HENDERSON CHAMBERS

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Consumer Finance

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Canada Square Operations v Potter [2023] UKSC 41

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In upholding the Court of Appeal's outcome, the Supreme Court has fundamentally reformulated the approach to s.32 of the Limitation Act 1980.

BACKGROUND

1. On 26 July 2006 the Respondent, Mrs Potter, took out a regulated fixed-sum loan with the Appellant, Canada Square. When they offered her the loan, Canada Square suggested to Mrs Potter that she take out insurance under a payment protection insurance policy with an insurer in the AXA group. The 'payment protection premium lent' was £3,834. Canada Square did not tell Mrs Potter that over 95% of the sum was paid to Canada Square as its commission on the sale of the policy. The loan agreement came to an end on 8 March 2010.

2. In 2018 Mrs Potter received compensation from Canada Square in the sum of £3,160. She subsequently brought proceedings to recover the balance of the premiums she had paid together with interest, relying on section 140A of the Consumer Credit Act 1974.

3. In its Defence, Canada Square averred that Mrs Potter's claim was time barred under section 9(1) of the Limitation Act 1980 ("the LA 1980"). In her Reply, Mrs Potter relied on section 32 of the LA 1980 as postponing the

start of the limitation period until she had found out about the commission. Section 32 provided Mrs Potter with two routes to proceed with her claim:

a. Section 32(1), which provides that where any fact relevant to the claimant's right of action has been deliberately concealed from her by the defendant, the period of limitation does not begin to run until the claimant has discovered the concealment or could with reasonable diligence have discovered it.

b. Section 32(2), which provides that for the purposes of section 32(1)(b), deliberate commission of a breach of duty in circumstances where it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

4. The sole issue at trial was whether Mrs Potter's claim was time barred. The trial judge found that the claim was not time barred. Canada Square's appeal was dismissed by Jay J ([2020] EWHC 672 (QB)), who held that Mrs Potter could not rely on section 32(1)(b) but could rely on section 32(2) of the LA 1980.

5. The Court of Appeal, Rose LJ giving the leading judgment, upheld that decision, and went farther in holding that she could rely on both limbs of section 32.

6. The defendant appealed that decision to the Supreme Court.

THE ISSUES

7. The issues for the Supreme Court can be summarised as follows:

a. Did the Court of Appeal err in law in finding that a duty of disclosure "in Limitation Act terms" was sufficient for the purpose of making a finding of concealment under section 32(1)(b)?

b. Did the Court of Appeal err in law in finding that it was sufficient, for the purpose of finding "deliberate concealment" under section 32(1)(b), that the defendant was reckless as to (a) whether it was under a duty to disclose the commission and (b) whether the commission was relevant to a cause of action against it?

c. Did the Court of Appeal err in relation to section 32(2) in finding that conduct which was merely reckless was sufficient for the purpose of showing "deliberate commission" of a breach of duty?

8. The defendant bank's submission on those points was respectively that: (1) "concealment" under section 32(1)(b) required a legal duty to make disclosure; (2) actual knowledge of both elements was required to establish "deliberate concealment" under section 32(1)(b); and (3) recklessness was not sufficient to satisfy the test in section 32(2).

The Meaning of 'Deliberate Concealment' in section 32(1)(b)

9. The Court resolved those three issues by reference to the plain language of sections 32(1)(b) and (2) themselves. Giving the judgment of the Court, Lord Reed considered first the meaning of the word "concealment" and then "deliberate". He undertook an extensive review of the history of the provision and both the pre- and post-1980 authorities, ultimately concluding that certain recent authorities at Court of Appeal level had strayed beyond the simple language of the section. In doing so, they had read into the provisions caveats and glosses for which there was no proper basis leading to unnecessary complexity. The Court's message, therefore, was one of simplicity.

'Concealment'

10. Lord Reed departed from the approach of the Court of Appeal on the meaning of this word in almost its entirety. First, he rejected the conclusion

of Rose LJ that the word 'conceal' carried with it "a duty to disclose the relevant fact or facts, comprising either a legal obligation or an obligation arising from a combination of utility and morality" at [93].

11. Rather, 'conceal' was given its simple and ordinary meaning, wiping away any suggestion that it carried with it implications of a 'duty' to disclose the relevant facts. At [98] Lord Reed said:

> As was explained at para 67 above, the word "conceal" means to keep something secret, either by taking active steps to hide it, or by failing to disclose it. A person who hides something can properly be described as concealing it, whether there is an obligation to disclose it or not.

12. He then gave the following examples of the word in common parlance:

> …an elderly lady who was afraid of burglars might conceal her pearls before going to bed, without any implication that she was obliged to leave them lying in plain sight.

13. He noted that the existence of a duty might be relevant to whether a concealment had been 'deliberate', it was not relevant to whether there had in fact been 'concealment': at [100]. On that point, Lord Reed considered that Rose LJ's reference to duties of disclosure based on "a combination of utility and morality" to have been the result of her attempt to avoid the obvious difficulties arising from the earlier Kriti Palm decision. Namely that whether there had been 'concealment' was to be considered according to whether a duty existed. Rose LJ's approach, however, gave rise to serious issues of certainty, at [103].

14. As a consequence Lord Reed concluded that for the purposes of the Limitation Act 1980, the word 'conceal' should have its ordinary English meaning. Namely, to withhold information from another, whether actively

or passively. On that issue there is no question of wrongdoing, or of any breach of duty (legal or otherwise) involved.

