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Case No: A2/2020/0759

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR JUSTICE JAY
[2020] EWHC 672 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/03/2021

Before:

SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE MALES
and
LADY JUSTICE ROSE DBE

- -

Between:

CANADA SQUARE OPERATIONS LTD	**Appellant**
- and –	
MRS BEVERLEY POTTER	**Respondent**

- -
- -

Charles Kimmins QC, Sean Snook and Patrick Dunn-Walsh (instructed by **Hogan Lovells International LLP**) for the **Appellant**
Robert Weir QC and Jonathan Butters (instructed by **HD Law Ltd**) for the **Respondent**

Hearing dates : 19, 20 and 21 January 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 11 March 2021 at 10.30 a.m.

Lady Justice Rose:

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I. INTRODUCTION

1. On 26 July 2006 the Respondent, Mrs Potter, took out a regulated fixed-sum loan with the Appellant ('Canada Square') for £16,953. The loan was repayable over 54 months at an annual interest rate of 7.9% so that the monthly instalments to pay both the interest and the principal were £372.18 and the total sum repaid was £20,097. When they offered her the loan, Canada Square suggested to Mrs Potter that she take out insurance under a payment protection insurance ('PPI') policy with an insurer in

the AXA group to ensure that the loan was repaid if she became unable to make the payments herself. Canada Square was the insurance intermediary arranging this policy on Mrs Potter's behalf with AXA.

2. The 'Key Financial Information' set out in the documentation given to Mrs Potter by Canada Square said that the 'payment protection premium lent' was £3,834. That sum was added to the loan and was also repayable at the same interest rate over 54 months, making the total payment for the insurance policy £4,545. What Mrs Potter was not told was that only a very small percentage, about 4.7%, of the payment protection premium lent, was the actual premium paid by her to AXA for the policy. The premium for the insurance policy was only £182.50 so that over 95% of the £3,834 that she paid for the PPI policy, and hence a substantial proportion of the £711 interest she paid on the loan of that sum, was paid to Canada Square as its commission on the sale of the policy.

3. Mrs Potter completed the payments under the agreement early and the agreement came to an end on 8 March 2010.

4. In November 2014 the Supreme Court handed down its judgment in *Plevin v Paragon Personal Finance Limited* [2014] UKSC 61, [2014] 1 WLR 4222. The Court held, on facts similar to those of Mrs Potter's case, that the 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 ('section 140A'). Section 140A provides that the court may determine that the relationship between a creditor and a debtor arising out of a credit agreement is unfair to the debtor because of, amongst other things, anything done or not done by the creditor either before or after the making of the agreement.

5. In April 2018 Mrs Potter complained to Canada Square that the PPI policy had been mis-sold to her. She received compensation amounting to some £3,160 but that did not cover all her loss. In November 2018 Mrs Potter consulted solicitors and on 14 December 2018 she brought proceedings in the County Court to recover the balance of the premium she had paid together with interest, relying on section 140A. She pleaded that had Canada Square told her about the commission, she would not have allowed the policy to be linked with the loan. She alleged that the relationship arising out of the loan was unfair because Canada Square had failed to disclose the commission and because the commission was excessive and/or extortionate. In its Defence, Canada Square admitted that it had not disclosed the fact that it would receive commission in respect of the policy but averred that Mrs Potter's claim was time barred under section 9(1) of the Limitation Act 1980 ('the LA 1980') because it had been brought more than six years after the relationship between the parties had ended.

6. In her reply, Mrs Potter relied on section 32 of the LA 1980 as postponing the start of the limitation period until she had found out about the commission. Section 32 contains two routes by which Mrs Potter might be able to proceed with her claim. Section 32(1)(b) provides that where any fact relevant to the claimant's right of action has been deliberately concealed from her by the defendant, the period of limitation does not begin to run until the claimant has discovered the concealment or could with reasonable diligence have discovered it. Section 32(2) provides that for the purposes of section 32(1)(b), deliberate commission of a breach of duty in circumstances where

it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty. Mrs Potter pleaded reliance on both limbs of section 32. She pleaded that Canada Square had deliberately concealed facts relevant to her cause of action within the meaning of section 32(1)(b), in particular the receipt of commission from the insurer and/or the amounts or levels of that commission. She pleaded further:

> "… it is averred that such concealment was deliberate on the basis that [Canada Square] can be presumed to have made a commercial decision not to inform customers of such commission payments in all likelihood because such information would undermine their customers' assessment of the value for money of the Policy and/or cause them, the customers, to decline to purchase it. In the premises it is averred that the concealment by [Canada Square] was unconscionable.
>
> Further or alternatively in receiving a commission from the Insurer without the Claimant's knowledge as to the payment or the amount thereof, [Canada Square] committed a deliberate breach of duty in circumstances in which it was unlikely to be discovered for some time within the meaning of section 32(2) LA which amounts to a deliberate concealment of the facts involved in that breach of duty for the purposes of section 32(1)(b) of the Act."

7. Initially Canada Square denied that the size of the commission received by it was sufficiently large that Mrs Potter's ignorance of it rendered the relationship unfair. This point was later conceded by Canada Square. The quantum of Mrs Potter's claim was agreed at £7,953 and the claim was allocated to the Small Claims Track by notice dated 8 June 2019.

8. The claim came before Recorder Murray Rosen QC in August 2019, by which time the sole issue was whether Mrs Potter's claim was time barred. Mrs Potter made a witness statement for the hearing that was not challenged. No evidence was offered by Canada Square. The Recorder accepted Mrs Potter's evidence that Canada Square had never mentioned commission to her at the time the PPI policy was sold to her and that she did not become aware that they were likely to have received or retained commissions that were excessive until she received advice from her solicitors in November 2018. He held, for reasons that I will describe further below, that Mrs Potter's claim was not time barred and gave judgment for her. Canada Square appealed and the appeal was heard by Jay J. He dismissed the appeal, following a judgment handed down on 20 March 2020: [2020] EWHC 672 (QB). He held that Mrs Potter could not rely on section 32(1)(b) by itself but that she could rely on section 32(2) of the LA 1980.

9. The issues raised in Canada Square's appeal from Jay J's order to this court and in Mrs Potter's respondent's notice are broadly those raised before Recorder Rosen and Jay J. Can Mrs Potter rely on either section 32(1)(b) or section 32(2) to postpone the start of the limitation period so that her claim has been brought in time?

II. THE LAW

(a) The Consumer Credit Act 1974

10. Sections 140A to 140D of the Consumer Credit Act 1974 ('CCA') were inserted into that Act by the Consumer Credit Act 2006, replacing the original provisions about extortionate credit bargains. Section 140A applies to all credit agreements, not just those which are otherwise regulated by the CCA. It provides as follows:

> "**140A Unfair relationships between creditors and debtors**
>
> (1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following —
>
> (a) any of the terms of the agreement or of any related agreement;
>
> (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
>
> (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).
>
> (2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).
>
> (3) For the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor.
>
> (4) A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended.
>
> …"

11. Section 140B sets out the orders that the court may make on finding that a credit relationship is unfair. These include requiring the creditor to repay sums paid by the debtor, reducing or discharging any sum payable by the debtor, setting aside any duty imposed on the debtor or altering the terms of the agreement. Section 140C defines the various terms used in sections 140A and B.

12. Sections 19, 20 and 21 of the 2006 Act, which inserted respectively sections 140A, 140B and 140C into the CCA, were brought into effect on 6 April 2007. Schedule 3 to the 2006 Act, at para 14, provided that the court may make an order under section 140B in connection with a credit agreement made before the commencement of the new provisions but only as from 6 April 2008. In other words, the provisions applied to all agreements entered into as from April 2007 but to existing agreements only as from April 2008.

13. The 2006 amendments to the CCA included a section 140D which was removed in 2013. Section 140D provided that the Office of Fair Trading ('the OFT') could publish advice and information under its powers in the Enterprise Act 2002 to indicate how it expected sections 140A to 140C to interact with the enforcement powers conferred on the OFT under Part 8 of the Enterprise Act. Those provisions in the Enterprise Act empower a number of regulators including the OFT to apply to the High Court under section 215 of that Act for an enforcement order against a company which the OFT thinks has engaged in conduct which contravenes one of a number of specified enactments, including the CCA, and which has harmed the collective interests of consumers.

14. The OFT published its initial guidance pursuant to section 140D in December 2006 and updated that guidance in May 2008 when it published OFT854. The guidance described the unfair relationships test, noting that the CCA did not define an unfair relationship beyond setting out in general terms the classes of factors which can give rise to such a relationship. This, the OFT said, "provides the courts with maximum flexibility in considering unfairness, and avoids unduly constraining them in individual cases" (para 3.12). The OFT referred to the regulatory framework governing some of the credit relationships covered by section 140A but emphasised at a number of points in the guidance that for the purposes of section 140A, it was immaterial whether the practice in question was itself a breach of the law or might be actionable as such. A court might, however, have regard to whether the practice has been identified as unfair in the past, whether by a court or in a regulatory context.

(b) The ICOB Rules

15. Canada Square undertook two roles in its relationship with Mrs Potter. First, it was the lender of the money to Mrs Potter and secondly, it was the insurance intermediary between Mrs Potter and AXA which issued the PPI policy. In that second role it was at the relevant time regulated by the Financial Services Authority ('the FSA') (renamed the Financial Conduct Authority in 2013). The FSA was the competent authority designated by the United Kingdom for the purposes of registering and regulating insurance intermediaries pursuant to Directive 2002/92/EC on insurance mediation (2003 Official Journal L 9/3).

16. The Directive harmonised the registration requirements for insurance intermediaries across the EU in order to remove barriers for those trying to establish themselves in a different Member State. It deals with a wide range of insurance policies, not only PPI policies. Most of the provisions deal with the harmonised registration requirements, but Chapter III provides for the information which must be provided by the insurance intermediary to the customer. The Directive focuses on information aimed at ensuring that the customer understands whether the insurance intermediary is tied to selling the products of only one insurer or whether it is able to offer products from a

range of insurers, giving the customer some comfort that the insurance intermediary has 'shopped around' on his behalf to find the best policy. Article 12.5 provides that Member States may maintain or adopt stricter provisions regarding the information requirements, provided that such provisions comply with EU law. The deadline for transposing the Directive into UK law was 15 January 2005.

17. In December 2002, in anticipation of the transposition of the Directive, the FSA issued a document called *Insurance selling and administration: the FSA's high level approach to regulation* (CP160). This was the first step to developing the rules by which the FSA would play its part in the implementation of the Directive. In the Chapter called 'Fair treatment', the FSA set out its proposals for ensuring the fair treatment of customers when they are sold insurance contracts. It recognised potential detriment for customers from poor value purchases arising from commission-driven sales and from expensive fees or charges. The FSA therefore set out its thinking on various ways to minimise such detriments, including by requiring the disclosure of commission. The FSA noted that if the insurance intermediary was the customer's agent, then the customer could ask it, as a fiduciary, to disclose any commission received from the product provider. At para. 11.6, the FSA said they had considered whether they should make a rule that commission should be disclosed even where the insurance intermediary was not the agent of the customer and the customer did not ask for it. At para 11.7, the FSA set out two reasons why the FSA thought that such a rule was not necessary. The first was that the commission did not affect the level of cover provided and that was known upfront. The second was that proposed rules did require disclosure of the total cost of the insurance separate from the cost of the loan (so in Mrs Potter's case the cost of £3,834 was shown separately from the cost of the credit on the loan). This, the FSA thought, made it easier for customers to compare policies and spot poor value products. The FSA went on to describe the drawbacks and costs involved in requiring firms to disclose commissions to private customers. It might confuse customers, making it more difficult for them to shop around and it might cause information overload. The FSA invited consultees to comment on the proposal that they would not introduce rules on commission disclosure for transactions involving private customers. They stated that they would keep this under review in the light of their supervision and monitoring work and might decide to consult on a rule requiring commission disclosure at a later date.

18. The FSA published its response to consultees in June 2003 (CP187). This set out the feedback it had received from CP160 and contained the draft rule book proposed to regulate insurance intermediaries. At Chapter 8 of CP187, the FSA recorded that nothing in the responses to CP160 had caused them to change their view that the rules should not require disclosure of commission because their other product disclosure requirements were likely to be sufficient to mitigate the risks to customers. In particular, the rules would require the premium for insurance (which it was assumed would incorporate the commission) to be shown separately from the charges for other goods and services being sold at the same time.

19. In January 2004, the FSA published Policy Statement 04/1 ('PS04/1') setting out its feedback on CP187 and the final, made, text of the Insurance Conduct of Business Sourcebook ('the ICOB Rules'). Rule 4.6 provided that if asked by a commercial rather than private customer, the intermediary must promptly disclose any commission received. But from the start to the end of the credit relationship between

Mrs Potter and Canada Square, there was no rule binding Canada Square as an insurance intermediary to disclose the commission it received to Mrs Potter.

(c) The case law on section 140A

20. The two main authorities on the non-disclosure of commission and section 140A are *Harrison v Black Horse Ltd* [2011] EWCA Civ 1128, [2012] E.C.C. 7 ('*Harrison*') which was then overruled by *Plevin v Paragon Personal Finance Ltd and another* [2014] UKSC 61, [2014] 1 WLR 4222 ('*Plevin*').

21. In *Harrison*, the debtors had bought a PPI policy from the defendant lender and sought to recover what they had paid under section 140B CCA. They had not been told that the lender was going to receive a substantial commission from the insurer amounting to 87% of the total PPI premium of £10,200. Tomlinson LJ (with whom Lord Neuberger MR and Patten LJ agreed) referred to concern about the conduct of lenders selling PPI as having been rife for some years and to the changes in the landscape that had occurred as a result. However, the court there was considering a loan and PPI policy sold in 2006. He also emphasised that the ambit of the complaint in Mr and Mrs Harrison's case was very narrow compared with the large number of common types of failings in PPI policy sales. Their complaint focused on a single aspect of the transaction which had not attracted regulatory comment, namely the failure to disclose the fact and size of the commission.

22. Tomlinson LJ referred to OFT 854, including the OFT's statement that regulatory standards were relevant to, but not determinative of, the question whether a practice was unfair. He said that the guidance was significant because it pointed one in the direction of the regulatory framework specific to the transaction in question. He noted that there was at the relevant time no regulatory guidance specific to selling PPI but the sale was subject to the ICOB Rules introduced in 2005. He then set out the background to the ICOB Rules and the Directive. He set out paragraphs 11.6 and 11.7 of the FSA's document, CP160, explaining why they had decided not to require the disclosure of commission. Much of the rest of his judgment was directed at considering whether or not there had been a breach of any ICOB Rules by Black Horse and concluding that there had not. He then turned to consider whether the level of commission was so egregious that it gave rise to a conflict of interest which it was the lender's duty to disclose. He said:

> "58. In the absence of an explanation such as an element of cross-subsidy the commission here is on any view quite startling and there will be many who regard it as unacceptable conduct on the part of lending institutions to have profited in this way. I struggle however to spell out of the mere size of the undisclosed commission an unfairness in the relationship between lender and borrower. Moreover the touchstone must in my view be the standard imposed by the regulatory authorities pursuant to their statutory duties, not resort to a visceral instinct that the relevant conduct is beyond the Pale. In that regard it is clear that the ICOB regime after due consultation and consideration does not require the disclosure of the receipt of commission. It would be an anomalous result if a lender was obliged to disclose receipt of a commission in

> order to escape a finding of unfairness under s.140A of the Act but yet not obliged to disclose it pursuant to the statutorily imposed regulatory framework under which it operates."

23. In *Plevin* the basic facts were similar to those in *Harrison* and in Mrs Potter's case. Some 71% of the PPI cost paid by the claimant was made up of commission not disclosed by the lender to the claimant. The Supreme Court held that this did make the relationship unfair within the meaning of section 140A. Lord Sumption JSC gave the judgment with which the other four Justices agreed. Having described the regulatory framework and the relevant ICOB Rules, Lord Sumption said that it was clear that the absence of a statutory obligation to disclose commissions to a non-commercial customer was the result of a considered policy of the FSA: [15]. He described the relevance of that to the issue raised by section 140A – and the limits of that relevance – as follows:

> "17 The view which a court takes of the fairness or unfairness of a debtor-creditor relationship may legitimately be influenced by the standard of commercial conduct reasonably to be expected of the creditor. The ICOB Rules are some evidence of what that standard is. But they cannot be determinative of the question posed by section 140A, because they are doing different things. The fundamental difference is that the ICOB Rules impose obligations on insurers and insurance intermediaries. Section 140A, by comparison, does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with the question whether the creditor's relationship with the debtor was unfair. It may be unfair for a variety of reasons, which do not have to involve a breach of duty. There are other differences, which flow from this. The ICOB Rules impose a minimum standard of conduct applicable in a wide range of situations, enforceable by action and sounding in damages. Section 140A introduces a broader test of fairness applied to the particular debtor-creditor relationship, which may lead to the transaction being reopened as a matter of judicial discretion. The standard of conduct required of practitioners by the ICOB Rules is laid down in advance by the Financial Services Authority (now the Financial Conduct Authority), whereas the standard of fairness in a debtor-creditor relationship is a matter for the court, on which it must make its own assessment. Most of the ICOB Rules, including those relating to the disclosure of commission, impose hard-edged requirements, whereas the question of fairness involves a large element of forensic judgment. It follows that the question whether the debtor-creditor relationship is fair cannot be the same as the question whether the creditor has complied with the ICOB Rules, and the facts which may be relevant to answer it are manifestly different. An altogether wider range of considerations may be relevant to the fairness of the

> relationship, most of which would not be relevant to the application of the rules. …"

24. Lord Sumption held that the non-disclosure of the commissions made Mrs Plevin's relationship with Paragon unfair. He referred to her evidence that if she had been told that 71.8% of the premium would be paid out in commissions she would have "certainly questioned this". Lord Sumption said that the information "was of critical relevance":

> "Any reasonable person in her position who was told that more than two thirds of the premium was going to intermediaries, would be bound to question whether the insurance represented value for money, and whether it was a sensible transaction to enter into. The fact that she was left in ignorance in my opinion made the relationship unfair."

25. On that footing, the Supreme Court overruled *Harrison*, deciding that the non-disclosure of the amount of the commission was the responsibility of Paragon; they could have disclosed this to Mrs Plevin and, given its significance for her decision: "in the interests of fairness it would have been reasonable to expect them to do so": [20].

