

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Deasan Holdings Ltd. v. Continental Casualty Company*,  
2025 BCCA 177

Date: 20250529  
Docket: CA49842

Between:

**Deasan Holdings Ltd.**

Appellant  
(Plaintiff)

And

**Continental Casualty Company**

Respondent  
(Defendant)

Before: The Honourable Madam Justice Fisher  
The Honourable Justice Griffin  
The Honourable Justice Donegan

On appeal from: An order of the Supreme Court of British Columbia, dated  
April 12, 2024 (*Deasan Holdings Ltd. v. Continental Casualty Company*,  
2024 BCSC 580, Kelowna Docket S137059).

Counsel for the Appellant: P.J. Stein, K.C.

Counsel for the Respondent: D.M. Pick  
H.A. Khan

Place and Date of Hearing: Vancouver, British Columbia  
December 6, 2024

Place and Date of Judgment: Vancouver, British Columbia  
May 29, 2025

**Written Reasons by:**

The Honourable Justice Griffin

**Concurred in by:**

The Honourable Madam Justice Fisher  
The Honourable Justice Donegan

**Summary:**

*The appellant, Deasan Holdings Ltd., appeals from a finding that the respondent, Continental Casualty Company, has no duty to defend it in a lawsuit arising from its gravel pit operation. Held: Appeal allowed. An insurance broker was acting as agent for Continental, and through its conduct, bound Continental to insure Deasan as owner of the gravel pit. The broker later accepted Deasan’s notice of a change in risk by way of start up of the gravel pit operation, by conduct and by operation of Statutory Condition 4 of the Insurance Act. The judge erred in limiting the broker’s role as agent for Continental to a few words in a certificate of insurance issued by the broker, and not considering the entire factual matrix of the broker’s role as agent, including its conduct in its relationship with Deasan and in receiving Deasan’s notice of a change in risk.*

**Reasons for Judgment of the Honourable Justice Griffin:**

**Introduction**

[1] The appellant, Deasan Holdings Ltd. (“Deasan”), appeals from a judgment dismissing its claim for insurance coverage against the respondent, Continental Casualty Company (“Continental”). The claim arose from a September 29, 2018 landslide on Deasan’s property located near Fort St. John, BC, during its gravel mining operation. The landslide led to Deasan being sued for damages by neighbouring property owners.

[2] Deasan sought a declaration that Continental had a duty to defend and indemnify it, under an insurance policy (the “Policy”) placed by an insurance broker with CMB Insurance Brokers (referred to as “CMB” in the judgment under appeal but I shall refer to it as the “Broker”). Continental denied it had a duty to defend and indemnify Deasan.

[3] The Policy named as insured a company affiliated to Deasan, namely, D.R.S. Energy Services Inc. (“DRS”).

[4] A central issue was whether the Broker had acted as agent for Continental to bind Continental to insure Deasan. The judge concluded that the Broker was agent for Continental in sending a certificate of insurance to Deasan, a conclusion which is not challenged on appeal. However, the judge interpreted the certificate narrowly,

and found that the Broker did not extend Continental's insurance coverage to Deasan's gravel pit operation. Deasan argues on appeal that the judge erred in reaching this conclusion. The judge's reasons are indexed as 2024 BCSC 580.

[5] In my view, this appeal turns on these issues only: whether the Broker, as agent, had the ability to bind Continental to provide insurance to Deasan in relation to the gravel pit operation, and whether the Broker in fact did so. For the reasons that follow, it is my view the answers to both questions are affirmative, and therefore I would allow the appeal.

**Background**

[6] The parties agreed on a number of the key facts and largely do not take issue with the judge's findings on some of the background facts.

[7] Deasan is not a subsidiary of DRS in that DRS itself does not own Deasan shares, but the two companies are affiliates under BC law.

[8] Both Deasan and DRS have some common shareholders, Lorean Enterprises Ltd. ("Lorean") and DSS Holdings Inc. ("DSS") which common owners together own 50% or more of the shares of Deasan and DRS.

[9] Specifically, Deasan shares are owned by: Lorean (50%) and DSS (50%). DRS shares are owned by: Lorean (35%), DSS (50%), and Russell Parker (15%). Lorean is owned by Sandy Beech; and DSS is owned by Dean Swanberg.

[10] DRS provides oil field services, including hauling equipment to and from oilfield sites.

[11] Until August 2017, Deasan was a numbered shelf company. However, that changed when DRS transferred some property to it located at 9815-77th Ave., Fort St. John (the "original lands"). These original lands were initially insured under DRS's name and housed a metal clad building and two portable offices.

