Michaelmas Term
[2023] UKSC 41
On appeal from: [2021] EWCA 339

JUDGMENT

Canada Square Operations Ltd (Appellant) *v* Potter (Respondent)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Kitchin
Lord Sales
Lord Lloyd-Jones

JUDGMENT GIVEN ON
15 November 2023

Heard on 14 and 15 June 2022

Appellant
Charles Kimmins KC
Sean Snook
Fiona Whiteside
(Instructed by Hogan Lovells International LLP (London))

Respondent
Robert Weir KC
Jonathan Butters
(Instructed by HD Law Ltd, Bradford)

LORD REED (with whom Lord Hodge, Lord Kitchin, Lord Sales and Lord Lloyd-Jones agree):

1. This appeal raises fundamental questions concerning section 32(1)(b) and section 32(2) of the Limitation Act 1980 ("the 1980 Act"). Section 32(1)(b) postpones the commencement of the ordinary limitation period where "any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant". Section 32(2) provides that, for the purposes of section 32(1), "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".

2. The questions raised in the appeal concern the meaning of the phrases "deliberately concealed", in section 32(1)(b), and "deliberate commission of a breach of duty", in section 32(2).

1. The facts

3. On 26 July 2006 the claimant, Mrs Potter, entered into a loan agreement with the defendant, Canada Square Operations Ltd, then known as Egg Banking plc. The agreement was constituted by a pre-printed standard form prepared by the defendant and signed by both parties, and was a credit agreement within the meaning of the Consumer Credit Act 1974 as amended ("the 1974 Act"). It stated that the total amount of credit was £20,787.24, comprising a cash amount of £16,953.00 and a payment protection premium of £3,834.24. That premium related to the claimant's purchase of a payment protection insurance policy ("the PPI policy"). The loan was repayable in instalments over a period of 54 months.

4. As well as being a commercial lender, the defendant was also an insurance intermediary. Over 95% of the amount described in the agreement as the payment protection premium constituted the defendant's commission on the PPI policy. The sum paid to the insurer was only £182.50. The defendant did not inform the claimant that it would receive or retain commission on the policy.

5. The claimant completed the payments under the agreement early, and the agreement came to an end on 8 March 2010.

6. In November 2014 this court gave judgment in the case of *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61; [2014] 1 WLR 4222 ("*Plevin*"). It held, on facts similar to those of the present case, that the non-disclosure of a very high

commission charged to a borrower made the relationship between the creditor and borrower "unfair" within the meaning of section 140A of the 1974 Act, with the consequence that the borrower could seek a remedial order under section 140B.

7. In April 2018 the claimant complained to the defendant that the PPI policy had been mis-sold to her. She received compensation in accordance with the redress scheme established by the Financial Conduct Authority for the mis-selling of PPI policies. In November 2018 she consulted solicitors and was advised that the amounts she had paid were likely to have included substantial commission.

2. The proceedings

(1) The County Court

8. On 14 December 2018 the claimant began proceedings in the County Court in which she sought to recover the amounts she had paid to the defendant in respect of the PPI policy under deduction of the compensation she had received, together with interest. She brought the claim on the basis that the relationship between her and the defendant was "unfair" in terms of section 140A of the 1974 Act, with the result that she was entitled to make an application under that section for the remedial orders set out in section 140B. In its defence, the defendant admitted that it had not disclosed the fact that it would receive commission in respect of the policy, but averred that the claim was time-barred under section 9(1) of the 1980 Act, which provides that an action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued. In her reply, the claimant relied on section 32 of the 1980 Act as postponing the start of the limitation period until she found out about the commission. The case proceeded as a small claim. Its having now reached the Supreme Court reflects the fact that it is a test case, there being said to be approximately 26,000 active claims of a similar nature.

9. By the time of the trial, the only issue in dispute was whether the claim was time-barred or whether time should be extended under section 32(1)(b) of the 1980 Act, read by itself or together with section 32(2). The defendant led no evidence at the trial, and did not challenge the claimant's evidence.

10. Recorder Rosen QC held that section 32 applied, and entered judgment for the claimant. He accepted her evidence that she did not become aware of the commission until she received legal advice in about November 2018. He considered that it was

obvious that the defendant's non-disclosure of its commission was deliberate: "[a]s a sophisticated creditor, the decision as to what commission to charge and not disclose must have been considered and at a high level. There is no evidence from the defendant to gainsay such inferences" (para 24). He also stated that the non-disclosure "was intentional or at least reckless" (para 26), seemingly implying that he interpreted "deliberate" in section 32 of the 1980 Act as covering things done either intentionally or recklessly. He found that the non-disclosure involved a breach of duty on the part of the defendant in what he described as "the wider sense applicable to section 32 of the 1980 Act" (para 27). He considered that as at the date of the agreement, and subsequently, the defendant must have known that it was acting unfairly in the sense explained in *Plevin* in failing to disclose the existence and amount of the commission.

11. The recorder rejected the defendant's argument that it could not have known of the unfairness or that it involved breaches of duty by it, because of industry practice, the absence of any regulatory disclosure requirements, or the decision of the Court of Appeal in *Harrison v Black Horse Ltd* [2011] EWCA Civ 1128; [2012] Lloyd's Rep IR 521, subsequently overruled in *Plevin*. He considered that if the defendant did not disclose the commission on the inception of the loan, it should at least have done so when sections 140A to 140D of the 1974 Act came into force, and all the more so when the law was settled in *Plevin*.

(2) The High Court

12. Two grounds of appeal were advanced to the High Court:

> (1) The recorder was wrong in law to find that the defendant 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 defendant 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.

13. Jay J dismissed the defendant's appeal: [2020] EWHC 672; [2020] 4 All ER 1114. He accepted that section 32(1)(b) of the 1980 Act did not apply. He considered that the decision of the Court of Appeal in *AIC Ltd v ITS Testing Services (UK) Ltd (The Kriti Palm)* [2006] EWCA Civ 1601; [2007] 1 All ER (Comm) 667 ("*The Kriti Palm*") established that, absent active concealment, section 32(1)(b) operated only where a duty to disclose arose under the general law. There was no such duty in the circumstances of the present case.

14. On the other hand, Jay J accepted that section 32(2) applied. The decision of the Court of Appeal in *Giles v Rhind (No 2)* [2008] EWCA Civ 118; [2009] Ch 191 established that "breach of duty" in section 32(2) was the obverse of "right of action" in section 32(1)(b). It covered legal wrongdoing of any kind which gave rise to a right of action, rather than being confined to a breach of duty in a contractual, tortious, equitable or fiduciary sense. In the present case, since the non-disclosure of the commission gave rise to the statutory right of action conferred by sections 140A to 140D of the 1974 Act, it was also a breach of duty for the purposes of section 32(2).

15. As to the characterisation of the breach of duty as deliberate, Jay J accepted that there was no deliberate breach of duty prior to the commencement of section 140A in April 2007. However, the breach of duty continued between April 2007 and March 2010, when the agreement came to an end. In relation to that period, he considered that the defendant's decision not to disclose the commission, in the knowledge that there was a risk that non-disclosure would be held to render its relationship with the claimant unfair for the purposes of section 140A, amounted to a "deliberate" breach of duty for the purpose of section 32(2).

(3) The Court of Appeal

16. Three issues were raised before the Court of Appeal. The first was whether the creation of an unfair relationship within the meaning of section 140A of the 1974 Act amounted to a "breach of duty" for the purposes of section 32(2) of the 1980 Act. The second was whether the defendant's failure to disclose the commission amounted to the "concealment" of that fact within the meaning of section 32(1)(b). The third was whether any concealment, under section 32(1)(b), or breach of duty, under section 32(2), was "deliberate" within the meaning of those provisions.

17. The court dismissed the defendant's appeal: [2021] EWCA Civ 339; [2022] QB 1. The principal judgment was given by Rose LJ. Males LJ agreed with her judgment, subject to some penetrating criticism of the way in which the law on section 32(1)(b) had developed. Sir Julian Flaux C agreed with both judgments. It will be necessary to consider the judgments in detail in the discussion below. They can however be summarised as follows.

18. In relation to the first issue identified above, Rose LJ agreed with the judge that, applying *Giles v Rhind (No 2),* the creation of an unfair relationship was a breach of duty, sufficient to engage section 32(2).

19. In relation to the second issue, it was common ground that the existence and amount of the commission were facts relevant to the claimant's right of action for the purposes of section 32(1)(b). Rose LJ considered that section 32(1)(b) could be engaged either by a positive act of concealment of a relevant fact or by a withholding of relevant information about that fact, where there was a duty to disclose it "in Limitation Act terms". In her view, the majority judgments in *The Kriti Palm* established that there was no requirement to show a free-standing contractual, tortious or fiduciary duty to disclose. The obligation to act fairly imposed on the defendant by section 140A of the 1974 Act was sufficient to mean that its failure to disclose the commission amounted to concealment of it within the meaning of section 32(1)(b). Accordingly, subject to the third issue, concerning the mental element, the judge had been wrong to hold that the claimant could not rely on that provision.

20. In relation to the third issue, it was common ground that the word "deliberate" connotes the same mental element for both section 32(1)(b) and section 32(2). The parties identified four potential candidates for the mental element required. The first was the defendant's subjective knowledge or actual awareness that it was committing a wrongful act. The second was subjective knowledge in a wider sense which included wilful blindness. The claimant accepted (and continues to accept) that she could not meet either of those tests. The third was recklessness with both a subjective and an objective element: that is to say, recklessness as described by Lord Bingham of Cornhill at para 41 of *R v G* [2003] UKHL 50; [2004] 1 AC 1034*,* in the context of section 1 of the Criminal Damage Act 1971:

> "A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to - (i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk."

The fourth was recklessness in a purely subjective sense (ie the *R v G* test, with the modification that the person must have been aware that it was unreasonable to take the risk). It was common ground that the claimant could only succeed if recklessness in one of the two latter senses established the necessary mental element.

21. Rose LJ considered that although "deliberate" was a common English word, there was not a natural meaning which gave an answer to the issue before the court. The case law construing "deliberate" was not conclusive as to whether recklessness would suffice. It was both permissible and necessary to consider the pre-1980 Act case law and the Parliamentary materials leading to the Limitation Amendment Act 1980 (the Act preceding the consolidation effected by the 1980 Act). The pre-1980 case law on the

precursor provision (section 26(b) of the Limitation Act 1939 ("the 1939 Act")) established that recklessness was sufficient to establish the requisite mental element under that section. The Parliamentary materials showed that the test under section 32 was not intended to be more difficult for a claimant to overcome. This was consistent with the obiter observations of Mance LJ in *Williams v Fanshaw Porter & Hazelhurst (a firm)* [2004] EWCA Civ 157; [2004] 1 WLR 3185 ("*Williams*"). Interpreting "deliberate" as including "reckless" best met the Parliamentary objective.

22. Construing recklessness in accordance with the decision of the House of Lords in *R v G*, the claimant could rely on section 32(1)(b) if she could show that the defendant realised that there was a risk that it had a duty to tell her about the commission, such that its failure to do so meant that it deliberately concealed that fact. She could rely on section 32(2) if she could show that the defendant realised that there was a risk that its failure to disclose the commission would make the relationship unfair and it was not objectively reasonable for it to take that risk.

23. A review of the regulatory material supported the decisions below that the defendant must, subjectively, have been aware that there was a risk that non-disclosure would make the parties' relationship unfair, and that it was not objectively reasonable for it to have taken that risk. The claimant could therefore rely on both section 32(1)(b) and section 32(2).

24. Males LJ added that the court was constrained by authority, but otherwise the courts could and should adopt what he described as the straightforward approach. The defendant's decision not to disclose the commission was plainly deliberate. The effect of section 140A of the 1974 Act, as analysed in *Plevin*, was that it would have been reasonable to expect the defendant to disclose the commission to the claimant in the interests of fairness. Accordingly, the defendant "deliberately concealed" the commission within the meaning of section 32(1)(b). On that straightforward approach it was unnecessary for the claimant to establish a separate duty to disclose or that the defendant had a further requisite mental element in relation to whether it was under a duty to disclose or whether the commission was relevant to a cause of action against it. However, Males LJ accepted that authority did not permit the Court of Appeal to adopt that approach.

25. Males LJ also noted that it was common ground that the defendant's failure to disclose the commission was not a case of "active" concealment, but only of non-disclosure. He did not think that this was correct. In his view, the defendant committed an act, rather than an omission to act, when not disclosing the commission. Its decision not to disclose could only be implemented by instructing its salesmen and account managers not to disclose the commission, and by preparing its documentation in a way which ensured that there was no mention of commission.