(d) The Limitation Act 1980

26. The parties are agreed that for the purposes of section 1 of the LA 1980, the ordinary time limit applicable to Mrs Potter's claim is that set by section 9(1) for sums recoverable by statute. That is six years from the date on which the cause of action accrued. In *Patel v Patel* [2009] EWHC 3264 (QB), [2010] 1 All ER (Comm) 864, George Leggatt QC (sitting as a deputy High Court Judge) considered when the limitation period begins to run for the relief available under section 140B. He held that that the debtor's cause of action was a continuing one which accrued from day to day until the relevant relationship ended. If the relationship had ended before the claim was brought, the determination of whether the relationship was unfair should be made as at the date when the relationship had ended. Subject to section 32, therefore, the limitation period for Mrs Potter's claim expired six years after the completion of the relationship, that is in March 2016.

27. Section 32 of the LA 1980 provides as follows:

> "**32. Postponement of limitation period in case of fraud, concealment or mistake**.
>
> (1) …, 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.
>
> References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.
>
> (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."

28. The aim of section 32 has been variously described as intended to ensure that the limitation period does not bar a plaintiff whose ignorance of the relevant facts is due to the improper actions of the defendant or as describing a situation where, if the defendant is not sued earlier, he has only himself to blame.

29. Mr Kimmins, appearing for Canada Square, argued as a general point that section 32 of the LA 1980 should be interpreted restrictively because it is an exception to the running of time. The courts should not encourage or facilitate the trial of stale actions. I do not accept that as a matter of general principle. The LA 1980, like the many Limitation Acts before it, strikes a balance between the competing aims of protecting defendants from stale claims but allowing claimants to overcome the expiry of the ordinary time limit where the statute so provides. This was explained recently by the Supreme Court in describing the rationale behind section 32(1)(c) in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2020] UKSC 47, [2020] 3 WLR 1369 ('*FII*'):

> "228. … First, section 32(1)(c), like the equitable rule which preceded it, necessarily qualifies the certainty otherwise provided by limitation periods. It means that the 1980 Act does not pursue an unqualified goal of barring stale claims: its pursuit of that objective is tempered by an acceptance that it would be unfair for time to run against a claimant before he could reasonably be aware of the circumstances giving rise to his right of action."

30. That in my view applies equally to section 32(1)(b) and section 32(2).

31. The reference in that passage from *FII* to the equitable rule which preceded section 32 is to section 26 of the Limitation Act 1939 ('the old section 26'). That provided as follows:

> "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) the right of action is concealed by the fraud of any such person as aforesaid, 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 or mistake, as the case may be, or could with reasonable diligence have discovered it."

32. The meaning of the phrase "concealed by ... fraud" in the old section 26 proved problematic and I will need to consider some of the cases which addressed that concept later. The way that the courts construed the old section 26 in those cases led to the test departing so far from the language of the provision that, in *Tito v Waddell (No. 2)* [1977] Ch 106, Sir Robert Megarry V-C commented that:

> "as the authorities stand, it can be said that in the ordinary use of language, not only does "fraud" not mean "fraud" but "concealed" does not mean "concealed" since any unconscionable failure to reveal is enough."

33. Following a report in 1977 by the Law Reform Committee, the Limitation Amendment Act 1980 inserted a new section 26 into the 1939 Act. That new section 26 was in the same terms as what became section 32 when the Limitation Acts came to be consolidated in the LA 1980.

(e) The main authorities on section 32

34. We were referred to a large number of authorities on the application of section 32. Some of them are relevant to more than one issue arising in these appeals so it is convenient to describe them here in general terms, though I will need to focus more closely on specific passages in them in due course. They are:

    i) *Sheldon & ors v R. H. M. Outhwaite (Underwriting Agencies) Ltd & ors* [1996] 1 AC 102 ('*Sheldon*');

    ii) *Cave v Robinson Jarvis & Rolf (a firm)* [2002] UKHL 18, [2003] 1 AC 384 ('*Cave*');

    iii) *Williams v Fanshaw Porter & Hazelhurst (a firm)* [2004] EWCA Civ 157, [2004] 1 WLR 3185 ('*Williams*'); and

    iv) *AIC Ltd v ITS Testing Services (UK) Ltd: The Kriti Palm* [2006] EWCA Civ 1601, [2007] 1 All ER (Comm) 667 ('*The Kriti Palm*').

35. In *Sheldon* the claimants were members of a Lloyd's syndicate managed by the defendants. They brought proceedings more than six years after the events giving rise to the claim, alleging breach of contract, breach of fiduciary duty and negligence. The causes of action had arisen in 1982, but the claimants asserted that in 1984 the defendants had deliberately concealed the facts relevant to the cause of action so that time did not start to run until after the claimants discovered the concealment. The question at issue was whether they could rely on deliberate concealment which occurred after the accrual of the cause of action, and hence whether the effect of section 32 was to suspend the running of the limitation period between the date of the concealment and the date on which it could reasonably have been discovered, or rather to restart the running of the limitation period as from the latter date. The House

of Lords held that the terms of section 32(1)(b) were wide enough to cover both the case where the concealment was contemporaneous with the accrual of the cause of action and the case where the concealment occurred some time later: see *per* Lord Keith of Kinkel at p. 140G. Further, the effect of section 32 was that the full limitation period was restarted as from the actual or deemed discovery of the concealment, even though some part of the ordinary time limit had already expired prior to the act of concealment.

36. *Cave* concerned an issue of more direct relevance to the present appeal. The claimant brought proceedings against his former solicitors for negligence in failing properly to draw up documents granting him mooring rights. The transaction was completed in March 1989. In February 1994, within the limitation period, he was informed by the grantor of the rights that the rights were no longer exercisable. The claimant wrote to the solicitors in November 1995 and thereafter but got no answer. He launched proceedings in January 1998 relying on the defendants' failure to answer his letters as constituting deliberate concealment. He accepted that the negligent drafting of the agreement was not done in the knowledge that it was a breach of duty. The issue before the House of Lords was whether the words 'deliberate concealment of a breach of duty' in section 32(2) merely required that the act or omission giving rise to the breach of duty had been deliberate or whether the fact that it amounted to a breach of duty had also to be deliberate. The earlier case of *Brocklesby v Armitage & Guest (Note)* [2002] 1 WLR 598 had held that ignorance of the law was no excuse and that, since in general a person is assumed to know the legal consequences of his actions, provided that the conduct was deliberate it was not necessary to establish that the defendant was aware that his conduct was a breach of duty. The House of Lords in *Cave* overruled that decision and held that it was not enough to establish that the solicitors had deliberately drafted the mooring grant documents, if they had not also done so with an awareness that they were thereby committing a breach of their duty to the claimant.

37. There were two principal speeches in *Cave*, that of Lord Millett (with whom Lord Mackay of Clashfern and Lord Hobhouse of Woodborough agreed) and that of Lord Scott of Foscote (with whom Lord Mackay and Lord Hobhouse also agreed together with Lord Slynn of Hadley). Lord Millett explained why section 32(2) had been included in the LA 1980 once the concept of deliberate concealment had been substituted for 'concealed fraud' in the old section 26:

> "23. … With all reference to fraud or conscious impropriety omitted, there was an obvious risk that "deliberate concealment" might be construed in its natural sense as meaning "active concealment" and not as embracing mere non-disclosure. Section 32(2) was therefore enacted to cover cases where active concealment should not be required. But such cases were limited in two respects: first, the defendant must have been guilty of a deliberate commission of a breach of duty; and secondly, the circumstances must make it unlikely that the breach of duty will be discovered for some time.
>
> 24. Given that section 32(2) is (or at least may be) required to cover cases of non-disclosure rather than active concealment, the reason for limiting it to the deliberate commission of a

> breach of duty becomes clear. It is only where the defendant is aware of his own deliberate wrongdoing that it is appropriate to penalise him for failing to disclose it."

38. Lord Scott also examined the earlier case law, concluding that it established that a merely negligent act was insufficient to enable the benefit of the section to be claimed: [41]. He also concluded that *Brocklesby* was wrong. He held as follows:

> "58. … The relevant words in section 32(2) are "deliberate commission of a breach of duty … amounts to deliberate concealment of the facts involved in that breach of duty." These are clear words of English. "Deliberate commission of a breach of duty" is to be contrasted with a commission of a breach of duty which is not deliberate, ie, a breach of duty which is inadvertent, accidental, unintended - there are a number of adjectives that can be chosen for the purpose of the contrast, and it does not matter which is chosen. Each would exclude a breach of duty that the actor was not aware he was committing."

39. There must, Lord Scott held, be an intended concealment. He described the relationship between section 32(1)(b) and section 32(2) as follows:

> "60. … A claimant who proposes to invoke section 32(1)(b) in order to defeat a Limitation Act defence must prove the facts necessary to bring the case within the paragraph. He can do so if he can show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by a withholding of relevant information, but, in either case, with the intention of concealing the fact or facts in question. In many cases the requisite proof of intention might be quite difficult to provide. The standard of proof would be the usual balance of probabilities standard and inferences could of course be drawn from suitable primary facts but, nonetheless, proof of intention, particularly where an omission rather than a positive act is relied on, is often very difficult. Subsection (2), however, provides an alternative route. The claimant need not concentrate on the allegedly concealed facts but can instead concentrate on the commission of the breach of duty. If the claimant can show that the defendant knew he was committing a breach of duty, or intended to commit the breach of duty - I can discern no difference between the two formulations; each would constitute, in my opinion, a deliberate commission of the breach - then, if the circumstances are such that the claimant is unlikely to discover for some time that the breach of duty has been committed, the facts involved in the breach are taken to have been deliberately concealed for subsection (1)(b) purposes. I do not agree with [counsel for the claimant] that the subsection, thus construed, adds nothing. It provides an alternative, and in some cases what may well be an

> easier, means of establishing the facts necessary to bring the case within section 32(1)(b)."

40. The case of *Williams* also involved a negligent solicitor. The claimant instructed the defendant firm to act for her in a professional negligence claim against a doctor. In August 1994, a trainee solicitor, Mr Brown, handling the case negligently agreed to a consent order dismissing the claim against the doctor. An application made to the court in December 1994 to reinstate her claim was dismissed with a wasted costs order made against the solicitors. Mr Brown did not tell Ms Williams about the consent order or about the dismissal of the application to re-join the doctor. In November 1995, the firm issued a new claim against the doctor which was struck out in February 1996 as an abuse of process. An appeal against that strike out was dismissed in May 1996. The findings of facts by the court below as to when Mr Brown had first told Ms Williams about the problems with her claim were not entirely clear. It appeared that Mr Brown had told her about the consent order in July 1995 but it was only in June 1996 that he advised Ms Williams to consult other solicitors. The claimant relied on section 32(1)(b), alleging that the solicitors had deliberately concealed facts relevant to her claim against them. The limitation issue was heard as a preliminary issue by Recorder Brunnen. The Recorder held that Mr Brown had not deliberately concealed anything from the claimant because at the time of the consent order in August 1994, he had genuinely thought that the position could be retrieved and had only avoided mentioning it to her to avoid his own embarrassment. He therefore held that the claim was statute-barred.

41. The claimant's appeal was allowed. The Court of Appeal concluded that once the application to reinstate the action against the doctor had been dismissed in December 1994, Mr Brown must have known that the concealed fact was relevant to Ms Williams' cause of action against his firm. Park J held that on the proper construction of section 32(1)(b): first, it is not the cause of action that must have been concealed by the defendant but only a fact relevant to the cause of action. Secondly, section 32(1)(b) did not require the claimant to show that the defendant must have known that the fact was relevant to the cause of action. All that is required is that the fact was known to the defendant and the fact must actually have been relevant, whether the defendant knew that or not. Thirdly, the concealment can be of any fact relevant to the cause of action, it does not have to be concealment of all the relevant facts, and fourthly, the concealment must have been deliberate. As to this last requirement, Park J said: [14]

> "It is, I think, plain that, for concealment to be deliberate, the defendant must have considered whether to inform the claimant of the fact and decided not to. I would go further and accept that the fact which he decides not to disclose either must be one which it was his duty to disclose, or must at least be one which he would ordinarily have disclosed in the normal course of his relationship with the claimant, but in the case of which he consciously decided to depart from what he would normally have done and to keep quiet about it."

42. Applying that test to the facts of the case before him, Park J held that the making of the consent order dismissing Ms Williams' claim was indisputably relevant to her right of action against the firm. That fact had been deliberately concealed by Mr

Brown. It was his professional duty to disclose the fact to her and he did not comply with that duty, at the latest from the date on which the application to restore was rejected. The decision not to tell her "was not just something which he did without thinking about it: it was a conscious decision on his part to refrain from doing something which he normally would have done and which he ought to have done."

43. Mance LJ gave a concurring judgment which is important for the issues raised in this appeal. He held that there was no doubt that the solicitor owed a duty to keep his client informed about the conduct of the case and about any error that might give the client cause for complaint: "A solicitor who intentionally withholds from his client a fact about which he knows he ought to inform him or her can readily be said to "conceal" it". He considered the situations in which something short of active concealment could amount to concealment for the purposes of section 32(1)(b). Mere non-disclosure in the absence of a duty to speak may be deliberate but could not, he said, constitute 'concealment'. He also considered whether the defendant had to know that the fact being concealed was relevant to the right of action, but did not have to decide that point since it was clear that Mr Brown had realised that the fact was so relevant. At several points in that discussion about deliberateness, Mance LJ referred to the state of knowledge of wrongdoing required as including recklessness – I will need to return to that aspect of the judgment later.

44. *The Kriti Palm* is the principal authority on what is required by section 32(1)(b) where the defendant has not taken active steps to conceal a relevant fact. In this case, the defendant had been instructed by AIC and Mobil to test and certify the quality of a cargo of gasoline due to be loaded on The Kriti Palm for carriage to New York. They negligently tested it using the wrong test method and certified that the fuel met the specification. AIC then sold the cargo on to a purchaser and warranted that the product met the specification. On delivery of the oil in New York, the purchaser faxed AIC to say that the testing on discharge of the oil showed that it was off-specification. AIC contacted ITS and both parties then realised that the wrong method had been used. ITS carried out the right tests, referred to in the judgments as 'the Cooper retests', which showed that the product was outside the specification. There was a phone call between Mr Whitaker of AIC and Mr Lucas of ITS by which time both sides were aware that the wrong test method had been used but during which Mr Lucas did not mention the Cooper retests. Instead, Mr Lucas told Mr Whitaker that ITS would 'stand by' the certificate, suggesting that he was not aware of anything that indicated that the cargo did not in fact meet the specification.

45. AIC relied on section 32(1)(b) to defeat a defence of limitation. The importance of the case for our purposes is what it has to say about whether the duty to disclose to which the court had referred in *Williams* existed here, and specifically whether that had to be a free-standing legal duty based in contract or tort or whether it could be a duty that arose purely for the purpose of applying section 32(1)(b). Rix LJ in his dissenting judgment held that the duty to disclose had to be a contractual or tortious duty owed independently of the application of section 32(1)(b). He held that ITS owed no such duty and so he would have held that the claim was time barred. Buxton LJ and Sir Martin Nourse held that ITS had been under a sufficient duty to inform AIC about the Cooper retests for their failure to do so to amount to concealment for the purposes of section 32(1)(b). I will return to this case to examine in more detail whether Buxton LJ's decision was based on his finding that an independent

contractual duty did exist or on his conclusion that no such duty was necessary, so long as there was a duty to disclose in what he called "the sense relevant to the Act": [443].

III. THE JUDGMENTS BELOW AND THE APPEAL

46. Recorder Rosen accepted Mrs Potter's evidence that she did not become aware of the commission until she received advice from her solicitors in about November 2018. He said that it was obvious that the non-disclosure of commission was deliberate: [24]

> "As a sophisticated creditor, the decision as to what commission to charge and not disclose must have been considered and at a high level. There is no evidence from the Defendant to gainsay such inferences."

47. He held that such non-disclosure "was intentional or at least reckless", the motive being to increase Canada Square's profits without Mrs Potter knowing it. It involved a breach of duty on the part of Canada Square and as from 26 July 2006 when Mrs Potter entered into the agreement, Canada Square: ([27]):

> "must have and did know that it was acting unfairly in the sense explained in *Plevin*: that it was reasonable to expect disclosure of the existence and extent of the commissions in the interests of fairness and that the Claimant was unlikely to discover the payment of excessive commissions unless informed of it by the Defendant and/or on enquiry through lawyers."

48. The Recorder rejected Canada Square's arguments that it could not be treated as having known of the unfairness or that it involved breaches of duty by it, relying on industry practice, in the absence of any regulatory disclosure requirements, or the decision in *Harrison*. He said:

> "30 The Defendant knew the relevant facts throughout. It must stretch the credulity of any judge, let alone a consumer, for it to claim that it never considered whether or not to disclose such significant information. If it did not disclose its commissions on inception of the loan in July 2006 (which in my judgment it was bound in fairness to do), it should at least have done so when sections 140A-D came into force and thereafter, whatever the fluxes in judge-stated law and all the more so when that was settled in *Plevin*.
>
> 31 The Defendant's deliberate withholding knowledge of its commissions was throughout unfair, for the reasons declared in *Plevin*. It exacerbates its breaches of duty for the Defendant now to claim that it believed itself to be entitled so to behave (that is, unfairly) at the time. And again the absence of any witness evidence from it to that effect is, in my judgment, telling as to the validity of the inferences which I must draw against it: I do not accept its unevidenced protestations of ignorance."

49. On appeal, Jay J read the Recorder's judgment as having decided that Mrs Potter was able to rely on section 32(2) to defeat the limitation defence. Before him, Mrs Potter relied on both section 32(2) and section 32(1)(b). As regards section 32(2), the judge held that the concepts of breach of duty in section 32(2) and the right of action in section 32(1)(b) "must be the two sides of the same coin: in Hohfeldian terms, 'juridical correlates'". He then turned to the question of deliberateness, noting that the presence of the mental element could not have predated the coming into force of section 140A, whether generally in April 2007 or in respect of this agreement in April 2008, nor could it have outlived the end of the relationship in March 2010. He held that the Recorder had been entitled to draw an adverse inference from Canada Square's failure to call any evidence: *Wisniewski v Central Manchester HA* [1998] EWCA Civ 596. He added: ([53])

> "perhaps the more accurate way of rationalising this in the particular circumstances of the present case is that an objective inference fell to be drawn which the Appellant called no evidence to rebut."

