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Cases Analysis

Kate Holderness and **Charlotte Eborall** of 3 Verulam Buildings report on recent banking law cases

NATURE AND EXTENT OF PROPRIETARY RIGHTS IN RELATION TO FISH

Borwick Development Solutions Limited v Clear Water Fisheries Limited

[2020] EWCA Civ 578

Whether the landowner's ownership rights to the fish in its lakes survived the sale of the land.

FACTS

The Respondent (Borwick) owned and operated nine lakes which provided sport for anglers for a period of 12 years. The lakes were separate from one another, such that fish could not pass from one to the other, and no fish could enter the lakes from outside of the closed system.

In 2016, the land comprising the lakes was sold to the Appellant (CWF) by way of enforcement of the security of Borwick's mortgagee. Borwick had borrowed money, secured by way of legal charge over the land, in order to expand its business. Receivers were appointed under the Law of Property Act 1925 and sold the land to CWF for £625,000. The receivers told Borwick that they did not consider that the lender's charge extended to the fish, and no rights were granted or reserved on the transfer to CWF.

Nevertheless, a dispute arose over the rights to the fish which, according to Borwick, had a value of £1.1m. Borwick contended that it retained its proprietary rights over the fish, and brought a claim against CWF for conversion.

At first instance, His Honour Judge Hodge QC held that Borwick retained its proprietary rights and awarded damages for conversion against CWF. CWF appealed.

DECISION

The first question addressed by the Court of Appeal was whether fish such as those in the lakes were categorised as wild animals (animals *ferae naturae*) or domestic animals (animals *domitae naturae*). This was held to be a question of law, and Sir Timothy Lloyd noted that fish have always been categorised as animals *ferae naturae*. The court rejected an argument that the classification of animals should be extended beyond animals *ferae naturae* and animals *domitae naturae* by creating a third classification of captive wild animals that can be subject to absolute ownership.

This classification was important for the determination of the second question addressed by the court: namely, the nature of Borwick's proprietary rights in relation to them. Animals *domitae naturae* can be the subject of ownership, whereas live animals *ferae naturae* cannot. However, there may be qualified property in animals *ferae naturae*, either:

- an exclusive right to reduce the wild animal into possession (eg a right conferred *ratione impotentiae et loci* in respect of the young of animals *ferae naturae* born on the land until they are old enough to fly or run away; *ratione soli*, ie by reason of ownership of the soil; or *rationae privilegii*, ie a right granted by the Crown); or
- an exclusive right to the possession of the wild animal which continues while the animal has the intention to return, such as a right conferred *per industriam*, ie by capturing, confining or domesticating the animal.

Borwick contended that its rights were acquired *per industriam*, and thus did not pass to CWF on the sale of the land. CWF contended that it mattered not whether Borwick's rights were acquired *per industriam* or *rationae soli*; that in any event Borwick had not reduced the fish into its possession sufficiently; and that whatever rights Borwick had, had ceased to exist and had been replaced by CWF's rights *ratione soli*.

Sir Timothy Lloyd considered carefully the question of what amounts to possession for the purpose of rights conferred *per industriam*. He identified two types of cases in which a particular test applied:

- in relation to animals *ferae naturae* where the person asserting the right does not have title to the land on which the animals are found – in such cases, the test is one of close control; and
- in relation to roaming animals, such as bees and pigeons – in relation to these, the test is not one of close control, but depends on the application of industry required to keep such animals.

The fish in Borwick's lakes did not fall into either category, as it owned the land in which the lakes were situated, and the fish could not escape from them. The question which arose was whether there was any need to distinguish between rights *ratione soli* and rights *per industriam* in such a case. Such a distinction only made sense if rights *per industriam* gave the holder of the right a better right which

could survive the sale of the land (ie after the holder of the right *per industriam* no longer had the rights of the landowner).

The court held that it did not. Rights which arise *per industriam* subsist only for so long as the animal remains in the possession of the owner. Whether Borwick's rights arose *per industriam* or *ratione soli*, they came to an end when the ownership of the land passed to CWF and Borwick ceased to have possession of the fish.

COMMENT

Although this is a decision concerned with an esoteric point of law, it is of broader interest because it highlights the importance of understanding the nature and extent of a landowner's rights when negotiating a sale.

