Section 32 of the Limitation Act and the FCA's proposed Motor Finance Consumer Redress Scheme

On 1 August 2025, the Supreme Court handed down judgment in *Hopcraft v Close Brothers Ltd* [2025] UKSC 33, determining three appeals that had been heard together. In each of the three cases: the claimant had entered into a financing agreement with the defendant to purchase a car; the entry into the agreement was facilitated by car dealer; and the claimant alleged that the lender (i.e. the defendant) and the dealer had failed properly to disclose their relationship, including the existence and size of commissions paid by the lender to the dealer.

The Supreme Court rejected the arguments that the commissions amounted to bribes or secret commissions. But it upheld the argument made by one of the appellants (Mr Johnson) that the failure of proper disclosure along with other matters caused the relationship between the claimant and the defendant to be unfair within the meaning of section 140A of the Consumer Credit Act 1974 (the "CCA"). All three appellants had relied on section 140A. But in the case of the other two appellants that argument was not live before the Supreme Court.

On 3 August 2025 the FCA announced its intention to consult on a compensation scheme for motor finance customers who had entered into arrangements similar to those of the appellants in *Hopcraft*. On 7 October 2025 it published CP 25/27 setting out its proposals and inviting responses (the "Consultation").

The scheme that has been proposed would cover regulated motor finance agreements taken out by consumers between 6 April 2007 and 1 November 2024. It would be delivered by lenders. In particular, they would be required to review their records to identify whether they entered into agreements potentially covered by the scheme; to assess whether they are liable to pay redress; and to calculate and then pay redress to consumers to whom they determine it to be merited.[1] A relationship between lender and borrower would be considered unfair where it involved inadequate disclosure of one or more of:

(1) A discretionary commission arrangement ("DCA"), whereby the broker could adjust the interest rate offered to a customer to obtain a higher commission;

[1] See the Consultation at §1.19.

(2) A high commission arrangement, where the commission was equal to or greater than 35% of the total cost of credit and 10% of the loan; and

(3) Tied arrangements that gave the lender exclusivity or a first right of refusal in relation to purchases from a particular dealer.[2]

It is proposed that for the purposes of the scheme, if one or more of the above factors was present the lender must presume that it was not adequately disclosed to the customer unless there is evidence of disclosure.[3]

This note focuses on just one aspect of the scheme, namely its approach to limitation.

Under English law, a claim based on section 140A of the CCA is time-barred under section 9 of the Limitation Act 1980 ("LA") if it is issued more than six years after the relationship between the borrower and the lender has come to an end.[4] It is proposed that a lender should assess whether a case is in time for the scheme at the point the lender determines whether it is a scheme case.[5] According to the proposal, that should occur within 3 or 6 months of the scheme starting (depending on whether the consumer has complained).[6] It is proposed that the policy statement and final rules will be published by early 2026, with the scheme to launch at the same time.[7] Therefore, a claim will be outside the primary limitation period under the LA if it relates to a relationship that ended before early- to mid-2020 (the precise date obviously will differ from case to case).

The FCA has said that where one of the above relevant facts was not adequately disclosed it is likely that there was "deliberate concealment" of a fact relevant to the right of action, and the borrower is therefore likely to be able to rely on LA section 32(1)(b); and that, on this basis, it does not expect lenders to be routinely finding that cases out of time for the scheme.[8] The Consultation includes legal analysis in favour of this approach. It states that the proposed

[2] Consultation §1.21.
[3] Consultation §§3.9, 3.12 and elsewhere.
[4] *Smith v Royal Bank of Scotland plc* [2023] UKSC 34; [2024] AC 955.
[5] Consultation §4.36.
[6] Consultation §5.1.
[7] Consultation §1.51.
[8] Consultation §§4.33-4.35.

approach is in accordance with "the relevant caselaw", citing in particular *Potter v Canada Square* [2023] UKSC [41]; [2024] AC 679 at §§108, 154.

However, such analysis is open to question.