[12] In October 2017, Deasan purchased additional property, located outside of town, where the landslide occurred in September 2018. For ease of reference it will be referred to as the “gravel pit lands”. The gravel pit lands had an inactive gravel mine on it, and was used to store some of the DRS equipment. There were no buildings on it and so it was referred to as “vacant land” by the Broker.

[13] DRS used the Broker as its insurance broker since 2015. The person the principals of DRS and Deasan dealt with at the Broker was Brett Kanuka. The Broker had the ability to place insurance with different insurance companies. The Broker also had a “producer agreement” with Continental.

[14] As of at least the year 2017, Mr. Kanuka obtained insurance for DRS from Specialty Wholesale Services (“SWS”).

[15] In October 2017, Mr. Beech contacted Mr. Kanuka to arrange for additional insurance coverage, in light of Deasan, its new ownership of the original lands, and its purchase of the gravel pit lands, and informed him that their plan was to start a gravel pit operation in the future. Mr. Beech wanted liability insurance on the gravel pit in case someone came on it and hurt themselves. Mr. Kanuka understood the affiliated ownership of DRS and Deasan.

[16] Mr. Kanuka sent a follow up email to Mr. Beech on October 16, 2017, stating “we will add Deasan Holdings Ltd. to the policy with regards to building ownership”, [meaning ownership of buildings on the original lands], as well as add rental income for the rent that DRS pays to Deasan each year for use of those lands. Mr. Kanuka was referring to adding Deasan to DRS’s insurance with SWS. He further wrote:

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.

Keep in mind that when/if you do open up the gravel pit operations there are better insurance companies for that type of operation and it would make sense to set up a separate policy for that operation.

[Emphasis added.]

[17] That same day, October 16, 2017, Mr. Beech had DRS's company controller, Louise Crook, send the legal descriptions of the new gravel pit lands to Mr. Kanuka.

[18] Mr. Kanuka thus arranged for additional insurance coverage over Deasan and its property with DRS's existing insurer, SWS. Mr. Kanuka described the gravel pit lands as vacant land, seeking insurance for liability only in respect of that property. The Broker advised SWS that the principals of DRS and Deasan were the same, and SWS responded that meant Deasan would be automatically covered under DRS's policy because the definitions in the SWS policy extended insurance coverage to affiliated companies of the insured.

[19] The Broker used its own application form, described as a "commercial risk application" to send some information about Deasan's property to SWS, although some of this information was incorrect. It did not name Deasan as owner of the real property.

[20] When the SWS policy was approaching expiry in 2018, Mr. Kanuka formed the view that the renewal terms proposed by SWS were not attractive. He contacted an underwriter employee at Continental for another insurance quote. That employee was Jason Saby.

[21] At Mr. Saby's request, Mr. Kanuka sent some documents to Continental applying for insurance that Mr. Kanuka intended to cover DRS and Deasan.

[22] Mr. Kanuka's documents included the earlier "commercial risk application" that he had used with SWS, identifying DRS as the name insured and not Deasan.

[23] Notably, the documents Mr. Kanuka sent to Continental contained errors and inconsistencies. The forms wrongly indicated insurance was being sought for the preceding year, not the current year. In the forms, Mr. Kanuka summarized the business of DRS but did not explain the ownership or business of Deasan; or even mention that Deasan required coverage. He listed the real property owned by both companies on a "property statement of values" but did not identify the fact that Deasan owned several of the properties. He described as "vacant lands" the gravel

pit lands and one parcel of the original lands, seeking coverage for liability in relation to this property, but elsewhere he set out that there were no vacant properties. The scheduled equipment included equipment owned by Deasan but this ownership was not identified.

[24] The commercial risk application sent by Mr. Kanuka to Continental contained a space to fill out names of “Subsidiaries and affiliates” but it was filled out as “None at this time”. However, in Mr. Kanuka’s request to Continental for coverage, he sought under the heading “Additional Extensions” coverage for a “Broad Definition of Insured”. The form did not explain what this meant.

[25] As found by the judge, Mr. Kanuka was intending to obtain insurance for DRS that would be a substitute for the SWS insurance, and so would also cover Deasan: para. 93.

[26] Mr. Saby understood the application for insurance was a year out of date, but chose to quote the risk. He understood that the coverage being sought for the gravel pit lands was for liability only. He sent a quote to Mr. Kanuka for insurance coverage, and on December 29, 2017, the Broker responded to the Continental quote asking Mr. Saby to “please bind coverage” for the year beginning December 31, 2017.

