IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Bailey v. Temple*, 2020 NLCA 3
Date: February 4, 2020
Docket Number: 201901H0002

BETWEEN:

MARY BAILEY	FIRST APPELLANT
AND:	
GERALD BAILEY	SECOND APPELLANT
AND:	
DAVID TEMPLE	FIRST RESPONDENT
AND:	
CITY OF CORNER BROOK	SECOND RESPONDENT

Coram: Green, O'Brien and Butler JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201104G0049
(2018 NLSC 177)

Appeal Heard: September 12, 2019
Judgment Rendered: February 4, 2020

Reasons for Judgment by: Butler J.A.
Concurred in by: Green and O'Brien JJ.A.

Counsel for the First and Second Appellants: J. Alexander Templeton
Counsel for the First Respondent: No Appearance
Counsel for the Second Respondent: Erin E. Best

Butler J.A.:

INTRODUCTION

[1] This appeal addresses the contractual interpretation principles applicable to a release signed in August 2011 (the "Release").

FACTS

[2] On March 3, 2009, Mary Bailey, operating a vehicle registered to her husband, Gerald Bailey, struck David Temple who was an employee of the City of Corner Brook performing road work. Within the statutory limitation period, Mr. Temple commenced an action against Ms. Bailey (the "Temple action"). Once served, Ms. Bailey brought the statement of claim to her insurers who advised her that they would take care of the matter.

[3] Subsequent to service of the Temple action on Ms. Bailey, the Baileys commenced an action against the City of Corner Brook for alleged property damage and physical injury suffered by them in the incident (the "Bailey action").

[4] Following discussions and negotiations between their respective solicitors, on August 29, 2011 the Baileys signed the Release prepared by solicitors for the City in return for payment of $7,500. A notice of discontinuance was subsequently filed in the Bailey action.

[5] Four and a half years later, counsel for the Baileys' automobile insurers filed a defence in the Temple action and issued a third party notice to the City of Corner Brook claiming that the City, and not the Baileys, was liable to Mr. Temple or in the alternative, if the Baileys were liable, they were entitled to contribution from the City.

[6] On November 18, 2016, the City defended the Baileys' third party claim on the basis that the Release the Baileys had executed on August 29, 2011 precluded such a claim.

[7] Relying upon the Release, the City applied for summary trial which was held on April 5, 2018.

[8] By judgment filed August 28, 2018, the trial judge concluded that the Release covered the third party claim filed by the Baileys' automobile insurers

against the City in the Temple action and ordered the third party claim stayed with costs to the City.

ISSUES

[9] On this appeal, the Court must determine whether the trial judge made a reviewable error in finding that the Release applied to the third party claim against the City in the Temple action.

STANDARD OF REVIEW

Questions of Mixed Fact and Law

[10] *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, establishes that determinations of questions of mixed fact and law should be deferred to by appellate courts in the absence of palpable and overriding error. However, the Court held that, if it was clear that the trial judge made some extricable error in principle in his/her characterization or application of the legal standard to the facts, the error may amount to an error of law, subject to review on a standard of correctness.

[11] The appellant suggests that a correctness standard applies to the trial judge's conclusion that the Release applied to the third party claim against the City. The respondent argues that it is the lower deferential standard of palpable and overriding error.

[12] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, the Court held that a question of contractual interpretation is generally a question of mixed fact and law because it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

[13] However, in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] S.C.R. 23, the Court applied a correctness standard of review to the interpretation of an exclusion clause in a common form all risk property insurance policy. It did so as an exception to the general rule which it had stated in *Sattva*. This exception, it felt, was justified where three conditions applied:

1. The document under interpretation was a standard form contract;

2. The interpretation would have precedential value; and

3. There was no meaningful, factual matrix specific to the parties to assist in the interpretative process.

[14] Where such prerequisites were met, the Court determined that the interpretation was better characterized as a question of law subject to correctness review (paragraph 24).

[15] On the basis of these authorities, I conclude that the deferential standard of review (palpable and overriding error) would apply to the mixed question of fact and law arising in the current case unless:

1. The case falls within the exception identified in *Ledcor*; or

2. An extricable error of principle is identified.

The Exception Identified in *Ledcor*

[16] John D. McCamus in *The Law of Contracts,* 2d ed (Toronto: Irwin Law, 2012) at 185, suggests that printed forms, offered on a "take it or leave it" basis are a "pervasive and indispensable feature of modern life and represent what is commonly accepted as standard form contracts".

