Neutral Citation Number: [2020] EWHC 672 (QB)

Case No: QA-2019-000262

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/03/2020

Before:

MR JUSTICE JAY

- -

Between:

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

- -
- -

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

Hearing date: 3rd March 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE JAY

MR JUSTICE JAY:

Synopsis

1. The events forming the basis of this appeal all took place a while ago now. The point of law which they generate concerns the interaction of section 32 of the Limitation Act 1980 ("the 1980 Act") with sections 140A-D of the Consumer Credit Act 1974 ("the 1974 Act"). It is a point of some general importance about which there is a diversity of first-instance opinion.

2. On 26th July 2006 Mrs Beverley Potter (originally the Claimant and now the Respondent) entered into a regulated fixed-sum loan agreement with Egg Banking Plc which has changed its name to Canada Square Operations Ltd (originally the Defendant and now the Appellant). The loan was in the sum of £16,953 and was repayable over 54 months at an interest rate of 7.9% APR. At the same time, the Respondent entered into a PPI policy with an insurer within the Axa group, the aggregate premia for which, net of interest, amounted to £3,834.24. Unbeknownst to the Respondent, the Appellant received a commission which amounted to 95.24% of these premia.

3. In the event, the Respondent discharged her obligations under these agreements by making payments as and when they fell due, and in March 2010 her account with the Appellant was closed.

4. In April 2018 a complaint was made on behalf of the Respondent to the Appellant on the basis that the PPI policy was mis-sold to her. In due course, she received compensation, but this did not cover the entirety of her loss. In January 2019 the Respondent brought proceedings seeking to recover the balance of the premia she had paid together with contractual and statutory interest, in reliance upon the provisions of sections 140A-D of the 1974 Act. The quantum of her claim was subsequently agreed in the sum of £7,953.53.

5. In a reserved judgment handed down on 6th August 2019, following an oral hearing which had taken place the previous day, Mr Recorder Rosen QC found for the Respondent. The Appellant now appeals with the leave of Stewart J.

Additional Essential Facts

6. The Appellant accepted below that the relationship between it and the Respondent was "unfair" for the purposes of section 140A(1) of the 1974 Act because the latter was not made aware of the commission and its amount. This obviated the need for any extensive inquiry into a matter which could only ever have led to one conclusion, and the Appellant called no evidence. However, it was in evidence that the ICOB Rules at all material times imposed no obligation on the Appellant to disclose the level of its commissions. This remains the position because when the FCA gave fresh guidance in PS17/3 all that was stipulated was a "single 50% tipping point for presuming unfairness" rather than any free-standing duty to make disclosure.

7. The Recorder accepted the Respondent's evidence that she was not aware of the commission until November 2018, and he found that she could not with reasonable diligence have ascertained the position earlier. This finding was necessary (albeit insufficient) for the Respondent's contention that the primary limitation period of six years could be disapplied.

The Statutory Framework

8. Sections 140A-D of the 1974 Act were inserted into that statute on 6th April 2007 by relevant provisions of the Consumer Credit Act 2006. Section 140D, on which nothing turns, was removed in 2013. For present purposes I need set out only section 140A:

> "**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.
>
> (5) …" [emphasis supplied]

9. At this juncture I need interpose that the provision applicable to the instant case is s.140A(1)(c) (which I have highlighted) and that the 2006 Act has retroactive effect through Schedule 3. The Recorder decided that the Appellant "should at least have

[disclosed its commissions] when section 140A-D came into force and thereafter" (para 30 of his judgment), and no appeal point in this respect has been taken.

10. Section 140B confers power on the court to impose various remedies, and these are not in issue.

11. Section 32(1) and (2) of the 1980 Act provide:

> "**32. Postponement of limitation period in case of fraud, concealment or mistake.**
>
> (1) Subject to …, 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***." [emphasis supplied]

12. I have highlighted section 32(1)(b) and (2) because the instant case does not engage paragraphs (a) and (c) of sub-section (1).

Key Jurisprudence on Sections 140A-D

13. In *Harrison v Black Horse Ltd* [2011] EWCA Civ 1128, [2012] E.C.C. 7 the Court of Appeal held that the absence of any breach of ICOB Rules was fatal to the borrowers' claims under these sections. The core reasoning was that the terms of the statutorily imposed regulatory framework were determinative of the ambit of section 140A.

