SLAUGHTER AND MAY/

JANUARY 2024

NO END IN SIGHT FOR PPI CLAIMS

Introduction

The Supreme Court has recently handed down two decisions that have an impact on whether claims relating to the mis-selling of PPI are time-barred. In the wake of these decisions, it is likely that we will see an increase in litigation regarding PPI, as claimants who previously thought that their claims were time-barred argue that they are not.

We consider the content of these decisions – and their practical implications – below.

Smith and another v Royal Bank of Scotland [2023] UKSC 34 - handed down on 4 October 2023

Background

The claimants in this case, Mrs Smith and Mr Burrell, took out credit cards with the Royal Bank of Scotland Plc ("**RBS**") in 1998 and 2000 respectively. RBS advised the claimants at the time to take out Payment Protection Insurance ("**PPI**"). However, RBS failed to disclose that it was retaining "*well over*"[1] 50% of the insurance premium as commission for having arranged the PPI.

It was common ground that the failure to disclose the commission rendered the credit relationship "unfair" within the meaning of the Consumer Credit Act 1974 (the "**1974 Act**"). The claimants commenced proceedings seeking a remedial order under s140B of the 1974 Act ("**s140B**"). They asked the court to remedy the unfairness by ordering that RBS pay back the amount of the insurance premium plus interest, less the amount they had received under a financial redress scheme set up by the FCA.

RBS argued that the claimants were out of time.

The claimants were successful before the County Court but lost before the Court of Appeal.

S9 of the Limitation Act 1980 (the "Limitation Act")

It was common ground that the limitation period (i.e. the period within which a claimant must commence proceedings in order to be regarded as having brought them "in time") was 6 years from the date that the cause of action accrued[2].

The question before the Supreme Court

The question before the Supreme Court was when exactly did the clock start ticking for limitation purposes. Did the clock start ticking from (i) the date that the last PPI payment was made or, alternatively, (ii) from the date that the credit relationship ended?

If the former, the claimants were out of time: in each case the claimants had made the last PPI payment over ten years before they commenced legal proceedings. If the latter, the claims had been brought in time. This is because the claimants had continued to have a credit relationship with the bank for some years after they finished paying for the PPI policy (and had commenced proceedings within 6 years of that credit relationship having ended).

Decision of the Supreme Court

The Supreme Court held that:

1. where a credit relationship is ongoing, the point in time at which unfairness will be assessed is as at the date of trial;

2. however, where there is no longer a credit relationship between the creditor and debtor (as in the present case), the clock starts ticking for limitation purposes from the date that the credit relationship ended.

On the facts of this case, the credit relationship ended in 2015 (in the case of Mrs Smith) and in 2019 (in the case of Mr Burrell). Both claimants had commenced proceedings in 2019, so were well within the 6-year deadline to commence proceedings.

Having established that the claims were not time-barred, the Supreme Court moved on to consider

[1] *Smith and another v Royal Bank of Scotland* [2023] UKSC 34 (paragraph 4)

[2] S9 of the Limitation Act 1980

whether it should grant a remedial order under s140B. It concluded that it should. The claimants were financially out-out-pocket and no steps had been taken to remedy the unfairness. Accordingly, the orders made in the County Court were restored.

Implications

The significance of this case should not be underestimated. Customers with ongoing relationships with the financial institutions that mis-sold PPI to them (or who had a relationship with those financial institutions up until six years ago) will be able to bring claims under s140B, notwithstanding the fact that they stopped making payments in relation to PPI many years ago.

In the wake of this claimant-friendly decision, it is likely that we will see an uptick in litigation arising from the PPI mis-selling scandal, as claims previously thought to be stale/time-barred may now be brought.

