IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Deasan Holdings Ltd. v. Continental Casualty Company,* 2024 BCSC 580

Date: 20240412
Docket: S137059
Registry: Kelowna

Between:

Deasan Holdings Ltd.

Plaintiff

And

Continental Casualty Company

Defendant

Before: The Honourable Mr. Justice Betton

Reasons for Judgment

Counsel for the Plaintiff:	P.J. Stein, K.C.
Counsel for the Defendant:	D.M. Pick
Place and Dates of Trial/Hearing:	Kelowna, B.C. October 17–19, 2023
Written Submissions Received:	November 3, 17, November 29, December 1, 2023 March 20, 2024
Place and Date of Judgment:	Kelowna, B.C. April 12, 2024

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Introduction

[1] A landslide occurred near Fort St. John, BC on September 29, 2018. It caused damage to private and public property, including residences and roads, that resulted in a civil claim being filed (the "Giesbrecht Action"). That matter is scheduled to proceed to trial in mid-2024.

[2] The plaintiff in this action, Deasan Holdings Ltd. ("Deasan"), is named as one of several defendants in the Giesbrecht Action. It is the owner of 70 acres of land at or near the landslide. Deasan commenced gravel mining operations on its lands approximately 29 days before the landslide.

[3] Deasan is an affiliate of D.R.S. Energy Services Inc. ("DRS"). At the time of the landslide DRS had in place a policy of insurance issued by CNA Canada ("CNA").

[4] The plaintiff's representative contacted CMB Insurance Brokers ("CMB"), its insurance broker, in advance of the commencement of its gravel mining operation in an effort to have it secure appropriate insurance coverage for the start-up. That prompted CMB to communicate with the defendant CNA on September 4, 2018 with a view to securing that insurance.

[5] The plaintiff says the claims against it are covered by the terms of the policy of insurance issued by the defendant to DRS on the basis that Deasan is included as an insured and because the policy coverage was extended to the gravel pit operations. As a result, it says the defendant is obligated to defend it in the Giesbrecht Action and to indemnify it for any damages that might be assessed against it in that claim.

[6] The defendant has denied coverage and any obligation to provide a defence to the Giesbrecht Action on behalf of Deasan.

Background

[7] The shares of the plaintiff are held equally by two other companies, D.S.S. Holdings Inc. (“DSS”) and Lorean Enterprises Inc. (“Lorean”). DSS shares are held by Dean Swanberg (“Swanberg”). The Lorean shares are held by Sandy Beech (“Beech”).

[8] DRS shares are held by DSS (50%) and Lorean (35%) and Russell Parker (15%).

[9] DRS is an oil field services company that hauls equipment to and from oilfield sites and maintains lease roads. Its annual revenues are in the order of $8 million.

[10] The parties agree that, in accordance with the laws of British Columbia, the plaintiff is an affiliated corporation of DRS.

[11] Until August 2017 the plaintiff was a numbered shelf company with no active business. The directors have always been Swanberg and Beech. At about that time, they caused property with shops used by DRS as well as adjoining lots of land to be transferred to the plaintiff from DRS. Three of those properties have the civic address of 9815-77 Avenue, Fort St. John, BC. The fourth is 7313-100 Avenue, Fort St. John, BC (the “original lands”).

[12] In October 2017 the plaintiff purchased additional property from a third party. This is the property associated to the landslide with legal descriptions of Lot 1, Plan PGP23762, Part NW1/4, Section 19, Township 83, Range 18, Meridian W6 Peace River Land District and Lot 1, Plan PGP20464, Part NW 1/4, Section 19, Township 83, Range 18, Meridian W6 Peace River Land District (together the “gravel pit lands”).

[13] A gravel mine had been in operation on the gravel pit lands 11 years or more prior to their acquisition. The principal objective in acquisition of the gravel pit lands was to provide additional space for DRS to keep equipment, or as described by

Beech, “to house DRS, to put our company in.” There was also consideration of the prospect that the gravel mine or pit operations might be restarted.

[14] By the summer of 2018 Deasan had determined that gravel operations would be commercially viable. DRS operations required gravel. The intention was to use gravel that would be produced in those operations and to sell to third parties. Preparatory work was commenced, including acquiring the necessary mining permit.

[15] The plaintiff did not have employees or equipment to conduct the operations. DRS transferred some equipment to the plaintiff and supplied employees for that preparatory work.

[16] In about 2015 Beech and Swanberg began using CMB for their insurance needs in respect of DRS.

[17] Brett Kanuka (“Kanuka”) was the individual with CMB who solicited their business. His role at CMB has evolved since he began his employment there in 2009, where he was initially an account executive responsible for building clientele for the firm. He progressed to the director of marketing, managing, among other things, the relationship between the brokerage itself and various insurance companies. At the time of trial, he was the branch president for the Edmonton and Calgary locations.

[18] Kanuka described CMB’s business as a broker, focusing on commercial insurance including “helping companies place coverage with insurers, assess the risk, and find the appropriate coverages for the right and appropriate pricing.”

[19] CMB maintains relationships with various insurance companies that provide insurance coverage to their business clients such as the plaintiff and DRS. At the relevant times those included the defendant, CNA and Specialty Wholesale Services (“SWS”). SWS is a representative of Palm Insurance Canada Inc. CMB had what is called a “producer agreement” with CNA.

[20] For at least the year prior to December 31, 2017 CMB obtained insurance coverage for DRS through SWS.

[21] After the plaintiff was created and the gravel pit lands acquired, Beech contacted Kanuka at CMB to arrange for insurance coverage and informed Kanuka of the intentions regarding the gravel operations on the newly acquired land. It was at that time that CMB first became aware of Deasan and that Deasan was an affiliate of DRS. It was also at that time that Beech first informed Kanuka that gravel operations were being considered.

[22] Kanuka informed Beech that if and when gravel operations were to commence, insurance coverage would be better obtained from a different company than SWS as “there are better insurance companies for that type of operation and it would make sense to set up a separate policy for that operation.”

[23] Kanuka then took steps to ensure the plaintiff and the lands were included in the policy coverage with SWS. CMB contacted a representative of SWS to add the plaintiff to the policy, advising that the principal was the same as DRS. SWS responded that, based on the terms of that policy, Deasan was automatically included.

[24] Later in 2018, when the SWS policy was approaching expiry, Kanuka learned of the renewal terms proposed by SWS. The costs were not attractive so he went to CNA to obtain a quote for coverage. Specifically, he communicated with Jason Saby (“Saby”), a senior underwriter with CNA’s Calgary office with whom Kanuka had an established working relationship.

[25] Underwriters decide what risk to accept and insure and for what prices.

[26] After first speaking with Saby by phone, Kanuka caused CMB to submit by email an application for insurance. CNA did not require its producers, including CMB, to use any specific form for such applications. The application attached four documents:

(a) “property statement of values” – this is a list of real property that included the original lands and the gravel pit lands and identifies the latter and one parcel of the original lands as “vacant lands”;

(b) “contractor’s equipment renewal schedule” – this is a list of equipment that includes a value for each piece;

(c) “SPF 4 – garage automobile summary” – this listed the original lands’ address of 9815-77 Avenue, Fort St. John for “operations: minor auto repairs and certification (Contingent Cover only)”;

(d) “DRS Energy Services Inc Narrative” – this is authored by Kanuka and provides a brief narrative description of the business of DRS and each of Swanberg, Beech and Parker; and

(e) “commercial risk application” – this is a form-type document that identifies DRS as the “Named Insured” and sets out the types of coverage sought.

[27] The latter was a revised version of the submission that CMB had used in the previous year to SWS. In revising it for submission to CNA, Kanuka testified some things were missed. On its face, it noted an expiration date of December 31, 2016 and that the insurance was required December 28, 2016. It makes no reference to gravel pit operations or Deasan and more specifically denies any vacant land. As noted above, the gravel pit lands had been acquired since the original form was created and were included in the statement of values as vacant lands. In addition, it referred to the “type of business” as “Heavy Oilfield hauling”.

[28] The application also sought coverage for a “broad definition of insured”, but the documents provided did not reference the plaintiff or clarify what the objective of this request was. The commercial risk application provided a space to identify “Subsidiaries and affiliates”, which was populated with the words “None at this time”.

[29] Later that same day, Saby sent an email containing a quote that also referenced some details of the coverage that would be provided. In preparing the quote Saby observed that the application referenced an expiration date of December 31, 2016 and assumed that the application information had just been copied from a prior year. He also noted that coverage was sought for locations that were described as vacant land, despite the indication there were no vacant lands.

[30] On December 29, 2017 CMB responded to the quote asking Saby to “please bind coverage” for the year beginning December 31, 2017. Within two hours Kanuka confirmed his actions by email to Beech including the statement, “I have currently bound the policy with CNA as I feel that it is the decision you are most likely to move forward with.” Beech did not question Kanuka’s actions.

[31] On January 3, 2018 CMB requested a change to the policy, by email. Saby responded that day agreeing to the change.

[32] On January 5, 2018 CMB created a certificate of insurance based on the quote and coverage discussed between Kanuka and Saby. Included in it under the heading “Additional Insured” is “Deasan Holdings Ltd wrt Ownership of Building at 9817-77 Avenue Fort St John BC”. This is also referred to as a “binder of coverage”. This document was not provided to or reviewed by CNA, but was forwarded to Beech on behalf of DRS and Deasan.