14. In *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61, [2014] 1 WLR 4222 the Supreme Court came to a different conclusion. The facts were very similar to those of the instant case save that the undisclosed commission was a mere 71.8%. Lord Sumption JSC gave the sole reasoned judgment. He made it quite clear that section 140A was not concerned with the question whether the lender was in breach of any legal duty. The issue of unfairness generated separate and broader questions which

fell to be addressed within the lexicon and parameters of the statutory scheme. Paras 19 and 20 of Lord Sumption's judgment contain the core of his reasoning:

> "19. The next question is whether that state of affairs arose from something done or not done by or on behalf of Paragon [i.e. for the purposes of s.140A(1)(c)]. For this purpose it is enough to consider the acts or omissions of Paragon itself, without exploring the conduct of others acting on its behalf. 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.
>
> 20. On that footing, I think it clear that the unfairness which arose from the non-disclosure of the amount of the commissions was the responsibility of Paragon. Paragon were the only party who must necessarily have known the size of both commissions. They could have disclosed them to Mrs Plevin. Given its significance for her decision, I consider that in the interests of fairness it would have been reasonable to expect them to do so. Had they done so this particular source of unfairness would have been removed because Mrs Plevin would then have been able to make a properly informed judgment about the value of the PPI policy. This is sufficiently demonstrated by her evidence that she would have questioned the commissions if she had known about them, even if the evidence does not establish what decision she would ultimately have made."

15. I will be coming back to these paragraphs, but I note at this stage that *Plevin* was not a case about section 32 of the 1980 Act.

The Recorder's Judgment

16. The Recorder held that section 32(1)(b) and (2) must be read together: they serve to deprive a defendant of a limitation defence "only if he deliberately concealed a breach of duty or other facts relevant to the cause of action against him". The relevant duty could arise as a "matter of common sense" and/or where there is "knowing legal wrongdoing of any kind". These statements of principle led into the Recorder's key conclusions at paragraphs 24, 27 and 28 of his judgment:

> "24. It is obvious that the Claimant's [sic] non-disclosure of its PPI commissions – which were 45.24% more than the FCA's so-called "tipping point" of 50% - to the Claimant was deliberate. …
>
> …
>
> 27. Moreover, it involved a "breach of duty" on the part of the Defendant in the wider sense applicable to section 32 of the 1980 Act. As at and from 26 July 2006 the Defendant must have known 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.
>
> 28. The Defendant's arguments to the contrary are in my judgment specious. I do not read Lord Sumption's comments in *Plevin*, comparing breach of duty under the ICOB Rules with an unfair relationship under section 140A as excluding a breach of duty on the part of the creditor in causing such a relationship: on the contrary, the creditor's "responsibility" for the latter, as later held by Lord Sumption, connotes a breach of duty for the purpose of section 32 of the 1980 Act, consistent with *Giles v Rhind* and *The Kriti Palm*."

17. Mr Sean Snook for the Appellant submitted that these paragraphs in the Recorder's judgment, and others, were a complete muddle and in oral argument did not hold back from being highly critical. Mr Jonathan Butters for the Respondent submitted that the Recorder was accepting both limbs of his client's case: namely, under section 32(1)(b), read in isolation, and under that provision read in conjunction with section 32(2). My reading of these passages is that the Recorder was not in fact basing himself on the proposition that the Appellant deliberately concealed a fact, namely the excessive commission, which was relevant to the Respondent's right of action (i.e. section 32(1)(b) *simpliciter*), but was holding that the Appellant deliberately committed a breach of duty (the duty in the wider sense being to disclose the extent of the commission pursuant to its responsibility to act fairly) in circumstances where that

failure would be unlikely to be discovered for some time (i.e. section 32(2) read in conjunction with section 32(1)(b)). The Recorder further found that the inference must be – in the absence of evidence to the contrary – that the Appellant did this deliberately.

18. It is possible that I have misunderstood the Recorder's essential reasoning, but if that be the case it matters not. The Respondent is not precluded from advancing submissions directed to what I am calling section 32(1)(b) *simpliciter*, and Mr Snook did not submit otherwise. The appeal comes before me on a pure point of law, and insofar as the Recorder made factual findings these are only placed in issue by the Appellant in the context of the issue of knowledge.

The Grounds of Appeal

19. Two Grounds of Appeal are advanced on behalf of the Appellant, viz.:

(1) The Recorder was wrong in law to find that the Appellant was under a relevant duty for the purposes of section 32 to disclose the existence or extent of the commission retained by it pursuant to the PPI policy.

(2) The Recorder was wrong in law to infer from the evidence before him that the Appellant must be taken to have known that its failure to disclose the extent of the commission it retained was a breach of duty for the purposes of section 32.

These Grounds Developed

20. In his impressive oral argument Mr Snook was careful to distinguish between section 32(1)(b) (read in isolation) and that provision read in conjunction with section 32(2). He observed, rightly in my view, that caution must be exercised as regards *obiter* statements as to one provision in the context of a case directly concerned with another.