[27] Mr. Kanuka then informed Mr. Beech that he had obtained coverage with Continental. He explained that the premiums would be less than with SWS. Mr. Kanuka knew from his prior dealings with Mr. Beech that both DRS and Deasan wanted insurance coverage together, and had both been covered when the insurance was issued by SWS. Mr. Kanuka believed that both DRS and Deasan were covered by Continental’s insurance: para. 117.

[28] On January 5, 2018, the Broker created a certificate of insurance that was supposed to reflect Continental’s insurance quote and coverage. The Broker forwarded the certificate of insurance to Mr. Beech on behalf of DRS and Deasan. It was not sent to Continental.

[29] This certificate of insurance is an important document in the case.

[30] The cover page of the certificate of insurance names DRS as the “Named Insured” and describes “Operations/Risk Insured” as “Rig Relocation and Movement of Oilfield Equipment”. After the cover page are pages headed “Commercial Package Summary”, which appear to summarize the kind of insurance coverage and limits that the Policy provides, listing property and equipment that is covered, as well as “Commercial General Liability” and “Umbrella Liability”. At the end of this small print summary of coverage is the heading “Additional Insured”. It reads:

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

[31] The above property listed under Deasan’s name was part of the original lands, not the gravel pit lands. However, only the original lands had buildings on it.

[32] Attached to the certificate of insurance summary of coverage were schedules: a property statement of values, and a schedule of contractor’s equipment. The property statement of values described the buildings on the original lands and assigned value to the buildings and equipment; but described the gravel pit lands as “liability only”, with nothing indicated there were buildings or equipment on it. This was consistent with previous descriptions of the gravel pit lands as vacant lands. The statement of values did not state who owned the real property, although it was owned by Deasan.

[33] DRS was charged an insurance premium of \$77,986, billed and collected by the Broker and remitted to Continental.

[34] On January 26, 2018, Continental sent the Policy wording to the Broker, who did not forward it to Mr. Beech on behalf of Deasan and DRS until after the landslide. The section of the Policy headed Commercial General Liability (“CGL”) Coverage set out the duty to defend “you” against any action seeking damages because of bodily injury or property damage. The term “you” was not modified within the CGL coverage (unlike in some other parts of the policy). Rather, the term “you” was defined in the common Policy conditions as follows:

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.

[Underlined emphasis added.]

[35] Continental maintains in this proceeding that Deasan was not within the definition of “insured” in the Policy. At the Policy page headed “common policy declarations”, the “named insured” was identified as DRS. DRS did not have a 50% or more controlling interest in Deasan.

[36] By the summer of 2018, Deasan had determined that the gravel pit operations were viable, and would assist DRS in its operations. Preparation for an active mine commenced.

[37] On August 31, 2018, Mr. Beech told Mr. Kanuka that Deasan intended to commence the gravel operations.

[38] At that time, both Mr. Beech and the Broker thought Deasan was already an insured under the Policy.

[39] The *Insurance Act*, R.S.B.C. 2012, c. 1, s. 29 imports certain statutory conditions into insurance contracts in BC, including statutory condition 4 (“Statutory Condition 4”), as follows:

**Material change in risk**

4(1) The insured must promptly give notice in writing to the insurer or its agent of a change that is

- (a) material to the risk, and
- (b) within the control and knowledge of the insured.

(2) If an insurer or its agent is not promptly notified of a change under subparagraph (1) of this condition, the contract is void as to the part affected by the change.

- (3) If an insurer or its agent is notified of a change under subparagraph (1) of this condition, the insurer may
  - (a) terminate the contract in accordance with Statutory Condition 5, or
  - (b) notify the insured in writing that, if the insured desires the contract to continue in force, the insured must, within 15 days after receipt of the notice, pay to the insurer an additional premium specified in the notice.
- (4) If the insured fails to pay an additional premium when required to do so under subparagraph (3) (b) of this condition, the contract is terminated at that time and Statutory Condition 5 (2) (a) applies in respect of the unearned portion of the premium.

[40] Mr. Beech instructed his administrative staff, Ms. Crook, to send the Broker any required information in relation to the extension of coverage for the gravel pit. That same day, August 31, 2018, Ms. Crook sent by email to Mr. Kanuka, a list of equipment and buildings owned by Deasan needing insurance coverage. Again, there were no buildings on the gravel pit lands, but Mr. Kanuka's emails indicated he clearly understood that Mr. Beech was expecting to have added to the insurance coverage the new operations of the gravel pit owned by Deasan of which he already had the property description (as listed in the certificate of insurance previously issued by Mr. Kanuka).

[41] On September 4, 2018, Mr. Kanuka of the Broker spoke with Mr. Saby of Continental, about adding gravel mine operations to the Policy coverage. Mr. Saby requested that certain information be sent to Continental. Beyond that, the specifics of their conversation were disputed and the call became defined in the litigation as the "STC".

[42] Gravel pit operations are a class of risk that Continental does insure.

[43] The judge did not accept that in the STC Mr. Saby agreed that Continental would provide coverage to Deasan for the operation of the gravel mine. Rather, he accepted Mr. Saby's evidence that he wanted some additional information first. Deasan does not challenge the judge's finding of fact in this regard.

[44] However, there remained confusion on the part of the Broker.

[45] On September 10, 2018, Mr. Kanuka emailed another employee of the Broker, Mr. Trujillo, stating that he “spoke with Jason at [Continental] 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”. He explained that the company name is the same as the building owner, Deasan, and that the operations would be a gravel pit with revenue of \$100,000. He instructed Mr. Trujillo to send an email to Continental “adding on the new gravel pit operation”, the “attached equipment list”, and the “attached buildings”. These were the same attachments that Ms. Crook sent to Mr. Kanuka on August 31. Mr. Kanuka asked that the lists and invoices be kept separate for the client and that Mr. Trujillo also “send an e-mail to the client with the approximate cost to add on this equipment & buildings so they can budget it for the end of the year”.

[46] Mr. Trujillo of the Broker wrote an email to another employee of the Broker, Daniel Keith, on September 26, 2018, asking if he could “please help and report this change to [Continental]”. That employee sent an email to Ms. Crook on September 28, 2018, asking her for the street and legal address of the three buildings, and stating he would be issuing the approximate cost for these additions a bit later on.

[47] On Saturday, September 29, 2018, a landslide occurred on the gravel pit lands.

[48] On October 1, 2018, Mr. Beech called Mr. Kanuka to report the landslide. He did not have direct contact information for the insurer, Continental.

[49] Continental has denied a duty to defend Deasan from claims of property damage brought by the neighbouring property owner, who commenced an action against Deasan (the “Giesbrecht Action”).

### **Trial Judgment**

[50] There were two key arguments advanced by Deasan at trial in support of its claim that Continental had a duty to defend it from the neighbouring property owner’s claims of property damage caused by the gravel pit operations. One argument was

that as a matter of contract interpretation, the Policy definitions of “insured” and “you” captured Deasan as an insured; the second argument was that the Broker acted as agent for the insurer and bound the insurer to cover Deasan for the gravel pit operations.

[51] The judge rejected the first argument, based on the language of the Policy.

[52] The judge accepted some aspects of the agency argument but nevertheless found that the Broker did not bind Continental to cover the gravel pit operations.

[53] The judge found that when the certificate of insurance was delivered to Mr. Beech, naming Deasan as additional insured, the Broker was agent for Continental with authority to deliver the certificate of insurance prior to the Policy itself being created and delivered, and indeed a responsibility to do so: para. 114. He found that the Broker had either actual implied authority from Continental to extend coverage and to include Deasan in it, or ostensible authority to do so: para. 116.

[54] The judge found that Mr. Kanuka assumed that the definitions of Named Insured in the Continental Policy would be similar to the definitions under the SWS policy, and so would capture Deasan: paras. 99, 121. He also accepted that Mr. Kanuka believed Deasan was an insured and the gravel pit lands as well as the original lands were covered by the Continental Policy: para. 117.

[55] The judge held that what was critical was what the Broker expressly communicated to Mr. Beech, on behalf of Deasan and DRS, in the certificate of insurance. The judge held:

[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.

[Emphasis added.]

[56] The judge found that Continental expected and relied on the Broker to send a certificate of insurance prior to the Policy being delivered to the Broker. Continental was therefore bound by the actions of its agent, the Broker, in sending the certificate of insurance to Mr. Beech on behalf of DRS and Deasan.

[57] However, the judge added that Continental “cannot be bound beyond that”, and all that the Broker communicated by way of the certificate of insurance was that Deasan was an additional insured with respect to the property in Fort St. John (the original lands, not the gravel pit lands): para. 122.

[58] The judge was critical of Mr. Beech for not asking questions about the certificate of insurance. The judge found the language in the certificate “unambiguous”: para. 124. He found that the Broker did not communicate to Deasan anything that could bind Continental to coverage for any liability of Deasan associated to the gravel pit lands, and the certificate of insurance could not mislead someone to think that Deasan had coverage for the gravel pit lands: paras. 123–124, 126.