50. Having analysed the authorities as to the nature of the mental element required, he concluded that conduct which is reckless is sufficient, "as is conduct where the actor knows that what he is doing may well be a wrong but takes the risk of it being so": [64]. Jay J's conclusions on the facts of the case were as follows: [67]

> "In April 2007, and thereafter, [Canada Square] must be taken to have known that it was under a duty to act fairly, and also must be taken to have decided that the commission would not be disclosed. In that critical respect, [Canada Square] acted deliberately; it did not act negligently or inadvertently. Any inferences more favourable to [Canada Square] cannot be properly drawn in the face of its failure to call evidence. … [Canada Square] must be treated as apprehending that there was a risk that legal wrongdoing would be found by the court even if it cannot be deemed to have predicted what the courts might say about sections 140A-D, there being no legal certainty in that respect. Here, there was "some degree of blameworthiness" and "unconscionable conduct" in the context of a deliberate decision not to do something in circumstances where it was obvious that the existence of the commission would not be discovered for some time."

51. The requirements of section 32(2) were therefore made out. As regards section 32(1)(b), Jay J held that *The Kriti Palm* was binding authority that section 32(1)(b) operates only where a duty to disclose arises under the general law. He held that there was no such free-standing duty to disclose the commission in the present case so that section 32(1)(b) could not postpone the limitation period for Mrs Potter.

52. Permission to appeal to this court was granted to Canada Square by Lewison LJ on 5 June 2020. He recorded in his order that Mrs Potter had asked for the grant of permission to be made conditional on Canada Square paying her reasonable costs of the appeal irrespective of the outcome. Lewison LJ noted that this was a case to which CPR Part 27.14(2) concerning the costs of a claim on the small claims track

applied. That rule provides that the court may not order a party to pay a sum to another party except for the limited amounts listed there. That rule applies to a second appeal to this court: see *Akhtar v Boland* [2014] EWCA Civ 943 and prevents the court from making an order for costs. Lewison LJ did not consider that it would be appropriate to use the power to attach conditions to the grant of appeal in a way which sidestepped that rule.

53. Four grounds of appeal are raised by Canada Square to argue that Jay J was wrong to hold that section 32(2) could be relied on by Mrs Potter. Ground 1 relates to the finding that Canada Square had committed a 'breach of duty' for the purposes of that subsection. Grounds 2, 3 and 4 relate to the mental element and the judge's decision, first, that recklessness was sufficient to make the breach of duty deliberate, and second, that recklessness was established on the facts. Mrs Potter has served a Respondent's notice arguing that Jay J was wrong to conclude that she could not rely on section 32(1)(b). She contends that Canada Square's statutory duty to disclose the commission in order to avoid unfairness, coupled with its deliberate decision not to disclose suffices to meet the requirement under section 32(1)(b) that the commission (being a fact relevant to her right of action) was 'deliberately concealed'.

54. I can summarise the issues raised in the appeal broadly as follows:

    i) Did the creation of an unfair relationship within the meaning of section 140A amount to a breach of duty by Canada Square towards Mrs Potter for the purposes of section 32(2)?

    ii) Was Canada Square's failure to disclose the existence and size of the commission a 'concealment' of that fact by Canada Square?

    iii) If there was a breach of duty for the purposes of section 32(2) and/or a concealment for the purposes of section 32(1)(b), was Canada Square's conduct 'deliberate' within the meaning of those provisions?

55. The parties are agreed on two things; first, that the existence and size of the commission is a fact relevant to Mrs Potter's right of action for the purposes of section 32(1)(b), and secondly that the word 'deliberate' connotes the same mental element for the purposes of section 32(1)(b) as it does for section 32(2). In the light of that, I will consider the mental element of deliberateness for both section 32(1)(b) and section 32(2) together, after considering the other contentious elements of those provisions.

IV. SECTION 32(2): WAS THERE A 'BREACH OF DUTY' HERE?

56. Ground 1 of Canada Square's appeal asserts that Jay J was wrong to find that conduct giving rise to Mrs Potter's claim under section 140A qualified as 'a breach of duty' within the meaning of section 32(2). They argue that there was no legal duty or obligation on Canada Square to disclose the commission under general law or under section 140A. The failure to disclose may be part of a multi-factorial assessment of whether the relationship was unfair, but that is different, they say, from there being a legal duty of the kind needed. Mr Kimmins argued that Mrs Potter's analysis does too much damage to the language used – the words 'breach of duty' are there for a reason and are different from the words 'right of action' used in section 32(1)(b). Parliament

must have intended that the subsection should be narrowly construed so as to restrict it to breaches of duty in the traditional sense, that is breaches of contractual obligations, tortious duties or fiduciary duties. Those are easy to identify whereas the unfairness referred to in section 140A arises in an amorphous way which does not properly fit within the concept of a breach of duty for the purposes of section 32(2).

57. Mr Kimmins relied particularly on the way in which Lord Sumption described the nature of section 140A in *Plevin*. At [19] Lord Sumption said:

> "Paragon owed no legal duty to Mrs Plevin under the ICOB Rules to disclose the commissions and, not being her agent or adviser, they owed no such duty under the general law either. However, as I have already pointed out, the question which arises under section 140A(1)(c) is not whether there was a legal duty to disclose the commissions. It is whether the unfairness arising from their non-disclosure was due to something done or not done by Paragon. Where the creditor has done a positive act which makes the relationship unfair, this gives rise to no particular conceptual difficulty. But the concept of causing a relationship to be unfair by not doing something is more problematical. It necessarily implies that the Act treats the creditor as being responsible for the unfairness which results from his inaction, even if that responsibility falls short of a legal duty. What is it that engages that responsibility? Bearing in mind the breadth of section 140A and the incidence of the burden of proof according to section 140B(9), the creditor must normally be regarded as responsible for an omission making his relationship with the debtor unfair if he fails to take such steps as (i) it would be reasonable to expect the creditor or someone acting on his behalf to take in the interests of fairness, and (ii) would have removed the source of that unfairness or mitigated its consequences so that the relationship as a whole can no longer be regarded as unfair."

58. Lord Sumption was careful there to refer to Paragon's 'responsibility' not to cause a relationship to be unfair, rather than using the language of duty. Mr Kimmins argued that the creation of an unfair relationship, at least in the absence of any breach of ICOB Rules or other independently imposed legal duty, does not therefore indicate that there has been a breach of duty.

59. In my judgment, this submission cannot be sustained in the light of the judgment of this court in *Giles v Rhind and another (No 2)* [2008] EWCA Civ 118, [2009] Ch 191 ('*Giles v Rhind*'). In that case, the claimant was a judgment creditor of the defendant in earlier proceedings and had obtained a charging order over the defendant's interest in his matrimonial home. The claimant then applied to set aside a deed entered into several years earlier between the defendant and his wife by which 30% of his then half interest in the house was transferred to his wife for no consideration. The claimant pleaded that the deed should be set aside pursuant to section 423 of the Insolvency Act 1986 as a transaction defrauding creditors. The issue before the Court of Appeal was whether a claim under section 423 was properly described as a claim for a breach of duty for the purposes of section 32(2). Arden LJ (with whose

judgment Sedley and Buxton LJJ agreed) noted that section 423 was not drafted in terms that expressly imposed a duty on a creditor not to enter into particular transactions but rather empowered the court to set aside a transaction entered into at an undervalue. She said at [16]:

> "16 Much of the argument on this appeal revolved around the question whether a claim under section 423 of the 1986 Act was properly described as a claim for a "breach of duty". Outside of section 423, a person who incurs credit or liabilities undoubtedly owes responsibilities to his present and future creditors. A person should not incur a debt unless he has reasonable or probable grounds for expecting to be able to pay it when it is due. It therefore follows that the person should not make a gift at a time when he has no reasonable or probable grounds for believing that (without the asset which he is proposing to give away) he will be able to pay his debts, present or future, as and when they fall due."

60. She went on to say that section 423 had to be seen "in the context of a debtor's responsibilities to his creditors generally" so that any argument that section 423 did not involve a breach of duty had a somewhat counterintuitive ring to it. However, she recognised at [36] that the right to relief under section 423 did not depend on showing that the victim was a person to whom some duty in contract or tort or some fiduciary duty was owed. She upheld the conclusion of the judge that there was nevertheless a breach of duty for the purposes of section 32(2): [37]

> " … The essence of the judge's approach was to hold that the expression "breach of duty" in section 32(2) was merely the "obverse" of the expression "right of action" in section 32(1)(b), by which he meant legal wrongdoing of any kind, giving rise to a right of action (para 41, as set out at para 24 above). He reasoned that this was the position under section 26 of the Limitation Act 1939, and it was not the intention of the 1980 Act to limit the scope of the pre-existing law. The judge thus held that the expression "breach of duty" applied to any legal wrongdoing in contradistinction to a breach of duty in a tortious or contractual sense or in the sense of a breach of an equitable or fiduciary duty (which I will call "the narrower meaning")."

61. Arden LJ agreed with this analysis, subject to some qualifications that do not concern us in the present appeal. She summarised her reasons for so holding as follows:

> "39. My reasons, which I amplify below, for holding that the expression "breach of duty" in section 32(2) includes a claim under section 423 of the 1986 Act may be summarised as follows. (a) The wider meaning is a legitimate meaning of breach of duty. (b) Section 32(2) was enacted pursuant to the recommendations of the Law Reform Committee's report on limitation in 1977 and the court can look at that report to see the mischief to which section 32(2) was directed. That

> committee did not recommend that the new provision be limited to some causes of action only. (c) The general structure of the 1980 Act indicates that section 32(2) is consistent with the wider meaning. (d) The expression "breach of duty" is used in section 11 of the 1980 Act but in a different context and so does not necessarily restrict the meaning of "breach of duty" in section 32(2). (e) Section 32 does not require the phrase to be given the narrower meaning. (f) The narrower meaning does not promote any part of the statutory purpose of section 32."

62. I respectfully agree with Arden LJ's reasons. I do not need to refer further to Arden LJ's elaboration of each of those reasons, save to put down a marker as to her detailed analysis of the Law Reform Committee's report in 1977 about the recasting of the old section 26.

63. Lord Sumption's comments at [19] of *Plevin* were not, of course, addressing the application of section 32(2). He was, in overturning the decision of the Court of Appeal in *Harrison*, concerned with whether a relationship could be unfair under section 140A even if there was no breach of an independent duty, whether in the ICOB Rules or elsewhere. I therefore consider that Jay J was right to hold that the creation of an unfair relationship by Canada Square was a breach of duty on which Mrs Potter can rely for the purposes of section 32(2). I would therefore dismiss ground 1 of Canada Square's appeal.

V. SECTION 32(1)(b): WAS THERE 'CONCEALMENT' HERE?

64. The parties are agreed that there was no active concealment by Canada Square. What is alleged is that they failed to disclose to Mrs Potter the existence and scale of the commission included in the cost she paid for the PPI policy. This issue can be broken down into a number of sub-issues:

i) If there is no active concealment, can section 32(1)(b) apply on the basis that defendant has failed to disclose a fact relevant to the right of action?

ii) If so, is that limited to a case where the defendant was under a free-standing legal duty to disclose that fact?

iii) Was Canada Square subject to a duty to disclose the existence and scale of the commission, sufficient for their failure to disclose to amount to concealment?

(a) Is section 32(1)(b) limited to cases of active concealment?

65. Mr Kimmins' first submission was that section 32(1)(b) can only be relied on where the claimant can show that the defendant actively concealed the relevant fact. If the claimant wishes to rely on a failure to disclose, he or she must be able to fit within section 32(2). He contrasted the ways Lord Millett and Lord Scott summarised the content of section 32(1)(b) in *Cave*. At [25] of *Cave*, Lord Millett said:

> "25. In my opinion, section 32 deprives a defendant of a limitation defence in two situations: (i) where he takes active steps to conceal his own breach of duty after he has become

> aware of it; and (ii) where he is guilty of deliberate wrongdoing and conceals or fails to disclose it in circumstances where it is unlikely to be discovered for some time. But it does not deprive a defendant of a limitation defence where he is charged with negligence if, being unaware of his error or that he has failed to take proper care, there has been nothing for him to disclose."

66. Mr Kimmins submits that Lord Millett there only regarded a failure to disclose as sufficient for section 32(2). The situation he described in (i) in that passage is intended to encapsulate section 32(1)(b) and refers only to active concealment. The reference to a failure to disclose is part of his situation (ii) which is encapsulating section 32(2). In contrast Lord Scott at [60] (which I have cited at paragraph 39, above) said that a claimant can rely on section 32(1)(b) "if he can show that some fact relevant to his right of action has been concealed from him *either by a positive act of concealment or by a withholding of relevant information*, but in either case with the intention of concealing the fact or facts in question." (my emphasis)

67. I do not accept that Lord Millett was deciding in [25] of *Cave* that only active steps of concealment were sufficient to satisfy section 32(1)(b). He was merely summarising briefly the distinction between the two provisions. Certainly, the later cases of *Williams* and *The Kriti Palm* have not treated *Cave* as authority ruling out reliance on section 32(1)(b) where there is no active concealment. I agree with the analysis of Park J in *Williams* that Lord Millett did not intend to do anything more than to give a condensed summary of the normal case to which section 32(1)(b) applies: see [23] of *Williams*.

(b) The ratio of The Kriti Palm

68. I turn then to consider what was decided by *The Kriti Palm*, the facts of which I have already outlined above. The Court of Appeal found that there had been no active concealment of the results of the Cooper retests by ITS. The question was whether those results had, none the less, been concealed by ITS from AIC within the meaning of section 32(1)(b). The trial judge, Cresswell J, had held that ITS' contract with AIC included an implied term requiring ITS to inform AIC of the Cooper retests. Counsel for AIC on appeal accepted that any such implied term was "at the cutting edge of the law": [52]. Rix LJ cited the passage in [14] of the judgment in *Williams* where Park J referred to the claimant needing to show that the fact which the defendant decided not to disclose was one which it was his duty to disclose, or that it must at least have been one which he would ordinarily have disclosed in the normal course of his relationship with the client. Rix LJ also referred to Mance LJ's judgment in *Williams* and concluded:

> "321. It appears therefore that there must be either active and intentional concealment of a fact relevant to a cause of action, or at least the intentional concealment by omission to speak of a fact relevant to a cause of action which the defendant knew himself to be under a duty to disclose. There is no decision that anything less than a duty to disclose will suffice in the absence of active concealment."

69. Rix LJ rejected AIC's case that they did not need to show a duty to disclose, provided they could establish that the fact would have been disclosed "in the ordinary course of the relationship". Although that formulation had been suggested by Park J in *Williams*, it had not been adopted by Brooke and Mance LJJ in that case. He therefore analysed at length whether there was a duty to disclose arising from the NAMAS guidelines governing the accreditation of laboratory facilities or from ITS' internal guidelines: [330]. Applying the traditional test of business efficacy, Rix LJ held that there was no implied term in the contract which assisted AIC: [340]. He considered the possibility that a term could be implied from a combination of utility and morality, to the effect that once any issue about a certificate has been identified, the certifier owes a duty to investigate and report: [344]. Rix LJ thought that this might have supported the conclusion that the trial judge had come to and was, he thought, the analysis adopted by Buxton LJ. Rix LJ's concern was that such an obligation, if it existed, would in theory be applicable to every conceivable kind of contract. He held that there was no separate, continuing duty to investigate and/or disclose: "There is no general principle that the wrongdoer comes under an additional obligation to disclose his wrongdoing": [345].

70. Sir Martin Nourse held that the key question was whether ITS was under a duty to disclose:

> "383 As to the duty of disclosure, I am in general agreement with the reasoning of Buxton LJ expressed at [428]–[443]. For myself, I would be content to base the existence of the duty on the simple common sense of the notion that a certifier who has acquired knowledge of a material inaccuracy in his certificate is obliged to disclose it: see [439] and [440]."

71. What, then, did Buxton LJ decide? Citing the speeches of Lord Millett and Lord Scott in *Cave* and Park J's judgment in *Williams*, Buxton LJ described the issues for the court as (i) whether ITS was under a duty to AIC to reveal the existence and content of the Cooper retests, (ii) whether ITS, knowing of that duty, decided not to reveal the existence and content of the Cooper retests, and (iii) whether the Cooper retests were relevant to any rights of action asserted by AIC that were otherwise statute barred: [427]. Buxton LJ described the first issue as having become bogged down in an examination of international standards and practices, ITS' internal guidelines and how they applied to what ITS had done. He dismissed the relevance of these because, as he put it, the question of whether, in terms of the LA 1980, ITS had a duty to reveal the Cooper retests was not necessarily determined by reference to ITS' contractual duties: [430]. He analysed in detail the evidence given by Mr Lucas and other ITS executives at the trial. Mr Lucas had denied knowing about the Cooper retests when he had the key phone conversation with AIC. In an argumentative reply during his cross-examination about his knowledge of those tests, Mr Lucas said that his assertion that he did not know about the retests must be true because he did not disclose the results to AIC in that call. He recognised by that answer that he had a duty to reveal the Cooper retests to AIC, so that if he had known of them, he would have performed his duty to reveal them. Buxton LJ concluded that although the ITS executives did not consider that those obligations stemmed from published guidelines and standards, they did regard themselves as being under a duty to disclose the Cooper retests; that was a considered assertion by senior and experienced men in the

industry: [438]. Buxton LJ went on (in the paragraphs of his judgment expressly endorsed by Sir Martin):

> "439. Not only was a duty to disclose the Cooper retests acknowledged by ITS, but also the existence of such a duty is a matter of common sense. We have seen the unchallenged evidence of AIC as to the importance to them of the accuracy of the statements of quality on the certificate … . The judge also stressed, and no one has suggested that he was wrong, the importance of the accuracy of a certificate to buyers and sub-buyers (at [183]). Not only as a matter of law, but also commercially, it really challenges reality to think that a certifier, armed with tests that suggested that the tests used to complete the certificate had or might have produced incorrect results, could nonetheless simply do nothing about it; and in particular could properly say nothing about those tests to those who had employed him to certify.
>
> 440. That obligation, of not sitting on material of one's own creation that is known to be inconsistent with the certificate, does not lead to the endless uncertainty that Rix LJ fears. It is for the holder of the certificate to decide what he does with the information once he receives it. What I cannot accept is that considerations of certainty empower the certifier to take that decision for the holder by withholding relevant information from him. Nor does such a duty create a continuing duty of review and disclosure under every conceivable kind of contract (cf [351], above). This is the specific case of a certificate, where the certifier was in possession of material of his own creation that cast doubt on the certificate that he had given. To hold, as I would, that he was under a duty in Limitation Act terms to reveal that material does not open any floodgate in any other sort of relationship."

