Lies, damned lies: Abuse of process and the dishonest litigant[1]

The Rt Hon Lord Reed

26 October 2012

One of the problems which a lawyer in civil practice is likely to encounter is the dishonest client. There are clients whose case would involve revealing previous dishonesty: for example, the builder who wants to recover lost profits on a contract for carrying out grant-aided works and whose records reveal that the prices on which the grant claims were based were different from the prices actually charged, or the personal injury claimant who wants to recover for the loss of undeclared earnings and who was fraudulently claiming benefits. Then there are clients who resort to dishonesty outside the court in order to win their case. I remember, from my early days at the Bar, a very senior colleague relating his appearance before a licensing board. The hearing went with so little difficulty and was over so quickly that he felt he had to explain to the client that he would nevertheless have to charge a day's fee. "Dinnae you worry, son", said the client, "you were the cheapest man there". Then there are clients who set out to deceive the court. Some dishonesty is relatively venial. George Emslie QC is said to have begun his cross-examination of the Duchess of Argyll in the Argyll divorce case[2] by challenging the answer she had given at the beginning of her evidence, when asked what her age was, concluding "So that is the first lie". Other dishonesty is more serious. Another example from my early days at the Bar was an intellectual property action in which the defender claimed to have designed an anchor which was remarkably similar to one which the pursuers had already patented.[3] When the defender was cross-examined, he was eventually compelled to admit that, contrary to his earlier evidence that he had graduated in engineering from Aberdeen University, he had in fact never

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[1] This lecture was delivered at the University of Edinburgh on 26 October 2012 as the fifth Annual Lecture at the Centre for Commercial Law.
[2] *Duke of Argyll v Duchess of Argyll* 1962 SC (HL) 88.
[3] *Brupart Ltd v Hoseason Smith,* unreported, 1984. An account appears in the *Glasgow Herald*, 31 August 1984.

been a student there and had no qualifications in engineering. He collapsed (or at least purported to collapse) in the witness box and completed giving his evidence from hospital. The judge discharged his legal aid certificate, and he was sequestrated.[4]

There are different ways in which the law addresses the problem of dishonest litigants. Dishonesty in the conduct of litigation falls within the ambit of the criminal law, as the convictions of Jeffrey Archer, Jonathan Aitken and Tommy Sheridan demonstrated. When the proof of a case discloses antecedent dishonesty, the court may refer the case to the prosecuting authorities: a possibility which I sometimes drew to the attention of counsel in commercial cases, and which proved to be an effective technique for achieving a speedy resolution of disputes. The court can also use its power to punish contempt, or it can penalise a party in relation to expenses or in its award of interest.[5] Where a claim is inherently tainted by crime or other illegality, the court may withhold its assistance on the basis of principles of substantive law.

What I propose to discuss is how the courts deal with litigants who set out to deceive the court: who produce forged documents, or conceal the existence of relevant documents, or give untruthful evidence. I am not concerned with cases where the court only concludes that there has been dishonesty in its findings after proof. A finding at that stage that a document was forged or suppressed, or that a party told lies in his evidence, is part of the court's ordinary adjudicative function. The judge may decide to punish the party for contempt, or refer the case to the prosecuting authorities, but he or she will nevertheless have adjudicated on the dispute. Where on the other hand it is established prior to proof, possibly as the result of an admission or a preliminary proof, or where it becomes apparent during the proof, that one of the parties is seeking to subvert the process of the court by fraudulent means, the court has to decide whether the case should be allowed to proceed any further. It has essentially two choices. It can decide to carry on notwithstanding the party's efforts to subvert the court process, and do the best it can in the circumstances, or it can decide to dismiss the party's case there and then.

[4] I have been told that he was also imprisoned for contempt of court, but have been unable to verify that.
[5] *Summers v Fairclough Homes Ltd* [2012] 1 WLR 2004.

