IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Mr. Justice William J. Burnett
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

URBANMINE INC., MARK CHISICK and ADAM CHISICK	)	***W. C. Empke***
	)	*for the Appellants*
(Applicants) Respondents	)	
	)	***D. G. Hill*** *and*
- and -	)	***R. C. Mascarenhas***
	)	*for the Respondents*
ST. PAUL FIRE AND MARINE INSURANCE COMPANY, TRAVELERS INSURANCE COMPANY OF CANADA and THE DOMINION OF CANADA GENERAL INSURANCE COMPANY	)	*Appeal heard:* ***January 30, 2017***
	)	*Judgment delivered:* ***April 20, 2017***
(Respondents) Appellants	)	

BURNETT JA

Introduction

[1] The respondents appeal the determination by the application judge that they have a duty to defend claims brought against their insured (the applicants) for fraud, theft, misappropriation and wrongful conversion.

[2] The general principles for making that determination are well-established.

[3] The insurance policy (the policy) provides that the respondents

will pay amounts that the applicants are required to pay as compensatory damages caused by an accident. The policy specifically excludes damage that is intended or expected by the insured.

[4] Of the various claims advanced against the applicants, the only cause of action that might give rise to an obligation to indemnify is the claim alleging wrongful conversion.

[5] I am of the view that the application judge erred in concluding that the respondents have a duty to defend the claims brought against the applicants, and I would allow the appeal.

Background

[6] An insurer is required to defend a claim where the facts alleged in the pleadings, if proven to be true, would require the insurer to indemnify the insured for the claim (see *Progressive Homes Ltd v Lombard General Insurance Co of Canada*, 2010 SCC 33 at para 19 and the authorities referred to in that paragraph). For that reason, the evidence on applications such as the present application is generally restricted to the pleadings and documents referred to in the pleadings, in this case the insurance policy (see *Monenco Ltd v Commonwealth Insurance Co*, 2001 SCC 49 at para 36).

Statement of Claim

[7] In the statement of claim, the plaintiff Vale Canada Limited (Vale) sued one of its subcontractors, Schwartz Bros. Construction Limited (Schwartz Bros.), seven individuals who were officers, employees and/or agents of Schwartz Bros. and a Vale employee (collectively, the Schwartz

Defendants), as well as the applicants, for fraud, theft, misappropriation and wrongful conversion of 494,050 pounds of nickel. The nickel is described in the statement of claim, and in this decision, as the stolen product.

[8] In the statement of claim, Vale says that it was the only producer and distributor of nickel in Manitoba.

[9] Vale alleges that some or all of the Schwartz Defendants stole the stolen product from its property in Thompson, Manitoba. It is further alleged that the Schwartz Defendants sold the stolen product to the corporate applicant (Urbanmine) below fair market value, that Urbanmine and/or the individual applicants fraudulently represented to a third party that they lawfully owned or possessed the stolen product, and that they resold the stolen product to the third party for less than fair market value.

[10] The specific allegations of wrongdoing by the applicants are contained in paras 17 and 19 of the statement of claim, which are reproduced below:

> 17. Vale states that, at all material times, Urbanmine and/or any or all of the [applicants]:
>
> (a) had the skill, industry knowledge, and means to determine that the Stolen Product was lawfully owned by Vale;
>
> (b) knew or ought to have known that Schwartz Bros. and/or any or all of the Schwartz Defendants did not carry on business as nickel manufacturers or as agents of, or dealer for Vale and therefore were not in lawful possession of the Stolen Product;
>
> (c) <u>knew or ought to have known that the Stolen Product was obtained through unlawful means;</u>

(d) knew or ought to have known of the conspiracy, fraud, theft and conversion of the Stolen Product and were therefore willing and knowledgeable participants in said unlawful conduct and are liable for same;

(e) knew or ought to have known that the prossession and conversion of the Stolen Product would cause loss and damage to Vale;

(f) intended to cause loss and damage to Vale or, in the alternative, Vale states that by reason of the unlawful means with which Urbanmine came into possession of the Stolen Product, constructive intent may be reasonabl[y] derived;

(g) are vicariously liable for the acts or omissions of their employees or agents who knowingly purchased, took possession of, and converted the Stolen Product;

(h) wrongfully and unlawfully converted the Stolen Product to their own use and their own profit; and

(i) were unjustly enriched by reason of their unlawful conduct, to the detriment of Vale.