72. Buxton LJ concluded at [443]:

> "I am therefore satisfied that in the sense relevant to the Act interpreted in the authorities set out at [426], above ITS had a duty to reveal to AIC the existence and content of the Cooper retests."

73. The authorities to which he had referred in [426] were *Cave* and *Williams*.

74. The question raised by Buxton LJ's judgment is this: was he deciding that there was indeed a contractual obligation on ITS to disclose the Cooper retests, an obligation that was recognised by Mr Lucas and his colleagues in their answers when cross-examined about their conduct? Or was he deciding that, regardless of the contractual position, there was enough of an obligation to disclose, as acknowledged by Mr Lucas, to mean that a failure to disclose amounted to a concealment for the purposes of section 32(1)(b)? On balance I am satisfied that Buxton LJ was holding that the latter was the case. My reasons are as follows. First, it would contradict the most

basic tenets of contract law to hold that a duty can be implied into a contract either as "a matter of common sense" or on the basis of the subjective views that one party's executives say they held some time after the contract was concluded. Secondly, Buxton LJ stated that the floodgates concerns expressed by Rix LJ as arising from a continuing contractual duty of review and disclosure did not arise, because he was deciding only that Mr Lucas had been "under a duty in Limitation Act terms to reveal the material". His decision did not mean that there was an implied obligation for any other purpose. Thirdly, he said at [430] that he did not regard the question of whether ITS was "in terms of the Act" under a duty to disclose as a question necessarily determined by reference to ITS's contractual duties. He thereby moved the discussion away from the question posed by the trial judge and by Rix LJ as to the proper scope of the contractual duties owed by ITS to AIC.

75. I respectfully also regard that as the better construction of the statutory provision. Section 32(1)(b) does not refer to a duty to disclose, it refers only to concealment. Inherent in the concept of 'concealing' something is the existence of some obligation to disclose it. To construe section 32(1)(b) as being satisfied only if there is a pre-existing legal duty to disclose seems to me to add an unwarranted and unhelpful gloss on the clear words of the statute. For the purposes of the Act that obligation need only be one arising from a combination of utility and morality to adopt Rix LJ's phrase. Buxton LJ was not, as Rix LJ suggested at [345], concluding on that basis that there was an implied term in the contract between ITS and AIC. Rather, as Sir Martin Nourse said at [383], Buxton LJ was basing the existence of the duty on a simple, common sense notion that a certifier who acquired knowledge of a material inaccuracy in his certificate is obliged to disclose it, such that if he fails to do so he can properly be described as concealing that fact.

76. I can see no reason why Parliament should require the court to undertake a detailed analysis of implied contractual terms between the parties or the precise scope of the tortious duties of care owned by the defendant when considering whether section 32(1)(b) is satisfied. Rix LJ's judgment shows the dangers of such an approach, getting bogged down in an analysis of international and internal guidelines and risking the undesirable wider repercussions that would arise from the finding of an implied contractual term or tortious duty of care. Those questions might have no other relevance to the right of action which the claimant is seeking to bring. In particular, since an implied term must be implied into the contract at the date on which the contract is formed, it may focus the attention of the court on a time before the concealment actually took place. As appears from *Sheldon*, the concealment may occur several years after the contract was concluded or the duty of care arose. The focus should instead be on the conduct which is alleged to amount to the concealment and on an analysis of whether the defendant was, at that point, under a sufficient obligation to disclose for the failure to disclose to amount to concealment as at that date.

77. I therefore consider that the majority judgments in *The Kriti Palm* establish that the 'duty to disclose' referred to by Park J at [14] and by Brooke LJ at [51] of *Williams* does not have to be a free-standing contractual, tortious or fiduciary duty.

78. Mr Kimmins objected that to decouple section 32(1)(b) from a free-standing duty risks opening up section 32(1)(b) in a way which creates uncertainty. I disagree; in my judgment it properly reflects the purpose of the provision, namely that a defendant

cannot rely on the limitation defence if he has only himself to blame for the failure of the claimant to bring the action sooner.

(b) Was there concealment by Canada Square?

79. I turn then to the question whether Canada Square owed a duty to Mrs Potter "in Limitation Act terms" to disclose the commission to her, such that their failure to do so amounts to concealment of that commission within the meaning of section 32(1)(b). Mr Kimmins argued that such an approach depends on 'recycling' Canada Square's conduct so that it serves both as the foundation for the right of action on which Mrs Potter brings her claim and also as the concealment of a fact relevant to that claim. That is impermissible, he argued, because the concealment of the fact has to be something other than, and subsequent to, the creation of the right of action itself. If the concealment is part of the right of action, he argued, then that is covered only by section 32(2). Mr Kimmins recognised that the pre-1980 cases accept that the concealment can be part and parcel of the conduct that also gives rise to the right of action. He referred to a '*Bulli*-type' concealment by which he meant the kind of conduct described by the Privy Council in *Bulli Coal Mining Co v Osborne* [1899] AC 351:

> "The contention on behalf of the appellants that the statute is a bar unless the wrongdoer is proved to have taken active measures in order to prevent detection is opposed to common sense as well as to the principles of equity. Two men, acting independently, steal a neighbour's coal. One is so clumsy in his operations, or so incautious, that he has to do something more in order to conceal his fraud. The other chooses his opportunity so wisely, and acts so warily, that he can safely calculate on not being found out for many a long day. Why is the one to go scot-free at the end of a limited period rather than the other? It would be something of a mockery for courts of equity to denounce fraud as 'a secret thing,' and to profess to punish it sooner or later, and then to hold out a reward for the cunning that makes detection difficult or remote."

80. However, Mr Kimmins submitted that in those circumstances the claimant must bring himself within what is now section 32(2). If the claimant relies on section 32(1)(b), the concealment must be some conduct other than the elements of the right of action itself. He also referred to the judgment of Lord Evershed MR in *Kitchen v Royal Air Force Association and others* [1958] 1 WLR 563 ('*Kitchen*'). In that case the claimant's solicitors had negligently allowed the claimant's claim under the Fatal Accidents Act to expire. The trial judge had held that the original failure by the solicitors to inform the plaintiff in regard to the limitation of time for her claim was itself not merely an act of negligence but also constituted the concealment by fraud. Lord Evershed was unable to agree with that conclusion: (p 569).

> "No doubt in some cases the facts may be such that the circumstances of the wrongful acts may also constitute concealment by fraud; for example where the wrongful acts are continuous and are also surreptitious."

81. Sellers LJ in *Kitchen* also identified the acts of negligent omission on the part of the solicitors as the failure to serve a writ within the statutory period to keep the claim open, the failure to inform Mrs Kitchen of the time limit for issuing the writ and the consequences of not issuing the writ and the failure to obtain her instructions one way or the other: p 578. Those acts of omission gave rise to the claim in negligence but did not of themselves provide evidence of fraudulent concealment. There were, however, subsequent acts of fraudulent concealment which entitled Mrs Kitchen to bring her claim in negligence.

82. It is not clear to me whether that aspect of *Kitchen* can still stand in the light of *Williams*; the earlier case does not seem to have been cited to the Court in *Williams*. But I can see that there was a distinction in *Kitchen* between the negligent acts of the solicitors in letting the limitation period expire on the one hand and their failure to disclose their mistake on the other, just as there was a distinction in the *Bulli*-type case between the right of action in conversion which does not depend on any concealment or surreptitiousness and the fraudulent concealment which does.

83. Despite that, I do not see why as a matter of principle the claimant should be in a worse position when seeking to establish concealment of a fact when the right of action turns on that very act of concealment, than he is where concealment is not an element in the right of action. Section 32(2) was intended to extend the scope of section 32(1)(b) to provide an alternative and in some cases easier means of establishing the facts necessary to bring the case within section 32(1)(b): see per Lord Scott in *Cave* at [60]. The potential application of section 32(2) should not operate to close out the possibility of section 32(1)(b) applying if the claimant can otherwise bring himself within that latter provision. Lord Evershed in *Kitchen* did not rule out that there may be circumstances where the wrongful acts may also constitute concealment by fraud and gave as an example where the wrongful acts are continuous. As to whether the non-disclosure was continuous here, Mr Kimmins points out that in *Plevin* Lord Sumption indicated at [18] that the significance of the lack of information about the commission was that Mrs Plevin was not able to shop around for better terms or to decide not to take a PPI policy at all if she concluded that it did not represent value for money. The concealment, Mr Kimmins said, was therefore operative only at the point in 2006 when Mrs Potter was considering whether to accept what Canada Square offered her. I do not accept that submission. I do not read Lord Sumption's judgment as suggesting that the only unfairness arising from the commission was the inability to decide based on proper information whether to take the policy at all. The unfairness lies additionally in the fact that because the cost of taking out the insurance was increased from £182 to £3,834, Mrs Potter did not have the option of paying for the policy without adding the premium to the loan. She was required to pay interest at 7.9% on the loan she took out to pay Canada Square's commission and those payments of principal and interest lasted until the end of the credit relationship. If at any point, at least after April 2008 when section 140A became enforceable as regards the agreement, Canada Square had disclosed to her the breakdown of the premium and commission within that payment of £3,834, she may well have been alerted to the unfairness which entitled her to challenge that continuing obligation to pay.

84. I would therefore hold that the ground raised in Mrs Potter's Respondent's notice is correct and that, subject to the mental element I discuss below, Jay J erred in holding

that she could not rely on section 32(1)(b). The obligations to act fairly imposed on Canada Square by section 140A were sufficient to mean that their failure to disclose the commission amounted to a concealment of that commission within the meaning of section 32(1)(b).

VI. THE MEANING OF 'DELIBERATE'

85. The decision of the House of Lords in *Cave* establishes that under section 32(2) it is not enough for Mrs Potter to show that Canada Square deliberately chose not to disclose the level of commission and that as a matter of law that gave rise to an unfair relationship contrary to section 140A. She must also show that the breach of duty was deliberate, in the sense that Canada Square had the necessary mental element in respect of the fact that their conduct gave rise to a breach of duty. Similarly, so far as section 32(1)(b) is concerned, it is not enough that the failure by Canada Square to disclose the fact that was relevant to Mrs Potter's right of action was a conscious choice by Canada Square rather than an inadvertent failure. The court must also be satisfied that Canada Square realised (to use a neutral word) that they should have told her about the commission and decided not to tell her.

86. There are four candidates for the mental element needed. The most stringent test would be if Mrs Potter has to show subjective knowledge or actual awareness within Canada Square that they were committing a wrongful act, either the breach of duty or the concealment. Mr Weir, appearing for Mrs Potter, accepts that Mrs Potter cannot establish actual knowledge for either section 32(2) or section 32(1)(b) so that Canada Square's appeal must succeed if that is the test. The second potential test is subjective knowledge which includes wilful blindness. Again, Mr Weir accepts that Mrs Potter cannot establish deliberateness even if wilful blindness is included in knowledge.

87. The third potential test is recklessness with both a subjective and objective element. This is the mental element of recklessness described by Lord Bingham of Cornhill at [41] of *R v G and anor* [2003] UKHL 50, [2004] AC 1034. In that case the House of Lords considered the meaning of recklessness for the offence of arson. The trial judge had directed the jury that (i) recklessness would be established if it would have been obvious to a reasonable person watching the small fire set by the defendants that it might spread to destroy the premises that had in fact been destroyed; (ii) that they must leave out of account that what was obvious to the reasonable bystander might not have been obvious to the defendants who were aged 11 and 12; and (iii) as to the state of mind of the two boys, the jury must be satisfied either that they had given no thought to there being such a risk or that, having recognised that there was such a risk, they none the less went on and did the act. Having reviewed the earlier case law, Lord Bingham (with whom the other members of the Judicial Committee agreed) held that the correct test was that a person acts recklessly with respect to a *circumstance* when he is aware of a risk that it exists or will exist and it is, in the circumstances known to him, unreasonable to take the risk. 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.

88. Although Lord Bingham stressed at [28] that he was addressing only the meaning of 'reckless' in the relevant statute and not in any other statutory or common law context, that test has been described as a 'working definition of recklessness' in other contexts and I will treat it as such too: see for example *Brett v the Solicitors*

Regulation Authority [2014] EWHC 2974 (Admin), [78] in the context of a solicitor's breach of the Solicitors Code of Conduct and *O (a child) v Rhodes and another* [2015] UKSC 32, [2016] AC 219, [84] in the context of the tort of intentionally causing physical or psychological harm.

89. The fourth possibility is the test which Canada Square say Jay J applied which is recklessness with a subjective element only. Jay J said that "conduct which is reckless is sufficient, as is conduct where the actor knows that what he is doing may well be a wrong but takes the risk of it being so": [64].

90. This issue, which was the most contentious of the appeal, raises the following sub-issues:

i) Is there a 'natural meaning' of the word 'deliberate' that does not include recklessness?

ii) What do the authorities interpreting section 32 decide about the meaning of 'deliberate'?

iii) Is it permissible to look back at the pre-1980 authorities on the old section 26 when construing section 32?

iv) Do the pre-1980 authorities construing the old section 26 decide that recklessness was a sufficient mental element for concealed fraud within the meaning of that provision?

v) If so, was it Parliament's intention in adopting the new section 26 in the Limitation Amendment Act 1980, which became section 32 of the LA 1980, that the mental element connoted by 'deliberate' should be the same as was required under the old section 26?

vi) What test would best fulfil Parliament's objective in enacting section 32?

(a) The natural meaning of the word 'deliberate'

91. Mr Kimmins took us through the main cases that I described in the earlier section of this judgment, pointing out the number of times where the judges use the terms 'knowledge', 'knowing', 'awareness' and 'aware' and other words denoting actual knowledge when describing the scope of section 32. He drew our attention to a similar use of language in, for example, *Kotonou v Reeves* [2015] EWHC 4301 (Ch) and *Grace v Black Horse* [2014] EWCA Civ 1413, [2015] Bus LR 1. He said that the use of those terms without qualification show that the courts regarded actual knowledge of wrongdoing as necessary for conduct to be deliberate within the meaning of section 32. I see that there is some force in that submission, but it cannot be conclusive where the issue before the court was not an issue concerning the mental element required and certainly not the issue now facing us directly as to whether recklessness is sufficient.

92. Mr Kimmins then pointed to other statutory provisions where the word 'reckless' had been included in addition to 'deliberate'. For example, section 15 of the Theft Act 1968 provides that for the offence of obtaining property by deception, 'deception' means "any deception (whether deliberate or reckless) by words or conduct as to fact

or as to law". The Consumer Insurance (Disclosure and Representations) Act 2012 defines qualifying mis-representations in section 5 as being either "(a) deliberate or reckless or (b) careless". I do not find those examples of much assistance. I can see that in a criminal provision such as the definition of obtaining property by deception, particularly where dishonesty is a necessary, separate element, the drafter would want to spell out how the element of deception is to be applied. In the 2012 Act, the content of the mental element is specified in great detail. Section 5(2) provides that a qualifying misrepresentation is deliberate or reckless if the consumer knew that it was untrue or misleading or did not care whether or not it was untrue or misleading and knew that the matter to which the misrepresentation related was relevant to the insurer, or did not care whether or not it was relevant to the insurer. Further, section 5(5) raises a rebuttable presumption that the consumer had the knowledge of a reasonable consumer and knew that a matter was relevant to the insurer if the insurer asked a clear and specific question about it. Given that the section has a lot to say about what is and is not a misrepresentation, I cannot read too much into the fact that the drafter used the phrase 'deliberate or reckless'.

93. Mr Kimmins then cited other cases in which courts have addressed the question of whether a contractual term that uses the word 'deliberate' should be construed as including recklessness. In *De Beers UK Ltd v Atos Origin IT Services UK Ltd* [2010] EWHC 3276 (TCC), Edwards-Stuart J was construing a clause in a contract which provided that nothing in the agreement excluded a person's liability for fraudulent misrepresentation, wilful misconduct or deliberate default. At [206], the judge said that 'deliberate default' there meant that the person committing the relevant act knew that it was a default and recklessness was not enough. I do not consider that that helps the present inquiry, even if it were legitimate to rely on an authority dealing with the wording of a particular contract when considering the construction of a statutory provision. It is clear that the judge's interpretation was quite properly coloured by the wording of the clause as a whole and by his conclusion that recklessness was already covered by the concept of 'wilful misconduct'. Similarly, in *Mutual Energy Ltd v Starr Underwriting Agents Ltd and another* [2016] EWHC 590 (TCC), insurers sought to avoid a contract of insurance on the grounds that there had been deliberate non-disclosure by the insured. The issue before the court was whether a reference in the policy to deliberate or fraudulent non-disclosure covered the circumstance where the insured honestly but mistakenly decided not to disclose a particular fact or whether it required that the insured took a decision not to disclose a fact which it knew was material. Again, I do not find that case helpful since Coulson J approached the task applying the well-established trio of cases on the principles of construction of contracts, in particular 'non-disclosure in breach of well-known and well-understood insurance obligations': see [14] and [31]. The cases he referred to on the meaning of the word 'deliberate' were cases involving contractual terms and he expressly rejected reliance on *Williams* as having no direct relevance to the issue of construction he had to decide: [79].

94. Although 'deliberate' is a common English word, I do not consider that there is a clear, 'natural' meaning in this context which gives an answer to this issue.

(b) The case law on section 32

95. Initially Canada Square appeared to accept that there was no English binding authority on the sufficiency of recklessness. Mr Kimmins referred us to the only case

in which that question had been squarely addressed, a decision of the Court of Appeal of the Cayman Islands that I discuss below. Later in his submissions, Mr Kimmins suggested that *The Kriti Palm* was binding authority that recklessness is not enough and that only actual knowledge will suffice.

