Date: 20070129

Docket: T-1006-04

Citation: 2007 FC 23

BETWEEN:

STEWART MCINTOSH

Plaintiff

and

ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA and OGILVY & OGILVY (ONTARIO) INC.

Defendants

AMENDED REASONS FOR JUDGMENT

MACTAVISH J.

[1] Stewart and Catherine McIntosh's dream for their retirement years was to live at their family cottage, and to run a small business chartering a high performance power boat. With the theft of their boat, and the subsequent denial of their insurance claim, the couple's dream has turned into a nightmare.

[2] By this action, Mr. McIntosh seeks a declaration that his insurance policy is binding on, and enforceable against his insurer, Royal & Sun Alliance Insurance Company of Canada, and that, as a consequence, he is entitled to be fully indemnified by Royal for the losses sustained as a result of

the theft of the boat. Mr. McIntosh further seeks specific performance of the insurance contract and payment of the amount of $240,000 for his loss.

[3] In the alternative, Mr. McIntosh seeks damages for breach of contract and negligence in the amount of $240,000 from Ogilvy & Ogilvy (Ontario) Inc., the insurance brokerage firm that had assisted him in obtaining the insurance on the boat.

[4] Royal and Ogilvy & Ogilvy have each cross-claimed against the other, asserting that if there is liability in this case, it is their co-defendant that is responsible for Mr. McIntosh's loss.

Background

[5] In 2002, Mr. McIntosh was employed in the automotive industry in Windsor, Ontario, and Mrs. McIntosh worked in human resources at the Windsor Casino. The couple had two adult children, who by this point were well on their way to financial independence. Like many people at this stage of their lives, the couple were turning their minds to their future, and were planning for their retirement.

[6] Mr. and Mrs. McIntosh owned a cottage in the Muskoka area north of Toronto, and each loved boating and cottage life. Much of the time that the couple spent at their cottage was spent with family and friends on their ChrisCraft Bowrider boat and their SeaDoo jet ski.

[7] The McIntoshs hoped to eventually leave their jobs, sell their home in Windsor, and move to their cottage on a full-time basis. From there, they planned on running a small business in an effort to supplement their retirement income.

[8] Because of their love of boating, the couple decided to work towards developing a business chartering a high speed power boat for “poker runs”, and other types of boat tours. “Poker runs” are boating events in which participants travel on high performance boats from location to location, collecting playing cards in sealed envelopes along the way. At the end of the day, each boat has amassed a poker hand, and the boat with the strongest hand wins the event.

[9] In pursuit of their dream, in July of 2002, the couple purchased a 32 foot Advantage Victory power boat for the sum of $220,000. The boat had high performance engines, and was equipped with a stereo system, a galley and a head. The couple also bought a trailer for the boat, as well as life insurance to cover the financing on the boat. After taxes, the couple’s total expenditure was $290,353.02.

[10] Part of the purchase price came from the proceeds of the sale of the family home in Windsor and from the couples’ Registered Retirement Savings Plans. The balance was financed through the Bank of Montreal.

[11] Asked why he chose this particular boat, Mr. McIntosh responded that after researching various types of high-performance power boats on the market, he had settled on the Advantage Victory because it provided the best value for money. In his words, the Advantage boat was “like

the Rolls Royce of boats for the price of a Cadillac". He also stated that the boat was very fast, and that it was the power of the boat that had attracted him.

Insuring the Boat

[12] Before taking possession of the boat, Mr. McIntosh began exploring the options available for insuring it. He testified that he contacted the insurance brokerage firm of Ogilvy & Ogilvy in an effort to obtain insurance for the boat, because the firm was well known in the poker run business. Ogilvy & Ogilvy was also recommended to Mr. McIntosh by the marina where he bought the boat.

[13] Mr. McIntosh's first contact with Ogilvy & Ogilvy took place sometime in early July of 2002. He spoke by phone to an insurance broker at the firm by the name of Ted Macaulay. Mr. Macaulay was an experienced insurance broker, who had recently joined Ogilvy & Ogilvy, where he was specializing in marine insurance.

[14] Mr. Macaulay was himself a boater, and had considerable experience with high performance boats such as the one purchased by Mr. McIntosh.

[15] Mr. McIntosh and Mr. Macaulay discussed the type of insurance that was available for the boat. They agree that either in this initial discussion or in subsequent telephone discussions between the two, Mr. McIntosh told Mr. Macaulay about his plan to eventually develop a business chartering the boat for poker runs and other such events.

[16] It is also not disputed that Mr. Macaulay told Mr. McIntosh that commercial insurance coverage for a boat such as his would be very expensive. Mr. Macaulay also told Mr. McIntosh that he would try to obtain a quote for commercial coverage for the boat, but that Mr. McIntosh should consider simply insuring the boat for personal use until such time as he was ready to take paying customers on the boat.

[17] Mr. McIntosh completed a "Pleasure Craft Application" for insurance, listing himself and his brother-in-law, Lyle Niemi, as the operators of the boat. The completed application was returned to Mr. Macaulay, and an insurance binder was then issued by Ogilvy & Ogilvy effective July 19, 2002.

[18] Mr. McIntosh's application form was then forwarded to Royal by Ogilvy & Ogilvy. At no time prior to the 2002 insurance policy being issued did Mr. Macaulay, or anyone else at Ogilvy & Ogilvy, tell anyone at Royal anything about Mr. McIntosh's plans for starting a business using the boat.

[19] By letter dated August 20, 2002, Ogilvy & Ogilvy sent Mr. McIntosh a copy of the insurance policy for his boat. The letter concludes by stating "We are attempting to obtain a commercial quote as requested, however in the interim coverage is for private pleasure use only."

[20] Under the heading "WARRANTIES", the policy states:

> In order to keep this policy in effect, [y]ou must make, and must keep, certain promises. These are known as warranties. If any of these promises are violated, coverage will be suspended from the

> time of such violation. The following warranties apply to this insurance:
>
> > 1. The vessel will be used solely for Private Pleasure Purposes. The vessel will not be chartered or leased or used for any commercial purpose.

[21] "Private Pleasure Purposes" is defined in the policy meaning that "the insured Vessel is used for recreational or leisure time activities, and includes entertainment of business clients provided it is not being chartered or hired".