19. Further, or in the alternative, Vale states that Urbanmine and/or any or all of the [applicants] recklessly and fraudulently represented to and advised [a third party] that it lawfully owned and/or was in lawful possession of the Stolen Product, which was false, and sold the Stolen Product to [the third party] with the knowledge and intent that selling said product would cause loss and damage to Vale.

[emphasis added]

The Policy

[11] In the policy, Urbanmine's business is described as: metal broker, battery recycling, scrap metal recycling and electronic recycling.

[12] Under the terms of the policy, the respondents agree to:

> pay amounts any [insured] is legally required to pay as compensatory damages for covered bodily injury or property damage that:
> - results from your covered premises, work, products or completed work;
> - happens while this agreement is in effect; and
> - is caused by an event.
>
> . . .
>
> *Event* means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
>
> [emphasis added]

[13] The only relevant exclusion in the policy (the exclusion) provides that the insurer "will not cover bodily injury or property damage that is intended or expected from the standpoint of the [insured]" (emphasis added).

[14] The policy contains provisions whereby the respondents will defend any claim for covered injury or damage made against an insured.

The Lower Court Decision

[15] In a relatively brief endorsement, the application judge found that the respondents have a duty to defend the claims described in the statement of claim.

[16] Relying on the Supreme Court of Canada decision in *Reid Crowther & Partners Ltd v Simcoe & Erie General Insurance Co*, [1993] 1 SCR 252, the application judge considered the reasonable expectations of the parties and found that:

> Using this definition, as a metal broker, the applicants' reasonable expectation would be that in the course of its operations, when it bought or sold metal, it would be offered liability coverage for decisions that were negligent during the course of those operations.
>
> As well, the respondents' reasonable expectation would be that it would be providing the insured with liability insurance for when the applicants bought or sold metal in a negligent manner.
>
> [emphasis added]

Significantly, there is no allegation of negligence in the statement of claim.

[17] The application judge went on to say:

> Having decided that this claim at its core is about buying and selling metal, which is the core business of a metal broker, the conclusion I reach is if there is no right to be defended against those allegations as set forth in the statement of claim, the purchase of insurance by the applicants would indeed be nugatory.

[18] The application judge reasoned that it is the buying and selling of metal, in this case nickel, that underpins the claim and that, if what occurred was in the routine of buying and selling nickel within the scope of the applicants' business, there would not be an intentional tort.

[19] The application judge concluded:

> There is a duty to defend in this case. The claim is for an action in the ordinary course of the applicants buying and selling of metal. There is no exclusion applicable. Compensatory damages would be payable if the claim succeeds. There is an event for which coverage is offered in this case, which is the purchase and sale of nickel in the ordinary course of business.

The Issues and the Parties' Positions

[20] The respondents say that the application judge erred when he:

1. ordered a duty to defend having found that there could be no possibility of indemnity under the policy if Vale proved any of its allegations;

2. found that the claim contained allegations satisfying the requirement for an accident;

3. concluded that the policy exclusion (i.e. no coverage if damage is expected or intended) did not apply, given that the true nature of the claim is that the applicants intended to cause harm;

4. concluded that the claim sought compensatory damages, given that it only seeks damages for restitution or similar relief.

[21] The respondents' position with respect to the first issue is based upon the penultimate paragraph of the endorsement where the application judge observed:

> However, if Vale is successful in proving on a balance of probabilities fraud, conspiracy, theft, or conversion or any of the other allegations in the statement of claim, the respondents may well deny coverage as such actions would be excluded under the policy as these would then be found to be intentional acts of the applicants.

Simply put, the respondents say that there can be no duty to defend when there is no possibility of a duty to indemnify.

[22] As to the second issue, the respondents say that the claim is clearly and unequivocally pled as a claim by which the applicants are sued for their deliberate choice to purchase and sell the stolen product, knowing that Vale was the true owner and would suffer harm as a consequence. According to the respondents, a claim for negligence is not asserted and cannot be inferred on the pleadings; there are no assertions in the claim that the applicants owed a duty of care to Vale or that they breached any particular standards of care.

[23] The third issue is closely connected to the second issue. The respondents submit that the true nature of the claim is that the applicants intended to cause harm, there are no allegations supporting a claim in negligence, and the exclusion is applicable.

