



Staff Opinion
on
Refunds

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September 2019

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BACKGROUND

This opinion explores the relevant legislation in relation to consumers' rights to refund and whether a provider of goods and/or services can deny a consumer the right to said refund. Additionally, it explores sellers' rights and obligations in relation to terms and conditions of sale.

ISSUES

1. What is the applicable legislation in relation to refunds to consumers for the purchase and the terms and conditions of sale of goods and/or services?
2. Is a consumer legally entitled to a refund and under what circumstances?
3. Can a provider of goods and/or services represent to a customer, in whatever medium- orally, in writing or otherwise, that they are not entitled to a refund?
4. Can a seller of goods or services unilaterally change the terms and/or conditions of purchase after the buyer has already paid their money for the said goods and/or services?

LAW & ANALYSIS

Relevant Legislation

In Jamaica the (main) Legislation that governs consumers and their rights to a refund are the Consumer Protection Act and the Sale of Goods Act. Also applicable are the Electronic Transaction Act ("ETA") and the Hire Purchase Act. The relevant sections of each of these Acts are set out below.

The Consumer Protection Act (the "CPA")

Important definitions -Section 2(1)

"Advertisement" means any form of communication made to the public or a section of the public for the purpose of promoting goods or services...

"Business" includes a professional practice or any other undertaking that is carried on for gain or reward or in the course of which goods or services are supplied other than for free of charge.

Consumer in relation to (a) any goods means any person who acquires or wishes to acquire goods for his own private use and consumption and a commercial undertaking that purchases consumer goods. (b) In relation to any services, means any person who employs or wishes to be provided with the services or facilities; and (c) in relation to any accommodation means the person who wishes to occupy the accommodation.

Provider in relation to (a) any goods means any person who sells such goods; (b) any services or facilities, means a person who provides such services or facilities.

The Consumer Affairs Commission ("**CAC/ the Commission**") established under section 5(1) of the CPA is the body that carries out the functions of the CPA including investigating consumer complaints regarding the sale of goods and services and instituting and carrying on legal proceedings against a provider for the contravention of the CPA. Where a dispute cannot be settled through the Commission's mediation proceedings the Consumer Protection Tribunal ("**CPT**") shall hear and determine the matter.¹ The CPT can hear and determine any matters not resolved through the Commission's mediation process and inter alia may call and examine witnesses and make orders requiring the payment of a refund and interest where appropriate.²

Relevant Sections

Section ("s.") 18 requires the provider of goods to provide certain information to the customer and s.19 requires that where weight, volume or other measurement is material to price that the provider is to provide the customer with the appropriate tool for measuring same and the consumer is entitled to check said measurement at the time of purchase.

Sections 20(1) and (2) state that where a consumer purchases goods or services the provider must give the consumer a receipt, and that the receipt issued shall be adequate proof of the purchase of the goods or service for the purposes of a refund under the CPA.

¹ The Consumer Protection Act section 44(1) and 44A(1) and 44B

² Ibid section 44B(1)& 44B(2)(a) &(d)(vi)

Where through no negligence or abuse by the consumer the good sold does not provide the benefit and uninterrupted enjoyment for which it was intended the provider shall be responsible for its repair or replacement at no cost to the consumer.³

Section 24 provides:

(1) Subject to subsections (3) and (4) where a consumer is encouraged to acquire goods by the provider's declaration and description of the goods and the consumer subsequently discovers that those goods are defective or different in a material particular from those declared or described, the consumer may return the goods to the provider.

(2) a provider to whom goods are returned pursuant to subsection (1) shall, after taking such time as is reasonably required to verify the matters referred to in subsections (1) and (3), offer to the consumer in exchange for the returned goods, monetary compensation to the value of the goods or such other amount as may be agreed between the consumer and provider.

