IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA256/2019
CA308/2019
[2020] NZCA 354

BETWEEN	PETER JAMES TAYLOR Appellant
AND	ASTERON LIFE LIMITED Respondent

Hearing:	17 June 2020. Further submissions received 27 July 2020.
Court:	Goddard, Ellis and Katz JJ
Counsel:	A C Beck for Appellant C M Meechan QC and A Borchardt for Respondent
Judgment:	19 August 2020 at 10.00 am

JUDGMENT OF THE COURT

A **The application for leave to adduce further evidence on appeal is declined.**

B **The appeal is allowed in part. The judgment entered for Asteron Life Ltd on its counterclaim is modified as set out in paragraphs [187] and [188]. If the parties cannot reach agreement on the consequences of this modification for the interest component of the judgment, leave is reserved to either party to file a memorandum seeking determination by this Court of the necessary adjustments.**

C **The appeal is otherwise dismissed.**

D **The appellant must pay costs to the respondent for a standard appeal on a band A basis, with usual disbursements. We certify for two counsel.**

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REASONS OF THE COURT

(Given by Goddard J)

Introduction and summary

[1] The appellant, Mr Taylor, carried on business as an insurance broker. In 1994 he took out an income protection insurance policy (the Policy) in relation to his income from that business. The insurer was the respondent, Asteron Life Ltd (Asteron), which at the time was known as Sun Alliance Life Ltd (Sun Alliance). In July 2010 Mr Taylor made a claim under the Policy, on the basis that as a result of significant medical problems he was totally disabled. Cover was accepted by Asteron. Mr Taylor was paid benefits under the Policy until September 2014, when Asteron suspended payment.

[2] Mr Taylor brought proceedings seeking a declaration that he was entitled to continuing benefits under the Policy, and seeking to recover arrears of payments. Asteron denied that Mr Taylor was entitled to any further payments under the Policy. Asteron counterclaimed for repayment of all sums previously paid under the Policy on the basis that Mr Taylor owed Asteron a duty of utmost good faith in connection with making claims, and had breached that duty by making false statements about the extent to which he had worked throughout the relevant period. Mr Taylor filed a defence to the counterclaim and reply in which he denied Asteron's allegations, and pleaded various defences to the counterclaim including a change of position defence.

[3] In the High Court Mr Taylor's claim was unsuccessful. Asteron's counterclaim succeeded. Asteron was awarded the sum of $371,286.70 plus interest and costs.[1] In a subsequent decision Cooke J determined a number of issues relating to the award of interest, and the costs recoverable by Asteron.[2]

[4] Mr Taylor's appeal to this Court raises a number of issues about the conclusions reached by the Judge in the High Court judgment and in the Interest/costs judgment. Mr Taylor also argues that it was wrong for the Judge to make

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1 *Taylor v Asteron Life Ltd* [2019] NZHC 978 [High Court judgment].
2 *Taylor v Asteron Life Ltd* [2019] NZHC 1489 [Interest/costs judgment].

certain findings, in particular the finding that Mr Taylor had acted dishonestly, in circumstances where that allegation was not adequately pleaded and was not squarely put to Mr Taylor in cross-examination.

[5] We agree with the Judge that Mr Taylor's claim must fail. He has not established that he was Totally Disabled (as that term was defined in the Policy) between September 2014, when Asteron suspended payment, and April 2016, when Asteron cancelled the Policy. Nor does the evidence establish that Mr Taylor was entitled to any payment during that period even if he were Totally Disabled. Rather, we agree with the Judge that Mr Taylor's income from his insurance broking business was at a level that resulted in full abatement of any benefits he might otherwise have been entitled to under the Policy during that period.

[6] We also agree with the Judge that Asteron is entitled to succeed on its counterclaim. But for reasons we explain in more detail below, we consider that Asteron is only entitled to recover payments made in respect of periods about which Mr Taylor was found to have dishonestly provided false information. The Judge declined to find that the initial claim made in July 2010 involved false statements that breached Mr Taylor's obligations in relation to making claims. So Asteron's claim as pleaded, which was founded solely on the allegation of breach of utmost good faith, could not succeed in respect of the initial period from January 2010 to 22 July 2010.

[7] There may well have been another basis on which the payments made in respect of that period could have been recovered. But they were not pleaded by Asteron, and Asteron did not give notice that it intended to support the High Court judgment on grounds other than those accepted by the Judge. The judgment on Asteron's counterclaim must therefore be reduced by $51,835.64. This has flow-on consequences for the interest calculation.

[8] We also accept one of Mr Taylor's numerous challenges to the costs award in the High Court. The costs awarded to Asteron are reduced by $1,600.

[9] Mr Taylor's appeal is otherwise dismissed.

Background

[10] The Judge's findings in relation to the background to the Policy and to Mr Taylor's claim were not challenged on appeal. The summary set out below is based on his findings.

[11] Mr Taylor commenced work as an insurance broker after leaving school and following a short period of study at the University of Otago. He worked for insurance companies, including Asteron (then known as Sun Alliance, as noted above), opting not to accept a salary but to be effectively self-employed. He subsequently established his own broking business in Dunedin.

[12] In October 1992 Mr Taylor completed an application for income protection insurance with Asteron. In it he described himself as self-employed, and advised Asteron that his share of after tax earnings from his business was $75,500. He provided financial information to verify this level of income: extracts from financial statements for "Peter Taylor Insurance Broker" to 31 March 1992, prepared by his accountants. They showed he had made a net profit for that year of $65,647.91. The revenue of this business included both life insurance commissions and fire and general insurance commissions. The expenditure included wages and salaries for employees. By letter dated 5 July 1994 Sun Alliance confirmed placement of this insurance and provided Mr Taylor with the relevant policy documents.

[13] Mr Taylor continued trading as a self-employed insurance broker. In July 2010 he submitted a claim under the Policy. In the claim form he said that he suffered from medical conditions of the kind covered by the Policy. He indicated that he had stopped all work on 23 December 2009. The claim form included a section completed by Mr Taylor's general practitioner, Dr Marie Neylon. She supplied information in relation to Mr Taylor's medical conditions and the treatment he was receiving, and indicated that Mr Taylor was first advised to cease work as a result of those conditions

on 23 December 2009. Asteron accepted the claim and commenced payments, including a significant payment backdated to 21 January 2010 of $51,835.64.[3]

[14] Mr Taylor was required to provide progress reports to Asteron describing the current state of his medical condition, whether he had been able to work, what income he had earned from working, and certain other matters. He provided progress reports in August, September, October, November 2010; January, February, March, April, July and October 2011; January, April, July and October 2012; April and October 2013; and April 2014. Further reports were provided in October and November 2014 after Asteron stopped making payments under the Policy in September 2014.

[15] By letter dated 19 May 2014 Asteron asked Mr Taylor to supply certain financial information. That request was repeated by letter dated 23 June 2014, and again on 24 July 2014. By email dated 20 August 2014 Mr Taylor provided some financial information, including signed accounts for the year ended 31 March 2014 for a limited liability company called Peter J Taylor and Associates Ltd (the Company). They were not the accounts for Mr Taylor's insurance broking business. It appears that some of the commissions earned by the broking business were channelled through the Company. The Company accounts showed that it had made a loss.

[16] Asteron then asked about commissions disclosed in these accounts that had been paid into, and then out of, the Company totalling $551,491. By email dated 28 August 2014 Mr Taylor responded by asking Asteron to confirm why they needed any further information. By email dated 3 September 2014 Asteron explained that the insurance entitlement under the Policy was subject to a deduction for the income that the insured earned while working. Asteron advised that it was not able to make any further payments under the Policy until it could reconcile the claim, with a provisional calculation showing that Mr Taylor had been overpaid by $77,398.60.

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[3] The relevant starting date for payment of a benefit under the Policy was 21 January 2010, taking into account the 30 day "No Pay" period provided for in the Policy.

[17] By email dated 5 September 2014 Mr Taylor replied as follows:

> 3. I have not been nor have received any income from any source other than Asteron.
>
> …
>
> 5. Please note that it is manifestly obvious that given your present view and adopted position that until this can be satisfactorily addressed and resolved to reinstatement of benefits or we both are able to reach an agreement in terms of application of policy that no other details requested by you will be forwarded from me.
>
> It would seem illogical to forward other detail given your suspending policy entitlements until this particular matter can be resolved to satisfaction.
>
> 6. It is unequivocally the writers view that you have stepped outside of the bounds of the policy in force in reaching the decision conveyed, that you are manifestly incorrect in your assessment reached, that you are unnecessarily withholding benefit entitlements, that by your action and the decision conveyed to withhold legitimate benefit entitlements under the policy in force you are and have caused me (the insured) absolute and totally unnecessary additional angst, hurt feelings, anguish and embarrassment aside from creating a totally unnecessary financial hardship resulting directly from your decision conveyed to suspend benefit entitlements.

[18] Mr Taylor then commenced these proceedings in December 2015.

[19] Mr Taylor subsequently sold his broking business. It appears this sale was completed on 1 June 2018.

The Policy

[20] The Policy was described as an "Income Plan" policy. It commenced on 1 August 1994 and was expressed to continue until 28 February 2026. The original premium payable by Mr Taylor was $85.95 per month, which was subsequently inflation adjusted.

[21] There are two categories of cover under the Policy — a Total Disability Benefit, and a Partial Disability Benefit.

[22] The Total Disability Benefit is described in the following clause:

> 2.1 Total Disability Benefit
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> If as a result solely of any Injury or Sickness you become Totally Disabled then we will pay you:
>
> (a) during the Full Pay Period, a monthly Total Disability Benefit of your Monthly Insured Income and,
>
> (b) during the 75% Pay Period, a monthly Total Disability Benefit of 75% of your Monthly Insured Income, reduced in both cases by any other income you receive from any other source in relation to:
>
> (i) the Sickness or Injury that caused you to become Totally Disabled, and
>
> (ii) retirement or superannuation benefits, and
>
> (iii) your Monthly Earned Income.
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> In the event that a lump sum payment is received by you in lieu of any income due to you in respect of the Sickness or Injury that caused you to become Totally Disabled or from any superannuation or retirement fund, that lump sum will be deemed to be equal to a monthly income of 1% of the lump sum.

[23] This benefit is payable when, as a sole result of Injury or Sickness (both defined terms), the insured becomes Totally Disabled, which is defined in the following terms:

> "TOTALLY DISABLED" means that you are unable to work in your usual occupation for more than ten hours per week.

[24] The Policy defines Monthly Insured Income as one twelfth of the Annual Insured Income specified in the Schedule. Mr Taylor's initial Annual Insured Income was $75,500. This figure was subsequently inflation adjusted.

[25] The Full Pay Period is 60 days.[4] There is then a 75 per cent Pay Period that continues through to age 65. Thus a person who is Totally Disabled will receive their Monthly Insured Income for 60 days, followed by 75 per cent of that amount through to age 65. That amount is subject to abatement as a result of income earned while disabled.

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[4] Commencing after an initial "No Pay" period of 30 days.

[26] The Policy provides for the Total Disability Benefit that is payable to be reduced by income from certain sources, including "Monthly Earned Income" defined as follows:

> "MONTHLY EARNED INCOME" means your monthly pre-tax salary, commissions, bonuses and fringe benefits if an employee, or your monthly pre-tax earnings net of any business expenses necessarily incurred in deriving those earnings if a self-employed person.

Partial Disability Benefit

[27] The Partial Disability Benefit is payable where an insured ceases to be Totally Disabled, but becomes Partially Disabled.

[28] The term Partially Disabled is defined as follows:

> "PARTALLY DISABLED" means that you are working in any occupation but, directly because of Sickness or Injury, you are only able to work to a limited extent such that your Monthly Earned Income is 75% or less of your Monthly Insured Income.

[29] The key consequence of being Partially Disabled rather than Totally Disabled is that only two-thirds of the policyholder's Monthly Earned Income is deducted from the benefit payable.

High Court judgment

Mr Taylor's claim for continuing payments

[30] Mr Taylor did not call any medical evidence to establish his condition. However he gave evidence about the various medical conditions from which he has suffered. Asteron did not dispute that Mr Taylor suffered from sickness within the meaning of the Policy. For that reason, and despite a lack of clarity in Mr Taylor's evidence, the Judge accepted that at all relevant times Mr Taylor suffered from a sickness as defined in the Policy, potentially enabling him to qualify for a Total Disability Benefit or Partial Disability Benefit.[5]

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5 High Court judgment, above n 1, at [36].

