

Canada Square v Potter [2023] UKSC 41: Deliberate Concealment under Section 32 of the Limitation Act 1980

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On 15 November 2023, the UK Supreme Court handed down its important judgment in *Canada Square Operations Ltd v Potter* [2023] UKSC 41 in relation to the test for 'deliberate concealment' under section 32(1)(b) of the Limitation Act 1980 ("LA 1980") and 'deliberate commission of a breach of duty' under section 32(2) LA 1980. On the same date, the Privy Council handed down a related judgment in *Primeo Fund v Bank of Bermuda (Cayman) Ltd* [2023] UKPC 40, also considering the 'deliberate commission of a breach of duty' issue.

Canada Square was a case concerning undisclosed commission on payment protection insurance ('PPI'), forming part of long-running litigation against UK high street banks and other lenders. The relevance of the decision extends well beyond the PPI context. The Supreme Court offered much needed clarity, in particular, in relation to the meaning of 'deliberate concealment' under section 32(1)(b) LA 1980. This provision is frequently relied on in all manner of civil fraud and other contractual and tortious claims in the English courts.

Background:

In brief, in July 2006, Mrs Potter entered into an agreement with Canada Square within the meaning of the

Consumer Credit Act 1974 (“**CCA 1974**”). She borrowed £20,787.24 from Canada Square, which included a PPI premium of £3,834.24. Canada Square had arranged her PPI policy. As is common in these types of cases, 95% of the premium was paid to Canada Square as commission on the sale of the PPI policy and Canada Square did not tell her about the commission. The relevant agreement ended in March 2010. She commenced proceedings against Canada Square in December 2018. She argued that Canada Square’s failure to disclose the substantial commission charged on the PPI policy rendered their relationship “unfair” within the meaning of section 140A CCA 1974. Canada Square raised a limitation defence. It was common ground that the primary limitation period was six years from the end of the agreement. Consequently, Mrs Potter relied on sections 32(1)(b) and 32(2) LA 1980 to overcome the primary limitation period. The County Court and Court of Appeal allowed her to rely on these provisions.

Decision in Supreme Court:

The Supreme Court concluded that Canada Square deliberately concealed a fact relevant to Mrs Potter’s right of action with the result that section 32(1)(b) LA 1980 postponed the commencement of the ordinary six-year limitation period for bringing her claim. However, the Supreme Court did not agree with Mrs Potter’s second argument that Canada Square’s conduct amounted to a deliberate commission of a breach of duty for the purposes of section 32(2) LA 1980. In the event, given the Supreme Court’s favourable decision on section 32(1)(b), its conclusion on section 32(2) was not material to the outcome of Mrs Potter’s case.

Importantly, in reaching its conclusions on both provisions, the Supreme Court disagreed with the lead judgment of Rose LJ in the Court of Appeal ([2021] EWCA Civ 339) and other prior Court of Appeal authority. In particular, Rose LJ’s endorsement of glosses on the legislative language in section 32 and reading of ‘deliberate’ as including ‘recklessness’ was jettisoned. Lord Reed gave the lead judgment in the Supreme Court and expressed strong disapproval of the approach followed in the Court of Appeal.

Issue (1): Deliberate concealment (s.32(1)(b) LA 1980)

On the first issue as to the meaning of ‘deliberate concealment’, Lord Reed considered at [98] that the essence of ‘concealment’ was that *“A person who hides something can properly be described as concealing it, whether there is an obligation to disclose it or not.”* He added at [99] that the same approach applies *“where concealment takes the form of the withholding of information with the intention of keeping it secret.”* He disagreed with previous case law (in particular *Williams v Fanshaw Porter & Hazelhurst (a firm)* [2004] EWCA Civ 157; [2004] 1 WLR 3185 and *The Kriti Palm* [2006] EWCA Civ 1601) followed by Rose LJ in the Court of Appeal. Those decisions were to the effect that the claimant must establish that the defendant was under a legal, moral or social duty to disclose the fact, or that the defendant knew the fact was relevant to the claimant’s right of action.

