

Deliberating about deliberate concealment and recklessness

The Supreme Court's decision in *Canada Square Operations Ltd v Potter* [2023] UKSC 41 is a major landmark, which should be welcomed for its restoration of reasonable simplicity to what had become an unduly complex subject. In doing so, it has established that in a limitation context, "deliberate" means "deliberate" and does not mean "reckless".

All practitioners concerned with a potential allegation invoking the concept of deliberate concealment in section 32 of the Limitation Act 1980 will need to turn to this decision. And when a practitioner does, the most important paragraph is surely paragraph 73, in which Lord Reed, speaking for the entire court, says:

"In words which should in my view be taken to heart, he [Lord Scott] said (para 65):

"The plain words of the statutory requirements, 'deliberately concealed' and 'deliberate commission of a breach of duty' need no embellishment."

Lord Scott had been speaking in *Cave v Robinson, Jarvis & Rolf* [2002] UKHL 18 [2003] 1 A.C. 384. In the succeeding paragraph in *Canada Square* Lord Reed says, of the two decades which followed *Cave*:

"Despite the guidance given by the House of Lords in *Sheldon*¹ and *Cave*, the case of *Williams*, cited in para 21 above, began a process in which the Court of Appeal has moved progressively further away from the clear language of the provisions; a process which continued in *The Kriti Palm* and culminated in the present case."

He went on to disapprove, expressly, of the reasoning in both *Williams* and *The Kriti Palm*: paragraph 104. Thanks to this decision, modern understanding of the law is now much easier.

Judgment in *Canada Square* was given on 15 November 2023. On the same day the Privy Council, constituted with the same members as decided *Canada Square*, gave its decision in *Primeo Fund v Bank of Bermuda (Cayman) Ltd* [2023] UKPC 40. This involved materially the same issues of statutory construction, with the same result and reasoning.

One of the writers of this note has a particular interest in the subject, because he had the privilege of leading for the (successful) defendant solicitors in *Cave*. He discussed the *Canada Square* case, and the Court of Appeal treatment of recklessness in connection with the word "deliberate", in detail in an article, "Deliberation About Recklessness: Deliberate Concealment Again", in the *Journal of Professional Negligence*, (2023) Jo.P.N. 125.

¹*Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] A.C. 102

In contrast, this note aims only to identify the highlights in the Supreme Court decision. The decision, which is concerned with complex facts, contains a formidable survey of the legislative history and prior judicial decisions. It deserves the study of every practitioner who may come across a potential question of “deliberate concealment”. It is also relevant when considering whether, in a given case on statutory interpretation, the conditions in *Pepper v Hart* [1993] A.C. 593 are satisfied.

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The relevant part of section 32 now reads as follows:

32.- Postponement of limitation period in case of fraud, concealment or mistake.

(1) Subject to subsections (3), (4A) and (4B) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; or

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

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) 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.

[...]

A claimant who wants to allege that there has been “concealment” which has the effect that section 32 is engaged can therefore allege either or both of the following:

- > that one or more facts relevant to the claimant's right of action has been deliberately concealed from the claimant by the defendant [section 32(1)(b)];
- > that the defendant deliberately committed a breach of duty in circumstances in which it was unlikely to be discovered for some time [section 32(2)].

In the latter case, section 32(2) has the result that “the facts involved in that breach of duty” have, for the purposes of section 32(1)(b), been deliberately concealed.

There is an interaction between section 32(1)(b) and section 32(2), because the latter subsection is for the purposes of the former. The claimant always has to show that a fact relevant to the claimant's right of action has been concealed. It is, however, conventional to write about invoking subsections 32(1)(b) and 32(2) as shorthands which identify what, in each of the two situations mentioned, the claimant is alleging - deliberate concealment as such, or deliberate commission of a breach of duty in the relevant circumstances.

Although the facts of Mrs Potter's case, briefly summarised at the end of this note, led to the conclusion, it is the legal analysis which is so very important.

We suggest that the highlights are:

- 1) Every Court should take note of what Lords Scott and Reed have said, quoted above. No one should try again to move in a direction away from the clear language of the provisions.
- 2) Deliberate concealment for the purposes of section 32(1)(b) may be brought about by an act, or by an omission: paragraphs 64, 65, 67, 68.
- 3) For a fact to be "deliberately concealed" for the purposes of section 32(1)(b) "the result of the act or omission, ie, the concealment, must be an intended result": paragraphs 70, 77.
- 4) Section 32(1)(b) does not require that the concealment must be in breach of either a legal duty, or a duty arising from a combination of utility and morality: paragraph 104.
- 5) "... it is sufficient, and accords with the purpose of section 32, that the defendant deliberately ensures that the claimant does not know about the facts in question and therefore cannot bring proceedings within the ordinary time limit": paragraph 105.
- 6) "Deliberately" cannot, in this context, mean "recklessly": paragraph 108.
- 7) In a "section 32(1)(b)" case, where the claimant is alleging deliberate concealment of facts, the law is as stated by Lord Scott, and summarised as:

"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."