[31] The Judge next considered whether Mr Taylor was Totally Disabled within the meaning of the Policy. He considered the evidence of Mr Taylor himself, and the evidence of three witnesses subpoenaed by Asteron who were employees of Mr Taylor at the relevant time. They gave evidence that Mr Taylor was actively involved in all aspects of his insurance broking business. Two of these former employees gave evidence that Mr Taylor worked approximately four hours per day. The other former employee did not provide a quantitative estimate, but said that Mr Taylor was working significantly more than three to five hours per week. The Judge considered that the evidence of these employees was confirmed by extensive documentary evidence, including emails and other written communications which showed that Mr Taylor was actively involved in his insurance business. The Judge accepted Asteron's submission that the evidence demonstrated that Mr Taylor retained responsibility for the most important clients, and clients that were more demanding. He also gave direction to other staff. The documentary evidence demonstrated that Mr Taylor was working extensively in the business, and that his evidence describing far more limited activities was not accurate. The Judge summarised his findings on this issue as follows:

> [46] I generally found Mr Taylor's evidence, and his answers in cross-examination, unreliable, and at times not credible. His explanations for the activities recorded in the documents varied — he argued that what he was doing was not work at all, that it was not the same work as he had previously undertaken, or that if he did work it was within the 10 hour limit. His answers were inconsistent with both the documentary records, and the evidence of the three subpoenaed witnesses. Ms Tricker's evidence must be particularly significant in this respect given Mr Taylor's assertion that she essentially took on the roles he could no longer perform. It is clear that apart from the period immediately surrounding his discectomy Mr Taylor was able to, and did in fact, work for more than 10 hours a week. It is possible that there were other short periods of total disability, but Mr Taylor has not provided sufficiently clear evidence for me to identify them, or to identify when they took place.
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> [47] For these reasons I find that Mr Taylor was not Totally Disabled within the meaning of the Policy.

[32] The Judge went on to consider whether Mr Taylor was entitled to a Partial Disability Benefit. The Judge noted that the threshold for qualifying for this benefit is that "directly because of Sickness" Mr Taylor was "only able to work to

a limited extent such that [his] Monthly Earned Income is 75 per cent or less" of his Monthly Insured Income.[6]

[33] In order to apply that test, the Judge had to determine a difference between the parties about the interpretation of the term "Monthly Earned Income". Mr Beck, counsel for Mr Taylor, argued that this related solely to income arising from Mr Taylor's own efforts. Asteron submitted that Monthly Earned Income included all earnings net of business expenses from Mr Taylor's insurance broking business.

[34] The Judge concluded that the language used in the definition of Monthly Earned Income referred to Mr Taylor's monthly pre-tax earnings from his business, whether or not the earnings were a consequence of his own efforts, or the efforts of his employees. He considered that approach was consistent with the commercial purpose of the contract, as what becomes insured is the level of net income earned from the business, and the impact of the disability of the insured person on that income.[7] That reading of the Policy was confirmed by the circumstances in which it was entered into. In order to establish his income for the purpose of obtaining the policy, Mr Taylor had advised Asteron that his income from his business was $75,500 per annum. The form noted that the income was verified by the balance sheet he provided. The financial statements for his insurance broking business to 31 March 1992 showed a profit for that year of $65,647.91, and a profit of $50,779.68 in the previous year. The financial statements recorded expenditure on wages. Thus, the Judge said, when the contract was entered into, both parties were aware that the relevant income being protected reflected the entire net profit made by the broking business known as "Peter Taylor Insurance Broker".[8] The Judge summarised the consequences of this finding as follows:

> [56] So there does not seem to me to be any reason to depart from the ordinary meaning of the terms used in the Policy — and particularly the definition of Monthly Earned Income — which fully corresponds to the intention of the parties viewed in its wider context. The full amount of the net profit from Mr Taylor's self-employed business gets deducted from the prescribed benefit irrespective of any arguments that it was not the product of his own endeavours, or solely his own endeavours. The adverse event that

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6 At [49].
7 At [53].
8 At [55].

> Mr Taylor was insuring against was that his earnings from his business would be eliminated or reduced as a consequence of his sickness or injury.

[35] Mr Taylor initially discovered financial statements for his insurance broking business which, as the Judge explained in some detail, falsely represented that the business made trading losses. Mr Taylor subsequently discovered correct financial statements for the business up to 31 March 2015 which showed that his income was at a level that led to full abatement of any amounts otherwise due under the Policy. No amounts were due to Mr Taylor.[9]

[36] The Judge noted that the financial statements before the Court only covered the period through to March 2015. Mr Taylor's claim for payment of arrears covered the period from 2014 to trial. In the absence of relevant accounting material it was not possible to make the calculation required by Mr Taylor's claim. But in any event, the Judge said, he had determined that Mr Taylor was not disabled by his sickness during that period.[10]

[37] Mr Taylor's claims were therefore dismissed.

Asteron's counterclaim for recovery of payments made

[38] The Judge moved on to consider Asteron's counterclaim. The Judge began by considering the correct legal framework for addressing the right to cancel or avoid liability under an insurance contract for a breach of the duty of good faith, and for addressing the insurer's claims for restitution for amounts that it has paid under the insurance contract. Asteron presented its case relying on common law principles found primarily in English authorities. Mr Beck argued that these issues should be addressed within the legal framework set out in the Contract and Commercial Law Act 2017 (the CCLA), which essentially re-enacts the regime formerly set out in the Contractual Remedies Act 1979.[11] As the Judge noted, s 40 of the CCLA provides that ss 36 to 39 have effect in place of the rules of the common law and of equity governing the circumstances in which a party to a contract may rescind it, or treat it as discharged,

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9 At [57]–[60].
10 At [61].
11 At [67].

for misrepresentation, repudiation, or breach. The Judge summarised his conclusion on this issue as follows:

> [70] [Section 40] means what it says. Sections 36 to 39 deal with cancellation. In addition the Act goes on to detail the ability of the Court to grant relief following cancellation, which can include the kind of restitutionary award sought by Asteron here (s 43), and also deals with the defence of change of position such as that raised by Mr Taylor (s 47). It covers the field. Subject to other legislation that may also apply (such as the Marine Insurance Act 1908, and the Insurance Law Reform Act 1977) the Act applies to a contract of insurance just as much as any other contract. Moreover as Ms Meechan and Mr Beck agreed, all the issues that are alive in the present case can be addressed within the provisions of the Act. I proceed on that basis.

[39] It appears to have been common ground that Mr Taylor owed Asteron an obligation of utmost good faith in connection with making claims. Asteron's pleaded case was that in his claim form and subsequent reports, Mr Taylor provided incorrect information about whether he was doing any work, and how much work he was doing. The Judge carefully reviewed the initial claim form and the subsequent progress statements, assessing the statements made and the evidence in relation to their correctness.

[40] The original claim form, which related to the period 23 December 2009 to July 2010, was dated 19 July 2010. The information contained in it was somewhat confusing and contradictory. The Judge set out his conclusions in relation to that form as follows:

> [77] Some of this information is not accurate, but I am not prepared to conclude that this form involves false statements supporting a finding of breach of Mr Taylor's obligations. There is considerable lack of clarity about precisely what Mr Taylor is saying in the form overall. He has indicated that he has been working part-time and that he intends working more fully. I am not satisfied there is any clearly incorrect (let alone deliberately incorrect) information, such that there was a breach of the obligation implied into the contract. Ms Meechan emphasised that he has represented that he had only returned to work on 12 July. But when describing when he stopped working a number of dates have been initially written in, and then changed or overwritten. Although he has indicated that he only returned to work in July (at the same time as filling in the form) I am not sure that it is as simple as that when all the answers in the form overall are considered. There is also no clear representation in the form that Mr Taylor is not making any money from his broking business.

[41] However the Judge found that the subsequent progress reports contained false statements. He said:

> [81] Given the findings I have already made earlier in this judgment, it is clear that what Mr Taylor was saying in the forms is false. Whatever the impact his conditions had had upon him, he returned to work in 2010 working approximately four hours per day at home or in the office, and generally overseeing the overall business operation. He also engaged in other activities associated with other business ventures.
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> [82] I found Mr Taylor's evidence suggesting otherwise to be unreliable, and at times untruthful. I am very conscious of the need to avoid making findings that a person has acted dishonestly, and that clear evidence must be provided before reaching that conclusion. But I do not see how Mr Taylor's inaccurate statements about his work could have been the consequence of error. I find that they deliberately misrepresented the amount of work he was engaged in and amounted to a breach of Mr Taylor's duties under the contract.
>
> (Footnote omitted).

[42] Asteron's claim that Mr Taylor breached his obligations focussed on the representations made by Mr Taylor about the number of hours that he worked. It did not place reliance on the statements he made about his income. However the Judge considered that these matters were inextricably interlinked, and went on to consider the accuracy of the information provided about income. The Judge found that the financial statements that were initially provided in Mr Taylor's discovery for the years 2010, 2011 and 2012 had been deliberately created by somebody to create the false impression that Mr Taylor made operating losses, when in fact he made operating profits.[12]

[43] It had not been put to Mr Taylor in cross-examination that he had been involved in preparing the false set of accounts. The Judge considered that in light of s 92 of the Evidence Act 2006, it was necessary to put that proposition directly to Mr Taylor before it would be appropriate for the Court to reach a conclusion that he had any personal involvement in the preparation of the false accounting material. The Judge therefore refrained from reaching a conclusion on this point.[13]

[44] However putting to one side any issue emerging from the creation and provision of the false accounts, the accurate accounts demonstrated that Mr Taylor

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12 At [92].
13 At [94].

earned income from his business which, on the application of the formula provided for in the Policy, resulted in an abatement that removed any entitlement to receive any payment.[14]

[45] Asteron sought an order requiring Mr Taylor to pay back to it all the money it had paid him under the policy, on the basis that the payments were induced by the false claims Mr Taylor had made about the hours he had worked. The Judge addressed this claim by reference to s 43 of the CCLA, which provides:

> **43 Power of court to grant relief**
>
> (1) When a contract is cancelled by any party, the court may, if it is just and practicable to do so, make an order or orders granting relief under this section.
>
> (2) The relief may be granted in the course of any proceeding or on application made for the purpose.
>
> (3) An order under this section may—
>
> (a) direct a party to pay to any other party the sum that the court thinks just (subject to section 35):
>
> (b) direct a party to do or refrain from doing, in relation to any other party, any act or thing that the court thinks just:
>
> (c) vest the whole or any part of any relevant property in a party:
>
> (d) direct a party to transfer or assign the whole or any part of any relevant property to any other party:
>
> (e) direct a party to deliver the whole or any part of the possession of any relevant property to any other party.
>
> (4) In subsection (3),—
>
> **party** means a party to the proceeding
>
> **relevant property** means real or personal property that was the subject of the contract or was the whole or part of the consideration for the contract.

[46] The Judge began by considering whether Asteron had actually cancelled the contract. When Asteron wrote to Mr Taylor in September 2014 to say it was making no more payments under the Policy, it did not say it was cancelling the Policy.

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[14] At [95].

Nor did it say this expressly in any subsequent communication addressed to Mr Taylor.[15]

[47] In Asteron's first amended statement of defence and counterclaim dated 11 April 2016, Asteron pleaded that Mr Taylor had breached his obligation of utmost good faith, and said this "entitles the defendant to cancel the policy". The Judge noted that that pleading was served, but may not have amounted to notice of cancellation because it was possible to read the statement as saying no more than that Asteron was entitled to cancel. The Judge did not consider that this was a clear communication of actual cancellation in accordance with s 41 of the CCLA.[16] However that ambiguity was removed by the evidence of Mr Andrew Strong, the in-house solicitor dealing with Mr Taylor's claim. In his brief of evidence dated 22 November 2018 he said that the position of Asteron was that it had cancelled the Policy and was seeking repayment. The Judge was satisfied that service of this brief of evidence amounted to notice of cancellation by Asteron within the meaning of s 41.[17]

[48] In any event, the Judge said, even if the Policy had not been cancelled and s 43 did not apply, Asteron was nevertheless able to seek damages for breach of contract as contemplated by s 49 of the CCLA. A breach of the implied terms of the contract by making false claims is a breach of contract. Asteron's loss, and its claim for breach of contract, was equivalent to the amounts it sought by way of restitution.[18]

[49] The Judge considered that Asteron could recover all payments under the Policy, as a result of Mr Taylor's misrepresentations. But in any event, he said, the position concerning restitution was straightforward because Mr Taylor never had any entitlement under the Policy due to his income levels.[19]

[50] Finally, the Judge considered Mr Taylor's defences to the restitution claim. He pleaded immateriality, absence of intent, and change of position. The Judge said he had already dealt with immateriality and absence of intent. The misstatements

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15 At [99].
16 At [100].
17 At [101].
18 At [102].
19 At [106]–[107].

made by Mr Taylor were plainly material, and he had found that they were deliberately false.[20] That left the change of position defence. This fell to be considered under s 47 of the CCLA:

> **47 Party who has altered position**
>
> (1) No order may be made under section 43 in respect of any property if any party to the contract has so altered the party's position in relation to the property that, having regard to all relevant circumstances, it would, in the opinion of the court, be inequitable to any party to make the order.
>
> (2) This section applies whether the party altered the party's position before or after the cancellation of the contract.

[51] The Judge considered that Mr Taylor had not acted in good faith. Nor did the evidence provided by Mr Taylor establish a factual foundation for a defence of change of position. The Judge said:

> [123] For these reasons I reject Mr Taylor's defence of change of position. Primarily that is because he has not acted in good faith. He is not able to resist repayment of money he has dishonestly secured because he says he has spent money on a holiday house, two luxury cars, and holidays to the Pacific. For that reason the defence is not available. Even apart from that point, however, the evidence he provided does not satisfy me that he incurred this expenditure in reliance upon the payments by Asteron.

[52] The Judge gave judgment for the full amount claimed by Asteron in its counterclaim: $371,286.70. He reserved leave for Asteron to file a memorandum setting out its claim for interest. The Judge also granted leave to the parties to file memoranda in relation to costs.

Interest/costs judgment

[53] In the Interest/costs judgment the Judge awarded interest under s 87 of the Judicature Act 1908 at a rate of five per cent per annum. The Judge did not accept Mr Taylor's submission that interest should be calculated using the interest calculator available under the Interest on Money Claims Act 2016. The Judge considered that this was a case where Mr Taylor had received payments to which he was not entitled.

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[20] At [108].

He had the advantage of the use of that money. Requiring repayment at a five per cent per annum interest rate did not involve over-compensation.[21]

[54] The Judge also rejected submissions made by Mr Taylor in relation to delays in the proceeding, which Mr Taylor said should preclude an award of interest to Asteron for the whole period, and in relation to over-payment of premiums. The Judge saw no significance in the point about delay, and considered that the plaintiff's stance on disclosing information to Asteron was also a cause of delay in the matter coming to court. He accepted Asteron's submission that the Court had no evidence about premium payments sufficient to affect the interest calculation.[22]

[55] The Judge determined a number of disputed items of costs. Some of these are the subject of the appeal to this Court, and are addressed below. The most significant issue concerned Asteron's application for a 15 per cent uplift on its costs award under r 14.6(3)(b) of the High Court Rules 2016. The Judge considered that an uplift of 15 per cent was relatively modest, and was justified. The Judge said:

> [10] In responding to these arguments it seems to me to be appropriate to proceed with caution. In *Paper Reclaim Ltd v Aotearoa International Ltd* the Court of Appeal overturned an award of indemnity costs because the High Court had made unjustified findings in relation to the honesty where the underlying claims were still properly advanced in the proceeding.[23] The pursuit of proper claims should not be penalised. Nevertheless I am satisfied that it is appropriate for there to be an uplift of the costs award in the present case given that costs of the litigation were increased by unmeritorious arguments. In particular:
>
> (a) The plaintiff had made deliberately false claims, and then gave evidence, that I found unreliable and at times not credible, that he had not been working in any meaningful capacity. He must have known that the claim lacked merit. To respond to this the defendants were required to undertake an extensive forensic exercise, including by subpoenaing his employees to demonstrate that this was not true.
>
> (b) In any event his income was not adversely affected by any issue of incapacitation. That fact was obscured by the discovery of false sets of accounts. The defendant was required to call expert accounting evidence to explore that point. Even at trial the plaintiff called his own accountant to explain the accounts so discovered were earlier draft iterations. This further evidence was demonstrated to be incorrect.

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21 Interest/costs judgment, above n 2, at [4].

22 At [3].

23 *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA) at [143]–[161].

> [11] The key point is that the plaintiff was advancing false claims for insurance entitlements. The pursuit of the claim can be seen as a continuation of the attempt to falsely claim entitlements. Given my findings, the plaintiff's claim was not properly brought. The defendant was put to considerable cost to demonstrate why the claims were illegitimate. In those circumstances an uplift to reflect the additional expense they were required to undertake is justified.

Issues on appeal

[56] Mr Taylor submits that the High Court erred in seven respects:

(a) by holding that Mr Taylor was not Totally Disabled in terms of the Policy;

(b) by finding that Mr Taylor had Monthly Earned Income exceeding the amount of his entitlements;

(c) by finding that deliberate misrepresentations had been made by Mr Taylor;

(d) by holding that Asteron was entitled to cancel the Policy, and to a refund of all amounts paid under the Policy;

(e) by rejecting Mr Taylor's change of position defence;

(f) by awarding the full amount of interest claimed by Asteron; and

(g) by awarding increased costs to Asteron and disbursements contrary to the rules.

[57] We address each of these issues below.

Was Mr Taylor Totally Disabled?

The issue

[58] The Policy provided for benefits to be paid if Mr Taylor became Totally Disabled. We set the definition out again for ease of reference:

> "TOTALLY DISABLED" means that you are unable to work in your usual occupation for more than ten hours per week.

[59] So the question was whether Mr Taylor had established that he was unable to work in his usual occupation as an insurance broker for more than 10 hours per week.

[60] The Judge considered that Mr Taylor was able to, and did in fact, work for more than 10 hours per week, apart from the period immediately surrounding his discectomy in April 2010. It was possible that there were other short periods of total disability, but Mr Taylor had not provided sufficiently clear evidence for those to be identified.[24]

Appellant's submissions

[61] Mr Beck submitted that the Court conflated ability to work with the number of hours spent at the business premises. Mr Taylor's evidence was that he was unable to function as previously, and much of the time he spent in the office was spent keeping up-to-date with industry developments and maintaining an involvement with the business, which fell short of income-generating work.

[62] Mr Beck emphasised that on the Judge's own reasoning there was an initial period where Mr Taylor was not able to work. That was corroborated by one of his former employees, Ms Tricker. There was accordingly a proper basis for Mr Taylor's claim, at least for this initial period.

[63] For the period from July 2010 onwards, Mr Beck submitted, the Judge should have found that Mr Taylor was unable to work having regard to his own evidence, a letter dated 30 October 2016 from his general practitioner, Dr Neylon, that was

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[24] High Court judgment, above n 1, at [46].

included in the agreed bundle at trial, and the evidence of Mr Rewcastle, an accountant who had worked closely with Mr Taylor over a number of years. The Judge had been overly influenced by evidence of former employees about Mr Taylor's presence at the office, without considering what was entailed in the concept of "work", and without giving proper weight to the absence of evidence about what Mr Taylor was actually doing while he was in the office.

Analysis

[64] We consider that the evidence from Mr Taylor's former employees, supported by extensive documentary evidence of Mr Taylor's involvement in the business, was compelling. We do not accept the narrow approach to the concept of "work" contended for by Mr Beck. Management activities undertaken by the principal of an insurance broking business form an integral part of that individual's work activities. Similarly, the suggestion that liaising with staff and providing direction to staff in relation to writing new business, renewals and claims handling does not amount to work is difficult to reconcile with the ordinary meaning of the term, or business common sense.

[65] The general statements made by Mr Rewcastle about the effect of Mr Taylor's illness on his ability to work shed no light on whether he was unable to work for more than 10 hours per week. It appears to be common ground that before Mr Taylor became unwell he worked long hours, and his illness resulted in a reduction of those hours. But the evidence that he regularly worked more than 10 hours per week for most of the relevant period, apart from a short period immediately surrounding his discectomy in April 2010, was quite clear.

[66] We agree with the Judge that the letter from Dr Neylon in relation to Mr Taylor's condition was not admissible as evidence of the truth of its contents. The inclusion of the letter in the agreed bundle for the trial, without objection, meant that r 9.5(1) of the High Court Rules applied:

> **9.5 Consequences of incorporating document in common bundle**
>
> (1) Each document contained in the common bundle is, unless the court otherwise directs, to be considered—

(a) to be admissible; and

(b) to be accurately described in the common bundle index; and

(c) to be what it appears to be; and

(d) to have been signed by any apparent signatory; and

(e) to have been sent by any apparent author and to have been received by any apparent addressee; and

(f) to have been produced by the party indicated in the common bundle index.

…

(4) A document in the common bundle is automatically received into evidence (subject to the resolution of any objection to admissibility) when a witness refers to it in evidence or when counsel refers to it in submissions (made otherwise than in a closing address).

…

[67] This rule must be read in conjunction with s 132 of the Evidence Act, which provides:

132 Documents required to be discovered or included in common bundle

(1) This section applies only to a civil proceeding.

(2) A document in a common bundle is received in evidence when the relevant conditions set out in rules of court have been complied with.

(3) A document required by rules of court to be included in a party's affidavit or list made for the purposes of discovery but which has not been so included, may be produced in evidence at the hearing only with—

(a) the consent of the other party; or

(b) the leave of the Judge.

(4) Each document contained in the common bundle is subject to presumptions as to nature and origin that—

(a) are specified in rules of court; and

(b) are rebuttable in circumstances and in the manner set out in those rules.

[68] The letter from Dr Neylon was referred to by Mr Beck in opening. It was therefore received in evidence, and became subject to the presumptions as to its nature and origin specified in r 9.5. It was admissible documentary evidence. But Mr Beck's submission fails to distinguish between the admissibility of the document as evidence that such a document was sent by Dr Neylon to Mr Taylor, and admissibility of the document as evidence of the truth of its contents. Rule 9.5(1)(a) read together with s 132 of the Evidence Act resulted in the document being received in evidence, and benefiting from the presumptions set out in r 9.5(1)(b) to (f). But the mere fact that the document has been received in evidence does not mean that it is received as evidence of the truth of its contents. That is a different proposition altogether. The document would be received as evidence of the truth of its contents only if it qualified as admissible hearsay evidence under s 18 of the Evidence Act, which provides:

> **18 General admissibility of hearsay**
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> (1) A hearsay statement is admissible in any proceeding if—
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> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
>
> (b) either—
>
> (i) the maker of the statement is unavailable as a witness; or
>
> (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.
>
> …

[69] Mr Beck did not suggest that Dr Neylon was unavailable as a witness. Nor did he identify any basis on which requiring her to be a witness would cause undue expense or delay. Rather, if Dr Neylon's observation that Mr Taylor was unable to work was relied on as evidence about this critical issue, it was essential that she be called and that Asteron have an opportunity to cross-examine her.

[70] Even if we had accepted Mr Beck's submission, and treated the letter from Dr Neylon as evidence of the truth of its contents, that would not have affected our conclusion that the Judge was right to find that Mr Taylor was not Totally Disabled.

Little weight could be placed on the opinion expressed by Dr Neylon without knowing what information she based her opinion on, and in particular, whether she was aware of the extent of the work that Mr Taylor was in fact undertaking. The evidence of the employees who worked with him, and the documentary evidence of his involvement in every aspect of the business, together provide a much more reliable basis for a finding on this issue.

[71] There is more force in Mr Beck's submission that the Judge found that there was in fact an initial period of total disability. The Judge accepted that there was a period immediately surrounding Mr Taylor's discectomy when he was not able to work for more than 10 hours per week.[25] The Judge went on to say that he was not prepared to find that the statements in the initial claim form in relation to the period 23 December 2009 to July 2010 were false.[26]

[72] Ms Meechan QC submitted that the Judge had not found that Mr Taylor was Totally Disabled during the initial period. The discectomy appears to have been carried out in early April 2010.[27] Ms Tricker gave evidence that there was a period of six to eight weeks when Mr Taylor was recovering from that operation and she did not see him in the office at all.[28] There was no evidence that he was disabled before that point in time, and business records showed he was actively involved in the broking business in early 2010.

[73] The evidence in relation to the initial period is sparse, and somewhat unsatisfactory. It appears Mr Taylor was totally disabled for at least six to eight weeks. It also appears that for some of the initial period, he may not have been Totally Disabled.

[74] It seems to us that the critical point in relation to this initial period is that it is not the subject of Mr Taylor's claim: that claim relates to the period from September 2014 onwards. The question whether Mr Taylor was Totally Disabled in the initial

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25 At [46].
26 At [76]–[77].
27 At [42].
28 At [41].

period is relevant only to Asteron's counterclaim. It is relevant to that counterclaim in two ways.

[75] First, it is relevant to Asteron's allegation that Mr Taylor made false statements in his initial claim and in his progress reports. The Judge rejected Asteron's submission that the initial proposal contained false statements that breached Mr Taylor's obligations. Asteron did not file a memorandum of intention to support the judgment on other grounds that challenged that finding. In those circumstances it would be wrong for us to revisit it.

[76] Second, whether Mr Taylor was Totally Disabled in this period could be relevant to a restitution claim in which Asteron sought recovery of payments made in that period on the basis that the Policy test was not made out. We discuss Asteron's restitution claim from [90] below. For present purposes, it is sufficient to note that the burden of making out that restitution claim falls on Asteron. In circumstances where the evidence about this period is unclear and equivocal, we are not persuaded that Mr Taylor was not Totally Disabled for all or most of that period.

[77] We therefore proceed on the basis that Asteron has failed to establish that Mr Taylor was not Totally Disabled from December 2009 to 22 July 2010, but has established that he was not Totally Disabled from 23 July 2010 onwards.

Mr Taylor's monthly earned income

The issue

[78] Clause 2.1 of the Policy, which was set out at [22] above, provided for the amount of any monthly Total Disability Benefit to be reduced by Monthly Earned Income. The term "Monthly Earned Income" was defined to include, for a self-employed person, "monthly pre-tax earnings net of any business expenses necessarily incurred in deriving those earnings".

[79] Mr Beck took issue with the Judge's interpretation of the term Monthly Earned Income. He submitted that the concept relates to income produced by virtue of individual effort, not income derived passively by virtue of investment.

