DRN-4192013

The complaint

Mr L says that Clydesdale Bank Plc, trading as Virgin Money, treated him unfairly when it would not refund him for collectable shoes he had purchased, which turned out to be fake.

What happened

During July and August 2020 Mr L purchased separately five pairs of rare and collectable shoes (trainers) from unconnected shoe sellers (the 'Shoe Sellers') on an online marketplace called eBay. The July 2020 purchases of shoes cost £365.70, £299.02, and £335. The August 2020 purchases were £523.10 and £530.99. So, he paid a total amount of £2,053.81 for what he thought were rare collectable trainers. He purchased them having either seen them being advertised as genuine and/or having asked the sellers before purchase whether they were genuine. After purchasing them Mr L became concerned and used an independent inspection company to check whether they were genuine or fakes. The company reviewed pictures of the trainers and confirmed that they were not genuine. And so Mr L complained to eBay, who told him that he'd brought his dispute to it outside of its timescales so it couldn't help. So Mr L took his complaint to Virgin.

Virgin considered the matter and noted that when Mr L raised the issue to it was a significant time after the purchase date. So it didn't think a Chargeback had a reasonable prospect of success. It also considered a claim under Section 75 of the Consumer Credit Act 1974. It decided that the necessary relationship set out in the Act was not in place for S75 to apply. So it said it couldn't be liable for any claim. Mr L felt that this was unfair, so he brought his complaint to this service.

Our Investigator looked into the matter and decided that the necessary relationship was in place for Virgin to be liable under the legislation I've described. And she felt that Virgin should refund Mr L the cost of the five pairs of shoes. Virgin felt that the requisite relationship wasn't in place so it couldn't be held liable. So this complaint came to me to decide.

In May 2023 I issued a provisional decision explaining that I felt the relationship required was in place and that Virgin should refund the cost of the shoes.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Mr L accepted my provisional decision without additional comment. Virgin mentioned in an aside in a preliminary response to my provisional decision that it seemed unfair to reflect on the Steiner case. I don't necessarily agree but in any event if the Steiner case was unavailable to my consideration then the relevant case law would be that of Governor and Company of the Bank of Scotland v Alfred Truman (a firm) [2005] EWHC 583, ('the Truman case'). I note that if Truman were to be applied to Mr L's case it would also be significantly in his favour for similar (and broader) reasons to Steiner. So I don't necessarily agree with Virgin's position on this point but in any event this doesn't make a difference to my overall conclusions here. Virgin then issued its final response to my provisional decision that it

accepted my provisional decision without comment. So I don't think it was giving significant weight to this particular point as it had opportunity to elucidate on it but chose not to (for obvious reasons to my mind).

Both parties eventually accepted my provisional decision. Accordingly I see no reason to deviate from the reasoning or conclusions of my provisional decision. Accordingly and for all the reasons set out in this decision Mr L's complaint is successful and Virgin must remedy the matter. Below is the reasoning as set out in my provisional decision along with my direction to Virgin regarding remedy updated to reflect the final nature of this decision.

authorisation

Mr L accepts he made the transactions for the shoes. He doesn't dispute the amounts charged or the dates they were charged. And it hasn't been argued that it was double charged or applied to the wrong account. Considering what has happened here and what the parties have said, I'm satisfied on balance that Mr L did properly authorise the transactions at the time. And accordingly they were correctly allocated to his account by Virgin.

could Virgin challenge the transaction through a chargeback?

In certain circumstances, when a cardholder has a dispute about a transaction, as Mr L does here, Virgin (as the card issuer) can attempt to go through a chargeback process. I don't think Virgin could've challenged the payment on the basis Mr L didn't properly authorise the transactions, given the conclusions on this issue that I've already set out.

Virgin has said that it couldn't raise a chargeback request due to the time constraints within the network rules and due to the time between when Mr L paid for the shoes and when he took his dispute to Virgin. I've looked into what happened here and considered the network rules around chargeback and agree it was out of time. Accordingly I don't think Mr L has lost out here by Virgin not raising a chargeback.