[17] The Release was not a standard printed form and the compensation reflected in it was negotiated.

[18] The interpretation of standard printed forms, offered on a "take it or leave it" basis would obviously be of precedential value to others in similar circumstances. Interpretation of this Release which references the particular accident and specifies the litigation that gave rise to the Release would not have the same broad scope precedential value. While releases generally have a similar format, the drafter has discretion in language.

[19] Further, in the current case, there is a meaningful, factual matrix specific to the parties which was of assistance to the interpretative process. That factual matrix required (*inter alia*) consideration of the parties' respective awareness of the Temple action and the negotiations held between counsel for the Baileys and the City. Such matters would not be relevant considerations when an individual is presented with a standard form contract such as an insurance policy.

[20] For these reasons I would not characterize the Release as a standard form contract. I conclude therefore that this case does not fall within the *Ledcor* exception. It follows that the standard of review applicable to the trial judge's

decision, is palpable and overriding error, unless an extricable principle of law is identified in the process of our review.

ANALYSIS

Resolute F.P. General Inc. v. Ontario (Attorney General), 2019 SCC 60

[21] Subsequent to the hearing of the within appeal on September 12, 2019, the Supreme Court of Canada rendered its decision in *Resolute* which addressed the interpretation of an indemnity. This Court invited the parties to make additional submissions on the relevance, if any, of the case to the interpretation of the Release. This decision reflects the supplementary submissions received from both counsel.

Interpretation of a Release as a Form of Contract

[22] The trial judge recognized that the test for determining what was in the contemplation of the parties is an objective one and that evidence of the parties' subjective intentions is not permitted.

[23] Counsel are in agreement that the trial judge correctly identified the interpretative principles applicable to the Release. At the summary trial they both relied upon a special interpretative principle known as the rule in *London and South Western Railway v. Blackmore* (1870), L.R. 4 H.L. 610 (U.K. H.L.).

[24] At paragraph 12 of his reasons, the trial judge cited the following except from Geoff R. Hall's discussion of the rule in *Canadian Contractual Interpretation Law*, 3d ed. (Toronto: LexisNexis Canada, 2016) at 260.

> 8.10.1 The Principle
>
> A release is a contract, and the general principles governing the interpretation of contracts apply equally to releases. However, there is also a special rule which is superadded onto the regular ones. This rule comes from *London and South Western Railway v. Blackmore*, an 1870 decision of the House of Lords. The rule in *London and South Western Railway* holds that a release is to be interpreted so that it covers only those matters which were specifically in the contemplation of the parties at the time the release was given. The rule allows the court to consider a fairly broad range of evidence of surrounding circumstances in order to ascertain what was in fact in the specific contemplation of the parties at the relevant time, and it is not uncommon for a significant amount of extrinsic evidence to be examined when the rule is applied. However, like the law of contractual interpretation generally, the scope of permissible extrinsic evidence does not extend to evidence of the parties' subjective intentions; such evidence is strictly inadmissible.

[25] The trial judge also correctly cited paragraph 47 of *Sattva* for the general principles governing the interpretation of contracts.

> … the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> (*Reardon Smith Line v. Hansen-Tangen* (1976), [1976] 3 All E.R. 570 (U.K.H.L.) at p. 574.)

[26] The appellants nevertheless argue that in his interpretation of the Release, the trial judge failed to follow the interpretive principles he cited.

The Rule from *London and South Western Railway*

[27] In *London and South Western Railway*, the House of Lords was considering whether the claimant had the right to purchase lands which the Railway determined to be surplus to its needs and which lands adjoined the claimant's property.

[28] While he was in agreement with the decision of the Lord Chancellor, Lord Westbury added as follows (at 623):

> The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given. But a dispute that had not emerged or a question which had not at all arisen, cannot be considered as bound and concluded by the anticipatory words of a general release.

[29] Professor Hall in *Canadian Contractual Interpretation Law* concludes that this rule remains "firmly engrained in Canadian law today". The author suggests that, except as modified by the rule in *London and South Western Railway*, "the interpretation of a release is an exercise in contractual interpretation like any other, grounded in the words chosen by the parties and governed by the principles which apply to the interpretation of contracts generally" (p. 260).