(3) Refunds on goods returned to the provider pursuant to subsection (1) shall only be made where the goods are returned to the provider-

(a) in the condition in which they were purchased; or

(b) with minimal damage resulting from reasonable exposure in the normal course of the consumer's use of the goods prior to discovery of the material difference between the goods received and the goods that the consumer requested.

(c)...

(4) A consumer who acquires a good that in every way is similar or identical to the one requested or described and declared by the provider shall not be entitled to a refund if, having left the place from which the provider sold the good, the consumer for any reason decides that he no longer wants it.

(5) A provider who contravenes subsection (2) commits an offence....

³ Ibid section 23(1)

Where a consumer purchases electrical goods believing them to be functional and discovers the good to be faulty or non-functional when attempting to use same the consumer is entitled to an exchange of the faulty good for a new functional similar good free of cost⁴ or to a refund for the amount paid for the good if the provider is unable to prove that the good was damaged as a direct result of the consumer's actions.⁵

Where a provider advertises a delivery date and fails to meet same without reasonable cause the consumer may elect not to accept such goods and in such circumstances is entitled to all monies paid plus interest at a rate of 15% per annum beginning with the date of deposit and ending on the date of the refund.⁶ A provider who has advertised a completion or delivery date may terminate the contract within seven days of receipt of the deposit but must refund the full value of the said deposit to the consumer.⁷

Section 46 speaks to the provision of services and prescribes that a provider of services is liable to make a full refund to the consumer and further compensate them for reasonable expenses incurred where the consumer has paid for the service but has not received the benefit of the service through no fault of the consumer.⁸ Where the benefit is only received in part the consumer shall be refunded a proportionate part of the fees collected or a similar proportionate part of the fees if not yet paid.⁹

A provider of services shall only provide services approved by the consumer and shall not require a consumer to sign an open ended commitment to pay for services which in addition to those contracted for the provider opines are necessary or appropriate.¹⁰

⁴ Ibid section 25(1)(a)

⁵ Ibid section 25(1)(b)

⁶ Ibid s. 33(2)

⁷ Ibid s. 33(3)

⁸ Ibid section 46(1) and 46(2)(a)

⁹ Ibid section 46(2)(b)

¹⁰ Ibid s. 26(1)

Part V of the CPA deals with Misleading and deceptive conduct and prohibits conduct in the course of trade or business that is likely to mislead or deceive.¹¹ This Part specifically prohibits engaging in conduct in the course of business or trade that is likely to mislead the public as to the nature, characteristics, suitability for purpose or quantity of the goods or services.¹² This includes making false and/or misleading representations regarding the kind, standard, quality and quantity of goods, price of goods or services and the existence or exclusion of any warranty, right or remedy in regards to same.¹³ Additionally, no person in the course of business or trade is permitted to advertise goods or services at a specified price that they don't intend to offer for supply or they don't have reasonable grounds to believe can be supplied at that price and for a reasonable period.¹⁴ Contraventions of these sections are offences for which the court can order that the provider among other things makes restitution to the consumer.¹⁵

Section 31(1) stipulates that:

Where it can be proven that a provider-

- a) Has contracted to provide goods or services;
- b) Pursuant to that contract, has received a deposit in cash or kind; and
- c) On the contracted delivery date, has failed without reasonable cause to deliver such goods or services or demonstrate that such goods or services are in a reasonably advanced state of production,

that provider shall be deemed to have acted in a fraudulent manner and is liable to be prosecuted..."¹⁶

A provider or goods or services cannot demand or accept payment or other consideration for goods or services if at the time the person does not intend to supply the goods or services, intends to supply

¹¹ Ibid s.28(1)

¹² Ibid s. 29(1)

¹³ Ibid s.30.

¹⁴ Ibid s.32

¹⁵ Ibid s.35.

something materially different or does not have reasonable grounds to believe that the goods or services will be supplied within the specified or a reasonable period.¹⁷

Therefore a provider/supplier of goods or services cannot after receipt of a deposit or other payment from a consumer unilaterally change the terms and or conditions of purchase thereafter. This would not only constitute a common law breach of contract but would also clearly be in breach of Part V of the CPA in general which deals with misleading and deceptive conduct in the course of business or trade and in particular section 34.