[22] Mr. McIntosh acknowledges receiving the 2002 policy, and says that he understood that as long as he did not take any paying customers on the boat, he would have insurance coverage.

[23] At some point in the summer of 2002, Mr. Macaulay contacted Royal in order to determine what it would cost to obtain commercial coverage for Mr. McIntosh's boat. He spoke first with Steve Scharien, a marine underwriter and the national pleasure craft manager at Royal, who was Mr. Macaulay's regular contact at the company. Mr. Macaulay was not certain if he told Mr. Scharien the name of the client on whose behalf he was making the inquiry. In any event, Mr. Scharien referred Mr. Macaulay to Mike Krunic, who was a commercial marine underwriter at Royal.

[24] After discussing the boat, and Mr. McIntosh's plans for it, with Mr. Macaulay, Mr. Krunic told Mr. Macaulay that Royal was not interested in taking on the risk of insuring the boat for commercial use.

[25] Mr. Macaulay testified that he advised Mr. McIntosh that he was unable to obtain a quote for commercial insurance coverage for the boat, and that "the marketplace did not have an appetite for this type of coverage at this time". According to Mr. Macaulay, Mr. McIntosh thanked him for his efforts on his behalf, and indicated that in the event that he required commercial coverage for the boat in the future, he would give Mr. Macaulay a call.

[26] Mr. McIntosh confirms that Mr. Macaulay had advised him that he had been unable to obtain a quote for commercial coverage, and that he understood that his boat was only insured for personal use.

[27] Mr. McIntosh paid for his insurance coverage through a pre-authorized chequing program. His payments were initially drawn on his personal bank account, although Mr. McIntosh advised Mr. Macaulay that he would be providing updated banking information as soon as he was able to set up another bank account for the business.

[28] Mr. McIntosh explained at trial that a dedicated account for the boat was set up as he and his wife wanted to keep the expenses for the boat separate from the family's personal finances.

[29] In early August of 2002, Mr. McIntosh provided Mr. Macaulay with a void cheque for an account in the name of "Offshore Performance Tours", and asked to have his automatic payments changed to this account. Mr. Macaulay forwarded the void cheque to Royal, and the automatic payments were subsequently taken from this account.

The Use of the Boat in the Summer of 2002

[30] Shortly after taking possession of the boat, Mr. McIntosh began making efforts to get his charter business up and running. Although his family cottage was in the Muskokas, he decided to store the boat at a marina near Mr. Niemi's home in Bradford, Ontario. Mr. McIntosh explained that this was a more central location, being closer to Lake Ontario and Georgian Bay, and thus provided a better launching point for the boat. As Mr. McIntosh put it in his testimony, this location was "better for the business".

[31] Storing the boat at this location also allowed Mr. Niemi to keep an eye on things.

[32] In addition to establishing a bank account in the name of Offshore Performance Tours, Mr. and Mrs. McIntosh also set up a numbered company for the boating business in July of 2002, in a further effort to keep the financial arrangements for the boat separate from those of the family.

[33] In an attempt to get the business going, Mr. McIntosh put a large Offshore Performance Tours decal on the deck of the boat, along with decals of checkered flags. He also had 100 or 150 business cards printed up in the name of Offshore Performance Tours.

[34] In a further effort to market the charter business, Mr. McIntosh took the boat to three poker runs during the summer of 2002, one in Gananoque, one at Ontario Place in Toronto, and one on Georgian Bay. Mr. McIntosh says that Mr. Niemi would take the boat out on the water for the poker runs, while he would hang around on the shore, checking out the competition, and handing out business cards in an effort to promote his business.

[35] Mr. McIntosh says that he quickly realized that his boat “was the runt of the litter” and that many of the boats that were available for hire were bigger and more powerful than his. He realized that he had been naive in his choice of boat, and that he should have done more research before purchasing a boat.

[36] Perhaps because of the size of the boat, Mr. McIntosh says that he had difficulty getting the business off the ground. According to Mr. McIntosh, while he did have some inquiries from people at poker runs who were interested in hiring the boat, at no time during the summer of 2002 did he have any paying customers on his boat.

The Renewal of the Insurance Policy in 2003

[37] In July of 2003, Mr. McIntosh’s insurance policy came up for renewal. A letter was sent to Mr. McIntosh by Ted Macaulay with the renewal of the policy. The letter asked Mr. McIntosh to “Please review your policy to make sure that it remains accurate. Advise our office immediately if any changes are required.”

[38] The 2003 policy came with an information sheet or “tag”, which highlighted the changes to the policy. Amongst other changes, the tag sheet noted that there had been changes made to the policy provisions dealing with warranties.

[39] In this regard, the tag sheet stated:

> Warranties Section
> All warranties have been split into two sub-categories, either Absolute (which apply to the entire policy period) or Suspensive ...

[40] The warranty relating to the use of the boat is contained in the section of the policy dealing with Absolute warranties. The policy stated:

> Warranties - Absolute
> The following absolute warranties apply to this insurance.
>
> 1. The vessel will be used solely for Private Pleasure Purposes. The vessel will not be chartered or leased or used for any commercial purpose....
>
> If any of the above absolute warranties in this section have been breached, [c]overage will cease immediately and cannot be reinstated once the violation ends. You will have no coverage from the date of the breach.

[41] “Private Pleasure Purposes” is defined in this policy as meaning that “the insured Vessel is used for recreational or leisure time activities” . The reference to the entertainment of business clients being allowed was deleted from this version of the policy.

[42] While both the 2002 and 2003 policies stipulated that the policies would be void from their inception if there had been concealment, misrepresentation or fraud, the 2003 policy added a provision that the policy would be void *ab initio* if the insured concealed or misrepresented a material fact relating to the “previous, current or future use of the boat”. This change in the wording of the policy was not noted on the tag sheet.

[43] There were no discussions between Mr. McIntosh and Mr. Macaulay or anyone else at Ogilvy & Ogilvy in the summer of 2003 with respect to the status of Mr. McIntosh’s charter business, his use of the boat or the changes to the insurance policy.

[44] Mr. McIntosh acknowledges receiving the new policy, but says that he did not read it over in detail. It is clear, however, that Mr. McIntosh continued to understand that he would be in breach of his insurance policy if he were to take any paying customers on the boat.