[59] The judge held:

[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.

[Emphasis added.]

[60] The judge considered the fact that the gravel pit lands were listed in the schedule of property, as part of the certificate of insurance. However, he found that coverage for those lands would only be available to DRS. The judge concluded:

[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.

[61] The judge then considered the contents of the STC. He found that Mr. Kanuka, for the Broker, made the telephone call promptly after receiving notice from Mr. Beech of the start-up of the gravel pit operations, and that he had known since the summer of 2017 that there was a prospect of Deasan doing so. Mr. Kanuka made the telephone call with the intention of securing coverage for those operations, believing that Deasan was already an insured under the Policy. He mentioned Deasan to Mr. Saby for the insurer: paras. 133, 135.

[62] However, as mentioned above, the judge found that Mr. Saby did not confirm in the STC that Continental would provide coverage for the gravel pit operations. This disposed of the claim that Continental directly agreed to extend coverage to the gravel pit operations.

[63] The judge did not address the implications of Statutory Condition 4 in light of Mr. Beech's notice to Mr. Kanuka of the start-up of the gravel pit operations.

**Issues on Appeal**

[64] Deasan raises three issues on appeal which I have re-stated as follows:

- a) While the judge was correct in finding that the Broker was acting as an agent for the insurer when it issued the certificate of insurance, extending coverage to Deasan as "additional insured", the judge then erred in narrowly construing the scope of that coverage to a building on the original lands only;
- b) The judge erred in failing to consider and conclude that Deasan's disclosure to the Broker of the commencement of the gravel pit operations in the context of the circumstances was disclosure to the insurer's agent and thus extended coverage to those operations by effect of Statutory Condition 4; and

- c) The judge erred in contractual interpretation of the definitions of “Insured” and “you” in the Policy, which, when interpreted correctly, include Deasan.

[65] Continental submits, in response, that:

- a) The judge correctly limited Deasan’s coverage to what was expressly stated in the insurance certificate, which was unambiguous and could not have misled Deasan;
- b) The judge did not fail to consider whether Deasan’s notice could have extended coverage to the gravel pit operations, and found no one communicated to Deasan that these operations were covered; and
- c) The judge correctly interpreted the insurance contract and the definitions of “Insured” and “you”.

[66] Deasan says its grounds of appeal turn on errors of law for which the standard of review is correctness. Continental says the first two grounds of appeal challenge the judge’s findings of fact or of mixed fact and law.

[67] I agree with Continental that the findings at issue related to the first two grounds of appeal are findings of fact or mixed fact and law, such that this court may only interfere if the judge made a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33.

[68] The parties agree that because the insurance contract is a standard form contract, the standard of review on questions of its interpretation is correctness. This is so unless the interpretation turns on a specific factual matrix: *Busato v. Gore Mutual Insurance Company*, 2025 BCCA 79 at para. 34, citing *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 24; *West Van Holdings Ltd. v. Economical Mutual Insurance Company*, 2019 BCCA 110 at para. 26.

**Analysis**

**Duty to Defend**

[69] Ultimately this appeal concerns whether Continental has a duty to defend Deasan in the Giesbrecht Action.

[70] The starting point for determining whether an insurer has a duty to defend is consideration of the pleadings in the action to determine if there is a possibility of the claims falling within the insurance coverage: *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33 [*Progressive Homes*]. The rule is “[i]f the pleadings allege facts which, if true, would require the insurer to indemnify the insured for the claim, then the insurer is obliged to provide a defence”: *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49 at para. 28.

[71] The duty to defend is broader than the duty to indemnify, as held in *Progressive Homes* at para. 19:

... 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.

[Citations omitted.]

[72] The allegations in the pleadings in the Giesbrecht Action include:

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.

...

[73] The pleadings in the Giesbrecht Action claim that Deasan owed a duty of care to neighbouring property owners and is liable to them in negligence for failing to take reasonable care in operating the gravel mine. The pleadings also allege that Deasan is liable in private nuisance and for breach of the right to support.

#### **Agency Issue and Statutory Condition 4**

[74] The question on appeal is whether the Broker, as agent for Continental, extended coverage to Deasan for the operation of the gravel mine.

[75] In this regard, I am persuaded by the first two grounds of appeal. In my view, while the judge correctly stated the principles that govern the law of agency, he failed to apply them and overlooked important evidence of the Broker's conduct. He also failed to consider and apply Statutory Condition 4.