[24] With respect to the fourth issue, the respondents argue that the policy only provides indemnity for amounts payable as compensatory damages, that Vale is not seeking compensation for damages done to it, and that the monetary relief sought in the claim is all in the nature of restitution.

[25] The applicants' response to the first issue is that the application judge did not actually find that there would be no duty to indemnify and, as such, he did not err. According to the applicants, the respondents have mischaracterized the application judge's words. They say that he did not make any definitive comment with respect to the respondents' obligation to indemnify the applicants pursuant to the policy and that he simply stated that the respondents "may" deny coverage if allegations in the claim are proven

to be true. The applicants submit that the application judge's comments in the endorsement regarding indemnification are nothing more than *obiter dicta*.

[26] Turning to the second issue, the applicants argue that the pleadings raise issues of constructive intent as opposed to actual intent. In that regard, para 18 of the statement of claim is particularly significant because it suggests that Urbanmine was not aware of the unlawful source of the stolen product:

> 18. Further, or in the alternative, Vale states that the Schwartz Defendants, in fraudulent conspiracy, falsely represented to and advised Urbanmine that they lawfully owned and/or were in lawful possession of the Stolen Product, which was false.

While the claim never uses the word "negligence" expressly, Urbanmine says that the pleadings clearly allow for the prospect that it unknowingly purchased and resold the stolen product.

[27] As to both the second and third issues, the applicants say that even if a cause of action in negligence is not contained in the statement of claim, the pleadings allow for the possibility that they were the victims of fraudulent conspiracy and false representations by the Schwartz Defendants and that any conversion of the stolen product by Urbanmine, and the corresponding injury or damage to Vale, was not expected or intended by Urbanmine. The applicants assert that the tort of conversion does not require that a party intended the result or consequences of their action. And, as noted in *Progressive Homes*, "coverage provisions are interpreted broadly, and exclusion clauses narrowly" (at para 24).

[28] Finally, in relation to the issue of damages, the applicants say that the damages sought are for fair market value of the stolen product which is a compensatory loss claim.

The Standard of Review

[29] In *Ontario Society for the Prevention of Cruelty to Animals v Sovereign General Insurance Company*, 2015 ONCA 702, the Ontario Court of Appeal specifically addressed the standard of review in a duty to defend application. There, Pepall JA, for the Court, stated (at paras 34-36):

> In both *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2015 ABCA 121, 386 D.L.R. (4th) 482, leave to appeal granted [2015] S.C.C.A. No. 188, and *Precision Plating Ltd. v. Axa Pacific Insurance Company*, 2015 BCCA 277, [2015] B.C.W.L.D. 4112, appellate courts have held that the limited standard of review espoused in *Sattva* [*Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53] may not be applicable to the interpretation of insurance policies. These contracts are generally widely used standard form agreements where appellate intervention is required so as to ensure consistency of result and certainty in the law.
>
> However, to reiterate, Rothstein J. stated that the circumstances in which a question of law can be extricated from the interpretation process will be rare. Rare, of course, does not mean non-existent. See for example *1298417 Ontario Ltd. v. Lakeshore (Town)*, 2014 ONCA 802.
>
> Where, as here, the exercise involves the application of a legal principle of contractual interpretation in the context of insurance to the pleadings in issue, a mixed question of fact and law is engaged.

[30] Appeals involving the interpretation of insurance contracts raise the issue of whether the policy is a standard form contract. In the

subsequent decision in *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37, the Supreme Court of Canada observed that, in some circumstances, where the appeal involves the interpretation of a standard form contract, the appropriate standard of review will be correctness (at paras 46-48):

> Conclusion on Standard of Review
>
> *Sattva* should not be read as holding that contractual interpretation is always a question of mixed fact and law, and always owed deference on appeal. I would recognize an exception to *Sattva*'s holding on the standard of review of contractual interpretation. Where, like here, the appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix specific to the particular parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.
>
> These criteria are met in the present case, so the standard of review applicable to the trial judge's interpretation of the Policy is correctness. The trial judge's underlying factual findings remain subject to deferential review, as mentioned above.
>
> Depending on the circumstances, however, the interpretation of a standard form contract may be a question of mixed fact and law, subject to deferential review on appeal. For instance, deference will be warranted if the factual matrix of a standard form contract that is specific to the particular parties assists in the interpretation. Deference will also be warranted if the parties negotiated and modified what was initially a standard form contract, because the interpretation will likely be of little or no precedential value. There may be other cases where deferential review remains appropriate. As Iacobucci J. recognized in *Southam* [*Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748], the line between questions of law and those of mixed fact and law is not always easily drawn. Appellate courts should consider whether "the dispute is over a general proposition" or "a very particular set of circumstances