[33] The premium was paid. CMB did not receive a commission from CNA. Its compensation came in the form of an agency fee paid by DRS.

[34] On January 26, 2018 CNA sent the contract/policy wordings to CMB, including the definition and description of who is an insured. The specifics of that policy language are dealt with in my analysis below. It identified DRS as the named insured. It makes no specific reference to Deasan. This was forwarded to Beech.

[35] On August 31, 2018 Beech contacted Kanuka to advise that Deasan intended to commence the gravel operations. Kanuka requested that Beech have his staff

provide information to CMB regarding the equipment to be used by Deasan in those operations.

[36] On September 4, 2018, the next business day, Kanuka called Saby. The precise content and effect of this call is a key point of dispute in this litigation. That September telephone call has been referred to by the parties as the “STC”. I adopt that approach in these reasons.

[37] There are aspects of that call that are not disputed, however. The parties agree that the subject of the conversation was the inclusion or addition to the insurance coverage for the gravel operation. The call lasted two minutes and 42 seconds. Other details are dealt with in my analysis of the effect of the STC, under that heading below.

[38] On September 10, 2018 Kanuka sent an email to one of his staff instructing him to send an email to CNA adding on the gravel operations equipment and buildings. That staff member passed the task to another CMB employee on September 26, 2018. Specifically, the latter email stated, “Could you please help and report this change to C. N. A.?” This was three days prior to the landslide. On September 28 that employee communicated with Louise Crook, a staff member of DRS/Deasan, seeking information for use in completing the task, including addresses of the buildings. She responded that day.

[39] The landslide occurred on September 29, 2018 between 1800 and 2200 hours. Beech informed Kanuka of the landslide by telephone prior to 0900 on the morning of Monday, October 1, 2018.

[40] Upon Kanuka’s arrival at his office, he learned that the information requested by Saby in their September 4 telephone call had not been sent. He instructed that information be sent and to report the landslide.

[41] On October 1, 2018 at 9:02 a.m. CMB emailed CNA about adding new operations for the gravel pit to the policy. The specific content of the email included the following:

> Effective September 24, 2018 can we please add new operations for a gravel pit to DRS's insurance policy? There will be common ownership with the following company: Deasan Holdings Ltd. . . .

[42] At 1436 hours on October 1, 2018 CMB sent another email to CNA providing notice of the landslide. The email included the following: “Please find enclosed a notice of loss for a claim occurring on September 29, 2018.”

[43] On October 3 and 4, 2018 Saby emailed CMB, requesting proof of ownership in Deasan by DRS.

[44] On October 10 CMB advised Saby that DRS had not acquired Deasan but had incorporated Deasan. The email included the following: “There are two owners of DRS energy: Dean Swanberg Sandy Beech. Deasan is the first three letters of both owners' name. We had it listed on the policy previously as the owner of the buildings that DRS is operating out of.”

[45] On October 17, 2018 CNA forwarded a “reservation of rights” letter by email asking CMB to provide it to “the insured”. The email also requested “additional information to respond to CMB’s request to add additional locations to the policy effective September 24, 2018” and to forward “the emails from the insured to your office requesting various locations be added to the policy” and “any emails from your office to CNA requesting that Deasan Holdings Ltd. or any other entities be added to the DRS Energy Services Inc. policy”.

[46] Mr. Kanuka responded on October 22 referencing the STC, although he erroneously referred to it as having occurred the week of August 27. At that time Kanuka advised he had no documentation of the call. He did not reference his email to his colleague on September 10, 2018.

[47] The events that followed are described in the agreed statement of facts as follows:

> 48. On November 7, 2018, Michael Ilnychy (“Ilnycky”) sent Kanuka an email stating that, to the best of CNA’s knowledge, the only document which CNA has which references Deasan in any way is a PDF titled

"2017-18 Schedules – D.R.", which did not come to CNA's attention until the October 22, 2018 email by Kanuka.

49. Kanuka replied the same day and advised CMB was reviewing the matter and revert back early next week. Ilnycky followed up on November 20, 2018 for any additional documents from CMB. Kanuka emailed Ilnycky the same day to state that CMB would respond in two days.

50. On November 22, 2018, Kanuka sent CNA an email, which included additional information and attachments.

51. On November 29, 201 8, CNA advised Deasan (through CMB) that it would be denying coverage to Deasan for the Landslide.

52. CNA's first letter denying coverage was sent December 3, 2018, before the Giesbrecht Action was commenced. The letter was addressed only to DRS care of CMB (the **"December 2018 Denial Letter"**).

53. On April 18, 2019, in response to CMB's request for reconsideration, CNA provided another letter to CMB which advised that "CNA maintains its decision to deny coverage for this claim" and reaffirmed that it will not defend Deasan because Deasan is not a named insured on the Policy" (the **"April 2019 Denial Letter"**).

54. On May 6, 2019, in response to CMB's request for reconsideration, CNA sent another denial letter to CMB denying coverage to Deasan (the **"May 2019 Denial Letter"**).

55. On February 28, 2020, Deasan's legal counsel delivered a letter to CNA demanding that CNA reverse its coverage positions.

56. On April 15, 2020, CNA's legal counsel provided a further letter denying Deasan's claim for coverage (the **"April 2020 Denial Letter"**).

[Bold in original.]

Issues and Analysis

Is Deasan Insured under the DRS Policy?

[48] In this portion of the decision I will address the question of whether or not Deasan became an insured at the time the policy was issued by CNA in December 2017. This portion of the analysis will address the policy terms and definitions of who is an insured. The arguments as to whether Deasan became an insured through the operation of the law of agency are addressed separately below under that heading. Further, the question of the impact, if any, of the STC on Deasan's &/or the gravel operation's coverage status will be addressed under that heading below.

[49] The parties generally agree with respect to the principles that have been developed by the courts in relation to the interpretation of insurance contracts. Those are summarized in the defence argument as follows:

> 123. A number of principles have been developed by the Supreme Court of Canada over the past 30 years that guide the interpretation of insurance contracts:
>
> a. 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.
>
> b. Determining whether the language of a policy has a clear meaning should be from the perspective of how the words would be understood by the average person applying for insurance, as opposed to insurance law experts.
>
> c. Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction. For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties, 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. Courts should also strive to ensure that similar insurance policies are construed consistently. These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place.
>
> d. When these rules of construction fail to resolve the ambiguity, courts will construe the policy contra proferentem — against the insurer. One corollary of the contra proferentem rule is that coverage provisions are interpreted broadly, and exclusion clauses narrowly.
>
> *Sabean v. Portage La Prairie Mutual Insurance Co.*, 2017 SCC 7

[50] I accept these principles as having been accurately presented by counsel.

[51] The parties also agree on the two key provisions from the insurance contract that are germane to identifying who is an insured under that contract of insurance. The first is a portion of the “Common Policy Conditions” which refers to the second, a “coverage form”.

[52] The parties disagree on how those provisions should be interpreted.

[53] The plaintiff suggests an expansive and broad interpretation that the defendant says "would give rise to an illogical situation in which an indefinite number of entities would qualify as '*insureds*'".

[54] The "Common Policy Conditions" provide as follows:

> ***CONTRACT***
>
> All Coverage Forms included in this policy are subject to the following conditions except where these conditions are either modified or supplemented by the Coverage Forms, riders or endorsements attached, or where this policy and its forms are in conflict with the Civil Code of the Province of Quebec...
>
> ALL TERMS AND CONDITIONS OF THIS POLICY SHALL BE IN FULL FORCE AND EFFECT AS OF THE EFFECTIVE DATE OF THIS POLICY
>
> VARIOUS PROVISIONS IN THIS POLICY RESTRICT COVERAGE. READ THE ENTIRE POLICY CAREFULLY TO DETERMINE RIGHTS, DUTIES AND WHAT IS AND IS NOT COVERED.
>
> Throughout this Policy the words "you" and "your" refer to the **insured** as defined directly below. The words "we", "us" and "our" refer to the Company providing this insurance.
>
> The word **insured** means the Named Insured shown in the Declarations and any persons or organization qualifying as such, if any, under WHO IS AN INSURED within each Coverage Form, and all subsidiary and affiliated companies, entities, divisions, corporations, firms, joint ventures or other interests which exist now and in which you have 50% or more controlling interest.
>
> [Bold in original.]

[55] The only "Coverage Form" identified by the parties in the contract with the description "WHO IS AN INSURED" as referred to in the final paragraph quoted above is in section II of the Common Policy Conditions. I will include only the content of that which, on the basis of the arguments presented, is possibly applicable to the facts of this case. That is as follows:

> *SECTION II - WHO IS AN INSURED*
>
> 1. If you are:
>
> a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner;
>
> . . .

d. An organization other than a partnership, limited liability partnership, joint venture or limited liability company, you are an insured. Your executive officers and directors are insureds, but only with respect to their duties as your offices or directors. Your stockholders are also insureds but only with respect to their liability as your stockholders.

2. Each of the following is also an insured:

a. Your volunteer workers only while performing duties related to the conduct of your business, or your employees, other than either your executive officers and directors (if you are an organization other than a partnership or joint venture) or to your managers (if you are limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. . . .

. . .