#### **Agent's Communications and Certificate of Insurance**

[76] It is well accepted that insurance brokers may at times act as agents for a party seeking insurance; and at other times act as agents for the party providing insurance coverage, including in the course of a single transaction: *Piggott Construction (1969) Ltd. v. Saskatchewan Government Insurance Office*, 1985 CarswellSask 244, [1985] S.J. No. 165 (Sask. CA) [*Piggott*]. In this case, the parties agreed that the Broker was an agent of both Continental and DRS/Deasan.

[77] As in *Piggott*, here when the Broker sent a certificate of insurance to Deasan, it was acting as agent for the insurer with authority to bind the insurer to provide coverage, as found by the judge.

[78] The judge was correct in finding that the Broker had authority as agent for Continental to extend coverage to Deasan at the time the Broker listed Deasan as an additional insured on the certificate of insurance.

[79] However, the judge then erred by limiting the Broker's authority to simply that which the Broker communicated expressly in writing under the words "additional insured" in the certificate of insurance, namely, coverage for a building on the original lands.

[80] In so limiting the Broker's authority and representations, the judge overlooked the entire factual matrix and context of the relationship between the Broker and Deasan. In considering the scope of the Broker's representations of coverage and limiting it to only some express words on one section of the certificate of insurance, the judge failed to consider the whole of the evidence, including:

- a) The Broker's knowledge, through Mr. Kanuka's communications with Mr. Beech, that Deasan wanted to be added to the DRS policy and to have the same full coverage for all of its property, including the gravel pit lands and its equipment;
- b) The Broker's knowledge that the gravel pit lands were listed in the certificate of insurance as property that was insured and that those lands were owned by Deasan;
- c) The Broker's belief that Deasan was being added to the Policy and would receive equivalent coverage as DRS; and
- d) The Broker's communication to Deasan that he had bound coverage with Continental.

[81] By overlooking the above facts in his analysis of the Broker's responsibility as agent, the judge failed to apply the law that an agent's implied authority arises based on conduct and, as regards third parties, is that which "he is reasonably believed to

have, having regard to all the circumstances”: *Berryere v. Fireman’s Fund Insurance Co.*, 51 D.L.R. (2d) 603, 1965 CanLII 610 (MBCA) at paras. 6–8 [*Berryere*].

[82] While the judge cited *Berryere*, he did not consider what was reasonable for Deasan to believe in all the circumstances. Mr. Kanuka believed through his dealings with Mr. Beech, that Mr. Beech wished Deasan to be covered by the DRS policy placed with Continental, including for the gravel pit lands. By his conduct, Mr. Kanuka indicated to Deasan that it was so covered; it was therefore clearly reasonable for Deasan to believe the same thing. The judge made a palpable and overriding error in not considering these facts and then limiting the scope of the Broker’s representations to one part of the certificate of insurance form only.

[83] In reaching these conclusions, I disagree with Continental that it is relevant that the Certificate stated it was not part of the Policy and could not modify or expand the coverage under the Policy. The Certificate formed one part of the Broker’s communications and representations to Deasan. Mr. Kanuka’s overall conduct, in the context of his ongoing relationship with Deasan, formed another part of the Broker’s communications and representations.

[84] I also disagree with the judge’s description of the certificate of insurance as unambiguous. The document was short-form and much of its content is not connected by complete sentences. It can only be understood in the factual matrix of what was known by the Broker and Deasan at the time the Broker issued it. Because the certificate listed the gravel pit property on the schedule of property insured, which was known to the Broker as being owned by Deasan and on which there were no buildings, it rendered ambiguous the language on the certificate mentioning adding Deasan as “additional insured wrt ownership of Building [on the original lands]”.

[85] As held in *Progressive Homes*:

[23] Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction (*Consolidated-Bathurst*, at pp. 900-902). For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties (*Gibbens*, at

para. 26; *Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901), so long as such an interpretation can be supported by the text of the policy. Courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded (*Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901). Courts should also strive to ensure that similar insurance policies are construed consistently (*Gibbens*, at para. 27). These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place.

[24] When these rules of construction fail to resolve the ambiguity, courts will construe the policy *contra proferentem* — against the insurer (*Gibbens*, at para. 25; *Scalera*, at para. 70; *Consolidated-Bathurst*, at pp. 899-901). One corollary of the *contra proferentem* rule is that coverage provisions are interpreted broadly, and exclusion clauses narrowly (*Jesuit Fathers*, at para. 28).

[Emphasis added.]