> that is not apt to be of much interest to judges and lawyers in the future" (para. 37).
>
> [emphasis added]

[31] There is no evidence as to whether the policy in the present case is a standard form policy, and the dispute relates to a very particular set of circumstances. While the terms of the policy must be interpreted and applied, the issues raised in this appeal focus on the application judge's finding with respect to the true nature and substance of the claim and on how he applied (or failed to apply) the principles applicable to an insurer's duty to defend, rather than on a specific interpretation of the policy wording. As will be seen, the application judge made palpable and overriding errors and errors in principle, both of which call for appellate intervention.

Duty to Defend Generally

[32] In *Progressive Homes*, the Supreme Court of Canada described an insurer's duty to defend in the following terms (at paras 19-20):

> A. *The Duty to Defend*
>
> An insurer is required to defend a claim where the facts alleged in the pleadings, if proven to be true, would require the insurer to indemnify the insured for the claim (*Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801, at pp. 810-11; *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49, [2001] 2 S.C.R. 699, at para. 28; *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at paras. 54-55). It is irrelevant whether the allegations in the pleadings can be proven in evidence. That is to say, the duty to defend is not dependent on the insured actually being liable and the insurer actually being required to indemnify. What is required is the mere possibility that a claim falls within the insurance policy. Where it is clear that the claim falls outside the

> policy, either because it does not come within the initial grant of coverage or is excluded by an exclusion clause, there will be no duty to defend (see *Nichols*, at p. 810; *Monenco*, at para. 29).
>
> In examining the pleadings to determine whether the claims fall within the scope of coverage, the parties to the insurance contract are not bound by the labels selected by the plaintiff (*Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at paras. 79 and 81). The use or absence of a particular term will not determine whether the duty to defend arises. What is determinative is the true nature or the substance of the claim (*Scalera*, at para. 79; *Monenco*, at para. 35; *Nichols*, at p. 810).
>
> [emphasis added]

[33] Subsequently, the Ontario Court of Appeal summarized the relevant principles in *Tedford v TD Insurance Meloche Monnex*, 2012 ONCA 429 (at para 14):

> The following principles emerge from the case law governing the duty to defend:
>
> (1) The insurer has a duty to defend if the pleadings filed against the insured allege facts which, if true, would require the insurer to indemnify the insured: Monenco Ltd. v. Commonwealth Insurance Co., [2001] 2 S.C.R. 699, [2001] S.C.J. No. 50, 2001 SCC 49, at para. 28.
>
> (2) If there is any possibility that the claim falls within the liability coverage, the insurer must defend: Nichols v. American Home Assurance Co., [1990] 1 S.C.R. 801, [1990] S.C.J. No. 33, at p. 810 S.C.R.
>
> (3) The court must look beyond the labels used by the plaintiff to ascertain the "substance" and "true nature" of the claims. It must determine whether the factual allegations, if true, could possibly support the plaintiff's legal claims: Monenco, at paras. 34-35; Scalera [*Non-Marine Underwriters, Lloyd's of London v Scalera*, 2000 SCC 24], at para. 79.

> (4) The court should determine if any claims plead are entirely "derivative" in nature, within the meaning of that term as set out in Scalera. A derivative claim will not trigger a duty to defend.
>
> (5) If the pleadings are not sufficiently precise to determine whether the claims would be covered by the policy, "the insurer's obligation to defend will be triggered where, on a reasonable reading of the pleadings, a claim within coverage can be inferred": Monenco, at para. 31.
>
> (6) In determining whether the policy would cover the claim, the usual principles governing the construction of insurance contracts apply, namely, the contra proferentem rule and the principle that coverage clauses should be construed broadly and exclusion clauses narrowly: Monenco, at para. 31; Scalera, at para. 70. As well, the desirability, where the policy is ambiguous, of giving effect to the reasonable expectations of the parties: Scalera, at para. 71.
>
> (7) Extrinsic evidence that has been explicitly referred to in the pleadings may be considered to determine the substance and true nature of the allegations: Monenco, at para. 36; see 1540039 Ontario Ltd. v. Farmers' Mutual Insurance Co. (Lindsay) (2012), 110 O.R. (3d) 116, [2012] O.J. No. 1380, 2012 ONCA 210. [page 149]
>
> [emphasis added]