The relevant provisions of section 32 of the LA are:

> "**32 Postponement of limitation period in case of fraud, concealment or mistake.**
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> (1) … where in the case of any action for which a period of limitation is prescribed by this Act …
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant;
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> …
>
> the period of limitation shall not begin to run until the plaintiff has discovered the … concealment … or could with reasonable diligence have discovered it.
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> References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.
>
> (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

Even if it is right that the failure adequately to disclose a fact amounts to the concealment of that fact in the relevant sense[9], time begins to run under LA section 32(1)(b) from the point at which a claimant "could with reasonable diligence" discover the concealment. According to the Consultation, 60% of the casefiles reviewed by the FCA included a statement that the customer had been informed that a commission "may" and/or "would" be received by the broker.[10] The first of these two formulations (i.e. "a commission may be payable") was found in the agreement between Mr Johnson and his lender.[11] It seems well arguable that having been

[9] This is what was decided in *Potter*. There may be scope for debate as to precisely how to apply such principle in individual cases.

[10] Consultation §3.8.

[11] See *Hopcraft* at [26], [41].

provided with the information that a commission "may" or "would" be paid, a customer exercising reasonable diligence would have gone on to ask for details of the commission.

In determining when a claimant could, with reasonable diligence, discover a claim the cases under LA section 32 frequently rely on the concept of a "trigger". They break down the requisite inquiry into two stages:

> "At the first stage, the claimant must be reasonably attentive so that he becomes aware (or is treated as becoming aware) of the things which a reasonably attentive person in his position would learn. At the second stage, he is taken to know those things which a reasonably diligent investigation would then reveal."[12]

In relation to cases such as those potentially falling within the proposed scheme, the FCA does not appear to have taken into consideration the possibility that the statement that a commission "may" or "would" be paid may constitute a trigger, which to a reasonably attentive person would lead to an investigation that may have identified the size and nature of the commission.

In this respect, the facts of Mr Johnson's case are materially different from those considered by the Supreme Court in *Potter v Canada Square*. In that case, the claimant (Ms Potter) had taken out a personal loan from the defendant and at the same time purchased a payment protection insurance ("PPI") policy. The PPI provider paid the lender a commission (amounting to 95% of the total amount paid by Ms Potter in premiums) which the lender did not disclose. These facts are different from many of the cases covered by the Consultation because in *Potter* the commission was not disclosed at all, whereas in many of the Consultation papers it would appear an actual or potential commission was disclosed, albeit inadequately. In *Potter* it was not suggested that the claimant could with reasonable diligence have discovered the existence of the commission any earlier than she did.[13] But arguably someone who received a notification in the same terms as Mr Johnson could have done.

The policies of the law which operate to protect those to whom representations are made, including (i) those which require clear communications of a commercial party's interest in a transaction and (ii) those which protect victims of fraud, by holding a defendant liable even if the victim acted foolishly or negligently, do not operate in the same way in relation to LA section 32.[14] LA Section 32 is subject also to a contrary policy, which seeks to ensure that

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[12] *OT Computers v Infineon* [2021] EWCA Civ 501; [2021] QB 1183 at [47].
[13] See the judgment at [154].
[14] *ERED v Treon* [2021] EWHC 2866 (Ch) at [775].

claims are brought timeously and that those who potentially have claims are diligent in pursuing them.

Moreover, it is well established that a claimant who wishes to rely on section 32 LA bears the burden of proving the facts necessary to enable that reliance.[15] It is arguable that the FCA ought to take this principle into account in determining how limitation should operate under the proposed scheme. By way of example, and developing the point above, it should take into account the fact that even if a customer did not receive adequate disclosure in relation to a commission, there may nonetheless have been sufficient disclosure to place an attentive person on notice that there was something to investigate. Similarly, while it accords with the policy of the CCA to assume, against a lender, that a relationship was unfair unless there is evidence that the relationship was fair;[16] it does not necessarily accord with the policy of the LA to make an equivalent assumption for limitation purposes.

This is, therefore, an aspect of the FCA's proposed scheme which requires further scrutiny and consideration. It is to be hoped that submissions will be made which properly examine this point.

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[15] See for example the recent statement to this effect by the Supreme Court in *Bilta (UK) Ltd v Tradition Financial Services Ltd* [2025] UKSC 18; [2025] 2 WLR 1015.

[16] Section 140A(9) CCA provides that "if … the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary."