LIMITATION AND DELIBERATE CONCEALMENT AFTER CANADA SQUARE V POTTER [2021] EWCA CIV 339 ("CANADA SQUARE")

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Introduction

In *Canada Square* the Court of Appeal considered s.32(1)(b) and s.32(2) of the Limitation Act 1980, which extend limitation periods in cases of "deliberate concealment". The context was a claim under the Consumer Credit Act 1974 alleging an "unfair relationship" due to non-disclosure of payment protection insurance commission. However the decision is of far wider relevance. The Court held:

(i) S.32(1)(b) covers cases where any fact relevant to the claimant's right of action has been "deliberately concealed" from him by the defendant. There is no need to show "active concealment" of a fact relevant to the claimant's cause of action, nor to show the defendant was under a pre-existing legal duty to disclose it. It is enough that the defendant was under an obligation to disclose arising from "utility and morality", but deliberately failed to disclose.

(ii) An alternative to s.32(1)(b) is s.32(2), allowing the claimant to postpone limitation by showing deliberate commission of a breach of duty in circumstances where it is unlikely to be discovered for some time. The relevant "breach of duty" need not be contractual, tortious or fiduciary. Any "legal wrongdoing" giving rise to the claimant's right of action is sufficient.

(iii) For both s.32(1)(b) and s.32(2), the defendant's act or failure must be deliberate. That is satisfied by recklessness, in the *R v G and anor*[1] sense. It is enough that the defendant was aware of a risk (that he ought to disclose the fact, or that he had committed a breach of duty), and it was in the circumstances known to him objectively unreasonable to take that risk, but he continued regardless.

This last point is controversial: other cases appear to hold that the defendant must be aware of his wrongdoing, not just aware of a risk of the wrongdoing.

Legal Background

The Law Commission has described the purpose of limitation as being:[2]-

(a) To protect defendants from stale claims;

(b) To encourage claimants to institute proceedings without unreasonable delay and thus enable actions to be tried at a time when the recollection of witnesses is still clear; and

(c) To enable a person to feel confident, after a lapse of a given period of time, that an incident which might have led to a claim against him is finally closed.

That purpose is given effect by statutory rules requiring claims to be brought within a set period of the accrual of a cause of action. After that period, the defendant is entitled to certainty (statutes of limitation have been called "statutes of peace"[3]), and to defeat a claim by relying on no more than the passage of time.

Part II of the Limitation Act 1980[4] can qualify this certainty, and mitigate the potential harshness of the rules. It covers extensions to the statutory time

1 [2003] UKHL 50
2 Final Report on limitations of actions, 1977, Cmnd 6923, para 1.7.
3 Cave v Robinson, Jarvis & Rolf (a firm) [2003] 1 AC 384 at 390E.
4 References to section numbers hereafter are to sections of the Limitation Act 1980 unless otherwise stated.

limits found in Part I of that Act. One such extension is where a claim is based on the fraud of the defendant.[5] Another is where the claim is for relief from the consequences of a mistake of law or fact.[6] A third, and the subject of this article, is where the defendant has "deliberately concealed" any fact relevant to the claimant's right of action.[7] In all three cases, time does not run until the claimant discovered the fraud, concealment or mistake, or could with reasonable diligence have discovered it. Section 32 thus recognises the unfairness of time running against a claimant before he could reasonably be expected to bring his claim.

Canada Square

In 2006 Mrs Potter took out a loan with Canada Square for £16,953. When it offered the loan, Canada Square also suggested Mrs Potter take out payment protection insurance, which she did. Canada Square acted as the insurance intermediary in relation to that insurance and received commission. The amount of the commission was over 95% of the sum Mrs Potter was told she was paying for the insurance. This fact was not disclosed to Mrs Potter.

Mrs Potter made the payments required of her and the agreement ended in 2010. In 2014 the Supreme Court ruled[8] that non-disclosure of a very high commission charged to a borrower made the relationship between the creditor and borrower 'unfair' within the meaning of section 140A of the Consumer Credit Act 1974 ("s.140A").

In December 2018 Mrs Potter brought proceedings against Canada Square, relying on s.140A. She relied on s.32(1)(b) and s.32(2) as postponing the running of time until she discovered the commission.

