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## CCI CASE NOTE: CANADA SQUARE OPERATIONS LTD V POTTER [2023] UKSC 41

By William Hopkin

### CANADA SQUARE OPERATIONS LTD V POTTER [2023] UKSC 41

*On 15.11.23, the Supreme Court clarified the meaning of a relevant fact being “deliberately concealed”, with reference to the postponement of limitation by s.32 Limitation Act 1980.*

#### FACTS

In 2006 Mrs Potter entered into a credit agreement (under the Consumer Credit Act 1974) with Canada Square. She borrowed c.£21K, being a loan of £17K and a PPI premium of £4K (arranged for her by Canada Square). c.£200 was paid to the insurer, with 95% of the premium going to Canada Square, who did not tell Mrs Potter about the commission.

The credit agreement terminated in 2010. In 2018, Mrs Potter brought a claim against Canada Square, for the £4K she paid in respect of the PPI Policy, plus interest, on the basis that the non-disclosure resulted in an ‘unfair relationship’ under s.140A of that Act. She had, at that point, recently found out about the commission, following taking legal advice.

Canada Square maintained that Mrs Potter’s claim was time-barred, as s.9 of the Limitation Act 1980 provided six-year limitation period, which had long expired. Mrs Potter contended that the limitation period was postponed by s.32 of that Act, due to the deliberate concealment of the commission.

#### LIMITATION ACT

As relevant to deliberate concealment, s.32 provides:

*(1)...where in the case of any action for which a period of limitation is prescribed by this Act, either...*

*(b) any fact relevant to the plaintiff’s right of action has been deliberately concealed from him by the defendant;...*

*the period of limitation shall not begin to run until the plaintiff has discovered the... concealment...or could with reasonable diligence have discovered it...*

*(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.*

#### DECISION

The Supreme Court, with Lord Reed giving the Judgment (with which all members of the Court agreed), determined that:

a) Concealment of a relevant fact will be deliberate if the defendant intended to conceal the fact in question. It is not necessary for the concealment to be in breach of a duty of disclosure, or for the defendant to realise that the fact related to the cause of action. Lord Reed did, however, reject the Court of Appeal's finding that "deliberately" can also mean "recklessly". In the present case, Canada Square consciously decided not to tell Mrs Potter about the commission, amounting to deliberate concealment;

b) The creation of an unfair relationship under s.140A Consumer Credit Act 1974 amounted to a breach of duty for the purposes of s.32(2) of the Limitation Act 1980. The defendant must, however, know that it was committing a breach of duty or intended to commit a breach of duty. Recklessness is insufficient i.e. if it realised that there may be a risk of a breach of duty and took that risk. In the present case, knowledge and intention could not be shown.

Accordingly, Mrs Potters claim was not time-barred (cf s.31(1)(b)), and the appeal was dismissed.

## TAKE AWAY POINTS

Deliberate concealment is now a simpler and broader concept. It is vitally important, however, that evidence in respect of deliberate concealment is carefully considered at the outset, and rigorously addressed throughout proceedings.

## EXTRA

For those interested in the topic, please also see the Privy Council decision (handed down on the same day) in *Primeo Fund (in Official Liquidation) v Bank of Bermuda (Cayman) Ltd* [2023] UKPC 40. This appeal concerns litigation arising from the multi-billion-dollar Ponzi scheme operated by Bernard Madoff, and the operation of similar limitation provisions in Cayman legislation.

*William Hopkin is a commercial chancery barrister, who has a speciality in secret commissions and breaches of fiduciary duty. The Legal 500 2024 notes: 'William has an unrivalled eye for detail coupled with excellent client care skills. The level of preparation that William undertakes makes him a formidable advocate.'*



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