There is relatively little case law on this subject in Scotland. There is a larger body of case law in England. The English cases however reveal more than one approach. The recent English cases also reflect the influence of the Civil Procedure Rules, and the overriding objective under those rules of dealing with cases justly, in a way which is proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party. They are for that reason of interest in Scotland as we await the implementation of the reforms recommended by the *Report of the Scottish Civil Courts Review*, chaired by Lord Gill. Those recommendations include the adoption of a guiding principle which embodies the fundamental purpose of the rules of court and of the underlying system of procedure. That guiding principle is to provide parties with a just resolution of their dispute in accordance with their substantive rights, in a fair manner with due regard to economy, proportionality and the efficient use of the resources of the parties and of the court.[6] That is evidently similar to the overriding objective of the CPR, but it is described as a "guiding" principle in order to make it clear that it does not override the express terms of the rules.

One can discern in the case law at least four approaches to the problem of dishonest litigants. One is that the court's power to punish contempt encompasses the power to dismiss the action. A second is that the litigant who resorts to forgery, perjury and the suppression of evidence in order to prevent the court from finding out the truth ipso facto forfeits his right to have the court hear his case. A third is that the court should adjudicate upon the issues between the parties as long as the dishonest litigant's conduct has not rendered it impossible to hold a fair trial. A fourth approach brings to bear the overriding objective of the CPR. It holds that, since a litigant who resorts to forgery, perjury and the like imposes an unnecessary burden on court resources, which may be at least as great as that imposed by a litigant who fails to comply with the rules of court or breaches the court's orders, he too may have his case struck out. On this approach, the court should proceed only as long as it is in accordance with the overriding

[6] *Report of the Scottish Civil Courts Review* (2009), Ch 9, paras 11 and 13.

objective, and therefore only as long as it remains possible to deal with the case justly and without the investment of disproportionate resources.

The first reported Scottish case in which the problem appears to have been considered is *Levison v Jewish Chronicle Ltd,*[7] a defamation action where the issue was whether the pursuer was a Rabbi, as he claimed. He lodged in process documents establishing his credentials as a Rabbi, but the defenders alleged that they were fabrications. His solicitor then borrowed the productions and put them in the pursuer's hands. When they were returned to the court, the alleged forgeries had disappeared. The pursuer said that he had borrowed the productions in order to use them in support of an application for employment as a "Reverend", as he put it, and the critical documents had become separated from the others because he had not wanted the persons wishing to appoint a Reverend to know that he was actually a Rabbi. Lord Ashmore found the pursuer in contempt of court. He also found that the absence of the documents would prejudice the defenders in the conduct of the defence. Stating that he doubted the appropriateness of a fine or imprisonment, he assoilzied the defenders and found them entitled to their expenses, and observed[8] that that disposal would not only be just to them, but would sufficiently penalise the pursuer for his unjustifiable and improper interference with the ordinary course of justice to the serious prejudice of his opponents in the litigation. One does not find there a clear choice between the contempt approach and the fair trial approach: Lord Ashmore was able, as it were, to kill both birds with one stone.

The only other reported Scottish case I know of in which the problem has been considered is *Shetland Sea Farms Ltd v Assuranceforeningen Skuld,* decided in 2001.[9] This was a claim by salmon farmers for compensation for losses caused by the grounding of an oil tanker, the *Braer*. Lord Gill found that the case was based on false averments of fact supported by fabricated

[7] 1924 SLT 755.
[8] At p 760.
[9] 2004 SLT 30.

documents. He said[10] that the court possessed an inherent power to strike out an action which amounted to an abuse of process. In doing so it protected the integrity of its procedures by preventing one party from putting the other at an unfair disadvantage and compromising the just and proper conduct of the proceedings. In support of this approach Lord Gill cited two influential articles discussing the inherent power of the court, and abuse of process, as those concepts had developed in England.[11] There were many ways, he said, in which a litigant could abuse the process of the court: for example, by pursuing a claim or presenting a defence in bad faith and with no genuine belief in its merits, or by fraudulent means, or for an improper ulterior motive. A number of examples were given from the English case law, besides the Scottish case of *Levison.*

This was an innovative judgment. It adopted a term, abuse of process, which as far as I know had never previously appeared in a Scottish judgment, but which was well established in England and Wales, and in many other jurisdictions. It also employed another term, inherent power or jurisdiction, which had not previously been used in this context in Scotland, although again its use in that way was familiar in England. Before going any further, it may be helpful to say a word about this terminology.

The power to dismiss a case summarily as an abuse of process was first employed in England in 1875, in a case brought by Thomas Castro, the Tichborne claimant. After he had been held to be an impostor and imprisoned for perjury, he sought to challenge his conviction by a civil procedure which required the consent of the Attorney General. When the clerk declined to seal the writ, as the Attorney General had not given his consent, Castro sued the clerk for half a million pounds in damages. The defendant immediately applied to the Court of Exchequer to have the action stayed. After consulting all the Barons, the court decided that it had the power to dismiss the action summarily. Baron Bramwell said that the action was

[10] At paras 143-152.
[11] Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems* 23; Jolowicz, "Abuse of the Process of the Court: Handle with Care" (1990) 43 *Current Legal Problems* 77.

absolutely groundless, and was one in which the court, in the exercise of its discretion, ought to stop the proceedings as being an abuse of the process of the court.[12]

That decision was followed by the Queen's Bench Division the following year in the case of Colonel William Dawkins, who brought repeated actions, all of which raised the same point, against the officers who had been involved in his being deprived of his commission following a court-martial. Eventually the court had had enough, and his latest action was immediately stayed. Blackburn J posed the question whether the court had the right to stop summarily an action which was "utterly hopeless". He held that it did, following the precedent set by the case of the Tichborne claimant.[13] Colonel Dawkins went on to become known to every law student, as I would like to hope, as the Dawkins of *Dawkins v Antrobus*.[14]

These cases established that the English courts had a common law power to stay or dismiss summarily actions which were an abuse of process, and demonstrated why such a power was necessary. There were of course other means, in England as in Scotland, by which a case which was bad in law could be disposed of without a trial of the facts, but those means were not sufficiently drastic to deal with the situation where the action was so plainly unsustainable as to be an abuse of the process of the court. By the early twentieth century, the power to stay or dismiss actions which were an abuse of process was regarded in England as an aspect of the inherent jurisdiction of the court[15]: that is to say, the powers which the court possesses simply by virtue of being a court, because they are essential to its proper functioning.

The principle that the court possesses inherent powers was also long established in Scotland. Erskine had written in the eighteenth century that "in all grants of jurisdiction, whether civil or criminal, supreme or inferior, every power is understood to be conferred without which the jurisdiction cannot be explicated . . . [E]very judge, however limited his jurisdiction may be, is vested with all the powers necessary … for supporting his jurisdiction and maintaining the

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[12] *Castro v Murray* (1875) LR 10 Ex 213, 218.
[13] *Dawkins v Prince Edward of Saxe Weimar* (1876) 1 QBD 499, 502.
[14] (1881) 17 Ch D 615.
[15] Winfield, *Abuse of Process* (Cambridge, 1921), p 239.

authority of the court, or for the execution of his decrees."[16] In cases concerned with contempt of court, Lord Justice General Emslie said that both the Court of Session and the High Court of Justiciary had an inherent jurisdiction to take effective action to vindicate their authority and preserve the due and impartial administration of justice.[17]

The court's inherent powers have however a wider scope than the punishment of contempt of court: they include, for example, the supervisory jurisdiction of the Court of Session, the summary dismissal of proceedings which are frivolous or vexatious, countless other aspects of the regulation of practice and proceedings, and taking notice of matters which are *pars judicis,* such as the illegality of a claim,[18] or objections arising under the maxim *ex turpi causa non oritur actio*.[19] And one can find in the Scottish case law at least one authoritative example, long before the *Shetland Sea Farms* case, of the court exercising an inherent power to dismiss an action not on the merits but because it was, in ordinary language, an abuse of the process of the court.

The case in question is *Glasgow Navigation Co Ltd v Iron Ore Co Ltd*,[20] decided by the House of Lords in 1910. The owners of a ship had pursued the charterers for demurrage. When the case reached the House of Lords, following a proof in the Sheriff Court and intermediate appeals, their Lordships spotted a clause in the charter party which excluded liability for demurrage. The parties then explained that they had agreed that if the case was tried in Scotland the clause would not be relied upon, and that there was a bill of lading under which the charterers were arguably liable for demurrage. The bill of lading however had not been produced. The House ordered that the action should be dismissed, the Lord Chancellor observing[21] that the court was asked to decide not upon a contract actually made, but upon a contract which never was made, and

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[16] Erskine, *Institute*, I, ii,.8.
[17] *Cordiner, Petr* 1973 JC16, 18. See also *Hall v Associated Newspapers* 1979 JC 1, a decision of a bench of five judges, where Lord Justice General Emslie spoke (p 9) of the court's inherent jurisdiction to vindicate the fair and impartial administration of justice
[18] See eg *Stewart v Gibson* (1840) 1 Rob 260; Gloag,, *Contract* , 2nd ed, p 549.
[19] See eg *Bile Bean Manufacturing Co v Davidson* (1906) 8F 1181. Recent examples include *Gray v Thames Trains Ltd* [2009] 1 AC 1339 and *Stone & Rolls Ltd (In Liquidation) v Moore Stephens (A Firm)* [2009] 1 AC 1391.
[20] 1910 SC (HL) 63; [1910] AC 293.
[21] At 64.

thereby what in real substance was a feigned issue had been presented to the House. Under those circumstances there was nothing to be done except to dismiss the action altogether.

Returning to the *Shetland Sea Farms* case, Lord Gill held that to found a claim on a false narrative of fact supported by fabricated documents was an abuse of process. Where a litigant had been guilty of dishonesty in the prosecution of his case, the court's disposal of the matter must depend on the question whether the dishonesty had made a fair trial of the issue impossible. Lord Gill referred in that connection to the judgment of Chadwick LJ in *Arrow Nominees Inc v Blackledge.*[22] If the dishonesty made a fair trial impossible, the court had a duty to stop the proceedings in order to protect the innocent party from an injustice. But if the dishonesty was found out and a fair trial of the claim remained possible, the court ought not to stop the proceedings. To do so in such circumstances, Lord Gill said, would simply be judicial retaliation for the affront to the court.

The approach adopted by Lord Gill earned the approval of Lord Justice Clerk Gill in the case of *Clarke v Fennoscandia Ltd (No 3),* decided in 2004.[23] There the pursuer sought a declarator from the Court of Session that judgments obtained against him in the USA had been obtained by fraud. He had previously brought three similar actions in England and the USA, all unsuccessful, and the defenders had undertaken not to enforce the judgments in Scotland. The action was dismissed. On appeal, the Lord Justice Clerk observed that the concept of an abuse of process need not be confined to fraud. The essential question, he said, was whether the action compromised the integrity of the court's procedures. It might do so if it wastefully occupied the time and resources of the court in a claim that was obviously without merit.[24]

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[22] [2001] BCC 591.
[23] *Clarke v Fennoscandia Ltd (No 3)* 2005 SLT 511.
[24] At para17. The other members of the court agreed, at paras 40 and 44. When the case proceeded to the House of Lords, Lord Rodger of Earlsferry observed that it was not competent to pursue proceedings for an illegitimate purpose: *Clarke v Fennoscandia Ltd* 2008 SC (HL) 122, para 35.

The idea that the court had an inherent power to dismiss summarily actions which were an abuse of process, being new, did not readily gain acceptance. In *Wright v Paton Farrell,*[25] a case concerned with an advocate's immunity from suit, decided in 2006, Lord Osborne accepted that in principle any court had an inherent power to prevent abuses of process, but considered that the Scottish courts could not exercise such a power because it had not been crystallised in rules of court.[26] Lord Johnston agreed, and Lord President Hamilton expressed similar doubts.[27]

The argument that the court could not exercise an inherent power unless it had been set out in rules of court was however demolished in the case of *Tonner v Reiach and Hall,* decided in 2007.[28] The issue in that case was want of prosecution: the case had been sisted for 19 years. The court held that it had an inherent power to dismiss an action where there had been inordinate and inexcusable delay in its prosecution and the interests of justice required that the action be brought to an end. It did not however base its decision upon abuse of process, but held that the court's power to regulate its practice and procedure enabled it to dismiss an action where there had been inordinate and inexcusable delay. The court questioned the use of the concept of abuse of process in relation to the earlier Scottish cases. It interpreted the case of *Levison* as one where the court had exercised its power to punish contempt of court. While in *Shetland Sea Farms* Lord Gill had referred to abuse of process, the conduct in that case could, it said, equally well have been categorised as a contempt of court. The observations about abuse of process in the *Fennoscandia* case had been obiter.[29]

The existence of a power to dismiss an action where there had been an abuse of process was finally put beyond doubt in *Moore v Scottish Daily Record and Sunday Mail Ltd,* decided in 2008. The case concerned the question whether the court could impose a penalty in court fees for late settlement. Lord Justice Clerk Gill, presiding in a court of five judges, said that the court had an

[25] 2006 SC 404.
[26] Para 164.
[27] Para 20.
[28] 2008 SC 1.
[29] *Tonner v Reiach and Hall* 2008 SC 1, paras 83-84.

undoubted inherent jurisdiction to take action where there had been a contempt of court or an abuse of process, or where for some other reason a fair trial of a case had become impossible. It was, he said, well established in Scots law that the court could exercise its inherent jurisdiction in the case of an abuse of process by way of a procedural sanction such as dismissal.[30] Ironically, *Tonner* was cited as authority for that proposition. The inherent jurisdiction did not however enable the court to require the payment of court fees,[31] since that was a matter governed by statute.

The last Scottish case I need mention is *Hepburn v Royal Alexandria NHS Trust,*[32] another case concerned with want of prosecution. The First Division held by a majority, following *Tonner,* that the court could dismiss an action where there had been inordinate and inexcusable delay as a result of which it could not be satisfied that a just determination of the dispute remained possible. The court held that it must have an inherent power to prevent its procedures being used to achieve injustice. The way I put it in my opinion was to say that if there has been such a delay in proceedings that the court cannot be satisfied that a just determination of the dispute remains possible, the only course open to the court, consistent with its function as a court of justice, is to bring the proceedings to an end.[33] I sought to make it clear that that should not be taken as an exhaustive formulation. To keep an action in court indefinitely with no intention of bringing it to a conclusion, for example, could be an abuse of process which should be stopped regardless of whether a fair trial of the action remained possible.[34] That point had been made earlier by Lord Woolf MR in the case of *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd*,[35] where he said that "abuse of process … does not depend on the need to show prejudice to the defendant or that a fair trial is no longer possible." That statement was treated as

[30] *Moore v Scottish Daily Record and Scottish Sunday Mail Ltd* 2009 SC 178, paras 13-14.
[31] Contrary to the earlier decision in *Billig v Council of the Law Society of Scotland* 2008 SC 150.
[32] 2011 SC 20.
[33] Para 47.
[34] Paras 48-50.
[35] [1998] 1 WLR 1426, 1436.

an established proposition by the Supreme Court in its judgment earlier this year in *Summers v Fairclough Homes Ltd.*[36]

So, the only Scottish cases concerned with dishonest litigants remain *Levison* - a case from which it is difficult to extract a clear principle – and *Shetland Sea Farms.* Lord Gill's rejection in that case of the idea that the court should dismiss an action in retaliation for the affront to the court points to why, in *Tonner,* the Extra Division were I think mistaken to suggest that the earlier cases should be understood as being concerned with the punishment of contempt of court. The first reason given by Lord Ashmore for his decision in the *Levison* case was that the pursuer's conduct had prejudiced the defence of the action: in other words, a just determination of the dispute had been compromised. Similarly, the ratio of Lord Gill's decision in the *Shetland Sea Farms* case was that, despite the fraud and forgery, a fair trial of the claim remained possible. In each case the court's focus was upon whether one party had put the other at an unfair disadvantage and compromised the just and proper conduct of the proceedings.

