

The complaint

Mr R complains that Clydesdale Bank Plc trading as Virgin Money ("Virgin Money") has treated him unfairly in relation to goods and services he bought using credit provided by it.

What happened

Mr R is represented in his complaint. But for ease of reading I've referred to everything that was said or sent in on his behalf as if he did it himself.

In June 2021 Mr R entered into a contract with a third party, a limited company I'll call "H" to carry out building works on his home. Specifically, Mr R contracted with H to replace a conservatory in his home. Mr R used his Virgin Money credit card to pay for the work in part.

The work began in December 2021, but Mr R called a halt to the work when he became aware that the structure H was in the process of building was not in line with what was agreed. Moreover, Mr R also asked H to stop working at this point as he became dissatisfied with the quality of the work. To date the project remains only partly completed.

Mr R and H tried to find a mutually agreeable solution. But both indicated that the other had behaved inappropriately and as a result their negotiations broke down. H has said that it is still willing to complete the work. But Mr R has lost confidence in H and would therefore prefer that any further work is done by an unrelated third party. In any event, it is Mr R's position that the issues with the building work which arise from both misrepresentation and breach of contract on the part of H, are so fundamental that all of the work will have to be completely redone.

Mr R had reached a stalemate with H therefore he turned to Virgin Money for help. In coming to Virgin Money Mr R relies on rights he thinks he has against Virgin Money due to the type of credit he used to pay for the works. Specifically Mr R relies on the provisions of the Consumer Credit Act 1974 ("CCA 1974") and in particular on Section 75 of that Act ("Section 75").

The general effect of Section 75 is that if Mr R has a claim for misrepresentation or breach of contract against the supplier (here that is H), he can also bring a like claim against Virgin Money, provided certain conditions are met. However, whilst Virgin Money accepts Mr R potentially has such a claim against it, Virgin Money's position is that Mr R has not demonstrated that there has been any misrepresentation and/or a breach of contract. As a result it declined to uphold his claim under Section 75. Mr R complained about this, and Virgin Money declined to uphold his complaint.

Dissatisfied with Virgin Money's response Mr R complained to our service.

Once Mr R's complaint was with us Mr R told us about the wider context of this work. He is coming up to retirement and is planning to use the conservatory much more, therefore he wanted to transform it into a light filled space with good temperature control throughout the year. The conservatory adjoins a reception room. Some of the windows in the reception room were partially obscured by the pre-existing conservatory. Mr R therefore wanted to put this situation right by raising the height of the roof of the new conservatory.

With these aims in mind Mr R tells us that prior to contracting with H he had at several discussions with H about the work. In particular, they discussed that Mr R did not want a like for like replacement because his then current conservatory compromised some of the

windows of the adjoining reception room. Therefore it was agreed as a contractual term that the building work would make sure that the windows were not obscured which would involve raising the roof of the new conservatory. Mr R's reiterated that his stance is that he only proceeded with the contract with H because it agreed to this.

Also Mr R sent us several quotes for the remedial work (which involves taking down H's work and starting again). Later Mr R sent us an expert's report from a limited company I will call "S". S assessed the work of H. In brief, S concluded that the work was not of satisfactory quality and that the only feasible remedy was to remove H's work and start again.

We sent all of the new information to Virgin Money for comment. Virgin Money responded that it still did not agree that there was anything to suggest H had made the representations Mr R said it had made. In particular, it pointed out that one of the quotes for the remedial work made it clear extra brickwork would be needed to raise the roof. However, no such extra brickwork was set out in the contract. Therefore in order for extra brickwork to be part of the contract, the contract would have had to have been amended. But Virgin Money pointed out the contract with H has an entire agreement clause that prevents any amendment to the contract unless the amendment is made in writing and agreed by both of the contracting parties. And there is no evidence of any such amendment.

Virgin Money added that even if the contract was amended as a goodwill gesture, (which it does not accept happened) that amended part of the contract was not financed by credit provided by it. Therefore it would have no liability under Section 75 in this scenario.

Further, Virgin Money told us the measurements included in the CAD designs in the contract did not demonstrate that the roof was going to be raised.

Moreover, in any case, Virgin Money did not agree that the report from S demonstrated there had been a misrepresentation or a breach of contract by H.

One of our investigators looked at what had happened. Our investigator recommended that Mr R's complaint be upheld. The remedy he recommended was that Virgin Money:

- Pay £20,411.45 in line with the latest quote Mr R had obtained for the replacement work.
- Refund the cost of the independent inspection that Mr R had commissioned in relation to the work, provided that Mr R provides an invoice for this report.
- Pay £500 for distress and inconvenience.