96. In *The Kriti Palm* Buxton LJ described the findings of the trial judge that the ITS executives knew about the Cooper retests (which they had denied knowing), and that they had thought that the retests were significant (which they had denied thinking). As I have already explained, the executives accepted that they would have been under a duty to disclose the retests to AIC if they had so known and so thought: [448]. Buxton LJ concluded that the judge on that basis had been correct to hold that there had been deliberate concealment. Sir Martin Nourse agreed, saying at [381] that in order to be deliberate, the concealment did not have to be dishonest. Neither Buxton LJ nor Sir Martin referred to recklessness and they did not need to do so. Rix LJ took a different view, holding that because all three judges agreed that the trial judge's finding of deceit could not stand on the evidence before him, that fatally undermined the findings of deliberate concealment as well. I see the point that if recklessness were an available alternative to actual knowledge, one might have expected Rix LJ to consider whether the facts would have supported a finding of recklessness, even if the judge's finding of knowledge and dishonesty were not sustainable. But there is no suggestion that this was argued before the court in *The Kriti Palm* and there is no reference to the judgment of Mance LJ in *Williams* in the context of deliberateness rather than in the context of the duty to disclose that I have discussed earlier. I do not accept therefore that *The Kriti Palm* decides whether recklessness is sufficient mental element for section 32(1)(b) or section 32(2).

97. Mr Weir relies heavily on the judgment of Mance LJ in *Williams* as showing that recklessness is enough, although he accepts that the remarks are *obiter*. They are, however, remarks that were made not accidentally but in the course of an exposition of the test to be applied and, since they are remarks of Mance LJ they are, of course, entitled to particular attention. I have already outlined the facts in *Williams* where the trainee solicitor, Mr Brown, negligently agreed to an order dismissing the case against the putative defendant doctor and then failed to have the action against the doctor restored. The case, like many of the cases in which the mental element required came to be considered, involved the appellate court grappling with findings of fact by the trial judge acquitting the protagonist of any intentional wrongdoing, findings that the appellate court regarded with considerable scepticism. Thus in *Williams* the Recorder at first instance had found that even after the application to re-join the doctor to the proceedings had been dismissed with an order that the solicitors pay the doctor's costs, the trainee solicitor had still not been aware that he had been negligent. Park J noted that Mr Brown had given evidence and impressed the Recorder as a totally sincere and frank witness who was ashamed of the way that he had handled the claimant's case: [13]. The Recorder also found that Mr Brown's motive in not telling Ms Williams what was going on was that he was embarrassed for himself rather than wishing to protect the firm from a negligence action. The Recorder had therefore found that, at all times until at least the striking out of the new claim against the doctor as an abuse of process or the dismissal of the appeal from that decision, "Mr Brown honestly and genuinely believed that the situation created by the consent order could be cured and that Ms Williams would still be able to bring her action against the doctor." Park J held that this was not sufficient to enable the solicitors to escape the

application of section 32(1)(b). Mr Brown had concealed the consent order from Ms Williams:

> "Further, he did so deliberately: not to tell her was not just something which he did without thinking about it: it was a conscious decision on his part to refrain from doing something which he normally would have done and which he ought to have done. It is true that a desire to conceal from Ms Williams the possibility that she might have a claim in negligence against [the firm] was not the reason why Mr Brown decided not to tell her what had happened: the reason was to avoid embarrassment. But in my view that makes no difference, and the Recorder was in error if (as I believe) he thought that it did make a difference. What is relevant to s.32(1)(b) is the fact of concealment, not the reason or motive for it. …"

98. Mance LJ recognised that the existence of the solicitor-client relationship in the case before him meant that the intentional suppression of information which Mr Brown knew should be communicated could readily be regarded as concealment of that information. He went on: ([36])

> "Here, the defendant solicitor's duty to speak extended not merely to (i) any fact known by him to be relevant to a potential claim against him, but also to (ii) any fact known by him to be relevant to the ongoing conduct of the claim against a third party which he was (or was supposed to be) conducting on behalf of his client. If a solicitor decides not to disclose any fact falling within either (i) or (ii) to his client, knowing that it is his duty to do so (or, what amounts in law to the same, being reckless as to whether or not it is his duty to do so), then he can in each case be described as having "deliberately concealed" that fact from his client. The deliberateness derives from his knowledge that he ought to disclose and his intentional disregard of his duty to do so. But whether this is sufficient in the particular statutory context of s.32(1)(b) is a different matter. Case (i) falls on any view within the scope of s.32(1)(b). But whether case (ii) does so depends upon what precisely needs to be known and intended for there to be "deliberateness" within s.32(1)(b)."

99. Mance LJ identified two possible interpretations of the mental element required under section 32(1)(b). The more limited reading would require the defendant to realise that the fact has some relevance to a potential claim against him or to be reckless as to whether or not it has. That would prevent the limitation period being extended where the defendant did not realise that the fact suppressed had any relevance to the wrongdoing provided he was not reckless in failing to realise this. The wider meaning would regard deliberate concealment as occurring even though the defendant did not realise that the fact concealed had any relevance to any wrongdoing. He made three observations about the position as it would be on the more limited reading of section 32(1)(b):

> "38. … First, the circumstances in which there could be deliberate concealment in breach of an unrelated duty without appreciating the relevance to some other wrongdoing of the fact concealed must in practice be limited. … deliberate concealment is in practice more likely to occur because of consciousness of the likelihood of the relevance of the fact concealed to a potential cause of complaint, than for some other reason. Second, any requirement that a defendant must realise the relevance of the fact to the plaintiff's right of action could not and should not be read narrowly. The plaintiff could not have to show that the defendant knew that there was a right of action which would succeed. The subsection refers to a fact "relevant" to the plaintiff's cause of action. I consider that there could, even on the more limited reading, be "deliberate concealment" within the subsection in any case where the defendant deliberately concealed a fact realising that it was relevant (or reckless as to whether or not it was relevant) to an actual or a potential claim against him, even though he might himself believe that any claim would, if pursued, prove to be ill-founded. Third, the relevance of recklessness - and the irrelevance of motives – in the present discussion follow as a matter of general principle, although both are reinforced by vigorous remarks by Lord Greene MR in the case of *Beaman v ARTS Ltd* [1949] 1 KB 550, 560-561 to which I already referred."

100. He held that there was no need for him to decide which was the meaning to be preferred. Having gone through the facts and the misconceived optimism with which the judge had credited Mr Brown, Mance LJ concluded that Mr Brown: ([46])

> " … must have been shutting his eyes to the dismissal order (which he had suppressed from counsel and his client) as well as to counsel's advice and to realities, and to have been at least reckless."

101. I interject here that I do not regard Mance LJ's reference there to Mr Brown 'shutting his eyes' to the dismissal order as restricting the extension of the scope of deliberateness from actual knowledge only to wilful blindness. It is clear reading the judgment as a whole that Mance LJ is referring to recklessness.

102. Brooke LJ also referred to the Recorder's express findings that even after the failure to restore the proceedings against the doctor and the wasted costs order against the firm, Mr Brown was still not aware that he had been negligent. He could not disturb that finding of fact about Mr Brown's state of mind. But Mr Brown had known that the consent order dismissing the claim against the doctor had seriously prejudiced Ms Williams' position and he had deliberately concealed its existence from her. The Recorder had been wrong to hold that Mr Brown's belief that he might yet retrieve the situation was relevant.

103. Mance LJ's judgment and the decision in *Williams* overall provide, in my view, strong support for the proposition that deliberateness can be found even where there is

no actual, subjective knowledge on the part of the defendant that the fact that he has decided not to disclose to the claimant is a fact that he ought to disclose to her, such that his decision not to do so amounts to concealment. It is true, as Mr Kimmins submitted, that the facts of *Williams* appear consistent with actual knowledge and that all three judges clearly thought the Recorder had been generous in his assessment of Mr Brown's state of mind. But all three judges were also reluctant directly to overturn those findings of fact made after hearing evidence. They had to find another route to justify concluding that Mr Brown's concealment had been deliberate. Mance LJ was the only member of the court to hold expressly that recklessness was sufficient and that Mr Brown had at least been reckless as to the significance of the rejection of the application to restore the action against the doctor. Brooke LJ and Park J reached the same conclusion in part by rejecting the judge's reliance on Mr Brown's motives or on his mistaken optimism that the position could be retrieved. Mr Kimmins fairly points out that if they had been satisfied that recklessness was sufficient, it is surprising that they did not rely on that in the same way as Mance LJ. He also queries the source of the 'general principle' to which Mance LJ referred at the end of [38] as including recklessness in deliberateness – Mance LJ did not identify this. Mr Kimmins suggested that it might have been a reference to the principle in *Derry v Peek* (1889) LR 14 App Cas 337 that fraudulent misrepresentation includes the making of a false representation recklessly, without caring whether it be true or false. If Mance LJ did have *Derry v Peek* in mind, then Mr Kimmins argued that that principle makes sense applied to false statements because the maker of the statement represents that he believes it to be true. There is no need, however, to extend that principle to the present context. On balance therefore I accept that *Williams*, though supportive of Mrs Potter's case, is not determinative.

104. Finally on the cases directly addressing the mental element of section 32, I come to *Primeo Fund (in official liquidation) v Bank of Bermuda (Cayman) Limited and anor*, judgment of the Grand Court of the Cayman Islands [2019] CICA JO613-1 ('*Primeo*'). This was an action brought by Primeo, a Cayman Island hedge fund, which had placed assets for investment with Bernard Madoff. Primeo claimed damages of about US$2 billion against the Bank of Bernuda as its former custodian, asserting that the custodian was strictly liable for losses caused by the sub-custodian Mr Madoff's wrongdoing. The claims were dismissed by Justice Andrew Jackson QC. Primeo's appeal was heard by Sir Richard Field, Sir Michael Birt and Sir Jack Beatson. One of the many issues considered was the application of section 37 of the Cayman limitation law which was in identical terms to section 32(1) and (2) of the LA 1980. The claims raised directly whether a reckless breach of duty constituted deliberate commission of a breach of duty within the Cayman provision equivalent to section 32(2). The trial judge had found that the defendant's witness' conduct did not amount to wilful default and that the relevant person was not conscious that what he did was a breach: [460]. He had also held that recklessness was not sufficient to establish a deliberate breach of duty. The Appeal Court held that the judge had not erred. It was difficult, they held, to construe the words 'deliberate concealment of a breach of duty' as including recklessness, particularly since the wording represented a move by the legislature away from the language of fraud into which recklessness has been held to fall. They considered that *Cave* had decided that recklessness does not suffice for section 32(2). They referred to paragraph 25 of Lord Millett's speech and to paragraph 60 of Lord Scott (which I have set out at paras 65 and 39 above, respectively), concluding that it was difficult to understand them as including

recklessness. They also quoted one passage from the judgment of Mance LJ in *Williams* where he said that section 32(2) required a defendant 'to realise that the act involved a breach of duty'.

105. It would not be right in my judgment to place too much weight on the analysis of the Court in *Primeo*. I do not agree that *Cave* decides that recklessness is not sufficient for deliberate concealment; it was addressing a different question. The Cayman court did not cite the many places at which Mance LJ referred expressly to recklessness being sufficient in *Williams* as I have pointed out.

106. In my judgment therefore the case law construing the word 'deliberate' in section 32 is inconclusive.

(c) Looking back to the case law on the old section 26

107. At the end of the passage that I have quoted from para 38 of the judgment in *Williams,* Mance LJ referred to the 'vigorous remarks' of Lord Greene MR in of *Beaman v ARTS Ltd* [1949] 1 KB 550 ('*Beaman*'). That is one of the cases on which Mrs Potter relies to establish that recklessness was a sufficient mental element under the old law of fraudulent concealment. She also argues that it is legitimate to rely on that old law because it is clear from the material surrounding the enactment of section 7 of the Limitation Amendment Act 1980 (which inserted the new section 26 into the LA 1939 prior to consolidation into the LA 1980 as section 32) that Parliament did not intend to make reliance on the postponement of the limitation period more difficult for claimants than it had been under the old section 26.

108. Canada Square argue that it is impermissible for this court to consider the content of the old law as casting any light on the meaning of the words in section 32. Mr Kimmins referred to the firm discouragement given by Lord Keith and Lord Browne-Wilkinson in *Sheldon*. Lord Keith said at p. 140E:

> "The past history of the limitation legislation and cases decided under it provide uncertain and conflicting guidance on the issue under consideration. In my opinion it must be decided upon an examination of section 32 itself, taken in its context, particularly since the section derives from section 7 of the Limitation Amendment Act 1980, the Act in which it now appears being a consolidation enactment. Recourse to the antecedents of a consolidation statute should only be had when there is a real difficulty or ambiguity incapable of being resolved by classical methods of construction: *Farrell v. Alexander* [1977] A.C. 59, 73, per Lord Wilberforce."

109. Lord Keith concluded that there was no difficulty or ambiguity in the wording as regards the issue before the House in *Sheldon*. Lord Browne-Wilkinson also referred to the reliance that the parties sought to place on the old equitable principle of concealment by fraud. Under that doctrine, subsequent concealment of facts did not constitute concealment by fraud so, it was argued, its statutory successor should not be more generous. Lord Browne-Wilkinson said that that was not a legitimate approach to the construction of section 32; there was no ambiguity or difficulty about construing the words of the section. The new wording deleted all references to

concealment by fraud because of the confused effect and misleading terminology of the old equitable doctrine: p 145B

> "In my judgment it is inconsistent with the plain Parliamentary intention lying behind the amendment of the Act of 1939 to continue to construe the Act of 1980 as if it were still a statutory enactment of the equitable doctrine of concealed fraud. The Act of 1980 is not."

110. Lord Millett in *Cave* also discouraged references to the old concept of concealment by fraud which he described as "an inapt and inelegant expression which caused much difficulty": [19]. Section 32 was designed to clarify and if necessary change the law. Reference to the earlier case law was of limited value since there could be no assumption that the later statute merely reproduced the pre-existing law. Nonetheless, Lord Millett examined that pre-existing case law at some length since the old law explained why Parliament had enacted section 32(2) as well as section 32(1)(b). Lord Scott in *Cave* referred to those passages in *Sheldon*, concluding at [46] that the importance of *Sheldon* was "that it insists that if the language of section 32 is clear, effect must be given to that language without regard to the section's legislative history."

111. I do not consider that the exercise that we are embarked on here is the exercise against which Lord Browne-Wilkinson issued his warning. We are not engaged in trying to work out the mental element required for the doctrine of equitable fraud either in 1926 or now. We are trying to ascertain the meaning of the word 'deliberate' and that does not depend on whether recklessness was in 1939, or has since become or has ceased to be sufficient to support a finding of fraud of any kind. The exercise we are undertaking is different; the new section 26 was certainly intended to decouple the mental element under the old section 26 from the unhelpful concept of equitable fraud. But it did not necessarily mean to change the content of the mental element as it had been interpreted by the courts. There are many cases since *Sheldon* where courts at all levels have found it illuminating to look at the earlier case law and at the material explaining the reasons for the replacement of the concept of fraud in the old section 26 with the new section 26 (later section 32) and the concept of deliberate concealment. For every passage in the case law warning us against looking back at the old law, Mr Weir was able to point to an instance where the courts have carefully considered not only the pre-1980 cases but also the Law Reform Committee's report which formed the foundation of the Limitation Amendment Act 1980. Arden LJ in *Giles v Rhind* looked at that material to see the mischief to which section 32(2) was aimed: see [43] onwards. In *Lowesley v Forbes (trading as L E Design Services)* [1999] 1 AC 329, Lord Lloyd of Berwick quoted from the Law Reform Committee's report in his historical survey of the point raised in that case about the proper construction of section 24 of the LA 1980: see pp 339 – 340. More recently in *FII*, Lord Reed PSC and Lord Hodge DPSC, giving the judgment of the majority, stated that as the interpretation of section 32(1) in that case raised questions of substantial difficulty, it was both permissible and necessary to consider the previous law in some detail: [102].

112. This is not a case where the wording of the provision is clear and unambiguous. That much is apparent from the many cases I have analysed in which the courts have grappled with what precisely must be shown to fulfil section 32(1)(b) or section 32(2)

where it cannot be shown that the defendant actually knew that his conduct amounted to a breach of duty or that he was under an obligation to tell the claimant about the fact relevant to her right of action. This is more a case of "substantial difficulty" in which it is helpful to look at the earlier case law, not to work out what is meant by the concept of equitable fraud or unconscionability as free-standing legal concepts, but rather to look at what those cases say about when a claimant was able to rely on the old section 26 in the absence of actual knowledge on the part of the defendant.

(d) The leading cases on 'fraud' under the old section 26

113. The first question, therefore, is whether Mr Weir is right to say that the pre-1980 case law shows that recklessness was sufficient to satisfy the test for concealed fraud under the old section 26. The second question is then whether the evidence he relies on does show that Parliament intended to carry that forward into the new section 26.

114. I consider first the *Beaman* case to which Mance LJ referred in *Williams*. In *Beaman* the claimant had deposited packages with the defendants for safekeeping whilst she went to Turkey, on the understanding that the packages would be sent on to her when she asked for them. Following the outbreak of the Second World War, it became impossible for the packages to be sent. The defendant company was owned by Italian nationals and their business in England was taken over by the custodian of enemy property. The English staff therefore wished to wind up the business. The business manager, Mr Ingram, reported to the company secretary, Mr Sayer, that the packages were of no value and they were disposed of to a charity. No steps were taken to ask for the claimant's consent or to get in touch with her before the packages were given away. The claimant brought a claim in conversion more than six years later, relying on the old section 26 and arguing that her right of action had been concealed by fraud.

115. Lord Greene MR stressed that "there was no shadow of justification" for the defendants disposing of the packages without Mrs Beaman's consent. Lord Greene was trenchant in his criticism of the trial judge, Denning J, who had dismissed the claim. Denning J had formed a favourable view of Mr Ingram, absolving him of dishonesty or moral turpitude and finding as a fact that Mr Ingram and hence the defendants had honestly formed the view that the goods were likely to be valueless and it was unlikely that they would be able to contact the claimant. Lord Greene commented that Denning J "appears to have under-estimated the readiness with which people deceive themselves into thinking their actions are honest, especially when their own interests are involved."

116. Lord Greene noted that the commercial interests of the defendants clearly lay in acting as they had done. Having set out the facts as he saw them, he concluded at p 565:

> "The defendants' principal purpose, if not their sole real purpose, in getting rid of the plaintiff's goods was to obtain for themselves the commercial advantage of being able to close down their business. In breach of their duty as bailees to communicate with the plaintiff before converting her goods, they recklessly and without making the slightest effort to ascertain the true position, assumed that communication was impossible, … and … they made no attempt to let the plaintiff

> know what they had done. They recklessly and without taking the least trouble to verify the facts assumed (what was false and on a simple examination of the records would have been shown to be false) that the plaintiff had not troubled about her goods, …. They recklessly formed the opinion that the goods were valueless without having any independent valuation and in disregard of the facts (which as bailees carrying on business as such they must have known) that the absence of pecuniary value could afford no justification for disregarding their obligations."