Borwick was not involved in the negotiation of the sale which was concluded through the receivers. However, Borwick had been in negotiations with CWF prior to the appointment of the receivers, and it had proposed a price for the sale of the land, and a separate price for the stock of fish in the lakes.

The receivers, by contrast, negotiated a sale price for the land only, and no reference was made to the fish, nor to any rights in relation to the fish, in the contract of sale. Although the receivers took the view that the mortagee's security did not include the fish, it is clear that the receivers had failed to appreciate the nature of Borwick's rights in the fish, and the effect of the sale of the land on those rights. Had they done so, they would have realised that the charge of the registered titles to Borwick's land included Borwick's rights *ratione soli*, and that those rights would be replaced by the purchaser's rights *ratione soli* once the sale completed. In the circumstances and given that Borwick did not remove the fish or sell them to another business, the value of the fish ought to have been taken into account when negotiating the sale price.

As Jackson LJ observed: "[g]iven its investment in the fishery", the outcome of the sale was "indeed a hard result" for Borwick. ■

A LIMITATION ON UNFAIR RELATIONSHIP CLAIMS FOR COMMISSION?

Canada Square Operations Limited v Beverley Potter

[2020] EWHC 672 (QB)

Commission payments, deliberate concealment under s 32 Limitation Act 1980 and unfair relationships

INTRODUCTION

Approximately one month after Mr Justice Jay handed down this judgment did the Financial Conduct Authority (FCA) publish its final report on the payment protection insurance complaints deadline.[1] In that report, the FCA's statistics stated that, since 2011, over 32.4 million complaints about payment protection insurance (PPI) had been made to firms who had, by that date, paid over £38bn of redress. With such eye-watering figures, it is unsurprising that PPI is "by far" (the FCA reports) the largest consumer redress exercise in the UK's history.

The FCA's 29 August 2019 complaints deadline means that it is now too late to make a new complaint to a business about PPI. However, that deadline has not stemmed the flow of PPI claims in the courts, claims made in respect of PPI sales which may now date back over a decade. Mrs Potter's claim was one such case.

FACTUAL BACKGROUND

On 26 July 2006, Mrs Potter entered into a regulated fixed-sum loan agreement with Canada Square Operations Limited (formerly Egg Banking plc) (the Lender) pursuant to which Mrs Potter borrowed £16,953 repayable over a term of four years, six months at an interest rate of 7.9% APR. At the same time, Mrs Potter took out a PPI policy with an insurer within the Axa group for which the aggregate premia was £3,824.24. Undisclosed to Mrs Potter, the Lender received a commission amounting to 95.24% of those premia.

JURISPRUDENTIAL BACKGROUND: *PLEVIN v PARAGON PERSONAL FINANCE LIMITED* [2014] UKSC 61

Nearly four years after Mrs Potter's relationship with the Lender ended, the Supreme Court's decision in *Plevin v Paragon Personal Finance Limited* [2014] UKSC 61, [2014] 1 WLR 4222 (*Plevin*) was determined. *Plevin* paved the way for complaints and claims to be made arising out of the unfairness of the non-disclosure of commission payments made in respect of PPI. In *Plevin*, that commission was 71.8% of the premium. Lord Sumption JSC gave the sole reasoned judgment. He explained that the lender, Paragon, owed no legal duty under the FCA's Insurance Conduct of Business (ICOB) rules to disclose the commissions, and it owed no such duty under the general law either. However, Mrs Plevin had not asserted breach of a legal duty but instead, that her relationship with Paragon was unfair as a result of the commission paid which was not disclosed. Section 140A(1)(c) of the Consumer Credit Act 1974 is not concerned with legal duties, but with whether there was something done or not by Paragon which rendered the relationship unfair. Lord Sumption held that, in the interests of fairness it would have been reasonable to expect Paragon, the only party who must necessarily have known about the commissions, to have disclosed them to Mrs Plevin.

As a result of *Plevin*, the FCA issued fresh guidance to firms dealing with PPI complaints, stating that any commission over 50% was the tipping point for presumed unfairness and redress should be granted accordingly.

MRS POTTER'S COMPLAINT AND HER CLAIM

In April 2018, Mrs Potter complained to her former Lender that the PPI policy was "mis-sold" to her. The Lender refunded to Mrs Potter part, but not all of the commission that she had paid through her PPI policy. By a claim issued in January 2019, Mrs Potter sought to recover the balance of the premia she had paid on the ground that she would not have entered into the PPI policy but for the unfair non-disclosure of the 95.24% commission.

