HENDERSON CHAMBERS

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Canada Square Operations Ltd v Potter
[2021] EWCA Civ 339
18 March 2021

Court of Appeal decision on the meaning of 'deliberate', 'concealment' and 'breach of duty' under s.32 Limitation Act 1980 in the context of the Consumer Credit Act's unfair relationship provisions

By Ben Norton

In *Canada Square Operations Ltd v Potter* [2021] EWCA Civ 339, the Court of Appeal considered the meaning of 'deliberate concealment' and 'deliberate breach of duty' for the purposes of sections 32(1)(b) and 32(2) of the Limitation Act 1980; two provisions commonly relied upon by claimants to postpone ordinary limitation periods.

The decision is of particular interest to those with conduct of historic PPI claims under section 140A of the Consumer Credit Act 1974, where commission paid many years ago was not disclosed at the time of the credit agreement. Mrs Potter had such a claim dating from 2006. The Court of Appeal found that she could rely on both sections 32(1)(b) and 32(2) so that the period of limitation did not begin to run on her claim until she discovered the concealment of the commission received by Canada Square in November 2018.

While the decision is particularly significant in the context of the Consumer Credit Act, it has wider application given the court's construction of the meaning of "deliberate".

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 only a small percentage of this sum (around 4.7%) was the actual premium paid by her to AXA for the policy. 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. She pleaded that, had Canada Square told her about the commission, she would not have allowed the policy to be linked with the loan. She alleged that the relationship arising out of the loan was unfair because Canada Square had failed to disclose the commission and because the commission was excessive and/or extortionate.

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. Mrs Potter made a witness statement which was not challenged. No evidence was offered by Canada Square. 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.

THE ISSUES

5. The main issues before the Court of Appeal were summarised by Rose LJ (with whom Males LJ, subject to certain observations, and Sir Julian Flaux, Chancellor of the High Court, agreed) at [54] as follows:

a. Did the creation of an unfair relationship within the meaning of section 140A amount to a breach of duty by Canada Square towards Mrs Potter for the purposes of section 32(2)?

b. Was Canada Square's failure to disclose the existence and size of the commission a 'concealment' of that fact by Canada Square?

c. If there was a breach of duty for the purposes of section 32(2) and/or a concealment for the purposes of section 32(1)(b), was Canada Square's conduct 'deliberate' within the meaning of those provisions?

ISSUES (1) AND (2)

Issue (1): was there a 'breach of duty'?

6. The first issue was dealt with by Rose LJ shortly at [56 – 63]; the creation of an unfair relationship does amount to a "breach of duty" for the purposes of section 32(2), *Giles v Rhind and another (No 2)* [2008] EWCA Civ 118 applied.

Issue (2): was there 'concealment'?

7. In relation to the second issue, Rose LJ found that section 32(1)(b) is not limited to cases of active concealment (at [67]) or cases where the defendant is under a free-standing legal duty to disclose the relevant fact (*AIC Ltd v ITS Testing Services (UK) Ltd (The Kriti Palm)* [2006] EWCA Civ 1601 and *Williams v Fanshaw Porter & Hazelhurst* [2004] EWCA Civ 157 considered):

   "*Section 32(1)(b) does not refer to a duty to disclose, it refers only to concealment. Inherent in the concept of 'concealing' something is the existence of some obligation to disclose it. To construe section 32(1)(b) as being satisfied only if there is a pre-existing legal duty to disclose seems to me to add an unwarranted and unhelpful gloss on the clear words of the statute. For the purposes of the Act that obligation need only be one arising from a combination of utility and morality to adopt Rix LJ's phrase* [*in The Kriti Palm*]" [75].

8. Rose LJ proceeded to find that the obligations to act fairly imposed on Canada Square by section 140A (which were in place at least from April 2008, when the section became enforceable as regards the agreement) were sufficient to mean that their failure to disclose the commission amounted to a concealment of that commission within the meaning of section 32(1)(b) (the parties had agreed that the existence and size of the commission was a relevant fact to Mrs Potter's right of action).

ISSUE (3): THE MEANING OF 'DELIBERATE'

The law

9. The third issue was the most contentious issue of the appeal. What mental element was required to establish 'deliberate' conduct within the meaning of sections 32(1)(b) and 32(2)? On this issue Rose LJ found that:

   a. There is not a clear, 'natural' meaning to the word 'deliberate' in this context which gives an answer to the issue [94].

   b. The case law construing the word 'deliberate' in section 32 is inconclusive [106].

   c. The pre-1980 authorities establish that recklessness was a sufficient mental element under the old section 26 of the Limitation Act 1939: "*The claimant did not have to show that the defendant knew that the conduct he was concealing gave rise to a cause of action; it was enough that the concealment was unconscionable and it would be unconscionable if he concealed the fact, being reckless as to whether or not he had committed an actionable wrong.*" [124]

   d. Parliament did not intend for section 32 to be any more difficult for the claimant to overcome than the old section 26 [137]. The test for recklessness is that set out by Lord Bingham in *R v G and anor* [2003] UKHL 50, i.e. a person acts recklessly where he is aware of a risk ('the subjective element') and, in the circumstances known to him, it is unreasonable to take that risk ('the objective element').