Mr R accepted our investigator's recommendation, Virgin Money did not. I've summarised below its reasons for rejecting the recommendation. Virgin Money repeated its previous stance. It added that since Mr R will not allow H to return, he has prevented it from completing the work in any event. But Virgin Money added *"we agree to your recommendation to award £500 compensation for distress caused"*.

Virgin Money asked that an ombudsman review Mr R's complaint.

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.

First, I'm very aware that I've summarised this complaint in far less detail than the parties and I've done so using my own words. I'm not going to respond to every single point made by all the parties involved. No discourtesy is intended by this. Instead, I've focussed on what I think are the key issues here.

Our rules allow me to do this. This simply reflects the informal nature of our service as a free alternative to the courts. If there's something I've not mentioned, it isn't because I've ignored it. Rather, I'm satisfied I don't need to comment on every individual argument to be able to reach what I think is the right outcome.

Where the evidence is incomplete, inconclusive, or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

In considering what is fair and reasonable, I need to have regard to the relevant law and regulations, regulator's rules, guidance and standards and codes of practice and (where appropriate) what I consider to have been good industry practice at the time. Amongst other things, I consider the CCA 1974 to be relevant law as well as the Consumer Rights Act 2015 ("CRA 2015").

As I have already explained under Section 75 if Mr R has a claim against H for misrepresentation or breach of contract in relation to the contract for goods and services he has with H, then he has a like claim against Virgin Money. It follows that if I thought that the contract between Mr R and H had been misrepresented and/or breached, I'd find it fair and reasonable that Virgin Money take action to put this right. I'll look at misrepresentation and breach of contract in turn.

In this context a misrepresentation is a false statement of fact that Mr R relied on when contracting. Moreover, under the CRA 2015 representations made in the course of negotiating a contract can become a contractual term.

Mr R has told us why it was so important to him that the new conservatory be built in a way that would not compromise the windows in the adjoining reception room. He has been consistent and clear about what he agreed with H and when. He has told us H made these representations verbally. By their very nature such alleged verbal representations are hard to substantiate, and I therefore have to assess this aspect on the basis of the balance of probabilities.

H's position is less clear it has said variously:

- there was no such discussion and a like for like replacement was always the plan.
- there was such a discussion, a solution was discussed but Mr R did not want this.

With such discrepancies in mind I have difficulty accepting the accuracy of H's recollections on this point. I pay close attention to H's version of events because Virgin Money seems to have adopted it as its own.

Virgin Money points out that one of the remedial work quotes indicates that additional brickwork would be required to raise the roof, and there is no provision for this in the contract. Which in turn suggests to it that no such verbal representations were ever made. And therefore Mr R got exactly what he contracted for.

I do think as a starting point, the terms of a written contract must be taken to set out the basis on which the parties agreed to contract. However, I can't disregard the possibility that the written contract did not accurately reflect what was agreed verbally. In the circumstances, I might not have expected Mr R to have recognised right away, that the contract did not reflect the verbal agreement. Rather, I don't find it surprising that it was only when he saw the actual structure in situ that he realised that something had gone wrong, and I think it is significant that he objected immediately.

Virgin Money also points out that the measurements in the CAD drawings in the contract don't indicate that the roof was going to be raised. But the contract says these measurements are for pictorial use only and may not be accurate. So this does not support Virgin Money's stance.

I don't need to get into the points that Virgin Money raises about contract amendments and whether any such amendments were funded by credit provided by it. Neither Mr R nor H say the contract was amended so I can't see the relevance of this line of argument.

When I think about what Mr R has told us about his motivation for getting the work done, which I have no reason to doubt. When I then think about the fact that Mr R called a halt to the works when it became clear that the work was leading to a like for like replacement in terms of overall size and location of the structure. And when I think about H's varying recollections, I find myself more persuaded by Mr R's stance than by Virgin Money's. In other words I find Mr R's version of events the most likely. It follows that I find that the contract was most likely misrepresented. I also find that the representations made about the siting of the roof were terms of the contract. I'll talk about terms of the contract and breach of contract below.

Given I find that the contract was misrepresented I also find it is fair and reasonable that Mr R be put in the position he would have been in but for the misrepresentation. That is he would not have gone ahead with the contract with H.

In addition, Mr R has a mixed contract with H, that is a contract for the supply of both goods and services. The CRA 2015 implies a term into such contracts that the services provided will be done with reasonable skill and care. Mr R says the work was not done with reasonable skill and care. He says this because he says the term of the contract about the roof height was not fulfilled. Virgin Money says the work did meet the required quality standard and just needs finishing off. Therefore the parties are miles apart on this issue.