I agree that dismissal is not an appropriate punishment for contempt of court. As the Supreme Court said in *Summers v Fairclough Homes Ltd*, "the power to strike out is not a power to punish but to protect the court's process."[37] Of course, that is not to say that dishonesty should not be punished as a contempt of court: on the contrary. In *Summers* the Supreme Court endorsed the recent trend in England to commit fraudulent litigants for contempt, and approved[38] a statement made by Moses LJ [39] where he pointed out that our system of adversarial justice depends upon openness, transparency and honesty, and said that those who make false claims should expect to go to prison if caught. The Supreme Court approved Moses LJ's statement that there is no other way to underline the gravity of the conduct, to deter those who may be tempted to make such claims, and to improve the administration of justice.

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[36] [2012] 1 WLR 2004, para 35.
[37] [2012] 1 WLR 2004, para 45.
[38] Paras 57-58.
[39] *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (Admin).

The Scottish cases on dishonesty do not, then, adopt the view that dismissal may be a penalty for contempt. Lord Gill made some observations which might suggest that case management considerations are relevant, when he said that the claimant had misused the time and resources of the court and had delayed the progress of the proceedings, and of other proceedings. But when he came to express a principle he appeared to adopt the fair trial approach: the court's disposal of the matter must depend on the question whether the dishonesty had made a fair trial of the issue impossible. He cited in support of that approach Chadwick LJ's judgment in *Arrow Nominees,* where, as I shall explain, the concept of a fair trial was however given a wide meaning which encompassed case management considerations.

The later Scottish cases concerned with abuse of process indicate that it would be a mistake to think that the court is only concerned to protect the interest of the innocent party. Indeed, in a case of dishonesty, there may be no innocent party: in one of the leading modern English cases, both parties produced forged documents and perjured testimony;[40] and in the *Glasgow Navigation* case, both parties wanted the court to proceed on a false basis, albeit without any dishonest intention. As Lord Blackburn once said, in an often-quoted passage,[41] the court has the right to protect *itself* against the abuse of its process. The Supreme Court emphasised this point in the case of *Summers*, stating that it was for the court to protect the court's process, and that the power to strike out existed in the public interest.[42] That is implicit in the fact that the court can act *ex proprio motu.* The central idea therefore, as I understand it, is to safeguard the administration of justice. A party who uses court process for the commission of a crime or a civil wrong is abusing it. A court which allows its process to be abused in that way will lose public confidence. The court protects itself by not tolerating such abuse. There is a link to the rationale of the court's refusal to enforce illegal contracts or other claims based on turpitude, albeit in those contexts the court addresses the problem via substantive rather than procedural law.

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[40] *Masood v Zahoor (Practice Note)* [2010] 1 WLR 746.
[41] *Metropolitan Bank v Pooley* (1885) 10 App Cas 210,220-221.
[42] [2012] 1 WLR 2004, paras 45 and 48.

I want to turn now to two of the recent English authorities. The first of these is the case of *Arrow Nominees Inc v Blackledge*. That was a case in which the court struck out a company law petition alleging unfairly prejudicial conduct where one of the petitioners had produced forged documents and, at the trial, was unwilling to make a frank disclosure of the extent of his fraudulent conduct and persisted in his attempts to deceive. Chadwick LJ stated that where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled - indeed, bound - to refuse to allow that litigant to take further part in the proceedings and to determine the proceedings against him. The reason, he explained, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice.[43] That seems to be following what I have called the fair trial approach. But his Lordship then said this:

> "In this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court. The court does not do justice to the other parties to the proceedings in question if it allows its process to be abused so that the real point in issue becomes subordinated to an investigation into the effect which the admittedly fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself … A decision to stop the trial in those circumstances is not based on the court's desire (or any perceived need) to punish the party concerned; rather, it is a proper and necessary response where a party has shown that his object is not to have the fair trial which it is the court's function to conduct, but to have a trial the fairness of which he has attempted (and continues to attempt) to compromise."[44]

[43] Para 54.
[44] [2001] BCC 591, paras 55-56.