The Use of the Boat in the Summer of 2003

[45] Mr. McIntosh continued with his marketing activities during the summer of 2003 in an effort to establish a business chartering the boat. To this end, he again took the boat to poker runs in Gananoque, Toronto and Georgian Bay. He had intended to take the boat to a fourth event, but it was cancelled at the last minute.

[46] Mr. McIntosh also increased his marketing efforts for the business by setting up a web site for Offshore Performance Tours, and by placing advertisements for the boat in conventional and on-line boating magazines.

[47] Mr. McIntosh also had post-card style flyers printed up, with pictures of the boat, a description of the services offered, and a price list for these services. By way of example, the cards note that for $375.00, plus GST, an individual could participate in a poker run, and receive lunch, dinner, a team shirt, and a video of the event, amongst other things.

[48] Mr. McIntosh says that he would hand these cards out at poker runs, and would also post them on bulletin boards in malls and grocery stores, all in an effort to attract business.

[49] Some of Mr. McIntosh's marketing efforts involved a measure of embellishment on his part. By way of example, the boat is described in the web site as being 36 feet long, whereas in actual fact it was only 32 feet in length. Similarly, the magazine advertisement says that the boat would go 85 miles per hour, whereas in his application for insurance coverage, Mr. McIntosh stated that the maximum rated speed for the boat was 75 miles per hour.

[50] Mr. McIntosh acknowledged that he exaggerated the attributes of his boat in an effort to make it look bigger and more powerful than it actually was, in an attempt to attract customers.

[51] Mr. McIntosh was pleased when a photograph of his boat appeared in "Poker Runs America", an on-line magazine relating to performance boating. The magazine was covering the Lake Ontario Hall of Fame Poker Run, which took place on September 12 and 13, 2003. The photograph in question shows Mr. McIntosh's boat with five people on board. Mr. McIntosh says that the boat was being driven by Mr. Niemi in the photograph, and that the other individuals in the boat were friends and family, who went out on the poker run in an effort to make the business look like it was up and running.

[52] Despite all of these efforts, Mr. McIntosh says that his business was not going anywhere, and that he was unable to attract a single paying customer in the summer of 2003.

The Theft of the Boat

[53] On his way to visit his own family in Northern Ontario for the Thanksgiving weekend in October of 2003, Mr. Niemi dropped the boat off at the McIntosh family cottage in the Muskokas.

After using the boat for recreational purposes over the weekend, Mr. McIntosh secured the boat to its trailer, and left it at the cottage, returning to his home in Windsor. Mr. McIntosh says that he had arranged for Mr. Niemi to pick up the boat to deliver it to the marina in Bradford, where it would be stored for the winter.

[54] Mr. McIntosh got a phone call a few days later from the Hamilton-Wentworth police, to advise him that the remains of his boat had been found in Ancaster, Ontario, and that the boat had been completely stripped.

[55] Mr. McIntosh contacted the Bracebridge office of the Ontario Provincial Police to report the theft. He was subsequently interviewed by Constable Rick Poulton, who had been assigned to investigate the matter. Mr. McIntosh also reported the theft to Ted Macaulay.

[56] Constable Poulton testified that the theft appeared to be "legitimate", and there is no suggestion that the McIntoshs had anything to do with it.

The Denial of Mr. McIntosh's Insurance Claim

[57] Mr. McIntosh's insurance claim was investigated by Royal, initially by Jim Goertz, one of its own employees, and later by Gary South, an outside adjuster. By letter dated November 12, 2002, Mr. South advised Mr. McIntosh that his investigation had raised serious underwriting concerns, which could affect the existence of Mr. McIntosh's insurance policy.

[58] After further investigation, the decision was made by Royal to deny coverage, and Mr. McIntosh was advised of this decision by way of a letter to his counsel dated April 8, 2004. The reason given for this decision was that:

> After analysis of the facts disclosed by this investigation, the Royal and SunAlliance Insurance Company is aware that your client used the vessel in contravention of the policy. Specifically, there has been a breach of the warranty concerning use of the subject vessel for the purpose of chartering and personal use.

[59] Through inadvertence, Royal continued to take premium payments from the Offshore Performance Tours bank account after denying coverage on the policy. This continued for a couple of months, until Mr. McIntosh closed the account. Royal then referred Mr. McIntosh's supposedly delinquent account to a collection agency, once again as a result of inadvertence on the part of the company.

[60] Royal has never returned any of the premiums paid by Mr. McIntosh, but says that it is prepared to do so in the event that it is successful in this litigation.

Issues

[61] The following issues were identified by the parties in the course of this trial:

1. Did Mr. McIntosh take paying customers on his boat?
2. Did the marketing activities engaged in by Mr. McIntosh and Mr. Niemi amount to use of the boat for a commercial purpose, thereby breaching the insurance policy?
3. Is Royal liable under the policy?
4. Is Ogilvy & Ogilvy liable for Mr. McIntosh's loss?

5. If there is liability on behalf of one or other defendant, what are Mr. McIntosh's damages?
6. Is Mr. McIntosh entitled to a return of his premiums, and if so, from what date?

Analysis

[62] For the reasons that follow, I find that Mr. McIntosh took paying customers out on his boat during the summer of 2003, an activity that clearly breached the absolute warranty against commercial use of the boat contained in the 2003 insurance policy.

[63] As counsel for Mr. McIntosh conceded in argument, if I were to find that Mr. McIntosh actually took paying customers on his boat, his claim against Royal must necessarily fail, and indeed it does.

[64] I also find that Ted Macaulay and Ogilvy & Ogilvy failed to meet the standard of care required of reasonably prudent marine insurance brokers. Nevertheless, in the absence of a causal link between Mr. Macaulay's actions and Mr. McIntosh's loss, I am of the view that Ogilvy & Ogilvy should not be held liable for Mr. McIntosh's loss.

[65] My reasons for making these findings are as follows.

Did Mr. McIntosh Take Paying Customers on His Boat?

[66] Mr. McIntosh would have me believe that his plans for his charter business were long-term in nature, and that the business was something that he hoped to develop in the future for his

retirement years. In this regard, he testified that he anticipated that it could take up to ten years for his business to become operational.

[67] However, the contemporaneous documentation suggests that his plans for the business were much more immediate. That is, in a note faxed to Mr. Macaulay by Mr. McIntosh on or around July 10, 2002, Mr. McIntosh stated “Short term I need coverage to transport the boat (personal) however, please inform me of the cost for commercial coverage as I plan on taking people on the boat very soon”.

[68] I prefer the contemporaneous documentation on this point to the oral testimony of Mr. McIntosh, and find that as of July of 2002, his intention was to get the charter business up and running, and to begin taking paying customers on the boat within a short period of time.

[69] Mr. McIntosh would also have me believe that he would not have taken a paying customer out on his boat without having first obtained insurance coverage for such a risk.

[70] However, knowing that he did not have the necessary insurance coverage, Mr. McIntosh nevertheless continued to actively market his charter business through the summers of 2002 and 2003. Mr. McIntosh says that his plan was that once he had a customer ready to pay to ride on the boat, he would have made the necessary arrangements by telephone, in order to obtain the appropriate coverage.

[71] I do not accept Mr. McIntosh’s evidence in this regard.

[72] Mr. McIntosh and Mr. Macaulay agree that during the summer of 2002, Mr. Macaulay told Mr. McIntosh that he would try to get Mr. McIntosh a quote for commercial insurance coverage for Mr. McIntosh's boat, and that no such quote was ever forthcoming.

[73] Moreover, Mr. Macaulay testified that he told Mr. McIntosh that he had been unable to get a quote for commercial coverage, and that the marketplace did not have an appetite for this type of risk at that time. While Mr. McIntosh did not specifically recall this discussion, he did not deny that Mr. Macaulay may have told him this, and I find that he did.

[74] Thus Mr. McIntosh knew in the summer of 2002 that Ogilvy & Ogilvy - the company that he had consulted specifically because of their expertise in marine insurance for performance boats - had been unable to even get him a quote for commercial coverage for his boat, much less actual insurance coverage for commercial purposes.

[75] Mr. McIntosh also knew that in July of 2002, before getting an insurance binder to insure his boat for personal use, he first had to complete a written application for pleasure craft insurance, and to submit the completed form to Ogilvy & Ogilvy.

[76] In these circumstances, I do not believe that Mr. McIntosh could reasonably have thought that he could simply pick up a telephone and obtain a commercial insurance binder in a timely fashion, while a prospective paying customer simply stood idly by, waiting to get onto the boat.

[77] Given that Mr. McIntosh continued to actively promote his charter business in the full knowledge that Ogilvy & Ogilvy could not get commercial insurance coverage for him, I find it far more probable that at some point during the summer of 2002, Mr. McIntosh made the conscious decision to simply go ahead with his charter business without commercial insurance coverage for his boat, and that he was prepared to take paying customers out on the boat, without having first obtained the necessary coverage.

[78] I am further satisfied that it is more probable than not that at the very least by the summer of 2003, paying customers had indeed been taken out on the McIntosh boat.

[79] In coming to this conclusion, I rely on several things, one of which is the banking records for Offshore Performance Tours. Both Mr. and Mrs. McIntosh testified that they used the Offshore Performance Tours account for all of the expenses for the boat, and that they would from time to time deposit funds from their personal account into the Offshore Performance Tours account in order to cover these expenses.

[80] Rather than simply transferring money between the accounts, both of which were with the same branch of the Canadian Imperial Bank of Commerce in Windsor, Mr. and Mrs. McIntosh each testified that their practice was to withdraw sums of cash from their personal account, and to deposit the money - sometimes upwards of a couple of thousand dollars - at automated teller machines in Bradford, a practice their own counsel conceded was odd.

[81] A review of the banking records discloses that the couple made regular ATM deposits in the Offshore Performance Tours account, many of which were in round amounts such as $1,000 or $2,000.

[82] There were, however, exceptions to this rule, one of which was a cash deposit made on August 18, 2003, in the amount of $401.25. Unlike all of the other bank deposits, which were evidently made by Mr. or Mrs. McIntosh, Mr. McIntosh says that this deposit was made by Mr. Niemi. Mr. McIntosh and Mrs. McIntosh were both at a complete loss to explain why a deposit in this amount was made, and Mrs. McIntosh herself conceded that it was indeed an odd amount to have deposited in the account.

[83] Not only is the deposit of $401.25 in cash unusual in light of the McIntosh's description of their banking practices, the amount itself is also significant, in that it represents the precise advertised cost of a day spent on the McIntosh boat while attending a poker run - namely $375.00, plus GST.

[84] My suspicions about this deposit are further heightened by the fact that Mr. McIntosh chose not to call Mr. Niemi to testify at trial, and provided no explanation for his failure to do so. Mr. McIntosh says that it was Mr. Niemi who actually made this deposit, and thus it would presumably have been Mr. Niemi who would have been in the best position to explain where the $401.25 came from. In the circumstances, I am prepared to draw an adverse inference from the fact that Mr. McIntosh chose not to call Mr. Niemi, and find that Mr. Niemi's evidence would likely not have assisted him.

[85] In the interest of completeness, it should also be noted that counsel for Royal endeavoured to subpoena Mr. Niemi to testify as part of Royal's case, but was unable to effect service of the subpoena. The affidavit of attempted service sworn by Royal's process server suggests that Mr. Niemi may have been attempting to evade service.

[86] In the absence of any explanation from either of the McIntoshs or from Mr. Niemi as to source of the funds reflected in the August 18, 2003 deposit, I find that it is more probable than not that the $401.25 deposited in the Offshore Performance Tours account on August 18, 2003 represented the payment received from an Offshore Performance Tours customer on or shortly before that date.

[87] The August 18, 2003 deposit is not, however, the only deposit in the Offshore Performance Tours bank account that is of concern. There was an earlier deposit, made on June 30, 2003, in the amount of $3,210.00, a deposit that was admittedly made by either Mr. or Mrs. McIntosh. Once again, the amount is unusual, in that it is not the sort of round number that one would expect to see if one were merely topping up an account to cover expenses coming due, and no explanation as to why a deposit in this amount was made was forthcoming from either of the McIntoshs.

[88] Moreover, not only is $3,210.00 a large amount of cash for anyone to carry around, here, once again, the amount itself is significant, in that it is precisely the total cost for a day on the McIntosh boat for a party of eight people ($375.00 + GST x 8).