The result of the interpretation adopted by the Judge was that the Policy taken out by Mr Taylor "was a completely worthless document. Because the business established by [Mr Taylor] was successful and continued to generate income even after he was compelled by illness to reduce his input, he was effectively paying premiums for no benefit".

[80] Mr Beck also submitted that the issue of Mr Taylor's Monthly Earned Income was not properly before the Court in the proceedings. Asteron did not plead by way of affirmative defence that any benefit to which Mr Taylor may have been entitled should have been reduced to take into account his earnings. Nor, as Mr Beck submitted in the course of oral argument, was this an issue pleaded in the context of Asteron's counterclaim. The Judge should not have considered the issue and made findings about it.

Analysis

[81] We deal with the pleading point first. Mr Beck was right to say that Mr Taylor's earnings, and the implications of those for the level of benefit to which he was entitled under the Policy, were not referred to in Asteron's pleading. That pleading was very sparse: the response to Mr Taylor's claim consisted mainly of denials, and the counterclaim focussed exclusively on Mr Taylor's statements about the hours of work he was undertaking.

[82] Mr Taylor's pleaded claim was equally sparse: it ran to just two pages including the request for relief. In that brief pleading Mr Taylor claimed arrears of monthly benefits from September 2014 onwards, and interest on those arrears. In order to establish an entitlement to arrears, he needed to establish the sum he was entitled to receive under the Policy in each month. So the burden was on him to show that he was Totally Disabled, and that he was entitled to receive a payment under the Policy in each relevant month. That in turn necessarily depended on the level of his Monthly Earned Income, under the formula set out in cl 2.1 of the Policy. We consider that the question of Monthly Earned Income was in issue as a result of Mr Taylor's claim to be paid a benefit from September 2014 onwards, and Asteron's denial of his entitlement.

[83] Neither party pleaded the issue as clearly and transparently as they ought to have. But Mr Taylor's earnings were put in issue by his claim for continuing payments for the period from September 2014 onwards. They were also relevant to his change of position defence in respect of Asteron's counterclaim. There was no unfairness to Mr Taylor in the Judge making findings on that topic. The reason that Asteron had suspended payments in 2014 was Mr Taylor's refusal to provide financial statements and other financial information. Asteron sought that information in discovery. It was initially provided with the false and misleading financial statements referred to at [35] above. Asteron filed expert evidence pointing out inconsistencies and defects in those financial statements. That eventually resulted in discovery of the correct financial statements. It is inconceivable that in those circumstances Mr Taylor was not aware that the extent of his earnings over the relevant period was an issue in the proceedings. Indeed Mr Taylor called expert evidence from Mr Graeme Lindsay, an experienced life insurance advisor, to support the argument that the abatement should relate solely to income arising from Mr Taylor's own efforts. He would not have needed to call evidence on that topic if the level of his earnings had not been in issue in the proceedings.

[84] Mr Beck accepted in argument that if the Judge's interpretation of the Policy was correct, it followed from the correct financial statements ultimately discovered by Mr Taylor that he had no entitlement under the Policy in the period covered by those financial statements. Mr Beck did not seek to argue that on the Judge's interpretation there were any factual matters concerning Mr Taylor's income that had not been adequately investigated at trial.

[85] We consider that it follows that there can be no unfair prejudice to Mr Taylor in the High Court, or this Court, determining the correct interpretation of the term "Monthly Earned Income" as it is used in the Policy. And if the Judge was right in his interpretation of the Policy, there can be no unfair prejudice in applying the provision by reference to the correct financial statements ultimately discovered by Mr Taylor.

[86] We can deal with the interpretation issue briefly. We consider that the Judge's interpretation of this term of the Policy was plainly right. It is consistent with the ordinary meaning of the words used. It is consistent with the context in which

the Policy was originally entered into, and in particular the use of the financial statements for the business to establish the level of income that Mr Taylor was earning and was able to insure. It is also consistent with commercial common sense. The purpose of the Policy was to protect Mr Taylor from a reduction in his income from his insurance broker business as a result of illness. When the Policy was initially taken out, there was every prospect that if he was unable to work his income would reduce below the insured level. It may well have been the case that as the business grew and became more profitable, the Policy became less suitable for Mr Taylor's needs. But that does not mean that its interpretation should be retrospectively revisited to accommodate that change in circumstances, as Mr Beck was constrained to accept.

[87] It follows that even if Mr Taylor was Totally Disabled or Partially Disabled, he was not entitled to be paid benefits under the Policy in the period January 2010 to March 2015 inclusive.

[88] There was no evidence about Mr Taylor's Monthly Earned Income from April 2015 until April 2016 when (as we explain below) the Policy was cancelled. This period is relevant for the purposes of Mr Taylor's claim. The burden was on him to establish that he was entitled to a benefit during this period. His failure to produce any information about his income during that period means that he has failed to make out his claim. And in any event, as the Judge held, Mr Taylor failed to establish that he was Totally Disabled in this period.[29]

[89] These findings are sufficient to dispose of Mr Taylor's claim for continuing payments under the Policy from September 2014 onwards. We therefore turn to the issues raised by Asteron's counterclaim.

Counterclaim — the legal framework

[90] The parties' written submissions dealt only briefly with the source and content of the obligations of an insured when making claims under a policy. Both parties accepted that the Judge was right to approach the issue by reference to the provisions of the CCLA in relation to breach and cancellation. In the course of oral argument we

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[29] At [61].

explored with counsel in more detail the source of the insured's obligations, the content of those obligations, and the consequences of a breach of those obligations. After the hearing we also invited the parties to provide further written submissions on these issues.

The insured's obligations in relation to claims

[91] Many insurance policies contain express terms that govern the obligations of an insured when making claims, and the consequences of a breach of those obligations. So for example the policy considered by the High Court in *Blanshard v National Mutual Life Association of Australasia Ltd* provided that the insurer would avoid the policy in the event of fraudulent misrepresentation or material non-disclosure by the insured, and would be entitled to cancel the policy in the event of a fraudulent claim under it.[30]

[92] But in this case the Policy was silent on those matters.

[93] The claim forms signed by Mr Taylor did refer to the need to provide accurate information, and to the consequences of failing to do so. The initial claim form included the following acknowledgement:

> I hereby declare that the information in this Claim Form is true, correct and complete. I understand and agree that if I make any false or fraudulent statements or fail to advise Asteron Life Limited New Zealand of any relevant information regarding my claim, Asteron Life Limited New Zealand may refuse to pay and cancel my claim. I understand that I can be prosecuted if I make any fraudulent statements.

[94] Asteron's claim was pleaded on the basis that an insured owes a duty of utmost good faith to an insurer in connection with making claims. Asteron's submissions proceeded on the basis that this requirement applies in relation to every insurance policy. Asteron did not rely on the acknowledgements in the claim forms as a basis for this obligation. Ms Meechan submitted that in order to show a breach of this obligation, Asteron needed to prove that Mr Taylor deliberately misled Asteron.

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30 *Blanshard v National Mutual Life Association of Australasia Ltd* (2004) 13 ANZ Insurance Cases 61-621 at [50].

That is, Asteron needed to establish dishonesty in connection with claims made by Mr Taylor.

[95] Mr Beck submitted that Asteron had failed to properly plead a claim based on breach of contract and cancellation under the CCLA. Putting that pleading point to one side, Mr Beck was anxious to persuade us that there was no requirement for Asteron to establish dishonesty in order to be entitled to cancel an insurance contract. If the contract required Mr Taylor to act in the utmost good faith in connection with claims, he said, then conduct short of dishonesty could breach that obligation. In his written submissions following the hearing Mr Beck submitted that when making a claim, the insured can be expected to disclose to the insurer everything the insured knows that is relevant to the claim in some material respect. Failure to do so would be a breach of contract that would entitle the insurer to claim damages.

[96] The parties' positions on the obligations of an insured in connection with claims were the reverse of what one might have expected, with Mr Beck contending for a much less demanding threshold for liability than Ms Meechan. The explanation for this unusual reversal of positions is that Mr Beck was seeking to persuade us that dishonesty was not in issue in these proceedings, and it was therefore wrong for the Judge to make a finding that Mr Taylor had been dishonest. Mr Beck submitted that there was no need to make any findings about dishonesty in order to determine Asteron's counterclaim; Asteron had not pleaded dishonesty; and Mr Taylor was not cross-examined about whether the statements in his initial claim and progress reports were made dishonestly. We return to these arguments about the Judge's findings at [121]–[129] below.

[97] In order to determine the consequences of a breach of the insured's obligations in relation to claims, we also need to consider the nature and source of those obligations. If they are implied terms, then the insurer's ability to cancel, and the consequences of cancellation, will be governed by the CCLA. If they are freestanding common law or equitable obligations, then the position would be more complex.

[98] It is well established that an insured must act honestly in connection with the making of a claim. Thus for example in *Blanshard*, Harrison J said:[31]

> 53. A contract of insurance obliges both parties to observe the duty of utmost good faith throughout their relationship. This principle applies most prominently in two distinct situations — formation and renewal of the relationship, and submission of claims for indemnity. An insurer alleging bad faith by an insured in the latter circumstance must prove dishonesty.

[99] In the recent United Kingdom Supreme Court decision in *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG (The DC Merwestone)*, Lord Sumption SCJ put it thus:[32]

> [1] At common law, if an insured makes a fraudulent claim on his insurer, the latter is not liable to pay the claim.

[100] Lord Sumption SCJ referred to this principle as the "fraudulent claims rule". We adopt that terminology. The content of this rule is reasonably well settled. But there is considerable uncertainty about the nature and source of the insured's obligation, in the absence of any express term in the policy. Is there an implied term to this effect? If so, is that implied term an essential term for the purposes of s 37 of the CCLA? Alternatively, is the fraudulent claims rule a freestanding common law or equitable rule? If so, what are the consequences of a breach of that rule — in particular, is the policy voidable prospectively or retrospectively? Or is this rule one aspect of a broader common law or equitable principle that the parties to insurance contracts owe each other a duty of utmost good faith? And, if so, what are the consequences of a breach of that broader duty?

[101] The English cases also discuss a possible statutory source for the fraudulent claims rule in the context of contracts of marine insurance: s 17 of the Marine Insurance Act 1906 (UK), which expressly provides that "[a] contract of marine insurance is a contract based upon the utmost good faith". There is no New Zealand statutory equivalent, so we need not consider that source of the rule.[33]

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31 *Blanshard*, above n 30.

32 *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG (The DC Merwestone)* [2016] UKSC 45, [2017] AC 1.

33 For the history of this omission from the New Zealand Act, see Neil Campbell "The Scope of an Insurer's Post-Contractual Duty of Good Faith" (2016) 27 ILJ 185 at 187 and n 8.

But we do need to consider whether there is a co-extensive common law or equitable principle that forms part of New Zealand law.

[102] In *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* Lord Hobhouse addressed the relevance of general principles of contract law to the fraudulent claims rule.[34] He drew a distinction between the operation of the principle of utmost good faith in relation to pre-contractual dealings — a rule which logically cannot depend on the terms of a yet-to-be-formed contract — and the operation of that principle in relation to dealings between the parties after formation of a valid contract, where the source of the parties' obligations is the contract, and the express and implied terms contained in that contract. He characterised the fraudulent claims rule, which applies after a valid contract of insurance has been formed, as a term implied by law that can be modified or extended by the express terms of the contract:

> 50 Having a contractual obligation of good faith in the performance of the contract presents no conceptual difficulty in itself. Such an obligation can arise from an implied or inferred contractual term. It is commonly the subject of an express term in certain types of contract such as partnership contracts. Once parties are in a contractual relationship, the source of their obligations the one to the other is the contract (although the contract is not necessarily exclusive and the relationship which comes into existence may of itself give rise to other liabilities, for example liabilities in tort). The primary remedy for breach of contract is damages. But the consequences of breach of contract are not confined to this. The contractual significance of the breach may go further. It may also amount to a breach of a contractual condition which will excuse or suspend the other party's obligation to continue to perform the contract. It may be a repudiatory breach, or evidence a renunciation, which entitles the other party to terminate the contract and sue for damages. However any such release only applies prospectively and does not affect already accrued rights: *Colonial Bank v European Grain and Shipping Ltd* [1989] AC 1056. Ordinarily, the right to the indemnity accrues as soon as the loss has been suffered: *Chandris v Argo Insurance Co Ltd* [1963] 2 Lloyd's Rep 65.
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> 51 The right to avoid referred to in section 17 is different. It applies retrospectively. It enables the aggrieved party to rescind the contract ab initio. Thus he totally nullifies the contract. Everything done under the contract is liable to be undone. If any adjustment of the parties' financial positions is to take place, it is done under the law of restitution not under the law of contract. This is appropriate where the cause, the want of good faith, has preceded and been material to the making of the contract. But, where the want of good faith first occurs later, it becomes anomalous and disproportionate that it should be so categorised and entitle the aggrieved party to such an outcome. But this

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[34] *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469.

will be the effect of accepting the defendants' argument. The result is effectively penal. Where a fully enforceable contract has been entered into insuring the assured, say, for a period of a year, the premium has been paid, a claim for a loss covered by the insurance has arisen and been paid, but later, towards the end of the period, the assured fails in some respect fully to discharge his duty of complete good faith, the insurer is able not only to treat himself as discharged from further liability but can also undo all that has perfectly properly gone before. This cannot be reconciled with principle. No principle of this breadth is supported by any authority whether before or after the Act. It would be possible to draft a contractual term which would have such an effect but it would be an improbable term for the parties to agree to and difficult if not impossible to justify as an implied term. The failure may well be wholly immaterial to anything that has gone before or will happen subsequently.

