


# Deliberate concealment as a defence to limitation – Canada Square v Potter

15 December 2023  Tim Johnson

The Supreme Court recently handed down its highly anticipated judgment in *Canada Square Operation Ltd v Potter* [2023] UKSC 41. The case considered the meaning of “deliberately concealed” and “deliberate commission of a breach of duty” in the context of section 32 of the Limitation Act 1980 (the **Act**).

## Background

Mrs Potter took out a loan and a PPI Policy in 2006 with Canada Square. She was not informed that Canada Square would receive 95% of the policy’s premium as commission.

The loan agreement came to an end in March 2010 and in November 2018 Mrs Potter was informed of the commission. She brought a claim to recover the sums she had paid on the basis of a failure to disclose the commission, which resulted in the relationship being unfair under section 140A of the Consumer Credit Act 1974.

Canada Square argued that as the six-year limitation period under the Act had expired, a claim could not be brought. Mrs Potter relied on section 32(1)(b) and 32(2) of the Act arguing that the limitation period did not run until she learned of the commission.

Under section 32(1)(b) of the Act, where any fact relevant to the claimant’s pleading of a claim has been “deliberately concealed” by the defendant, the limitation period will not run. Furthermore, section 32(2) states that “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”.

## Judgement

The Supreme Court unanimously dismissed Canada Square’s appeal. The court considered the meaning of “concealed” and “deliberately” including whether “deliberately” could also mean “recklessly”.

Lord Reed stated that “deliberately” and “concealed” would be given their ordinary meanings. Deliberate concealment could be understood as keeping “a secret from the claimant, either by taking active steps to hide it or by failing to disclose it”. However, Lord Reed rejected the notion that “deliberately” could also mean “recklessly” in this circumstance. Therefore, the defendant’s concealment does not extend to reckless intention.

Departing from the previous Court of Appeal decision, the claimant is not required to show that the defendant had a moral or social duty to disclose the information. They also do not have to show that the defendant was aware that the fact was relevant for the claimant’s cause of action.

The Supreme Court rejected the argument of “deliberate commission of a breach of duty” under section 32(2) on the basis that it had not been demonstrated that Canada Square intended its failure to disclose to result in the relationship’s unfairness under section 140A of the Consumer Credit Act 1974. Despite this, the appeal was dismissed as section 32(1)(b) was fulfilled.

## Comment

As Canada Square v Potter was a test case, there will likely now be an increase in the number of PPI claims that were previously considered to be time barred. There are currently approximately 26,000 similar and active claims that may be impacted by this decision. This judgment could also have wider significance to undisclosed commission cases where similar scenarios arise.

However, the flurry of cases might be limited due to the previous landmark case of Plevin v Paragon Finance Limited [2014] UKSC 61 which also dealt with undisclosed commissions and PPI. The parties in Potter did not consider 'discovery of the relevant fact' through reasonable diligence. However, due to **Plevin's** high media coverage, banks could argue that claims issued from 2020 onwards should remain time barred as through reasonable diligence as they could have discovered the concealment. We doubt this is the last we have heard of the PPI mis-selling saga.

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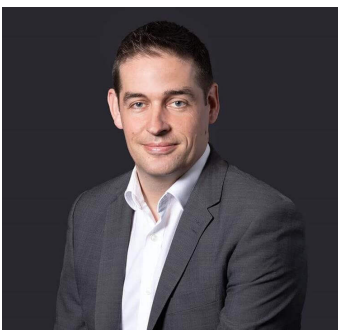
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