'Deliberately'

15. Lord Reed then turned to the question of the meaning of 'deliberately'. In doing so he again rejecting the approach of the Court below.

16. The Court of Appeal had found that the word 'deliberately' should be read as including the state of mind of recklessness. It had reached that conclusion because, if 'concealment' required a breach of duty, then to 'deliberately' conceal something one must have been aware of that duty in order to breach it. Moreover, since one cannot know ahead of time whether a court would conclude that a duty had been breached, the requisite state of mind required must be recklessness, in the sense of taking an unjustified risk of breaching a duty.

17. Lord Reed rejected that logic instead preferring the more straightforward analysis of an earlier Court of Appeal decision in Williams. At [108]:

> Accordingly, as Park J stated in Williams at para 14, the defendant must have considered whether to inform the claimant of the relevant fact and decided not to. So construed, section 32(1)(b) strikes a balance between the interests of the claimant and the defendant, as Parliament intended. If the defendant has concealed a fact from the claimant, and has done so deliberately, that is to say knowingly, then he has the means to start the limitation period running by disclosing the fact.

18. The result is that for a concealment to be 'deliberate', the defendant must have considered whether to disclose the fact, and decided against it. The mere fact of non-disclosure cannot demonstrate that it was done 'deliberately'.

The Meaning of 'deliberate commission of a breach of duty' in section 32(2)

19. Lord Reed likewise rejected the Court of Appeal's analysis of the language of section 32(2) of the 1980 Act. He held that, as above, recklessness was not a sufficient state of mind to find that a breach had been made 'deliberately'.

20. He concluded at [153]:

> For all these reasons, the reasoning of the Court of Appeal in relation to section 32(2) cannot be accepted. "Deliberate", in section 32(2), does not include "reckless". Nor does it include awareness that the defendant is exposed to a claim. As Lord Scott said in Cave at para 58, the words "deliberate commission of a breach of duty" are clear words of English. They mean, as he added at para 61, that the defendant "knows he is committing a breach of duty".

21. Thus, per the House of Lords' earlier decision in Cave, section 32(2) applies to a situation in which the defendant had "knowledge that what was done was in breach of duty" (at [133]).

22. In so holding Lord Reed rejected Rose LJ's concern that that interpretation gave rise to circularity, in that whether the duty had been breached could only be determined after a trial with the effect that no claim could ever be time-barred. Rather, the approach in Cave at most meant that "there are liable to be cases where the application of section 32(2) cannot be determined as a preliminary issue… That is not a logical paradox" (at [149]).

23. Again, the focus of the court was on giving words their ordinary meaning, rather than trying to trace a cogent thread through a sequence of cases that the Court of Appeal itself has recognised as unsatisfactory.

24. The Court firmly rejected the Claimant's position that recklessness, i.e. awareness of the risk of a claim, should suffice. Lord Reed pointed out that many people are involved in professions which involve the possibility of claims, but the Claimant's construction would expose them to risks of litigation for an indefinite period. At [152]:

> The same would be true if it sufficed, to deprive a defendant of a limitation defence, that it knew that it was exposed to a claim, as the claimant proposes. Professional people and others often know that they are exposed to claims, because their work necessarily involves the taking of risks…. indemnity insurance. However, if the test proposed by the claimant were to be applied, people such as these would have no protection against claims for the indefinite future.

Supreme Court's Conclusions

25. Applying its analysis to the facts of Mrs Potter's case, the Court found that she could rely on section 32(1)(b). The defendant had clearly 'concealed' facts by not disclosing them at any point; and it had already been found as a fact by the Recorder at first instance that it had done so 'deliberately', i.e. consciously. See [154]. As to section 32(2), however, it was conceded that deliberate breach of duty could not be established as against the Defendant. The Claimant could not therefore rely upon the provision. See [155].

26. In the circumstances, the claim was held not to be statute-barred, albeit for radically different reasons than those relied upon by the Court of Appeal.

Discussion

27. This is a significant decision which offers substantial and welcome clarification of the meaning of section 32 of the Limitation Act 1980. It now represents the most authoritative judgment on the provision.

28. It was notable that the Supreme Court departed from the reasoning of the Court of Appeal in almost every respect, but nonetheless reached the same end-result.

29. In terms of PPI claims, it remains to be seen how this ruling affects the application of section 32(1)(b) as 'deliberate concealment' under that section is now more a question fact, and less a question of law. Indeed, the question of 'deliberateness' may become a more readily triable issue for defendant lenders in the right circumstances. Although the Court ultimately concluded that section 32(1)(b) applied, that was based on findings of fact made by the Recorder at trial, rather than any inherent aspect of the claim which meant the commission must have been deliberately concealed.

30. Likewise, it is now difficult to see how claimants in PPI claims might rely on section 32(2). As noted above, Mrs Potter's team conceded that she could not prove that the Defendant had knowingly committed any breach of duty. Support for that concession is found in Lord Reed's references to professional people who need protections to those who engage in work where legal claims might arise. Those who have not made any decision to conceal a fact will as a consequence be far better protected against future claims based on a suggestion that the defendant should have been aware of the risk of claim. It will be necessary to show the defendant had actual knowledge of commission of breach of duty.

31. Finally, the focus on simplicity and the ordinary meaning of words may signal the return of a jurisprudential perspective that will influence the approach of judges at all levels.

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