21. His headline submission on section 32(1)(b) was that the present case is not an example of deliberate, in the sense of active, concealment, but rather a paradigm illustration of an omission to disclose. It follows that his client could not have "deliberately concealed" a fact relevant to the Respondent's right of action, namely the PPI commission, unless they were under a duty to disclose it; and on clear authority there was no such duty.

22. Mr Snook submitted that section 32(2) is inapplicable for the straightforward reason that *Plevin* is authority for the proposition that the claim under sections 140A-D of the 1974 Act is not predicated on there being any *legal* duty to make disclosure: indeed, the existence of such a duty is specifically disavowed by Lord Sumption. It follows that there can be no question of any "deliberate commission of a breach of duty" for the purposes of that sub-section.

23. As for his second ground of appeal, Mr Snook submitted in the alternative that the concept of deliberateness requires there to be sufficient knowledge of a breach to constitute the implicit mental element. The basic point here is that his client could not have known that they were under any duty at all until 6th April 2007, and that the

relevant jurisprudence did not fix them with requisite knowledge until the publication of the Supreme Court's decision in *Plevin*, namely 12th November 2014.

The Respondent's Notice

24. In addition to supporting the Recorder's decision for the reasons he gave, the Respondent seeks to affirm his judgment on two further grounds, both germane to section 32(1)(b):

    (1) In the event that the Appellant was under no duty (however analysed) to disclose the receipt of commission, a fact relevant to the Respondent's right of action was nevertheless intentionally withheld from her.

    (2) On the same premise, disclosure of the commission was a fact that the Appellant would ordinarily have disclosed in the normal course of his relationship with the Respondent.

25. In equally impressive oral submissions, Mr Butters developed his client's case on section 32(2) in a way which had not been wholly prefigured in his skeleton argument. Boiled down to its essential elements, his submissions were as follows. First, the expression "breach of duty" in section 32(2) must be seen as the obverse of "right of action" in section 32(1)(b). The "right of action" here is the statutory right to seek relief under section 140B of the 1974 Act on the basis set forth under section 140A. It is the legal wrongdoing which founds that right to relief (in concrete terms, the non-revelation of the commission) which is the "breach of duty" for the purposes of section 32(2), even if section 140A itself is not predicated on any concept of underlying legal duty. Secondly, and in order to circumvent the difficulties which flow from the fact that the 2006 Act did not come into force until after the relevant loan agreement was made, Mr Butters submitted that the Appellant was in continuing breach of section 140A (sub-section (1)(c) being particularly on point); and that it had knowledge of its responsibilities, and of its concomitant wrongdoing or unconscionable conduct, during the currency of the loan agreement. Mr Butters also advanced a fall-back submission based on the position post-March 2010, but in my view it is not arguable that any continuing responsibilities were owed post-termination, however these may be characterised.

26. As for section 32(1)(b), Mr Butters relied on the following three arguments. First, he submitted that the Appellant was under a "Limitation Act duty" to disclose the existence and scale of the commission, being a duty conceptually distinct from Lord Sumption's "legal duty". Secondly, and in reliance on para 60 of Lord Scott's opinion in *Cave v Robinson Jarvis & Rolf (a firm)* [2002] UKHL 18, [2003] 1 AC 384, Mr Butters submitted that it was sufficient for the Respondent's purposes to prove "a withholding of relevant information … with the intention of concealing the fact or facts in question". Thirdly, and in reliance on para 14 of Park J's judgment in *Williams v Fanshaw Porter & Hazlehurst (a firm)* [2004] EWCA Civ 157, [2004] 1 WLR 2004, the commission was a fact which the Appellant decided not to disclose and would ordinarily have disclosed in the normal course of its relationship with the Respondent.

27. The Respondent made a late attempt to rely on the old extortionate credit bargain provisions, but Mr Butters sensibly withdrew her application to do so once it was made clear that an application to adjourn would be required.

Discussion

Ground 1 and the Respondent Notice Points on Section 32(1)(b)

28. Sections 32(1)(b) and (2) overlap to some extent but they are not duplicative. The paradigm case covered by the former provision is where the defendant takes active steps to conceal facts relevant to the claimant's right of action. This is not the present case because here the Appellant made an intentional or deliberate decision not to reveal the commission to the Respondent, in my opinion for obvious commercial reasons; but no positive action was taken. So, the instant case is not about the taking of active steps but rather non-disclosure. The case law has expanded section 32(1)(b) to cover instances of non-disclosure but not, as we shall see, across the board.