117. He held that this was sufficient to amount to fraudulent concealment. Somervell LJ agreed. He referred to Denning J's conclusion that the defendants had acted honestly. As a result, Somervell LJ said, the court had no direct evidence as to the reasons why the claimant's goods were given away. However, the only possible inference was that the defendants wanted to get rid of the goods for their own convenience and with complete disregard of the value which the claimant had shown she attached to her property. He held that "any reasonable person directing himself to the facts as known would have realised that the defendants had no right to give away the plaintiff's goods and that it was dishonest to do so." Singleton LJ also noted that Denning J had held that Mr Ingram was an honest and reliable witness but said that that still left open the question as to the proper inference to be drawn from the concealment. He accepted that there needed to be 'conscious wrongdoing' but held that there was ample proof of that. There was wilful disposition of the property with knowledge that the packages were valued by the plaintiff. The disposition of the property was carried out furtively and the fact that this had been done was deliberately concealed from her. The appeal was therefore allowed.

118. Mr Kimmins argued that although Lord Greene MR used the term 'recklessly' in his judgment, it was clear that all the members of the court believed that the defendants had knowingly converted the packages. That may be true, but they were faced with the fact that the trial judge had concluded that Mr Ingram was an honest witness and that neither he nor Mr Sayer had realised that it was wrong and dishonest to dispose of the packages. Lord Greene recognised that he could not overturn that finding, however sceptical he was that it was justified. I do not accept therefore Mr Kimmins' submission that the decision of the Court of Appeal was based on holding that the defendants had *known* that they were acting in breach of their duty as bailees when they disposed of the goods. All the members of the court recognised that that conclusion was ruled out by the findings of fact made by the trial judge. That, in my view, is why Lord Greene MR referred to their recklessness as a finding that was open him and why Somervell LJ held that even if Mr Sayer had been honest when directing Mr Ingram to dispose of the goods, "any reasonable person" would have realised that they had no right to do so. In my judgment therefore, because the Court of Appeal could not go behind the findings made by the judge, the case is authority for the proposition that something less than actual knowledge was sufficient.

119. A similar situation arose in *Kitchen* to which I have already referred. The plaintiff's husband, a member of the Royal Air Force, had been electrocuted when switching on the electricity at their home. Mrs Kitchen consulted solicitors with a view to bringing an action against the electricity company. The solicitor, Mr Arditti, negligently

allowed the limitation period to expire without starting proceedings on her behalf. Some time later, the electricity company made an *ex gratia* payment to the Royal Air Force Association to be used for her benefit. The money was then given to her by the RAFA but, at Mr Arditti's suggestion in a telephone conversation with the electricity company, she was not told that the money had come from the electricity company. The trial judge had found as a fact that Mr Arditti had wanted to withhold the source of the money from Mrs Kitchen not in order to avoid criticism of his firm but because he thought it would prevent the relationship of solicitor and client from springing up between the firm and Mrs Kitchen. Lord Evershed MR recorded at p 571 that that finding was "strongly challenged" by counsel for Mrs Kitchen but said that he was not prepared to go behind it. He therefore accepted "the judge's acquittal of deliberate motive on Mr Arditti's part." Having determined that there had been concealment, Lord Evershed addressed the question of whether there was sufficient mental element: (p 572)

> "I repeat that there is no finding and no justification for any finding of dishonesty as that word is ordinarily understood. But it is now clear that the word "fraud" in the section which I have read, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman v. A.R.T.S. Ltd* that no degree of moral turpitude is necessary to establish fraud within the section. … it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other."

120. He then considered the *Beaman* case in detail and held that the same reasoning applied in the case before him; the conduct of the appellants "was in the sense in which Lord Greene MR used the word, reckless, in at least to the same degree as it was in *Beaman's* case": p 574. Parker LJ agreed with Lord Evershed as did Sellers LJ. Sellers LJ said that "Whatever may have been in the mind of Mr Arditti at the time of the telephone conversation, his failure of duty concealed from the plaintiff facts which would, in all probability, have revealed the appellants' earlier breach of duty. The concealment was intentional and did, in fact, benefit and save the interests of the appellants". He held that that was sufficient to prevent the appellants from relying on the limitation defence: p 579.

121. By the time of the next relevant case, *King v Victor Parsons & Co (a firm)* [1973] 1 WLR 29 ('*King v Victor Parsons*'), Denning J had risen to become Lord Denning MR. Estate developers contracted to sell a plot of land on which the foundations of a house had been laid. The vendors of the land then built a house for the plaintiff on the site. In fact the foundations had been built on an old rubbish tip so that, as Lord Denning put it, "it seemed firm on top, but was soft and slushy underneath". The house had to be demolished. The evidence at trial was that the vendors had been advised by an architect that they needed to use reinforced foundations but they had not acted on that advice. The trial judge held that the vendors could not rely on the limitation period bar because they ought to have known of the consequent risk of subsidence. As they had not told the plaintiff of the risk, there had been concealment of his right of action by fraud. The vendors appealed and the plaintiff cross-appealed that the judge should have held that the vendors did know of those facts, not merely

that they ought to have known. Having set out the wording of the old section 26, Lord Denning set out the law in a passage that has been cited often in later cases: (pp 33 – 34)

> "The word "fraud" here is not used in the common law sense. It is used in the equitable sense to denote conduct by the defendant or his agent such that it would be "against conscience" for him to avail himself of the lapse of time. The cases show that, if a man knowingly commits a wrong (such as digging underground another man's coal); or a breach of contract (such as putting in bad foundations to a house), in such circumstances that it is unlikely to be found out for many a long day, he cannot rely on the Statute of Limitations as a bar to the claim: see *Bulli Coal Mining Co. v. Osborne* [1899] A.C. 351 and *Applegate v. Moss* [1971] 1 Q.B. 406. In order to show that he "concealed" the right of action "by fraud", it is not necessary to show that he took active steps to conceal his wrong-doing or breach of contract. It is sufficient that he knowingly committed it and did not tell the owner anything about it. He did the wrong or committed the breach secretly. By saying nothing he keeps it secret. He conceals the right of action. He conceals it by "fraud" as those words have been interpreted in the cases. To this word "knowingly" there must be added "recklessly": see *Beaman v. A.R.T.S. Ltd.* [1949] 1 K.B. 550, 565-566. Like the man who turns a blind eye. He is aware that what he is doing may well be a wrong, or a breach of contract, but he takes the risk of it being so. He refrains from further inquiry lest it should prove to be correct: and says nothing about it. The court will not allow him to get away with conduct of that kind. It may be that he has no dishonest motive: but that does not matter. He has kept the plaintiff out of the knowledge of his right of action: and that is enough: see *Kitchen v. Royal Air Force Association* [1958] 1 W.L.R. 563. If the defendant was, however, quite unaware that he was committing a wrong or a breach of contract, it would be different. So if by an honest blunder he unwittingly commits a wrong (by digging another man's coal), or a breach of contract (by putting in an insufficient foundation) then he could avail himself of the Statute of Limitations."

122. Lord Denning overturned the judge's finding and held that the correct finding would have been that the defendants knew that there was a risk of subsidence and "nevertheless they took their chance on it". That was, he said, "a reckless disregard of their obligations" and was unconscionable conduct which precluded reliance on the Limitation Act. I do not consider that Lord Denning's reference to "the man who turns a blind eye" in that passage was intended to indicate that he was only considering wilful blindness or 'Nelsonian blindness' as it is sometimes called. He must have known that that is different from recklessness. Megaw LJ decided the case on a different basis. He held that the judge had been wrong to conclude that 'ought to know' was enough. The cases did not, he held, go that far. But on the true view of the

facts, the defendants had known that the warranty they gave was untrue. Brabin J agreed that the facts found by the judge showed that there was actual knowledge and it was therefore not necessary to consider what the result would have been had the finding been otherwise: p 42C.

123. There were other decisions before 1980 arising from the concealment of negligent building work that only became apparent once the claimant house buyers had lived in the property for some years: see *Applegate v Moss* [1971] 1 QB 406 and *Clark and anor v Woor* [1965] 1 WLR 650. Those cases stress that even though the statute referred to 'fraud', the correct test was unconscionability that did not necessarily involve 'moral turpitude'.

124. In my judgment these cases do establish that recklessness was a sufficient mental element under the old section 26. The claimant did not have to show that the defendant knew that the conduct he was concealing gave rise to a cause of action; it was enough that the concealment was unconscionable and it would be unconscionable if he concealed the fact, being reckless as to whether or not he had committed an actionable wrong. It may be that the facts of the cases could equally have supported a finding of actual knowledge and that the appellate courts thought the trial judges had been rather indulgent in their factual findings. But the appellate judges found that the test was satisfied largely without overturning those factual findings but by concluding that actual knowledge was not needed. The next question is, therefore, whether the same is true of section 32 of the LA 1980.

(e) Parliamentary materials on the enactment of section 7 of the Limitation Amendment Act 1980

125. The Law Reform Committee, chaired by The Rt Hon Lord Justice Orr OBE, published its final report on limitations of actions in 1977 (Cmnd 6923). The Report described the development of the concept of concealed fraud that had been captured in the old section 26 by setting out the lengthy passage from the judgment of Lord Denning MR in *King v Victor Parsons* that I have set out above: see para 2.11 of the Report. The Report said that the essential feature of the concealed fraud approach was that it operated on some degree of blameworthiness on the part of the defendant beyond his mere failure to comply with his legal obligations; "the traditional expression is 'unconscionable conduct'". The Committee suggested that if that was thought to be the best approach, it would not be difficult to reformulate the old section 26 in a way which "while incorporating the feature of unconscionability, reproduced in a more readily intelligible form the construction placed on that section by the courts." The Report continued:

> "2.23 It is evident from the judgment of Lord Denning MR, quoted above that both the title and the wording of section 26 are misleading in that it:-
>
> (i) is not limited to fraud in the common law sense;
>
> (ii) embraces recklessness; and
>
> (iii) is not limited to cases of active concealment."

126. The Committee then set out their proposed redraft of section 26(1), though acknowledging that the wording would be for Parliamentary Counsel to settle. The wording proposed provided that the limitation period would be postponed where:

> "the action is based on a deliberate or reckless breach of duty (whether or not arising under a contract);"

and where:

> "the right of action is concealed by the dishonest conduct of [the defendant]."

127. When the Bill which later became the Limitation Amendment Act 1980 was debated in the House of Lords, the proposed new section 26 to be inserted into the LA 1939 was contained in clause 7 of the Bill. This clause, said the Explanatory Memorandum at the front of the Bill, "restates, without substantive change, the provisions in section 26 of the Limitation Act 1939 (postponement of limitation period in case of fraud or mistake)". The new clause 26 at that stage had an expanded equivalent of what later became section 32(1)(b), because it required not only that any fact relevant to the plaintiff's right of action "has been deliberately concealed from him by the defendant" but also, in clause 26(2)(b), imposed a requirement that "it would be unjust in view of the defendant's conduct" to allow him to rely on the expiry of the limitation period. The proposed new clause 26(3) reflected what is now section 32(2).

128. When the Bill was presented in the House of Lords for its second reading by the Lord Chancellor, Lord Hailsham of Saint Marylebone, he described clause 7 as "a restatement of old law in modern language". The Bill was subsequently debated in the House of Lords in July 1979. Lord Mishcon tabled an amendment to delete the whole of the new clause 26(2)(b) because of concern that the introduction of the 'unjust to rely' requirement made the test more difficult for a claimant to satisfy than the old section 26. He argued that it was wrong and unnecessary to add this requirement. Lord Hailsham, responding for the Government, said that although the clause was new:

> "the purpose of the clause is to restate the law more or less as it is, in language which is more or less contemporary, because the old law has come to be interpreted by the courts in such a way that the old language is no longer contemporary and this is thought to be an easier way of putting it."

129. Lord Hailsham said that the new 'unjust to rely' requirement was intended to reflect the Law Reform Committee's view that it was essential that there be unconscionability, that is some degree of blameworthiness on the part of the defendant over and above his failure to comply with his strict legal obligations. It was thought that the 'unjust to rely' provision would leave the courts:

> "with as much flexibility as they had before in interpreting fraud in the old Section 26 which is being replaced in order to determine when a defendant has behaved so badly that he should not be allowed to rely on the expiry of the relevant limitation period."

130. Lord Hailsham described the purpose of the new clause as "to get rid of the term "concealed fraud" as a concept, as a term of art." He also described the inclusion of clause 26(3) as extending the definition of 'deliberate concealment' to include deliberate commission of a breach of duty. This was required, he said:

> "since it is not intended that the new section should be in any way more restrictive than the present law. There is a case of the Court of Appeal … *Beaman v A.R.T.S.*"

131. During the debate, Lord Elwyn-Jones supported Lord Mishcon's view that the 'unjust to rely' requirement would impose the burden of a double proof of blameworthy conduct. Lord Hailsham undertook to think again, at which point Lord Mishcon withdrew his proposed amendment.

132. That description of the clause by Lord Hailsham was repeated by the Solicitor-General, Sir Ian Percival when he moved for the second reading of the Bill in the House of Commons in October 1979. He said:

> "Clause 7 is a restatement in modern language of the extension of time conferred when there has been fraud or what is presently known as "concealed fraud" on the part of the defendant, or mistake on the part of the plaintiff. The committee found that the language of the Limitation Act 1939 no longer reflected the principles on which the courts operated when determining whether there should be an extension of time in such cases. It suggested that the section should be revised in order to express more accurately the present case law. This difficult exercise—all who have considered it appreciate that it is very difficult—has been attempted, and I hope that the House will consider that success has been achieved in clause 7."

133. Sir Ian told the House that the Government had decided to omit the 'unjust to rely' requirement by deleting proposed clause 26(2)(b). The text finally enacted as the new section 26 inserted by section 7 of the Limitation Amendment Act 1980 into the LA 1939 was in the same terms as were then consolidated into the LA 1980 as section 32.

134. Mr Kimmins argued that if the court is minded to engage in this analysis, which he strongly deprecated, then the key fact to note was the omission from the Bill of the words 'or reckless' which had been included in the wording proposed in the Law Reform Committee's Report. The decision to delete those words between the Committee's wording and the clause included in the Limitation Amendment Bill, he said, sticks out like a sore thumb. Both Mr Kimmins and Mr Weir speculated why Parliamentary Counsel had removed those words when drafting clause 7 of the Limitation Amendment Bill; was it because recklessness was not intended to be sufficient mental element as Mr Kimmins suggested or because the drafter believed that the word 'deliberate' included the concept of 'recklessness' anyway? That does not seem to me to be the relevant point. The point is rather that the Bill presented by the Lord Chancellor was said not to be in any way more restrictive than the previous law, in the course of a debate which was focused on the element of unconscionability of the defendant's conduct.

135. There is support for Mrs Potter's submissions on this point in the post-1980 case law too. Lord Millett in *Cave* set out the same passage from the judgment of Lord Denning MR in *King v Victor Parsons* that the Law Reform Committee had cited: [20]. In *Giles v Rhind* in the passage from [37] that I have set out at para 60, above, Arden LJ considered the broader scope of the reference to a 'breach of duty' in section 32(2). She agreed with the trial judge's reasoning that that had been the position under the old section 26 "and it was not the intention of the 1980 Act to limit the scope of the pre-existing law". The authors of *Clerk & Lindsell on Torts* (23rd edn) state at para. 31-22 (citing the Law Reform Committee's Report) that:

> "Section 32 of the Limitation Act 1980 is a re-draft of s. 26 of the Limitation Act 1939, designed not to change the existing law, but to bring the statute more obviously into line with the interpretation which the courts had put upon it."

(f) What test would best meet the Parliamentary objective behind section 32?

136. I accept Mr Weir's submission that the extension of the mental element of 'deliberateness' to include recklessness is also supported by the practicalities of the matter. In many situations, as here, the existence of a legal wrongdoing can only be absolutely known by the defendant once a court has determined that a wrong has been committed. One must avoid a similar kind of 'logical paradox' that the Supreme Court described in *FII* at [173] onwards, namely that one can only determine whether the test for allowing the claim to go forward has been satisfiedm once the claim has gone forward and been determined in the claimant's favour. This was the problem to which Mance LJ referred in *Williams* at [38] where he said that "the plaintiff could not have to show that the defendant knew that there was a right of action which would succeed". It should be sufficient that the defendant appreciates that there is a real risk that its conduct will amount to a legal wrong in circumstances where it is not reasonable for them to take that risk. Of course, the recklessness test brings with it its own list of potential sub-issues – how serious does the risk have to be? how is the appreciation of risk to be proved? Those issues may be difficult or straightforward to resolve, but the courts are familiar with making that kind of evaluative judgment on the facts of the particular case.

(g) Conclusion on the meaning of 'deliberate'

137. My conclusion following this survey is therefore that the pre-1980 case law establishes that recklessness was a sufficient mental element for the old section 26 and the Parliamentary materials relied on by Mrs Potter show that the test under section 32 was not intended to be any more difficult for the claimant to overcome. Expressed in modern terms, the test is that set out by Lord Bingham in *R v G*. Applying it to the present case, I would hold that:

    i) Mrs Potter can rely on section 32(2) if she can show that Canada Square realised that there was a risk that their failure to disclose the fact and extent of the commission resulted in their relationship with her being unfair within the meaning of section 140A, and it was not reasonable for them to take that risk of creating an unfair relationship; or

ii) Mrs Potter can rely on section 32(1)(b) if she can show that Canada Square realised that there was a risk that they had a duty to tell Mrs Potter about the commission charge, such that their failure to do so meant that they deliberately concealed that fact from her.

138. The fact that she was not able to establish that Canada Square had actual knowledge that the failure to disclose the commission made their relationship unfair is not therefore fatal to her reliance on section 32(1)(b) or section 32(2).

VII. WAS CANADA SQUARE'S CONCEALMENT DELIBERATE?

139. Grounds 3 and 4 of Canada Square's appeal focus on the application of the recklessness test by Jay J. By Ground 3, Canada Square argue that if, contrary to their primary submission, recklessness is sufficient, then the test comprises two stages: first, a subjective stage that Canada Square appreciated that there was a risk, and secondly an objective stage that it was unreasonable for them to take that risk. They contend that the finding of the judge at [67] that "Canada Square must be treated as apprehending that there was a risk that legal wrongdoing would be found by the court" showed that he had applied only the first, subjective limb of the recklessness test without going on to consider whether it was reasonable for them to take that risk. That, they argue, was an error of law. By Ground 4, Canada Square argue that even if Jay J was right that all that is needed is a subjective apprehension of risk, he was wrong to find that that test was satisfied on the facts of this case.