52 A coherent scheme can be achieved by distinguishing a lack of good faith which is material to the making of the contract itself (or some variation of it) and a lack of good faith during the performance of the contract which may prejudice the other party or cause him loss or destroy the continuing contractual relationship. The former derives from requirements of the law which pre-exist the contract and are not created by it although they only become material because a contract has been entered into. The remedy is the right to elect to avoid the contract. The latter can derive from express or implied terms of the contract; it would be a contractual obligation arising from the contract and the remedies are the contractual remedies provided by the law of contract. This is no doubt why judges have on a number of occasions been led to attribute the post-contract application of the principle of good faith to an implied term.

…

Fraudulent Claims:

61 This question arises upon policies which up to the time of the making of the claim are to be assumed to be valid and enforceable. No right to avoid the contract had arisen. On ordinary contractual principles it would be expected that any question as to what are the parties' rights in relation to anything which has occurred since the contract was made would be answered by construing the contract in accordance with its terms, both express and implied by law. Indeed, it is commonplace for insurance contracts to include a clause making express provision for when a fraudulent claim has been made. But it is also possible for principles drawn from the general law to apply to an existing contract—on the better view, frustration is an example of this as is the principle that a party shall not be allowed to take advantage of his own unlawful act. It is such a principle upon which the defendants rely in the present case. As I have previously stated there are contractual remedies for breach of contract and repudiation which act prospectively and upon which the defendants do not rely. The potential is also there for the parties, if they so choose, to provide by their contract for remedies or consequences which would act retrospectively. All this shows that the courts should be cautious before extending to contractual relations principles of law which the parties could themselves have incorporated into their contract if they had so chosen. The courts should likewise be prepared to examine the application of any such principle to the particular class of situation to see to what extent its application would reflect principles of public policy or the over-riding needs of justice.

> Where the application of the proposed principle would simply serve the interests of one party and do so in a disproportionate fashion, it is right to question whether the principle has been correctly formulated or is being correctly applied and it is right to question whether the codifying statute from which the right contended for is said to be drawn is being correctly construed.
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> 62 Where an insured is found to have made a fraudulent claim upon the insurers, the insurer is obviously not liable for the fraudulent claim. But often there will have been a lesser claim which could properly have been made and which the insured, when found out, seeks to recover. The law is that the insured who has made a fraudulent claim may not recover the claim which could have been honestly made. The principle is well established and has certainly existed since the early 19th century: *Halsbury's Laws of England*, 4th ed reissue, vol 25 (1994), p 284, para 492, *Welford and Otter-Barry, Fire Insurance,* 4th ed (1948) p 289 et seq. This result is not dependant upon the inclusion in the contract of a term having that effect or the type of insurance; it is the consequence of a rule of law. Just as the law will not allow an insured to commit a crime and then use it as a basis for recovering an indemnity (*Beresford v Royal Insurance Co Ltd* [1937] 2 KB 197), so it will not allow an insured who has made a fraudulent claim to recover. The logic is simple. The fraudulent insured must not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful, I will lose nothing.

[103] In *Versloot Dredging* Lord Sumption SCJ (with whom Lord Clarke, Lord Hughes and Lord Toulson SCJJ agreed) traced the evolution of the fraudulent claims rule, and endorsed the view expressed by Lord Hobhouse in *The Star Sea* that after a contract of insurance has been entered into, the content of the duty of good faith and the consequences of its breach can be accommodated within the general principles of the law of contract. On that approach, the fraudulent claims rule can be seen as a term implied or inferred by law, and the consequences of a fraudulent claim are determined by the principles that govern breaches of contract:[35]

> 7 The common law rule relating to fraudulent claims appears to originate … in the middle of the 19th century. In *Britton v Royal Insurance Co* (1866) 4 F & F 905, which is generally regarded as the leading case, there was an express clause, but Willes J in his summing up to the jury stated the law altogether generally, at pp 908–909:
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> > "A fire insurance, he said, is a contract of indemnity; that is, it is a contract to indemnify the assured against the consequences of a fire, provided it is not wilful. Of course, if the assured set fire to his house, he could not recover. That is clear. But it is not less clear that, even supposing it were not wilful, yet as it is a contract of indemnity only, that is, a contract to recoup the insured the value of the property destroyed by fire, if the claim is fraudulent, it is defeated altogether. That is, suppose the insured made a claim for twice the amount insured and lost, thus seeking to put the office off its guard, and in

[35] *Versloot Dredging*, above n 32.

> the result to recover more than he is entitled to, that would be a wilful fraud, and the consequence is that he could not recover anything. This is a defence quite different from that of wilful arson. It gives the go-bye to the origin of the fire, and it amounts to this—that the assured took advantage of the fire to make a fraudulent claim. The law upon such a case is in accordance with justice, and also with sound policy. The law is, that a person who has made such a fraudulent claim could not be permitted to recover at all. The contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained. It is the common practice to insert in fire-policies conditions that they shall be void in the event of a fraudulent claim; and there was such a condition in the present case. Such a condition is only in accordance with legal principle and sound policy."

This approach was not initially accepted in Scotland, where the Court of Session held that the genuine part of a fraudulently initiated claim was recoverable: *Reid & Co Ltd v Employers' Accident and Livestock Insurance Co Ltd* (1899) 1 F 1031. But in England the courts consistently applied Willes J's test to avoid the entirety of an exaggerated claim. That approach was endorsed by the House of Lords in *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2003] 1 AC 469.

8 It was settled from an early stage of the history of English insurance law that the duty of utmost good faith applied not only in the making of the contract but in the course of its performance. The principle was given statutory force by section 17 of the Marine Insurance Act. In *Britton's* case, Willes J regarded the fraudulent claims rule as a manifestation of the duty of utmost good faith, a view adopted by Christopher Clarke LJ, delivering the leading judgment in the Court of Appeal in the present case: paras 76–77. The rule is peculiar to contracts of insurance, and there can be little doubt that historically it is because they are contracts of utmost good faith that they have this unique characteristic. But I am inclined to agree with the view expressed by Lord Hobhouse of Woodborough in *The Star Sea* (paras 50, 61–62) that once the contract is made, the content of the duty of good faith and the consequences of its breach must be accommodated within the general principles of the law of contract. On that view of the matter, the fraudulent claims rule must be regarded as a term implied or inferred by law, or at any rate an incident of the contract. The correct categorisation matters only because if it is a manifestation of the duty of utmost good faith, then the effect of section 17 of the Marine Insurance Act 1906 is that the whole contract is voidable ab initio upon a breach, and not just the fraudulent claim. If, on the other hand, one adheres to the contractual analysis, the right to avoid the contract for breach of the duty must depend on the principles governing the repudiation of contracts, and avoidance would operate prospectively only. The choice is not, however, before us on this appeal because the insurers do not seek to avoid the contract. They seek only to avoid the claim for this particular casualty.

9 What matters for present purposes is the rationale of the rule, on which there is a broad consensus in the authorities. It is the deterrence of fraud. As Lord Hobhouse observed in *The Star Sea* at para 62, "The logic is simple. The fraudulent insured must not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful, I will lose nothing." Cf *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep IR

> 209, 214 (Millett LJ); *Direct Line Insurance plc v Khan* [2002] Lloyd's Rep IR 364, para 38; *Agapitos v Agnew* [2003] QB 556, para 14 (Mance LJ); *Axa General Insurance Ltd v Gottlieb* [2005] 1 All ER (Comm) 445 (CA), paras 28 and 31. The courts have explained the lack of a similar rule in other areas of the law of contract by pointing to the asymmetrical positions of the parties to an insurance contract, the insurer being vulnerable on account of his dependence on the insured for information both at the formation of the contract and in the processing of claims: see *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501, 542B (Lord Mustill); *Orakpo v Barclays Insurance Service*s [1995] LRLR 443, 451 (Hoffmann LJ), 452 (Sir Roger Parker).
>
> 10 Fraudulent insurance claims are a serious problem, the cost of which ultimately falls on the general body of policy-holders in the form of increased premiums. But it was submitted to us that a forfeiture rule was not the answer to that problem. There was, it was said, little empirical evidence that the common law rule was an effective deterrent to fraud, and no reason to think that the problem was peculiar to claims on insurers as opposed to, say, claims in tort for personal injuries, the cost of which also falls ultimately on insurers and policy-holders without there being any equivalent common law rule. Informational asymmetry is not a peculiarity of insurance, and in modern conditions may not even be as true of insurance as it once was. These points have some force. But I doubt whether they are relevant. Courts are rarely in a position to assess empirically the wider behavioural consequences of legal rules. The formation of legal policy in this as in other areas depends mainly on the vindication of collective moral values and on judicial instincts about the motivation of rational beings, not on the scientific anthropology of fraud or underwriting. As applied to dishonestly exaggerated claims, the fraudulent claims rule is well established and, as I have said, will shortly become statutory.

[104] Lord Hughes SCJ also traced the origins of the fraudulent claims rule, agreeing with Lord Sumption SCJ about its rationale but describing it as a rule of common law rather than as an implied term in the insurance contract:

> 54 The law has for centuries recognised that special rules need to apply to insurance contracts. At the stage when a policy is being taken out, the potential insured will typically know a great deal more about his circumstances, and thus about the risk, than can the insurer to whom he is applying. The response of the common law to this truth was to develop the rule that a contract for insurance must be conducted on both sides in the utmost good faith. In particular, when the contract is in negotiation the general common law rule was that the applicant must volunteer to the insurer, whether he is asked or not, anything which he knows or ought to know and which a prudent insurer would regard as relevant to the assessment of the risk. The consequence of breach, at common law, was that the insurer is entitled to avoid the policy altogether. When the law of insurance as it applied to marine contracts was codified by the Marine Insurance Act 1906, this rule of utmost good faith was repeated in section 17, which read: "A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party." This provision was declaratory of the common law relating

to insurance generally. As will be seen, this common law/statutory rule has recently been modified by statute, differentially for consumer insurance and non-consumer policies, but exacting duties of disclosure are still imposed on the applicant for insurance at the pre-contract stage. Otherwise, no doubt, the consequence would either be difficulty obtaining insurance or, more likely, demands for higher premiums.

55 At the later stage when a claim is made, the policyholder will also typically know a good deal more about the facts which give rise to the claim than the insurers possibly can, whether the claim arises out of a motor accident, a burglary, fire damage to a factory or warehouse, the loss of luggage on holiday or the ingress of seawater into a ship. Insured loss is generally adventitious. It may occur anywhere in the world and with or without witnesses. Only sometimes will thorough investigation of the circumstances of the claimed loss be a realistic option for insurers. Moreover, it is very much in the interest of policyholders generally that when a claim arises, it should be accepted promptly by the insurers, payment should be made, and business or private life should be allowed to resume with the loss repaired. Typically, insurers market their policies in part by advertising what they assert to be their prompt and uncomplicated response to claims. If such is to be the response to claims, insurers must take the claiming insured to a considerable extent on trust. Furthermore, if claims have to be investigated in detail and routinely verified by insurers, the cost of the systems necessary to do this will fall on policyholders generally through increased premiums, and good claims will be delayed alongside the bad. The response of the common law to these truths was the development of the fraudulent claims rule. It is a rule of law, imposed by the courts whether or not the policy contains a clause to the same effect, although many do and more used to do in the early days of insurance when the rule was developing. It seems more realistic to acknowledge it as having achieved the status of a rule of common law, grounded in sound policy, rather than depending on an implied term in the contract. Apart from any other reason, it seems far from clear that in every case such an implied term would meet the tests of obviousness or business necessity. To anticipate, it will be seen that the recent legislation in relation to consumer and non-consumer insurance preserves the fraudulent claims rule, but without resolving the question raised in the present case about its extent.

…

64 It seems likely that the fraudulent claims rule developed as a matter of history from the general rule that the parties to a contract of insurance owe each other the duty to act with the utmost good faith. In the present case, in the Court of Appeal, Christopher Clarke LJ accepted this as the juridical basis for the fraudulent claims rule: see para 77.