Analysis and Decision

[34] In *Progressive Homes*, the Court provided a brief review of the relevant principles of insurance policy interpretation (at paras 22-24):

> The primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole (*Scalera*, at para. 71).
>
> Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction

> (*Consolidated-Bathurst*, [*Consolidated-Bathurst Export Ltd v Mutual Boiler and Machinery Insurance Co*, [1980] 1 SCR 888] at pp. 900-902). For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties (*Gibbens* [*Co-operators Life Insurance Co v Gibbens*, 2009 SCC 59], at para. 26; *Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901), so long as such an interpretation can be supported by the text of the policy. Courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded (*Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901). Courts should also strive to ensure that similar insurance policies are construed consistently (*Gibbens*, at para. 27). These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place.
>
> When these rules of construction fail to resolve the ambiguity, courts will construe the policy *contra proferentem* — against the insurer (*Gibbens*, at para. 25; *Scalera*, at para. 70; *Consolidated-Bathurst*, at pp. 899-901). One corollary of the *contra proferentem* rule is that coverage provisions are interpreted broadly, and exclusion clauses narrowly (*Jesuit Fathers*, at para. 28).
>
> [emphasis added]

[35] While I see no ambiguity in the policy wording, the application judge was clearly of the view that the language is ambiguous because he examined the reasonable expectations of the parties. Unfortunately, the application judge failed to articulate the ambiguity. His analysis of the parties' reasonable expectations focussed on the possibility of negligence by the applicants, notwithstanding the absence of any express claim for negligence in the statement of claim. Significantly, and as discussed below, it is difficult to envision any claim for negligence that could be advanced by Vale against the applicants on the present facts.

[36] Under the terms of the policy, the respondents agreed to pay for damages caused by an accident. The definition of an "accident" was considered by the Supreme Court of Canada in *Progressive Homes* (at para 47):

> Fortuity is built into the definition of "accident" itself as the insured is required to show that the damage was "neither expected nor intended from the standpoint of the Insured". This definition is consistent with this Court's core understanding of "accident": "an unlooked-for mishap or an untoward event which is not expected or designed". . . . When an event is unlooked for, unexpected or not intended by the insured, it is fortuitous.

Clearly, if Vale proves fraud, theft or misappropriation by the applicants, it cannot be said that the damage was not intended or expected by the applicants, and damages would not be payable as a result of any accident.

[37] In *Non-Marine Underwriters, Lloyd's of London v Scalera*, 2000 SCC 24, MacLachlin J (as she then was), speaking for the majority, said (at paras 37-38):

> The question at issue on this appeal is whether the insurer may avoid the obligation to defend the defendant to the battery action under the policy exclusion for "any intentional . . . act". I agree with Iacobucci J. that this clause must be interpreted as requiring an intent to injure.
>
> In other words, where there is an allegation of sexual battery, courts will conclude as a matter of legal inference that the defendant intended harm for the purpose of construing exemptions of insurance coverage for intentional injury.

Similarly, where (as here) there are allegations of fraud, theft and

misappropriation, it is my view that courts will conclude as a matter of legal inference that such claims contemplate that the defendant intended harm for the purpose of construing exemptions of insurance coverage for intended injury. It follows that the exclusion applies, and the respondents have no duty to defend such claims in the present case.

[38] The only remaining cause of action pled in the statement of claim is conversion, which Vale generally refers to as wrongful conversion. The tort of conversion involves a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession (*Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce*, [1996] 3 SCR 727 at para 31).

[39] It is possible, however, to commit the tort of conversion innocently. John G Fleming, *The Law of Torts*, 5th ed (Sydney: Law Book Company, 1977), observes (at p 53):

> The required intent is to interfere or deal with the goods by exercising dominion over them on one's own behalf or of someone other than the plaintiff. See *Lancs. & Yorks. Ry* v. *MacNicoll* (1919) 88 L.J.K.B. 601, 605. But it is not necessary that the defendant should have been minded to commit a wrong, because he may be liable for acting in ignorance or under an innocent mistake.

