

## **Goods soiled by consumer**

**Bed sagging- “warrantee void due to stains”: Supplier to replace or refund.**

**Complaint ref** : **2013315222**  
**Adjudicator** : **N Melville**  
**Date** : **24 June 2013**

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

The Complainant bought a king size bed on 08/04/2011, After a few weeks it started to sag. The store was made aware but nothing was done about it. For the first time since she complained, she was given a reference number on 21/04/2012. An agent from the manufacturer agent came to her house to inspect the bed and after the inspection she was informed that they will get back to her, but that was never done. When she called the care-line making a follow-up, she was informed that the manufacturer will not be able to assist because the bed has stains. She is disheartened because she paid lots of money for the bed.

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

The consumer has the right to claim against the supplier, who in turn can claim against the manufacturer in terms of the agreement between themselves. The clause regarding stains in the manufacturer’s warranty does not override the section 56(2) CPA rights during this period. The only exception provided for in section 56(2) is if the goods have been altered contrary to instructions. This clearly does not cover stains, which are presumably as a result of using the bed for its intended purpose.

It is suggested that the supplier (retailer) either provides the consumer with a replacement mattress/ bed (depending on whether a replacement of the mattress alone is feasible) or a refund, the choice of replacement or refund being for the complainant.

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

Feedback received from Senior Management: the warranty claims cannot be honoured if the mattress is stained.

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

The above explanation was given but the customer was not satisfied. The file was closed although the Complainant was not satisfied. The newly appointed ombudsman, Advocate N Melville, reviewed the file and he has determined it to be appropriate to reconsider the decision in this file.

## **5. Investigative findings**

No investigation has been undertaken but it appears that it is common cause that:

a) the bed was defective in that it sagged, and b) that it was stained. The supplier has not disputed that the problem arose within weeks of the purchase. Although no copy of the warranty has been provided, I will accept for the present purposes that it contains a provision excluding liability if it is stained.

## **6. 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:**

The provisions relating to the return of the supplier are set out in the attached Advisory Note 1. In summary, if a defect occurs within six months of purchase, the consumer is entitled to repair, refund or replacement. After the six months expires, any product warranty would apply, subject to its terms being fair and reasonable in terms of section 48 of CPA:

**48.** (1) A supplier must not—

(a) offer to supply, supply, or enter into an agreement to supply, any goods or services—

...

(ii) on terms that are unfair, unreasonable or unjust;

...; or

(c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer—

(i) to waive any rights;

(ii) assume any obligation; or

(iii) waive any liability of the supplier,

on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.

Further, any exclusion in it would have to comply with section 49(1):

**49.** (1) Any notice to consumers or provision of a consumer agreement that purports to—

- (a) limit in any way the risk or liability of the supplier or any other person;
- (b) constitute an assumption of risk or liability by the consumer;
- (c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or
- (d) be an acknowledgement of any fact by the consumer, must be drawn to the attention of the consumer...

As far as the party that the consumer may claim against, section 56 (1)&(2) apply:

**56.** (1) In any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the **producer or importer, the distributor and the retailer each warrant that the goods comply with the requirements** and standards contemplated in section 55, except to the extent that those goods have been altered contrary to the instructions, or after leaving the control, of the producer or importer, a distributor or the retailer, as the case may be.

(2) Within six months after the delivery of any goods to a consumer, **the consumer may return the goods to the supplier**, without penalty and at the supplier's risk and expense, if the goods fail to satisfy the requirements and standards contemplated in section 55, and the supplier must, at the direction of the consumer, either—

- (a) repair or replace the failed, unsafe or the supplier; or
- (b) refund to the consumer the price paid by the consumer, for the goods.

(my emphasis).

## **7. Conclusion**

Based on the information provided by the parties, the Complainant became aware of a defect within weeks of purchasing the mattress. The retailer (supplier) was tardy in assisting but eventually deferred to the manufacturer.

The consumer has the right to claim against the supplier, who in turn can claim against the manufacturer in terms of the agreement between themselves.

On the assumption that the defect was reported within six months, the consumer is entitled to a refund or replacement (repair seems impractical). The clause regarding stains in the manufacturer's warranty does not override the section 56(2) CPA rights during this period. The only exception provided for in section 56(2) is if the goods have been altered contrary to instructions. This clearly does not cover stains, which are presumably as a result of using the bed for its intended purpose. It was not contended by the supplier that the cause of the sagging was the spilling of liquids on the bed.

If the defect was found not to have been reported in 6 months, the warranty would come into effect and its terms would apply unless contrary to the CPA. The invalidating of the warrant on the basis of staining may be regarded by a court as being an unfair or unreasonable term if the staining could not be shown to have contributed to the defect and as it is immaterial, as it surely not the intention of the manufacturer to repair and resell the mattress/ bed. Even without stains, it would be second hand.

## **8. Suggested resolution**

In the interests of fairness and a speedy and cost effective resolution of this matter, acting in terms of paragraph 11.5 of the Code (attached), it is suggested that the supplier (retailer) either provides the consumer with a replacement mattress/ bed (depending on whether a replacement of the mattress alone is feasible) or a refund, the choice of replacement or refund being for the complainant.