[89] In the absence of any real explanation from either Mr. or Mrs. McIntosh with respect to this deposit, I find on a balance of probabilities that the source of these funds was paying customers taken on the boat during the weekend of June 28-29, 2003.

[90] Finally, my conclusion that paying customers were indeed taken on the McIntosh boat during the summer of 2003 is reinforced by the evidence of Constable Poulton, who, it will be recalled, was the OPP officer assigned to investigate the theft of the McIntosh boat.

[91] Constable Poulton interviewed Mr. McIntosh in relation to the theft in October of 2003. It was clear from Constable Poulton's testimony that he has a strong present recollection of the interview, which he explains by the fact that the investigation into the theft was a lengthy one, and involved an expensive boat. Moreover, Constable Poulton's testimony was largely, although not entirely, corroborated by his contemporaneous notes of the interview. Finally, Constable Poulton was an entirely disinterested witness, and had no reason not to be completely truthful in his testimony.

[92] For these reasons, I accept Constable Poulton's testimony without reservation, and find that in the course of Mr. McIntosh's interview with the officer, Mr. McIntosh told Constable Poulton that he had used his boat mostly for pleasure in 2003, but that he had also chartered the boat out for different tours, including poker runs.

[93] Based on the above, I therefore find that at least as early as the weekend of June 28-29, 2003, Mr. McIntosh took paying customers out on his boat, in breach of the suspensive warranty in his original insurance policy, which expired on July 19, 2003.

[94] Moreover, I am satisfied that Mr. McIntosh continued to take paying customers out on his boat during the summer of 2003, in clear breach of the absolute warranty contained in his 2003-2004 insurance policy.

[95] Having breached the absolute warranty against commercial use of the boat, the renewal policy was voided, and was no longer in effect at the time that Mr. McIntosh suffered the loss of his boat. As a result, this action will be dismissed as against Royal.

[96] Before leaving this issue, it should be noted that in coming to the conclusion that Mr. McIntosh's action should be dismissed as against Royal, I have considered, and rejected, Ogilvy & Ogilvy's argument that having continued to deduct premiums from the Offshore Performance Tours bank account, Royal should be treated as having waived the breach of the policy by Mr. McIntosh.

[97] In this regard, I note that neither Mr. McIntosh nor Ogilvy & Ogilvy raised the waiver issue in their pleadings. Moreover, it would be difficult to find either an express or implied waiver on the part of Royal, given that the denial letter is absolutely clear that Royal intended to treat the policy as void.

[98] Finally, I accept the evidence of Mr. Scharien that the continued withdrawal of premiums from Mr. McIntosh's account was the result of inadvertence on the part of Royal, namely the failure of one branch of the company to communicate with another, and that there was no intent to waive the breach of the warranty on the part of Royal.

[99] As was noted earlier, my finding that Mr. McIntosh actually took paying customers out on his boat in the summer of 2003 is determinative of Mr. McIntosh's claim against Royal. It does not, however, determine the question of Ogilvy & Ogilvy's liability for Mr. McIntosh's loss. This issue will be considered next.

Is Ogilvy & Ogilvy Liable for Mr. McIntosh's Loss?

[100] Mr. McIntosh's claim against Ogilvy & Ogilvy asserts that the firm breached the duty of care owed by an insurance broker to an insured to make sure that the insured had adequate insurance coverage in place in the event of a loss.

[101] Mr. McIntosh says that he chose Ogilvy & Ogilvy as his insurance broker specifically because of the firm's reputation in the marine insurance industry, and that he relied on Ogilvy & Ogilvy's knowledge, expertise and advice to ensure that appropriate coverage was put in place for his boat.

[102] Mr. McIntosh points to the fact that he was completely up front with Mr. Macaulay about his plan to try to develop a charter business using the boat, and says that he relied on Mr.

Macaulay's advice that he did not need commercial coverage for the boat until such time as he actually had a paying customer, to his detriment.

[103] As a consequence, Mr. McIntosh says that in the event that it is determined that he breached his insurance policy in any way, the fault for that contravention lies at the feet of Ogilvy & Ogilvy, and that Ogilvy & Ogilvy should be liable for his loss.

[104] Mr. McIntosh's argument raises two issues. The first is whether Mr. Macaulay and Ogilvy & Ogilvy met the standard of care required of an insurance broker in light of the advice provided to Mr. McIntosh by Mr. Macaulay. In the event that I determine that they did not do so, the question then arises as to whether Ogilvy & Ogilvy should be held to account for Mr. McIntosh's loss.

[105] Insofar as the standard of care required of the reasonable insurance broker is concerned, the parties agree that the duty of an insurance broker is to ask the necessary questions of an applicant for insurance in order to assess the risks that should be insured against, to assess the foreseeable risks, and insure the client against them. The broker also has a duty to explain the limitations of the coverage to the insured: see *Fine's Flowers Ltd. et al. v. General Accident Insurance Co. of Canada et al.*, (1978), 17 O.R. (2d) 529 (C.A.), at para. 35. See also *Elite Marine Co. v. Southlands Insurance Inc.*, [1994] B.C.J. No. 3188, at paras. 12-14.

[106] For the reasons that follow, I find that Mr. Macaulay did not meet the standard of care required of a reasonably prudent insurance broker, as he failed to ask relevant questions of Mr. McIntosh, given what Mr. Macaulay knew about Mr. McIntosh's plans for the boat.

[107] I am further satisfied that Mr. Macaulay failed to meet the necessary standard of care by providing inaccurate information to Mr. McIntosh with respect to his need for commercial coverage, given Mr. McIntosh's plans for his boat.

[108] However, for the reasons set out below, I am nevertheless satisfied that Ogilvy & Ogilvy should not be held liable for Mr. McIntosh's loss.

[109] Dealing with first with the question of Mr. Macaulay's failure to ask the necessary questions of Mr. McIntosh during the application process, Mr. Macaulay says that Mr. McIntosh's plan to develop his business was long-term in nature, that many clients have these kinds of dreams, and that few ever realize on them. In these circumstances, Mr. Macaulay says that he had no obligation to explore Mr. McIntosh's business plans with him in any detail.