Section 75

Here I must consider what Virgin should do. To do this, I have to decide what I think is fair and reasonable, having regard to, amongst other things, any relevant law including both legislation and case law. In this case, the relevant starting point is S75 of the Consumer Credit Act 1974 (the "CCA") which says that, in certain circumstances, if Mr L paid for goods or services on his credit card and there was a breach of contract or misrepresentation by the Supplier, Virgin can be held responsible.

For clarity's sake I shall explain the underpinning legislation concerning the DCS concept before explaining my thinking on this case. S75(1) states:
"If the debtor under a debtor-creditor-supplier agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor."

So s.75 only applies if:

i) There is a debtor-creditor-supplier agreement (or "DCS" agreement, for short) of the type that falls within s.12(b) or (c);
ii) That agreement finances the transaction between the debtor (Mr L) and the supplier (The Shoe Suppliers); and,

iii) If, relating to that transaction, the debtor (Mr L) has a claim against the supplier (The Shoe Suppliers) in respect of a misrepresentation or breach of contract. If so, then the creditor (Virgin) is jointly and severally liable to the debtor.

S.12(b) applies to:
"a restricted use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier"
S.11(1)(b) defines a restricted-use credit agreement as a regulated consumer credit agreement:
"to finance a transaction between the debtor and a person (the "supplier") other than the creditor"
Subsections 11(3) & (4) provide:
"(3) An agreement does not fall within subsection (1) if the credit is in fact provided in such a way as to leave the debtor free to use it as he chooses, even though certain uses would contravene that or any other agreement.
(4) An agreement may fall within subsection (1)(b) although the identity of the supplier is unknown at the time the agreement is made."
Section 187 provides:
"(1) A consumer credit agreement shall be treated as entered into under pre-existing arrangements between a creditor and a supplier if it is entered into in accordance with, or in furtherance of, arrangements previously made between persons mentioned in subsection (4)(a), (b) or (c).
(2) A consumer credit agreement shall be treated as entered into in contemplation of future arrangements between a creditor and a supplier if it is entered into in the expectation that arrangements will subsequently be made between persons mentioned in subsection (4)(a), (b) or (c) for the supply of cash, goods and services (or any of them) to be financed by the consumer credit agreement.
(3) Arrangements shall be disregarded for the purposes of subsection (1) or (2) if—
(a) they are arrangements for the making, in specified circumstances, of payments to the supplier by the creditor, and
(b) the creditor holds himself out as willing to make, in such circumstances, payments of the kind to suppliers generally.
(4) The persons referred to in subsections (1) and (2) are—
(a) the creditor and the supplier;
And s.189 says *"finance"* means to wholly or partly finance, and that *"financed"* shall be construed accordingly.
Historically credit cards worked within a commonplace three-party structure. Specifically that there was:

- an agreement between the card issuer (the Creditor) and the cardholder (the Debtor) to extend credit by paying for goods or services purchased by the cardholder from suppliers who had agreed to honour the card;
- an agreement between the card issuer and the Supplier under which the Supplier agreed to accept the card in payment and the card issuer agreed to pay the Supplier promptly;
- an agreement between the cardholder and the Supplier for the purchase of goods or services.

As time went by a new type of party entered the market and specifically these types of transactions, known as the 'Merchant Acquirer'. This led to the creation of four party relationships where instead of the agreement being between the card issuer and the supplier, there were two agreements:

- an agreement between the merchant acquirer and the supplier, under which the supplier undertook to honour the card and the merchant acquirer undertook to pay

the supplier; and

- an agreement between the merchant acquirer and the card issuer, under which the merchant acquirer agreed to pay the supplier and the card issuer undertook to reimburse the merchant acquirer.