However, I have a report from an impartial third party that is S. In the circumstances, I think it is appropriate to rely on this report. The expert's findings are unequivocal. It finds that the work was not done with reasonable skill and care on several grounds not just in relation to roof height but in relation to several other aspects of the work. The report concludes:

"In my opinion the work has not been carried out with reasonable care and skill. I say this because the design is flawed with the height of the roof whereas this will foul the existing sitting room door and window arrangement. Furthermore, there are numerous aspects of the works that are not in my opinion undertaken with reasonable care and skill."

Moreover specifically with the regards to the height of the roof and the impact on the windows even if I accepted one of H's stances, that this was never discussed (which I don't) then this would still be a breach of contract. I say this because the expert's report says:

"I understand the existing arrangement fouled the windows but, in my opinion, if this new construction was to do the same, this is such a fundamental digression from what might reasonably be expected within the industry standards, [H] should have specifically raised this in their quotation and contract."

Given the above I am satisfied that there have been several breaches of contract. The next question is what is the fair and reasonable remedy for this.

In some instances repair might be an appropriate way to put things right if there has been a breach of contract. However, the report from S makes it clear that repair is not a reasonable remedy here, rather the report says:

"The fundamental error in the setting out cannot in my opinion be overcome. It will require the whole installation to be removed and reconstructed with increased heights of the doors and windows. The use of timber studwork to build up the height on the masonry wall is in my opinion not the most appropriate solution but studwork could be used accepting there will be an unsightly horizontal crack between different finishings."

Therefore I think it is irrelevant that Mr R will not allow H back on site to complete the work.

In any event repair would not be a fair or reasonable remedy given I have found the contract was misrepresented.

For all of these reasons I am satisfied that it is fair and reasonable that I require Virgin Money to take responsibility for putting things right for Mr R. And I am further satisfied that means paying for the existing work to be removed and for the conservatory to be rebuilt from scratch. The information I have suggests this will cost £20,411.45.

Further, I am well aware that this matter had been ongoing since December 2021. I am mindful too that currently prices are going up at a rate that is unprecedented in recent times. Moreover, it seems the current structure is not entirely weatherproof, and Mr R's home has turned into something of a "*building site*" due to the stalled work. Consequently, Mr R is anxious to get on with the work and he does not want any further delays. In the context of the very individual circumstances of this complaint, it is fair and reasonable that Mr R should not have to wait any longer to get started. Nor should Mr R have to wait for Virgin Money to assist him in overseeing the work. That is why I am requiring Virgin Money to pay him the money directly and it will be then up to Mr R to sort out his own contractors and set the pace.

Normally, I might require Mr R to return all of the building materials H used to Virgin Money. However, I find it doubtful that Virgin Money would want this or would have the facilities to easily arrange for the collection of those building materials. Therefore I am not making the redress I order conditional on Mr R returning anything to Virgin Money. That said, Mr R needs to be aware that H might have a different view on this particular point. Should Mr R want to look into this further he may wish to take independent legal advice on this point.

Mr R only had to instruct S due to the misrepresentation and breaches of contract on the part of H. Therefore I think it is fair and reasonable that Virgin Money needs to refund Mr R for the cost of S's report provided Mr R provides an invoice from S for this work.

I don't need to look any further at the question of the distress and inconvenience that Mr R has experienced as a result of misrepresentation and breach of contract because Virgin Money has offered £500 for this, and Mr R has accepted it.

For completeness I considered whether Virgin Money ought to have tried a process known as chargeback to attempt to get back Mr R's money. Chargeback would not have helped Mr R to obtain the money he needs to remove H's work and get the conservatory rebuilt. Therefore given that Mr R wants the current work removed and the conservatory rebuilt, and that he has already been given a complete remedy without looking at chargeback, there is nothing to be gained by looking further this point.

My final decision

My final decision is that Clydesdale Bank Plc trading as Virgin Money must:

- Pay Mr R £20,411.45.
- Refund Mr R for the money paid for the expert's report provided that Mr R provides Virgin Money with an invoice/receipt from the expert for this payment.
- Pay Mr R £500 for distress and inconvenience.

It must pay the total compensation within 28 days of the date on which Mr R accepts my final decision. If it pays later than this it must also pay interest on the compensation from the date of the final decision until the date of payment at the rate of 8% simple per year.

If it considers it is legally required to deduct income tax from that interest, it must send a tax deduction certificate with the payment so that Mr R can reclaim the tax if he is able to.

Mr R should refer back to Virgin Money if he is unsure of the approach it has taken and both parties should contact HM Revenue & Customs if they want to know more about the tax treatment of this portion of the compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or

reject my decision before 16 August 2023.

Joyce Gordon
Ombudsman