Application to the facts

10. Applying the law to the present case, Rose LJ held at [137] that:

   a. Mrs Potter can rely on section 32(2) if she can show that Canada Square realised that there was a risk that their failure to disclose the fact and extent of the commission resulted in their relationship with her being

unfair within the meaning of section 140A, and it was not reasonable for them to take that risk of creating an unfair relationship; or

b. Mrs Potter can rely on section 32(1)(b) if she can show that Canada Square realised that there was a risk that they had a duty to tell Mrs Potter about the commission charge, such that their failure to do so meant that they deliberately concealed that fact from her.

11. Given the lack of evidence from Canada Square, the subjective element could only be satisfied by an inference from the surrounding circumstances as to what Canada Square appreciated about the risks of non-disclosure of the commission.

12. Canada Square contended that the relevant surrounding circumstances were (i) the absence of any provision in the ICOB Rules requiring or encouraging them to disclose commission to their customers and (ii) the decision in *Harrison v Black Horse Ltd* [2011] EWCA Civ 1128 (although this could not, of course, have informed Canada Square's decision not to disclose the commission before the date of that judgment).

13. Mrs Potter emphasised the importance of other surrounding circumstances, including:

a. The FSA review of the ICOB Rules in March 2007.

b. The OFT guidance, OFT 854, published in May 2008. This guidance provided that the category of conduct in section 140A(1)(c) encompasses both acts and omissions such as where the lender has failed to take certain steps which in the interests of fairness he might reasonably be expected to have taken. Relevant omissions "*might include failure to provide key information in a clear and timely manner (or at all), or to disclose material facts*."

c. On 7 February 2007, the OFT referred the supply of all PPI sold to retail customers to the Competition Commission for investigation under section 131 of the Enterprise Act 2002.

d. Towards the end of 2012, the Parliamentary Commission on Banking Standards carried out its own inquiry into bank mis-selling of PPI. Although the giving of this evidence post-dates the end of Mrs Potter's credit relationship, Rose LJ found that it recorded the situation that existed during that relationship and, since Canada Square was an active participant in that market, it is reasonable to infer that it was aware of what was going on [154].

14. Rose LJ found that the material relied upon by Mrs Potter entirely supports the decision that Canada Square must, subjectively, have been aware that there was a risk that the non-disclosure of the commission made the relationship with Mrs Potter unfair:

"*There were plenty of warning signs that lead inevitably to the inference that Canada Square must have appreciated that if they decided not to tell Mrs Potter that the PPI policy for which they were charging her £3,834 was in fact valued by the insurer at £182.50, there was a risk at least after April 2008 that the credit relationship between them would be regarded as unfair. Similarly, they must have realised that there was a risk that they ought to disclose the commission to her because to do otherwise would conceal from her a fact that was relevant to her right of action against them under section 140A*" [157].

15. As to the objective element of the test, Rose LJ dealt with this shortly; there would have been no difficulty or expense incurred in disclosing to Mrs Potter that the insurance premium payable to AXA for the PPI policy was only £182.50 and there would have been no possible harm to Mrs Potter in showing her the split of the costs. There is no reason why a reasonable person would have decided not to disclose the commission [160].

16. Accordingly, Mrs Potter could rely upon both sections 32(1)(b) and 32(2) to defeat Canada Square's reliance on the ordinary limitation period. The period of limitation did not begin to run on her claim under section 140A until she discovered the concealment in November 2018 [161].

DISCUSSION

17. The Court of Appeal's decision on the meaning of 'deliberate', 'concealment' and 'breach of duty' for the purposes of section 32 of the LA 1980 will, of course, have significant implications beyond the world of PPI disputes allocated to the Small Claims Track. Few would disagree with Rose LJ's assessment that the previous case law construing the word 'deliberate' is inconclusive; some would go further and agree with Males LJ that the law "*has got itself into a rather unsatisfactory state*" [177]. As Rose LJ conceded, the recklessness test brings its own list of potential sub-issues which may be difficult to resolve [136]. However, there is at least some clarity on the test to be applied.

18. The unusual background to this judgment is that there are many similar PPI claims which are currently proceeding in the County Courts where limitation is in issue. This context clearly informed Males LJ's judgment in which he identified a 'straightforward approach' which ought to be sufficient to dismiss the appeal and "*even more importantly*" enable judges in the County Court to apply section 32 without undue complexity [173]. However, Males LJ conceded that such an approach is not available in light of case law binding on the Court of Appeal and for that reason he agreed with the judgment of Rose LJ [199].

19. It follows that County Court judges faced with claims that fall within the same category as Mrs Potter's must apply Rose LJ's test set out at [137]. The

question for the Defendants in these claims will be whether they can avoid the same fate as Canada Square on the facts of that case. If not, the limitation period will not begin to run until the claimant discovered the concealment, or could with reasonable diligence have discovered it. In other words, claims alleging unfairness under section 140A on the basis of undisclosed commission may roll on for the foreseeable future.

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