Cases Analysis

The Lender accepted that the non-disclosure of commission caused unfairness in the relationship; however, it defended the claim on the basis that it was issued outside the six-year limitation period.[2] Mrs Potter's legal team invoked s 32 of the Limitation Act 1980, which extends the limitation period.

SECTION 32 LIMITATION ACT 1980

Section 32 of the 1980 Act relevantly provides:

> "32. Postponement of limitation period in case of fraud, concealment or mistake.
>
> (1) …, where in the case of any action for which a period of limitation is prescribed by this Act, either —
> (a) …
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
> (c) …
> 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.
> …
>
> (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."

Mrs Potter claimed that the non-disclosure of the commission payment had been deliberately concealed from her, either within the meaning under s 32(1)(b), read in isolation, or within the broader meaning under sub-s (2).

At first instance, Mr Recorder Rosen QC accepted that Mrs Potter was not aware of the commission payment until November 2018. The Recorder further agreed that the Lender's failure to disclose the commission payment amounted to deliberate concealment because it involved a "breach of duty" in the wider sense envisaged by s 32(2) in that, since July 2006, it must have known that it was acting unfairly because Mrs Potter would be otherwise unlikely to discover the payment.

The Lender appealed.

THE GROUNDS OF APPEAL AND SUBMISSIONS

The Lender appealed on two grounds: first, that the Recorder was wrong in law to find that it was under a relevant "duty" for the purpose of s 32; and secondly, that he was wrong in law to infer from the evidence that the Lender must be taken to have known that its failure to disclose the extent of the commission was a breach of duty under that section.

The Lender's counsel was careful to distinguish between authorities which address s 32(1)(b) in isolation, and s 32(2), which concerns the broader meaning of "deliberate concealment". Mrs Potter's case could not, it was submitted, fall within s 32(1)(b) because nothing "deliberate" was done; there was only an omission to disclose. Further, s 32(2) could not apply because, as Lord Sumption JSC highlighted in *Plevin*, there was no legal duty upon a lender to disclose commission.

Mrs Potter's counsel submitted that, first, "breach of duty" in s 32(2) is the obverse of "right of action", which, here, is the relief sought under s 140A(1) – no "legal duty" is required; and second, albeit s 140A did not come into force until 6 April 2007, the "breach of duty" was a continuing one and it was therefore in breach during the relationship.

In relation to s 32(1)(b), it was submitted on behalf of Mrs Potter that, in reliance upon para 60 of Lord Scott's opinion in the House of Lords decision, *Cave v Robinson Jarvis & Rolf (a firm)* [2002] UKHL 18, [2003] 1 AC 384, it was sufficient that there was a "withholding of relevant information … with the intention of concealing the fact or facts in question". Further, the commission was, it was submitted, a fact that the Lender decided not to disclose and which would ordinarily have been disclosed in the normal course of the relationship, relying upon *Williams v Fanshaw Porter & Hazlehurst (a firm)* [2004] EWCA Civ 157, [2004] 1 WLR 2004.

THE DECISION

Preliminary observations

First, Mr Justice Jay made a number of helpful preliminary observations in relation to the proper construction and reading of ss 32(1)(b) and 32(2):

- Sections 32(1)(b) and (2) overlap to some extent but they are not duplicative:
  - The paradigm case covered by s 32(1)(b) is where the defendant takes active steps to conceal facts relevant to the claimant's right of action (although the case law has expanded s 32(1)(b) to cover some instances of non-disclosure).
  - Section 32(2) is in the nature of a deeming provision. 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.
- Where a defendant has not taken active steps to conceal, s 32(1)(b) only applies where a duty to disclose arises under the general law: *The Kriti Palm* [2006] EWCA Civ 1601, [2007] 2 CLC 223 at [321] (Rix LJ dissenting, but not on the issue of principle), [425-427] (Buxton LJ) and [381 and 383] (Sir Martin Nourse). This was a legal duty and not some autonomous or free-standing "Limitation Act duty".
- As to what is meant by "breach of duty" under s 32(2), the judge held, accepting the submission made on behalf of Mrs Potter, that (at [29]):

> "29. 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."