See paragraph 109.

- 8) In section 32(2) "deliberate" does not include "reckless"; a "deliberate breach of duty" requires knowledge that the defendant "knows he is committing a breach of duty": paragraph 153.

- 9) The reference by the Court of Appeal to Parliamentary materials did not justify the Court of Appeal's conclusion, and had not been consistent with *Pepper v Hart* [1993] A.C. 593: paragraph 137 and following.
 - a) The statement of the Lord Chancellor relied upon did not say anything (either way) about recklessness: paragraph 137.
 - b) The first condition in *Pepper v Hart* was not satisfied - the provision in question was not ambiguous, obscure, or such that its literal meaning led to an absurdity: paragraph 138.
 - c) The third condition in *Pepper v Hart* was not satisfied - the Lord Chancellor's words did not address the meaning of "deliberate" and did not disclose the legislative intention lying behind that word: paragraph 139.

- 10) There are very intricate questions, which potentially differ from word to word, as to the circumstances in which one may refer to previous law and material in order to interpret the Limitation Act 1980: paragraphs 140 to 144. *Sheldon* and *Cave* show that in some circumstances (the interpretation of "deliberate" being one of them) it is impermissible: paragraph 140.

And the core facts?

- 1) Canada Square sold Mrs Potter some PPI, for which she paid £3,834.24. The amount received by the PPI insurer was £182.50, Canada Square retaining commission of £3,651.74. It did not tell Mrs Potter that it was receiving commission; therefore, it did not tell her that more than 95% of what she paid was going in commission (putting it another way, it was getting 20 times as much as the insurer). The trial Judge held that Canada Square had consciously decided not to disclose the commission to Mrs Potter.
- 2) In November 2014 the Supreme Court gave its decision in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 [2014] 1 W.L.R. 4222, that on similar facts the relevant relationship was "unfair" within the meaning of section 140A of the Consumer Credit Act 1974, giving rise to the possibility of a remedial order under section 140B.
- 3) Canada Square continued not to tell Mrs Potter about the commission.
- 4) On 14 December 2018 Mrs Potter began proceedings in the County Court, seeking remedial orders.
- 5) Canada Square admitted that it had not disclosed the fact that it would receive commission in respect of the policy, but pleaded limitation.
- 6) Mrs Potter invoked section 32 of the Limitation Act 1980. She asserted both that

Canada Square had [section 32(1)(b)] deliberately concealed from her the facts of its commission and amount, and that it had owed her a duty to tell her, which it had [section 32(2)] deliberately breached.

- 7) The Court of Appeal decided that the claimant could rely on section 32(2) if she could show that the defendant realised that there was a risk that its failure to disclose the commission would make the relationship unfair and it was not objectively reasonable for it to take that risk.

The result in the Supreme Court

- > On the facts and correct understanding of the law, there had been deliberate concealment of a fact relevant to the claimant's right of action, and she was therefore entitled to proceed, having proved her case under section 32(1)(b).
- > It was conceded by Mrs Potter that it was not shown that in not disclosing the facts of its commission, the defendant knew or intended that it was committing a breach of duty. Accordingly, on the correct interpretation of section 32, the claimant had not made out her case under section 32(2).
- > Because Mrs Potter succeeded under section 32(1)(b) her claim was not time-barred.

Conclusion

In conclusion, in order to rely on section 32(1)(b) to extend time for limitation, a claimant must prove that there had been deliberate concealment, of a fact relevant to the right of action, by the defendant. Deliberate concealment occurred either if the defendant did indeed deliberately (advertently) conceal such a fact or if the defendant deliberately (advertently to the fact of it being a breach) committed a breach of duty in circumstances in which it is unlikely to be discovered for some time. Unless the defendant knew or intended to commit a breach of duty, a claimant cannot rely upon section 32(2). The test as to whether conduct has been deliberate is straightforward and it is not necessary or sufficient to prove recklessness on the part of the defendant. The history of cases since 2002 suggests nonetheless that claims pursuing remedies for historic breaches of duty may yet be argued to raise new questions. Attempts to argue again about the meaning of the word "deliberate" will not be welcome in the Supreme Court.

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Disclaimer: this article is not to be relied on as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.