The Supreme Court abandoned these glosses on the statutory language in section 32(1)(b): see [98]-[105]. As to section 32(1)(b) LA 1980, Lord Reed re-stated the test as follows at [109]: *“What is required is (1) a fact relevant to the claimant’s right of action, (2) the concealment of that fact from her by the defendant, either by a positive act of concealment or by a withholding of the relevant information, and (3) an intention on the part of the defendant to conceal the fact or facts in question.”*

The meaning of the adjective ‘deliberate’ in the context of ‘deliberate concealment’ was addressed briefly at [106]-[109] and further under Issue (2) as the Supreme Court concluded it had the same meaning in both sections 32(1)(b) and 32(2) LA 1980. In short, the Supreme Court concluded that deliberately cannot mean recklessly under this legislation.

Issue (2): Deliberate commission of a breach of duty (s.32(2) LA 1980)

Section 32(2) LA 1980 provides: *“(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.”* The issue for the Supreme Court was what amounts to ‘deliberate’ commission of a breach of duty. It concluded that a claimant who wishes to rely on section 32(2) must show that the defendant knew it was committing a breach of duty or intended to

commit a breach of duty, noting that 'deliberate' in section 32(2) does not include 'reckless', nor "awareness that the defendant is exposed to a claim": [153]-[155]. On this point, the reasoning of Lord Scott in *Cave v Robinson Jarvis & Rolf*[2002] UKHL 18; [2003] 1 AC 384 at paragraph 60 was followed.

Factual application

As noted above, on the facts of *Canada Square*, the Supreme Court decided that the existence and amount of Canada Square's commission on the PPI policy were facts relevant to Mrs Potter's claim under section 140A CCA 1974 and that Canada Square deliberately concealed these facts from her by consciously deciding not to tell her about the commission. Mrs Potter did not find out about the commission until November 2018 and then promptly issued her claim. There was also no issue regarding whether she had acted with reasonable diligence. Accordingly, the Supreme Court agreed with the courts below (but for different reasons) that the claim was not time-barred as a result of the application of section 32(1)(b) LA 1980.

As to section 32(2) LA 1980, however, the Supreme Court concluded that it had not been demonstrated that Canada Square knew or intended that its failure to disclose the commission to Mrs Potter would render their relationship unfair within the meaning of section 140A CCA 1974. As such, there was no deliberate commission of Canada Square's duty. She was not able to rely on section 32(2) LA 1980 but section 32(1)(b) was sufficient to succeed on appeal.

Comment:

While the factual analysis is naturally directed at the PPI context and section 140A CCA 1974, the reasoning of the Supreme Court in particular in relation to section 32(1)(b) LA 1980 will be hugely significant in the full panoply of civil fraud and other cases. In cases ranging from common law conspiracies with an international element to contractual claims where there are allegations of concealment not amounting to fraud in the narrow sense of fraudulent misrepresentation. The Supreme Court's decision provides much-needed clarity to practitioners and litigants alike in an area which had become fraught with complexity and nuance ill-suited to advice at the pre-action stage or after exchange of initial pleadings. The touchstone under section 32(1)(b), which includes both fraud in the narrow sense and deliberate concealment, is now clearly defined. The same applies to section 32(2) as far as recklessness is concerned. The return to a standard of intention instead of recklessness will be of comfort to defendants facing section 32(1)(b) or section 32(2) arguments, but equally the clarity of the Supreme Court's decision is a net-positive for claimants.

The *Canada Square* litigation is itself a cautionary tale of drawn-out limitation battles involving multiple appeals. It is to be hoped that section 32 arguments again become the exclusive preserve of trial judges and that its application in civil fraud cases, as also in PPI and other types of claims, will become increasingly consistent and predictable.

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