may fairly and reasonably be considered either arising naturally, that is according to

² The Tribunal is further of the view that the seller did not make an honest representation that the horse was a sound horse.

the usual course of things, from such breach of contract itself” (and it is to be noted that this is close to the terminology in the *Sale of Goods Act*, or (2) “such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it”).

- [34] The Tribunal is satisfied the Applicant is entitled to the first two items on the list of his damages in paragraph 32, refund of the purchase price and the cost of the filing fee. Pursuant to section 54 of the Act the Respondent buyer is by reason of the breach of warranty entitled to set up an action for extinction of the purchase price. The Tribunal has found the horse has minimal value. The Tribunal finds the Respondent is entitled to refund of the purchase price of \$4,950 and (as no offer for any refund was made) to the filing fee of \$125.40.
- [35] The Respondent has sought further damages and according to law the Tribunal must determine whether each item could be said to have arisen naturally in the ordinary course of events from the breach.
- [36] The horse had a significant injury which rendered it lame, but the Respondent effectually held it out to be sound. It follows therefore, that the Applicant having no prior knowledge of the injury, paid to send the horse to be assessed by an equine service, who referred the horse to a vet clinic. The Respondents failure to tell the Applicant of the symptoms of the injury had the natural result that when the horse was unable to perform as described, he incurred the costs of diagnosis. These costs, and the costs of travel to and from the assessments, are losses directly and naturally resulting in the ordinary course of events from the breach of contract. The Tribunal is satisfied those costs were incurred and that the travel claim is reasonable given the distances involved. The Tribunal adds that it was entirely foreseeable that, in selling a lame horse described as being capable of ‘mustering’ and ‘campdraft’ for \$4,950, a buyer would incur equine and/or veterinary assessment costs and transport to investigate the problem.
- [37] The Respondent also seeks that the horse be returned to the Applicant. Generally under the Act, a breach of condition will result in a right to reject. However, the terms of section 54 are as follows: ‘...when the buyer elects to treat a breach of a condition on the part of the seller as a breach of warranty, the buyer is not entitled to reject the goods; but the buyer may seek damages for breach...’
- [38] Further, the right to return may be lost on acceptance of goods. The test for acceptance is pursuant to section 37. The Tribunal notes that the Applicant did contact the Respondent initially, indicating some guarded acceptance of the horse: “We will give him a few days to settle in and ride him this weekend. He is lovely.” Then, when the problems began to develop, rather than contacting the seller at that point to return the horse, the Respondent sought treatment, further indicating acceptance of the horse. There is no evidence that at any time prior to the QCAT application the Applicant sought return of the horse.
- [39] In *Downes v Smith* [2014] QCATA 350 it was found that because the contract did not specifically provide otherwise, property in the vehicle passed at the time of contract. Although s 13(2)(a)(iv) of the QCAT Act (2009) Qld allows the Tribunal to order the return of goods, that power can only be exercised if a legal right to possession exists. Even though the car was still registered in his name, Mr Smith made it clear that his intention was that Ms Downes would become the registered

owner. As Mr Smith had no right to possession, it was found that the learned Magistrate erred in ordering that the car be returned.

[40] Neither party would appear to want the horse. As such, unfortunately for the Applicant there is no legal basis on which to order return of the horse.

ORDER

1. Accordingly, the Tribunal allows the Application and orders the Respondent pay the Applicant the sum of \$9612.70 forthwith.