

Gough Square Chambers' consumer credit column: April 2021

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Ruth Bala, Lee Finch, Sabrina Goodchild and Thomas Samuels are all specialist consumer credit counsel at Gough Square Chambers. On a regular basis, they will share their views with Practical Law Financial Services subscribers on topical developments or key issues relating to consumer credit.

In the April 2021 column, Sabrina Goodchild considers the recent decision in *Canada Square Operations Ltd v Potter* [2021] EWCA Civ 339.

Deliberate concealment: historic claims revitalised

Introduction

In *Canada Square Operations Ltd v Potter* [2021] EWCA Civ 339, the Court of Appeal comprehensively reviewed the requirements of sections 32(1)(b) and (2) of the Limitation Act 1980 (LA). Solidifying the expansive (and at some times convoluted) interpretation previously adopted by the courts, this decision is of considerable assistance to claimants relying on a broad range of non-disclosures.

This column focuses on the impact of the judgment from a consumer credit perspective, particularly in the context of the so-called "PPI 2" litigation (non-disclosure of commission in relation to payment protection insurance (PPI) policies) currently flooding the courts.

Background to the litigation

On 26 July 2006, Mrs Potter took out a regulated fixed-sum loan agreement with Canada Square (Loan) and a PPI policy with a third-party insurer to protect her repayments under the Loan. The PPI premiums were added to the Loan and contractual interest charged on the same. Unbeknownst to Mrs Potter, Canada Square received over 95% of the PPI premiums and a substantial proportion of the interest paid on those premiums as commission. Following early repayment, the Loan came to an end on 8 March 2010.

Following a "missale" complaint in April 2018, Mrs Potter received limited redress from Canada Square. In December 2018, Mrs Potter brought an unfair relationship

claim under section 140A of the Consumer Credit Act 1974 (CCA), relying on Canada Square's non-disclosure of commission and the excessive amount of commission received. Canada Square defended the claim at trial on the sole ground that the claim was time-barred under section 9(1) of the LA because the claim was brought more than six years after the relationship between the parties had ended. In her Reply, Mrs Potter relied upon section 32(1)(b) of the LA and section 32(2) of the LA to postpone the start of the limitation period until she had discovered the commission.

At first instance, Recorder Murray Rosen QC held that the claim was not time barred and gave judgment for Mrs Potter. Canada Square's appeal ([2020] EWHC 672 (QB)) was dismissed by Jay J, who held that Mrs Potter could not rely upon section 32(1)(b) of the LA by itself, but could rely upon section 32(2) of the LA. Canada Square appealed for a second time to the Court of Appeal.

Court of Appeal's analysis

Rose LJ, in one of her last judgments before elevation to the Supreme Court earlier this month, identified the following issues in the appeal:

- Did the creation of an unfair relationship under section 140A of the CCA amount to a breach of duty by Canada Square for the purposes of section 32(2) of the LA? See Breach of duty.
- Was Canada Square's failure to disclose the existence and amount of the commission a "concealment" of that fact? See Concealment.
- If the answer to both of those questions is yes, was Canada Square's conduct "deliberate"? See Deliberate.

The court expressly rejected the suggestion that section 32 of the LA should be interpreted restrictively (at [29]). Instead, the court held that the LA "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" (applying *Test Claimants in FII Group Litigation v HMRC* [2020] UKSC 47).

Breach of duty

Following *Giles v Rhind and another (No 2)* [2008] EWCA Civ 118, the court agreed that the expression "breach of duty" applied to any legal wrongdoing. There was no need to establish a breach of duty in a tortious, contractual, equitable or fiduciary sense. Accordingly, the creation of an unfair relationship by Canada Square (which was undisputed) was a breach of duty on which Mrs Potter could rely for the purposes of section 32(2) of the LA (at [63]).

Concealment

Holding that section 32(1)(b) of the LA is not limited to cases of active concealment, there being no authority to support such a conclusion (at [67]), the court held that, correctly interpreted, *Kriti Palm* [2006] EWCA Civ 1601 established that there was no requirement for a free-standing contractual, tortious or fiduciary duty for the defendant to disclose the fact in issue in circumstances of no active concealment (at [77]). The court considered that to hold otherwise would be to add an "unwarranted" and "unhelpful gloss" on the clear words of the statute. Rather, for the purposes of the LA, "the obligation need only be one arising from a combination of utility and morality" (at [75]).

Rejecting Canada Square's submission that the concealment must be some conduct other than the elements of the cause of action itself (at [83]), the court held that the obligations to act fairly imposed by section 140A of the CCA were sufficient to mean that Canada Square's failure to disclose the commission amounted to a concealment of that commission within section 32(1)(b) of the LA (at [84]).

Deliberate

Considering the mental element imported by the requirement of "deliberate" concealment, Rose LJ held that there was no clear, natural meaning of "deliberate" in this context and that the case law construing "deliberate" in section 32 of the LA was inconclusive. Relying on case law decided under the statutory provisions replaced by section 32 of the LA and the "practicalities of the matter", the court held that the correct test is that of recklessness with both a subjective and objective element, adopting the test identified in *R v G and anor* [2003] UKHL 50.

Applying it to the present case, the court held (at [137]):

- Mrs Potter can rely on section 32(2) of the LA 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, and it was not reasonable for them to take that risk of creating an unfair relationship.
- Mrs Potter can rely on section 32(1)(b) of the LA 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.

The court considered that the earliest date for the mental element to be present was either April 2007 (when credit agreements became subject to section 140A of the CCA and it was apparent that the provisions would apply to existing agreements a year later), or April 2008 (when section 140A of the CCA became applicable to the relationship between Mrs Potter and Canada Square). The court then proceeded to review the context in which Canada Square were acting whilst the relationship was still extant, including relevant court decisions, work being undertaken by the FSA and OFT guidance.

The court concluded that this background material supported the decisions of the courts below that Canada Square must, subjectively, have been aware that (i) there was a risk that the non-disclosure of commission made the relationship unfair and (ii) there was a risk that they ought to disclose the commission because to do otherwise would conceal from her a fact relevant to her cause of action under section 140A of the CCA (at [157]). The court also concluded that it was not reasonable for Canada Square to take this risk (at [160]).

Accordingly, the court found reliance on sections 32(1)(b) and (2) of the LA proved and the appeal was dismissed.

Comment

Whilst an encouraging read to claimants in unfair relationship claims, particularly in the context of the current PPI litigation, the door to limitation defences is not firmly closed and has, to a limited extent, been left ajar. There remains the possibility of such defences being successfully raised on, inter alia, the following grounds:

- A factual challenge to the claimant's evidence on when they discovered the non-disclosure. Here, Canada Square made no challenge to this evidence.
- Proffering evidence on when a claimant with reasonable diligence could have discovered the non-disclosure. This issue was not considered by the Court of Appeal as the matter was not in issue.

- Proffering evidence on the subjective element of the recklessness test. Here, Canada Square relied on no evidence at trial such that the court's considerations in relation to this issue were limited to the relevant factual background, as opposed to defendant-specific matters. Given the subjective element to the test, what the defendant thought it was doing, if properly evidenced, is likely to be given significant weight.
- The relationship ended prior to sections 140A-C of the CCA coming into force. Some contention may arise if the relationship ended in the transitional period created for these provisions.

It remains to be seen whether this decision will be appealed for a third time, and if so, whether the "straightforward approach" preferred by Males LJ, which favours an interpretation of "deliberate concealment" according to its natural and ordinary meaning in their context, will be favoured.

Gough Square Chambers' consumer credit columns

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