3. Any organization you newly acquire or form, other than a partnership, limited liability partnership or joint venture or limited liability company and over which you maintain ownership or majority interest, will be deemed to be a Named Insured if there is no other similar insurance available for that organization. However:

a. Coverage under this provision is afforded only until the 180th day after you acquire or form the organization or the end of the Policy Period, whichever is earlier,

b. Coverage A and D do not apply to bodily injury or property damage that occurred before you acquired or formed the organization, and

c. Coverage B does not apply to persona and advertising injury arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership, limited liability partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

. . .

6. An additional insured is insured but only with respect to their acts within the scope of your business.

[56] The plaintiff argues that “you” in the common policy conditions “necessarily means any one of DRS, Beech, Swanberg, Lorean or DSS”. That leads to this proposition in its argument:

> 180. Accordingly, the clause defining who is an **insured** may be reasonably read in a number of different ways, which inevitably lead to an interpretation that Deasan as an insured:
>
> (a) **Insured** means [DRS] ...
>
> (b) **Insured** means [DRS] ... and [Beech, Swanberg, Lorean and DSS]...
>
> (c) **Insured** means [DRS] ... and all ... affiliated companies [i.e. Deasan];
>
> (d) **Insured** means [DRS] ... and all ... affiliated corporations [i.e. Deasan];
>
> (e) **Insured** means [DRS] ... and all ... affiliated companies ... in which [Beech, Swanberg, Lorean and DSS] have 50% or more controlling interest [i.e. Deasan];
>
> (f) **Insured** means [DRS] ... and all ... affiliated ... corporations ... in which [Beech, Swanberg, Lorean and DSS] have 50% or more controlling interest [i.e. Deasan];
>
> (g) **Insured** means [DRS] ... and all ... corporations ... in which [Beech, Swanberg, Lorean and DSS] have 50% or more controlling interest [i.e. Deasan];
>
> (h) **Insured** means [DRS] ... and all ... other interests in which [Beech, Swanberg, Lorean and DSS] have 50% or more controlling interest [i.e. Deasan].
>
> [Bold in original argument.]

[57] I will review each of the different readings suggested by reference to sub-paragraph letter although not necessarily in alphabetical order.

[58] DRS is the named insured in the policy and is an insured under the common policy provisions set out above. That much is beyond dispute and (a) is obviously accurate.

[59] The common policy terms also identify two other categories of entities as insureds. They are, first, any persons or organization qualifying as such, if any, under who is an insured within the coverage form; and second, all subsidiary and

affiliated companies, entities, divisions, corporations, firms, joint ventures or other interests which exist now and in which you have 50% or more controlling interest.

[60] The language of the policy in the coverage form begins by stating "If **you** are…". The defendant argues that:

> 133. . . . The logical interpretation is that "you" appearing in the Common Policy Conditions maintains a reference to the singular entity or individual identified as the Insured in the Declarations, maintaining clarity and coherence within the policy's terminology.

[61] I agree. "You" must be a reference to DRS, the named insured. If it were otherwise, the list that follows would be at best vague and the scope of the risk virtually undeterminable by CNA.

[62] As a result of this determination, clause 1(d) of the coverage form description of "Who is Insured" becomes crucial to the outcome here, DRS being "An organization other than a partnership, limited liability partnership, joint venture or limited liability company".

[63] Coverage is expressly provided to its "executive officers and directors" but limited to their duties as such. This would include Swanberg and Beech. It also extends to DRS' stockholders, but limited to their liability as stockholders. This is Lorean and DSS.

[64] This provides the foundation for sub-paragraph (b) from the plaintiff's argument.

[65] On its face none of this extends to Deasan.

[66] This brings me to deal with the other logic presented by the plaintiff that would extend the coverage to Deasan.

[67] The plaintiff's argument includes the following:

> 170. Beech and Swanberg are and always have been directors of DRS. Beech and Swanberg therefore qualify as insureds under the CGL Coverage Form's "WHO IS AN INSURED" section. They therefore

> further qualify as **insureds** under the Common Policy Condition's definition of **insured**: "*any persons or organization qualifying as such, if any, under WHO IS AN INSURED within each Coverage Form*".
>
> 171. DSS and Lorean are and always have been shareholders (85%) of DRS. DSS and Lorean therefore qualify as insureds under the CGL Coverage Form's "WHO IS AN INSURED" section. They therefore further qualify as **insureds** under the Common Policy Condition's definition of **insured**: "*any persons or organization qualifying as such, if any, under WHO IS AN INSURED within each Coverage Form*".
>
> 172. Beech and Swanberg are also employees of DRS. Beech and Swanberg therefore qualify as insureds, again, under the CGL Coverage Form's "WHO IS AN INSURED" section. They therefore further qualify as **insureds** under the Common Policy Condition's definition of **insured**: "*any persons or organization qualifying as such, if any, under WHO IS AN INSURED within each Coverage Form*".
>
> 173. DRS, Beech, Swanberg, DSS and Lorean all qualify as **insureds** under the Common Policy Conditions. None of this is in dispute.
>
> [Bold and italics in original argument.]

[68] The second additional category described in the common policy conditions is "all subsidiary and affiliated companies, entities, divisions, corporations, firms, joint ventures or other interests which exist now and in which you have 50% or more controlling interest."

[69] Within the agreed statement of facts is this paragraph:

> 2. In accordance with the law of British Columbia, Deasan is an affiliated corporation of D.R.S. Energy Services Inc. . . .

[70] As set out in the background above at para. 8, the shares in Deasan are held by DSS Holdings Inc. and Lorean Enterprises Inc. DRS does not have a "50% or more controlling interest" in Deasan for it to qualify it as an insured on that basis.

[71] The plaintiff says, however, that since Beech, Swanberg, Lorean and DSS are insured and since they have 50% or more controlling interests in Deasan, Deasan is also an insured. This is the basis for the argument in sub-paragraphs (e), (f), (g) and (h).

[72] The difficulty with this argument is that it uses the expressed limited scope of coverage to them (in relation to "their duties as your offices or directors" or their

liability as “stockholders”) as the basis for full policy coverage to affiliated companies or corporations. This does not in my view accord with the principles that guide the interpretation of insurance contracts set out above and endorsed by both parties.

[73] An average person would see the language as clear. It provides limited coverage to Beech, Swanberg, Lorean and DSS. Providing full policy coverage to Deasan as an affiliate to DRS on the basis of the interests of Beech, Swanberg, Lorean and DSS in Deasan would be a significant extension beyond the clearly stated limited coverage.

[74] The plaintiff has an additional argument that would support sub-paragraphs (c) and (d). That is stated as follows:

> 181. Further, it may reasonably be interpreted that the clause “and in which you have 50% or more controlling interest” does not apply to the earlier references to “all subsidiary and affiliated companies … divisions… corporations”. This is because being controlled by another party is already embedded within the meaning of “subsidiary” and “affiliate”:
>
> > **2** (1) For the purposes of this Act, one corporation is affiliated with another corporation if
> >
> > (a) one of them is a subsidiary of the other,
> >
> > (b) both of them are subsidiaries of the same corporation, or
> >
> > (c) each of them is controlled by the same person.
> >
> > (2) For the purposes of this Act, a corporation is a subsidiary of another corporation if
> >
> > (a) it is controlled by
> >
> > (i) that other corporation,
> >
> > (ii) that other corporation and one or more corporations controlled by that other corporation, or
> >
> > (iii) 2 or more corporations controlled by that other corporation, or
> >
> > (b) it is a subsidiary of a subsidiary of that other corporation.
>
> *Business Corporations Act, SBC 2002, c. 57*
>
> [Underlining in original.]

[75] I disagree with the plaintiff's suggestion that the 50% or more controlling interest is a separate consideration. The construction of the sentence is clear that "and in which you have 50% or more controlling interest" relates to the "subsidiary and affiliated companies, entities, divisions, corporations, firms, joint ventures or other interests". The plaintiff's proposition that "[t]his is because being controlled by another party is already embedded within the meaning of 'subsidiary' and 'affiliate'" is not one that I accept. The use of the word "and" clearly makes both the association and the percentage interest necessary components. To effectively conclude the words "in in which you have a 50% or more controlling interest" are surplusage in relation to "all subsidiary and affiliated companies" would distort the plain language of the policy.

[76] It is my conclusion that Deasan is not included as an insured under the DRS policy by interpretation of the policy terms and language.

Agency

[77] A further path by which Deasan may have become an insured is through the operation of the principals of agency. Here I will deal with the broader relationship between CMB and CNA. I will deal with the STC separately, where the arguments surrounding the effect of that call also involve agency considerations.

[78] In their submissions, both parties reference three sources of authority where an agent can bind its principal: actual express authority, actual implied authority or ostensible authority. Both parties cite *Williams (Guardian ad litem of) v. B.C. Conference of the Mennonite Brethren Churches*, 2010 BCSC 791 where the Court said as follows:

> [41] The conference, Starfield, Jones Deslauriers, and Premiere agreed on the law that applies to the principal/agent relationship wherein an agent may bind a principal under actual or ostensible authority. The three forms of legal authority whereby an agent's conduct may bind the principal are: actual express authority, actual implied authority, and ostensible authority (*D. Fogell Associates Ltd. v. Esprit De Corp. (1980) Ltd.*, [1997] B.C.J. No. 1060, at para. 24 (S.C.)).