Canada Square Operations Ltd v Potter [2023] UKSC 41 – handed down on 15 November 2023

Background

The factual background to this case is similar to that in *Smith*. The claimant (Mrs Potter) took out a loan agreement with Canada Square Operations Ltd (then known as Egg Banking Plc) (the "**Bank**") in 2006. The Bank encouraged the claimant to take out PPI but failed to disclose the fact that it would be retaining over 95% of the insurance premium as commission.

Again, it was common ground that the failure to disclose the existence and amount of the commission rendered the credit relationship unfair within the terms of the 1974 Act. As in *Smith*, the claimant sought a remedial order under s140B. However, even taking into account the generous approach to limitation in *Smith*, the claimant was out of time. This is because her credit relationship ended in 2010 and she did not commence proceedings until December 2018, by which point the 6-year limitation period had expired.

In light of this, the claimant sought to rely on the "deliberate concealment" provisions in s32 of the Limitation Act ("**s32**"), which prevent the clock from ticking for limitation purposes until such times as the claimant either discovered the deliberate concealment or could, with reasonable diligence, have discovered it. In particular, the claimant sought to rely on s32(1)(b)(deliberate concealment of a fact relevant to a cause of action) and/or s32(2) (deliberate commission of a breach of duty in circumstances where the breach is unlikely to be discovered for some time).

The lower courts all found in favour of the claimant. However, there was a lack of agreement as to (i) which of the provisions in s32 the claimant could rely on and (ii) what needed to be established in order to rely on each subsection, particularly in relation to the words "deliberate" and "concealment".

The decision of the Supreme Court

The Supreme Court was asked to clarify what was meant by "concealment" (in the context of s32(1)(b)) and "deliberate" (in the context of both s32(1)(b) and s32(2)).

(a) The meaning of 'concealment' in s32(1)(b)

The Supreme Court held that:

- "concealment" is to be interpreted broadly. It means to keep something secret, either by taking active steps to hide it, or by failing to disclose it[3];
- a claimant seeking to establish that there has been "concealment" under s32(1)(b) does not need to establish that the defendant is under some sort of duty to disclose the fact relevant to the cause of action. This marks a significant departure from the decision of the Court of Appeal, which concluded that "*inherent*"[4] in the concept of concealing something was the existence of some sort of obligation to disclose it.

(b) Does "deliberate" include recklessness?

The Supreme Court held that "deliberate" does not encompass recklessness. In reaching that conclusion, the Supreme Court stressed the importance of adhering to the "*primary rule*"[5] of statutory interpretation (namely that words must be given their ordinary meaning). In everyday language, "deliberate" and "recklessness" are regarded as distinct concepts. Deliberate involves doing something "*consciously and intentionally*"[6], whereas reckless involves doing something "*without care for the consequences*"[7]. Recklessness has never been treated as a "*synonym of "deliberate*"[8].

The Supreme Court went on to clarify that "deliberate" is to be understood in terms of intention or knowledge. Accordingly:

- a claimant can make out the necessary mental element in s32(1)(b) if they can prove intention on the part of the defendant to conceal the fact or facts or question; and

[3] *Canada Square Operations Ltd v Potter* [2023] UKSC 41 (paragraph 65)
[4] *Canada Square Operations Ltd v Potter* [2021] EWCA Civ 339 (paragraph 75)
[5] *Canada Square Operations Ltd v Potter* [2023] UKSC 41 (paragraph 115)
[6] *Canada Square Operations Ltd v Potter* [2023] UKSC 41 (paragraph 112)
[7] *Canada Square Operations Ltd v Potter* [2023] UKSC 41 (paragraph 112)
[8] *Canada Square Operations Ltd v Potter* [2023] UKSC 41(paragraph 113)

- a claimant can make out the necessary mental element in s32(2) if the claimant can establish that the defendant knew they were committing a breach of duty, or if the defendant intended to commit the breach of duty[9].

On the facts of the case, the criteria in s32(1)(b) had been satisfied, but the criteria in s32(2) had not[10]. The clock started ticking for limitation purposes in November 2018 (i.e. when the claimant took legal advice on the matter and discovered the deliberate concealment). Given that the claimant commenced proceedings shortly after, she was well within the six-year limitation period.

