

# **Dishonesty – fundamental and other forms**

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# The three developments:

## 1. Pt.44.16 – into force, 1 Apr 13:

The potential removal of C’s protection against adverse costs under the QuOCS regime “*if the claim is found ..... to be fundamentally dishonest*”.

## 2. S.57 CJCA 2015 – commencement, 13 Apr 15:

Reversing/revising Supreme Court decision in *Fairclough v Summers*, June 2012:

A claim can be dismissed in its entirety “*if the claimant [cf. “the claim” – reason?] has been fundamentally dishonest ...*”.

So we have the arrival of “*fundamental dishonesty*” into two areas concerning what the courts can do with dishonest claims **in the course of litigation**.

# The three developments:

## 3. Zurich v Hayward - 2<sup>nd</sup> CA judgment 31 Mar 2015

Tomlin order                      3 Oct 03

[2011] EWCA Civ 641 (CA; 1<sup>st</sup>)

HHJ Moloney Nov 12 & Sept 13

[2015] EWCA Civ 327 (CA; 2<sup>nd</sup>)

Add Noble v Owens [2010] 1WLR 224 (Court of Appeal)

We have the situation where the necessary evidence of C's dishonesty ("fundamental" or otherwise) is discovered **only post-trial or post-settlement**. What can the insurer do when it has paid out £3m.?

# Noble v Owens

Accident	2 Sept 03
1 <sup>st</sup> surveillance	Oct – Dec 07
1 <sup>st</sup> trial & judgment: Field J - £3.4m	11 Mar 08
<b>End of claim process</b>	
Mr N & partner buy house for £780,000	Sept 08
“Discussion” with neighbour	
Neighbour contacts insurer	31 Oct 08
2 <sup>nd</sup> surveillance	Nov-Dec 08; Mar 09
Freezing order: Field J	28 Apr 09
D’s appeal to CA – judgment	10 Mar 10
Hearing before Field J – 8 days + judgment	16 Mar 11

# Noble v Owens – What do we learn?

1. Where no concession or agreement has been made (i.e. after trial), D can return to court to pursue subsequently discovered fraud.

Should be done by fresh action – to set aside judgment on ground of fraud.

For the principles then to be applied, see:

- *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] EWCA Civ 328 CA (Aikens LJ at paragraph 106);
- *Takhar v Gracefield Developments Ltd* [2015] EWHC 1276 (Ch: Newey J)

# Noble v Owens – What do we learn?

2. Suggest same can still be done if fraud was alleged in course of action and dismissed in judgment. No new factor arises as a matter of principle.

But procedure must then surely be via late appeal to CA – and new evidence must then qualify for admission under Ladd v Marshall.

3. Beware that difficulties of proof remain! (Including burden of proof and Re H – see Field J at [24])

# Zurich v Hayward – 1<sup>st</sup> phase

Accident	1998
Enq agents engaged by Zurich	Oct 99
Claim issued:	
• P of Clm; £420,000 - Perm unfit for any work	11 Sep 01
• Defence (expressly including exaggeration)	30 Oct 01
• Order for permission to adduce video ev	20 Mar 02
Medics' joint statement <b>with</b> sight of video	Apr 02
Liability settled; 80 – 20 ⇒ clm = £336,000	Aug 02
Settlement at £135,000 (Tomlin order)	3 Oct 03

**End of 1<sup>st</sup> phase: claim process**

# Zurich v Hayward – 2<sup>nd</sup> phase

Neighbours contact employers Smiths <i>Preparation of further evidence?</i>	2005
Zurich issues fresh proceedings	12 Feb 09
Defence served: no dishonesty; issues compromised	?
Def (Hayward) applies to strike out Pt.3.4	4 Feb 10
<ul style="list-style-type: none"><li>• DDJ dismisses application;</li><li>• HHJ Yelton allows appeal and strikes out (July 10)</li></ul>	
Hayward appeals: 1 <sup>st</sup> CA judgment – remit to Cty Crt	25 May 11

**End of 2<sup>nd</sup> phase**



# Zurich v Hayward – 3<sup>rd</sup> phase

- Trial of issue of dishonesty HHJ Moloney: Yes ∴ set aside .. Nov 12
- Trial of quantum HHJ Moloney: correct damages = £14,720 6 Sept 13
- Hayward's appeal re ruling to set aside: CA's 2<sup>nd</sup> judgment 31 Mar 15
- No reliance by Zurich - ∴ settlement not to be set aside :
- Underhill LJ: “ ... parties who settle claims with their eyes wide open should not be entitled to revive them only because better evidence comes along later”. [25]
  - Briggs LJ: “... if [a party] already knows or perceives the truth by the time of the [settlement] contract, he elects to proceed by entering into it, and cannot later seek rescission merely because he later obtains better evidence of that which he already believed, still less if he merely repents of it.” [31]

# Zurich v Hayward – What do we learn?

**Everything failed because (a) fraud raised in original claim by Hayward; and (b) claim was then settled – and with it the allegation of fraud was compromised.**

Take away (a) (i.e. no fraud raised) – no problem.

Take away (b) (i.e. do not settle) – no problem.

## **BUT:**

- Can D desist from alleging fraud - solely on basis of hope for better evidence in future? (And anyway, is desisting good enough, if insurer has knowledge of relevant allegation?)
- Can D desist from settling and instead go all the way to trial, alleging fraud - solely on basis of hope for better evidence sometime in future?

# The result

## *Noble v Owens*

**Post-judgment:** Insurer held by the CA to be entitled to return to court, but was then unable to establish dishonesty.

## *Zurich v Hayward*

**Post-settlement:** Insurer established dishonesty, but was then held by the CA (in effect) not to be entitled to return to court.

**An alternative possibility:** statutory intervention to reverse effect of *Zurich* – via a new s.57A ??