29. Section 32(2) is in the nature of a deeming provision: it treats for these purposes section 32(1)(b) as fulfilled if its own self-contained criterion is met. Thus, if there is "deliberate commission of a breach of duty", this – in circumstances where the breach is unlikely to be discovered for some time – "amounts to deliberate concealment of the facts involved in that breach of duty". Of course, the breach of duty is not committed in abstract: something specific is either done or omitted to be done which amounts to or entails that breach. The language of section 32(2) does not precisely track section 32(1)(b), but all that I would wish to remark upon at this stage is that the latter does not mention "breach of duty" but rather "right of action". That is defined extremely broadly in section 38(9) and includes, albeit is not limited to, "cause of action". Approaching this without the benefit of authority at this point, it seems clear that the concepts of "breach of duty" and "right/cause of action" must be the two sides of the same coin: in Hohfeldian terms, "juridical correlates". Section 32(1)(b) considers the matter from the perspective of a claimant; section 32(2) from the perspective of a defendant.

30. This self-contained criterion does not at first blush appear difficult to understand and apply, but appearances are deceptive. This is because in the circumstances of the present case there was no duty under the common law or the general law to disclose the commission, nor was there a duty to act fairly or in good faith. Lord Sumption's analysis in *Plevin* reinforces this: see paras 19 and 20 of his judgment, including his statement that the court's powers to remedy unfairness under sections 140A-D are not predicated on there being or having been any such legal duty. It is this consideration that enables Mr Snook to submit with some force and intellectual attraction that the absence of any legal duty inherent in the statutory architecture means that there can be no breach of duty for the purposes of section 32(2).

31. Having made these preliminary observations, I will be returning to the true construction of section 32(2); but at this juncture it is convenient to address, and dispose of, all the Respondent's arguments based on section 32(1)(b).

32. There is binding Court of Appeal authority in support of the proposition that, absent active concealment (in the sense of taking active steps to conceal) section 32(1)(b) operates only where a duty to disclose arises under the general law: see *The Kriti*

Palm [2006] EWCA Civ 1601, [2007] 2 CLC 223 at para 321 (Rix LJ dissenting, but not on the issue of principle), paras 425-427 (Buxton LJ) and paras 381 and 383 (Sir Martin Nourse).

33. This duty to disclose must be envisaged as a legal duty and not some autonomous or free-standing "Limitation Act duty". It is true that at para 440 of his judgment Buxton LJ referred to "a duty in Limitation Act terms", but this conclusion was based on reasoning to the effect that a certifier was under a tortious duty to correct his certificate if material of his own creation cast doubt on it: this was analysed in terms of there being a "continuing duty of review and disclosure".

34. Both Buxton LJ and Sir Martin Nourse held that the existence of this duty was a matter of common sense. Mr Butters latched onto this in support of a submission that amounted to saying that once the door is slightly ajar it may be thrown wide open (he did not put it quite that way), but I would resist any temptation to do that. The point in *The Kriti Palm* was that instinctual considerations were relevant to the issue of whether a *legal* duty could be said to arise.

35. In the circumstances of the present case, there is nothing in the relationship between the parties which might enable any duty to disclose to be spelled out. The Appellant is not in the position of an entity which certifies facts as being true in the knowledge that its certificate will continue to be relied on as such, and the instant case is a long way from the solicitors' cases where a continuing legal duty is owed to disclose relevant facts. This is the explanation for *Williams*, including Park J's reference to a fact which would be ordinarily disclosed in the normal course of the relationship.

36. Mr Butters' first point in his Respondent's Notice (and, more specifically, the second of the arguments I have listed under para 26 above) is that section 32(1)(b) does not require a legal duty. Some modest support for that contention may be derived from an *obiter dictum* of Lord Scott in *Cave*, at 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."

Lord Scott has not interpolated wording such as "in circumstances where he is under a duty to disclose it" after "a withholding of relevant information", although *Cave* was a solicitor's negligence case where such a duty was not in issue.

37. To be fair to Mr Butters, Park J in *Williams* considered that Lord Scott's analysis more closely tracked the wording of the statutory language than did Lord Millett's in the same case (see paras 23-25). *Williams* was a case on section 32(1)(b) whereas *Cave* addressed section 32(2). Mance LJ (as he then was), impliedly disagreeing with Park J on this issue, questioned whether Lord Scott's simple equation of positive acts with withholding of relevant information was correct (para 35), but did not have to

decide the point in a case where there clearly was a continuing duty to disclose (para 39).

38. These *dicta* are both inconclusive and nothing to the point. Despite what the Recorder has characterised as "the fluxes in judge-stated law", it seems to me that Mr Butters' first Respondent's Notice point has been conclusively addressed in *The Kriti Palm*: see para 32 above.

39. The destiny of this appeal must therefore turn on the true construction of section 32(2) and, in particular, the meaning of the term "breach of duty".