Implications

The decision in *Potter* provides some much-needed clarity as to what needs to be established in order for claimants to rely on s32.

The fact that "deliberate" does not include "recklessness" will be met with relief by potential defendants. However, the wide definition of "concealment" and the clarification that there is no need to establish that the defendant is under a duty to disclose the fact relevant to the cause of action in order to succeed under s32(1)(b), will be met with concern.

Given the breadth of s32 (which can be relied on in all cases involving deliberate concealment, irrespective of the subject matter), this case is likely to have ramifications both inside and outside of the PPI context. In relation to the former, it is important to note that *Potter* was a test case. The Supreme Court was keen to emphasise that 26,000 active claims of a "*similar nature*"[11] (i.e. involving PPI mis-selling and s32) been lodged with the courts. It is likely that a significant number of the claimants involved in these cases will seek to progress their claims through the courts by focussing on the more claimant-friendly aspects of this judgment on "concealment", and making an inferential case on that concealment being deliberate in order to obtain disclosure on the issue from the defendants.

C. Is it all bad news for financial institutions?

There is no doubt that the decision in *Smith* adopts a highly claimant friendly approach to the issue of limitation. *Potter*, while not quite as claimant friendly as it could have been, nonetheless raises points that will be of significant concern to financial institutions.

However, it is important to remember that the decisions discussed above relate to whether a claimant can be regarded as having commenced proceedings in time. A claimant who succeeds on limitation will still need to persuade a court that a remedial order under s140B should be granted.

Financial institutions can perhaps take some comfort from the comments made by the Supreme Court in *Smith* regarding (i) how unfairness will be assessed and (ii) the highly discretionary nature of s140B. The Supreme Court acknowledged that "*theoretically*"[12], under the approach to limitation taken in *Smith*, a bank that charged a customer unfair interest in the first year of a 25-year relationship could find itself being sued by claimants over 30 years later. However, the Supreme Court stressed that when it comes to assessing the unfairness of a relationship, the court will look at the relationship *"as a whole"*[13]. Countervailing factors such as the rate of interest, whether the claimant ever complained about the interest charged, or whether they attempted to seek redress during the 25-year history of the relationship would be taken into account when conducting that assessment. In the absence of "*some extraordinary explanation, inaction by the debtor over such a long period of time is likely to be regarded as an overwhelming factor pointing to the relationship not being unfair when it ended*"[14].

Further, even if a credit relationship is found to be unfair, the courts have a large degree of discretion when it comes to whether or not to make a remedial order. If a debtor had knowledge of the relevant facts but waited thirty years before commencing proceedings, it would be "*inconceivable that the court would think it just*" [15] to make an order under s140B.

In the wake of these decisions, it likely that we will see a significant increase in the volume of claims relating to PPI and non-disclosure of commission, as claimants seek to argue that their claim is not time-barred because of the longevity of their credit relationship, because of s32, or both. However, the actual outcome of these claims is far from certain. Developments in this area will no doubt be watched closely by claimants and defendants alike.

[9] *Canada Square Operations Ltd v Potter* [2023] UKSC 41(paragraph 155)

[10] Again, this marked a significant departure from the Court of Appeal, which concluded that the claimant could rely on both 32(1)(b) and 32(2).

[11] *Canada Square Operations Ltd v Potter* [2023] UKSC 41(paragraph 8)

[12] *Smith and another v Royal Bank of Scotland* [2023] UKSC 34 (paragraph 55)

[13] *Smith and another v Royal Bank of Scotland* [2023] UKSC 34 (paragraph 56)

[14] *Smith and another v Royal Bank of Scotland* [2023] UKSC 34 (paragraph 56)

[15] *Smith and another v Royal Bank of Scotland* [2023] UKSC 34 (paragraph 57)

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