[40] The question here is whether there is a possibility that the statement of claim includes, by inference, a claim against the applicants for conversion resulting from ignorance, innocent mistake or negligence. Is it a reasonable interpretation of the statement of claim that the applicants "innocently" or "negligently" bought and sold 494,050 pounds of nickel that

they thought the Schwartz Defendants lawfully owned? I am not persuaded that the statement of claim includes such claims.

[41] I say this for several reasons.

[42] First, the claims made against the applicants are not claims based on the purchase and sale of nickel in the ordinary course of business, and in making that finding, the application judge made a palpable and overriding error. The true nature and substance of the claims made against the applicants is that they were willing and knowledgeable participants in an unlawful scheme intended to cause loss to Vale. In particular, paras 17 and 19 of the statement of claim make it clear that the claim for wrongful conversion is entirely based on the wrongful and intentional actions of the applicants in buying and selling the stolen product for less than fair market value.

[43] Second, para 18 speaks to misrepresentations allegedly made by the Schwartz Defendants. There is nothing in the statement of claim that suggests the applicants were misled or fooled by such representations. To the contrary, the applicants are specifically alleged to have known that the stolen product was obtained through unlawful means, and they are said to be willing and knowledgeable participants in the alleged conspiracy, fraud, theft and conversion of the stolen product.

[44] Third, it is incompatible (and perhaps incomprehensible) to say, on the one hand, that the applicants recklessly and fraudulently represented to a third party that they lawfully owned and/or were in possession of the stolen product with the knowledge and intent that selling the stolen product would cause loss to Vale (para 19), and then to infer, on the other hand, that the

applicants were somehow duped or tricked into believing that they lawfully owned and/or were in possession of the stolen product and innocently or negligently sold it to the third party.

[45] Fourth, conversion is complete when a person wrongfully interferes with the goods of another. Here Vale specifically alleges that the applicants, by their conduct, intended to cause loss or damage. In these circumstances, it can hardly be said that damage was caused by an "accident" which would come within the coverage contemplated by the policy, and the exclusion clause would operate to deny coverage.

[46] Fifth, it is simply not possible to envision a claim by Vale against the applicants for negligence on the facts as pled. For example, what duty of care would the applicants owe to Vale in the circumstances? In my view, it would require an unreasonable and fanciful reading of the statement of claim to infer a claim based on negligence (see *Monenco* at para 32).

[47] Finally, if a claim in negligence was inferred, it would be derivative in nature because Vale specifically pleads that the applicants wrongfully converted the stolen product to their own use and intended to cause injury. As noted by Iacobucci J in *Scalera* (at para 85):

> Having construed the pleadings, there may be properly pleaded allegations of both intentional and non-intentional tort. When faced with this situation, a court construing an insurer's duty to defend must decide whether the harm allegedly inflicted by the negligent conduct is derivative of that caused by the intentional conduct. In this context, a claim for negligence will not be derivative if the underlying elements of the negligence and of the intentional tort are sufficiently disparate to render the two claims unrelated. If both the negligence and intentional tort claims arise from the same actions and cause the same harm, the negligence

> claim is derivative, and it will be subsumed into the intentional tort for the purposes of the exclusion clause analysis. If, on the other hand, neither claim is derivative, the claim of negligence will survive and the duty to defend will apply. Parenthetically, I note that the foregoing should not preclude a duty to defend simply because the plaintiff has pleaded in the alternative. As Pryor, "The Stories We Tell: Intentional Harm and the Quest for Insurance Funding", *supra*, points out at p. 1752, "[p]laintiffs must have the freedom to plead in the alternative, to develop alternative theories, and even to submit alternative theories to the jury". A claim should only be treated as "derivative", for the purposes of this analysis, if it is an ostensibly separate claim which nonetheless is clearly inseparable from a claim of intentional tort.
>
> [emphasis added]

A derivative claim does not trigger a duty to defend (see *Tedford* at para 14(4)).

[48] For these reasons, I agree with the respondents that the application judge made a palpable and overriding error with respect to the true nature of the claim, that he erred in his application of the relevant legal principles and that his conclusion that the respondents have a duty to defend must be set aside. Given these errors, it is not necessary to decide whether Vale is seeking compensatory damages.

[49] I would allow the appeal with costs.

Burnett JA

I agree: Hamilton JA

I agree: Pfuetzner JA