140. I have already concluded that the test for recklessness does include the two stages enunciated by Lord Bingham in *R v G*. However, given that the lack of evidence from Canada Square means that the subjective element in the present case can only be satisfied by an inference from the surrounding circumstances as to what Canada Square appreciated about the risks for them of non-disclosure, the line between the subjective and objective elements in this case is rather less distinct than it might be in other circumstances. Canada Square have not contested the findings below that, as a sophisticated creditor, they must have taken a deliberate decision not to disclose the commission to Mrs Potter and that the decision must have been taken at a high level within the company for commercial reasons.

141. The issues raised by Grounds 3 and 4 can therefore be dealt with together by considering:

i) The presence or absence of warning signs in the market that the non-disclosure of a very large commission payment might make the credit relationship unfair (section 32(2)) and/or have placed Canada Square under a duty to disclose the commission (section 32(1)(b)); and

ii) If one can infer from those warning signs that Canada Square must have appreciated that there was such a risk, whether it was reasonable for them to take that risk by not disclosing the commission.

(a) Warning signs of unfairness: some preliminary points

142. Mr Weir accepted that the finding of Recorder Rosen at [27] of his judgment that Canada Square must have been aware of the unfairness as from 26 July 2006 could

not stand. The earliest date for the mental element to be present must be either April 2007 when credit agreements became subject to the section 140A regime and it was apparent that the provisions would apply to existing agreements a year later, or April 2008 when section 140A became applicable to the relationship between Canada Square and Mrs Potter. In the present case it does not matter which date is chosen.

143. Mr Weir's submissions referred us to regulatory material, some of which was not before Recorder Rosen or Jay J. Mr Kimmins objected to the introduction of that material. It did not satisfy the test in *Ladd v Marshall* [1954] 1 WLR 1489 since it had been available to Mrs Potter and known to her at those earlier stages. A similar point was made before this court in *Zipvit Ltd v Revenue and Customs Commissioners* [2018] EWCA Civ 1515, [2018] 1 WLR 5729. Henderson LJ held there that new contractual documents should be admitted in evidence in part because the case before the court was a lead case in wider litigation so that "it is of particular importance that the facts should be investigated as fully as possible in relation to the sample transactions on which the [tribunal] was asked to rule": [42]. I consider that the same reason applies here, since it is unlikely that Canada Square are pursuing this appeal for the sake of the £7,953 they may owe to Mrs Potter.

(b) Warning signs of unfairness: events before March 2010

144. Canada Square place considerable reliance on the absence of any provision in the ICOB Rules requiring or encouraging them to disclose commission to their customers, regardless of the size of that commission. They point out that Black Horse had relied successfully on that regulatory background in *Harrison* to establish that there had been no unfairness. Paragon had been similarly successful in relying on it at all stages in the *Plevin* proceedings until they arrived at the Supreme Court in 2014. Mr Kimmins drew our attention to the comment of Hamblen J in *Dunlop Haywards (DHL) Ltd & ors v Barbon Insurance Group Ltd & ors* [2009] EWHC 2900 (Comm), [164] that the ICOB rules "might be said to be a high target by which to set a standard" and that they were based on "existing industry standards and best practice".

145. I note that Canada Square cannot claim that they actually relied on the decision of the Court of Appeal in *Harrison* in deciding not to disclose the commission. The Court of Appeal's decision came only after the relationship with Mrs Potter had ended in March 2010 and the first decision in those proceedings, that of District Judge Marston, had been in July 2010. By the end of the relationship between Mrs Potter and Canada Square, there was nothing to suggest that the law was more likely to develop in the direction taken by *Harrison* than it was to develop in the direction taken by *Plevin*.

146. Mr Kimmins concluded his submissions by saying that until the judgment in *Plevin* overruling *Harrison*, it was not reasonably foreseeable by Canada Square that the mere non-disclosure of the commission would make relationships unfair. It would have taken, he said, a fair level of genius on the part of the banks to have thought in April 2008 that, despite the FSA discouraging the disclosure of commissions, there was a risk that not doing so would give rise to an unfair relationship within section 140A. Moreover, a finding that Canada Square appreciated the risk required additional mental gymnastics because, as Lord Sumption had said in *Plevin*, the mischief of the non-disclosure related to the period before the loan was concluded, that mischief being that it prevented the borrower from shopping around or deciding

against taking out the PPI policy at all. Canada Square could not have realised as at July 2006 that there was such a risk, nor could they have realised that the non-disclosure gave rise to an on-going unfairness after section 140A came into effect.

147. Mr Weir in his submissions took us carefully through the regulatory material which, in my judgment, casts a different light on what was happening at the time.

148. I have already described the genesis of the ICOB rules as adopted by the FSA in 2005. Moving to the period covered by Mrs Potter's credit agreement, the FSA carried out a review of the ICOB Rules in March 2007. The *ICOB Review Interim Report: Consumer Experiences and Outcomes in General Insurance Markets* discussed PPI specifically at paras 5.8 onwards. It described the nature of the market and noted at para 5.8.5 that competition in the market was not passed down to consumers, with nearly all consumers purchasing the product from the provider of the credit. The FSA referred to the widespread lack of engagement by customers with the terms of the product they were buying, leaving "considerable scope for the sale of unsuitable policies": (para 5.8.9). Policies could be unsuitable for a variety of reasons and lack of competition at the point of sale meant that customers may make expensive purchases. The FSA referred to commission rates as leading to expensive purchases. The potential for cross-subsidy whereby the money made on PPI policies enabled a lower interest rate on the credit was regarded by the FSA as problematic. Consumers typically shopped around on loan interest rates but not on the combined loan and PPI cost: (para. 5.8.10).

149. The conclusion arrived at by the FSA 2007 review was that "purchasers of PPI have a significant risk of consumer detriment". There were particular risks of consumers purchasing products that they could not claim under or that were not good value. The FSA frankly acknowledged in this review that their current disclosure rules "do not achieve their intended outcome" and that the evidence "suggests the market for PPI generally appears to be failing to deliver against key intended consumer outcomes of ICOB" (para. 5.8.13). Their work showed:

> "that there is substantial evidence of significant market failures that our current rules have not dealt with. The limited competition at the point of sale is primarily for competition authorities to tackle and the PPI markets have now been referred to the Competition Commission. Our focus continues to be on selling practices."

150. So far as the OFT was concerned, I referred at the start of this judgment to the guidance, OFT 854. That guidance was published in May 2008 pursuant to the OFT's obligation under the then section 140D to explain how it planned to use its enforcement powers under the Enterprise Act 2002 for the benefit of consumers. That guidance cannot have given any comfort to Canada Square that it was safe from the application of section 140A because of the ICOB Rules. The OFT said that the category of conduct in section 140A(1)(c) encompasses both acts and omissions such as where the lender has failed to take certain steps which in the interests of fairness he might reasonably be expected to have taken. Relevant omissions "might include failure to provide key information in a clear and timely manner (or at all), or to disclose material facts." The OFT also said that regulatory guidance on what is or is not acceptable business practice may be helpful in identifying unfair behaviour,

referring to the criteria set out elsewhere in the CCA by which the OFT assesses fitness to hold a consumer credit licence. The OFT would take into account whether there had been a breach of the FSA rules, for example in relation to PPI policy sales. The guidance considered potentially unfair business practices in more detail in section 4, stating at para. 4.27 that:

> "… for these purposes it is immaterial whether the practice in question is itself a breach of the law or may be actionable as such, although this may be relevant in determining the OFT's enforcement priorities and the appropriate mechanism for dealing with the issue."

151. At para 4.44 the guidance said:

> "4.44 As noted above, practices can contribute to unfair relationships even if they do not themselves involve any contravention of the law. In considering the unfairness of such practices the court might have regard to whether they are of a kind that has been identified as unfair in the past (whether by a court or in a regulatory context) or which is recognisably unfair according to established tests of fairness."

152. Even before the publication of that guidance, the OFT had taken action in the exercise of its functions as a competition authority in respect of the market for selling PPI. On 7 February 2007, the OFT referred the supply of all PPI sold to retail customers to the Competition Commission ('the CC') for investigation under section 131 of the Enterprise Act 2002. This followed the making of a 'super-complaint' (as defined by section 11(1) of that Act) by Citizens Advice, one of the consumer bodies designated for this purpose. Section 131 empowered the OFT to refer a market for investigation by the CC if it suspected that there were features of the market which operated in an anti-competitive way. If the CC decided that there were features having an adverse effect on competition, it was required to consider whether it should take action to remedy those adverse effects or any detrimental effect on customers.

153. In January 2009, the CC published its market investigation report into payment protection insurance. It concluded that there were features of the market for PPI which were anti-competitive and which led to consumers paying higher prices and having less choice than they would if the market were functioning efficiently. One of the remedies they concluded was appropriate was a prohibition on selling single-premium PPI policies where the premium is paid in one upfront payment, generally by adding the premium to the credit borrowed. The selling of single premium PPI was eventually prohibited by the CC's Payment Protection Insurance Market Investigation Order 2011.

154. Finally, towards the end of 2012, the Parliamentary Commission on Banking Standards carried out its own inquiry into bank mis-selling of PPI. Mr Weir showed us the FSA's written evidence to that Commission. Although the giving of this evidence post-dates the end of Mrs Potter's credit relationship, it recorded the situation that existed during that relationship and, since Canada Square was an active participant in that market, it is reasonable to infer that it was aware of what was going on. In that evidence the FSA again frankly recognised that its regulation of PPI had

failed over the period when it had regulated general insurance from January 2005. The evidence stressed the enormous profits that the banks made from the commission on PPI, stating that "It appears that given the profits were so large, firms were content to risk a fine for mis-selling practices". The FSA said that although they had been aware when they took on the regulation of general insurance that there were "potential issues with PPI", they had believed that the ICOB Rules would address concerns about poor practices. The FSA went on:

> "However, in 2005 – 2007 the FSA did not appreciate the full extent of profit made by a few high street retail banks. The FSA lacked the capability to do market wide analysis which could have informed our thematic work. Consequently the true picture of the extent of banks' PPI sales, profits and of associated market failures, was not completely clear to us until the OFT and then the Competition Commission's work was available (2007-2009)."

155. The FSA said in that evidence that they had focused from 2008 onwards on making sure that firms gave fair redress to consumers but those attempts were not successful. It is also significant in my view that the FSA told the Parliamentary Commission that their consideration whether to adopt a more robust approach to regulating PPI after November 2005 was influenced by the fact that the OFT was considering whether to make a market investigation reference to the CC – the FSA did not want to pre-empt the CC's own conclusions and remedies. Finally, the FSA recorded that following the publication of the CC report in January 2009, they wrote a 'Dear CEO' letter to all firms still selling single premium PPI with unsecured personal loans asking them to stop selling by 29 May 2009. Firms complied with this request.

156. I fully accept that the focus of all these discussions, reviews and investigations was on a wide range of mis-selling practices, including a lender's insistence on the debtor taking out PPI as a condition of the loan, the sale of policies that were not suitable given the debtor's personal circumstances or of policies that did not in fact cover the risks that the debtor needed to be covered. I would accept that the non-disclosure of commission was not among the most serious of the unfair practices that comprised what became known as the 'PPI mis-selling scandal'. I also recognise, as Mr Kimmins urged upon us, that the only factor relied on by Mrs Potter as making her relationship with Canada Square unfair is the non-disclosure of commission. She was not complaining about being required to pay a single upfront premium for several years of cover or suggesting that she had been required to take out a PPI policy as a condition of the loan.

157. Even taking all that into account, for Canada Square to suggest that the Supreme Court's judgment in *Plevin* came to them as a bolt of lightning out of a clear blue sky simply because the ICOB Rules did not require disclosure of commission is very far from a fair portrayal of what took place. For most of the currency of the relationship with Mrs Potter, the CC was investigating selling practices in the market in light of the OFT's concerns about market failures leading to consumers making expensive purchases. The reasons why the FSA did not act on its findings in the 2007 Review by toughening up the regulation of PPI was not because it was satisfied that everything was operating as it should. In my judgment this material entirely supports the decisions of Recorder Rosen and Jay J that Canada Square must, subjectively,

have been aware that there was a risk that the non-disclosure of the commission made the relationship with Mrs Potter unfair. There were plenty of warning signs that lead inevitably to the inference that Canada Square must have appreciated that if they decided not to tell Mrs Potter that the PPI policy for which they were charging her £3,834 was in fact valued by the insurer at £182.50, there was a risk at least after April 2008 that the credit relationship between them would be regarded as unfair. Similarly, they must have realised that there was a risk that they ought to disclose the commission to her because to do otherwise would conceal from her a fact that was relevant to her right of action against them under section 140A.

158. Was it reasonable, objectively, for them to take that risk? Mr Weir argued that the very fact that Canada Square have conceded in this case that their relationship with Mrs Potter was unfair means that they must have conceded that it was reasonable to expect them to disclose the commission. He refers to the formulation of unfairness by Lord Sumption in *Plevin* at [19]. That may be right but I would not want to decide the appeal on a basis so specific to what has happened in the current proceedings.

159. Mr Kimmins wisely did not seek to argue that a reasonable bank would take the risk of not disclosing commissions to its borrowers because it could thereby earn enormous profits as against a risk of having to pay compensation to the few customers who later exercise their rights under section 140A. He did, however, seek to rely on an argument along the lines that since all the banks were doing it, it must have been reasonable for Canada Square to do it. In my judgment, any comfort that Canada Square might have drawn from the fact that other creditors were doing the same must have been dispelled at the latest on the publication of the Competition Commission Report, even if not by the FSA 2007 Review and the reference by the OFT of the market to the CC for investigation. It was precisely because the practices criticised were so ubiquitous that the CC found that there had been a serious market failure from the point of view of consumers.

160. Other factors relevant to the reasonableness of taking the risk might arise in other cases, such as the difficulty or expense of avoiding the risk, or a countervailing risk of harm to the claimant, even if that harm did not amount to a legal wrong. Here there would have been no difficulty or expense incurred in disclosing to Mrs Potter that the insurance premium payable to AXA for the PPI policy was only £182.50 and that the rest of the cost was Canada Square's commission. There would have been no possible harm to Mrs Potter in showing her that split of the costs. I can see no reason why a reasonable person, apprehending the risk that Canada Square must have apprehended, would have decided not to disclose the commission to Mrs Potter.

VIII. CONCLUSION

161. In the light of my conclusions, I would therefore dismiss the appeal on the basis that Mrs Potter can defeat Canada Square's reliance on the ordinary limitation period by reliance on section 32(1)(b). Canada Square deliberately concealed from her a fact, namely the existence and extent of the commission they received, that fact being relevant to her right of action under section 140A. The period of limitation did not therefore begin to run on her claim under section 140A until she discovered the concealment in November 2018. Further or alternatively she can rely on section 32(1)(b) as expanded by section 32(2) because Canada Square deliberately committed

a breach of their duty towards her under section 140A in circumstances where that breach was unlikely to be discovered for some time.

Lord Justice Males:

162. Subject to some observations which I wish to make about the way in which the law on section 32(1)(b) has developed, I agree with the clear and comprehensive judgment of Rose LJ.

163. In my view it is sensible to begin with section 32(1)(b), even though the issue whether that provision applies comes before us by way of Respondent's Notice. Section 32(1)(b) is the primary provision, suspending the running of time if "any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant". Section 32(2) is an additional provision, in effect extending the concept of deliberate concealment to a case where there has been a "deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time". Deliberate commission of a breach of duty in those circumstances is deemed to amount to "deliberate concealment of the facts involved in that breach of duty", whether or not there was actually such deliberate concealment.

The straightforward approach

164. The statutory words ("deliberately concealed") are ordinary English words which ought to be capable of being interpreted according to their natural and ordinary meaning in their context and in the light of the statutory purpose, which is to extend the primary limitation period in cases where the defendant's conduct has prevented the claimant from realising that she has a claim. A judge ought to be able, having ascertained the facts, to decide whether there is a relevant fact which has been deliberately concealed. That ought not to be a complicated question.

165. This was the view of Lord Scott in *Cave v Robinson Jarvis & Rolf* [2002] UKHL 18, [2003] 1 AC 384. He concluded his analysis of the terms of section 32(1)(b) and 32(2) by rejecting any elaboration of their language such as the addition of a requirement that the defendant's behaviour should be unconscionable:

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

166. It ought, therefore, to be possible to decide this appeal in the following straightforward way.

167. The first step is to identify the facts which are relevant to the claimant's right of action. That expression has been narrowly interpreted to refer to a fact without which the cause of action is incomplete (*Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 883, [2015] Bus LR 1362). It is in accordance with the statutory purpose that there should be such a narrow interpretation: if the claimant can plead a claim without needing to know the fact in question, there is no good reason why the primary limitation period should not apply. But it does not necessarily follow that the section as a whole should be narrowly interpreted. It should be given its natural meaning without a predisposition to interpret it either narrowly or broadly.

168. The bank admits (and in the light of *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61, [2014] 1 WLR 4222 has no choice but to admit) that its relationship with the claimant was unfair within the meaning of section 140A of the Consumer Credit Act 1974 because of its failure to disclose the fact and amount of the PPI commission. The relationship was unfair from the beginning, but the Act only afforded Ms Potter a remedy from the date when section 140A came into force with respect to pre-existing agreements.

169. Accordingly the relevant fact for the purpose of section 32(1)(b) is the fact and amount of the commission. Without knowing this, the claimant could not bring a claim.

170. The next question is whether the bank deliberately concealed that fact. In addressing that question it is relevant to bear in mind why the failure to disclose rendered the relationship unfair. *Plevin* holds that a relationship may be unfair even though there was no duty outside section 140A to disclose the commission and even though the section itself does not impose an obligation to disclose it. The unfairness arises because "the creditor must normally be regarded as responsible for an omission making his relationship with the debtor unfair if he fails to take such steps as (i) it would be reasonable to expect the creditor or someone acting on his behalf to take in the interests of fairness, and (ii) would have removed the source of that unfairness or mitigated its consequences so that the relationship as a whole can no longer be regarded as unfair" (see Lord Sumption at [19]). Accordingly the starting point for any consideration of deliberate concealment in this case is that it would have been reasonable to expect the bank to disclose the commission in the interests of fairness and that the bank acted unreasonably in not doing so.