[30] The Court in *Resolute* made no reference to *London and South Western Railway* and the appellant suggests that this was because the Court was addressing an indemnity instead of a release.

[31] I conclude, however, that the rule originally stated in *London and South Western Railway* has over time, been subsumed into the principles of contractual interpretation affirmed by the Court in *Sattva* and *Ledcor*. It is, in effect, a particular application of the general approach to contractual interpretation which approach requires taking account of surrounding circumstances known to the parties at the time of contracting, for the purpose of giving meaning to the words used.

[32] Nevertheless, since both counsel relied on the "rule" at trial and on appeal, I shall address the trial judge's decision on that basis. In the end however, whether one approaches the matter on the basis of the application of a special "rule" or on the basis of general contractual interpretation principles, the result in this case would be the same.

[33] I agree with the view expressed by Professor Hall in *Canadian Contractual Interpretation Law* that the structure of the analysis (to the interpretation of a release) was outlined in *Bank of British Columbia Pension Plan v. Kaiser*, 2000 BCCA 291, 137 BCAC 37, at paragraph 17 as follows:

> 1. No particular form of words is necessary to constitute a valid release. Any words which show an evident intention to renounce a claim or discharge the obligation are sufficient.
>
> 2. The normal rules relating to the construction of a written contract also apply to a release, and so, a release in general terms is to be construed according to the particular purpose for which it was made.
>
> 3. The court will construe a release which is general in its terms in the light of the circumstances existing at the time of its execution and with reference to its context and recitals in order to give effect to the intention of the party by whom it was executed.

> 4. In particular, it will not be construed as applying to facts of which the party making the release had no knowledge at the time of its execution or to objects which must then have been outside his contemplation.
>
> 5. The construction of any individual release will necessarily depend upon its particular wording and phraseology.

[34] The judicial tendency is to interpret releases narrowly.

[35] For example, in *Biancaniello v. DMCT LLP*, 2017 ONCA 386, a fee dispute arose between parties on tax-related services which involved execution of a mutual release in relation to the defendant's action for payment of fees. The Ontario Court of Appeal noted that the language used in the release was broad but the release was nevertheless interpreted as limited in its intended scope to claims for services provided to December 31, 2007.

[36] Also in *Strata Plan BCS 327 v. Ipex Inc.*, 2014 BCCA 237, the court interpreted a release executed in relation to an incident with a sprinkler system in a high rise residential condominium. The British Columbia Court of Appeal considered the release itself, the limited scope of the statement of claim and the context of the settlement to determine the intention of the parties. While the release referenced "any and all actions … whether known or unknown …" as having been released, it concluded that it was specifically relevant that the release itself referenced the case number from the statement of claim that was filed with the Court. It held that the release was confined to settlement of damage claimed in that action.

How Was the Release Worded?

[37] After referencing the parties and the settlement sum of $7,500, the Release stated as follows:

> …the Releasors, on behalf of themselves and their heirs, dependents, executors, administrators, successors, assigns, and legal and personal representatives, hereby release and forever discharge the Releases their servants, agents, officers, directors, managers, employees, their associated, affiliated and subsidiary legal entities and their legal successors and assigns both jointly and severally, from all actions, suits, causes of action, debts, dues, accounts, benefits, bonds, covenants, contracts, costs, claims and demands whatsoever, including all claims for compensation, loss of use, loss of time, loss of wages, expenses, disability, past, present or future, and any aggravation, foreseen or unforeseen, as well as for injuries presently undisclosed and all demands and claims of any kind or nature whatsoever arising out of or relating to the accident which occurred on or about March 3, 2009, and without limiting the generality of the foregoing form all claims raised or which could have been raised in the action entitled

2011 04G 0062, between MARY BAILEY, as First Plaintiff, GERALD BAILEY, as Second Plaintiff, and THE CORNER BROOK CITY COUNCIL as Defendant, which was commenced in the Supreme Court of Newfoundland and Labrador, Trial Division (General) (the "Action"), including but not restricted to claims for:

- special damages to be proven at trial, including property damages to the motor vehicle of the First Plaintiff and Second Plaintiff;

- general damages to be proven at trial;

- costs of this action including cost of Discoveries;

- prejudgment and post-judgment interest;

- such further and other relief as this Honourable Court may deem just.