The Sale of Goods Act (“SOGA”)

SOGA governs sales and agreements to sell.

It is the seller’s duty to deliver goods and the buyer to accept and pay for them in accordance with the terms of the contract of sale.¹⁸ (This implies that a seller cannot unilaterally change the terms of the contract after the buyer has paid money pursuant to the agreed contractual terms).

Section 53 of this Act provides that: *“Nothing in this Act shall affect the right of the buyer or seller ... to recover money paid where the consideration of the payment of it has failed.”*

No section of this act speaks to a buyer’s specific right to a refund although it does mention certain situations in which he is not bound to accept goods. SOGA also details certain conditions that should be fulfilled for example that in a sale of goods by description the goods must correspond to said description¹⁹ and that goods bought by description from a seller who deals in goods of that description are to be of merchantable quality.²⁰ Finally, section 53 above provides for the buyer to recover money paid/ a refund where the consideration for the payment has failed- this, it is opined would include cases where the buyer has not received what he has contracted for (what was specified in the sale agreement) such as the goods not corresponding to the description.

¹⁷ Ibid s.34

¹⁸ Ibid s. 27

¹⁹ Ibid s.14

²⁰ Ibid s.15(b)

The Electronic Transaction Act (the “ETA”)

The ETA allows for inter alia, the storage and filing of information in electronic form as well as conducting and concluding transactions (business and otherwise) electronically. The act provides that in relation to contracts an offer and acceptance of an offer can be expressed electronically unless the parties agree otherwise.²¹

A contract may be formed by the interaction of an automated communication device of each party even if no party was aware of or reviewed the actions of the device or resulting terms of the agreement.²² A contract may also be formed by the interaction of an automated communication device and an individual although the individual or person on whose behalf the individual is acting will not be bound by the terms of the contract unless they were capable of reviewing the terms of same prior to the formation of the contract.²³

Part IV of the ETA governs electronic transactions for the supply of goods, services or facilities for sale, hire or exchange and the performance of such agreements.²⁴ This Part provides that a consumer who is aggrieved by any breach of the sections thereunder may make a complaint to the CAC.²⁵

Part IV ETA

A supplier is defined as a person who offers goods, services or facilities for sale hire or exchange by electronic means.²⁶ Where a supplier fails to allow the consumer an opportunity to review the entire transaction, correct any errors, withdraw from the transaction before finally placing an order and access electronically and reproduce an accurate summary of the order and terms the consumer is entitled to cancel the transaction within 14 days of receiving the goods, services or facilities and on return of the goods or cessation of use is entitled to a refund of all payments made.²⁷

²¹ The Electronic Transactions Act s.16(1)

²² Ibid s.16(3)

²³ Ibid s. 16(4)&(5)

²⁴ Ibid s.26(1)

²⁵ Ibid s.32

²⁶ Ibid s.26

²⁷ Ibid s.27

Additionally, the ETA provides that a consumer may cancel an electronic transaction or credit agreement for the supply of goods or services within 7 days after receipt of the goods or of the date of the agreement save in circumstances listed at s.28 (2) which include where the agreement is for the provision of financial services or the goods are personalized or made to specifications.²⁸ Where the consumer has paid for goods or services prior to the cancellation they are entitled to a full refund of the payment (save for any direct cost to the supplier of returning the goods if applicable), same to be made by the supplier within 30 days of cancellation.²⁹

Further, the ETA provides that where the supplier of goods, services or facilities fails to provide same within the time specified, or if no time specified within a reasonable time, then the consumer may cancel the agreement 7 days after giving notice of that intention to the supplier.³⁰ Where the supplier is unable to perform the agreement because of unavailability he must notify the consumer and refund all payments made within 30 days of becoming aware of the unavailability/inability to perform.³¹