65 In the past it has from time to time been assumed, in cases where any difference between the two rules did not fall for examination, that the fraudulent claims rule was simply a manifestation of the rule of good faith. That assumption was made in passing in the classic direction to the jury of Willes J in *Britton v Royal Insurance Co* (1866) 4 F & F 905, quoted by Lord Sumption JSC at para 7 above, doubtless for the very good reason that the judge was directing the jury as to the law to be applied rather than embarking on a general lecture upon legal theory. A similar assumption then figured in the judgments in both *Orapko v Barclays Insurance Services* [1995]

> LRLR 443 and *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep IR 209. But in none of those cases did any question of difference between the two rules arise. In each of the three there was fraudulent exaggeration of the claim, and indeed in the last two cases also non-disclosure pre-contract. In fact, there are significant differences between the two rules.
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> 66 If it were the case that the pre-contract duty of good faith continues unaltered post-contract, that would no doubt support the contention that the fraudulent claims rule embraces collateral lies deployed in support of a legally sound claim. The collateral lie would be a breach of good faith and, as Lord Sumption JSC says at para 8, the consequence of an unaltered duty of good faith would be that the collateral lie would entitle the insurer to avoid the whole policy, and not simply for the future but ab initio. If that were so, the claim would fall with the policy.
>
> 67 It has, however, been clear for many years, and is now indisputable following *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2003] 1 AC 469, that although some duty of good faith continues post contract, it differs significantly from the pre-contract rule both as to the obligation which it imposes and as to the remedy for breach. There is, for example, no continuing duty on the insured to disclose information which comes to the actual or constructive knowledge of the insured after the cover was issued: see *Cory v Patton* (1872) LR 7 QB 304, *Lishman v Northern Maritime Insurance Co* (1875) LR 10 CP 179, *Niger Co Ltd v Guardian Assurance Co Ltd* (1922) 13 Ll LRep 75 and *New Hampshire Insurance Co v MGN Ltd* [1997] LRLR 24, all confirmed in *The Star Sea*. There is no occasion in the present case to pursue the elusive matter of definitive analysis of the content of the post-contract duty of good faith, for it is enough that it plainly includes the fraudulent claims rule. Secondly, any duty of disclosure which may exist post-contract ends with the commencement of litigation, when the different rules of court take over; they include, significantly, the concept of legal privilege. Thirdly and for present purposes most importantly, as *The Star Sea* makes clear, the remedy for post-contract fraud in the making of the claim is loss of the claim, not avoidance of the whole policy.

[105] The position that appears to have been reached in England is that the fraudulent claims rule is best seen as a common law rule in its own right, though its origins lie in the concept of good faith. Treating the fraudulent claims rule as a manifestation of a wider duty of good faith invites confusion, as the standard required in the context of insurance claims — honesty — is significantly less demanding than the standard of disclosure required before entry into an insurance policy. But there is continuing debate as to whether the fraudulent claims rule should be seen as an implied term of the insurance policy, as suggested by Lord Hobhouse in *The Star Sea* and Lord Sumption SCJ in *Versloot Dredging*, or as a rule of common law that applies to insurance policies, as suggested by Lord Hughes SCJ in *Versloot Dredging*.[36]

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[36] See also *Axa General Insurance Ltd v Gottlieb* [2005] EWCA Civ 112, [2005] 1 All ER (Comm)

[106] As the passages set out above confirm, it is well established that if the insured acts fraudulently in making a claim, the whole of the fraudulent claim is disallowed. Suppose for example that an insured has cover for loss caused by theft. Certain valuable items are stolen. When the insured makes a claim for those items, the insured dishonestly inflates that claim by including additional items that were not stolen. In such a case, the insurer may decline to pay the whole of the claim.[37]

[107] However the English courts have rejected the proposition that the making of a fraudulent claim entitles the insurer to avoid the policy from its inception, with the result that the insurer can recover payments made in respect of earlier properly made claims.[38]

[108] The fraudulent claims rule has not been considered in any detail in New Zealand by this Court or the Supreme Court. It has been considered and applied in a number of first instance New Zealand decisions. Those decisions consistently apply a standard of dishonesty in connection with the making of claims, not the more demanding standard of disclosure that applies before an insurance policy is entered into.[39] They tend to treat the rule as a manifestation of a wider principle of good faith, along the lines of the passage from *Blanshard* set out above at [98]. But in those cases nothing appears to have turned on the nature of the fraudulent claims rule, in particular, whether or not it can be seen as an implied term of the policy. None of those decisions addresses the implications of this analysis for s 40 of the CCLA or its precursor, s 7(1) of the Contractual Remedies Act.

[109] We consider that, to paraphrase Lord Sumption SCJ in *Versloot Dredging*, the fraudulent claims rule can and should be accommodated within the general

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445 at [18]–[20].

37 See Robert Merkin and Chris Nicoll (eds) *Colinvaux's Law of Insurance in New Zealand* (2nd ed, Thompson Reuters, Wellington, 2017) at [7.3.5].

38 *Axa General Insurance Ltd v Gottlieb*, above n 36, at [22]; and *The Star Sea*, above n 34, at [51].

39 See for example *Sampson v Gold Star Insurance Co Ltd* [1980] 2 NZLR 742 (SC); *Action Scaffolding Ltd v AMP Fire & General Insurance Co (NZ) Ltd* (1990) 6 ANZ Insurance Cases 60-970 (HC); *UEB Packaging Ltd v QBE Insurance (International) Ltd* [1996] 2 NZLR 467 (HC) at 479; *Blanshard*, above n 30; *Vero Insurance NZ Ltd v Posa* [2008] 3 NZLR 701 (HC); and *Fussell & McNamara v Broadbase Christchurch Ltd* (2011) 16 ANZ Insurance Cases 61–913.

principles of the law of contract.[40] The rule should be seen as a term implied by law in all contracts of insurance to the effect that:[41]

(a) the insured must act honestly in connection with the making of a claim; and

(b) if the insured fails to do so, and dishonestly makes a claim that is false in some material respect, the whole of the fraudulent claim will be disallowed.

[110] That implied term is of course subject to the express terms of the insurance contract, which may extend, modify or restrict the term that would otherwise be implied.

[111] An implied term to this effect is consistent with longstanding common law principles. It gives effect to the important policy considerations referred to in *The Star Sea* and *Versloot Dredging*.

The insurer's right to cancel in response to a fraudulent claim

[112] It follows from this approach that, as the Judge held in this case, an insurer's entitlement to cancel an insurance policy is governed by the CCLA. Section 40 provides that the CCLA is a code governing cancellation for breach. None of the exceptions set out in s 59 applies. We do not consider that there are any special rules governing cancellation of insurance contracts that operate in parallel to the CCLA. The continuing existence of a separate insurance-specific regime is not

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40 *Versloot Dredging*, above n 32, at [8].

41 Despite the doubts expressed by Lord Hughes SCJ in *Versloot Dredging*, this term would also in our view meet the orthodox test for implication of terms into a particular contract, including the requirements that it is necessary to give the contract business efficacy, and that it is so obvious that it goes without saying: see Jeremy Finn, Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2017) at [6.4.4(a)]; and *Ward Equipment Ltd v Preston* [2017] NZCA 444, [2018] NZCCLR 15 at [93]–[94]. The alternative approach to implication of terms referred to in *Ward Equipment* at [46]–[47] would lead to the same result.

reconcilable with s 40 of the CCLA. A parallel regime of that kind would add nothing but complexity and confusion. The law in relation to express and implied terms, and the provisions of the CCLA in relation to cancellation and its consequences, provide a workable and appropriate framework for determining these issues.

[113] It follows that the entitlement of an insurer to cancel an insurance policy because of the conduct of the insured in connection with a claim turns on:

(a) the terms of the policy — express or implied — governing the making of claims;

(b) whether the insured has breached a relevant term of the policy; and

(c) whether that breach entitles the insurer to cancel the contract. That will be the case if, and only if, the contract expressly provides for a right to cancel in the circumstances which have occurred, or the test for cancellation in s 37 of the CCLA is met.

[114] Section 37 of the CCLA provides as follows:

> **37 Party may cancel contract if induced to enter into it by misrepresentation or if term is or will be breached**
>
> (1) A party to a contract may cancel it if—
>
> (a) the party has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to the contract; or
>
> (b) a term in the contract is breached by another party to the contract; or
>
> (c) it is clear that a term in the contract will be breached by another party to the contract.
>
> (2) If subsection (1)(a), (b), or (c) applies, a party may exercise the right to cancel the contract if, and only if,—
>
> (a) the parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the term is essential to the cancelling party; or
>
> (b) the effect of the misrepresentation or breach of the contract is, or, in the case of an anticipated breach, will be,—

(i) substantially to reduce the benefit of the contract to the cancelling party; or

(ii) substantially to increase the burden of the cancelling party under the contract; or

(iii) in relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.

…

[115] In the absence of an express term providing for cancellation, the insurer will be entitled to cancel if a term (the implied term set out above at [109], or an express term to similar effect) is breached and either that term is essential (s 37(2)(a)) or the consequences of breach are substantial (s 37(2)(b)).

[116] Where the term set out above is implied into a contract of insurance, we consider that it is implicit in that contract that performance of this implied term is essential to the insurer. An insurer would not be willing to contract with an insured who was not willing to promise to act honestly in connection with claims. It would be obvious to both insurer and insured that no insurer would wish to continue to provide cover to an insured who had made a dishonest claim.

[117] It follows that if an insured makes a dishonest claim, the insurer is entitled to damages for any loss caused by that breach, and is entitled to cancel the contract under s 37(1)(b) and (2)(a) of the CCLA. Section 42(1) of the CCLA provides that (subject of course to any express term to different effect) cancellation operates prospectively:

42 Effect of cancellation

(1) When a contract is cancelled, the following provisions apply:

(a) to the extent that the contract remains unperformed at the time of the cancellation, no party is obliged or entitled to perform it further:

(b) to the extent that the contract has been performed at the time of the cancellation, no party is, by reason only of the cancellation, divested of any property transferred or money paid under the contract.

…

[118] So where a fraudulent claim is made, and the insurer cancels the policy:

(a) The policy is terminated with effect from the date of cancellation;

(b) The insurer is not obliged to pay the fraudulent claim, by virtue of the implied term set out at [109] above; but

(c) The cancellation does not affect other claims made under the policy before the date of cancellation. If an earlier claim has been paid, cancellation does not affect the right of the insured to retain that payment. If the claim has not been paid, it must be settled in accordance with the terms of the policy in the normal way.

[119] We explored with counsel whether it might be possible to imply a more far-reaching term that requires an insured to provide accurate and complete information to support a claim. We do not consider that a broader term of this kind can be implied into all insurance contracts. That would go far beyond the long-established common law fraudulent claims rule. It is neither necessary, nor obvious.[42] If an insurer wishes to contract on more stringent terms, they should do so expressly in the interests of transparency: especially in the context of consumer insurance products such as the income protection policy in this case. Our view that the appropriate implied term does not extend beyond requiring honesty is reinforced by the Fair Insurance Code 2020 issued by the Insurance Council of New Zealand. That Code advises insureds that: "You should act honestly when making a claim".[43] It would be difficult for a New Zealand insurer to argue that a more onerous obligation should be implied into all insurance contracts, in circumstances where their jointly issued public-facing statement of an insured's obligations did not go that far.

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[42] In particular, such a term is not necessary to enable an insurer to decline a claim based on inaccurate information. In most cases where an insured provides honest but incorrect information in a claim, and that information is material to the insured's entitlement under the policy, the insurer will be able to recover any overpayment in a restitution claim. A broader implied term, coupled with a claim for breach of that term, is not necessary in order for the insurer to have a right of recovery in this scenario.

[43] Fair Insurance Code 2020 at 11.

[120] Thus we proceed on the basis that Asteron was entitled to cancel the Policy under the CCLA if, and only if, Mr Taylor breached the implied essential term that the insured must act honestly in connection with the making of a claim. Such a cancellation would operate prospectively. It would also enable relief to be sought under s 43 of the CCLA.

Was dishonesty in issue in these proceedings?

[121] We return to Mr Beck's submission that Mr Taylor's honesty was not in issue in these proceedings, and the Judge should not have made findings on that point.

Did Asteron's pleading allege dishonesty?

[122] As noted above, Asteron pleaded that Mr Taylor owed Asteron a duty of utmost good faith, and had breached that duty. This is the language used in *Blanshard* and other New Zealand insurance cases when applying the fraudulent claims rule.[44] The pleading needs to be read against the backdrop of this line of authorities. It would have been obvious to an experienced lawyer advising Mr Taylor that this was an allegation of dishonesty. It would have been preferable for the allegation of dishonesty to be pleaded more explicitly, but we do not think there was any room for doubt in practice.

[123] Nor were Mr Taylor and Mr Beck under any misapprehension on this score. In his reply brief of evidence, filed in advance of the trial, Mr Taylor said:

> Asteron is claiming that I deliberately misled them regarding the work I was doing while on claim. I completely reject the insinuation that I have been dishonest in my dealings with Asteron. I provided the information requested from me to the best of my recollection, and answered all the questions asked in follow-up phone calls.

[124] And as the Judge recorded:[45]

> … in opening Mr Beck for the plaintiff advised that there was a very stark difference in the positions of the parties, as Asteron was contending that Mr Taylor had acted fraudulently, and Mr Taylor contended that Asteron was failing in its duties in a highly inappropriate way.