[42] Actual authority as described in *Keddie v. Canada Life Assurance Co.*, 1999 BCCA 541 at para. 23, 70 B.C.L.R. (3d) 270 [*Keddie*] by adopting *Bowstead on Agency*, 15th ed. (London: Sweet & Maxwell, 1985) at 92 is:

> Actual authority is the authority which the principal has given the agent wholly or in part by means of words or writing (called here express authority) or is regarded by the law as having given him because of the interpretation put by the law on the relationship and dealings of the two parties (called here implied authority). "An 'actual' authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties...." [*Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd.* [1964] 2 Q.B. 480, 502, per Diplock L.J.]

Actual authority turns on the relationship between the principal and agent. Thus, adopting an American description implicit in Keddie, actual authority exists where there has been a manifestation by the principal to the agent that the agent may act on his account and consent by the agent to so act. It may be created by express agreement or implied from the conduct of the parties or surrounding circumstances (*State Farm Fire and Casualty Company v. Pacific Rent-All, Inc.* (1999), 978 P. 2d 753 at 763 (Hawaii Sup. Ct.)).

[43] Implied authority is described in *Bowstead and Reynolds on Agency*, 18th ed. (London: Sweet & Maxwell, 2006) at 51 as when the principal places another in such a situation that, according to ordinary usage, that person would understand himself to have the principal's authority to act on his behalf or where the principal's words or conduct, coming to the knowledge of the agent, are such as to lead to the reasonable inference that he is authorizing the agent to act for him. Gerald Fridman, *CNAadian Agency Law*, (Markham: Lexisnexis, 2009) at 65 ("Fridman") says that implied authority results when an agent has a reasonable belief, because of the conduct of the principal towards the agent, which includes acquiescence, communicated directly or indirectly to the agent, that the principal desired or consented to the agent acting as he did. Where such implication can be made, the principal has in fact consented to the agent having authority to act as he did.

[44] Implied authority may exist where the course of dealings between the agent and principal shows that, with the knowledge and consent (express or implied) of the principal, the agent has been exercising the authority he assumed (Fridman at 65). In *Murfitt v. Royal Insurance Co.* (1922), 38 T.L.R. 334, 10 Ll.L.R.191 (King's Bench), an agent was found to have implied authority to bind the insurer based on the fact that the agent had been giving verbal coverage before sending documentation of such coverage to the insurer for two years. The court found that the agent's practice must have been known to the insurer and that the agent was therefore acting with the insurer's assent and knowledge. Both the existence and scope of implied authority are discoverable by reference to the conduct of the parties (*North Shore Seafoods v. Montague Seafood Inc.*, [1993] P.E.I.J. No. 83, 110 Nfld & P.E.I.R. 322 at para. 16 (P.E.I.S.C.T..)).

[79] In *Doiron v. Manufacturers Life Insurance Company*, 2003 ABCA 336 the Court described the concept of ostensible authority in these terms:

> [13] The doctrine of ostensible authority serves to give an agent the authority to bind a principal to agreements made with third parties in circumstances where the agent has no actual authority to do so. The requirements to establish ostensible authority are set out in the leading case of *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd.*, [1964] 1 All E.R. 630 (C.A.). They are:
>
> a) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;
>
> b) that such representation was made by a person or persons who had actual authority to manage the business of the company either generally or in respect of those matters to which the contract relates;
>
> c) that the contractor was induced by such representation to enter into the contract (i.e. that he in fact relied upon it); and
>
> d) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.
>
> [14] The test for ostensible authority has also been stated by Slade, J., in *Rama Corp. Ltd. v. Proved Tin & General Investments Ltd.*, [1952] 2 Q.B. 147 at pp. 149-50:
>
> "Ostensible or apparent authority which negatives the existence of actual authority is merely a form of estoppel, indeed, it has been termed agency by estoppel, and you Cannot call in aid an estoppel unless you have three ingredients: (i) a representation, (ii) a reliance on the representation, and (iii) an alteration of your position resulting from such reliance."
>
> [15] The law of ostensible authority does not require an explicit representation of authority. It is found where the principal has created a situation such that it is reasonable to infer and rely upon the apparent authority of the person. The appellant conceded in argument that Manulife had cloaked Demmers with ostensible authority in this case. However, it submits that there was no agreement made between Demmers, on behalf of Manulife with the Doirons. The fact that the Doirons believed that they were contracting with Manulife is insufficient to bind Manulife to an agreement entered into between the Doirons and an entirely different entity.

[80] Our Court of Appeal's decision in *Keddie v. Canada Life Assurance Co.*, 1999 BCCA 541 is helpful for its identification of the distinction between insurance agents

and insurance brokers and its comments on ostensible authority. That discussion, which adopts the phrase “apparent authority”, includes the following:

> [28] A finding of apparent authority depends on some representation through words or conduct on the part of the principal that leads a third party to believe that the agent has the authority in question. Apparent authority is a product of the principal's outward conduct with respect to third parties, not of the principal’s internal agreements or arrangements with its agent.
>
> . . .
>
> [42] *Galiher v. Spates*, 262 N.E.2d 626 at 628 (Ill. Ct. App. 4th Dist. 1970) puts the distinction in these terms:
>
> > An insurance broker is one who procures insurance and acts as middleman between the insured and the insurer, and solicits insurance business from the public under no employment from any special company, but, having secured an order, places the insurance with the company selected by the insured, or, in the absence of any selection by him, with the company selected by the broker... Insurance agents have a fixed and permanent relation to the companies they represent and have certain duties and allegiances to such companies. Whether a person is an agent or a broker is determined by his acts or what he does.

[81] The parties agree in the agreed statement of facts that:

> 18. CMB Insurance Brokers (“**CMB**”) was the insurance broker of Deasan and DRS in 2017 and 2018.
>
> 19. CMB is an agent of CNA. It is also an agent for DRS and Deasan.
>
> [Bold in original.]

[82] The question is then what is the scope, if any, of CMB’s ability to act on behalf of CNA and commit it to coverage.

[83] The plaintiff cites *Berryere v. Fireman’s Fund Insurance Co.*, 1965 CanLII 610 (MBCA), [1965] M.J. No. 44 (Q.L.); which provides helpful guidance including these statements:

> 6 . . .While the cases show that determination of the authority of an agent is primarily a question of fact, dependent on the particular circumstances, it is necessary to refer briefly to the general law of agency and in particular to the relationship of insurance agents and their principal.
>
> 7. The extent of the authority of an agent is dealt with by *Halsbury*, 3rd ed., vol. 1, para. 378, p. 161, thus:

> The authority, whether the agency be created expressly by writing or be implied from conduct, is governed by rules which define its scope in accordance with the nature of the agent's employment and duties. As between the agent and his principal, the authority may be limited by agreement or special instructions, but as regards third persons the authority which the agent has is that which he is reasonably believed to have, having regard to all the circumstances, and which is reasonably to be gathered from the nature of his employment and duties.
>
> The scope of the authority is therefore largely governed by the class of agent employed, provided that he is acting within the limit of his ordinary avocation; or by the relation of the agent to the principal; or by the customs of particular trades and professions.

8. In regard to the instant case, two points here referred to require comment. The first is:

> The authority which the agent has is that which he is *reasonably* believed to have, having regard to *all* the circumstances. [Emphasis added by MBCA.]

9. The rule would seem to be that assuming there is good faith throughout by the third party then, as between principal and agent, it will be the agent's ostensible authority, not his actual authority, that will determine the extent to which he may bind his principal. The basis of this rule is that when a third party deals in good faith with an agent, relying upon credentials entrusted to such agent by his principal and which credentials are reasonable indicia of the agent's authority, the principal is estopped from denying the agent's authority. It will, of necessity, depend on the circumstances of each particular case as to whether or not the third party acted throughout in good faith and as to whether or not there was sufficient indicia of the agent's authority, but these are questions of fact to be decided by the trial Judge.

10. The second point requiring comment is that concerned with the customs of the insurance business. *MacGillivray on Insurance Law*, 5th ed., vol. 1, p. 304, points out that in fire, burglary, accident and motor-car insurance:

> . . . the usual practice is to issue upon application and payment of the whole or part of the first year's premium an “interim receipt,” or “cover note”.

[84] The plaintiff also refers to s. 18 of the *Insurance Act*, R.S.B.C. 2012, c. 1, which provides as follows:

> **Effect of delivery of policy or premium receipt**

> 18 If a policy or a receipt for the premium under a contract is delivered to the insured by the insurer or its agent, the insurer is bound by the contract, even though
>
> (a) the delivery may have been made by the agent without authority, or
>
> (b) the premium may not in fact have been paid.

[85] Each party highlights aspects of the relationships between entities, including the parties themselves and DRS/Deasan. The plaintiff stresses that all aspects of DRS/Deasan's dealings with CNA went through CMB. The defence stresses that Beech knew and acknowledged that CMB was not an insurance company and CMB did not hold itself to DRS as CNA's representative.

[86] As between CMB and Deasan, CMB's role as broker was to obtain the best coverage for Deasan and DRS for the best price possible.

[87] CMB and CNA entered into the "producer agreement". In argument both parties point to one of the terms of that agreement which states, "the company hereby appoints the producer as its producer with full power and authority to receive proposals for insurance coverage such classes of risk as the company may from time to time authorized to be insured." There is no evidence of any other written authority.

[88] CMB's relationship with CNA is defined, in part, by the producer agreement between them but also through their past practices and protocols.