The impact of this development on the application of S75 was considered by the Court of Appeal in the case of Office of Fair Trading v Lloyds & others [2006] ("the OFT case"). The Court of Appeal first considered whether the introduction of the four-party structure meant that the system had evolved significantly beyond the state of affairs to which S75 had been directed. They concluded that it had not, stating at paragraph 55 of their judgment:

"*From the customer's point of view … it is difficult to see any justification for drawing a distinction between the different [three-party and four-party] situations. Indeed, in the case of those card issuers such as Virgin TSB, who operate under both three-party and four-party structures, the customer has no means of knowing whether any given transaction is conducted under one or other arrangement. Similarly, from the point of view of the card issuer and the supplier the commercial nature of the relationship is essentially the same: each benefits from the involvement of the other in a way that makes it possible to regard them as involved in something akin to a joint venture, just as much as in the case of the three-party structure."*

They went on to say;

"*It is clear that, whether the transaction is entered into under a three-party or four-party structure, the purpose of the credit agreement is to provide the customer with the means to pay for goods or services. It follows that in both cases the card issuer finances the transaction between the customer and the supplier by making credit available at the point of purchase in accordance with the credit agreement. The fact that it does so through the medium of an agreement with the merchant acquirer does not detract from that because it is the card issuer's agreement to provide credit to the customer that provides the financial basis for the transaction with the supplier*."

In the House of Lords in the same case Lord Mance said, in relation to the recruitment of overseas suppliers to the network:

30. That, in today's market, arrangements between card issuers and overseas suppliers under schemes such as VISA and MasterCard are indirect (rather than pursuant to a direct contract as is still the case with American Express and Diners Club) is a consequence of the way in which the VISA and MasterCard networks have developed and operate. Likewise, the fact that the rules of these networks give card issuers no direct choice as to the suppliers in relation to whom their cards will be used. The choice of suppliers is, in effect, delegated to the merchant acquirers in each country in which these networks operate, and provision is made, as one would expect, to ensure and monitor the reliability of such suppliers in the interests of all network members. That network rules may not provide all the protections that they might, e.g. by way of indemnity and/or jurisdiction agreements, is neither here nor there. They could in theory do so, and it is apparent that there are some differences in this respect between different networks. The Crowther Report and 1974 Act proceed on the basis of a relatively simple model which contemplated that card issuers would have direct control of such matters. A more sophisticated worldwide network, like VISA or MasterCard, offers both card issuers and card holders considerable countervailing benefits. Card issuers make a choice, commercially inevitable though it may have become, to join one of these networks, for better or worse.

Lord Mance was talking about the conditions that existed almost twenty years ago, because the case from which he was hearing an appeal went to trial in 2004. But, I think it is clear that

even by then the commercial practices by which card networks recruited suppliers had evolved by developing a system that left supplier recruitment to intermediaries, and card issuers were faced with an essentially commercial decision as to whether to participate in network that included suppliers who had been recruited that way. Since 2004, new technology and the growth of internet commerce have opened up additional channels for recruiting suppliers and routing payment to them (for example, “payment facilitators”, which are now an established part of the payments industry and internet marketplaces to name two examples) and, again, card networks have changed their rules and practices in response. Having provided some important context to the circumstances in Mr L’s case, I need to now establish the exact nature of what happened as best I can and the relation between the parties involved.

The DCS issue

I have considered the particular facts of Mr L’s case. In order for S75 to apply there has to have been ‘arrangements’ between Virgin and the Shoe Sellers to finance transactions between Virgin’s cardholders and the Shoe Sellers. It’s clear that there was no direct arrangement between them, but this isn’t a requirement for the application of S75.

I say this because the Judge who heard the OFT case at first instance ([2005] 1 All ER 843) had also considered the meaning of the word “arrangements”, as used in section 12, and whether there existed relevant arrangements between creditors and suppliers in the four-party situation. He said that the use of the word showed a deliberate intention on the part of the draftsman to use broad, loose language, which was to be contrasted with the word “agreement”. In the Court of Appeal, the creditors argued that arrangements should be given a narrower meaning that took the four-party structure outside the definition. But the Court of Appeal agreed with the Judge that “arrangements” had been used to embrace a wide range of commercial structures having substantially the same effect. They held that it was not required for arrangements to be made directly by or between the creditor and supplier, merely that arrangements should exist between them, and it was difficult to resist the conclusion that such arrangements existed between credit card issuers and suppliers who agreed to accept their cards, and stated:

“Moreover, we find it difficult to accept that Parliament would have been willing to allow some consumers to be disadvantaged by the existence of indirect arrangements when other consumers were protected because the relevant arrangements were direct.”

