

Beyond Canada Square

Dr. Robert Whittock

24 June 2024

Causes of Action

- Negligence
- Breach of Contract
- Breach of Trust
- Breach of Fiduciary Duty

Causes of Action

- **Negligence**
- Breach of Contract
- Breach of Trust
- Breach of Fiduciary Duty

Negligence

- Primary limitation period
– 6 years
- Extensions:
 - s.14A LA 1980
 - s.32 LA 1980

Negligence

- s.14A LA 1980
 - 3 years
 - Start - date first had knowledge required for bringing an action for damages
 - Knowledge includes that reasonably expected to be acquired from facts observable by him or ascertainable by him or with the help of appropriate expert advice.

Negligence

- s.32 LA 1980
 - 6 years
 - Start – discovered the fraud, concealment or mistake or could with reasonable diligence have discovered it.

s.32 Limitation Act 1980

'Postponement of limitation period in case of fraud, concealment or mistake.

(1) Subject to subsections (3), (4A) and (4B) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—

...

*(b) any fact relevant to the plaintiff's right of action has been **deliberately concealed** from him by the defendant; or*

...

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.***

Court of Appeal – Canada Square v Potter¹

Lady Justice Rose Judgment:

(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.*

Supreme Court – Canada Square v Potter²

Lord Reed's Judgment:

'(iii) Conclusions in relation to section 32(1)(b)

*109. The elaborate and confusing analyses of section 32(1)(b) put forward in Williams, The Kriti Palm and the present case represent a **wrong turning in the law**. It should return to the clarity and simplicity of Lord Scott's authoritative explanation in Cave (para 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."

What is required is (1) a fact relevant to the claimant's right of action, (2) the concealment of that fact from her by the defendant, either by a positive act of concealment or by a withholding of the relevant information, and (3) an intention on the part of the defendant to conceal the fact or facts in question.'

Supreme Court – Canada Square v Potter²

Lord Reed's Judgment:

'(v) Conclusions in relation to section 32(2)

153. For all these reasons, the reasoning of the Court of Appeal in relation to section 32(2) cannot be accepted. **"Deliberate", in section 32(2), does not include "reckless"**. Nor does it include awareness that the defendant is exposed to a claim. As Lord Scott said in *Cave* at para 58, the words "deliberate commission of a breach of duty" are clear words of English. They mean, as he added at para 61, that the defendant "knows he is committing a breach of duty".'

Key Points

s.32(1)(b)

- **“deliberately concealed”:**
 - A fact relevant to the right of action
 - Concealment (positive act or withholding) of that fact by the defendant
 - Intention on the part of the defendant to conceal the fact.

s. 32(2)

- **“deliberate concealment” = deliberate breach:**
 - breach of duty where the defendant knows that he is committing a breach of duty (does not include the defendant being “reckless”).
 - breach of duty that is unlikely to be discovered for some time.

Thank you!

Any questions?

robert.whittock@gatehouselaw.co.uk