171. The bank's decision not to disclose the commission was plainly deliberate. The bank thought about disclosing but decided not to do so. It is obvious that a decision was made at a senior level within the bank that the extraordinary level of commission should not be disclosed to customers; that salesmen and account managers were instructed accordingly; that documentation was prepared in a way which ensured that there was no mention of commission, let alone its amount; that the bank knew that disclosure of the commission would cause enormous customer dissatisfaction (and, in the case of new business, would mean that the customer would be unlikely to proceed); and that the bank's decision not to disclose was made in order to safeguard this very lucrative business. Any other view defies common sense.

172. The answer to the question whether there was deliberate concealment is then obvious. As a matter of ordinary language, a conscious decision not to disclose facts which it would be reasonable to expect a defendant to disclose in order to avoid unfairness seems to me, at any rate in the absence of some unusual circumstances, to be properly described as deliberate concealment. If I consciously decide not to tell you something which I know that you would wish to know and will not like, and which it would be reasonable for me to tell you in order that the relationship between us should be fair, I am deliberately concealing it from you. If the fact is relevant to a right of action which you have against me, I am still deliberately concealing it from you, whether or not I know anything about your right of action.

173. This simple approach ought to be sufficient to enable us to decide that the appeal should be dismissed by reason of the Respondent's Notice and (even more

importantly) to enable judges in the county court to apply section 32 in this kind of case without undue complexity.

174. I do not think that *Cave* compels a different view, even though the parties rightly agree that "deliberately" must mean the same in section 32(1)(b) as it does in section 32(2). *Cave* holds that in order for the commission of a breach of duty to be deliberate under section 32(2), it is not enough that the defendant is negligently unaware of the fact that a breach of duty is being committed. But the language of section 32(1)(b) is different from that of section 32(2). It is the concealment of the fact which must be deliberate.

175. The question then arises whether the defendant must not only conceal deliberately a relevant fact, but must also know that (or be reckless whether) the fact in question is relevant to the claimant's right of action. If free to say so, I would say, in agreement with Park J in *Williams v Fanshaw Porter & Hazelhurst* [2004] EWCA Civ 157, [2004] 1 WLR 3185, that this is not necessary:

> "14. … Although the concealed fact must have been relevant to the right of action, the paragraph does not say, and in my judgment does not require, that the defendant must have known that the fact was relevant to the right of action. In most cases where section 32(1)(b) applies the defendant probably will have known that the fact or facts which he concealed were relevant, but that is not essential. All that is essential is that the fact must actually have been relevant, whether the defendant knew that or not. The paragraph does of course require that the fact was one which the defendant knew, because otherwise he could not have concealed it. But it is not necessary in addition that the defendant knew that the fact was relevant to the claimant's right of action."

176. The natural meaning of the subsection is that there must be a fact which is "relevant to the plaintiff's right of action", and that fact must be deliberately concealed, but it is not necessary that the defendant should know that the fact is relevant or even that the claimant has a right of action. It is sufficient, and accords with the purpose of section 32, that the defendant deliberately ensures that the claimant does not know about the fact in question and therefore cannot bring proceedings within the primary limitation period.

The case law on deliberate concealment

177. Unfortunately, the cases do not permit this straightforward approach. In my view the law concerning section 32(1)(b) has got itself into a rather unsatisfactory state. The cases have increasingly moved away from a focus on the language of the subsection.

178. The first step was to draw a distinction between "active concealment" and "mere non-disclosure". In *Cave* Lord Millett drew that distinction at [23], suggesting that, because there was a risk that section 32(1)(b) might be construed as extending only to "active concealment", section 32(2) had been enacted to cover cases where active concealment should not be required. He summarised the section as applying in two situations:

> "25. In my opinion, section 32 deprives a defendant of a limitation defence in two situations: (i) where he takes active steps to conceal his own breach of duty after he has become aware of it; and (ii) where he is guilty of deliberate wrongdoing and conceals or fails to disclose it in circumstances where it is unlikely to be discovered for some time. …"

179. Lord Scott's analysis was different. His view was that section 32(1)(b) was capable of extending to an omission as well as an act, but that section 32(2) provided an alternative route for a claimant where proof of deliberate concealment might be difficult:

> "60. … I agree that deliberate concealment for section 32(1)(b) purposes may be brought about by an act or an omission and that, in either case, the result of the act or omission, i.e. the concealment, must be an intended result. But I do not agree that that renders subsection (2) otiose. A claimant who proposes to invoke section 32(1)(b) in order to defeat a Limitation Act defence must prove the facts necessary to bring the case within the paragraph. He can do so if he can show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by a withholding of relevant information, but, in either case, with the intention of concealing the fact or facts in question. In many cases the requisite proof of intention might be quite difficult to provide. The standard of proof would be the usual balance of probabilities standard and inferences could of course be drawn from suitable primary facts but, none the less, proof of intention, particularly where an omission rather than a positive act is relied on, is often very difficult. Subsection (2), however, provides an alternative route. … I do not agree with [counsel for the claimant] that the subsection, thus construed, adds nothing. It provides an alternative, and in some cases what may well be an easier, means of establishing the facts necessary to bring the case within section 32(1)(b)."

180. In the present case the parties agree that the bank's failure to disclose the commission was not a case of active concealment, but only of non-disclosure. For my part, however, if this question has to be asked, I do not think that this answer is correct. The bank went to considerable lengths to ensure that the claimant would not know about the commission.

181. The second development was to read into section 32(1)(b) a requirement that, in a case of mere omission, deliberate concealment requires a duty to speak. In *Williams v Fanshaw Porter & Hazelhurst* [2004] EWCA Civ 157, [2004] 1 WLR 3185 all three judges emphasised, on the facts, that the solicitor defendant had been under a duty to inform the claimant about the existence of the consent order which had prejudiced her position. Plainly that was a reference to a legal duty arising out of the relationship of solicitor and client. As a result of the solicitor's breach of that duty, deliberate concealment was established.

182. Giving the first judgment, Park J described "deliberate concealment" in the following terms:

> "14. … (iv) The requirement is that the fact must be 'deliberately concealed'. It is, I think, plain that the defendant must have considered whether to inform the claimant of the fact and decided not to. I would go further and accept that the fact which he decides not to disclose either must be one which it was his duty to disclose, or must at least be one which he would ordinarily have disclosed in the normal course of his relationship with the claimant, but in the case of which he consciously decided to depart from what he would normally have done and to keep quiet about it."

183. Because the solicitor was under a duty to disclose the existence of the consent order, the first of these two possibilities was satisfied. Park J, however, did not regard a duty to disclose as essential, as he allowed for the alternative that disclosure would ordinarily have been made in the normal course of the parties' relationship. He noted the different formulations of Lord Millett and Lord Scott in *Cave*, but considered that Lord Millett at [25] was doing no more than giving a condensed summary of the normal case to which section 32(1)(b) applies, and that Lord Scott's analysis tracked the statutory words more fully and closely (see [23] of Park J's judgment). I agree.

184. Mance LJ also drew attention at [32] and [33] to the different approaches of Lord Millett and Lord Scott. He appears to have regarded this as a real difference, but considered that it was unnecessary to decide which was correct. He too regarded the critical feature of the case as being that the solicitor had a duty to speak:

> "36. The existence of the solicitor-client relationship in the present case means that we do not have directly to confront the apparent difference between Lord Millett and Lord Scott regarding the nature of concealment. Where, as here, there is a duty to speak, then the intentional suppression of information which is known should be communicated pursuant to that duty can readily be regarded as 'concealment' of that information. …"

185. Brooke LJ likewise founded his short judgment on the solicitor's duty to speak:

> "51. … The claimant did not know any fact relevant to her cause of action until a date less than six years before this action was brought, and the reason why she did not know it was that Mr Brown intentionally concealed it from her when he was under a duty to tell her about it."

186. I do not think that the court in *Williams* should be taken to have held that the existence of a duty of disclosure was a necessary requirement under section 32(1)(b), even in a case of a mere omission to speak. It was unnecessary for it to do so. It was simply a case where, because the solicitor had such a duty, and had made a conscious decision not to disclose the relevant fact, there was no difficulty in concluding that he had deliberately concealed it. For my part, I agree with Park J that a conscious

decision not to disclose a fact which a defendant would have disclosed in the normal course of his relationship with the claimant can equally be described as a deliberate concealment regardless of whether the failure to disclose also amounts to a breach of duty, although I note that Rix LJ in *The Kriti Palm* [2006] EWCA Civ 1601, [2007] 1 All ER (Comm) 667 at [328] expressly rejected this approach, while Buxton LJ at [426] regarded it as controversial. Rix LJ said:

> "328. Mr Hamblen submitted that there was no need for this ingredient [i.e. a duty to disclose] to be met. He contended that it would be sufficient if the relevant facts would have been disclosed in the ordinary course of the relationship between the parties, citing the dictum of Park J in *Williams'* case … where Park J suggested that as an alternative. However, the other members of the court in that case did not adopt the same broader language, and on the facts a continuing duty to disclose was found on the part of the solicitor defendant. As I understand the analysis of Brooke and Mance LJJ in *Williams'* case, what is needed is either a duty to disclose and a conscious omission to disclose, or at least active concealment. AIC has not alleged active concealment."

187. The two elements which I have discussed so far, i.e. (1) Lord Millett's distinction between active concealment and an omission to disclose and (2) the requirement for a duty to disclose, were thus brought together in *The Kriti Palm*. Reasoning from *Cave* and *Williams*, Rix LJ described the test necessary to satisfy section 32(1)(b) as follows:

> "321. It appears therefore that there must be either active and intentional concealment of a fact relevant to a cause of action, or at least the intentional concealment by omission to speak of a fact relevant to a cause of action which the defendant knew himself to be under a duty to disclose. There is no decision that anything less than a duty to disclose will suffice in the absence of active concealment."

188. In my judgment, and with respect, this is an unjustified gloss on the wording of section 32(1)(b). It is an unnecessary complication. The subsection contains no reference to any requirement that the defendant is under a duty to disclose.

189. The position has been further complicated by the fact that Rix LJ and Buxton LJ (with whom Sir Martin Nourse agreed) were referring to different kinds of duty. Rix LJ was referring, as were all three judges in *Williams*, to a legal duty arising from the relationship between the parties which is independent of section 32. Hence his detailed analysis, between [328] and [351], of whether a term should be implied in the contract between the parties. Buxton LJ, however, was referring to a duty "in Limitation Act terms", a concept which had not been mentioned in any previous case. The result was that although Rix LJ and Buxton LJ identified the issues for decision in ostensibly similar terms, Rix LJ at [326] and Buxton LJ at [427], in fact they were each asking a different question.

190. Rix LJ's formulation was as follows:

> "326. In his skeleton argument, [counsel for the defendant] submitted that for the requirements of the deliberate concealment principle to be met, four points had to be answered in each case against ITS, namely: (1) Did ITS owe a duty to disclose the relevant information? (2) Were Mr Lucas and Mr Chalmers aware of that duty? (3) Did Mr Lucas and Mr Chalmers take a deliberate decision, in spite of their knowledge of ITS's duty, not to disclose the relevant information? (4) Was the information relevant to AIC's right of action?
>
> 327. In his judgment below, Buxton LJ adopts three tests which essentially cover the same ground (see [427] below). …"

191. Buxton LJ put it this way, also after citing extensively from *Cave* and *Williams*:

> "427. That exposition, and the judge's application of it, raises the following issues for this court. (i) Was ITS under a duty to AIC to reveal the existence and content of the Cooper retests? (ii) Did ITS, knowing of that duty, decide not to reveal the existence and content of the Cooper retests? (iii) Were the Cooper retests relevant to any and if so which of the rights of action asserted by AIC that are otherwise statute barred?"

192. Although the first issue in these two formulations appears to be identical, Rix LJ's question was concerned with whether there was a legal duty, while Buxton LJ (who must be regarded as in the majority in view of Sir Martin Nourse's agreement) was concerned with a duty "in Limitation Act terms" (see [440]) or a duty "in the sense relevant to the Act" (see [443]). These are not the same.

193. A duty "in Limitation Act terms" is a somewhat elusive concept. It appears that the existence of such a duty is not to be determined by reference to a defendant's contractual duties (see [430]) and that its existence is, at least to some extent, "a matter of common sense" (see [439]), but that does not help much in determining when such a duty exists. It may be that the duty is nothing more than a duty not deliberately to conceal relevant facts but, if so, it appears to add nothing of substance to the wording of section 32(1)(b), apart from enabling the unnecessary requirement to find a breach of duty to be satisfied.

194. A yet further complication which has arisen in the cases is whether section 32(1)(b) requires that the defendant is aware that his failure to disclose amounts to a breach of duty or that the fact is relevant to the claimant's right of action. So far as the latter point is concerned, Park J in *Williams* said not:

> "14. … Although the concealed fact must have been relevant to the right of action, the paragraph does not say, and in my judgment does not require, that the defendant must have known that the fact was relevant to the right of action. In most cases where section 32(1)(b) applies the defendant probably will have known that the fact or facts which he concealed were relevant, but that is not essential. All that is essential is that the fact must actually have been relevant, whether the defendant knew that or

> not. The paragraph does of course require that the fact was one which the defendant knew, because otherwise he could not have concealed it. But it is not necessary in addition that the defendant knew that the fact was relevant to the claimant's right of action."

195. However, Mance LJ appears to have taken a different view, saying that (at least typically) section 32(1)(b) applies where the defendant knew that his failure to disclose amounted to a breach of duty:

> "34. I return to the structure of section 32 with this assistance. Deliberate commission of a breach of duty involves knowledge of wrongdoing. Where it is likely to be some time before the commission of a deliberate breach of duty is discovered, there is deemed to have been 'deliberate concealment of the facts involved in the breach of duty'. These words in section 32(2) are a paraphrase referring to section 32(1)(b). Both under them and under the language of section 32(1)(b) itself, the legislature must have had in mind (at least as the typical concern) situations where a defendant deliberately concealed facts knowing that they were relevant to an actual or potential breach of duty. So read, section 32(1)(b) deals (at least typically) with deliberate concealment of facts known to be relevant to wrongdoing, while section 32(2) deals with deliberate wrongdoing, which is (in the specified circumstances) equated with deliberate concealment of wrongdoing. In each, the wrongdoing is the wrongdoing in respect of which the plaintiff is claiming. I leave for a moment the question whether this typical concern is the only concern of section 32(1)(b)."

196. Mance LJ then referred, at [37] to two possible interpretations of section 32(1)(b), a narrow interpretation which required the defendant to know that the concealed fact was relevant to the claimant's right of action, and a wider interpretation which did not. In both cases, however, it was at least implicit in Mance LJ's formulation that, in a case of omission as distinct from active concealment, the defendant had to know that the failure to speak was a breach of duty. For example, he said at [36] that "The deliberateness derives from [the defendant's] knowledge that he ought to disclose and his intentional disregard of his duty to do so" and he referred at [37] to deliberate concealment in these terms:

> "Deliberate concealment, at least if that means active misleading or knowing breach of a duty to speak, is a particularly serious matter; …"

197. Finally, when he came to his ultimate decision, he treated the solicitor's knowledge of the fact that he had been negligent as one of the ingredients required to satisfy section 32(1)(b):

> "48. In my judgment, therefore, all the ingredients required under section 32(1)(b) are, even on its more limited reading, satisfied: there was here on and after the hearing and order of

> 16th December 1994 a realisation by Mr Brown that he had been negligent, in the sense that agreeing to the consent order had been a bad mistake for which he was responsible, and deliberate concealment from her by him as her solicitor of the fact of that negligence - or more specifically of the fact of the consent order (as well as the dismissal consequent on it, which would have revealed the existence of the consent order)."

198. Following this lead, this court in *The Kriti Palm* viewed the defendant's knowledge that his failure to disclose the fact in question was a breach of duty as an essential requirement of deliberate concealment under section 32(1)(b). That is apparent from (among other things) the formulation of the issues by both Rix LJ and Buxton LJ which I have set out above. As Rix LJ concluded that there was no (legal) duty, the question whether the defendant was aware of that duty or its breach could not arise, although Rix LJ nevertheless addressed it for the sake of completeness at [363] to [366]. For Buxton LJ the relevant duty was a duty "in Limitation Act terms" and he addressed the issue whether the defendant knowingly breached that duty at [447] to [450]. His conclusion that it did was based upon admissions by the defendant's witnesses in cross examination that if they had known about the Cooper retests, they ought to have told the claimant about them.

199. It appears, therefore, that in order to decide whether the bank deliberately concealed the fact and amount of its commission from Ms Potter, we are required to ask a series of questions: (1) whether this was a case of active concealment or mere non-disclosure; (2) if the latter, whether the bank was under a duty to disclose the commission, either as an independent duty or as a duty "in Limitation Act terms"; (3) whether the bank knew that (or was reckless whether) it was in breach of that duty; and (5) whether the bank knew that (or was reckless whether) the commission was relevant to a right of action of the claimant. In my view, in posing these questions the cases have travelled a very long way from the statutory language, which does not refer to breach of duty at all in section 32(1)(b), let alone draw distinctions between different kinds of duty, and does not contain any requirement about the defendant's knowledge of such a duty. Nevertheless we are bound by (at least) *The Kriti Palm* and must do the best we can with the subsection as it has been interpreted in the cases which are binding upon us. It is on that basis that I agree with the judgment of Rose LJ.

200. I should explain that I have included recklessness in my summary of the questions which the cases require to be asked because I agree with Rose LJ that, in the context of section 32(1)(b), a defendant who is reckless whether a duty exists, or whether a fact is relevant to a right of action, can properly be described, if these questions have to be asked, as deliberately concealing the fact in question. That is so as a matter of the language and statutory purpose, even though the cases (with the exception of the Cayman Islands case of *Primeo Fund v Bank of Bermuda (Cayman) Limited* [2019] CICA JO613-1 where the reasoning is very brief) have not had to address this point. The facts of the present case demonstrate this: the bank did not actually *know* that it had a duty to Ms Potter, even "in Limitation Act terms", or that she had a right of action against it, but undoubtedly it concealed the commission from her and did so deliberately. To hold that its conduct did not satisfy the requirements of section 32(1)(b) would defeat the purpose of the subsection.

Sir Julian Flaux, Chancellor of the High Court:

201. I agree with both judgments.