

## **Material defect**

### **Suitcase zipper: not a material defect. Supplier entitled to repair**

**Complaint ref** : **20143261013**  
**Adjudicator** : **N Melville**  
**Date** : **25 April 2014**

#### **1. Summary of the complaint**

In October 2013 the complainant bought a suitcase. When the complainant used the suitcase for the first time, she discovered the zip tag was broken when she collected the suitcase at the airport. The complainant had experienced the same problem with her previous suitcase of the same make.

The consumer now requests a refund.

#### **2. Summary of outcome**

It was not clear that the suitcase was defective as per section 56 (1)(a) of CPA because it would be unreasonable to equate any inability to withstand every hazard usually associated with an intended usage as amounting to a defect in the product. Further, even if it was defective, the defect was not material as it related to a small component that could easily and quickly be remedied. Accordingly, the consumer's right to a refund did not kick in and the supplier is entitled to repair the goods. If the zipper breaks again within 3 months, the complainant would be entitled to a refund or replacement.

#### **3. Jurisdictional issues**

The date of the purchase falls within the Consumer Protection Act (CPA). The defect was raised within the six months automatic warranty provided for in section 56 of the Consumer Protection Act.

#### **4. The response of the supplier**

The supplier expressed the view that the complainant's problems with her bag were not manufacturing defects or defects for which they would be responsible in terms of law for the following reasons:

- The complainant tested the bag (including the zipper) in the store and subsequently used it when packing her suitcase. If there was an inherent problem with the pulling tag, she would have become aware of it sooner. There is therefore minimal chance of the product being a manufacturing defect; it is more likely that the damage occurred afterwards.

- Most, if not all, luggage manufacturers exclude damage to luggage caused by airlines and other carriers as a result of poor handling during transit. This is because third party damage is extremely common and completely out of their control. It would be unreasonable to expect them to compensate the complainant in such circumstances.
- Even on the unlikely assumption that the bag in question had a latent problem when it was sold, their view is that the alleged issue with the pulling tab does not qualify as a defect under the CPA or the common law. This is because it is not material or integral to the practical functioning of the bag such that it would substantially impair her ability to use it.

The supplier offered as a gesture of goodwill to:

- (i) Repair the faulty puller free-of-charge
- (ii) Deliver the repaired bag to the complainant's house free-of-charge.

## **5. Attempts to resolve the complaint**

When the supplier's area manager was informed of the problem on 13 December 2014 he offered a free repair. The area manager attributed the damage to the airport. CGSO phoned the complainant to explain the supplier's response to us and to suggest that a repair would be reasonable in the circumstances. It was also explained that if the suitcase were to break again within 3 month after the repair, she would be entitled to a refund.

The complainant advised that she will definitely not accept the repair as this is not the first suitcase she bought from the supplier that broke (apparently the zip tag fell off the previous suitcase bought from the supplier. When she complained to the store on that occasion, they advised her to buy a more expensive suitcase its zip was stronger. The complainant bought the bag for travelling purposes and therefore wants a refund as the bag does not fulfil its intended purpose.

## **6. Investigative findings**

A report and a digital photograph of the suitcase in question (Annexure "A") were obtained from the supplier. From an examination of Annexure "A", it is evident that the loop on top of the slider/ puller that would have held the tag has sheared off. Signs of scuffing of the fabric of the suitcase and the black plastic appurtenances are indicative of fairly robust usage.

The damaged puller was not subjected to scientific examination in light of the value of the claim, the fact that it is an isolated incident not involving safety and because even if it was shown that the damage was a result of a defect in design or manufacture, it would not likely to change the outcome, as will become evident later.

## 7. Legal considerations/Applicable provisions of the *Code of Conduct*

### Code:

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

8.5.1 the law, especially the CPA;

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 **defects**<sup>1</sup>;

(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.

53. (1) (a) “**defect**” means—

(i) any **material**<sup>2</sup> 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.

In addition to this, in terms of section 55 (3)...if a consumer has specifically

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<sup>1</sup> See 53. (1) (a) below

<sup>2</sup> Considered more fully under **Law**.

informed the supplier of the particular purpose for which the consumer wishes to acquire any goods, or the use to which the consumer intends to apply those goods, and the supplier—

- (a) ordinarily offers to supply such goods; or
- (b) acts in a manner consistent with being knowledgeable about the use of those goods,

the consumer has a right to expect that the goods are reasonably suitable for the specific purpose that the consumer has indicated.