[110] I do not accept Mr. Macaulay's argument in this regard, as the facts simply do not support it. As I have previously noted, before Mr. Macaulay obtained personal use insurance for Mr. McIntosh's boat, he had been informed, in writing, that Mr. McIntosh intended to take paying customers on his boat in the very near future. In these circumstances, I am satisfied that Mr. Macaulay had an obligation to explore Mr. McIntosh's business plans with him in much greater detail, and, if necessary, to discuss these plans with Royal, in order to ensure that Mr. McIntosh obtained adequate insurance coverage.

[111] Before leaving this point, I should also note that Andrew Robertson, the expert called by Ogilvy & Ogilvy on the duty of insurance brokers in obtaining marine insurance for clients, was of

the opinion that Mr. Macaulay had asked the right questions of Mr. McIntosh when arranging for the insurance on Mr. McIntosh's boat, and thus fulfilled the duty owed to him.

[112] Mr. Robertson's opinion was, however, premised on the assumption that Mr. McIntosh's plans to start a business were indeed long-term in nature. Given that this assumption is not supported by the evidence, I give no weight to Mr. Robertson's opinion on this point.

[113] Insofar as the accuracy of the advice provided to Mr. McIntosh by Mr. Macaulay is concerned, Mr. Macaulay says that his understanding that a boat would not be considered to have been used for a commercial purpose until such time as paying customers were actually taken on board was based on discussions that he had had with underwriters at Royal itself, most likely with Steve Scharien, or possibly with another individual by the name of Paul Gespechne [phon.].

[114] I do not accept Mr. Macaulay's evidence in this regard.

[115] Mr. Macaulay's evidence on this point was vague and entirely lacking in any specifics. Not only did he not have anything in writing from Royal to confirm that this was Royal's view of the situation, Mr. Macaulay himself could not provide any details as to when or where it was that these discussions ostensibly took place, nor could he say with any certainty who at Royal it was that was supposed to have told him this.

[116] Steve Scharien was responsible for underwriting and policy development for pleasure craft insurance at Royal, and was Mr. Macaulay's primary contact at the company. Mr. Scharien denies

ever having told Mr. Macaulay that commercial coverage was only required when an insured was ready to actually take a paying customer on board a boat.

[117] Mr. Scharien reviewed Royal's marine underwriting practices at some length in his testimony, and it was clear from his evidence that Royal's concerns with respect to the risks posed by commercial activities involving boats extended well beyond those raised by the taking of paying customers on board.

[118] Moreover, Mr. Scharien's evidence that the promotion and use of a boat to generate business for a charter company would raise significant underwriting concerns for a marine insurer was confirmed by the experts who testified at trial with respect to marine insurance underwriting and brokerage practices.

[119] As a result, it does not make sense that Mr. Scharien - or anyone else at Royal for that matter - would have told Mr. Macaulay that boat owners whose craft were insured for personal use would have insurance coverage as long as they did not take paying customers on board their boats.

[120] Regardless of where he got the information, Mr. Macaulay clearly believed that 'commercial purpose' as the term was used in Royal's marine insurance policies was to be equated with the taking of paying customers on a boat, with the result that personal use insurance would suffice for an individual intending to develop a charter business until such time as the individual was ready to take paying customers on the boat in question.

[121] The question, then, is whether in providing this advice to Mr. McIntosh, Mr. Macaulay and Ogilvy & Ogilvy breached the duty of care owed by insurance brokers to their clients.

[122] Two experts were called with respect to the duty of insurance brokers in obtaining marine insurance for clients - Mr. Robertson by Ogilvy & Ogilvy and Justin MacGregor by Royal, and both experts discussed the sort of activities that would amount to the commercial use of a boat in their testimony.

[123] In Mr. MacGregor's view, it was the act of holding a boat out for hire that amounted to commercial use, regardless of whether or not the boat owner actually got paid for taking customers on board.

[124] In contrast, Mr. Robertson was initially of the view that it was the act of entering into a contract with a third party that crossed the boundary into commercial use. Later on in his testimony, however, Mr. Robertson qualified his opinion, stating that in his view, the act of taking family and friends on a boat at poker runs to create the illusion that a charter business was up and running would amount to the use of a boat for a commercial purpose, even though no contract was involved.

[125] Mr. Robertson further conceded that giving a prospective customer a "freebie" - that is taking the individual out on the boat without charge, in the hope of generating future business, would also amount to a commercial use of the boat.

[126] Thus, by the time that he had finished testifying, Ogilvy & Ogilvy's own expert in marine insurance brokerage and underwriting practices agreed that the act of using a boat to promote a charter business amounted to a commercial use of the boat, regardless of whether or not any fees were paid to the owner of the boat.

[127] A similar view was also expressed by Claudio Verconich, the expert in marine insurance underwriting matters, who testified on behalf of Royal.

[128] At the end of the day, no one agreed with Mr. Macaulay that a private pleasure purposes warranty would only be breached when a boat owner took a paying customer on a boat, and that it was only then that the owner required commercial insurance coverage for the boat.

[129] Moreover, I am satisfied that the meaning of the words 'commercial purpose', as they are used in the insurance policy in issue here, cannot reasonably bear the interpretation advanced by Mr. Macaulay, and extends beyond the narrow definition advanced by him.

[130] In this regard, Mr. McIntosh argues that in the absence of any clear definition as to what will and will not amount to a "commercial purpose" in the insurance policies, the policies are ambiguous. Relying on cases such as *Consolidated Bathurst Export. Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, and *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252, Mr. McIntosh submits that to the extent that there is an ambiguity in the policies, this ambiguity should be resolved in favour of the interpretation advocated by Mr. McIntosh and Ogilvy & Ogilvy.

[131] I do not accept these submissions.

[132] Warranties contained in insurance policies are to be given a strict, though reasonable construction: *Staples v. Great America Insurance Co., New York*, [1941] S.C.R. 213.

[133] The warranty in issue in this case states that the boat was to be used "solely for Private Pleasure Purposes." and that "[t]he vessel will not be chartered or leased or used for any commercial purpose". While the phrase "any commercial purpose" is not defined in the policy, the ordinary meaning of the term clearly extends beyond that suggested by Mr. Macaulay.

[134] Moreover, the phrase has to be read in context: see *Lake v. Simmons*, [1927] A.C. 487, at p. 499, as cited in Malcolm A. Clarke, *The Law of Insurance Contracts*, (London: Lloyds of London Press Ltd., 1989).