(4) The appeal to this court

(i) The appeal in relation to section 32(1)(b)

26. In relation to section 32(1)(b), the defendant does not appeal against the Court of Appeal's conclusion that it was reckless in the *R v G* sense as to whether it was under a duty in terms of the 1980 Act to tell the claimant about the commission: in other words, that it realised that there was a risk that it ought to disclose the commission, because to do otherwise would conceal from her a fact which was relevant to her right of action under section 140A of the 1974 Act, and that it was objectively unreasonable for it to take that risk. The defendant's grounds of appeal in relation to section 32(1)(b) are as follows:

> (1) The Court of Appeal erred in law in finding that a duty of disclosure "in Limitation Act terms" was sufficient for the purpose of making a finding of concealment under section 32(1)(b). The court should have found that "concealment" required a legal duty to make disclosure, and that the defendant was under no such duty.
>
> (2) The Court of Appeal erred in law in finding that it was sufficient, for the purpose of finding "deliberate concealment", that the defendant was reckless as to (a) whether it was under a duty to disclose the commission and (b) whether the commission was relevant to a cause of action against it. The court should have found that it was necessary to show actual knowledge of both elements, or alternatively actual knowledge or wilful blindness, in order to establish "deliberate concealment" in this context.

27. The claimant raises three grounds, in addition to those given by the Court of Appeal, on which she maintains that its decision in relation to section 32(1)(b) should be upheld:

> (1) This court, being free to depart from Court of Appeal authority, should adopt what Males LJ described as "the straightforward approach". The defendant's decision not to disclose the commission was plainly deliberate, as held by the recorder and the judge. Further, the effect of section 140A of the 1974 Act was that it would have been reasonable to expect the defendant to disclose the commission to the respondent in the interests of fairness. Accordingly, the defendant "deliberately concealed" the commission within the meaning of section 32(1)(b). It is not necessary for the claimant to establish a separate duty to disclose or that the defendant had a further requisite mental

element in relation to (a) whether it was under a duty to disclose or (b) whether the commission was relevant to a cause of action against it.

(2) The defendant committed an act, rather than an omission to act, when not disclosing the commission. Steps were taken by its management to ensure that its agents did not disclose the commission. This is therefore a case of active concealment rather than non-disclosure. On this basis also, the court does not need to identify any "duty to disclose."

(3) The defendant knew that it was under a duty to disclose and/or knew that the commission was relevant to a cause of action against it after the judgment in *Plevin* was handed down. It nevertheless decided not to inform the claimant about the commission, thereby concealing from her the information that would enable her to bring a claim. The claimant is entitled to rely on section 32(1)(b) after the end of the loan agreement. The recorder was right to find that disclosure should have taken place after the law was settled in *Plevin*. The defendant's failure to do so means that it cannot enjoy limitation protection now.

(ii) The appeal in relation to section 32(2)

28. In relation to section 32(2) of the 1980 Act, the defendant does not appeal against the Court of Appeal's conclusion that the creation of an unfair relationship within the meaning of section 140A of the 1974 Act amounted to a breach of duty for the purposes of section 32(2). Nor does it appeal against the Court of Appeal's finding that it was reckless in the *R v G* sense as to whether it was in breach of duty: in other words, that it was aware of the risk that non-disclosure of the existence and amount of the commission would make the credit relationship unfair within the meaning of section 140A, and that it was objectively unreasonable for it to take that risk. The defendant's ground of appeal, in relation to section 32(2), is that the Court of Appeal erred in law in finding that conduct which was reckless was sufficient for the purpose of showing the "deliberate commission" of a breach of duty within the meaning of section 32(2).

29. The claimant raises an alternative ground, in addition to those given by the Court of Appeal, on which she maintains that its decision in relation to section 32(2) should be upheld. That ground proceeds from the fact that it may be impossible to be certain whether conduct constitutes a breach of duty until the issue has been judicially determined. For that reason, it is contended that section 32(2) cannot require the defendant to know that its conduct is in breach of duty. It must be sufficient that the defendant knows that its conduct could give rise to a claim against it, which might or might not prove to be well-founded. That condition is satisfied in the present case, since the defendant knew that there was a risk that its non-disclosure of the commission

would make its relationship with the claimant legally unfair, and therefore the subject of a potential claim. As a fall-back position, the claimant argues that it is sufficient to meet the "deliberate commission" requirement of section 32(2) that it was unreasonable for the defendant to engage in the conduct in question, knowing that it gave rise to a potential claim against it.

3. Section 140A of the Consumer Credit Act 1974

30. Before considering the law of limitation, it is necessary to provide a brief explanation of section 140A of the 1974 Act. The section provides, so far as material:

> "(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).
>
> …
>
> (4) A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended."

In the present case, it is section 140A(1)(c) which is relevant, the "thing … not done" by the defendant being the disclosure of the existence and amount of the commission.

31. Section 140B(1) sets out the orders which may be made under that section. They include requiring the creditor to repay sums paid by the debtor. Section 140B(2) provides that an order under that section may be made inter alia on an application by the debtor. Such applications, in England and Wales, must be made to the County Court: section 140B(4)(a).

32. Sections 140A to 140D were inserted into the 1974 Act by sections 19 to 21 of the Consumer Credit Act 2006 with effect from 6 April 2007. Paragraph 14 of Schedule 3 to the 2006 Act provides, so far as material, that the court may make an order under section 140B in connection with a credit agreement made before the commencement of section 20 of the 2006 Act (which inserted section 140B), but only on an application under section 140B(2) made on or after 6 April 2008.

33. Section 140A does not impose a legal duty upon creditors. In the case of *Plevin,* cited in para 6 above, Lord Sumption, with whom the other members of the court agreed, explained (para 17):

> "Section 140A … does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with the question whether the creditor's relationship with the debtor was unfair. It may be unfair for a variety of reasons, which do not have to involve a breach of duty."

In relation to the disclosure of commission, in particular, Lord Sumption stated (para 19):

> "Paragon [the creditor] owed no legal duty to Mrs Plevin [the debtor] under the ICOB Rules [the statutory rules imposing obligations on insurers and insurance intermediaries] 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."

34. Lord Sumption went on to consider the circumstances in which a failure to act (in that case, as in the present case, a failure to disclose commission) could render the relationship unfair (para 19):

> "… 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? … 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."

4. The legal background to section 32(1)(b) and section 32(2) of the 1980 Act

35. As will appear, there is a question as to whether it is permissible to take account of the law prior to the 1980 Act as an aid to the interpretation of the provisions in issue in the present case. However, as the submissions of the claimant, the reasoning of the Court of Appeal and some previous decisions of the Court of Appeal which it will be necessary to consider are all based on the view that recourse to the prior law is both necessary and appropriate, it is convenient to set out its principal features at this stage. That will include some discussion of authorities. It is also helpful in any event to understand the background to the enactment of the 1980 Act, and the mischief which it was intended to address.

(1) The pre-1939 law

36. As Lord Camden explained in *Smith v Clay* (1767) 3 Bro CC 639 (Note), a court of equity always refused its aid to stale demands. However, as it had no legislative authority, it could not define an exact time bar. But once Parliament enacted statutes of limitation in respect of common law actions, from 1623 onwards, courts of equity adopted those rules and applied them to similar cases in equity. Nevertheless, courts of equity permitted actions to proceed after the expiry of the statutory limitation period where the plaintiff's cause of action was founded on or concealed by the fraud of the defendant: *Booth v Earl of Warrington* (1714) 4 Bro PC 163. For these purposes, there could be no "fraud" unless the defendant had been aware of the facts alleged to have been concealed. In cases of "concealed fraud", so understood, it was felt to be against conscience that the defendant should be able to rely on the statute to defeat the

plaintiff's claim. This doctrine received limited statutory recognition in section 26 of the Real Property Limitation Act 1833, under which the right to bring a suit in equity for the recovery of land or rent of which the plaintiff or his predecessors were deprived by "concealed fraud" was deemed to have accrued "at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered".

37. *Bulli Coal Mining Co v Osborne* [1899] AC 351 developed the law further. It concerned a claim in an insolvency in respect of the value of coal which a company had deliberately removed from the claimants' land by means of underground workings, knowing that the coal did not belong to them. It was argued on behalf of the company that since there had not been any active concealment of the removal of the coal, it followed that the limitation period ran. That argument was rejected. Lord James of Hereford explained that it was a fraud to rob one's neighbour furtively of his property (pp 362-363). It had always been a principle of equity that no length of time was a bar to relief in the case of fraud, in the absence of laches on the part of the person defrauded. Therefore, he said, there was "no room for the application of the statute in the case of concealed fraud, so long as the party defrauded remains in ignorance without any fault of his own" (p 363). The contention that active concealment was essential was rejected in the light of the circumstances of the case (pp 363-364):

> "The contention on behalf of the appellants that the statute is a bar unless the wrongdoer is proved to have taken active measures in order to prevent detection is opposed to common sense as well as to the principles of equity. Two men, acting independently, steal a neighbour's coal. One is so clumsy in his operations, or so incautious, that he has to do something more in order to conceal his fraud. The other chooses his opportunity so wisely, and acts so warily, that he can safely calculate on not being found out for many a long day. Why is the one to go scot-free at the end of a limited period rather than the other? It would be something of a mockery for courts of equity to denounce fraud as 'a secret thing,' and to profess to punish it sooner or later, and then to hold out a reward for the cunning that makes detection difficult or remote."

Lord James also made it clear that the position would be different where the underground trespass was done under an innocent mistake (p 364).

(2) The Report of the Law Revision Committee

38. In 1934 the Law Revision Committee was invited to consider various aspects of the law of limitation, including the scope of the rules on concealed fraud. It reported in 1936: Fifth Interim Report (Statutes of Limitation), Cmd 5334. In relation to concealed fraud, it explained that the doctrine encompassed cases where "[ei]ther the cause of action may spring from the fraud of the defendant or else the existence of a cause of action untainted in its origin by fraud may have been concealed from the plaintiff by the fraudulent conduct of the defendant". The committee's concern was that the extent of the area within which this equitable doctrine operated, following the fusion of law and equity, was a matter of doubt and controversy. It recommended "that in all cases to which the Statutes of Limitation apply or are applied by analogy, where a cause of action is founded on fraud, committed by the defendant or his agent, or some person through whom he claims, or where a cause of action unconnected with fraud is fraudulently concealed from the plaintiff by the defendant or his agent, or someone through whom he claims, the right of the plaintiff to sue shall be deemed to have first accrued at the time when he discovered such fraud or could with reasonable diligence have discovered it" (para 22).

(3) The Limitation Act 1939

39. That report was the foundation of the 1939 Act, which substantially implemented the committee's recommendations, with some modifications. Section 26 was headed "Postponement of limitation period in case of fraud or mistake". It provided, so far as material:

> "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 his agent or of any person through whom he claims or his agent, or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid, 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 or the mistake, as the case may be, or could with reasonable diligence have discovered it".

The material provision for present purposes was subsection (b).

(4) Authorities on the 1939 Act

40. Following the enactment of section 26 of the 1939 Act, the doctrine of concealed fraud was developed in a number of cases. Two are particularly relied on in the present case.

(i) Beaman v ARTS Ltd

41. The first is *Beaman v ARTS Ltd* [1949] 1 KB 550, which concerned the defendants' conversion of the plaintiff's property, of which they were bailees. She had deposited her belongings with them for safe custody before travelling overseas. In 1940 they decided to close down their business. In order to do so as quickly as possible, they gave away the plaintiff's belongings to the Salvation Army, apart from one item which their employee kept for himself. They did so without the plaintiff's knowledge or consent. When she discovered what had happened, and brought proceedings for damages, the defendants pleaded that the action was time-barred. In reply, the plaintiff relied on section 26(a) and (b) of the 1939 Act. The Court of Appeal concluded that the action was not based on fraud, so that section 26(a) had no application, but that, applying *Bulli Coal Mining Co v Osborne,* the plaintiff's right of action had been concealed by fraud, so that section 26(b) applied and the action was not time-barred.

42. Lord Greene MR considered that section 26(a) applied only where fraud was a necessary allegation in order to constitute the cause of action (p 558); a construction which excluded claims based on conversion. In relation to section 26(b), Lord Greene noted that no active concealment of a fraudulent nature, subsequent to the conversion, was relied upon. However, he stated (p 559):

> "… there may, in my opinion, be fraudulent concealment of a cause of action which is not subsequent to the act which gives rise to the cause of action; it may acquire its character as such from the very manner in which that act is performed."