40. The case which affords the most assistance on this topic is *Giles v Rhind (No 2)* [2008] EWCA Civ 118, [2009] Ch. 191. The dispute concerned an insolvent company and a transfer by deed executed by one of the directors of the majority of part of his interest in the matrimonial home to his wife in order to put assets beyond the reach of the director's creditors. The issue was whether this disposition arguably involved the deliberate commission of a breach of duty for the purposes of section 32(2), and the Court of Appeal held that it did.

41. The execution of the deed in these circumstances was an impugned transaction in the nature of a gift for the purposes of section 423(1) of the Insolvency Act 1986. The inferences to be drawn from the available evidence on an application to amend the pleadings included the possibility that the director acted as he did "for the purpose of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him": see section 423(3). The effect of sub-sections 423(4) and (5) was that the court had jurisdiction to intervene at the suit of a victim.

42. Arden LJ (as she then was) gave the sole reasoned judgment. At paras 16-17 she pointed out that "outside of section 423, a person who incurs credit or liabilities owes responsibilities to his present and future creditors", and:

> "… section 423 has to be seen in the context of a debtor's responsibilities to his creditors generally. It actualises those responsibilities in particular circumstances. Any argument that section 423 does not involve a breach of duty has therefore a somewhat counter-intuitive ring to it."

By contrast, I do not think that it is possible to apply a similar approach to sections 140A-D of the 1974: our provisions are not built on the foundations of the general law but amount to a statutory construct designed to reflect Parliament's view of social and commercial policy in a consumer context. That said, this was not the first occasion on which Parliament has legislated in the domain of consumer protection, and in any event these passages in Arden LJ's judgment do not form part of the *ratio* of the case.

43. The *ratio* is to be found in paras 36-39 with further supporting reasoning set out subsequently. My understanding of these paragraphs is that the true construction of section 32(2) does not depend on the narrower meaning of the language deployed, that is to say a meaning which requires the identification of a breach of duty in a contractual, tortious, equitable or fiduciary sense. Whether or not section 423 could fulfil that narrower meaning, the correct analysis was that section 32(2) should be interpreted more widely so as to cover "legal wrongdoing of any kind, giving rise to a

right of action". Arden LJ endorsed the approach of David Richards J (as he then was) which was that the term "breach of duty" in sub-section (1) was merely the obverse of "right of action" in sub-section (2). Thus, "breach of duty" covered legal wrongdoing under section 423 because the Insolvency Act 1986 made it such. Arden LJ's only caveat was that the breadth of "legal wrongdoing" was not such as necessarily to cover certain public law duties, but these on any view are irrelevant to the present discussion.

44. The wrongdoing on the facts of *Giles'* case was the execution of the deed for the purpose of putting assets beyond the reach of creditors. Whether or not this action amounted in itself to a "breach of duty" cognisable in equity in some way, the reasoning of Arden LJ was that this legal wrongdoing gave rise to the "right of action" under the section, and the director who executed the deed committed a correlative "breach of duty" for the purposes of section 32(2). In my judgment, exactly the same reasoning is apposite in the present case. The Appellant's non-disclosure of the commission was unfair and amounted to a legal wrongdoing for the purposes of the statutory "right of action" conferred by sections 140A-D. The logical obverse of this was that the Appellant committed a "breach of duty" for the purposes of section 32(2): the duty does not arise under the general law (there is none); it arises under sections 140A-D themselves. Furthermore, the fact that the exercise under the 1974 Act entails a wide-ranging evaluation of unfairness does not materially differentiate it from section 423. Subject to whether the breach was "deliberate", I consider that the ingredients of the sub-section have been satisfied.

45. I should add that no distinction falls to be drawn between acts and omissions for this particular purpose. The House of Lords made it clear in *Cave* that section 32(2) could apply to an omissions case.

46. At para 41 of her judgment, Arden LJ explained that this broad approach to "breach of duty" was apt to accommodate "simply a breach of a legal obligation or constraint". This wide interpretation reflected the view of the Twenty-First Report of the Law Reform Committee (Final Report on Limitation of Actions) (1977) where it was observed that the philosophy of the old law – section 26 of the Limitation Act 1939 – should continue to apply: it was based on a conceptions of blameworthiness or "unconscionable conduct" which went beyond a defendant's "mere failure to comply with his legal obligations".