A person who contravenes any provisions under the ETA commits an offence and is liable on conviction to a fine and/or imprisonment.³²

The Hire Purchase Act (“HPA”)

A vendor is not entitled to enforce a vending agreement (a conditional sale agreement, credit sale agreement or hire purchase agreement) unless inter alia the cash price is stated in writing and if the customer selects the goods by catalogue that the price or advertisement for same clearly states the cash price.³³ The agreement must also contain among other things a statement of the hire purchase price or total price, the amount of each instalment and how many, the date on which each instalment

²⁸ Ibid s. 28(1) & (2)

²⁹ Ibid s. 28(3) & 4

³⁰ Ibid s.30(1) & (2)

³¹ Ibid s.30(3)

³² Ibid s.34

³³ The Hire-Purchase Act s.4 & 5(a)&(c)

is payable and a list of goods to which the agreement relates³⁴ A copy of the agreement is to be sent to the purchaser.³⁵

Where the balance payable is paid one month or more before the due date the purchaser shall be given a rebate of 5% per annum or such other rate calculated on the amount of the balance for the period in which it was prepaid and vice versa, i.e. vendor may charge interest if unpaid.³⁶

The Regulations contained in the 1st Schedule of the Act contain provisions regarding advertisements and what must be contained therein. Where the advertisement contains details of payment in respect of any goods some such requirements of said advertisement include that the amount of the deposit is directly expressed or that no deposit is payable, the amount of each instalment directly expressed and if any instalments are payable before delivery of the goods, the number of instalments so payable.³⁷

CONCLUSION ON THE LAW

The main piece of legislation that governs transactions, rights and obligations of buyers and sellers of goods and services is the CPA, additionally, the SOGA, the ETA and the HPA contain provisions that address such rights.

A seller or provider of goods or services is not entitled under the law to issue a blanket statement saying that a consumer is not entitled to a refund, or no exchanges. The CAC in Observer article dated May 15, 2016 has expressly stated that hundreds of merchants operate in breach of the law by forcing customers to exchange items instead of offering them a refund as provided under the CPA.³⁸

As can be seen in the foregoing provisions of the CPA, SOGA and ETA there are certain circumstances in which a consumer is entitled to a refund of their money paid, for example where goods are

³⁴ Ibid s.6

³⁵ Ibid s.7

³⁶ Ibid s.17(1)(a) & (b)

³⁷ Ibid First Schedule regulation4(2)

³⁸ Alpha Saunders, 'No refund policy illegal- CAC' Jamaica Observer (May 15, 2016)

defective or different in a material particular from what was represented under the contract (CPA s.24 (1) & (2)) or where the supplier fails to provide the customer the opportunity to review the transaction prior to placing the order in the case of a sale by electronic means (s.27 ETA). In other circumstances the purchaser/consumer is entitled to have the goods repaired or replaced/exchanged- for example in the case of electrical goods (s.25 CPA).

However, it must be noted that under the CPA a consumer is not entitled to a refund in cases where the good is similar or identical to what purchased but they subsequently have a change of mind or what is termed “buyer’s remorse.”

It is clear that as regards a seller/ provider of goods, services or accommodations/facilities that the said seller/provider cannot after receiving a deposit unilaterally change the terms and conditions of sale, including but not limited to the price. Provisions in the CPA, SOGA, ETA and HPA stipulate certain obligations on the part of a seller/provider including the obligation to deliver what was agreed under the agreement for sale and not to engage in misleading conduct. In particular Part V of the CPA sections 31 and 34 speak to the fact that a provider cannot accept payment for goods or services if they intend to supply something materially different or cannot supply what was contracted for within a reasonable time. It is additionally opined that such conduct would be in breach of section 37 of the Fair Competition Act. Therefore in addition to being in breach of the foregoing pieces of legislation, a seller or provider who accepts a deposit or payment for goods or services and thereafter changes the conditions of sale would also be liable under the common law for breach of contract.