

NZILA Lecture Series 2018

Can the assured's conduct defeat a claim?

Professor Rob Merkin QC

Dougal is the proud owner of the pleasure craft, *Boaty McBoatface*, which he purchased on 1 April 2016 in reply to an advertisement. The vessel is equipped with all of the latest safety technology. In particular, in the event of any mechanical malfunction, there is an impressive array of alarms, flashing lights and an automatic speed limiter. The instruction manual for *Boaty McBoatface* explains how all of this works, and contains a paragraph in bold block capitals stating that if the oil pressure drops the engine should be switched off immediately. Dougal, in line with his training as an insurance lawyer, did not bother to read the manual, maintaining the established market custom that any issues can be sorted out at the claims stage.

On 1 April 2017, the day after *Boaty McBoatface* had undergone a thorough service, Dougal took the vessel on a short trip from her berth at Auckland Harbour across the bay to Devonport. On board was a package containing a large quantity of methamphetamine, which Dougal was taking to his friend Hamish, a dealer in the substance. Two minutes after leaving berth, *Boaty McBoatface's* entire warning system came to life and the engine automatically dropped to half of the cruising speed. Dougal decided that the safest thing would be to continue the voyage to Devonport. After another minute the engine cut out entirely. *Boaty McBoatface* had to be towed back to Auckland by the harbour authorities. An official carried out a routine search of the vessel, and discovered the package. After a short conversation and the transfer of \$100, the official decided that his eyes and nose had deceived him.

The engine was entirely destroyed. Dougal submitted a claim form to his insurers, BoatsRUs. The policy covered "accidents", excluded liability for loss by reason of the negligence of repairers and imposed an obligation on Dougal "to take all reasonable steps to avoid or prevent any loss." The insurers wrote to Dougal asking for the sale agreement evidencing his purchase of *Boaty McBoatface*. Dougal's insurance law training again came to the fore and he was unable to locate either the agreement or the seller. With a flash of inspiration, Dougal asked Hamish to draft and backdate a sale agreement, which Dougal then presented to BoatsRUs on 30 April 2017.

On 5 May 2017 Dougal and Hamish had a heated argument about the best batting line up for the BlackCaps, ending in an exchange of insults. Hamish threatened revenge. On 7 May 2017 BoatsRUs received a letter "From a Friend", saying that the sale agreement was a forgery and that Dougal had been using *Boaty McBoatface* to carry illegal drugs. After an inquiry, on 31 May 2017 BoatsRUs sent a declination letter to Dougal, rejecting his claim for the wrecked engine on the grounds that: (a) he was committing an illegal act when the loss occurred; (b) he had submitted a fraudulent claim; (c) he was in breach of the reasonable precautions clause; and (d) he was in breach of the implied warranty of legality in section 42 of the Marine Insurance Act 1908.

Dougal issued proceedings. BoatsRUs applied for a strike out. The matter came before Justice O'Connell. She is due to deliver her judgment on 15 March 2018.