Bulli Coal Mining Co v Osborne was cited as an illustration. The instant case was another where fraudulent concealment was "implicit in the technique adopted in committing the tort" (p 560). The defendants "must have known that the bailor was reposing confidence in them" (p 561), and "must have known that by reason of that

confidence there would be no reason for her to inquire whether or not they were being unfaithful to it" (p 562).

43. Much reference has been made in the present case to passages in Lord Greene's judgment in which he referred to recklessness. It should be noted at the outset that there was no argument directed to recklessness in relation to section 26(b), so far as appears from the report; that Lord Greene did not define what he meant by recklessness; that he did not explain the relevance of recklessness to his analysis; and that recklessness was not mentioned in the judgments of the other members of the court. The matter arose in the context of a discussion of the judgment of the trial judge, Denning J. He had held that section 26(a) was not confined to cases where fraud was an essential ingredient of the cause of action; but he also held that it did not apply on the facts of the case, because the defendants had acted from honest motives. He further held that section 26(b) applied only where there was fraudulent concealment subsequent to the commission of a breach of duty.

44. It was in the course of a discussion of Denning J's finding that the defendants had acted from honest motives that Lord Greene referred to recklessness. He considered that, in accepting the defendants' evidence that they had acted in good faith, Denning J had misled himself "into accepting the protestations of the defendants' witnesses at their face value" (p 561). If the defendants formed the opinion that it would be beneficial to the plaintiff to give away her property, as they claimed, "that belief was entertained with a recklessness which I can only attribute to self-deception" (p 561). If they believed that it was impossible to communicate with her because of wartime conditions, as they claimed, "the truth … is that [they], in [their] haste to disembarrass the defendants of a trust, which was at the moment inconvenient to perform, quite recklessly made an assumption which [they] thought would assist them in achieving that object without giving any honest consideration to the question whether that assumption was true or false" (p 562). The "dominating influence which was weighing with the defendants was … the desire to obtain the commercial benefit of disembarrassing themselves of an obligation which would impede the closing down of the business" (p 564). That fact "explains … the recklessness with which they formed their conclusions" (p 565). They "recklessly … assumed … that the plaintiff had not troubled about her goods, and that large storage charges had mounted up and would continue to mount up which the plaintiff would be unable to pay" (ibid); and they "recklessly formed the opinion that the goods were valueless" (ibid), which even if true "they *must have known* … could afford no justification for disregarding their obligations" (p 566; emphasis added). All this they did "when they *must have known* that the plaintiff … would be relying on them to be faithful to their trust" (ibid; emphasis added). Lord Greene concluded (ibid):

> "I am of opinion that the conduct of the defendants, by the very manner in which they converted the plaintiff's chattels in

> breach of the confidence reposed in them, and in circumstances calculated to keep her in ignorance of the wrong that they had committed amounted to a fraudulent concealment of the cause of action."

45. It appears from these extracts that Lord Greene considered that the defendants had knowingly acted in breach of their duties as bailees, and, by making no attempt to communicate with the plaintiff, in circumstances where to their knowledge she was reposing confidence in them to perform their duties, had ensured that she remained in ignorance of what they had done. That amounted to fraudulent concealment, following *Bulli Coal Mining Co v Osborne*. So far as I can judge, the defendants' recklessness in making self-deceiving assumptions to justify their breach of their duties as bailees does not appear to have been an element in the reasoning which led to Lord Greene's conclusion that there had been fraudulent concealment. It appears that he was going through the evidence which led Denning J to accept that the defendants had acted with an honest motive, and explaining why he rejected that conclusion. But he also made it clear that an honest motive did not matter in any event, as had earlier been decided in *In re McCallum* [1901] 1 Ch 143*,* stating that "[n]o amount of self-deception can make a dishonest action other than dishonest; nor does an action which is essentially dishonest become blameless because it is committed with a good motive" (p 561). It also appears that what Lord Greene meant by "recklessness" went beyond taking a risk in circumstances in which a reasonable person would not have taken the risk. The language used by Lord Greene is suggestive of conscious wrongdoing, or at least wilful blindness.

(ii) King v Victor Parsons & Co

46. Several reported cases in the 1960s and 1970s concerned the application of section 26(b) of the 1939 Act to claims brought in respect of the construction of houses with defective foundations. One problem in such cases was that the defective nature of the foundations was not apparent until damage appeared, possibly many years later, by which time the ordinary limitation period might have expired. The approach adopted by the courts was to treat situations where the builder or developer was aware of the defective nature of the foundations and kept silent about it as involving concealed fraud: see, for example, *Applegate v Moss* [1971] 1 QB 406.

47. In the present case, reliance has been placed on a passage in the judgment of Lord Denning MR in another case of this kind, *King v Victor Parsons & Co* [1973] 1 WLR 29, 33-34:

> "The word 'fraud' here [viz in section 26(b) of the 1939 Act] 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 wrong-doing 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...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 in original)

48. It is to be noted that Lord Denning referred in that passage to a person who acted "recklessly ... like the man who turns a blind eye … He refrains from further inquiry lest it should prove to be correct". A person who turned a blind eye, or refrained from further inquiry lest awareness of a risk should prove to be correct, was said to be in the same position as a person who acted knowingly. That would be in accordance with the wider principle according to which equity sometimes attributes constructive notice (eg of a defect in an agent's authority, or in the title of a transferor of property) to persons

who are wilfully blind. When Lord Denning went on to apply the law to the facts, he noted that the developers had disregarded the advice of their architects as to the type of foundations that were necessary, and knew that there was a risk of subsidence, but let the purchaser think that the foundations were properly constructed. Lord Denning described that as "a reckless disregard of their obligations" (p 35). No doubt it was, but it was also a conscious breach of contract, as the other members of the court concluded (pp 37-38 and 42; there was an implied contractual term that the foundations were "proper and workmanlike and … reasonably fit for the dwelling": p 35).

49. As is apparent from these authorities, the way in which the courts construed section 26 of the 1939 Act strained the language of the provision. In *Tito v Waddell (No 2)* [1977] Ch 106, 245 Sir Robert Megarry V-C commented that "as the authorities stand, it can be said that in the ordinary use of language, not only does 'fraud' not mean 'fraud' but also 'concealed' does not mean 'concealed', since any unconscionable failure to reveal is enough."

(5) The Report of the Law Reform Committee

50. The law of limitation was reviewed by the Law Reform Committee in its 21st Report (Final Report on Limitation of Actions), Cmnd 6923 (1977). Its principal concern in this area was the impact upon section 26 of the 1939 Act of cases concerned with latent damage to buildings and other structures, and in particular with the point in time at which a cause of action arose, following *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] QB 858 and *Anns v Merton London Borough Council* [1978] AC 728. It put forward three possible approaches, the first of which was "adherence to the 'concealed fraud' principle, involving the retention of section 26, reformulated so as to express its true legal purport as decided by the courts" (para 2.21). The other two approaches were not taken forward and need not be examined.

51. In relation to the "concealed fraud" approach, the committee explained at para 2.22 that its essential feature was that "it operates on some degree of blameworthiness on the part of the defendant beyond his mere failure to comply with his legal obligations; the traditional expression is 'unconscionable conduct'". It observed that if that were thought to be the best approach, it would not be difficult "to reformulate section 26 in a way which, while incorporating the feature of unconscionability, reproduces in a more readily intelligible form the construction placed on that section by the courts". In that regard, the committee observed that both the title and the wording of section 26 were misleading in that "it (i) is not limited to fraud in the common law sense; (ii) embraces recklessness; and (iii) is not limited to cases of active concealment" (para 2.23).

52. The committee then put forward a suggested reformulation which "attempted to cure these defects" (para 2.24). However, the committee's draft bears no resemblance to the amended section 26 which was subsequently enacted in the Limitation Amendment Act 1980 and re-enacted as part of the consolidation effected by the 1980 Act. So far as material, the committee's draft provided:

> "… where, in the case of any action for which a period of limitation is prescribed by this Act -
>
> …
>
> (c) the action is based on a deliberate or reckless breach of duty (whether or not arising under a contract); or
>
> (d) the right of action is concealed by the dishonest conduct of [the defendant or his agent or any person through whom he claims or his agent];
>
> the period of limitation shall not begin to run until the plaintiff has discovered … the right of action … or could with reasonable diligence have discovered it."

The proposed test was therefore whether the right of action was based on a deliberate or reckless breach of duty, or was concealed by dishonest conduct: not, as subsequently enacted, whether a relevant fact was deliberately concealed, or whether a breach of duty was deliberately committed in circumstances where it was unlikely to be discovered for some time. The committee rejected the idea of a provision to the latter effect as being unrealistic and unduly complex (para 2.25).

(6) The Limitation Amendment Act 1980

53. In the event, the Limitation Amendment Act 1980 adopted an approach which gave effect to the spirit of the committee's recommendation in so far as it dispensed with the language of fraud and was not limited to cases of active concealment. On the other hand, it made no reference to recklessness, and it made specific provision for a breach of duty committed in circumstances where it was unlikely to be discovered for some time.

54. The long title of the Act described it as an Act "to amend the law with respect to the limitation of actions". The first group of sections, headed "Miscellaneous amendments of Limitation Act 1939", included section 7, which substituted for section 26 of the 1939 Act an amended version. It was that amended version of section 26 which was re-enacted by section 32 of the 1980 Act, as part of the consolidation effected by that Act.

5. The Limitation Act 1980

55. The 1980 Act is described in its long title as an Act to consolidate the Limitation Acts 1939 to 1980. Part I sets out the ordinary time limits for different classes of actions. In particular, section 9(1) provides that an action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued. Part II is concerned with the extension or exclusion of ordinary time limits. It includes section 32, which provides, so far as material:

> "(1) … 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.
>
> …
>
> (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."

56. Section 38 is the interpretation section. It provides, so far as material:

> "(1) … 'action' includes any proceeding in a court of law …
>
> (9) References in Part II of this Act to a right of action shall include references to -
>
> (a) a cause of action".

6. The development of the law on section 32(1)(b) and section 32(2) of the 1980 Act

57. It is necessary next to consider how the law on section 32(1)(b) and section 32(2) has developed through the principal authorities.

(i) Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd

58. The case of *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] AC 102 ("*Sheldon*") is an important starting point because of its emphasis on giving the language of section 32(1)(b) its ordinary meaning, rather than reading it as a continuation of the pre-1980 law.

59. The case concerned the question whether, and if so how, section 32(1)(b) applied where the deliberate concealment of a relevant fact occurred after the limitation period had already begun to run. That is not an issue which arises in the present case, but the guidance given by the House of Lords to the correct approach to the construction of section 32 is in point. The defendants argued that section 32 was the statutory successor of section 26(b) of the 1939 Act, which in turn was a statutory enactment of the equitable doctrine of concealed fraud. Both parties relied on cases decided prior to 1980, some of which assumed that the concealment of facts after the limitation period had begun to run was capable of constituting concealment by fraud, and others of which contained dicta suggesting the contrary.

60. Lord Keith of Kinkel stated at p 140 that the issue must be decided upon an examination of section 32 itself, taken in its context, particularly since the 1980 Act was a consolidation statute. He commented that "[r]ecourse to the antecedents of a consolidation statute should only be had when there is a real difficulty or ambiguity

incapable of being resolved by classical methods of construction: *Farrell v Alexander* [1977] AC 59, 73, per Lord Wilberforce".

61. Lord Browne-Wilkinson, with whom Lord Keith agreed, roundly rejected the argument that section 32 should be construed on the basis that it was the statutory successor of section 26(b) of the 1939 Act, and therefore of the equitable principle of concealed fraud. That, he said at p 144, was "not a legitimate approach to the construction of section 32". Like Lord Keith, he noted (ibid) that the 1980 Act was a consolidating Act, and said that "unless there is an ambiguity, it is not permissible to construe consolidating Acts in the light of their statutory history." He went on at p 145 to explain that, even if it were legitimate to look at the legislative history, the immediate predecessor of section 32 of the 1980 Act was not section 26 of the 1939 Act but section 7 of the Limitation Amendment Act 1980, which had deleted all references to concealment by fraud from section 26 and substituted the concept of deliberate concealment of relevant facts. This had been "done deliberately because of the confused effect and misleading terminology of the old equitable doctrine of concealed fraud". He concluded on this point (ibid):

> "In my judgment it is inconsistent with the plain Parliamentary intention lying behind the amendment of the Act of 1939 to continue to construe the Act of 1980 as if it were still a statutory enactment of the equitable doctrine of concealed fraud. The Act of 1980 is not."