47. Mr Butters, whose submissions on *Giles* were particularly helpful, also placed emphasis on para 42:

> "There is a further point about s 32(2), which may be noted here, though it has not been argued and so I express only a provisional view here. For s 32(2) to apply, (1) there must be the deliberate commission of an act; (2) that act must amount to a "breach of duty"; and (3) that breach of duty must occur in circumstances in which it is unlikely to be discovered for some time. If those ingredients are satisfied, then the next step (where the claimant relies on s 32(1)(b)) is to go back to s 32(1)(b) and to identify the facts that are involved in the relevant breach of duty. After that, those facts can be tested against the right of action relied on in the proceedings. ***There is no need, as I see***

> ***it, on an ordinary reading of s 32(1) (b) to show that the right of action was for a breach of duty. All that it is necessary to show is that the relevant facts involved a breach of duty.*** Accordingly, in this case, all that matters is whether the execution of the deed *involved* the deliberate commission of a breach of duty of some kind." [my emphasis]

Although expressed as a preliminary view, I would respectfully agree with it. The act or omission in question must be deliberate; it must amount to a "breach of duty" in the sense that it constitutes some form of legal wrongdoing as stigmatised by statute; and it follows that the act or omission in question *involves* a "breach of duty" even if the "right of action" is not *for* a breach duty and, outside of the statutory scheme, there is no independent duty.

48. An additional consideration is to return to an examination of the paradigm case under section 32(1)(b), namely deliberate concealment of any fact relevant to the claimant's right of action. Although the present case is not concerned with active concealment, it is possible to envisage circumstances in which section 32(1)(b) could apply to the deliberate covering up of a claimant's right of action under sections 140A-D. In these hypothetical circumstances, what is being actively concealed is any fact relevant to the autonomous statutory right of action conferred by the 1974 Act. In my view, section 32(2) operates in a similar way, at least constructively. The effect of the sub-section is to treat a deliberate commission of a breach of duty (i.e. doing or not doing something which amounts to a breach of obligation, whatever it happens to be) in circumstances where it is unlikely to be discovered for some time as a deliberate concealment of any fact involved in that breach of duty: in these circumstances, being a fact pertaining to the claimant's right of action under section 140A-D. In both situations, therefore, what is being concealed, either actively (section 32(1)(b)) or constructively (section 32(2)), is a fact relevant to the legal claim the claimant is advancing. In this way, section 32(2) works in a piece with section 32(1)(b). At the end of the day, there is simply no room for the Appellant's analysis that treats "breach of duty" as requiring proof in some manner of breach of an underlying legal obligation pre-existing or separate from any right of action, statutory or otherwise, that is being invoked.

49. I conclude that a close reading of Arden LJ's judgment provides powerful support for Mr Butters' primary case, and that Mr Snook was unable to provide a convincing rebuttal. His submission that it was obvious that section 423 is distinguishable from sections 140A-D is not borne about by Arden LJ's approach to the former section.

Ground 2

50. It is necessary to be clear as to the extent to which Ground 2 adds to Ground 1. If there is no "breach of duty" for the purposes of section 32(2), the issue of "*deliberate* commission" and the mental element for it does not arise. If there is a "breach of duty", *pace* Mr Snook's main argument, then consideration must be given to whether it was deliberate or intentional.

51. Mr Butters realistically recognised, but he did not concede, that his case faced difficulties on the issue of deliberateness, intentionality or knowledge in relation to the period July 2006 - April 2007 when the Consumer Credit Act 2006 was not in

force. My attention was drawn to the remarks of Lewison LJ on a permission application which highlighted the difficulty. Mr Butters did submit, somewhat boldly, that Lewison LJ was wrong; but I respectfully think that he was right and in any case it is unnecessary to come to any definitive conclusion about this. The focus may be directed to the period April 2007 - March 2010 (the Appellant says, April 2008 – March 2010, but it matters not) because, as the Recorder found at paras 27 and 30 of his judgment, the Appellant's legal wrongdoing continued until the loan agreement came to an end. A combination of (1) the retroactive effect of section 140A, (2) the wording of sub-section (1)(c), (3) the decision of the House of Lords in *Sheldon v R.H.M. Outhwaite (Underwriting Agencies) Ltd* [1996] 1 AC 102 (which in my view must apply to section 32(2) as much as it does to section 32(1)(b)), and (4) paras 63-65 of the judgment of Mr George Leggatt QC (as he then was) in *Patel v Patel* [2010] 1 All ER (Comm) carries the Recorder home on this issue. Mr Snook made no submission to the contrary.

52. Mr Snook submitted that the Recorder's conclusion that his client's failures were deliberate and/or intentional was perverse: there was no evidential foundation for this inference.

53. The Recorder drew an adverse inference from the Appellant's failure to call any evidence, and in my judgment that in principle was permissible: see, for example, *Wisniewski v Central Manchester HA* [1998] EWCA Civ 596. 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 (see further below) which the Appellant called no evidence to rebut. However, elements of para 30 of the Recorder's judgment are, to my mind, problematic:

> "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 section 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*."