[89] The evidence of the process by which the DRS policy with CNA was put in place and documented as well as the process for the change in early January 2018 is also relevant to any actual implied authority. The former is set out in paras. 24–30 above.

[90] In respect of the latter, CMB had identified an exclusion in the DRS policy that it felt should be altered based on CMB's knowledge of DRS's business. On January 3, 2018 CMB called Saby to request the change. That was followed by an email confirming the request on the same day. Also on the same day Saby responded by

email confirming the coverage would be changed as requested. There was no fee associated to the change.

[91] In practice, Kanuka confirmed that the process of placing insurance coverage with CNA or other insurers began with a CMB client requesting the coverage. Once armed with sufficient information, CMB would go to the insurance market and obtain a quote or quotes. Those would be discussed with the client. Upon receipt of instructions or approval to go ahead with placing the coverage, CMB communicated in writing with the insurer to advise them they would like to bind coverage. It was at that point the coverage became effective. That is of course what took place in December 2017 when the DRS policy was fashioned. A similar practice was undertaken when the change was made in early January dealing with fire protection coverage.

[92] From Beech's perspective on behalf of Deasan, he was seeking coverage for Deasan but left it to Kaunka to make the arrangements. He simply relied on CMB to secure the coverage they needed. Beech did not understand that CMB had the authority to issue a policy on behalf of CNA, but rather was a broker searching the market for coverage. No one at CMB, including Kanuka, ever told Beech that CMB had the authority or ability to issue a policy on behalf of CNA.

[93] From CMB's perspective, Deasan had been included as an insured in the SWS policy. CMB requested a "broad definition of insured" when seeking the quote for the coverage under the CNA policy, but did clarify why or specify that its goal was to include the affiliate Deasan. Deasan's inclusion as an insured under the SWS policy had been confirmed through email by reference to the policy terms after CMB asked to have it added as an insured. CMB made no such effort in its dealings with CNA and did not compare the definitions of "insured" in the two policies. Kanuka apparently assumed a similar definition would apply.

[94] From CNA's perspective there had never been a mention or reference to Deasan or what it owned before the STC.

[95] When Saby provided the quote, the cover letter included the following:

> We are pleased to offer you our New Policy quote based on the information provided by you. We are offering only the limits and Coverage described in the document, which are based on CNA standard OneWorld policy. Please review the details carefully and advise us immediately if any changes are required.
>
> . . .
>
> This quote is valid for 30 Days only and is subject to the terms and conditions contained herein. Coverage cannot be bound unless all conditions are met or otherwise agreed and notice of binding must be provided to the company prior to Inception Date. We reserve the right to change this quote in whole or in part, or revoke, rescind or cancel this quote altogether at our sole discretion. Any insurance contracts and premium agreements subsequently issued shall conform to this quote or amendments thereto.
>
> [Emphasis added.]

[96] The letter enclosed a list of various coverages and associated limits. There is no reference in it to who would be insured or to any definition of who is insured other than this header:

> **Subject:** DRS Energy Services Inc.
> Box 6958
> Fort St. John, BC V1J 4J3

[97] Kanuka was well aware that different policies contain different terms and definitions.

[98] After receipt of that correspondence, Kanuka communicated with Beech on December 29, 2017, advising that he had approached CNA for a quote and that it had provided “much more competitive terms” with additional coverage benefits. He advised Beech that he had “currently bound the policy with CNA as I feel that is the decision you are most likely to move forward with. However upon your return next week we can always reverse the decision if you have some concerns I am not aware of”. There is no evidence any such concerns were raised by Beech.

[99] This was followed by CMB creating a “Certificate of Insurance”. It was prepared solely by CMB and had not first been provided to CNA for its review or approval. It involved the process of cutting and pasting and updating a document

that had been prepared in the previous year when dealing with SWS, but included CNA's quotes and numbers. It would appear that Kanuka assumed the CNA's definition(s) of insured would be the same as those of SWS.

[100] A review of the evidence of how Deasan and the gravel pit lands were added to the SWS policy offers some context for how critical portions of the certificate came to be.

[101] As noted in the background, Beech asked Kanuka to obtain liability coverage for the gravel pit lands as soon as they were acquired in October 2017. He had not previously asked Kanuka to make any changes when DRS transferred the original lands in August 2017. Kanuka confirmed those instructions with Beech as follows:

> Thank you for the phone call this morning. As per our conversation, we will add Deasan Holdings Ltd to the policy with regards to building ownership. We will also add on rental income of $480,000 for the rent that DRS pays Deasan each year.
>
> If you are able to send me the 2 legal descriptions of the 70 acre gravel pit that you purchased I can add that onto the policy for liability purposes.

[102] Kanuka then instructed his staff on October 16 at 1014 hours as follows:

> I just spoke with [Beech] at DRS Energy, and there are a couple of changes to the policy that we should make:
>
> - Can we please add Deasan Holdings Ltd to the policy with regards to building ownership (they own the current building on the policy)
> - Can we please add $480,000 in rental income to the policy as this is what DRS is paying Deasan for rent each year
> - There are 2 legal addresses for vacant land that will follow. When we have these numbers, can we please add the vacant land to the policy.
>
> [Emphasis added.]

[103] The "current building" on the policy was on the property 9815-77Avenue, Fort St. John, BC.

[104] The instructions were expressly limited to add Deasan Holdings Ltd. to the policy "with regards to building ownership" and that is what was done. At 1536 hours that day that staff member contacted SWS with this request:

> Effective October 16, 2017, please amend coverage as follows:
>
> - Add Deasan Holdings Ltd. as Additional Named Insured to the policy with regards to building ownership (the own the current building on the policy). Principal are the same as DRS Energy.
> - Add $480,000 in Rental Income to the policy as this is what DRS is paying Deasan for rent each year.

[105] At 1537 that day staff of DRS provided Kanuka with the legal descriptions of the gravel pit lands and at 1631hours Kanuka forwarded that to his staff with this email:

> Please see below the legal description of the 2 locations owned by Deasan Holdings (under the DRS Policy). It is vacant land only at the moment.

[106] The next day SWS responded to the email at para. 98 above by inserting responses (which I have underlined) as follows:

> Effective October 16, 2017, please amend coverage as follows:
>
> - Add Deasan Holdings Ltd. as Additional Named Insured to the policy with regards to building ownership (they own the current building on the policy). Principal are the same as DRS Energy. <u>Believe Deasan Holdings is automatically included as Additional Insured because of how the Blanket Additional Insured Endorsement (copy attached), so no separate endorsement will be required. We'll put Insurers on notice however</u>.
> - Add $480,000 in Rental Income to the policy as this is what DRS is paying Deasan for rent each year <u>OK – will request endorsement</u>.

[107] In the certificate prepared in January 2018 in relation to the new CNA policy the gravel pit lands are included. The only reference to Deasan is under a heading "Additional Insured" as follows:

> Deasan Holdings Ltd.
>
> wrt: Ownership of Building at 9815 - 77 Avenue, Fort St. John, BC

[108] Michael Ilnycky ("Ilnicky") has been CNA's assistant vice president of claims since at least 2017. He has a different function than an underwriter, such as Saby. Ilnicky also testified on behalf of CNA.

[109] In his testimony in cross-examination he was taken to that certificate of insurance and agreed that it might be referred to as either a "certificate of insurance" or a "binder of coverage":

> Q. This is a certificate of insurance prepared by CMB Insurance Brokers. It also appears in tab 19. It stands alone on tab 47. So I'll take you to that one. Just take a moment to look at it, please.
>
> A Okay
>
> Q Have you taken a look at that?
>
> A I'm somewhat familiar with it.
>
> Q Okay. So will you agree that this is commonly referred to in the industry as a binder of coverage? A certificate of insurance is also known as a binder of coverage?
>
> A Yes.

[110] He also confirmed that, in respect of CMB "*there is some aspect of dual agency but that is limited. CMB confirms binder of coverage and they collect the premiums on behalf of CNA*" [Italics in original argument.]

[111] The defence submissions reference that evidence but go on to assert as follows:

> 42. . . . <u>The important consideration here is that CMB confirms binders of coverage, but does not prepare them on behalf of CNA</u>. CMB takes the information from the CNA Policy and quote and then produces the binder of coverage, also known as the Certificate of Insurance.
>
> 43. In this particular case, CMB did not confirm the binder of coverage against the Policy. Rather, they utilized a cut and paste template from the prior policy without confirming the same coverages were afforded under the CNA Policy. This Court heard no evidence that there was any authority granted by CNA to CMB for writing binders of coverage, rather only confirming the coverage that was already bound.
>
> [Emphasis added.]

[112] Ilnicky's evidence, however, contradicts that assertion on two critical points. First, he confirmed that, from CNA's perspective, it was CMB's responsibility to

communicate the certificate of insurance (also referred to as a binder of coverage) to DRS once that coverage had been bound. Second, he confirmed that this was expected to occur before the policy had been delivered, at least in part, so that the insured could provide evidence of coverage to third parties. Specifically, he testified as follows:

> Q Okay. And in these documents, this certificate of insurance or binders of coverage as they may be referred to, are used to communicate that coverage has been bound to an insured, and it also enables the insured to provide evidence of coverage to parties that they may be dealing with, contractors or other parties that may require evidence of insurance?
>
> A Yes. That's one of the reasons the document is provided.
>
> Q Okay. And you'll agree, sir, that in this matter, CNA relied on CMB to provide communication in that binder of coverage to DRS once coverage had been bound by CNA?
>
> A That's their – that's CMB's responsibility. Yes.
>
> Q Right. And I'm going to refer you to one of your . . .
>
> Q And that's because almost always, there's a gap in time between when coverage is bound after the discussion between the broker or producer and CNA and when the policy is actually produced and sent to the broker at CMB?
>
> A Yes.
>
> [Emphasis added].