62. Lord Browne-Wilkinson went on to observe that section 32(1)(b) was not ambiguous (ibid):

> "On the plain meaning of the words any deliberate concealment of relevant facts falls within section 32(1)(b) with the consequence that, in applying the statutory time limits, time does not start to run until the concealment is discovered. The onus lies on the defendants to show a compelling reason to limit the generality of the words used."

(ii) Cave v Robinson Jarvis & Rolf

63. The case of *Cave v Robinson Jarvis & Rolf* [2002] UKHL 18; [2003] 1 AC 384 ("*Cave*") concerned a claim brought against solicitors for alleged negligence in drafting a deed and in failing to register it. In response to a defence that the action was time-barred, the claimant argued that the negligent drafting of the deed constituted the

deliberate commission of a breach of duty in circumstances in which the breach of duty was unlikely to be discovered for some time, so that section 32(2) applied. The two members of the Appellate Committee who gave substantial speeches, Lord Millett and Lord Scott of Foscote, adopted different approaches to section 32, which bore in particular on their interpretation of section 32(1)(b), but were in agreement as to the meaning of "deliberate" in section 32(2). Lord Mackay of Clashfern and Lord Hobhouse of Woodborough agreed with both speeches; Lord Slynn of Hadley expressed agreement only with Lord Scott; neither Lord Millett nor Lord Scott expressed agreement with each other.

64. Lord Millett's starting point was that "[c]oncealment and non-disclosure are different concepts" (para 21). Lord Scott disagreed, stating that "deliberate concealment for section 32(1)(b) purposes may be brought about by an act or an omission", and that the claimant must "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" (para 60).

65. I agree with Lord Scott. As a matter of ordinary English, the verb "to conceal" means to keep something secret, either by taking active steps to hide it, or by failing to disclose it. The primary definition of the word in the Oxford English Dictionary is "to keep (information, intentions, feelings, etc) from the knowledge of others; to keep secret *from* (formerly also *to*) others; to refrain from disclosing or divulging". The fact that concealment can take the form of the conscious withholding of information is illustrated by Lord Denning's remark in *King v Victor Parsons & Co* (para 47 above) that the wrongdoer in a case such as that "[b]y saying nothing … conceals the right of action".

66. However, proceeding on the basis that concealment and non-disclosure were distinct, Lord Millett treated section 32(1)(b) as being concerned with cases of active concealment, and section 32(2) as covering situations where active concealment was not required and where non-disclosure was therefore sufficient. In such cases, the defendant was deprived of a limitation defence only where the wrongdoing was deliberate and took place in circumstances where it was unlikely to be discovered for some time: see paras 23-25 of his speech. Lord Millett found a historical basis for that analysis in the pre-1980 law of concealed fraud, on the view that a distinction could be drawn between cases involving concealment in the ordinary sense of the word and cases, such as *Bulli Coal Mining Co v Osborne,* where it was sufficient that a breach of duty was deliberately committed in circumstances in which it was unlikely to be discovered for some time.

67. Lord Scott again disagreed, as I shall explain shortly. In my view he was right to do so. Lord Millett was correct in regarding section 32(2) as historically rooted in cases such as *Bulli Coal Mining Co v Osborne,* where a breach of duty was deliberately

committed in circumstances in which it was unlikely to be discovered for some time. But that does not imply that the 1980 Act draws a binary distinction between cases involving active concealment and cases of non-disclosure, falling respectively under section 32(1)(b) and section 32(2). As Lord Scott accepted, a plain reading of section 32(1)(b) encompasses both concealment by taking positive steps and concealment by non-disclosure. Furthermore, a given situation may fall within the scope of both section 32(1)(b) and section 32(2). For example, in a case concerned with defective foundations, of the kind with which the courts and the Law Reform Committee were much concerned in the period leading up to the enactment of the Limitation Amendment Act 1980, both provisions might be relevant. If a builder knowingly concealed from the purchaser of a house the fact that the foundations were defective, either by positive steps (such as by covering up the bad work, so that there was no opportunity for examination) or by non-disclosure (such as by failing to tell the purchaser about the problem), that would constitute the deliberate concealment of a fact which was relevant to the claimant's right of action against the builder (assuming such a right of action to exist), falling within section 32(1)(b). If the builder knowingly constructed the foundations in a defective manner, in circumstances where the work would then be covered up without examination, that would constitute the deliberate commission of a breach of duty in circumstances in which the defect was unlikely to be discovered for some time, falling within section 32(2). Depending on the evidence available, one provision or the other might be easier for the claimant to rely on.

68. Lord Scott explained this point very clearly (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."

However, he went on:

> "In many cases the requisite proof of intention might be quite difficult to provide. The standard of proof would be the usual balance of probabilities standard and inferences could of course be drawn from suitable primary facts but, none the less, proof of intention, particularly where an omission rather than a positive act is relied on, is often very difficult."

This was where section 32(2) came in:

> "Subsection (2), however, provides an alternative route. The claimant need not concentrate on the allegedly concealed facts but can instead concentrate on the commission of the breach of duty. If the claimant can show that the defendant knew he was committing a breach of duty, or intended to commit the breach of duty - I can discern no difference between the two formulations; each would constitute, in my opinion, a deliberate commission of the breach - then, if the circumstances are such that the claimant is unlikely to discover for some time that the breach of duty has been committed, the facts involved in the breach are taken to have been deliberately concealed for subsection (1)(b) purposes."

69. In the event, later cases have followed Lord Scott in treating "concealed" within the meaning of section 32(1)(b) as encompassing both active concealment and concealment by non-disclosure.

70. Lord Scott gave clear guidance as to the meaning of "deliberate" (as in "deliberately concealed" and "deliberate commission of a breach of duty"). In relation to section 32(1)(b), he agreed with counsel's submission that in order for a fact to be "deliberately concealed" for the purposes of that provision "the concealment must be an intended concealment" (para 59). Whether the concealment took the form of positive steps to conceal or the withholding of information, "in either case, the result of the act or omission, ie, the concealment, must be an intended result" (para 60).

71. In relation to section 32(2), he emphasised that the words "deliberate commission of a breach of duty" were clear words of English (para 58). Deliberate commission of a breach of duty was to be contrasted with the commission of a breach of duty which was not deliberate, ie "a breach of duty that the actor was not aware he was committing" (ibid). He added at para 61 that the clear words of section 32(2) showed that Parliament had made a distinction "between the case where the actor knows he is committing a breach of duty and the case where he does not".

72. Lord Millett appears to have taken the same view, stating in relation to section 32(2) (para 24):

> "It is only where the defendant is aware of his own deliberate wrongdoing that it is appropriate to penalise him for failing to disclose it."

The implication is that Lord Millett also understood the word "deliberate" in section 32(2) as requiring that the defendant had consciously committed a breach of duty.

73. It is also relevant to note the support given by Lord Scott to reading the provisions without relying on the legislative history. He said at para 46 that the importance of the *Sheldon* case was "that it insists that if the language of section 32 is clear, effect must be given to that language without regard to the section's legislative history". Following that approach, he stated at para 58 that "[u]nless there is some ambiguity in the statutory language, recourse to legislative history is unnecessary and impermissible". In words which should in my view be taken to heart, he said (para 65):

> "The plain words of the statutory requirements, 'deliberately concealed' and 'deliberate commission of a breach of duty' need no embellishment."

(iii) Williams v Fanshaw Porter & Hazelhurst

74. Despite the guidance given by the House of Lords in *Sheldon* and *Cave,* the case of *Williams,* cited in para 21 above, began a process in which the Court of Appeal has moved progressively further away from the clear language of the provisions; a process which continued in *The Kriti Palm* and culminated in the present case.

75. *Williams* concerned an action brought against a solicitor who had consented to an order dismissing the claimant's earlier claim against a doctor for medical negligence. The solicitor was under a professional duty to disclose the existence of the consent order to the claimant, but failed to do so. When she eventually discovered what had happened and brought a claim in negligence, it was argued that the claim was time-barred. In response, the claimant relied on section 32(1)(b) of the 1980 Act. At first instance, the recorder found that the solicitor's motive in not informing the claimant was that he was embarrassed for himself rather than wishing to protect his firm from a negligence action, and that he honestly believed that the situation created by the consent order could be cured: facts which indicated a motive for deliberate concealment, but were in no way inconsistent with its existence.

76. All three judges in the Court of Appeal gave judgments. Two of them made obiter observations about section 32(2). Park J noted at para 9 that *Cave* decided that section 32(2) "required the defendant, not just to know what he was doing, but also to know that it was a breach of duty". Mance LJ stated at para 31 that "*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". He added at para 34:

> "Deliberate commission of a breach of duty involves knowledge of wrongdoing."

Those statements are entirely consistent with *Cave.*

77. In relation to section 32(1)(b), two significant issues were raised in the judgments. The first was whether, in order to establish that the defendant had deliberately concealed a relevant fact, it was necessary to show that he had been under a duty to disclose it, or at least that he would ordinarily have disclosed it in the course of his relationship with the claimant. Park J considered that it was (para 14):

> "It is, I think, plain that, for concealment to be deliberate, the defendant must have considered whether to inform the claimant of the fact and decided not to. I would go further and accept that the fact which he decides not to disclose either must be one which it was his duty to disclose, or must at least be one which he would ordinarily have disclosed in the normal course of his relationship with the claimant, but in the case of which he consciously decided to depart from what he would normally have done and to keep quiet about it."

For reasons explained below, in the context of the meaning of "deliberate", the point made in the first sentence is in my view correct, and of critical importance. As Lord Scott explained in *Cave* at para 60, deliberate concealment for section 32(1)(b) purposes may be brought about by an act or an omission, but in either case "the result of the act or omission, ie the concealment [sc from the claimant], must be an intended result". As he also observed (ibid), proof of intention, particularly where an omission rather than a positive act is relied on, is often very difficult. The second sentence in the passage cited from Park J's judgment, on the other hand, appears to introduce a requirement which has no basis in the terms of section 32(1)(b).

78. Mance LJ observed at para 29 that where there is a legal duty to disclose a fact, its deliberate non-disclosure may readily be described as concealment. Although it was unnecessary to decide the point (since the solicitor was undoubtedly under a duty of disclosure), the position appeared to him to be arguably different where there was no such duty:

> "On the face of it, 'concealment' in such a context might seem to require active conduct, rather than a mere decision to remain silent – even in circumstances where it would be normal or moral to speak."

On that approach, section 32(1)(b) might be understood as implicitly distinguishing between (a) cases of active concealment, where there need not be any legal duty of disclosure, and (b) cases of non-disclosure, where it must be established that there had been a breach of a legal duty of disclosure (and where, contrary to Park J's view, nothing less would suffice).

79. The third member of the court, Brooke LJ, based his decision on the fact that the solicitor had intentionally concealed from the claimant a fact relevant to her cause of action "when he was under a duty to tell her about it" (para 51).

80. The second important issue discussed in *Williams* was the meaning of "deliberate" concealment. This had two aspects. The first was whether, in order to establish that the defendant had "deliberately" concealed a fact which was relevant to the claimant's right of action, it was necessary to show that the defendant was aware of the relevance of the fact to the right of action. Park J considered that it was not: "the paragraph does not say, and in my judgment does not require, that the defendant must have known that the fact was relevant to the right of action" (para 14). Mance LJ favoured the contrary view, stating that "the legislature must have had in mind (at least as the typical concern) situations where a defendant deliberately concealed facts knowing that they were relevant to an actual or potential breach of duty" (para 34). Brooke LJ expressed no opinion on the point.

81. The second aspect, considered only by Mance LJ, proceeded from the premise that concealment of a relevant fact required the breach of a duty to disclose it, and raised the question whether it was necessary to show that the defendant was aware of that duty and knowingly breached it.

82. Mance LJ introduced his discussion of the point by noting that the defendant solicitor's duty of disclosure extended not only to (i) any fact known by him to be

relevant to a potential claim against himself, but also to (ii) any fact known by him to be relevant to the ongoing conduct of the claim against the third party which he was conducting on behalf of the claimant. He continued (para 36):

> "If a solicitor decides not to disclose any fact falling within either (i) or (ii) to his client, knowing that it his duty to do so (or, what amounts in law to the same, being reckless as to whether or not it is his duty to do so), then he can in each case be described as having 'deliberately concealed' that fact from his client. *The deliberateness derives from his knowledge that he ought to disclose and his intentional disregard of his duty to do so* … Case (i) falls on any view within the scope of section 32(1)(b)". (emphasis added)

83. Mance LJ went on to state that there were "two possible interpretations of the mental element required under section 32(1)(b)" (para 37). On the first interpretation, section 32(1)(b) "requires deliberate concealment of a fact in circumstances where the defendant realises that the fact has some relevance to an actual or potential claim against him (or is reckless as to whether or not it does)" (ibid). So read, "the running of a limitation period would not be postponed by a deliberate concealment of a fact by a defendant, which was in breach of a duty unrelated to the wrongdoing in respect of which the claimant later claims and which occurred in circumstances where the defendant did not realise that the fact suppressed had relevance to any such wrongdoing (and was not reckless in not realising this)" (ibid). On the second interpretation, "any deliberate concealment should carry the consequence attributed by section 32(1)(b), even though the defendant did not (and it may be could not) realise that the fact concealed had any relevance to any actual or potential wrongdoing" (ibid). Mance LJ did not express any concluded view as to the interpretation he preferred, correctly noting (at para 39) that it might be influenced by the resolution of the difference between Lord Millett's and Lord Scott's formulation of the nature of the conduct involved in concealment – that is, whether non-disclosure is sufficient or whether there must be active concealment.