I’ve also considered the recent High Court case of Steiner v National Westminster Bank (2022) EWHC 2519 (‘the Steiner case’). This case involved payments to a trust for the provision of a timeshare supplied by a timeshare provider. The High Court dismissed the claim under s.75 on the basis that the timeshare purchase was not made under a debtor-creditor-supplier agreement. This was because payment had been made in the first instance to the trust company, whereas the claim related to agreement to purchase a timeshare from the timeshare provider. Mr Steiner’s credit card was issued under the MasterCard scheme and the trust company was a member of the MasterCard network, but the timeshare provider was not.

The Judge (Lavender J) held that central question was not whether "arrangements" existed between the bank and the timeshare provider at the time when Mr and Mrs Steiner had entered into their agreement with the timeshare provider and Mr Steiner had used his card to pay the trust company. Rather, the question posed by s.12(b) CCA was whether Mr Steiner’s credit card agreement with the bank was made by the creditor (i.e. the bank) “under pre-existing arrangements, or in contemplation of future arrangements”, between the creditor (i.e. the bank) and the timeshare provider.

When a bank made an agreement with one of its customers in relation to a card issued by the bank to the customer, then the agreement was made under the card network, which constituted "arrangements" between the bank and the other members of the network. So, if a supplier was already a member of the card network, the agreement was made "under pre-existing arrangements ... between the bank and the supplier". The bank was also aware that other merchants were likely to join the card network in the future, so in that respect the agreement was made "in contemplation of future arrangements", between the bank and merchant who subsequently joins the card network.

However, in the absence of specific factual evidence as to the bank's state of mind, the Judge said it was difficult to envisage that a bank which issued a card to its customer and made a credit card agreement in relation to that card made that agreement under, or in contemplation of, any arrangements other than the card network. And, as the timeshare provider was outside the card network, it didn't supply the timeshare under a debtor-creditor-supplier agreement.

Is there a DCS agreement here?

The question of whether Mr L's transaction took place under a DCS agreement seems to me to turn in this case on two matters: first, whether there existed arrangements between Virgin and the Shoe Sellers for the financing of transactions with the Shoe Seller's customers; and second, if such arrangements existed, whether that was the case when Virgin entered a credit agreement with Mr L or, if the arrangements came into existence after that, whether Virgin contemplated that they would do so. I'll examine those questions in turn.

Arrangements

Here Virgin has pointed to the presence of the online marketplace (eBay) as the reason that the DCS agreement isn't in place and to a lesser extent the presence of the well-known financial services provider PayPal. Virgin has said:

"if a buyer uses a credit card, their payment is processed through PayPal's payment gateway before being added to the sellers Paypal account. This means that the payment for the goods is not going directly from the credit card to the merchant, and therefore there is a breach in the transaction, merchant, credit card chain. We understand that you did not use PayPal to pay for the goods, however eBay's processes all payments through the PayPal payment gateway creating a breach."

In this case it seems clear that from what Virgin has said and what this Service knows of these sorts of transactions that PayPal has acted here as both a Payment Facilitator to the operation of the transaction and also the provider of the respective accounts of the Shoe Sellers where the payments were destined and credited. In essence it appears that the Shoe Sellers had outsourced their payments processes to PayPal in these instances.

PayPal has terms and conditions including that all applicable network/card scheme rules must be complied with. And within those terms and conditions some networks are named including Mastercard, the network relevant here. And I've also considered the Mastercard network rules applicable here and this need to comply with the network rules is mirrored within those.

Similarly I've considered eBay's terms and conditions which require adherence by its users whether they're purchasers or sellers. Within this it says;

"*eBay does not have possession of anything listed or sold through eBay, and is not involved in the actual transaction between buyers and sellers. The contract for the sale is directly*

between buyer and seller. eBay is not a party to the transaction and is not a traditional auctioneer."