So Chadwick LJ's approach involved an expansion of the conventional understanding of fairness so as to encompass not only fairness as between the parties to the case, but also the need to deal with the case expeditiously and without disproportionate expense, and to take account of other litigants who are waiting to have their disputes heard.

Ward LJ, who gave the other judgment in the case, also concluded that the court must consider whether it is in the interests of the administration of justice generally to allow the trial to continue, but reached that conclusion after emphasising that the CPR had created a new climate in which the court was required to examine the plaintiff's conduct by reference to the overall interests of justice (including consideration of the interests of other litigants, and the interests of the court in ensuring the prompt despatch of court business), and not exclusively the impact of the conduct on the other party's case. Access to the courts was open to all, he said, but the time of the courts was a precious resource which needed to be managed rigorously in order to be fair to all.[45] Ward LJ also referred to proportionality, concluding, after an assessment of the court time and expense which had resulted from the petitioner's conduct, that striking out was not a disproportionate remedy for such abuse.[46]

The final case I would like to consider is one we heard recently in the Supreme Court, and on which I sat. The case, *Summers v Fairclough Homes Ltd*,[47] was an action of damages for personal injuries brought by a man against his employers after he had an accident at work in which he broke a bone in his hand and also his heel bone. The court separated the issues of liability and quantum. On the issue of liability, it found against the employers. A trial on quantum was then ordered. The claimant maintained that he was grossly disabled, dependent on crutches, in constant pain and unable to work: he could not even put up kitchen units. The employers' insurers however obtained surveillance film which revealed that he was living a normal life, working as a self-employed kitchen fitter, driving a van and playing football in his spare time, but

[45] Paras 69-70.
[46] Para 74.
[47] [2012] 1 WLR 2004.

was careful to use crutches when he was seeing doctors, dispensing with them as soon as he was out of sight. This material was disclosed to the claimant's solicitors in advance of the trial. They were acting on a conditional fee basis and were understandably eager to settle, but the defendants insisted on going to trial in order to run the legal argument which eventually came to us. In his evidence at the trial the claimant persisted in his dishonesty, maintaining that the surveillance happened to have been carried out on exceptional days when he was taking strong painkillers and forcing himself to attempt a return to work by helping other people for free. But his evidence was disowned by his lawyers, and the medical evidence was agreed. At the end of the trial, the defendants sought to have the claim struck out as an abuse of process. The judge accepted that there had been a deliberate fraud, but held, following earlier decisions of the Court of Appeal,[48] that he had no power to strike out the action after all the evidence had been heard. He was able to make an accurate assessment of damages, and made a modest award for pain and suffering and some minor continuing disability. He also found the claimant liable in costs, with the consequence that he would in fact receive little or nothing. That decision was upheld by the Court of Appeal. We dismissed a further appeal, but on different grounds.

Overruling the earlier decisions of the Court of Appeal, we accepted that the court had jurisdiction to strike out an action at any stage – even after an entitlement to damages had been established - if it was satisfied that a party's abuse of process was so serious that he had forfeited the right to have his claim determined. We cited the case of *Glasgow Navigation Co v Iron Ore Co* as an example of the court dismissing an action as an abuse of process after trial. One matter which we considered was the impact of Convention rights on this area of the law. There was no doubt that restrictions on access to a court were compatible with article 6 so long as they pursued a legitimate aim and were proportionate. If dishonesty was discovered prior to the trial, then the action could be dismissed if that was a proportionate means of achieving the legitimate aim of

[48] Notably *Ul-Haq v Shah* [2010] 1 WLR 616.