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44 See [108] above and n 39.

45 High Court judgment, above n 1, at [3].

[125] We therefore proceed on the basis that Asteron's pleading was sufficient to put in issue the honesty of Mr Taylor's statements in the initial claim form and progress reports about the extent to which he was able to work. That was an issue that the Judge was required to decide.

Was the allegation of dishonesty adequately put to Mr Taylor?

[126] It is also convenient to deal at this point with Mr Beck's submission that the issue of dishonesty was never properly put to Mr Taylor. Section 92 of the Evidence Act required this serious and legally significant allegation to be put squarely to Mr Taylor, to give him an opportunity to answer it. Section 92 provides:

> **92 Cross-examination duties**
>
> (1) In any proceeding, a party must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters.
>
> (2) If a party fails to comply with this section, the Judge may—
>
> (a) grant permission for the witness to be recalled and questioned about the contradictory evidence; or
>
> (b) admit the contradictory evidence on the basis that the weight to be given to it may be affected by the fact that the witness, who may have been able to explain the contradiction, was not questioned about the evidence; or
>
> (c) exclude the contradictory evidence; or
>
> (d) make any other order that the Judge considers just.

[127] Where a witness has not been given an adequate opportunity to provide an explanation of their conduct, it is not appropriate to draw a conclusion of dishonesty.[46]

[128] Mr Taylor was cross-examined extensively about the inaccuracies in the initial claim form and in his progress reports. Before that cross-examination took place, he knew that Asteron's case was that he had dishonestly failed to disclose the extent of

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[46] *Longhurst v Ministry of Social Development* [2019] NZHC 1496 at [63]–[64]; and *Blair v R* [2012] NZCA 62 at [42].

the work he was undertaking. He had every opportunity to provide explanations for the omissions in the claim documents in his evidence in chief, in cross-examination, and (if Mr Beck thought that Mr Taylor was in a position to provide an explanation) in re-examination. It would have been preferable for Ms Meechan to squarely put to Mr Taylor, in relation to each claim document, the proposition that he knew that he had done work that was not disclosed, and knew that the claim form was false. But we do not consider that there is any unfairness in the Judge's approach to the evidence, or in his findings that there was an irresistible inference that Mr Taylor knew that the statements he made that he had not done any work in most of the relevant periods simply were not true.

[129] The findings of dishonesty made by the Judge were a necessary step in determining Asteron's counterclaim. Mr Taylor knew that Asteron was alleging that he had acted dishonestly by failing to make full disclosure in the claim forms of work he had done. He had a fair opportunity to respond to that allegation and provide explanations for the omissions. It was open to the Judge to make findings of dishonesty.

Breach of Mr Taylor's obligation to act honestly in connection with claims

[130] We have already concluded that the Judge was right to find that Mr Taylor was working substantially more than 10 hours per week from July 2010 onwards. He disclosed even fewer hours than this in the claim forms. They were plainly false. Given the extent and frequency of the work done by Mr Taylor, the inference that he knew the statements in the claim forms were false is irresistible.

[131] Mr Beck did not attempt to persuade us that the claim forms were accurate. The primary explanation he suggested for the inaccuracies in the claim forms was that Mr Taylor was entitled to engage in limited activities and to spend up to 10 hours per week in his usual occupation. Mr Taylor's view, according to Mr Beck, was that he was working within those constraints.

[132] The difficulty with this submission is that the claim forms did not ask for disclosure of work done in excess of 10 hours per week. They sought disclosure of all work done, so that Asteron could assess whether the 10-hour threshold for Total Disability was exceeded. In many of the periods for which claim forms were filed Mr Taylor failed to disclose that he had done any work, when plainly he had. In other periods he engaged in work well in excess of what was disclosed. Mr Taylor's view about what he was entitled to do was simply irrelevant so far as his disclosure obligation was concerned.

[133] Mr Beck also suggested to us that claims managers at Asteron were not concerned about Mr Taylor's limited activities. But the lack of concern they expressed was of course based on the incomplete and misleading information provided in the claim forms. Mr Beck did not suggest that Mr Taylor had been given, and had relied on, indications from claims managers that certain types of work need not be disclosed. There was no evidence to support any suggestion along those lines. Mr Beck expressly disclaimed any argument founded on an estoppel.

[134] We consider that the Judge was entitled to find, as he did, that Mr Taylor acted dishonestly in connection with all the claim forms other than the initial claim form. It follows that Mr Taylor breached the implied essential term that he would act honestly in connection with claims. This breach was pleaded and argued by Asteron in the language of duty of utmost good faith that is found in cases such as *Blanshard*. Those formulations amount to the same thing as a matter of substance, as we explained above.[47]

[135] That breach entitled Asteron to claim damages. Because the term was impliedly essential, Asteron was also entitled to cancel the Policy under s 37 of the CCLA. Did Asteron do so?

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47 See [122] above.

Cancellation

The issue

[136] Mr Beck submitted that Asteron had never validly cancelled the Policy. Section 41 of the CCLA generally requires a cancelling party to give notice of that cancellation before it is effective. Section 41 provides:

> **41 When cancellation may take effect**
>
> (1) The cancellation of a contract by a party does not take effect—
>
> (a) before the time at which the cancellation is made known to the other party; or
>
> (b) before the time at which the party cancelling the contract shows, by some clear means that is reasonable in the circumstances, an intention to cancel the contract, if—
>
> (i) it is not reasonably practicable for the cancelling party to communicate with the other party; or
>
> (ii) the other party cannot reasonably expect to receive notice of the cancellation because of that other party's conduct in relation to the contract.
>
> (2) The cancellation may be made known by words or by conduct showing an intention to cancel, or both. It is not necessary to use any particular form of words, so long as the intention to cancel is made known.

[137] Asteron never wrote to Mr Taylor cancelling the Policy. The issue at trial was whether Asteron had by some other means conveyed its intention to cancel.

[138] The Judge considered that the statement in Mr Strong's brief of evidence, referred to at [47] above, could be interpreted as notice of cancellation. That, Mr Beck submitted, cannot be right. Mr Strong accepted that his evidence was not given on behalf of Asteron. So statements in his evidence could not be notice by Asteron. And in his evidence Mr Strong claimed that the Policy had been cancelled on 11 April 2016: that is inconsistent with Mr Strong giving notice of cancellation in the brief filed in 2018. So, Mr Beck said, Asteron had failed to establish the requirements for cancellation under the CCLA, and its counterclaim ought to have been dismissed.

Analysis

[139] We consider that Asteron's pleading dated 11 April 2016 was sufficient notice of cancellation for the purposes of s 41 of the CCLA. Section 41 requires the cancelling party to show an intention to cancel. It is not necessary to use any particular form of words, so long as the intention to cancel is made known.

[140] In [17] of its pleading Asteron expressly said that it was entitled to cancel the Policy. At [18] Asteron pleaded that it was not obliged to pay any further benefits to Mr Taylor, and was entitled to recover the benefits paid to date. We read this pleading as a clear indication by Asteron that it regarded the contract as at an end. Thus Asteron's pleading was in our view an effective communication of cancellation. It is therefore unnecessary to consider whether the brief of evidence filed by Mr Strong was capable of being treated as notice of cancellation by Asteron, though we see some force in Mr Beck's criticisms of that proposition.

[141] Hence the contract was validly cancelled in April 2016. Asteron had no continuing liability under the Policy from that point onwards. And, as the Judge said, it was entitled to damages and could seek relief under s 43 of the CCLA.

What is Asteron entitled to recover?

The issues

[142] Mr Taylor submits that Asteron is not entitled to recover amounts paid in respect of the initial period, as the Judge did not find that the initial claim form contained false statements.

[143] Mr Taylor also submits that the Judge erred in rejecting his change of position defence.

Analysis

[144] It follows from the findings the Judge made in relation to breach by Mr Taylor that Asteron would be entitled to recover, as damages, the amounts that it paid

Mr Taylor as a result of his dishonest statements. On this basis Asteron could recover all the amounts it paid other than the $51,835.64 paid in respect of the initial period.

[145] Cancellation of a contract under the CCLA operates prospectively, not retrospectively, as explained above. So it does not follow from the fact of cancellation that Asteron is entitled to recover any payments made before April 2016.

[146] We do not consider that Mr Taylor's dishonesty in respect of subsequent periods means that Asteron is entitled to recover amounts paid in respect of the initial period, whether as damages or under s 43. His dishonesty in respect of those later periods, and Asteron's cancellation in response to that dishonesty, do not impugn in any way the validity of the payments made in that earlier period. We agree with the Judge that where an insured acts dishonestly in connection with a claim, the insurer is entitled to refuse to pay the whole of that claim, including any component of the claim that could properly have been made. The implied term we have identified at [109] above provides for this consequence. But it does not follow that earlier claims that were properly made and properly paid can be unravelled. Our view that fraudulent claims do not have that effect as a matter of New Zealand contract law is consistent with the position reached by the English courts in relation to the consequences of a fraudulent claim as a matter of common law: see [107] above.

[147] It follows from the Judge's findings about Mr Taylor's earnings in 2010 that Mr Taylor was not in fact entitled to any benefit under the Policy during the initial period. The payments by Asteron were made under the influence of a mistake. In such circumstances an insurer will generally be able to recover the mistaken payments in a restitution claim, subject to the defences that normally apply to such a claim. However Asteron did not plead a claim for recovery of overpayments on the basis that Mr Taylor's earnings disqualified him from receiving benefits under the Policy. And as noted above, Asteron did not seek to uphold the Judge's award on that basis in this Court by filing a memorandum of intention to support on other grounds.

[148] Asteron says it only learned of the extent of Mr Taylor's earnings in late 2018, a few months before the trial, when the correct financial statements were finally discovered. Asteron could have sought leave to amend its pleading to add a restitution

cause of action, in the alternative to the cause of action based on the fraudulent claims rule. The case for granting leave would have been compelling in circumstances where late discovery had been provided of a dramatically different set of financial statements for Mr Taylor's business. Ms Meechan suggested that seeking leave to amend would have created a risk of the trial being adjourned. That is possible, though the case for an adjournment on this basis seems rather weak. Asteron might have faced potential limitation issues if it had sought to amend its counterclaim in late 2018 or early 2019 to add a restitution claim in relation to payments made in 2010, unless it could argue that the running of time was postponed under s 28 of the Limitation Act 1950. Be that as it may, Asteron chose to refrain from seeking to amend its pleading, and proceeded to trial. It cannot now complain that it is unable to pursue a claim that it chose not to seek to pursue.

[149] We can deal briefly with Mr Taylor's change of position defence in relation to the period from July 2010 onwards. We agree with the Judge that the basic ingredient of good faith was absent in respect of this period.[48] Moreover the evidence to support the argument that Mr Taylor relied on the sums received from Asteron when making decisions about lifestyle expenditure during this period was wholly inadequate. Without evidence about Mr Taylor's overall level of income and expenditure it was impossible for Mr Taylor to establish the materiality of the sums received from Asteron to the spending choices he made. He was in receipt of a substantial income throughout the period, in addition to the sums received from Asteron. He did not establish that his financial position was substantially different with the Asteron payments than it would have been without the Asteron payments. Nor did he establish that his spending choices were likely to have been different in the latter scenario. The Judge was right to find that the change of position defence was not made out.

Application to adduce further evidence on appeal

[150] For completeness, we address Mr Taylor's application for leave to adduce an affidavit from his general practitioner, Dr Neylon. The affidavit attaches the letter

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[48] Though not, as explained above, in respect of the period prior to July 2010. If Asteron had pleaded a restitution claim based on mistake in relation to Mr Taylor's income during this period, a more focused change of position defence in respect of that period might have raised different issues that (absent such a claim) were not canvassed before the High Court or before this Court.

from Dr Neylon dated 30 October 2016 referred to at [63] above and an updated report on Mr Taylor's condition prepared in July 2019. The affidavit records that Dr Neylon had a consultation with Mr Taylor on 21 February 2020. She says that his condition has not improved. He continues to suffer from chronic pain and is on a high dose of methadone. She does not expect any marked change in his condition in the foreseeable future.

[151] Mr Beck described this evidence as updating evidence. He said that its purpose was "so that the Court can have current information regarding the status of the appellant's health". Mr Beck expressly disclaimed any suggestion that the purpose of adducing this evidence was to support the argument that Mr Taylor was Totally Disabled in the period prior to the High Court judgment.

[152] Asteron opposed admission of this evidence. Ms Meechan said that to the extent that Dr Neylon addressed issues that were live before the High Court the evidence was not fresh: she could have been called to give that evidence at trial. And it would be seriously unfair for such evidence to be admitted on appeal, without any opportunity to cross-examine or to call evidence in response.

[153] We agree with Ms Meechan that in so far as Dr Neylon's evidence relates to Mr Taylor's medical condition and ability to work in the period up to April 2016, it should not be received on appeal. It is not fresh. There would be unfair prejudice to Asteron if it were to be admitted at this stage. But as we noted above, Mr Beck disclaimed any reliance on the evidence for that purpose.