I note that this is directly contrary to what Virgin has said on the matter. I think it's likely that eBay is more likely to be correct in its own legal position than Virgin. And I think I can rely on eBay's user agreement to find that the contract for "*the sale is directly between the buyer* (Mr L) *and the seller* (the Shoe Sellers)."

I also note that eBay's terms state that both its buyers and sellers are obliged to follow its rules but that it isn't a party to the actual contract between and buyers and sellers (in this instance for the purchases of these shoes).

So the Shoe Sellers have an agreement with PayPal which includes the obligation of adhering to the card network rules here (Mastercard). PayPal is obliged to follow the same network rules also both in providing its accounts but particularly whilst acting as a payment facilitator. Virgin, by using the card scheme here, is bound to follow the same card scheme rules as well. And Mr L's card use is governed by his obligations to Virgin through his contract with it. And Mr L and the Shoe Sellers are both bound to the terms and conditions of eBay in their dealings with one another aside from the sale contract being between them directly as the eBay terms make clear. And according to Virgin itself the transaction goes through PayPal's payment processing through to the Shoe Seller's PayPal accounts. I've seen no persuasive evidence of eBay participating in the payment transaction directly, however even if it did (which I'm not necessarily persuaded) it seems clear it would only be by acting as a payment facilitator. In essence all parties involved in these financial transactions here all have different roles but are all obliged to work within the rules of the network to complete the same transaction.

It is clear that these transactions from Mr L's credit card to the Shoe Sellers' accounts with PayPal are in essence instantaneous. It also seems likely here that there is a conversion to E-Money in the transactions, but I don't think it makes a difference here and doesn't prevent there from being a DCS agreement for reasons I shall give in this decision later.

I should add at this juncture that Virgin has provided minimal representations to support its argument here on DCS. I note its comments about the contractual basis of these transactions is directly contradicted by eBay's own terms and conditions. It hasn't provided detail about the exact journey of this transaction nor explained why it believes that there is no longer a relevant DCS relationship in regard to this transaction other than pointing to the presence of other parties (mainly eBay). It has not explained why the arrangement in this case should be distinguished from the established legal authorities. Nor has it chosen to provide supporting evidence about the agreements in place between the various parties. Furthermore it hasn't even demonstrated that the funds were ever in eBay's possession even fleetingly. It has only pointed to PayPal and particularly eBay and in essence said their mere presence is proof that there is no relevant DCS agreement.

It may be that in this case there was a separate Merchant Acquirer here as well. But whether there was a four-party arrangement here or indeed a five or six party arrangement present in Mr L's case, either way I'm still satisfied that there are sufficient arrangements between Virgin, as card issuer, and the Shoe Sellers, as suppliers, for the purposes of establishing a DCS agreement, I shall now explain why.

In Mr L's case, I think there are indications of relevant arrangements even before looking at the contractual obligations undertaken by the parties, given that PayPal was specifically, and publicly in the business of processing or facilitating financial transactions such as the transaction in this case. It should also be noted that PayPal is a very large company generating vast numbers of transactions which go through all the card networks every day.

So clearly the network here (and other networks) have decided to allow such payments to go through their networks. And it would seem that considering the commercial benefits of such volumes of transactions this is entirely understandable.

And eBay too is a vast commercial enterprise which facilitates huge numbers of purchases through its marketplace offering. It seems clear that at the point of sale Virgin and indeed Mastercard were well aware of eBay's commercial offering. And it is of note that Mastercard allow the transactions linked to sales through online marketplaces to go through its scheme. Furthermore it is of note that Mastercard advertise its services to online marketplaces. On its current website this is reflected by its advertising its services to online marketplaces:

"Mastercard provides a suite of innovative and secure solutions to support online marketplaces throughout their ecommerce journey from local to global platforms. Many established and emerging marketplaces use Mastercard's world-class products to streamline payments, improve the overall eCommerce experience and enable further expansion and growth."