[135] That is, the statement in the warranty that the boat is not to be used for "any commercial purpose" has to be interpreted in light of the earlier statement that limits the use of the boat to "Private Pleasure Purposes", which are defined as meaning "recreational or leisure time activities" .

[136] It is not necessary to try to lay down a global definition as to what will and will not amount to a commercial purpose, and indeed, the experts struggled to come up with a clear and all-encompassing definition of the term. That does not, however, mean that the term is ambiguous. Rather, it simply reflects the fact that the determination of whether activities involving the use of a boat amount to use for a commercial purpose will depend to a large extent on the specific facts in

issue in a given case.

[137] It is also not necessary to determine whether marketing activities, such as the handing out of flyers, and the creation of a web site - activities that do not actually involve the use of the boat itself - amount to use of a boat for a commercial purpose. This is because I am satisfied that, at a minimum, the activities in issue here involving the actual use of the boat, including the storing of the boat at a location specifically because of its proximity to business opportunities, the transporting of the boat to poker runs in order to promote the business, the participation in those poker runs for promotional reasons, and the taking of friends and family on the boat during the poker runs in order to make the business appear operational, are not recreational or leisure time activities, and amount to the use of the boat for a commercial purpose.

[138] I am also satisfied that a reasonably prudent marine insurance broker would understand that use of a boat for a commercial purpose was not limited to the situation where paying customers were being taken on the boat, and would not have offered the simplistic advice that was provided to Mr. McIntosh by Mr. Macaulay in this case.

[139] As a result, I am satisfied that in providing the advice to Mr. McIntosh that he did, in the full knowledge that Mr. McIntosh intended to try to get his charter business up and running, and to take paying customers on board in the near future, Mr. Macaulay and Ogilvy & Ogilvy fell below the standard of care demanded of reasonably prudent insurance brokers.

[140] Moreover, I am also satisfied that Mr. Macaulay fell below the requisite standard of care in failing to ask the necessary questions of Mr. McIntosh, and in failing to obtain the relevant information regarding the risk from him.

[141] Mr. Macaulay says that if he had been aware of Mr. McIntosh's plan to begin marketing his boat right away, he would have asked him for more information, and would "absolutely" have checked with Mr. Scharien to see if these plans would have any impact on Mr. McIntosh's insurance coverage with Royal.

[142] However, as I have previously noted, Mr. Macaulay was specifically told about Mr. McIntosh's plan to develop a business chartering his boat during the time that Mr. Macaulay was arranging for Mr. McIntosh's boat insurance, and was made aware of the fact that Mr. McIntosh hoped to take paying customers on the boat in the very near future. There is no suggestion in the evidence, however, that Mr. Macaulay asked Mr. McIntosh for any information about his business plan, nor did he ask Mr. McIntosh any questions about how these plans would affect his use of the boat.

[143] I am of the view that once Mr. McIntosh told Mr. Macaulay about what were clearly short-range plans to try to develop a charter business for the boat, Mr. Macaulay had a duty to explore Mr. McIntosh's business plans with him in order to determine whether these plans had any implications for Mr. McIntosh's insurance coverage. Having failed to do so, I find that Mr. Macaulay and Ogilvy & Ogilvy fell below the standard of care expected of a reasonably prudent insurance broker.

[144] The next question, then, is whether Ogilvy & Ogilvy should be held to account for Mr. McIntosh's loss.

[145] Having carefully considered the matter, I have concluded that notwithstanding the shortcomings in the advice and services provided to Mr. McIntosh by Mr. Macaulay, Ogilvy & Ogilvy should not be held liable for Mr. McIntosh's loss.

[146] While Mr. Macaulay unquestionably gave Mr. McIntosh bad advice, at the end of the day, Mr. McIntosh did not rely on that advice to his detriment. Rather Mr. McIntosh chose instead to disregard Mr. Macaulay's advice, in the full knowledge that his insurance coverage could be affected by his actions.

[147] That is, Mr. McIntosh knew from the beginning that he was not to take paying customers out on his boat, and that if he did so, his insurance coverage would be in jeopardy. I have already found that he did precisely this during the summer of 2003.

[148] Reliance on the advice provided by Mr. Macaulay is necessary for Mr. McIntosh to be able to establish a causal link between the breach of the duty owed to Mr. McIntosh by Mr. Macaulay and Ogilvy & Ogilvy, and Mr. McIntosh's loss: see Linden and Feldthusen, *Canadian Tort Law*, 8th Ed., at p. 467.

[149] In the circumstances of this case, it does not now lie with Mr. McIntosh to say that he relied on the bad advice provided by Mr. Macaulay to his detriment. While Mr. Macaulay's advice as to

what constituted use of a boat for a commercial purpose might not have been accurate, it was correct insofar as it went, in that the taking of paying customers on the boat would indeed amount to commercial use.

[150] Having consciously chosen to disregard Mr. Macaulay's advice in this regard, and to take paying customers out on his boat, Mr. McIntosh knowingly put his insurance coverage in jeopardy, and was ultimately the author of his own misfortune.

[151] Before leaving the matter of Ogilvy & Ogilvy's liability, I should note that it does not appear that there was ever any discussion between Mr. Macaulay and Mr. McIntosh with respect to either the suspensive nature of the personal use warranty in the 2002 policy, or the absolute nature of the personal use warranty in the 2003 policy.

[152] In my view, these are matters that should have been discussed with Mr. McIntosh, especially given what Mr. Macaulay knew about Mr. McIntosh's plans for the boat. In failing to discuss these matters with Mr. McIntosh, Mr. Macaulay and Ogilvy & Ogilvy once again fell below the standard expected of the prudent insurance broker.

[153] That said, as I noted earlier, Mr. McIntosh clearly understood from the outset that his insurance coverage would be jeopardized if he took paying customers out on his boat. At no time in his testimony did Mr. McIntosh suggest that he relied on the fact that the personal use warranty was originally suspensive in nature when he made his decision to take paying customers out on his boat.

[154] Nor did Mr. McIntosh ever suggest that he would have conducted himself any differently, had he been made aware of the fact that the personal use warranty became absolute in nature when his insurance policy was renewed in July of 2003.

[155] Rather, Mr. McIntosh's position was always that he never took any paying customers on his boat at all, a position that I have specifically rejected.