[154] We have concluded that the Policy was effectively cancelled in April 2016. So no question of continuing entitlement under the Policy arises. In so far as the affidavit provides updating evidence to support a claim to benefits under the Policy after April 2016, it is irrelevant as the Policy was no longer on foot. The issue of whether Mr Taylor was disabled after that date does not arise.

[155] In these circumstances we decline leave to adduce the affidavit on appeal. It is not relevant to any issue that we need to decide.

Interest

[156] We can deal briefly with the appeal in relation to the interest awarded to Asteron. Mr Beck accepts that s 87 of the Judicature Act applies to Asteron's counterclaim. But he says that the Interest on Money Claims Act 2016 was designed to provide a more accurate way of compensating for the use of money, based on the actual cost of money during the relevant period. It would be more just to use the figure derived by applying the Interest on Money Claims Act. The difference between the figures derived using the two methodologies — $18,247.03 — indicates, he submitted, that the "blunt instrument" of Judicature Act interest results in overcompensation. There was no basis for the Judge's statement that interest at five per cent did not involve overcompensation here. Mr Beck also suggested that the delays in resolving the case, which he attributed to Asteron's pursuit of third-party discovery, had led to a substantial increase in the interest awarded. Asteron's responsibility for that delay, he said, made it appropriate for interest to be reduced accordingly.

[157] Ms Meechan emphasised that it was common ground that s 87 of the Judicature Act applied in this case. There was no reason to adopt a different approach to interest. The time taken to prepare for trial was justifiable, and was necessitated by Mr Taylor's concealment of the work he did and the income he derived during the claims period. Asteron had not claimed the higher rate of interest (8.5 per cent per annum) that applied under the Judicature Act for part of the relevant period. The approach adopted by Asteron of claiming interest at five per cent per annum for the entire period produced a fair result.

[158] We agree with Ms Meechan that Mr Taylor has not established that the application of the Judicature Act methodology gives rise to any material unfairness in this case. It is a blunt instrument. But it strikes a reasonably fair balance between the parties in this case. In particular:

(a) There was no unjustifiable delay in bringing this matter to trial that would justify reducing the period for which interest is awarded. Asteron was kept out of its money for the relevant period, and

Mr Taylor had the benefit of use of that money for that period, as a result of his dishonesty. Asteron is entitled to receive interest for the whole of the period from the making of each dishonestly procured payment until the date of judgment.

(b) Having regard to the concession already made by Asteron in relation to the applicable interest rate, a more fine-grained inquiry into the rate of interest to be paid in this case is not justified.

[159] Mr Beck also complained that no credit had been given for premiums that Mr Taylor continued to pay while he was receiving payments under the Policy, despite provision in the Policy for a "Waiver of Premium Benefit" under which he was entitled to a waiver or refund of premiums paid while on claim. This issue was not raised in the pleadings. It appears that Mr Taylor continued to pay premiums while he was receiving a disability benefit under the Policy, and those premiums were then refunded to him together with the disability benefit payments. The schedule attached to Asteron's counterclaim refers to premium refund payments being made throughout the relevant period. If that was the position, then no credit would be due to Mr Taylor: premiums were payable by him as the Policy remained on foot; refunds were paid while he was on claim; and for the period in respect of which fraudulent claims were made Asteron was entitled to recover all payments made under the Policy including premium refunds.

[160] Mr Beck's submission that premiums continued to be paid for a period after cancellation of the Policy in April 2016 was not supported by any evidence before us.

[161] We are not satisfied that any premium payments were made by Mr Taylor in respect of which a credit should have been provided when calculating interest.

Costs issues

[162] Mr Beck raised a number of issues about the costs award in the High Court.

[163] First, he complained that the discovery exercise had been "enormous, and completely out of proportion to the amount at stake". He contended that Asteron had "run riot" with discovery in this case.

[164] We consider that the Judge was well placed to assess the proportionality of the discovery exercise and associated costs in this case. Mr Beck has not identified any reason for us to take a view that differs from that of the Judge. We add that the nature of the claim made by Mr Taylor, and Asteron's defence and counterclaim, made a detailed examination of Mr Taylor's involvement in the day to day operation of his business inevitable. Discovery of the extensive documentation evidencing his involvement in the business over an extended period enabled Asteron to demonstrate that Mr Taylor's claims were false, and that he had acted dishonestly. That documentation was important to the determination of the matters in issue below. The Judge's award of costs for discovery on a 2C basis in these circumstances is not surprising.

[165] Second, Mr Beck submitted that the Judge erred in awarding the full amount of disbursements claimed in respect of two of the expert witnesses: Mr Hussey, who gave expert accounting evidence, and Mr Roigard, a private investigator, who gave evidence about telephone calls made to and from numbers associated with Mr Taylor.

[166] For the reasons explained above, we do not accept Mr Beck's submission that Mr Taylor's income was not in issue. It was relevant to his claim, and to his change of position defence to Asteron's counterclaim. The time required to investigate these issues was significantly increased by Mr Taylor's initial provision of irrelevant financial statements for the Company, and of falsified financial statements for his insurance broking business. Mr Taylor cannot reasonably complain about meeting the cost to Asteron of Mr Hussey's time spent ascertaining the correct position, against that backdrop.

[167] Mr Roigard's evidence was described by the Judge as being "of only peripheral relevance".[49] But, the Judge said, the amount claimed was not high, it was unsurprising that evidence was called about the frequency of Mr Taylor's telephone

[49] Interests/costs judgment, above n 2, at [15(b)].

calls, and the disbursement was reasonably necessary for the conduct of the proceedings. We agree with the Judge that evidence about Mr Taylor's call activity was relevant to the issue of his continuing involvement in the business. We are not persuaded that the Judge erred in awarding this disbursement.

[168] Third, Mr Beck says that the Judge erred in awarding Asteron the costs it paid IAG in connection with the third party discovery that Asteron sought from IAG. Other insurers from whom third party discovery was obtained had not incurred external legal fees. Ms Meechan responded that the third party discovery obtained from IAG was more extensive than the discovery obtained from other insurers. Other insurers had used in-house lawyers to provide their more modest discovery. IAG had reasonably used external lawyers, and Asteron had met the cost of their doing so.

[169] We consider that the legal costs incurred by IAG and paid by Asteron were properly recoverable as a disbursement, unless they were shown to be so plainly unnecessary or excessive that it was not reasonable for Asteron to have met them. Mr Beck's criticisms did not persuade us that that was the case.

[170] Fourth, Mr Beck says that Asteron claimed a scheduling fee of $1,600 in respect of an interlocutory application. However under the High Court Fees Regulations 2013 there is no scheduling fee for an interlocutory application. Asteron says it paid the relevant fee to the Court, so should be able to recover it from Mr Taylor.

[171] This issue was not addressed by the Judge. If Asteron did pay a fee that was not properly payable, it should be able to recover it from the High Court. It is possible that the fee was misdescribed in Asteron's costs schedule, and that the amount paid related to some other properly payable fee. But Asteron did not provide any further information about this item, and we cannot simply assume that a claimed payment is a justifiable disbursement on a basis other than that identified by the party claiming it. We therefore disallow this claimed disbursement.

[172] Fifth, Mr Beck says that Asteron claimed, and was awarded, filing fees for its original statement of defence. Mr Beck submitted that r 7.77(8) of the High Court Rules provides that a party filing an amended pleading must bear all the costs of

the original pleading. He says the Judge did not address this issue, and the claim is not a legitimate one.

[173] Rule 7.77(8) provides that a party filing an amended pleading must bear the costs of the original pleading "unless the court otherwise orders". The rule establishes a default position which may be departed from where appropriate. In this case we consider that it was reasonable for Asteron to file an initial defence to Mr Taylor's claim, and then (after investigating the issues in more depth) file an amended defence and a counterclaim seeking recovery of payments previously made. The High Court awarded costs for the original pleading, in effect applying the proviso to r 7.77(8). We consider that was an appropriate approach in the circumstances of this case.

[174] Sixth, Mr Beck objects to the inclusion in the costs award following trial of costs in respect of two interlocutory applications where the judicial officers dealing with the application did not address the question of costs at the time the application was heard and determined. Mr Beck is right to say that costs should be fixed at the time an interlocutory application is determined, in the absence of special reasons to the contrary.[50] But in circumstances where the judicial officers who determined the applications did not make an award of costs, it was open to the trial Judge to do so.[51] One of the practical rationales for the rule requiring costs to be dealt with at the time of the interlocutory application was well illustrated by the argument before us on this issue: counsel had diametrically opposed views about the relative success their clients had enjoyed in respect of these applications. It appears from the judgments delivered in relation to the two applications that it was reasonable for Asteron to make the applications, and Asteron enjoyed a substantial measure of success, though not complete or unqualified success.[52] In those circumstances Mr Beck has not persuaded us that the Judge was wrong to award costs to Asteron in respect of these applications.

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50 High Court Rules 2016, r 14.8.
51 Hgh Court Rules, r 14.9.
52 *Taylor v Asteron Life Ltd* [2017] NZHC 871; and *Taylor v Asteron Life Ltd* [2018] NZHC 2939.

[175] Seventh, Mr Beck submitted that the Judge had erred in awarding increased costs under r 14.6(3)(b) of the High Court Rules on the basis of his findings that Mr Taylor had deliberately made false claims, had given evidence that was unreliable, and had not had his income affected by his incapacity. Increased costs should be awarded only where the unreasonable conduct relates to the proceedings, and must occur after those proceedings were commenced. In this case, Mr Beck submitted, the conduct of the proceeding could not be described as unreasonable: Mr Taylor had effectively been penalised because the Judge did not accept his evidence.

[176] Ms Meechan responded that the modest uplift in costs awarded by the Judge was appropriate and ought not to be disturbed. The uplift was not based on the Judge's view about Mr Taylor's behaviour while the claim was live, but rather the way in which he conducted the litigation.

[177] We accept Ms Meechan's submission. The uplift was modest. It was awarded because the Judge considered that the costs of the litigation were increased by unmeritorious arguments which Mr Taylor elected to run at trial. The Judge found that he must have known that his claim lacked merit. By pursuing the claim he forced Asteron to undertake an extensive forensic exercise to demonstrate that lack of merit. He discovered false sets of accounts and called a witness to provide an explanation in relation to those accounts that was shown to be incorrect. Asteron was required to call expert accounting evidence to address these matters.[53] These were proper grounds for an award of increased costs.

[178] Eighth, Mr Beck submitted that the Court should have ordered reduced costs because Asteron contributed unnecessarily to the time and expense involved in the proceeding by taking or pursuing unnecessary steps.[54] Mr Beck submitted that Asteron took a number of steps, in particular in relation to discovery and third party discovery, that significantly increased the total time and expense of the proceeding. He suggested a 25 per cent reduction in costs would be appropriate.

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53 Interest/costs judgment, above n 2, at [10].
54 High Court Rules, r 14.7.

[179] Ms Meechan responded that the defence and counterclaim were conducted professionally and appropriately. Asteron had a high bar to clear in order to prove fraud against Mr Taylor. It was only able to do so through extensive discovery, and analysis of the information provided. The award of costs was reasonable and appropriate.

[180] We accept Ms Meechan's submission on this issue. Asteron set out to establish fraud, in circumstances where all the relevant information was in the possession of Mr Taylor or third parties. In order to do so Asteron reasonably sought extensive discovery and third party discovery, subpoenaed witnesses, and called a number of expert witnesses. The same information asymmetry that underpins the fraudulent claims rule means that it will typically be difficult and costly for an insurer to establish that the rule has been breached. Asteron took steps to make out its defence and counterclaim that were well justified in light of that information asymmetry. There is no justification for a reduced award of costs.

[181] In summary, we dismiss all of Mr Taylor's challenges to the costs awarded in the High Court other than his objection to inclusion in the disbursements claimed of a scheduling fee of $1,600. The costs awarded are reduced by $1,600.

Costs on appeal

[182] Mr Taylor's appeal in respect of his own claim was unsuccessful. He enjoyed a modest measure of success in his appeal concerning Asteron's counterclaim. He was largely unsuccessful, with one minor exception, in relation to the numerous issues he raised concerning interest and costs.

[183] Overall we consider that Asteron was the successful party, and is entitled to an award of costs. We do not consider that the modest success enjoyed by Mr Taylor justifies a reduction in that award.

[184] We award costs to Asteron for a standard appeal on a band A basis, with usual disbursements. We certify for two counsel.

Result

[185] The application for leave to adduce further evidence on appeal is declined.

[186] The appeal is allowed to the extent set out in [187] and [188] below. It is otherwise dismissed.

[187] The judgment entered for Asteron on its counterclaim is reduced by $51,835.64. This reduction in the judgment sum will have consequences for the interest component of the judgment: if the parties cannot reach agreement on that issue, we reserve leave to either party to file a memorandum seeking determination by this Court of the necessary adjustments to the interest component of the judgment.

[188] The costs award to Asteron under the judgment is reduced by $1,600.

[189] Mr Taylor must pay costs to Asteron for a standard appeal on a band A basis, with usual disbursements. We certify for two counsel.

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