AND for the consideration aforesaid, the Releasors on behalf of themselves and their heirs, dependents, executors, administrators, successors, assigns and both legal and personal representative hereby covenant, agree and undertake to indemnify and save harmless and to keep indemnified the Releasees, their servants, agents, officers, directors, managers, employees, their associated, affiliated and legal entities and their legal successors and assigns, both jointly and severally, from any further claims, demands, actions or suits which may be brought by or on behalf of or in the name of the Releasors against the Releasees, their servants, agents, officers, directors, managers, employees, their associated, affiliated and legal entities and their legal successors, either jointly or severally, for and in respect of any of the matters or things hereinbefore set forth;

AND for the consideration aforesaid Releasors further agree not to make any claim or take any proceedings against any other person, corporation or entity who might claim contribution or indemnity or other relief against the Releasees, their servants, agents, officers, directors, managers, employees, their associated, affiliated and legal entities and their legal successors and assigns, either jointly or severally, under the provisions of any applicable law or at equity in relation to any causes, matters or things released hereunder;

AND the Releasors hereby declare that at all times relative hereto they have been represented by legal counsel of their own choosing who has advised them concerning this Release and that they fully understand the terms of this Release, and that in executing this Release they have done so with full knowledge of any and all rights which they may have as against the Releasees and the issues raised in the Action, and that the aforesaid consideration is accepted by them voluntarily in order to make a full and final compromise, adjust and resolution of all claims, causes, matters and things released hereunder;

…

The Trial Judge's Reasons

[38] The trial judge reviewed the language used in the Release and concluded that there was nothing in the words which limited the Release to covering only the first party personal injury and property damage claims of the Baileys arising out of or related to the Bailey action.

[39] The judge then moved to discuss the context in which the Release was signed and concluded that it was noteworthy that on that date, the Baileys were aware or ought to have been aware of the Temple action given that they had been served with the statement of claim in March of 2011. The trial judge did not consider that their delivery of the statement of claim to their own insurers (who promised to take care of the matter) was relevant to the Baileys' continuing knowledge of the Temple action and whether it could realistically be said to continue to have been in their contemplation when the Release was signed.

[40] The trial judge also found it material that Ms. Bailey was represented by a solicitor when she commenced her action against the City and until she signed the Release. Further, he concluded that Ms. Bailey was aware that Mr. Temple had been injured and that the City was potentially liable for the accident because this was alleged in her own statement of claim in the Bailey action.

[41] While counsel for the City submitted at paragraph 126 of its Factum that the City was not aware of the Temple action when the Release was negotiated and signed, there was no evidence before the trial judge to this effect.

[42] The trial judge therefore could not conclude (and he made no finding) that it was within the City's contemplation that there was any exposure by it to a potential third party claim arising from the Temple action.

[43] Even if the Baileys were aware of the Temple action, (as the trial judge concluded) there was no evidence that the City was aware. Therefore, it would not be possible to reach the conclusion that the Temple action was within the contemplation of both parties.

[44] Next, the trial judge examined the exchange of correspondence between the parties to assist in his assessment of what was in their contemplation. At paragraph 36 he stated:

> I do not doubt that on August 10, 2011 when counsel for the Baileys emailed counsel for the City and advised that he was prepared to advise Mrs. Bailey to accept $10,000

> in full and final settlement of her claims he may have only been contemplating her claim for personal injury and property damage.

[45] In contrast, the trial judge stated that when counsel for the City responded with a counter offer on quantum of $7,500 contingent on "a full and final release to our satisfaction" the form of the Release prepared by counsel for the City became "of critical importance in determining what was in the contemplation of the City" (paragraph 38). In this respect, the trial judge concluded that "the broad and all-encompassing wording" of the Release suggested that "what was in the contemplation of the City when it presented the Release" was that it "would be released from any and all claims and demands which Mrs. Bailey might be able to bring aginst it as a result of the Accident" (paras. 39-40).

[46] At paragraph 43 the trial judge concluded that in light of the Baileys' knowledge of the Temple action and the City's intent to "rid itself of any possible claim by Mrs. Bailey", the broad wording of the Release was sufficient to cover the third party claim.