[113] The plaintiff's submissions on the application of the principles of agency include the following:

> 150. CMB's preparation and delivery of the Certificate of Insurance was a function performed on behalf of CNA, consistent with CNA's understandings and expectations, and necessary in light of the four week gap between the binder of coverage and CNA's issuance of the Policy wordings. It was all comfortably within CMB's authority.

[114] I agree. I conclude that CMB had implied actual authority to deliver the certificate of insurance prior to the policy itself having been created and delivered to CMB. As Ilnicky put it, it was CMB's responsibility to do so.

[115] As quoted above from *Williams*, "actual authority exists where there has been a manifestation by the principal to the agent that the agent may act on his account

and consent by the agent to so act. It may be created by express agreement or implied from the conduct of the parties or surrounding circumstances."

[116] If I am wrong that CMB's authority to extend coverage and to include Deasan can be implied from the conduct of CNA and CMB and the surrounding circumstances, I would find there was ostensible authority for CMB to do so.

[117] I accept that in December 2017 Kanuka believed that Deasan was an insured, and later that both the gravel pit lands and the original lands were covered by the new CNA policy. He did so based on an assumption that the coverage was sufficiently similar to the SWS policy, not on information from CNA or his knowledge of the CNA policy terms. I would note that it was only in the STC that Kanuka says he actually referenced Deasan in any dialogue with CNA. In the STC, he says Saby indicated that Deasan's coverage "shouldn't be a problem if there was common ownership". The ownership structure was not further discussed. I have dealt with the ownership of the corporate entities and the policy terms above.

[118] Having reached these conclusions as to the agency relationship, what is critical is what CMB, as agent, communicated to Beech on behalf of DRS and Deasan. The certificate states under the heading "additional insured":

> Deasan Holdings Ltd.
> wrt: Ownership of Building at 9815 - 77 Avenue, Fort St. John, BC

[119] There is no evidence Kanuka advised Beech of anything more than this.

[120] The property statement of values provided to CNA includes the gravel pit lands and states "vacant land, liability only". Reviewing the emails referenced above between CMB and SWS in October, the certificate appears to reflect what had occurred in October. At that time CMB told SWS that Deasan owned the "current building on the policy", which are part of the original lands.

[121] The content of the certificate and Kanuka's belief seems to be a product of lack of precision in CMB's internal communications in October 2017, assumptions about similarities between policy terms from two separate insurers, careless cutting

and pasting from documents created by CMB in relation to the SWS policy and not taking the time to confirm assumptions with CNA.

[122] CNA expected and relied on CMB to send the certificate prior to the policy being delivered to CMB. CNA is bound by the action of CMB as its agent in that regard but cannot be bound beyond that. On the evidence before me, all that CMB communicated to Beech, DRS and Deasan was that Deasan was an additional insured "with respect to 9815 Fort St. John" in the certificate on insurance.

[123] On the basis of what the certificate indicates, the gravel pit lands were covered under the DRS policy but there is nothing to suggest that coverage extended to Deasan. It is perhaps an interesting question as to whether DRS in fact could have effective coverage in relation to the gravel pit lands, since it was not the owner of the gravel pit lands, but that is not a question before me. DRS is not named in the Giesbrecht Action, Deasan is the defendant. There was nothing communicated to Deasan by CMB that could bind CNA to coverage for any liability of Deasan associated to the gravel pit lands.

[124] If CMB, as agent for CNA, intended to communicate to Deasan that it had coverage for the gravel pit lands, it failed to do so. The language is unambiguous. Beech or anyone else on behalf of Deasan who looked at the certificate could not be misled. The express limitation of the scope of coverage for Deasan apparently never prompted any questions of CMB.

[125] The evidence does not reveal who actually prepared the certificate or include the previous form from which it originated. The certificate obviously has its origins in the email communications with SWS in October 2017. However it came to be, the certificate could not have been read by Beech or anyone of behalf of Deasan as indicating Deasan was insured for liability in relation to the gravel pit lands.

[126] The combined effect of CMB's failures in preparing the certificate and Deasan (Beech) not asking questions about it created the problem Deasan now faces. That shortcoming cannot be the responsibility of CNA. Any coverage Deasan has is not

based on the language of the policy but is a product of its agency relationship with CNA and must be appropriately narrowly construed.

[127] I cannot conclude that limiting words “Deasan wrt: Ownership of Building at 9815-77 Avenue, Fort St. John, BC” Deasan somehow envelops the gravel pit lands under Deasan’s ownership.

September Telephone Call (“STC”)

[128] Both parties agree that what was said in the STC and its legal consequences are important and potentially determinative of the issues in this case.

[129] The plaintiff asserts that if Kanuka’s evidence with respect to the call is accepted, the issue of coverage for the landslide claim must be resolved in the plaintiff’s favour without more. It reasons that CNA had been made aware of Deasan and the gravel operations and Saby had confirmed that he would add that risk to the policy on September 4, 2018. There is no question that was within his authority for CNA. It says the procedure for written confirmation was preferred or best practice of coverage but not a requirement.

[130] The plaintiff argues that, in the STC, Saby represented to Kanuka that he would add the gravel operations to the policy and that, as a result, CNA is estopped from taking a contrary position in this litigation.

[131] The defendant argues that the Court must look not only at what was said during the STC, but also at what was expected to happen after the call. It says that the information requested by Saby needed to be sent in order for him to assess the risk and provide a quote. It was only after acceptance of the quote by DRS/Deasan that there could be any binder of coverage. It says that the process to bind coverage required CMB to obtain Deasan/DRS approval of the coverage terms and the price and to notify CNA of the same. CMB needed to provide notice of binding to CNA before coverage was actually bound.

[132] CNA argues that the email communications that followed the STC support their assertions. Logically all of the requested information would have been reduced to writing. Even if the Court were to conclude that no writing was required, the requested information was still required.

[133] Although the prospect of Deasan commencing its gravel operations had been made known to Kanuka in the summer of 2017, Beech provided minimal notice of the actual intended start-up of those operations. Kanuka made the STC call promptly upon receiving the information and I accept that he did so with the intention of securing coverage for the operation from CNA. He had already placed coverage with CNA for DRS and was aware that it generally had an appetite for providing coverage for such gravel operations.

[134] At the time he made the STC, it is clear from Kanuka's evidence that he believed Deasan was already an insured under the policy. My conclusions on the policy language and agency issues set out above do not change the fact that Saby and CNA had seen no reference to nor had any knowledge of Deasan prior to the STC.

[135] On the evidence of Kanuka and Saby, I accept that Deasan was referred to by Kanuka during the call. Kanuka expressed certainty of its mention and Saby could not deny it.

[136] The parties agree as to some of the content of that conversation. Each refers to that in their arguments.

[137] The plaintiff says this at para. 111:

> 111. There are elements that both versions agree on: the date; that it was about adding gravel operations to the existing Policy; that the gravel operations would be a small part of the total operations; that the silica exclusion was discussed and that Kanuka had no issue with it in the circumstances; and that at the conclusion of the call, what was left to be done was for CMB to send in the equipment list and revenue information.

[138] The defence summarizes it in these terms:

> 78. These are the undisputed facts from the records and evidence of Mr. Kanuka and Mr. Saby concerning the STC:
>
> a. Mr. Kanuka told Mr. Saby that he was calling about the DRS Policy.
>
> b. They discussed the possibility of adding gravel pit operations to the DRS Policy.
>
> c. Mr. Saby inquired about the percentage of the gravel pit operations as part of the overall operations. Mr. Kanuka responded by saying that it would be a small percentage.
>
> d. Mr. Saby advised Mr. Kanuka that CNA would be unable to remove a silica exclusion which is company policy. Mr. Kanuka advised that it would not be a problem.
>
> e. Mr. Saby requested further information such as revenues to confirm the percentage of the operations and equipment.

[139] Kanuka's assertion is that there was additional content. He testified that during the call he indicated to Saby the that Deasan was starting gravel pit operations and that he reminded Saby about the common ownership of Deasan and DRS. The plaintiff introduced into evidence excerpts of Saby's examination for discovery where he indicated he cannot say with certainty that the issue of common ownership between DRS and Deasan was not discussed.

[140] In his testimony Saby did not recall Deasan being mentioned and stated that if it had "he would question why CNA is now being asked to insure it and what its relation to DRS was".

[141] The call lasted only two minutes and 42 seconds which provides some context for how detailed the discussions could have been beyond what the parties agree.

[142] As noted above the plaintiff says that Saby had confirmed that he would add them to the policy on September 4, 2018. On that critical question I will reference excerpts from the transcript of Kanuka's testimony in direct and cross-examination for precision.

[143] From his direct examination:

> Q Did Jason Saby tell you during this call that CNA would provide coverage for the gravel operation?
>
> A That was my understanding of it. Yes.

[144] There is of course a distinction between Kanuka's interpretation of what was said and what Saby actually said. Kanuka could did not testify that Saby said CNA would add the new gravel operations to the policy.

