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Too Soon to Move On?

Supreme Court Changes Limitation in Secret Commission Cases: *Canada Square Operations Ltd v Potter* [2023] UKSC 41

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The Supreme Court has provided important clarification on when "deliberate concealment" or "deliberate commission of a breach of duty" by a defendant will extend the limitation period for bringing claims.

The decision is bad news for financial services firms affected by PPI mis-selling claims and other claims in which firms are accused of making secret commissions on financial products, such as interest rate swaps and other derivatives.

The Law on Limitation Per the Supreme Court

Under section 32(1)(b) of the Limitation Act 1980 (deliberate concealment), a fact will have been concealed if the defendant has kept it secret from the claimant, either by taking active steps to hide it or by failing to disclose it. The Supreme Court has overturned as wrong the Court of Appeal finding that a claimant needs to establish that the defendant was under a legal, moral or social duty to disclose the fact and/or that the defendant knew the fact was relevant to the claimant's right of action.

All that is required is that the defendant deliberately ensures that the claimant does not know about the fact in question and so cannot bring proceedings within the ordinary time limit. The concealment is deliberate if the defendant intended to conceal the fact in question. The Supreme Court overturned as wrong the Court of Appeal finding that deliberately can be equated with recklessness. It is now clear that recklessness plays no part in the assessment.

Under section 32(2) of the Limitation Act (deliberate commission of a breach of duty), a claimant must show that the defendant knew it was committing a breach of duty or intended to commit a breach of duty. Again, the Supreme Court rejected the submission that "deliberate" includes "reckless", so that a defendant could be said to commit a breach of duty deliberately if it realised that there was a risk that what it was doing might be a breach of duty and took that risk in circumstances where it was objectively unreasonable for it to do so.

The Implications

This is an important simplification of the law relating to the postponement of limitation in cases involving deliberate concealment and deliberate commission of breach of duty. As the Supreme Court acknowledged, it may have wide application, especially in the field of PPI mis-selling claims.

In Potter's case, the claimant succeeded through section 32(1)(b) and established a postponed limitation date. The defendant's knowledge of the secret commission, coupled with the fact of non-disclosure to the claimant, was enough to satisfy the Supreme Court of deliberate concealment under the newly simplified test. The running of limitation was, therefore, postponed until the moment of disclosure by the defendant to the claimant of the fact of the secret commission. From that point, the claimant then had six years to issue proceedings.

This scenario is likely to play out frequently for claimants in various types of cases in which claimants allege that secret commissions have been made by financial services firms in relation to the sale of financial products. It now looks likely that there will be a fourth act to the defence of PPI mis-selling claims, as there is now certainty over the law on the postponement of limitation periods rendering those claims viable. Secret commission claims relating to other products and services such as interest rate swaps, other derivatives, loans, mortgages and the like that would otherwise be time-barred may also get a new lease of life.

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