(iv) The Kriti Palm

84. The process of embellishment of section 32(1)(b) continued in the case of *The Kriti Palm*, cited in para 13 above. The case arose out of the engagement of the defendants, ITS, by the claimants, AIC, to issue a certificate of quality for a cargo of gasoline. They tested it using the wrong method and certified that it met the required specification. Quality tests carried out when the cargo was discharged were inconsistent with the certificate, leading to claims by sub-purchasers against AIC. They notified ITS, who performed further tests using the correct method ("the Cooper retests"), and found

that the gasoline did not meet the specification. They did not inform AIC of those results, but instead told them that they would stand by their certificate. In proceedings brought by AIC against ITS, a majority of the Court of Appeal (Buxton LJ and Sir Martin Nourse, Rix LJ dissenting) held that AIC could rely on section 32(1)(b), on the basis that ITS had concealed relevant facts, namely the existence and result of the Cooper retests. That conclusion was reached on the basis that ITS had been under a duty to disclose the existence and result of the further tests, but, knowing of that duty, had deliberately failed to comply with it.

85. Rix LJ considered that "there must be either active and intentional concealment of a fact relevant to a cause of action, or at least the intentional concealment by omission to speak of a fact relevant to a cause of action which the defendant knew himself to be under a duty to disclose" (para 321). He thus brought together (1) the distinction between active concealment and concealment by non-disclosure, drawn by Lord Millett in *Cave* and discussed by Mance LJ in *Williams,* (2) the requirement of a duty to disclose, which had been introduced in *Williams*, and (3) a requirement of knowledge of that duty, following Mance LJ's lead in *Williams*. The other members of the court followed the same approach, subject to a possible difference in relation to the nature of the duty of disclosure. Sir Martin Nourse described the trial judge's findings that ITS should have disclosed the test results, that they knew that they should have disclosed them, and that they deliberately decided not to disclose them, as "necessary to establish a case within section 32(1)(b)" (para 381). Buxton LJ identified the issues in the appeal as follows (para 427):

> "(i) Was ITS under a duty to AIC to reveal the existence and content of the Cooper retests?
>
> (ii) Did ITS, knowing of that duty, decide not to reveal the existence and content of the Cooper retests?
>
> (iii) Were the Cooper retests relevant to any and if so which of the rights of action asserted by AIC that are otherwise statute-barred?"

All the members of the court therefore treated it as a necessary element of section 32(1)(b), in a case where concealment took the form of non-disclosure, that the claimant must establish that the defendant had been under a duty to disclose the relevant facts to him, had known of that duty, and had intentionally failed to comply with that duty.

86. As to the nature of the duty, Rix LJ concluded that ITS were under no legal duty to disclose the test results, and that there had therefore been no concealment. The majority concluded that a duty of disclosure arose, but their reasoning as to the nature of that duty is obscure. As explained earlier, in the present case Jay J regarded the case as authority that, absent positive concealment, there must be a duty of disclosure under the general law, whereas Rose LJ considered it as establishing that there was no requirement to show a pre-existing legal duty to disclose, and that it was sufficient that there should be a duty "in Limitation Act terms", as I shall shortly explain.

87. In a passage with which Sir Martin Nourse expressed agreement, Buxton LJ stated (para 439):

> "Not only was a duty to disclose the Cooper retests acknowledged by ITS, but also the existence of such a duty is a matter of common sense … Not only as a matter of law, but also commercially, it really challenges reality to think that a certifier, armed with tests that suggested that the tests used to complete the certificate had or might have produced incorrect results, could nonetheless simply do nothing about it; and in particular could properly say nothing about those tests to those who had employed him to certify."

The reference in that passage to common sense seemed to Jay J to be consistent with the conclusion that a legal duty existed: as, in effect, a way of expressing the response of the hypothetical officious bystander. The words "as a matter of law" also appear to imply that Buxton LJ had in mind a legal duty. That interpretation is supported by the reasons he gave for rejecting a submission that the existence of a claim based on the certificate would justify non-disclosure, stating (para 442):

> "First, I cannot accept the argument as a matter of law. If ITS did have a duty to tell AIC about the Cooper retests, it cannot exempt ITS from discharging that duty that AIC are threatening to sue ITS on a basis that, by definition, does not embrace the Cooper retests."

That interpretation is also consistent with later passages in which Buxton LJ accepted that a certifier could breach a duty in negligence by failing to reveal to its client some matter which was relevant to the client's reliance on the certificate (para 458).

88. On the other hand, Buxton LJ concluded at para 440, in a passage to which Rose LJ attached importance in the present case, that a certifier in possession of material of his own creation which cast doubt on the certificate that he had given "was under a duty in Limitation Act terms to reveal that material". He did not explain the concept of "a duty in Limitation Act terms" (which appears also at paras 430 and 443 of his judgment).

(v) The present case

89. In the present case, the Court of Appeal followed the approach to section 32(1)(b) which had been established by the judgments in *Williams* and *The Kriti Palm.* As Males LJ explained (para 199), in a judgment with which Sir Julian Flaux C agreed, the court had to ask a series of questions:

> "(1) whether this was a case of active concealment or mere non-disclosure; (2) if the latter, whether the bank was under a duty to disclose the commission, either as an independent duty or as a duty 'in Limitation Act terms'; (3) whether the bank knew that (or was reckless whether) it was in breach of that duty; and (4) whether the bank knew that (or was reckless whether) the commission was relevant to a right of action of the claimant."

As Males LJ commented (ibid), "in posing these questions the cases have travelled a very long way from the statutory language, which does not refer to breach of duty at all in section 32(1)(b), let alone draw distinctions between different kinds of duty, and does not contain any requirement about the defendant's knowledge of such a duty".

90. Rose LJ, in a judgment with which the other members of the court agreed, took as her starting point that the existence and amount of the commission were facts which were relevant to the claimant's right of action under section 140A of the 1974 Act. She found that those facts had been "deliberately concealed" from the claimant by the defendant within the meaning of section 32(1)(b). In reaching that conclusion, she proceeded on the basis that the concept of "concealment" contained an inherent requirement that the defendant was under an obligation to disclose the facts in question to the claimant. She derived from *The Kriti Palm* the proposition that the duty which was required in order for non-disclosure to constitute concealment could be "a duty that arose purely for the purpose of applying section 32(1)(b)" (para 45). She inferred that Buxton LJ's decision in *The Kriti Palm* that there was "a duty in Limitation Act terms" meant that "there was enough of an obligation to disclose … to mean that a failure to disclose amounted to a concealment for the purposes of section 32(1)(b)", but "did not

mean that there was an implied obligation for any other purpose" (para 74). On the contrary, she considered that "[f]or the purposes of the Act that obligation need only be one arising from a combination of utility and morality" (para 75). This approach offered the advantage, in her view, that it did not require the court to undertake a detailed analysis of implied contractual terms or tortious duties of care (para 76). Instead, the court's focus was on the conduct which was alleged to amount to the concealment and on "an analysis of whether the defendant was, at that point, under a sufficient obligation to disclose for the failure to disclose to amount to concealment as at that date" (ibid).

91. Construing "deliberately" as including "recklessly", on the basis particularly of Mance LJ's remarks about recklessness in *Williams,* and applying the *R v G* approach to recklessness, Rose LJ concluded that the defendant had "deliberately concealed" the commission, since it must have known that there was a risk that non-disclosure of the commission would make the parties' relationship unfair within the meaning of section 140A of the 1974 Act, and it was not objectively reasonable for it to have taken that risk. The claimant therefore succeeded under section 32(1)(b).

92. In relation to section 32(2), Rose LJ concluded that the defendant had acted in breach of a duty owed by it under section 140A of the 1974 Act. Once more interpreting "deliberate" as encompassing the taking of a risk in circumstances where it was objectively unreasonable to take the risk, she further concluded that the defendant's breach of duty had been deliberate, and that the claimant therefore succeeded also under section 32(2).

7. Taking stock

(1) Section 32(1)(b)

(i) "Concealed"

93. There are a number of serious difficulties with the approach to section 32(1)(b) which has been developed by the Court of Appeal through *Williams, The Kriti Palm* and the present case: an approach based on the elaboration of the words "concealed" and, in the present case, "deliberately". To recap, "concealed" has been construed as requiring (1) at least in cases of non-disclosure as opposed to active concealment, a duty to disclose the relevant fact or facts, comprising either a legal obligation or an obligation arising from a combination of utility and morality, and (2) knowledge that the fact concealed is relevant to the claimant's right of action or to a potential right of action, or recklessness as to its relevance to such a right of action. "Deliberately" has been construed as requiring the breach of the duty of disclosure either (1) intentionally or (2)

knowing that there is a risk of such a breach and taking that risk in circumstances in which it was objectively unreasonable to do so.

94. So construed, and with the embellishments marked in bold, section 32(1)(b) is interpreted as if it read:

> "any fact **which was to the knowledge of the defendant** relevant to the plaintiff's right of action or to a potential right of action, **or as to the relevance of which to the plaintiff's right of action or potential right of action the defendant was reckless**, has been deliberately concealed from him by the defendant **knowingly or recklessly in breach of a duty, either imposed by law or arising from a combination of utility and morality, to disclose it**".

95. The first problem with this interpretation is that it reads far more into the provision than Parliament enacted, in a situation where the provision makes good sense without elaboration. Such a reading is wholly inconsistent with the emphasis placed both in *Sheldon* and in *Cave* on giving clear language its ordinary meaning. To give section 32(1)(b) a straightforward reading is also consistent with the background of the legislation in the Law Reform Committee's desire that the law should be expressed more intelligibly than was previously the case (paras 50-52 above). In reality, the decisions of the Court of Appeal in *Williams, The Kriti Palm* and the present case have given the words "deliberately concealed" a meaning which is at least as strained as the meaning which the courts had given, prior to the 1980 Act, to the statutory language of "concealed by fraud".

96. What section 32(1)(b) requires is that the defendant has "deliberately concealed" "a fact relevant to the plaintiff's right of action". The words "the plaintiff's right of action" must refer to the right of action asserted by the plaintiff in the proceedings before the court. That follows from the terms of section 32(1), so far as material: "… where in the case of any action for which a period of limitation is prescribed by this Act … any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant …" The right of action asserted by the plaintiff may or may not be well-founded: that is a matter which will only need to be determined if the plea of limitation is rejected. As to the words "a fact relevant to the plaintiff's right of action", that phrase has been interpreted as referring to a fact without which the cause of action is incomplete: see, for example, *Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 883; [2015] Bus LR 1362. That interpretation is not in issue in this appeal, but it makes sense: if the claimant can plead a claim without needing to know the fact in question, there would appear to be no good reason why the limitation period should not run.

97. As to the meaning of "deliberately concealed", the Court of Appeal's approach rests on an understanding of the meaning of ordinary English words which I am unable to accept. The meaning of "deliberately" is considered below. For the present, it is sufficient to note that it constitutes a critically important element of section 32(1)(b), as Lord Scott made clear in *Cave* (para 68 above), and as Park J correctly noted in *Williams* (para 77 above). Although, for the purposes of the present analysis, it is necessary to consider the elements of deliberateness and concealment separately, it should be emphasised that both elements must be satisfied before section 32(1)(b) will apply.

98. In relation to the meaning of "concealed", it seems that in *Williams* the court found a duty of disclosure to be inherent in the meaning of the word "concealment". In the present case, Rose LJ expressly stated that "inherent in the concept of 'concealing' something is the existence of some obligation to disclose it" (para 75). I respectfully disagree. As was explained at para 67 above, the word "conceal" means to keep something secret, either by taking active steps to hide it, or by failing to disclose it. A person who hides something can properly be described as concealing it, whether there is an obligation to disclose it or not. For example, an elderly lady who was afraid of burglars might conceal her pearls before going to bed, without any implication that she was obliged to leave them lying in plain sight. Some people use cosmetics ("concealer") to conceal blemishes in their skin, without any implication that they are under an obligation to reveal the imperfections.