I have no real difficulty with the first two sentences. Although section 140A-D has retroactive effect, that does not mean that the Appellant perpetrated a deliberate breach of duty in July 2006 because *at that time* there was no duty capable of being breached. Whatever happened with "judge-stated law" after March 2010 is nothing to the point, and for knowledge purposes at least I do not consider that the declaratory theory of law (not mentioned by the Recorder but likely what he had in mind) provides a complete answer; and Mr Butters did not submit that it did. His stronger point, which was not addressed by the Recorder, is that *Harrison* was not decided in the Court of Appeal until after the currency of this loan agreement. The only authority on sections 140A-D decided before March 2010 which was drawn to my attention is *Patel*, and this addressed a slightly different point. I note that in *Harrison* the earliest case cited by the Court of Appeal was a decision given in the Manchester County Court on 14th May 2010 where an unfair relationship – on facts less stark than ours - was found.

54. Between 2011 and 2014, "judge-stated law" was premised on the ICOB Rules and the absence of there being any duty of disclosure, however characterised, for the purposes of section 140A-D. Although, as I have said, the relevant jurisprudence on section 140A-D post-dated the end of this loan agreement, Mr Snook is at least entitled to argue that, if the inference must be that his client did apply their mind to the issue, they would have concluded that it was not in fact incumbent on them to make disclosure.

55. It cannot sensibly be maintained other than the Appellant acted deliberately in the sense that it took a conscious decision not to disclose its PPI commission to the Respondent. That is the objective inference which the Recorder was entitled to draw, it could not be rebutted in view of the Appellant's failure to call evidence, and it in any event accords with basic common sense. So, the Appellant did not act inadvertently or negligently. The real issue here is whether the Appellant acted in deliberate breach of duty in circumstances where no reasonable inference could be drawn that the Appellant understood that the law would unequivocally regard the failure to disclose the commission as unfair for the purposes of the Respondent's right of action under the statute. Put another way, the issue frames the extent of the Appellant's apprehension, if any, of the legal consequences of non-disclosure.

56. In *Brocklesby v Armitage & Guest (a firm)* [2002] 1 WLR 598, Morritt LJ in an interlocutory appeal in a solicitor's negligence case rejected the proposition that for section 32(2) to apply "it is necessary that the actor should also know and appreciate and intend that the act is and should be a breach of contract or other duty" (at 605C-D). His reasoning was as follows:

> "Generally speaking, and I do not say that there may not be exceptions, the civil law, and, so far as I know, the criminal law, does not require that a person should know the legal consequences of the act which he commits. Generally speaking, if he knows of the act and he intends the act, but is unaware of the legal consequences, his unawareness is immaterial, for it is trite law that ignorance of the law is no defence. It appears to me that had Parliament intended in the case of a deliberate concealment under section 32(1)(b), as amplified by subsection (2), that there should be both deliberate commission of an act in the sense of knowingly and intentionally committing the act and also knowledge that such commission gave rise to a particular legal consequence, then it required clearer words to spell that out than are to be found in subsection (2) or subsection (1)." [at 605E-F]

57. In *Cave*, the House of Lords overruled *Brocklesby*. There, the solicitors drafted a conveyance which, owing to their negligence, did not create the legal rights which it was supposed to. The solicitors did not appreciate the nature of their error. It was held that section 32(2) did not apply to such a situation. As Lord Millett explained:

> "… section 32 deprives a defendant of a limitation defence in two situations: (i) …; 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 [para 25]
>
> …
>
> The maxim that ignorance of the law is no defence does not operate to convert a lawyer's inadvertent want of care into an intentional tort. [para 29]"

58. Para 61 of Lord Scott's Opinion is also germane:

> "Morritt LJ said, in a passage I have cited, that in general a person is assumed to know the legal consequences of his actions and that, therefore, if an act has been done intentionally, the actor's unawareness of its legal consequences would be immaterial and no defence. The premise is, in my opinion, much too wide to constitute a satisfactory approach to construction of a statutory provision such as section 32(2). A person may or may not know that an act of his or an omission to do or say something or other constitutes a breach of tortious or contractual duty. His knowledge or lack of it may well be immaterial to the question whether a cause of action for which he is liable has accrued to the person injured by the act or omission. But that is no reason at all why Parliament, in prescribing the circumstances in which the person injured by the act or omission can escape from a Limitation Act defence, should not distinguish between the case where the actor knows he is committing a breach of duty and the case where he does not. The clear words of section 32(2)— "deliberate commission of a breach of duty"— show that Parliament has made that distinction."