[145] In his testimony in direct that followed soon after the above, he offered his understanding of the need for Saby's requests to be answered before coverage for the gravel operations could be bound as follows:

> Q Okay. Now, as a matter of fact, in your mind at that time, did you think or expect that the provision of that e-mail with that information was a pre--condition to coverage being bound for the gravel operations?
>
> A No.

[146] His testimony in cross-examination serves to expand on this and confirm this was his interpretation of the discussion as distinct from what Saby actually said. That testimony included the following:

> Q -- the purpose of the phone call wasn't – was more along the lines of asking a question and making an inquiry about whether they would add this to be policy; right?
>
> A Yeah. With it being time sensitive, it's quicker to pick up the phone, explain the situation, explain what you're trying to do than it is to send an e-mail, wait for a reply, go back and forth. So it was -- it was to expedite the process.
>
> Q Okay. And Jason's response to that was what?
>
> A Confirming that it wouldn't be an issue.
>
> Q Well, he more specifically said that would be possible, didn't he?
>
> A I would disagree with that. It was -- I was pretty confident that he added it to the policy. If I knew there was any doubt and if the answer was just a possibility, I would have been working on plan B, placing up with another insurer.
>
> . . .
>
> Q But in order to verify that, Jason was asking for some information, additional information, not just coming from you but DRS; right?
>
> A He was asking for additional information, but it was more information on how to price the policy and price the change; right? So revenues, you know, the liability would be different than oilfield hauling. So you

need to know the revenue so you can price for that, what being equipment was being used and added on. I think those were the main two key items.

Q Okay. But I don't want you assuming it.

A Yeah.

Q I want to know if that was something that he actually did mention to you in this brief conversation or you're assuming that's why he was asking for it.

A It was my understanding he was asking for it to price the policy, not to confirm coverage.

. . .

Q One of the reasons you're having this conversation with Jason in the first place is so he can assess the risk?

A That's fair. Yeah.

Q And did you remember if coverage is available and how much the premium would be for that coverage?

A Yeah. I mean, in the discussion, there was -- I feel there was enough information for him to assess whether or not they would take on the risk, but of course we did have to get them more information to price it. Yeah.

Q Right. And, again, we can always assume things, and I appreciate what you may have assumed arising out of this conversation.

A Yeah.

Q But what I'm more trying to dig down into --

A Yeah.

Q -- because this is an important call --

A Yeah.

Q -- is what he actually -- you remember him actually saying to you.

A You know, at the end of the day, it's really hard for me to reflect exactly what Jason said on a conversation five years ago, but I know walking out of that conversation that I was comfortable that CNA was going to take on that risk of Deasan. Otherwise, I would have looked to seek alternatives through Aviva, through Intact, through RSA, any other alternative if I wasn't comfortable knowing that CNA had taken on that risk.

Q But this was still --

A Yeah.

Q And you walked away from that conversation knowing additional information had been requested?

A To price the policy. Yes.

> Q That's your assumption. We talked about that earlier.
>
> A Sure. Yeah.
>
> [Emphasis added.]

[147] This is not evidence that, in my view, confirms Saby, on behalf of CNA, agreed that coverage would be provided. Kanuka candidly acknowledges that he cannot recall what Saby said with precision. The most that can be said from Kanuka's testimony is that it was his interpretation of Saby's comments that coverage would be provided.

[148] The defence goes further and argues that the emails between Kanuka and his staff at CMB do not support that Kanuka actually believed that coverage was in place. On September 10, Kanuka sent an email to a staff member that included these statements:

> I spoke with Jason at CNA the other day, and he was okay with adding the new operations of a gravel pit to DRS current policy as there is common ownership.
>
> . . .
>
> Can you please send an e-mail adding on:
>
> - The new operation
> - The attached equipment list
> - The attached buildings
>
> [Emphasis added.]

[149] As noted above the information was not sent until after the landslide and then, the defendant stresses, prior to actually reporting the landslide. The former occurred at 0902 hours and the latter at 1436 hours on October 1, 2018. In the email at 0902 the CMB customer service representative included this introduction:

> Good morning Jason,
>
> Effective September 24, 2018, can we please add new operations for a gravel pit to DRS's insurance policy? There will be common ownership with the following company:
>
> **Deasan Holdings Ltd.**
> **PO Box 6958**
> **Fort St. John, BC VU 4J3**

[150] There was no evidence explaining the September 24, 2018 date. The CMB employee who authored the email did not testify.

[151] The defence argues that all of this supports the proposition that Kanuka and CMB knew that the coverage had not been put in place as a result of the STC. As it stated in argument, “The inescapable fact of these emails is that CMB realized it had not sent the information Mr. Saby needed until the Landslide had already occurred. What followed was a panicked rush to get this information out to CNA before even reporting the Landslide.”

[152] There is an important distinction between what occurred after the policy quote was received in December 2017 and what occurred after the STC. In December a quote was received. A letter from CMB to CNA asked that coverage be bound. Beech was notified by CMB the policy was put in place and Beech received the certificate of insurance identifying Deasan as an “additional insured”. A similar process occurred with the variation on January 3, 2018. There were no similar actions or communications in relation to the request for coverage for the gravel operations.

[153] When Beech called Kanuka on August 31 he knew that the gravel operations were not covered by the existing DRS policy. He did not suggest in his testimony that Kanuka told him that the gravel operations would automatically be covered by CNA. Most importantly he confirmed that, prior to the landslide occurring, no one at CMB ever provided confirmation to him or Deasan or DRS that gravel pit operations had been added to the policy.

[154] Kanuka’s evidence must also be measured against Saby’s evidence. While Saby recalls less detail than Kanuka, Saby was clear in his testimony that he required the information that he requested of Kanuka to assess and price the risk and that it would only be upon confirmation that the insured accepted, that coverage would be extended.

[155] Carefully scrutinized, Kanuka's evidence does not contradict Saby on this point.

[156] I will address an additional aspect of the plaintiff's arguments on agency which it outlines under the heading "CMB's knowledge is CNA's knowledge". The plaintiff's position is summarized at para. 156 of its argument:

> 156. In its dual agency role, all of the knowledge that CMB acquired from DRS and Deasan became the knowledge of CNA. This is the case both in fact and in law. Therefore, if CMB knew about Deasan, the Land and the gravel operations, then so did its principal, CNA. CNA cannot argue, as Ilnycky has throughout CNA's denials of coverage, that CNA was never previously aware of Deasan. CNA's position is both factually incorrect based on the September Telephone Conversation, and further, is legally incorrect based on the imputed knowledge of its agent.

[157] Having concluded that Saby did not in fact confirm that CNA would provide the coverage for the gravel operations and that CMB did not communicate to Deasan, DRS or Beech that coverage was in place, this proposition of law does not advance the plaintiff's position.

[158] On this evidence, I am unable to conclude that the STC resulted in CNA agreeing to provide coverage to Deasan for the operation of the gravel mine.

[159] In these circumstances it is not necessary for me to address the argument that policy changes annot be made by telephone calls, and the request ultimately needs to be made in writing. I note, however, that I am not inclined to agree that it was strictly necessary. Rather, I view it as best practice as distinct from a requirement.

[160] These conclusions would also dispose of the plaintiff's argument regarding estoppel. The plaintiff states:

> During the course of the September Telephone Conversation, Saby represented to Kanuka that he would add Deasan's gravel operations to the Policy. All that was left to do was to paper the details. This was a verbal binder of coverage in every sense. CNA cannot resile from the effects of Saby's representation to Deasan's agent, CMB.

[161] Having found that Saby did not represent that he would add Deasan's gravel operations, the principles could not apply. There was no such agreement from which CNA is attempting to resile.

Bad Faith

[162] The plaintiff alleges that at least by October 12, 2018 CNA's senior management intervened in the claim's management with an objective of denying the claim. It was on that date that David Price, CNA's chief underwriter officer for Canada, responded to an email from an underwriting specialist with the following direction to Saby, Ilnicky and others:

> Thanks guys I appreciate this. Everything is cool. I just briefed Brosnan on it, no worries. Let's stop with written correspondence as we should expect litigation. Please make sure all document filing is up to date in efile and let's talk on Monday.

[163] "Brosnan" was David Brosnan, the executive vice-president international of the parent company of CNA, being CNA Hardy in London, England. Each of Bronsan and Price were made aware of the claim because of its potential magnitude.

[164] Thereafter CNA retained counsel and asserted privilege over its communications. The plaintiff stresses that no denial of coverage was communicated to DRS or Deasan until November 29, 2018.

[165] The plaintiff says this is evidence of pressure to deny the claim and to "Cover your tracks. We don't want anyone to follow what we're doing here."

[166] The focus of the plaintiff's submissions on this issue is the response of CNA, after these communications, to information it acquired regarding the STC.

[167] In a general sense CNA asked CMB for information or records regarding the STC that would support CMB's assertion that coverage for the gravel operations had been placed as result of the STC. When Kanuka's September 10, 2018 email was provided, CNA's position did not change. The plaintiff argues that, when viewed in

light of the internal communications and the inferred intention to deny the claim, bad faith is demonstrated.