Similarly PayPal *is* specifically and publicly in the business of providing financial transactional services to suppliers, such as the Shoe Sellers. Virgin would be able to know the parties within the arrangement here included PayPal and that PayPal's business involved processing payments under the network for its customers, such as these Shoe Sellers. And the Shoe Sellers were obliged through their agreements with PayPal to also be bound to follow the rules in the card network in this case. Fundamentally, it follows that Virgin financed the transaction between Mr L and the Shoe Sellers by making credit available at the point of purchase in accordance with the credit agreement between them. The fact that it does so through the medium of PayPal (and possibly eBay as well) does not detract from that: it is Virgin's agreement to provide credit to Mr L that provides the financial basis for the transaction with the Shoe Sellers. And all of this done with all parties being required to comply with the card network rules. And the presence of eBay which isn't a party to the contracts of sale here and is a Payment Facilitator at most doesn't materially impact this matter at all to my mind. There's no evidence of the money going through eBay's accounts and even if it did it was simply facilitating the payments between Mr L and the Shoe Sellers in compliance with the accepted processes and practices of Mastercard.

I would also note that both Virgin and the Shoe Sellers undoubtedly benefit commercially from the involvement of the other, through the intermediations of PayPal (and any Merchant Acquirer present), in a way that makes it possible to allow the transaction to happen. By financing purchases from the Shoe Sellers, Virgin is able to lend money to their customer (Mr L) and make interest and/or other charges for that service, whilst the Shoe Sellers are able to obtain payments from Virgin's credit card holders and so benefit from the credit Virgin extended (albeit indirectly).

Contemplation

It is possible that Virgin may argue that such arrangements as those present in Mr L's case were outside of its contemplation at the time when it agreed with Mr L to open his credit card account, and thus there is no DCS agreement for it to be liable under.

Given that payments systems and card networks have continuously changed and evolved over the past half century, I think it likely that Virgin always understood that the Mastercard scheme would be operated in accordance with evolving rules and commercial practices, and that this evolution was likely to bring in new groups of network participants. Virgin must have known Mastercard would try to adapt its network to accommodate major changes in the payments industry; and it would certainly not have expected that each customer to whom it issued a credit card would only make purchases from the suppliers recruited under the rules

and practices applicable at the date when the credit agreement was first entered into. Rather, it would have contemplated that all its credit card holders would (irrespective of when their credit agreement started) have access to the same suppliers, i.e. those suppliers allowed under the Mastercard network (including suppliers such as the Shoe Suppliers). So, I think Virgin must have contemplated, when agreeing to give Mr L a credit card, that his card would be used to finance purchases from whatever suppliers the network's changing rules and practices accommodated at the time of the purchase.

In this case, the credit card payment went to the Shoe Sellers via PayPal which when acting as a Payment Facilitator is a recognised participant in the same card scheme as Virgin, and this transactional process between debtors and suppliers is commonplace within the rules of the scheme. And as I've explained the card scheme here run by Mastercard clearly supports and actively recruits the business generated through online marketplaces such as eBay. Hence the method of payment here (and the type of arrangement between the parties concerned) is of a type of that the network's rules and practices accommodate and, as such, I consider that it was within Virgin's contemplation when the credit card agreement was entered into.

Conversion

Virgin may point to any conversion from Sterling to E-money here as a reason for why there might no longer be a DCS agreement. But I'm not persuaded by this either, because had there been a conversion of foreign currency in the transaction as is the case in huge numbers of credit card transactions used during holidays abroad for instance, the accepted position is that the DCS agreement isn't broken. And usually in such foreign transactions there is a fee charged for providing the added service of the currency exchange. It is important to remember here that the sums here were funded by the Virgin credit card. This transaction wasn't funded wholly by the balance already held in the account with PayPal. These were near instantaneous transactions from Mr L's Virgin credit card to the Shoe Suppliers accounts through the intermediation of the financial transactional services as provided by PayPal. And I cannot see a fee being directly charged for any exchange to E-money here. And even if there was such a fee (whether directly applied to the transaction or as part of the overall service that PayPal provided) I don't think it would make this transaction distinguishable from the other types of currency exchanges I've described.