Section 32(1)(b)

On the issue of deliberate concealment under s 32(1)(b), Mr Justice Jay held that the Court of Appeal authority *The Kriti Palm (ibid.)* already addressed the question as to when a non-disclosure could amount to deliberate concealment. Accordingly, Mrs Potter's submission under her Respondent's Notice was dismissed.

Section 32(2)

The appeal therefore turned on the proper construction of s 32(2) and the meaning of "breach of duty". On this point, the Judge relied upon *Giles v Rhind (No 2)* [2009] Ch 191 in which he noted that Arden LJ had endorsed the approach of David Richards J (as he then was) which was that the term "breach of duty" in sub-s (1) was merely the obverse of "right of action" in sub-s (2). Thus, "breach of duty" in that case covered legal wrongdoing under s 423 because the Insolvency Act 1986 made it such.[3] Thus, it is necessary to show that the relevant facts involved a breach of duty.

Mr Justice Jay also noted that, referring to *Cave*, s 32(2) could apply equally to an omissions case as to an act. Therefore, a duty could be breached by mere omission.

APPLICATION TO THE INSTANT CASE

Ground 2 of the appeal required the judge to grapple with the issue whether, even if the non-disclosure of commission amounted to a breach of duty within the meaning of s 32(2), was it a "deliberate commission" of a breach of duty such as to amount (within the s 32(2) deeming provision) to a "deliberate concealment"?

Mrs Potter's case faced several hurdles at this stage: she had no evidence other than the absence of disclosure of the commission to her to offer the court, and the Lender offered no evidence. Accordingly, deliberateness could not be easily shown. Moreover, as at the date of the Loan Agreement, s 140A was not in force and it was argued that the Lender could not have deliberately committed a breach of duty about which it was unaware and in respect of legislation not yet in force.

However, applying *Wisniewski v Central Manchester HA* [1998] EWCA Civ 596, the judge did not disturb the Recorder's adverse inference that he drew from the Lender's failure to call any evidence (the judge himself noted that in his opinion there were "obvious commercial reasons" for not disclosing the commission).

But the judge went further and considered in detail the authorities addressing the question of deliberateness under this subsection.

Because of the difficulties with Mrs Potter's case prior to 6 April 2007 when s 140A came into force, the judge focussed upon the period thereafter and posed the question whether it could be properly inferred that the Lender reasonably understood that s 140A did not require disclosure of commissions (at [55]). He noted that, although *Cave* concluded that sub-s 32(2) required a defendant to realise that his act involved a breach of duty, *Giles v Rhind (No 2)* lowered the mental state to one of mere recklessness as to the legal consequences of his act (at [64]).

Applying that to the instant case, the judge concluded that the Lender must have known of the requirement to act fairly by April 2007 and nevertheless decided to continue in its relationship with Mrs Potter without disclosing the commissions received. In that respect it acted "deliberately". In the absence of any evidence from the Lender, no more favourable inferences could be drawn. Thus, there had been a "deliberate commission of a breach of duty" under s 32(2).

COMMENT

It appears that compensation payments to be made resulting from the PPI mis-selling scandal are not over yet. Although firms are now relieved from the obligation to determine new PPI complaints being made after the FCA deadline, commission claims in the courts remain and this decision will no doubt fuel the claims management companies to garner additional similar claims for commission.

Mr Justice Jay's decision provides helpful clarity on the distinction between s 32(1)(b) and s 32(2) and a thorough analysis of the competing points derived from the authorities on the issues of "breach of duty" and "deliberate" commission of that breach of duty under s 32(2).

However, applying Mr Justice Jay's analysis, unless a lender turned its mind, on 6 April 2007, to each credit agreement it held, to consider whether anything not disclosed now ought to be disclosed to ensure that the relationship is a fair one, it appears difficult to see how a lender could avail itself of the limitation period designed to prevent very stale claims from continuing to be litigated, an outcome potentially at odds with the FCA's desire to give closure to PPI mis-selling complaints. ■

1 https://www.fca.org.uk/publication/ppi/payment-protection-insurance-complaints-deadline-final-report.pdf

2 The limitation period in respect of unfair relationship claims is, according George Leggatt QC's (as he then was) decision in *Patel v Patel* [2010] 1 All ER (Comm) 864, six years (or twelve years if the action is based upon a specialty) from the date on which the credit agreement ended.

3 Arden LJ's only caveat was that the breadth of "legal wrongdoing" did not necessarily cover certain public law duties, but these are irrelevant here.