Analysis

As noted in the Introduction, the Court of Appeal (Sir Julian Flaux C., Males LJ and Rose LJ) held that for s.32(1)(b) there did not need to be active concealment of the fact in question. Rose LJ said that *"inherent in the concept of "concealing" something is the existence of some obligation to disclose it"*, but that the obligation need not arise from a pre-existing legal duty. It could arise "from a combination of utility and morality", as had occurred in a case called The Kriti Palm.[9] In that case the majority in the Court of Appeal held that a party that had been instructed to certify the quality of a cargo, who later learns of a material inaccuracy in his certificate, is obliged as a matter of "common sense" to disclose it. For Canada Square, the obligation to act fairly that was imposed by s.140A was a sufficient obligation to disclose for s.32 purposes.

Turning to s.32(2), the Court discussed the phrase "commission of a breach of duty" and followed the insolvency case of *Giles v Rhind and anor* (No. 2) [2008] EWCA Civ 118 in holding that the breach did not need to be a breach of contract, in tort or of fiduciary duties. A "legal wrongdoing" was enough. In Giles it was held that a claim under s.423 of the Insolvency Act 1986 was a claim for "breach of duty" within s.32(2), given "the context of a debtor's responsibilities to his creditors generally". Following that approach, the creation of an unfair relationship under s.140A was a "breach of duty."

The most controversial conclusion the Court reached is likely to be on the meaning of "deliberate". The parties agreed that it meant the same in s.32(1)(b) and 32(2). The Court held that it meant reckless, with both a subjective and an objective element. It adopted the approach of Lord Bingham in *R v G and anor*[10]: a person acts recklessly with respect to a result when he is aware of the risk that it will occur and it is, in the circumstances known to him, unreasonable to take that risk. It reached this conclusion by holding (i) there is no natural meaning of "deliberate" in this context, (ii) the case law was inconclusive, (iii) recklessness was enough for the doctrine of "concealed fraud" pre-1980, and s.32 was not intended to be any more restrictive for the claimant than the previous law as regards the mental element of the defendant's conduct.

Each of these three steps seems debatable. As to (i), "deliberate" may not have one natural meaning, but it is possible to say that it does not naturally mean the same as reckless. This is particularly so as what must be construed is a phrase in s.32: "deliberately concealed" or "deliberate commission". In that context, "deliberate" imparts a sense of the concealment or commission being an intended consequence as opposed to an unintended result. As to (ii), Lord Scott in Cave v Robinson Jarvis & Rolf[11] said that deliberate commission of a breach of duty is to be contrasted with a breach "that the actor was not aware he was committing". He considered that the defendant must know he was committing a breach, or intend to do so, for s.32(2) to apply. As to (iii), reliance on the pre-1980 law must be secondary to the words of s.32 itself.

The case seems destined for the Supreme Court. The case law is unclear and the point is one of real importance. As Rose LJ said, *"it is unlikely that Canada Square are pursuing this appeal for the sake of the £7,953 they may owe to Mrs Potter".* ***The ramifications of a "recklessness" test are very significant. If a board of directors receives advice that a proposed course of conduct poses a 15% risk of breaching a contract, and the circumstances are such that either any breach is unlikely to be discovered for some time, or there might be said to be an obligation in "utility and morality" to tell the counterparty, can the directors safely proceed without disclosing? Their company would appear unable to rely on a limitation defence unless a court later concludes that it was objectively reasonable for them to act as they did. If a company in insolvency pursues a director for breach of duty, can it postpone limitation if the director was aware of a risk he was in breach because a director's failure to disclose actual knowledge of his breach has been held to fall within s.32(1)(b).[12] This seems a long way from the certainty for defendants that limitation is supposed to advance.***

5 S.32(1)(a).
6 S.32(1)(c), recently considered by the Supreme Court in the FII Group litigation [2020] UKSC 47.
7 S.32(1)(b).
8 In *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61.
9 *AIC Ltd v ITS Testing Services (UK) Ltd* [2006] EWCA Civ 1601.
10 [2003] UKHL 50.
11 [2003] 1 AC 384.
12 *IT Human Resources plc v Land* [2014] EWHC 3812 (Ch) at [134-5].

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