99. The position seems to me to be the same, as a matter of ordinary English, where concealment takes the form of the withholding of information with the intention of keeping it secret. For example, Samuel Pepys concealed the contents of his diary by writing it in code; but that does not imply that he was under an obligation to reveal what he had written. Someone who decides not to tell anyone that he has been diagnosed with cancer can properly be described as concealing his illness, without any implication that he is under an obligation to share the information. It is to be noted that in all the examples I have given, as in most if not all cases where "conceal" is used in the active mood, concealment involves intentional hiding or withholding of information. This underlines the importance of the explicit emphasis placed by Parliament on the requirement that the relevant fact must have been "deliberately concealed".

100. Of course, if the defendant is subject to a duty of disclosure to the claimant, it is possible that that may be a relevant circumstance bearing upon whether it can be concluded that there has been deliberate concealment. The considerations to which Park J referred in *Williams,* para 14 – that the relevant fact was one which it was the defendant's duty to disclose, or was one which he would ordinarily have disclosed in the normal course of his relationship with the claimant - may therefore have an evidential significance in determining whether there was deliberate concealment. But it

has to be emphasised that this is not to say that the question of deliberate concealment can either be reduced to, or is dependent upon, a breach of duty.

101. It is also important to appreciate that the duty of disclosure which the Court of Appeal considered to be inherent in section 32(1)(b) is distinct from the duty which in most cases underlies the claimant's right of action. In most cases, the right of action will be based on the alleged breach of an obligation owed by the defendant to the claimant. (There are, of course, exceptions, of which the present case is an example: the claimant's right of action under section 140A of the 1974 Act arises as a result of conduct by the defendant which does not amount to a breach of an obligation owed to the claimant.) The result of the approach to concealment adopted in *Williams, The Kriti Palm* and the present case is therefore that, in order to for section 32(1)(b) to apply, the defendant must not only have allegedly acted in breach of the duty giving rise to the claimant's right of action, but must in addition have acted in breach of a duty to disclose to the claimant all relevant facts relating to the first breach. (Even in exceptional cases such as the present, he must have acted in such a way as to give rise to the claimant's right of action, and must in addition have acted in breach of a duty to disclose to the claimant all relevant facts relating to his former conduct.)

102. However, most defendants who have acted (or allegedly acted) in breach of a duty owed to a claimant, giving rise to a right of action, are not under any legal obligation to disclose their wrongdoing to the claimant. The wrong committed by the mining company in the *Bulli Coal Mining* case, for example, was its trespass, not its failure to inform the landowner of what it had done. In the present case, section 140A of the 1974 Act imposed no duty of disclosure upon the defendant. A further problem with this approach, in addition to its embellishment of the statutory language and its departure from the ordinary meaning of "concealment", is therefore that its effect is to cut down considerably the apparent scope of section 32(1)(b): a scope which is already closely confined by the requirement that the concealment must be deliberate.

103. Rose LJ sought to avoid that problem by holding that something less than a legal duty would suffice, on the view that the judgment of Buxton LJ in *The Kriti Palm* created a precedent for that approach. I do not interpret Buxton LJ's judgment in the same way, but I accept that it is not entirely clear what Buxton LJ meant. The real problem, however, is not the interpretation of *The Kriti Palm,* but that Rose LJ's solution raises serious problems of justiciability and legal certainty. The courts are courts of law, not of moral or social norms. They do not have the function of determining what obligations arise from "a combination of utility and morality". They can determine whether one person was under a legal obligation to disclose information to another; but the question whether a person was under a moral or social obligation to do so does not raise a justiciable issue. No defined or agreed standards of utility or morality exist which would enable judges to establish such obligations objectively or

predictably. Nor would a court be assisted by a test of whether "there was enough of an obligation to disclose … to mean that a failure to disclose amounted to a concealment for the purposes of section 32(1)(b)". What does "enough of an obligation" mean? How much of an obligation is enough?

104. For all these reasons I reject the argument that section 32(1)(b) should be read as containing a requirement that the concealment must be in breach of either a legal duty, or a duty arising from a combination of utility and morality. I conclude that the reasoning of the Court of Appeal in *Williams* and *The Kriti Palm* should be disapproved.

105. The further embellishment suggested by Mance LJ in *Williams* and adopted in *The Kriti Palm* and the present case - that not only must the fact have been relevant to the claimant's right of action (or to a potential right of action), but it must also be established that the defendant knew that it was relevant to the right of action (or to a potential right of action), or was reckless as to that possibility - involves reading in further additions, for which the legislation provides no warrant. In agreement with Park J in *Williams,* and Males LJ in the present case (para 176), it seems to me that it is sufficient, and accords with the purpose of section 32, that the defendant deliberately ensures that the claimant does not know about the facts in question and therefore cannot bring proceedings within the ordinary time limit.

(ii) "Deliberately"

106. There remains the embellishment of the word "deliberately". Before the Court of Appeal, it was accepted that the claimant could not show that the defendant knew (either actually or constructively, on the basis of wilful blindness) that it was under a duty to disclose to her the fact and amount of the commission. However, the Court of Appeal considered that it would be sufficient, in order for her to establish that the commission had been "deliberately concealed", for her to show that the defendant was reckless as to its breach of a duty of disclosure in the *R v G* sense or in a purely subjective sense, as explained earlier. In other words, the claimant would succeed if she showed that the defendant realised that there was a risk that it was under a duty to disclose the information about the commission, and took that risk in circumstances where it was unreasonable for it to do so.

107. This reasoning proceeds on the premise that "conceals" involves the breach of a duty of disclosure: "deliberately conceals" has been interpreted in the present case as meaning that not only must the defendant have been under a duty to disclose the relevant fact, but he must also have been aware of that duty, and intentionally or

recklessly have failed to comply with it. That reading must be rejected along with the premise on which it is based.

108. For the reasons developed below in the discussion of the word "deliberate" in section 32(2), I would in addition reject the contention that "deliberately", in this context, can mean "recklessly". As Lord Scott explained in *Cave* at para 60, deliberate concealment for section 32(1)(b) purposes may be brought about by an act or an omission, but in either case "the result of the act or omission, ie the concealment [sc from the claimant], must be an intended result". Accordingly, as Park J stated in *Williams* at para 14, the defendant must have considered whether to inform the claimant of the relevant fact and decided not to. So construed, section 32(1)(b) strikes a balance between the interests of the claimant and the defendant, as Parliament intended. If the defendant has concealed a fact from the claimant, and has done so deliberately, that is to say knowingly, then he has the means to start the limitation period running by disclosing the fact. If he does not do so, but chooses to keep the claimant in ignorance of a fact which she requires to know in order to plead her claim, then it is just that the defendant should be deprived of a limitation defence. As Lord Millett observed in *Cave,* para 8, if the defendant is not sued earlier, he has only himself to blame.

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

109. The elaborate and confusing analyses of section 32(1)(b) put forward in *Williams, The Kriti Palm* and the present case represent a wrong turning in the law. It should return to the clarity and simplicity of Lord Scott's authoritative explanation in *Cave* (para 60):

> "A claimant who proposes to invoke section 32(1)(b) in order to defeat a Limitation Act defence must prove the facts necessary to bring the case within the paragraph. He can do so if he can show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by a withholding of relevant information, but, in either case, with the intention of concealing the fact or facts in question."

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

(2) Section 32(2)

110. The appeal in respect of section 32(2) raises a single issue: the meaning of the word "deliberate" as it is used in that provision. It may be helpful to begin by setting out section 32(2) once more:

> "(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."

111. The issue raised by the decision of the Court of Appeal is whether "deliberate" includes "reckless", in the sense in which that term was defined in *R v G* (or in the modified version of the *R v G* definition explained in para 20 above), ie the taking of a risk of which the person is aware in circumstances where it is objectively unreasonable to do so. In deciding that it did, Rose LJ began by considering whether "deliberate" had a natural meaning which did not include recklessness, and concluded that it did not. She then considered authorities interpreting "deliberately" and "deliberate" in the context of section 32, and concluded that they were inconclusive as to whether recklessness would suffice. In those circumstances, she considered that it was both permissible and necessary to consider the pre-1980 Act case law and the Parliamentary materials relating to the enactment of the Limitation Amendment Act 1980. She concluded that the pre-1980 case law on section 26(b) of the 1939 Act established that recklessness was sufficient to establish the requisite mental element to constitute "fraud" under that section. The Parliamentary materials showed, in her view, that the test under section 32 of the 1980 Act was not intended to be more difficult for a claimant to overcome. She also considered that the practicalities of the matter supported the extension of "deliberateness" to include recklessness. Interpreting "deliberate" as including "reckless" therefore best met the Parliamentary objective. I shall consider the elements in this analysis in turn.

(i) The ordinary meaning of "deliberate"

112. As a matter of the ordinary use of language, the adjectives "deliberate" and "reckless" have different meanings. As one would expect, their ordinary meanings are reflected in dictionary definitions. For example, the Concise Oxford Dictionary defines "deliberate" as meaning "done consciously and intentionally", and "reckless" as meaning "without thought or care for the consequences of an action". Those definitions capture the distinction between the two words in ordinary speech.

(a) Illustrations from judicial decisions

113. In legal contexts, recklessness has been described as "a somewhat tricky concept" (*O (A Child) v Rhodes* [2015] UKSC 32; [2016] AC 219, para 113). It is "capable of different shades of meaning", and "presents problems of definition" (ibid, paras 84 and 87). That observation is borne out by the discussion earlier of the treatment of "recklessness" in *Beaman v ARTS Ltd, King v Victor Parsons & Co* and *Williams.* However, as far as counsel's research has disclosed, it has never been treated as a synonym of "deliberate". In legal contexts, as in ordinary usage, deliberation and recklessness are different concepts.

114. The point is illustrated by the case of *Grant v International Insurance Co of Hanover Ltd* [2021] UKSC 12; [2021] 1 WLR 2465, where this court had to decide whether an insurance exclusion for "liability arising out of deliberate acts" by employees applied to reckless acts. The court held that it did not. Lord Hamblen, giving a judgment with which the other members of the court agreed, stated at para 52:

> "First, the starting point is the natural meaning of 'deliberate' acts. This connotes consciously performing an act intending its consequences. It involves a different state of mind to recklessness."

115. Although *Grant* was decided after the Court of Appeal gave judgment in the present case, other cases were cited to it in which it was similarly held that a contractual term using the word "deliberate" could not be construed as including recklessness. Rose LJ expressed doubt as to the legitimacy of relying on authorities dealing with the wording of contracts when considering the construction of a statutory provision (para 93). I do not share that doubt. The primary rule of the construction of contracts, as of statutes, is that words are given their ordinary meaning. Of course, the construction of a word may be coloured by the context in which it appears and by a variety of other circumstances. If that is the position, then the meaning given to the word in that context will not be of assistance in a different context. But if that is not the position, then the decision of the court may be of assistance, essentially as material supporting the judge's understanding of the ordinary meaning of an English word.

116. In addition to *Grant,* it is worth mentioning some of the contractual cases cited to the Court of Appeal, which concerned the meaning of the word "deliberate" in the context of a breach of duty or a failure to disclose. In *De Beers UK Ltd v Atos Origin IT Services UK Ltd* [2010] EWHC 3276 (TCC); [2011] BLR 274, Edwards-Stuart J considered a contractual clause which referred to a party's "wilful misconduct or deliberate default". He stated at para 206:

> "Wilful misconduct refers to conduct by a person who knows that he is committing, and intends to commit a breach of duty, or is reckless in the sense of not caring whether or not he commits a breach of duty (see Romer J *Re City Equitable Fire Insurance Company Ltd* [1925] Ch 407). Deliberate default means, in my view, a default that is deliberate, in the sense that the person committing the relevant act knew that it was a default (ie in this case a breach of contract). I consider that it does not extend to recklessness and is therefore narrower than wilful misconduct (although the latter will embrace deliberate default)."

117. Rose LJ did not find that case helpful, because of her doubt as to the legitimacy of relying on contract cases, and also because she considered that the judge's interpretation of "deliberate" was coloured by the wording of the contractual clause as a whole and his conclusion that recklessness was already covered by the concept of "wilful misconduct" (para 93). I respectfully disagree. The judge's analysis illustrates the difference between "deliberate" and "reckless" in ordinary usage. It is also relevant to note the decision which he cited. In *In re City Equitable Fire Insurance Co Ltd* [1925] Ch 407, 434, Romer J held that the adjective "wilful", in a provision imposing liability on directors for "wilful neglect or default", covered situations where the person "knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty". Those two distinct situations correspond to the distinction between the deliberate commission of a breach of duty and a breach which is reckless.