Accounts

It may be that Virgin points to the fact that the transaction journey here is from Mr L's card into the Shoe Suppliers' accounts with PayPal via accounts used for payment facilitation (here provided by PayPal also) as a reason why to consider their might not be a DCS agreement. But I'm not persuaded by this. There are still the necessary arrangements to my mind. Merchant Acquirers, Payment Processors and those parties providing currency conversion services have accounts in which transactions pass through on their journey from debtor's account with the creditor to the supplier. I've not seen any persuasive reason to distinguish what happened here from the authorities mentioned before.

The network stance

Mastercard's public stance on the DCS matter generally is unclear from my research. However I reiterate my earlier comments here about it actively advertising its ability to provide services to online marketplaces and also its facilitation of large numbers of transactions including PayPal through its network/scheme on a daily basis and it being aware of large marketplaces such as eBay through the normal course of its business.

So all in all I've not seen any persuasive evidence at this stage that the additional services provided by PayPal interrupts the DCS agreement. I'm also satisfied these transactions fit within the financial limits set out in relation to S75 claims as described in the Act. Accordingly I'm satisfied that there is the necessary DCS agreement and a S75 claim can be successful if the other requirements are made out.

liability

As I've explained, for Virgin to be liable under S75 a breach of contract or a material misrepresentation needs to be made out. Mr L has submitted in support of his claims the supporting reports he paid for from an independent shoe inspector (to both Virgin and this service).

I've considered the operation of this inspection service based online, which is done through the submission of photographs, analysis through artificial intelligence of the photographs of the shoes to be tested and then these results are vetted by two employed inspectors to ensure the accuracy of the artificial intelligence's findings. I've no persuasive reason to discount this evidence. I've also seen plenty of evidence online showing that such fake shoes are a substantial concern in this particular market which is also supported by the growth of this inspection resource to detect such fake shoes. So on balance considering the evidence Mr L has supplied and that Virgin hasn't challenged it at all, I'm satisfied on balance each of the pairs of shoes listed is not genuine as per the findings of these inspections.

Did Mr L buy from a trader or a private seller?

The online marketplace Mr L visited allows items to be sold by businesses and people acting in a business capacity, or by private sellers making one-off or occasional sales. This is potentially important in cases such as this because different legislation would apply to purchases depending on whether or not they are made from a "trader". A trader, according to the Consumer Rights Act 2015 ("CRA"), is "*a person acting for purposes relating to that person's trade, business, craft or profession…"*

So if the Shoe Sellers weren't 'traders' then the CRA wouldn't apply. As a consequence it would be the Sale of Goods Act 1979 (SGA) which would apply instead. However for the following reasons I don't think I need to decide here which of these apply.

This is because it is clear that Mr L was provided information which he relied upon which turned out to be untrue and he suffered a loss by entering into a contract that I'm satisfied he wouldn't have done had he known the true nature of these shoes. And unlike the CRA the Misrepresentation Act 1967 only requires a "*person*" (here Mr L) to have a misrepresentation "*made to him by another party".* So I don't have any issues here about this Act not applying because of the nature or capacity in which Mr L or the Shoe Sellers acted. This legislation states that in such a situation the damages are to be awarded. And as Virgin here can be held to a 'like claim' for the reasons I've already provided then the it is liable to such damages.

Putting things right

Mr L has requested a full refund for these shoes. Considering all of the circumstances I think this is a fair remedy. Ultimately these types of shoes have the value they have due to their collectable nature and rarity of the models/brands of shoes Mr L sought to purchase. Fake versions of these models/brands of shoes have little or negligible intrinsic value. Both parties have accepted my provisional position as above. Accordingly I direct Virgin to refund Mr L £2,053.81 and Virgin can take possession of the shoes if it so wishes before making the

refund. Virgin should also pay 8% interest on this amount from when it rejected Mr L's claim to it until it settles this matter.

My final decision

It is my final decision that this complaint should be successful. I have decided that there is the required DCS agreement under s.75, and on balance, there is a misrepresentation and I'm satisfied that Clydesdale Bank Plc, trading as Virgin Money should compensate Mr L for the loss suffered here as described above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 13 July 2023.

Rod Glyn-Thomas
Ombudsman