[156] As a consequence, the action will also be dismissed as against Ogilvy & Ogilvy.

Is Mr. McIntosh entitled to a return of his premiums, and if so, from what date?

[157] Given that the private pleasure purposes warranty contained in Mr. McIntosh's original insurance policy was merely suspensive in nature, Mr. McIntosh retained his insurance coverage when he was using the boat for recreational or leisure time activities, and thus is not entitled to a return of the premiums paid during the term of this policy.

[158] In contrast, the private pleasure purposes warranty contained in the 2003-2004 policy was absolute in nature. That is, once the boat was chartered or used for any commercial purpose, the policy was voided, and coverage could not be reinstated.

[159] I have found that after renewing his insurance policy in July of 2003, Mr. McIntosh used his boat for a commercial purpose, namely the carriage of paying customers. I have also found that a number of other activities that he engaged in with the boat during the summer of 2003 amounted to the commercial use of the boat.

[160] The evidence as to precisely when various events such as poker runs took place is not entirely clear. Nor do we know where the boat was at different points during the summer of 2003. We do know, however, that Mr. McIntosh took paying customers out on his boat on or shortly before August 18, 2003.

[161] Mr. McIntosh having clearly breached the absolute warranty in the policy by that date at the latest, Royal was entitled to act as it did, and to treat the policy as void. In accordance with the provisions of subsection 85(2) of the *Marine Insurance Act*, Mr. McIntosh is entitled to the return of any insurance premiums paid by him after August 18, 2003.

[162] Although not mentioned in oral argument, Royal submitted in its written argument that it should be entitled to deduct the costs of its investigation and defence from the premiums to be returned.

[163] As requested by the parties, I will not deal with the issue of costs until such time as the parties have an opportunity to make submissions in this regard, and thus the matter of Royal's entitlement to its costs has yet to be determined. Moreover, Royal has led no evidence with respect to any costs that it may have incurred in investigating Mr. McIntosh's insurance claim. In the circumstances, I decline to make any order in this regard.

Damages

[164] Having found no liability on the part of either defendant, it is not, strictly speaking, necessary to assess the damages in this case. However, I will do so in the event that an appellate court takes a different view of this matter.

[165] Although Mr. McIntosh's expert was of the view that the boat was a total loss, at trial, counsel for Mr. McIntosh conceded that the boat could indeed be repaired. Thus the question to be decided is what it would cost to repair the boat.

[166] Two witnesses were called on this point, both of whom were marine surveyors, and both of whom were qualified as experts in appraising damage to boats. There was very little difference in the experts' assessment of what needed to be done to return the McIntosh boat to its previous condition, insofar as that was possible, nor was there much disagreement between the witnesses as to the cost of repairs.

[167] Mr. McIntosh relies on the evidence of Gerry Montpellier, who inspected the boat on September 26, 2006, and who estimated the cost of repairing the boat, as of October, 2006, to be $121,387.20, with a further sum of between $15-20,000 to be allocated for additional repairs identified in the course of the work. When asked how he arrived at the figure for the 'extras', Mr. Montpellier said that there was "no magic" to this, and it appears that this was something of a 'ball park' figure.

[168] In contrast, Royal called David Buchanan, who prepared his repair estimate in November of 2003. In his report to Royal, Mr. Buchanan recommended that a reserve of $125,000.00 be set aside to cover the cost of repairs. Like Mr. Montpellier's estimate, Mr. Buchanan's figure also included a component for unforeseen costs, although he did not identify what this amount would be.

[169] There is a difference in the operative dates of the two assessments, which would account for some of the disparity in the two estimates, although Mr. Buchanan testified that while the cost of major components might have increased "a bit", all of the other costs of repair would have remained more or less the same.

[170] Mr. Montpellier's estimate also included the cost of repairing the transom of the boat, which had delaminated. Mr. Montpellier conceded in cross-examination that he did not know whether this delamination pre-dated the theft of the boat or not. In contrast, while Mr. Buchanan's report noted the presence of the delamination observed during his inspection in November of 2003, he was of the view that this was a pre-existing condition, and was not attributable to the theft. As a result, Mr. Buchanan did not allocate anything for the cost of this repair, although he testified that it would take approximately six to ten hours of work to repair, at a labour cost of between $80 and $90 an hour.

[171] Given that Mr. Buchanan actually inspected the boat in 2003, he was in the best position to determine whether the delamination of the boat's transom was related to the theft or not. As a result, I accept his evidence that this was a pre-existing condition, and should not be taken into account in determining the cost of repairing the boat.

[172] I am also satisfied that had Mr. McIntosh been able to establish that he was entitled to compensation for his loss, he would be entitled to the present cost of the components needed to repair the boat, given his evidence that he was not in a financial position to effect the repairs himself, without the proceeds of his insurance.

[173] Taking all of this into account, I am satisfied that the damages suffered by Mr. McIntosh in relation to the cost of repairing his boat should properly be assessed in the amount of $130,000.00.

Conclusion

[174] For these reasons, this action will be dismissed. Each party shall have two weeks from the date of judgment to serve and file their written submissions with respect to the matter of costs, which submissions are not to exceed three pages in length.

"Anne Mactavish"

Judge

Ottawa, Ontario

January 29, 2007

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1006-04
STYLE OF CAUSE:	STEWART MCINTOSH v. ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA ET AL
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 11-15, 2006
REASONS FOR JUDGMENT:	The Honourable Madam Justice Mactavish
DATED:	January 29, 2007

APPEARANCES:

Mr. Mathew R. Todd	FOR THE PLAINTIFF
Mr. Rui Fernandes Ms. Kim Stoll	FOR THE DEFENDANT ROYAL & SUN ALLIANCE
Mr. Van Krkachovski Mr. John Teal	FOR THE DEFENDANT OGILVY & OGILVY

SOLICITORS OF RECORD:

RENAUD TODD LLP Windsor, Ontario	FOR THE PLAINTIFF
FERNANDES HEARN LLP Toronto, Ontario	FOR THE DEFENDANT ROYAL & SUN ALLIANCE
MCCAGUE, PEACOCK, BORLACK, MCINNIS & LLOYD LLP Toronto, Ontario	FOR THE DEFENDANT OGILVY & OGILVY