[86] In my view, where as here the insurer’s agent makes representations to the insured about the scope of the insurance contract and the insured does not yet have the insurance contract, any ambiguity ought to be resolved consistently with the parties’ reasonable expectations, and ambiguity in a certificate of insurance describing coverage provisions ought to be interpreted broadly, in favour of coverage.

[87] The only way to resolve the ambiguity in the certificate of insurance, in the context of Mr. Kanuka’s prior conversations with Mr. Beech and conduct, was to conclude that the certificate of insurance communicated to Deasan exactly what Mr. Kanuka intended and thought to be the case, consistent with what Deasan expected: that the gravel pit lands were covered by the Policy for liability no matter which of DRS or Deasan owned the lands; and Deasan was an additional insured including with respect to its ownership of the gravel pit lands, but that the only buildings it owned that were covered by the insurance were located on the original lands.

[88] On this basis alone, then, the judge ought to have found that Deasan was added to the Continental Policy as an insured, together with DRS. The Broker informed Deasan that it was an “additional insured” by way of the certificate of insurance, and therefore, in accordance with the history of the Broker’s

communications with Deasan's principal, this meant Deasan was an insured under the Policy.

[89] Binding insurance contracts have been found in a number of cases where a broker has been found to have been an agent for the insurer, but has failed to correctly fill out or complete an insurance application on behalf of an insured, or has failed to note an exclusion in the policy applicable to the insured. In this regard, see for example: *Piggott, Pritchard v. Rideau Insurance Service Ltd.*, 14 C.C.L.I. (3d) 165, 1999 CanLII 36857 (ON SC); *Gooderham v. Bank of Nova Scotia*, 47 O.R. (3d) 554, 2000 CanLII 22344 (ON SC); *Boolinow Estate v. Canadian Imperial Bank of Commerce*, 3 C.C.L.I. (2d) 138, 1991 CanLII 14519 (BC SC); *Miller v. Guardian Insurance Co. of Canada*, 1997 ABCA 210; *Saskatchewan v. Mountain Pacific Transport Ltd.*, [1994] 8 W.W.R. 153, 1994 CanLII 5126 (SK KB).

### ***Change in Risk***

[90] I now turn to the implications arising from Deasan's notice to the Broker of the commencement of gravel pit operations.

[91] Respectfully, in my view the judge did not grapple with the question of what was the Broker's role when Deasan gave notice to it that Deasan was going to commence operations of the gravel pit. The judge also did not grapple with the effect of Statutory Condition 4.

[92] Initially when the certificate of insurance was issued, Deasan, as an insured, was not operating the gravel pit. However, it was objectively reasonable for Mr. Beech to believe based on the information and conversations he had previously had with Mr. Kanuka, and the Broker's conduct outlined above, that Deasan was covered for liability with respect to its ownership of the gravel pit, and that if it decided to operate the gravel pit, it simply needed to give notice to the Broker and this risk would be added to the Policy.

[93] In my respectful view, the judge's findings, narrowing the scope of insurance coverage for Deasan by excluding coverage for the gravel pit operation, are

inconsistent with the judge's findings that the Broker had authority as agent for Continental to extend coverage to Deasan and did so by sending the certificate of insurance to Deasan. If the Broker had authority to extend coverage on behalf of Continental, it also had authority to accept an expansion of the risk that was covered.

[94] At the time Mr. Beech spoke to Mr. Kanuka about commencing the gravel pit operations, followed by Ms. Crook's written communications sending along requested information, both he and Mr. Kanuka believed Deasan to be already covered by Continental's insurance Policy, based on the Broker's conduct when he was acting as the agent for the insurer.

[95] It was reasonable based on the past conversations with Mr. Kanuka, and the Broker's actions in sending out the certificate of insurance, for Mr. Beech on behalf of Deasan to believe that the Broker had authority on behalf of Continental to reduce or expand its coverage if the risks changed. Mr. Kanuka had invited Mr. Beech to simply give him notice when operations commenced and did not warn him when he received this notice that it would take time to add this operation to the Policy.

[96] An agent acts for its principal. If the insurer had all the same conversations and history with Deasan's principals as did the Broker in this case, it is difficult to see how the conclusion would be anything but that the insurer represented to Deasan that Deasan was covered for the gravel pit operations, once it received notice from Deasan that those operations were starting up and it failed to advise or warn that coverage would not be extended. The facts that support this conclusion based on the Broker's conduct are:

- a) The Broker was told well in advance that Deasan expected to commence gravel pit operations in the future;
- b) The Broker told Deasan it could obtain a better price from Continental than from its existing insurer, SWS, for coverage related to gravel pit operations;

- c) As agent for Continental, the Broker confirmed by way of the certificate of insurance that Deasan was an additional insured and that the gravel pit lands it owned were covered; and
- d) When Deasan told the Broker that operations were started, this was notice of a change in risk. The Broker accepted this advice, which was consistent with the earlier advice that these operations would eventually start, and the Broker did not warn or tell Deasan that coverage was not in fact available or might not be available or that the Broker would need time to obtain coverage.

