

Repeated repair

Defect material; Consumer entitled to refund

Complaint ref : **2013611175**
Adjudicator : **N Melville**
Date : **16 August 2013**

1. Summary of the complaint

In August 2012, the consumer purchased a bedroom suite and paid for it in cash. After the suite was assembled, she noticed that the drawers would not close properly. After the matter was reported to the store manager, a carpenter was sent out to fix the unit. The problem reoccurred and in all, the unit was repaired three times. The store offered to replace the unit but the consumer did not see anything that she fancied. The consumer now requests a refund.

2. Summary of outcome

The drawers were defective from the outset. In deciding whether the defect is a material (or significant) imperfection or a characteristic that renders the goods less useful, a consideration is whether it was something that could be easily remedied. The fact that the unit had to be repaired on 3 occasions suggests this was not the case. After the first repair, the consumer was entitled to a refund or a replacement.

3. The response of the supplier

The supplier indicated on 24 July 2013 that it had sent someone out to the complainant the previous day but the complainant had managed to sort out the drawers. When called to confirm this, the consumer informed this office that she did not want the drawers repaired but wanted the goods collected and a refund.

4. Legal considerations/Applicable provisions of the *Code of Conduct*

Code:

a. The criteria to be used in resolving disputes includes:

8.5.1 the law, especially the Act and the Code (in cases where there is conflict between the interpretation of the Code or the Act, the Act will always prevail);

8.5.2 applicable industry codes or guidelines;

i. Fairness in all the circumstances.

Applicable provisions of the CPA:

Section of the 56 Consumer Protection Act (CPA) imposes a built-in or automatic warranty (commonly known as a guaranty) that all goods sold comply with the requirements listed in Section 55, namely:

- (a) They are reasonably suitable for the purposes for which they are generally intended;
- (b) They are of good quality, in good working order and free of any defects¹;
- (c) They will be useable and durable (will last) for a reasonable period of time;
- (d) They comply with the Standards Act/ other public regulations; and
- (e) They are reasonably suitable for the specific purpose that the consumer has informed the supplier that the consumer wants to use them for.

If the goods are not suitable for the purposes for which they are intended or otherwise fail to comply with the requirements listed in Section 55, the consumer is entitled to return them within six months of being delivered, at the supplier's risk and expense and without penalty, and:

- (a) Have the item(s) repaired; or
- (a) Have the item(s) replaced; or
- (b) Get a full refund of the price paid.

It is important to note that the choice is the consumer's: the supplier cannot force a consumer to opt to have the goods repaired if the consumer wants a refund or replacement. The consumer can insist on a cash refund instead of a store credit or vouchers, or on a replacement with something similar at no additional cost. The supplier must bear the costs of collecting and/ or replacing the the supplier

The above rules regarding refunds do not apply if:

- (a) The consumer was specifically told that the particular goods were offered in a specific condition (e.g. that they were in some way defective)(section 55 (6)); or
- (b) The goods were altered contrary to the instructions, or after leaving the control, of the supplier (tampered with by the consumer)(section 56 (1)).

The above rules regarding refunds apply irrespective of the store's refund policy or the terms of the manufacturer's guaranty/ warranty. In other words, the store's refund policy or the terms of the manufacturer's guaranty/ warranty cannot override the CPA requirements, but they can go further than or offer more rights to the customer than the Act does.

¹ 53. (1) (a) “defect” means—

(i) any **material** imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or (ii) any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.

Law:

It is permissible under the CPA to look to foreign law for guidance.

According to 15 USCS § 6602 (4), [Title 15. Commerce and Trade; Chapter 92. Year 2000] the term **material** defect means “a defect in any item, whether tangible or intangible, or in the provision of a service, that substantially prevents the item or service from operating or functioning as designed or according to its specifications.” The term "material defect" does not include a defect that--²

(A) has an insignificant or de minimis effect on the operation or functioning of an item or computer program;

(B) affects only a component of an item or program that, as a whole, substantially operates or functions as designed; or

(C) has an insignificant or de minimis effect on the efficacy of the service provided.

5. Consideration of facts and law

The facts do not seem to be in dispute: that the drawers of the unit were defective from the outset. It is still, in order for a defect to meet with the above quoted requirements of the CPA, necessary to decide whether the defect is a material (or significant) imperfection or a characteristic that renders the goods less useful. A consideration must surely be if it was something that could be easily remedied, in which case it would not give rise to a right to cancel the agreement and obtain a refund. The fact that the unit had to be repaired on 3 occasions suggests this was not the case. After the first repair, the consumer was entitled to a refund or a replacement. The supplier has acted contrary to that right.

6. Conclusion

Based on the information provided by the parties, the consumer was entitled to cancel the agreement after the first repair failed, when it became evident the defect was not insignificant/ that it impaired the usefulness of the goods.

7. Suggested resolution

The supplier should cancel the agreement and refund the consumer (without interest as the consumer has continued to enjoy the benefit of the unit).

² See: <http://definitions.uslegal.com/m/material-defect/>

