



## Press Summary

15 November 2023

### Canada Square Operations Ltd (Appellant) v Potter (Respondent)

[2023] UKSC 41

*On appeal from [2021] EWCA Civ 339*

**Justices:** Lord Reed (President), Lord Hodge (Deputy President), Lord Kitchin, Lord Sales, Lord Lloyd-Jones

#### Background to the Appeal

The Limitation Act 1980 (“the **1980 Act**”) sets out the time limits (or limitation periods) for bringing different kinds of legal claims. Section 32(1)(b) postpones the commencement of the ordinary limitation period where any fact relevant to the claimant’s right of action has been “deliberately concealed” from them by the defendant. Section 32(2) provides that, for the purposes of section 32(1), “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.”

In this appeal, the Supreme Court is asked to clarify the meaning of the phrases “deliberately concealed” in section 32(1)(b) and “deliberate commission of a breach of duty” in section 32(2), so as to determine whether Mrs Potter’s claim against the defendant, Canada Square Operations Ltd (“**Canada Square**”), was issued too late and is therefore time barred. The meaning of “deliberate commission of a breach of duty” in section 32(2) is also considered in the judgment of the Judicial Committee of the Privy Council in *Primeo Fund v Bank of Bermuda (Cayman) Ltd* [2023] UKPC 40, handed down on the same date as the judgment in the present case.

On 26 July 2006, Mrs Potter entered into an agreement with Canada Square, then known as Egg Banking plc. The agreement was a credit agreement within the meaning of the Consumer Credit Act 1974 (“the **1974 Act**”). Mrs Potter borrowed £20,787.24 from Canada Square, comprising a cash loan of £16,953.00 and a payment protection premium of £3,834.24 (“the **premium**”). The premium related to Mrs Potter’s purchase of a payment protection insurance policy (“the **PPI Policy**”), which Canada Square arranged on her behalf. Over 95% of the premium was paid to Canada Square as commission on the sale of the PPI Policy. The sum paid to the insurer was only £182.50. Canada Square did not tell Mrs Potter about the commission. The agreement ended on 8 March 2010.

On 14 December 2018, Mrs Potter issued a claim against Canada Square, seeking to recover the amounts she had paid to Canada Square in respect of the PPI Policy, plus interest. Mrs Potter claimed that Canada Square's failure to disclose the substantial commission charged on the PPI Policy rendered the relationship between them "unfair" within the meaning of section 140A of the 1974 Act. She was therefore entitled to apply for the remedial orders set out in section 140B. Canada Square argued that it was too late for Mrs Potter to bring her claim, because section 9 of the 1980 Act imposed a six-year limitation period which had long expired. Relying on section 32, Mrs Potter contended that her claim was not time barred because the limitation period did not start to run until she found out about the commission after taking legal advice in November 2018.

The County Court held that section 32 applied, and therefore found for Mrs Potter. Canada Square's appeals to the High Court and the Court of Appeal were unsuccessful. The Court of Appeal held that both section 32(1)(b) and section 32(2) operated to postpone the commencement of the six-year limitation period, so Mrs Potter's claim is not time barred. Canada Square now appeals to the Supreme Court.

## **Judgment**

The Supreme Court unanimously dismisses Canada Square's appeal. It holds that Mrs Potter's claim is not time barred. This is because section 32(1)(b) of the 1980 Act postponed the commencement of the six-year limitation period until November 2018, when Mrs Potter was advised that the premium was likely to have included substantial commission. However, Canada Square's failure to disclose the commission was not a deliberate breach of duty for the purposes of section 32(2), so the Court of Appeal was wrong to hold that Canada Square was also deprived of a limitation defence by the operation of that section. Lord Reed gives the judgment, with which the other members of the Court agree.

## **Reasons for the Judgment**

**Issue 1: Did Canada Square deliberately conceal a fact relevant to Mrs Potter's right of action so that so that section 32(1)(b) of the 1980 Act postponed the commencement of the ordinary six-year limitation period for bringing her claim?**

A claimant who wishes to rely on section 32(1)(b) to defeat a Limitation Act defence must prove that there was a fact relevant to the claimant's right of action, which was deliberately concealed from her by the defendant. In this appeal, the Supreme Court is asked to clarify the meaning of the words "deliberately" and "concealed" in this context.

Beginning with the meaning of "concealed", the Supreme Court holds that a fact will have been concealed if the defendant has kept it secret from the claimant, either by taking active steps to hide it or by failing to disclose it. Contrary to previous Court of Appeal authority, the claimant does not need to establish that the defendant was under a legal, moral or social duty to disclose the fact, nor does she need to show that the defendant knew the fact was relevant to the claimant's right of action. All that is required is that the defendant deliberately ensures that the claimant does not know about the fact in question and so cannot bring proceedings within the ordinary time limit [67], [98]-[105], [109].

Turning to the meaning of "deliberately", the Supreme Court holds that the defendant's concealment of a relevant fact will be deliberate if the defendant intended to conceal the fact in question. The Court rejects the Court of Appeal's finding that "deliberately" can also mean "recklessly" in this context [106]-[109].

Applying this to the facts of the case, the existence and amount of Canada Square's commission on the PPI Policy were facts which were relevant to Mrs Potter's right of action

under section 140A of the 1974 Act, since she could not plead her case without knowing them. Canada Square deliberately concealed these facts from Mrs Potter by consciously deciding not to tell her about the commission. Section 140A was not in force when Canada Square initially decided not to disclose the commission. However, Canada Square continued to withhold the information from Mrs Potter after section 140A was brought into force, even though the agreement between Mrs Potter and Canada Square remained in force and the commission continued to be paid. Mrs Potter did not find out about the commission until November 2018, shortly before she issued her claim against Canada Square. There is no suggestion that, with reasonable diligence, she could have discovered the concealment any earlier. Accordingly, the requirements of section 32(1)(b) of the 1980 Act are met [154].

This means that Mrs Potter's claim against Canada Square is not time barred, because section 32(1)(b) of the 1980 Act postponed the commencement of the ordinary six-year limitation period for bringing her claim until November 2018.

## **Issue 2: Did Canada Square's conduct amount to a deliberate commission of a breach of duty for the purposes of section 32(2) of the 1980 Act?**

The Court of Appeal concluded that the creation of an unfair relationship within the meaning of section 140A of the 1974 Act amounted to a breach of duty by Canada Square for the purposes of section 32(2) of the 1980 Act. The issue before the Supreme Court is whether that breach of duty was deliberate.

The Supreme Court holds 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 [153], [155]. It rejects the submission that "deliberate" includes "reckless" so that a defendant could be said to commit a breach of duty deliberately if it realised that there was a risk that what it was doing might be a breach of duty and took that risk in circumstances where it was objectively unreasonable for it to do so, for four reasons. First, "deliberate" and "reckless" have different ordinary meanings and are used to mean different things in both judicial decisions and legislation [112]-[122]. Secondly, the case law supports the view that that recklessness is not sufficient to establish a deliberate breach of duty for the purposes of section 32(2) [123]-[133]. Thirdly, section 32 should not be construed as a restatement of the old law of concealed fraud [134]-[144]. Fourthly, interpreting "deliberate" to include "reckless" would be likely to result in practical problems [151]-[152].

Applying this to the facts, it has not been shown 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 of the 1974 Act. Accordingly, Canada Square's breach of duty was not deliberate. This means that Mrs Potter cannot rely on section 32(2) of the 1980 Act to postpone the commencement of the ordinary six-year limitation period for bringing her claim [155].

*References in square brackets are to paragraphs in the judgment.*

### **NOTE:**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [Decided cases - The Supreme Court](#)**