118. Rose LJ also considered the case of *Mutual Energy Ltd v Starr Underwriting Agents Ltd* [2016] EWHC 590 (TCC); [2016] Lloyd's Rep IR 550; [2016] 1 CLC 832, where the issue was whether insurers were entitled to avoid a policy for "deliberate non-disclosure" by the insured. Coulson J began his discussion with the dictionary definition of "deliberate", and added at para 27 that there was "plenty of authority to the effect that the use of the word 'deliberate', in the context of a 'breach' or 'default', means an intentional act; in other words, a breach or default which the relevant party knew at the time that it committed the relevant act was a breach or default". Rose LJ did not find the case helpful, because the cases which the judge referred to on the meaning of "deliberate" were cases involving contractual terms, and because the judge rejected reliance on the case of *Williams* (para 95). I have already addressed the first of those concerns. As I have explained, it is no answer to say that the cases involve the construction of particular contracts, unless the meaning given to the term turned upon the specific context. The cases are of assistance because they are examples illustrating that, as a matter of ordinary language, "deliberate" means something different from "reckless". In relation to the second point, the case of *Williams* is discussed below.

119. Looking beyond contractual cases, the same approach to the meaning of "reckless" was adopted in *O v Rhodes,* where this court held that the tort of intentionally causing physical or psychological harm does not extend to recklessness. As Lord Neuberger stated at para 113, "[i]ntentionality … excludes not merely negligently harmful statements, but also recklessly harmful statements".

(b) Illustrations from legislation

120. The same approach can be seen in legislation, where "reckless" is often employed in conjunction with "deliberate", or other words signifying knowledge or intentionality, in order to widen the ambit of the provision. For example, section 15 of the Theft Act 1968 provides that for the offence of obtaining property by deception, "deception" means "any deception (whether deliberate or reckless) by words or conduct as to fact or as to law". Rose LJ did not find this example of assistance, observing at para 92 that "in a criminal provision such as the definition of obtaining property by deception, particularly where dishonesty is a necessary, separate element, the drafter would want to spell out how the element of deception is to be applied". It is not clear to me why that aspect of the legislation detracts from the fact that "deliberate" and "reckless" were clearly regarded by the drafter as distinct alternatives.

121. Another example is the Consumer Insurance (Disclosure and Representations) Act 2012, section 5(1) of which defines qualifying misrepresentations as being either "(a) deliberate or reckless or (b) careless". Section 5(2) provides that a qualifying misrepresentation is deliberate or reckless if the consumer knew that it was untrue or misleading or did not care whether or not it was untrue or misleading and knew that the matter to which the misrepresentation related was relevant to the insurer, or did not care whether or not it was relevant to the insurer. Rose LJ did not find that example of much assistance either, observing at para 92 that the content of the mental element was spelled out in great detail and that the section had a lot to say about what was or was not a misrepresentation. That does not seem to me to detract from the fact that the drafter treated "deliberate" and "reckless" as distinct, and defined the former in terms of knowledge of specified circumstances and the latter in terms of not caring about them: the same distinction between the terms as is drawn in ordinary usage.

122. In the light of all these considerations, it is clear that the adjective "deliberate" has an ordinary meaning, which is different from the meaning of "reckless". I respectfully disagree with Rose LJ's contrary view (para 94).

(ii) Authorities interpreting "deliberate" in section 32(2)

(a) Cave v Robinson Jarvis & Rolf

123. The meaning of "deliberate" in the context of section 32 of the 1980 Act was considered by the House of Lords in *Cave,* as explained at paras 68 and 71-72 above. Rose LJ rejected the relevance of *Cave* to the question whether "deliberately" or "deliberate" in section 32 included recklessness in a single sentence: "I do not agree that *Cave* decides that recklessness is not sufficient for deliberate concealment; it was addressing a different question" (para 105). It is true that the question whether recklessness was sufficient for deliberate concealment, or for a deliberate breach of duty, was not expressly addressed. Nevertheless, Lord Millett and Lord Scott clearly considered that actual knowledge or intention is required.

124. Although there are differences between what was said by Lord Millett and Lord Scott in relation to concealment, they were clear that "deliberate" concealment or breach of duty required the defendant to act intentionally or knowingly. In relation to section 32(1)(b), this was made particularly clear by Lord Scott at paras 59 ("the concealment must be an intended concealment") and 60 ("some fact relevant to his right of action has been concealed … with the intention of concealing the fact or facts in question"). In relation to section 32(2), Lord Millett and Lord Scott were in agreement that there must be an intentional breach of duty, ie a breach of duty committed in the knowledge that the relevant act or omission is in breach of duty. As Lord Millett put it at para 24, it is necessary that "the defendant is aware of his own deliberate wrongdoing". As Lord Scott put it at para 60, it must be shown that "the defendant knew he was committing a breach of duty, or intended to commit the breach of duty", adding that he could discern no difference between the two formulations.

125. The speeches in *Cave* are inconsistent with the proposition that section 32(2) applies where a defendant is aware only of a risk that what he is doing may be a breach of duty. The inescapable implication is that recklessness is insufficient.

(b) Williams v Fanshaw Porter & Hazelhurst

126. In the present proceedings, Rose LJ considered that *Williams* provided strong support for the view that recklessness was sufficient to constitute "deliberate" breach of duty or "deliberate" concealment.

127. As was explained at para 76 above, Park J and Mance LJ made observations about section 32(2) which were entirely consistent with *Cave,* and wholly inconsistent with the proposition that a reckless breach of duty is sufficient. Rose LJ did not refer to them, focusing instead on Mance LJ's obiter dicta concerning section 32(1)(b).

128. As was explained at para 81 above, Mance LJ's discussion of this issue proceeded from the premise that concealment of a relevant fact required the breach of a duty to disclose it, and raised the question whether it was also necessary to show that the defendant was aware of that duty and knowingly breached it. It was in that context that Mance LJ made observations to the effect that recklessness "amounts in law to the same" as knowledge: paras 82 and 83 above. He added at para 38 of his judgment, in relation to the question whether a defendant needed to know that a fact was relevant to a potential claim against him or her, that "the relevance of recklessness – and the irrelevance of motives - in the present discussion follow as a matter of general principle, although both are reinforced by vigorous remarks by Lord Greene MR in the case of *Beaman v ARTS Ltd".* Having gone through the facts and the misconceived optimism with which the judge had credited the solicitor, Mance LJ concluded at para 46 that "he must have been shutting his eyes to the dismissal order (which he had suppressed from counsel and his client) as well as to counsel's advice and to realities, and to have been at least reckless".

129. The first thing to be said about this discussion is that I have rejected the premises on which it was based, ie the propositions that concealment involves the breach of a duty of disclosure, and that deliberateness involves knowledge that the fact concealed is relevant to a potential right of action. The second point to be made is that it is by no means clear that, when Mance LJ referred to recklessness, he was using that term in the sense in which it is being used in the present case, ie the sense defined in *R v G* (or in the modified version of the *R v G* definition explained in para 20 above). To say that recklessness in that sense amounts in law to the same thing as knowledge would be incorrect. Mance LJ may have had in mind wilful blindness, which commonly results in the attribution of constructive knowledge, as Lord Denning noted in the passage cited earlier from *King v Victor Parsons & Co:* see para 48 above. The reference to Lord Greene MR's judgment in *Beaman v ARTS Ltd* supports the view that "recklessness" was not being used in the *R v G* sense in which it has been used in the present case: see paras 43-45 above. Mance LJ's description of the "reckless" solicitor as "shutting his eyes" is also consistent with wilful blindness. In any event, this part of Mance LJ's judgment was obiter dictum. The other judgments in *Williams* make no mention of recklessness.

(c) More recent English authorities

130. More recent English authorities on section 32(2) have also followed the approach adopted in *Cave.* One example is *Giles v Rhind (No 2)*, cited at para 14 above, where Arden LJ, in a judgment with which Sedley and Buxton LJJ agreed, stated at para 9 that "[f]or there to be a deliberate breach of duty for the purpose of section 32, the defendant must have known of his wrongdoing: *Cave v Robinson Jarvis & Rolf*". Another is *Grace v Black Horse Ltd* [2014] EWCA Civ 1413; [2015] Bus LR 1; [2015] 3 All ER

223, where Briggs LJ, in a judgment with which Lord Dyson MR and Beatson LJ agreed, stated at para 20 that "[d]eliberate commission of a breach of duty … requires that [the defendant] be shown to have been aware at the time that what he was doing was a breach of duty". Another is *Kotonou v Reeves* [2015] EWHC 4301 (Ch), where similar observations were made. Rose LJ commented at para 91 in relation to these latter two cases that there was no issue as to recklessness before the court, which is true. Nevertheless, they demonstrate that section 32(2) was understood as requiring that the defendant must have known that what he was doing was a breach of duty, with the implication that recklessness would not suffice.

(d) Primeo Fund v Bank of Bermuda (Cayman) Ltd

131. The question whether recklessness will suffice to render a breach of duty "deliberate" within the meaning of section 32(2) arose directly in the case of *Primeo Fund v Bank of Bermuda (Cayman) Ltd* ("*Primeo*") [2019] CICA JO613-1. The case concerned the application of section 37(2) of the Cayman Islands Limitation Act, which is in the same terms as section 32(2) of the 1980 Act. In its judgment, the Court of Appeal of the Cayman Islands (Sir Richard Field, Sir Michael Birt and Sir Jack Beatson JJA) held that recklessness did not suffice. It considered that the point was decided by *Cave* (para 464). The court added that Mance LJ's statement in *Williams,* para 31, cited at para 76 above, "could not be clearer".

132. Rose LJ commented in the present case (at para 105) that it would not be right to place too much weight on the analysis of the court in *Primeo.* She did not agree that *Cave* decided that recklessness was insufficient: it was, she said, addressing a different question. The court had not cited the passages in *Williams* in which Mance LJ had referred to recklessness as being sufficient (in the context of deliberate concealment, as explained above).

133. On these matters, I respectfully agree with the judgment of the Court of Appeal of the Cayman Islands. *Cave* decided that a deliberate breach of duty required knowledge that what was done was in breach of duty. The logical consequence is that recklessness does not suffice. In so far as Mance LJ touched on the construction of section 32(2) in *Williams*, his judgment is to the same effect. I conclude that the case law supports the natural construction of section 32(2), according to which recklessness will not suffice.

(iii) Should section 32 be construed as a restatement of the previous law?

134. Having rejected the argument that "deliberate" in section 32(2) should not be construed as including "reckless" on the basis of the ordinary meaning of those words and the relevant case law from *Cave* onwards, Rose LJ turned to examine the old law of concealed fraud. She concluded that, under the old law, a reckless breach of duty was sufficient to prevent the limitation period from running.

135. Rose LJ found a justification for this approach in the Parliamentary materials relating to the Limitation Amendment Act 1980, placing particular weight on a statement made by the Lord Chancellor in relation to an early version of the amended section 26 of the 1939 Act, as proposed in clause 7 of the Bill. The clause not only required, in relation to what later became section 32(1)(b) of the 1980 Act, that any fact relevant to the plaintiff's right of action "has been deliberately concealed from him by the defendant", but also, in the proposed section 26(2)(b), imposed an additional requirement that "it would be unjust in view of the defendant's conduct" to allow him to rely on the expiry of the limitation period. In response to an amendment to delete the proposed section 26(2)(b), on the ground that the "unjust to rely" requirement made the test more difficult for a claimant to satisfy than the existing section 26(b), the Lord Chancellor said that the purpose of "the new clause" – seemingly, the proposed section 26(2)(b) - was to restate the law "more or less" as it was, and that it reflected the existing requirement for unconscionability (Hansard (HL Debates) 16 July 1979, cols 1169-1170). The Bill was subsequently amended, on the Government's motion, so as to delete the proposed subsection.

136. Rose LJ also relied on another statement made by the Lord Chancellor during the same debate, in response to concerns raised in relation to the proposed section 26(3), which later became section 32(2) of the 1980 Act. Referring to the fact that "the definition of a 'deliberate concealment' is extended to include the deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time", the Lord Chancellor stated (cols 1170-1171):

> "That is required since it is not intended that the new section should be in any way more restrictive than the present law. There was a case of the Court of Appeal - and again for the sake of those who like references and may want to refer to it again it is *Beaman v ARTS Ltd* and was reported in 1949 King's Bench, 550. The Court of Appeal held that the plaintiff's right of action was concealed by fraud simply because of the surreptitious way in which the defendants had committed their breach of duty. On such facts, subsection (3) as at present drafted could make a difference. So, for example, a builder might take no steps deliberately to conceal his breach of duty but he might know perfectly well that it would

> not be discovered for some time. Then subsection (3) would bring his conduct within the ambit of the clause and the plaintiff would be entitled to the extension of time that it confers."