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.

The above rules regarding refunds do not apply if the goods were altered contrary to the instructions, or after leaving the control, of the supplier (section 56 (1)).

### **Law:**

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

### **USA<sup>3</sup>**

According to 15 USCS § 6602 (4), 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 <sup>4</sup>:

- “(A) has an insignificant or *de minimis*<sup>5</sup> 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.”

### **European Union<sup>6</sup>**

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<sup>3</sup>Title 15. Commerce and Trade; Chapter 92. Year 2000.

<sup>4</sup> See <http://definitions.uslegal.com/m/material-defect/>.

<sup>5</sup> Thefreedictionary.com: *de minimis*: Latin for "of minimum importance" or "trifling." Essentially it refers to something or a difference that is so little, small, minuscule, or tiny that the law does not refer to it and will not consider it. In a million dollar deal, a \$10 mistake is *de minimis*.

#### Article 3(6)

The consumer is not entitled to have the contract rescinded if the lack of conformity is minor.

#### Article 4

Any repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods.

#### Australia<sup>7</sup>

A purchased item has a *major* problem when it:

- has a problem that would have stopped someone from buying the item if they had known about it
- is unsafe
- is significantly different from the sample or description
- doesn't do what you said it would, or what the consumer asked for and can't easily be fixed.

### 8. Consideration of facts and law

It is common cause that the consumer purchased a suitcase from the supplier and that one of its tags came off when a piece of the puller to which it was attached broke off while the suitcase was in the possession of the airline/ airport. It is not known how precisely the damage was caused to the puller, but it is reasonable to infer that the most probable cause was mechanical damage during the transportation process. Whether it was something ordinary or an exceptional occurrence that caused the damage is not known.

In any event, the question is whether the inability to withstand every hazard usually associated with an intended usage amounts to a defect in the product. This cannot be the case. If it was, tyre manufacturers would be liable for punctures caused by nails and potholes, furniture manufactures for liquid stains and burns to wooden components and beds, umbrella manufacturers would be liable for umbrellas that were turned inside out by the wind and so on.

Even were I to accept that the slider was defective, in order for a defect to meet with the above quoted requirements of the CPA, it is still 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 whether it was something that could be easily remedied (in line with the foreign law referred to above), in which case it would not give rise to a right to cancel the agreement and obtain a refund. If the defect is not material, the consumer's right to a refund does not kick in and the supplier is entitled to repair the goods.

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<sup>6</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

<sup>7</sup> See: <http://www.accc.gov.au/business/treating-customers-fairly/consumers-rights-obligations>

Another thing to consider is that the complainant in effect claims she informed the supplier of the intended purpose of the suitcase and that the supplier warranted its suitability for that purpose (Section 53(3)). As with defects, this raises the question of whether this would require that the goods are capable of withstanding all foreseeable hazards. In this instance the question is easier to answer as all that is required is that the goods are reasonably suitable for the intended purpose. This surely cannot impose a requirement that goods are capable of withstanding all foreseeable hazards. On this analysis, the suitcase was reasonably suitable for the purpose of containing and protecting items while being transported by air: the consumer does not say that the supplier gave an assurance that the zip on the more expensive suitcase would withstand all possible hazards, only that it was stronger than that of the less expensive model.

## **9. Conclusion**

It cannot be said with certainty that the suitcase was defective in terms of the CPA, but even if I find that it was, this does not mean the consumer is entitled to a refund. In light of the information available to me and the facts that the suitcase substantially performed as required/ was reasonably suitable for the purpose intended, the “defective” aspect is only a small component of the suitcase and it can be repaired easily and quickly, I am of the view that the defect is not material and consequently that the supplier is entitled to carry out the proposed repair instead of refunding the consumer. If the puller breaks again within 3 months, the supplier would be obliged to provide a refund or replacement at the option of the consumer.

## **10. Suggested resolution**

In light of the above conclusion, I urge the complainant to accept the supplier’s offer of repair.