[168] The defence position is summarized in these paras. from its written argument:

> 165. The suggestion that Mr. Price's email influenced CNA's determination at the onset of its investigation is rebutted by all the subsequent events even after coverage was denied. Notwithstanding the denial, Mr. Ilnycky continued to see information from CMB that would allows it to revisit its coverage determination based on new or additional information.
>
> 166. CNA afforded all possible opportunity to CMB to provide it with any information that would help determine coverage in favour of Deasan. The numerous emails and telephone calls between CNA and CMB, the request for further information, assessing the additional information and request for further clarification and additional documentation all point to CNA's robust due diligence to ensure no stone was left unturned prior to November 29, 2018 (and even for months thereafter).

[169] Among the authorities referenced that describe the duty of good faith is *702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's London, England*, 2000 CanLII 5684, (ONCA). That case includes these comments:

> [30] What constitutes bad faith will depend on the circumstances in each case. A court considering whether the duty has been breached will look at the conduct of the insurer throughout the claims process to determine whether in light of the circumstances, as they then existed, the insurer acted fairly and promptly in responding to the claim.
>
> [31] A breach of the duty to act in good faith gives rise to a separate cause of action from an action for the failure of an insurer to compensate for loss covered by the policy. In *Whiten v. Pilot Insurance,* Laskin J.A. made the point at p. 650:
>
> > [i]n every insurance contract an insurer has an implied obligation to deal with the claims of its insureds in good faith. [cites omitted] That obligation to act in good faith is separate from the insurer's obligation to compensate its insured for a loss covered by the policy. An action for dealing with an insurance claim in bad faith is different from an action on the policy for damages for the insured loss. In other words, breach of an insurer's obligation to act in good faith is a separate or independent wrong from the wrong for which compensation is paid.

[170] My conclusion on the effect of the STC is not determinative of the issue, but it is relevant. In any event, I agree with the defence position quoted above. On the

whole of the evidence, I cannot agree that the plaintiff has shown the claim determination was predetermined or less than an objective and legitimate one.

[171] In my view CNA's position was based on their interpretation of events and documents that they were entitled to take. The issue in an assertion of bad faith is not whether that position was correct or incorrect. On the whole of the evidence they conducted a reasonable inquiry and reached a conclusion that they were entitled to reach irrespective of whether it was endorsed by the court at the end of the day.

Duty to Defend

[172] Counsel were invited to make additional submissions on this subject on March 11, 2024. The invitation was accepted and, on counsels' suggestion, additional written submissions were received on March 20, 2024.

[173] Both parties reference *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33 for its guiding statement on the issue. The Court held as follows:

> [19] 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] 1S.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).
>
> [20] 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 (*NonMarine 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).

[174] There are additional Supreme Court of Canada statements that reference the obligation that aid in understanding its scope. In *Non-Marine Underwriters, Lloyd's of London v. Sclera* the Court found the duty did not exist where the plaintiff's notice of civil claim failed to assert any allegation that could potentially give rise to an indemnity under the insurance contract. An insurer only has a duty to defend when a lawsuit against the insured raises a claim that could potentially fall within coverage: p. 553–554.

[175] The notice of civil claim in the Giesbrecht Action names several defendants and not surprisingly casts a wide net regarding the potential cause(s) of and responsibility for the landslide.

[176] As noted above, the evidence before me indicates Deasan did preliminary and investigative work before commencement of the gravel operations in the summer of 2018. The STC followed Deasan's indication that intended to commence those operations.

[177] The Giesbrecht notice of civil claim alleges Deasan began operating "an aggregate mine" in or about June 2018. It includes the following:

> 43. Between about June 2018 and October 2018, Deasan caused or permitted the excavation of earth and the stockpiling of gravel and other excavated material along the southern portion of the Gravel Pit Properties. In doing so, Deasan:
>
> (a) breached the terms of relevant statutes, bylaws, regulations, permits, and covenants, including the Mining Permit and the Gravel Pit Covenant; and
>
> (b) destabilized the Slope, thereby increasing the risk of a landslide.
>
> 44. Between about June 2018 and October 2018, Deasan failed to immediately:
>
> (a) report to the MEMPR and rectify any breaches of the Mining Permit;
>
> (b) report to the Regional District and rectify any breaches of the Gravel Pit Covenant; and,
>
> (c) warn the plaintiffs of the increased risk of landslide caused by operation of the Mine.
>
> . . .

> 54. The Landslide was caused, or, in the alternative, the risk of the Landslide occurring was materially contributed to by:
>
> (a) the activities of Deasan on the Gravel Pit Properties;
>
> (b) the discharge of water from the Sewage Lagoons; and
>
> (c) such further and other causes as the plaintiffs may discover and advise.

[178] The evidence of Beech was that at the time of Deasan's acquisition, the property was not level and material would have to be moved to make it useable to "house DRS". The gravel mine plan emerged from that preliminary investigation and the permit for gravel pit operations was obtained August 7, 2018. The process was described by Beech:

> A We're moving -- so what we did, what the whole pit plan was to do, is that we were -- so the pit had been in operation since 1946. So they had taken out a big swath of gravel in the gravel pit, and when they had taken that out, they take the overburden from there and place it onto this other gravel. And then they excavated that all out, and I believe that they stopped doing that in -- I want to say it was -- I don't know. It was 11 years before we bought it or 13 years before we bought it.
>
> And so what our proposal was is to take the strippings off of this gravel and put it back into the hole that had been excavated, and then it was level and flat and useable.
>
> Q Okay. So when did that stripping activity start at the land?
>
> A It started -- I don't know the exact date. It was -- I don't know the exact date, but it was in -- it was, like, early summer 2018.

[179] What is described is the movement of material to refill the earlier excavation and then mine the area that had previously been covered. The mining itself was an additional phase.

[180] The defendant states in its additional submissions "Under the heading 'Legal Basis', the Giesbrecht Action indicates that the claims against Deasan are brought in negligence arising from the ownership and operation of the Mine."

[181] While the notice of civil claim includes that, it goes further. The claim alleges the landslide was caused by "the activities of Deasan on the Gravel Pit Properties".

Also, the legal basis includes additional claims in private nuisance and the right to support as follows:

> Private Nuisance
>
> 87. Deason, in causing or permitting excavation and piling of earth and aggregate on the Gravel Pit Properties, disturbed the subsurface in the vicinity of the Gravel Pit Properties and in doing so caused a substantial, non-trivial and unreasonable:
>
> (a) damage to the Plaintiff Properties; and/or,
>
> (b) interference with the Plaintiffs' occupation and enjoyment of the Plaintiff Properties.
>
> 88. Accordingly, Deasan is liable to the plaintiffs in private nuisance for the loss, damage, injury and expense pleaded above at paragraph 57.
>
> Breach of the Right to Support
>
> 89. Deasan, in causing or permitting excavation and piling of earth and aggregate on the Gravel Pit Properties, disturbed the subsurface in the vicinity of the Gravel Pit Properties and in doing so breached the right of the plaintiffs to have their soil supported in its natural state by their neighbours.
>
> 90. Accordingly, Deasan is liable to the plaintiffs for the loss, damage, injury and expense pleaded above at paragraph 57 which resulted from the breach of their right to support.

[182] The plaintiff refers to these excerpts from the policy that was in place:

> 10. As is typical of CGL policies, the CGL Form starts with a broad grant of coverage for bodily injury and property damage liability, followed by exclusions and exceptions:
>
> **1. Insuring Agreement**
>
> a. We will pay those sums you become legally obligated to pay as damages because of **bodily injury** or **property damage** to which this insurance applies. We will have the right and duty to defend you against any action seeking those damages. However, we will have no duty to defend you against any **action** seeking damages for **bodily injury** or **property damage** to which this insurance does not apply. ...
>
> b. This insurance applies to **bodily injury** and **property damage** only if:
>
> (1) The **bodily injury** or **property damage** is caused by an **occurrence** that takes place in the **coverage territory**; and
>
> (2) The **bodily injury** or **property damage** occurs during the policy period; and

> (3) Prior to the policy period, no insured listed under Paragraph 1. of SECTION II – WHO IS AN INSURED and no **employee** authorized by you to give or receive notice of an **occurrence** or **claim**, knew that the **bodily injury** or **property damage** had occurred, in whole or in part. …
>
> 11. The CGL Form provides the following definitions material to the grant of coverage:
>
> SECTION IV – DEFINITIONS
>
> 18. **Occurrence:** an accident, including continuous or repeated exposure to substantially the same general harmful conditions. ...
>
> 21. **Property damage:**
>
> a. Physical injury to tangible property, including all resulting loss of use of that property; or
>
> b. Loss of use of tangible property that is not physically injured.
>
> [Bold in original argument.]

[183] Here, however, I have concluded any coverage available to Deasan is limited to what is indicated in the certificate prepared by CMB. For Deasan, it does not extend to the gravel pit lands. While those lands are referred to in the certificate, whatever coverage might exist would be available to DRS. It is not named or referenced in the Giesbrecht Action.

[184] As a result, even considering the broad scope of the duty to defend it cannot extend to Deasan in relation to the Giesbrecht Action. It is my conclusion that the defendant does have the duty to defend the plaintiff in the Giesbrecht Action.

Conclusions

[185] For the reasons set out above the plaintiff's claims against the defendant are dismissed.

[186] I have not heard submissions as to costs. There may be considerations relevant to costs that I am not aware of. At this point it would appear that the defendant is entitled to its costs at scale B. If, however, either side takes a different view they are at liberty to seek an opportunity to appear to address the issue. If that is the case, Supreme Court scheduling should be advised within 21 days of release of these reasons.

"Betton J."