59. At para 31 of his judgment in *Williams*, Mance LJ summarised the position as follows:

> "*Cave*'s case decided that the wording of section 32(2) – "deliberate commission of a breach of duty" – requires a defendant not merely to have intended to do an act which constituted a breach of duty, but also to realise that the act involved a breach of duty."

60. An application of Arden LJ's three stage approach in *Giles* (see para 47 above) might lead to the conclusion that for the purposes of the right of action under section 423 all that is required is proof of a deliberate act which amounts to a breach of duty without proof that the actor knew that it was a breach of duty. In my view, that possible conclusion needs to be debated, as does its potential application to the different statutory context of sections 140A-D.

61. An individual may enter into a transaction which contravenes section 423 without having any idea that the reach of the law extends to the conduct in question and, indeed, has for hundreds of years regarded debtors as owing responsibilities to their creditors: all that is required is proof of an act (sc. sale at an undervalue or a gift) carried out with the purpose of placing assets out of reach of actual or potential creditors. An act of this sort will always be done deliberately and purposively, and to that extent section 423 cases are distinguishable from the solicitors' negligence cases; but the point I am making is that the person performing the act may be oblivious to the legal consequences.

62. The issue arose in *Giles* on an application to amend the pleadings, and precise states of mind did not fall to be examined. Furthermore, it could be maintained that not all section 423 cases fall within the scope of section 32(2): even if section 423 does not require action which is cognisant of the legal consequences, the argument would be that section 32(2) applies if and only if those legal consequences *are* apprehended. However, I do not read Arden LJ's judgment as differentiating between categories of section 423 breaches for section 32(2) purposes. I think that her analysis proceeded along a different path.

63. Arden LJ's reasoning cannot be understood as a reversion to Morritt LJ's approach in *Brocklesby*. In my view, her analysis was premised on the concept of unconscionable conduct. On any view, the deliberate placing of assets beyond the reach of creditors is not morally neutral. Arden LJ (and I would add Lord Millett in *Cave*) referred to Lord Denning MR's judgment in *King v Victor Parsons & Co* [1973] 1 WLR 29, and on my reading neither judge sought to subtract from it. That was a case on the predecessor limitation provisions, and the Court of Appeal held that the expression "concealed by fraud" did not extend to a situation where the defendant ought to have known but did not in fact know the relevant facts which constituted the cause of action against him. At pages 33-34, Lord Denning MR said this:

> "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] AC 351 and *Applegate v Moss [1971]* 1 QB 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 wrongdoing 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 ARTS Ltd* [1949] 1 KB 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 WLR 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." [emphasis supplied]

64. In short, 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. In all the cases I have cited other than *Giles*, the defendant's knowledge or culpability fell short of this: properly analysed, these were not cases of deliberate wrongdoing at all, but attempts by the claimant to convert inadvertence or negligence into the higher degree of culpability required by the sub-section.

65. It is noteworthy that in para 45 of *Giles* Arden LJ, when citing with approval the views of the Law Reform Committee, considered that the concepts of "some degree of blameworthiness" and "unconscionable conduct" were of value. It was these notions which fed into what was to become section 32(2).

66. It is apparent that a broad and purposive approach underlay Arden LJ's application of section 32(2) to the provisions of section 423 of the 1986 Act. The question arises of how, if at all, the breadth of this approach may apply to sections 140A-D of the 1974 Act.

67. The statutory right of action conferred by sections 140A-D is somewhat open-textured and, to use David Richards J's adjective, amorphous: the court embarks on a general inquiry of unfairness and weighs all the circumstances in the balance. None the less, the determinative factor in the present case, as it was in *Plevin*, is the fact and amount of the secret commission. In April 2007, and thereafter, the Appellant 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, the Appellant acted deliberately; it did not act negligently or inadvertently. Any inferences more favourable to the Appellant cannot be properly drawn in the face of its failure to call evidence. For example, the Appellant cannot be heard to say that it took comfort in the ICOB Rules, nor can it invite the Court to speculate as to what legal advice would have been between April 2007 and March 2010. In my judgment, in like manner to a party whose actions are found to have contravened section 423 of the 1986 Act, the Appellant 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. Returning therefore to my analysis of Arden LJ's three-step approach set out at para 42 of *Giles*, and applying it to the present statutory context, I conclude that there was a deliberate commission of a breach of duty for the purposes of section 32(2).

68. Although I would certainly not express my conclusion as robustly and confidently as did the Recorder, who appears to have sliced through these tough thickets far more rapidly than me, I would hold that his finding of fact cannot be disturbed in the light of the applicable law, and that the mental element of section 32(2) has been fulfilled. The Appellant's Ground 2 must be rejected.

Conclusion

69. This appeal must be dismissed.