controlling the process of the court and deciding cases justly.[49] The position was more difficult where the dishonesty only became apparent to the court in the course of the evidence, and where it did not taint the whole claim. In those circumstances, if the court was able to make a proper assessment of liability and quantum notwithstanding the dishonesty, it could only be in exceptional circumstances that a strike-out would be a proportionate response. That was because there would be no question in those circumstances of the conduct preventing the court from adjudicating fairly on the dispute between the parties, and striking out at that stage would save little court time. We considered that the dishonesty could best be addressed in such cases, in all but exceptional circumstances, by appropriate awards of costs, which were likely to be on an indemnity basis, and by appropriate punishment for contempt, which was likely to be imprisonment.

It appears from the material presented to us in the *Summers* case that fraudulent claims, particularly against insurers, are a real problem. Awards of expenses are unlikely in practice to be an effective penalty, since they are frequently impossible to enforce. It is also unlikely in practice that a fraudulent claimant will be prosecuted for the criminal offences involved, although it may be appropriate where fraudulent claims are organised on an industrial scale, as has happened in England, with fake road accidents being staged with fake passengers to claim for fake whiplash. The most effective way of addressing the problem, however, is for the courts themselves to use their powers. The punishment of contempt of court is one option. Dismissal of the action as an abuse of process is another option, which may be more widely used if in future the Scottish courts, like those in England, attach greater importance to ensuring the proper use of their resources.

The conception of the interests of justice as going beyond the interests of the parties in the adjudication of their dispute, and encompassing the wider public interest in the administration of justice, can I think be accommodated within the approach adopted in *Shetland*

[49] Para 48.

Sea Farms and *Moore v Scottish Daily Record*, emphasising as it does the prevention of a litigant's compromising the proper conduct of proceedings. It is also consistent with the approach which the Inner House adopted in the case of *Brogan v O'Rourke*, [50] concerned with non-compliance with the rules of court. Delivering the opinion of the court in that case, I said that the rules of court were designed to serve the interests of justice by ensuring that cases were dealt with expeditiously, without undue expense, and without undue demands on the resources of the court.

This approach is also consistent with the thrust of the reforms recommended by the *Report of the Scottish Civil Courts Review*. One of the implications of those reforms is that the control of proceedings will rest with the judge and not with the parties. Litigants will not be entitled to uncontrolled use of a judge's time while other litigants wait their turn. The premise that a pursuer is entitled to his day in court will no longer hold. In that context, where the dismissal of actions will be in greater use as a sanction for non-compliance with the rules of court, there may be a greater readiness to dismiss actions which constitute an abuse of process. It makes little sense to be willing to dismiss an action for non-compliance with a procedural rule and the consequent waste of time and money, but to forbear from doing so when a similar or greater waste has been occasioned by a litigant's dishonesty. In that situation I would anticipate that the impact of dishonest conduct may be assessed not only from the point of view of the prejudice caused to the particular litigants involved in the case, but also in relation to the effect it can have on other litigants who are waiting to have their cases heard, and the prejudice which is caused to the due administration of civil justice. The risk of a fair trial no longer being possible will of course remain a factor of very considerable weight. But it may not be the only material factor. Other matters may have to be put in the scales and weighed.

In conclusion, I would suggest that judges should not be unduly reluctant to dismiss cases where it appears that the litigant is determined to subvert the adjudicative process by

[50] 2005 SLT 29.

fraudulent means. If the courts wish to avoid bringing the administration of justice into disrepute, they should in my view be slow to make decisions favouring those who set out to use the court process as an instrument of fraud. Summary dismissal in such circumstances is not to my mind aptly regarded simply as the denial of a right of access to the court. Where a litigant has demonstrated that his object is to prevent a fair trial, he is merely purporting to invoke his right of access to the court: his real object is not to have a fair trial at all. It seems to me that a court which declines to entertain such a litigant's case is merely drawing a reasonable conclusion from his refusal to accept the rules of the institution whose processes he is seeking to abuse.