137. Rose LJ construed the Lord Chancellor's statement that the new section was not intended to be more restrictive than the existing law as implying that a reckless breach of duty was intended to suffice under the new section (on the basis that, in her view, recklessness sufficed under the old law of concealed fraud). But the Lord Chancellor said nothing about recklessness. He was explaining that under the new section, as under the existing law, the surreptitious commission of a breach of duty would postpone the commencement of the limitation period.

138. There is a further reason why it is impermissible to rely on the Parliamentary materials in the present context. It was laid down in *Pepper v Hart* [1993] AC 593, 634 that three conditions must be satisfied before it is permissible to refer to such material. The first is that there is an issue as to "the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity". That condition is not met in relation to the interpretation of section 32(2). The meaning of "deliberate", in the phrase "deliberate commission of a breach of duty", is neither ambiguous nor obscure. Nor does its literal meaning lead to an absurdity.

139. Furthermore, the particular statements on which Rose LJ relied do not satisfy the third condition laid down in *Pepper v Hart*: that the material "clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words." The words used by the Lord Chancellor in the first passage relied on ("to restate the law more or less as it is") concerned a particular clause which did not find its way into the legislation as enacted. They were not directed to what became section 32(1)(b) or section 32(2). The second passage relied on ("That is required since it is not intended that the new section should be in any way more restrictive than the present law") concerned the extension of the concept of concealment by section 32(2). The Lord Chancellor's words did not address the meaning of "deliberate". They did not disclose, clearly or otherwise, the legislative intention lying behind that word.

140. Quite apart from the problem of relying on the Parliamentary materials as a justification for using the old law of concealed fraud as a guide to the meaning of "deliberate" in section 32(2), Rose LJ's reliance on the old law faces the further difficulty that it was made clear by the House of Lords in *Sheldon* and *Cave* that it is impermissible to rely on the 1939 Act and the cases applying it where the meaning of the current legislation is clear. The word "deliberate" has a clear meaning in the context of section 32(2), as was decided in *Cave.*

141. In the present case, the Court of Appeal was referred to the relevant passages in *Sheldon* and *Cave.* However*,* Rose LJ treated three other cases as establishing the propriety of using the previous law as a guide to interpretation. The first was the decision of the House of Lords in *Lowsley v Forbes (trading as LE Design Services)* [1999] 1 AC 329, where the material issue concerned the meaning of the words "action … upon any judgment" in section 24(1) of the 1980 Act. The phrase was a re-enactment of words appearing in section 2(4) of the 1939 Act. The previous law was referred to on the basis that there was an ambiguity (p 335). That is a recognised exception to the general rule, as was noted in *Sheldon* and *Cave*.

142. In the second case, *Giles v Rhind (No 2)*, the issue concerned the meaning of the words "breach of duty" in section 32(2). There was a serious question of interpretation, which justified Arden LJ's reference to the report of the Law Reform Committee which preceded the enactment of the 1980 Act in order to identify the mischief which the legislation sought to address (although it has to be borne in mind that the 1980 Act differed in material respects, including the terms of section 32(2), from the proposals set out in the report, as explained above). She was also "prepared to assume for present purposes" that the Lord Chancellor's statement to Parliament during the passage of the Bill, to the effect that the new section was not intended to be more restrictive than the existing law, was an admissible aid to interpretation, but found that it did not take the matter any further (para 48). That qualified assumption, in circumstances where it made no difference, is of no real significance.

143. The third case was the decision of this court in *Test Claimants in the FII Group Litigation v Revenue and Customs Comrs* [2020] UKSC 47; [2022] AC 1 ("*FII Test Claimants*"). It concerned the interpretation of section 32(1)(c), which – unlike section 32(1)(b) and section 32(2) – was a precise re-enactment of a provision of the 1939 Act (section 26(c)). The court considered that its interpretation raised questions of substantial difficulty, and that it was therefore permissible to consider the previous law (para 102).

144. The position in each of those cases was therefore readily distinguishable from the position in the present case. In none of those cases did the court draw upon the previous law, or Parliamentary materials, in order to elucidate the mental element required for deliberate concealment or a deliberate breach of duty.

(iv) Practical considerations

145. Rose LJ accepted counsel for the claimant's submission that the extension of the mental element of "deliberateness" to include recklessness was supported by the practicalities of the matter (para 136). She reasoned that in many situations the existence

of legal wrongdoing could only be known with certainty by the defendant once a court had determined that a wrong had been committed. It was necessary to avoid a similar kind of logical paradox to that described by this court in *FII Test Claimants* at para 173 onwards, namely that one can only determine whether the test for allowing the claim to go forward has been satisfied once the claim has gone forward and been determined in the claimant's favour. It should be sufficient that the defendant appreciated that there was a real risk that its conduct would amount to a legal wrong in circumstances where it was not reasonable for it to take that risk.

146. It is relevant in this context also to consider the reasoning which the claimant advances in support of her additional grounds for supporting the Court of Appeal's decision. She argues that it may be impossible to know whether conduct is in breach of duty until a court has adjudicated upon the issue. It must be enough, to constitute "deliberate commission of a breach of duty", that the defendant engaged in conduct which it knew would leave it exposed to a claim against it. That is said to be the position in the present case, since the Court of Appeal found that the defendant realised that there was a risk that its conduct rendered its relationship with the claimant unfair within the meaning of section 140A of the 1974 Act.

147. This is effectively the same argument as the one accepted by Rose LJ. There is no difference in substance between the defendant's knowing that there is a real risk that conduct will amount to a legal wrong and its knowing that conduct will expose it to a claim. The word "risk" has disappeared, but it is subsumed in the concept of exposure to a claim, ie being at risk of a claim in respect of an arguable legal wrong. That is reflected in the claimant's reliance in the present case on the defendant's awareness that there was a risk that its conduct rendered its relationship with the claimant unfair, in order to demonstrate that the defendant knew that its conduct would expose it to a claim.

148. I am not persuaded by the argument. In the first place, the dicta in *FII Test Claimants* are not in point. They concerned the conclusion of the House of Lords in an earlier case that a mistake of law was not discoverable, for the purposes of section 32(1)(c) of the 1980 Act, until the law had been authoritatively determined by a final court. On that basis, where a novel claim was based on a mistake of law it followed that the limitation period for the bringing of the claim could not begin to run until the claim was finally decided, with the consequence that the claim could never be time-barred. The court concluded that such an approach was illogical and frustrated the purpose of the legislation.

149. There is no true analogy between that problem and the present case. There is no question of section 32(2) having the effect that a claim to which it applies can never be time-barred. The most that can be said is that there are liable to be cases where the

application of section 32(2) cannot be determined as a preliminary issue. (That said, *Cave* was decided on a preliminary issue; *Giles v Rhind (No 2)* was decided on an application for permission to amend; and *Kotonou v Reeves* was decided on a preliminary issue.) That is not a logical paradox. Nor does it appear to have caused practical problems: in *Grace v Black Horse Ltd* and *Primeo* (and in the pre-1980 cases concerned with deliberate breaches of duty committed in circumstances in which they were unlikely to be discovered for some time, such as *Bulli Coal Mining Co v Osborne, Beaman v ARTS Ltd* and *Applegate v Moss*) the issue of limitation was determined after trial, without any practical problem being remarked upon.

150. The difference between the present case and *FII Test Claimants* reflects the fact that, whereas section 32(1)(c), which was in issue in the latter case, is focused on the claimant's state of knowledge of an ingredient of its claim at a given point in time, section 32(2) is focused on the circumstances in which the breach of duty on which the claim is based is alleged to have been committed. The claimant's state of knowledge about the ingredients of its claim can usually be determined without considering the merits of the claim. Determining whether the alleged breach of duty was committed knowingly, and in circumstances in which it was unlikely to be discovered for some time, is more likely to require an investigation of the facts surrounding the alleged breach of duty.

151. In reality, the construction favoured by the claimant and accepted by the Court of Appeal would be more likely to result in practical problems. They can be illustrated by recalling the circumstances of *Cave.* As I have explained, the House of Lords decided that a negligent breach of duty, committed in circumstances in which it was unlikely to be discovered for some time, did not fall within the scope of section 32(2) of the 1980 Act and therefore did not postpone the running of the limitation period – notwithstanding that, as a consequence, the plaintiff might find that his action was time-barred before he had had a reasonable opportunity to bring it. Lord Millett explained at para 15 why that result was considered to be justified, notwithstanding its consequences for the plaintiff. Referring to an earlier case in which the Court of Appeal had reached the contrary conclusion, he said:

> "The effect of *Brocklesby v Armitage & Guest* [[2002] 1 WLR 598] is to deprive a professional man, charged with having given negligent advice and who denies that his advice was wrong let alone negligent, of any effective limitation defence. However stale the claim, he must defend the action on the merits, for he will not have the benefit of a limitation defence unless he can show that he was not negligent. This subverts the whole purpose of the Limitation Acts … In the absence of any intentional wrongdoing on his part, it is neither

> just nor consistent with the policy of the Limitation Acts to expose a professional man to a claim for negligence long after he has retired from practice and has ceased to be covered by indemnity insurance."

152. The same would be true if it sufficed, to deprive a defendant of a limitation defence, that it knew that it was exposed to a claim, as the claimant proposes. Professional people and others often know that they are exposed to claims, because their work necessarily involves the taking of risks. For example, surgeons operating on their patients are aware of the risk that the surgery may have an adverse outcome. Lawyers advising on difficult points of law are aware of the risk that their advice may prove to be mistaken. They, like the surgeons, know only too well that they are exposed to claims. That is the reason why surgeons, lawyers and other professionals take out professional indemnity insurance. However, if the test proposed by the claimant were to be applied, people such as these would have no protection against claims for the indefinite future. The implications for many professions and other kinds of business would be drastic, with indefinite exposure to stale claims long after indemnity insurance had expired. The 1980 Act would have failed to serve its purpose of protecting defendants from having to litigate stale claims. The addition of an element of objective unreasonableness, as proposed by the claimant in her fall-back position, and by the Court of Appeal in its proposal that the objective element of the *R v G* test should be adopted, mitigates this effect, but only to a degree.

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

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

8. The application of the law to the facts

154. Once one returns to the plain language of the provisions, their application to the facts is relatively straightforward. So far as section 32(1)(b) is concerned, the existence and amount of the commission were facts which were relevant to the claimant's right of action under section 140A of the 1974 Act, interpreting "relevant" in accordance with *Arcadia Group Brands Ltd v Visa Inc,* since she could not plead her claim without knowing those facts. The defendant deliberately concealed those facts from her, as the recorder held, by consciously deciding not to disclose the commission to her. Although

section 140A was not in force when that decision was initially taken, with the result that the facts concealed were not relevant to a right of action at that time, the defendant continued to withhold the information from her after section 140A was brought into force in respect of pre-existing agreements (see para 32 above), while the credit agreement remained in force and the commission continued to be paid. The claimant did not discover the concealment until November 2018, shortly before commencing these proceedings. It is not suggested that she could with reasonable diligence have discovered the concealment any earlier. The requirements of section 32(1)(b) are accordingly met.

155. So far as section 32(2) is concerned, it follows from *Cave,* as has been explained, that it must be shown that "the defendant knew he was committing a breach of duty, or intended to commit the breach of duty" (as Lord Scott said at para 60). It is conceded that that test cannot be met in the circumstances of the present case. The basis of the concession, as I understand it, is that although the defendant deliberately decided not to disclose the commission, and must have been aware that there was a risk that by doing so it was making its relationship with the claimant unfair within the meaning of section 140A of the 1974 Act, it has not been shown that it knew or intended that the non-disclosure would have that effect. Accordingly, although its failure to disclose the commission gave rise to the claimant's right of action, and can therefore be regarded as a breach of duty for the purposes of section 32(2), it cannot be shown that the defendant knew that it was committing a breach of duty or intended to do so.

9. Conclusion

156. Although I find myself in respectful disagreement with the reasoning of the Court of Appeal, I conclude that it was correct to hold that the defendant was deprived of a limitation defence by the operation of section 32(1)(b) of the 1980 Act, although it wrongly held that the defendant was also deprived of such a defence by the operation of section 32(2). It follows that the claim is not time-barred and that the defendant's appeal should be dismissed.