[97] Any objectively reasonable person in Deasan's position would conclude, based on the Broker's representations in the context of the Broker's conduct and the history of the Broker's dealings with Deasan, that the Broker had authority to extend coverage to Deasan for the gravel pit operations and had done so upon receipt of Deasan's notice that these operations were starting, without the need for anything more. Perhaps based on messages sent by the Broker to Ms. Crook, Deasan might expect to ultimately receive a bill for a higher premium, but it was reasonable for an insured in Deasan's position to expect that coverage was available immediately upon its notice to the Broker.

[98] As agent, knowledge of the Broker gained in the course of its duties is knowledge of Continental: *Mah v. Wawanesa Mutual Insurance Co.*, 2013 ABCA 363 at paras. 13–15 [*Mah*]; *601 Main Partnership v. Centura Building Systems (2013) Ltd.*, 2024 BCCA 76 at para. 101, citing *Equinav Financial Corporation v. Roesslein Estate*, 2020 SKCA 69.

[99] The judge did not consider this broader context and did not consider the fact that since neither the Broker nor Continental communicated to Deasan that Continental disavowed coverage for the new risk, or warned Deasan it would not be covered, by the Broker's entire conduct and by operation of Statutory Condition 4, the notice to Mr. Kanuka given by Mr. Beech was sufficient to expand the scope of coverage to include Deasan's gravel pit operations: *Mah* at para. 17.

[100] Respectfully, given the history I have reviewed, the judge was in error at para. 152 and 153 of the reasons, in focusing on the fact that Mr. Beech did not receive written confirmation of coverage for Deasan's gravel pit operations. Mr. Beech expected Mr. Kanuka to tell him if there was any problem with simply adding the gravel pit operations. This expectation was reasonable given the context and history of their communications and the Broker's role as agent for Continental. This expectation is also consistent with Statutory Condition 4, which the judge did not consider.

[101] In light of this, Continental cannot rely on the fact that, in the STC with Mr. Kanuka, Mr. Saby did not confirm coverage for the gravel pit operations. Deasan was not informed by Continental of this, and instead, was led to believe by Mr. Kanuka's representations, acting as agent for Continental, that Deasan was covered for the increased risk.

[102] In conclusion, the Broker had authority as agent for Continental to expand the coverage under the Policy, and did so by expanding coverage to Deasan, first as owner of the gravel pit, and then for the gravel pit operation. Based on the Broker's conduct, coverage for the gravel pit operation commenced at least as of August 31, 2018, when Mr. Beech informed Mr. Kanuka that they were starting up the gravel pit operations, and Ms. Crook sent the follow up written information, and Mr. Kanuka did not immediately warn that coverage was not available.

***Duty to Defend***

[103] It follows, in my view, that Deasan is covered by the duty to defend under the Policy as of August 31, 2018 with respect to its gravel pit operations.

[104] While some of Deasan's conduct that is impugned in the Giesbrecht Action predates August 31, 2018, the allegations include conduct from August 31, 2018 and afterwards. Furthermore, the landslide causing the damage occurred on September 29, 2018. In my view, this is sufficient to engage the duty to defend Deasan under the Policy.

[105] This is because, in duty to defend cases, there is an obligation on the insurer to show that the claims raised in the action fall outside the scope of the policy. The question is not whether the insurer will be required to indemnify the insured if the action succeeds, but the “mere possibility that a claim falls within the insurance policy”: *Progressive Homes* at para. 19. Here, Continental has not shown that it is clear that Deasan was not covered by the Policy in relation to the allegations in the Giesbrecht Action. Therefore, the duty to defend is engaged.

**Contract Issue**

[106] Having reached the conclusions set out above, it is not necessary to consider the contractual interpretation issue advanced by Deasan and whether there is an ambiguity in the definitions of “insured” and “you” to be resolved in Deasan’s favour.

**Disposition**

[107] I would allow the appeal, set aside the order dismissing Deasan’s claims against Continental, and declare that Continental has a duty to defend Deasan in the Giesbrecht Action.

“The Honourable Justice Griffin”

I AGREE:

“The Honourable Madam Justice Fisher”

I AGREE:

“The Honourable Justice Donegan”