[47] At paragraph 44 the trial judge added:

> I do not believe that either of the parties was thinking of any particular type of claim by the Baileys or Mrs. Bailey, including a third party claim. However, I do not believe that it is necessary that the parties be specifically contemplating a particular type of claim. Instead, I believe it is sufficient that the parties were contemplating any and all types of claims relating to a particular event such as the Accident. That, in my determination, was the situation here. What the parties were contemplating by payment of the $7,500 and signing the Release was that Mrs. Bailey could bring no more claims or demands against the City relating to the Accident. This includes the third party claim she has attempted to bring.

[48] In essence the judge relied upon the broad language of the Release for his conclusion that the Baileys had not only released the City from their first party claims arising out of the accident, but also agreed:

1. to indemnify and save harmless the City from any further claims which might be brought in their names against the City in relation to the accident (even if such claims sought to recover damages suffered by a third party); and

2. that they would not make any claims against any other person (who might claim contribution or indemnity from the City in relation to the accident.)

Extricable Principle of Law

[49] Paragraphs 38-44 of the trial judge's reasons reflect an incorrect application of the interpretative principles cited by the trial judge and I offer the following as guidance.

[50] Firstly, what was in the contemplation of the City in drafting the Release is not determinative of mutual intent.

[51] Secondly, it was in fact necessary to determine what was "specifically" contemplated by both parties.

[52] Thirdly, it was not sufficient that the broad general wording of the Release potentially covered a subsequent third party action for contribution if the surrounding circumstances suggested otherwise.

[53] A trial judge is required to assess the surrounding circumstances for the purpose of determining what an objective bystander would conclude was the specific intent of both parties, and the scope of their understanding (*Sattva* at paragraph 47).

[54] *Ledcor*, at paragraph 21, confirms that "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" will not meet the correctness standard of review.

[55] The mistaken approach in this case had a material effect upon the result; the judge concluded that because the words were broad and general, the parties must have contemplated releasing both first party and third party claims.

[56] To similar effect, in *Resolute*, the primary issue addressed by the Court was whether the scope of an indemnity ("Indemnity") granted by the province of Ontario to former owners of a pulp and paper mill, applied to a remediation order issued to the former owners by an agency of the province twenty-six years later. In its analysis, the Court distinguished third party pollution claims brought against the former mill owners (admittedly covered by the Indemnity) from direct first party claims against the former mill owners (including those by an agent of the province to recover remediation costs associated with regulatory compliance). The majority concluded in part that the motion judge had failed to give sufficient regard to the factual matrix when interpreting the scope of the Indemnity.

[57] Since an incorrect approach was taken and the error had a material effect upon the result in the case, this Court is free to replace the opinion of the trial judge with its own (*Housen*, at para. 8).

How Should the Release be Interpreted

The Words Used

[58] While the Release contained several general and broad phrases including "all actions, suits, causes of actions, debts, dues, accounts, benefits, bonds, comments, contracts, costs, claims, and demands whatsoever," such general clauses were to be considered against more specific references in the Release in order to determine those things which were specially in the contemplation of the parties at the time when the release was given.

[59] There were numerous specific references of assistance to the interpretation of the Release.

[60] Firstly, the Release confirmed that the claims were to include, but were not restricted to the claims in the Bailey action which were itemized as:

- special damages to be proven at trial, including property damages to the motor vehicle,
- general damages,
- costs,
- pre-judgment interest, and
- such further and other relief as the Court may deem just.

[61] This was the focus of the Release and these were clearly the Baileys' own claims in the Bailey action. These terms do not contemplate losses unrelated to the Baileys' damages. This language represented specific words which served to limit the general words used earlier in the Release.

[62] Secondly, the Release referenced "the accident which occurred on or about March 3, 2009 and without limiting the generality of the foregoing from all claims raised or which could have been raised in" the Bailey action identified by the court file number, 201104G0062. The third party claim (for contribution in the event both the Baileys and the City were found to be liable to Mr. Temple) was not raised in the Bailey action; nor was it possible for it to have

been raised therein since the Baileys were only claiming in respect of their personal injury and personal damage claims.

[63] Thirdly, the quantum of settlement referenced in the Release was only $7,500. In its submissions, the City suggested this was compensation for the Baileys' "nuisance claim".

[64] The quantum stated in the Release was therefore not inconsistent with the conclusion that what was in the contemplation of both parties was settlement only of the Bailey's claims and not unspecified claims that someone else (who was also injured in the accident) could make against them and for which they would seek contribution from the City.

[65] Finally, the Release did not reference either the Temple action or the possibility of a third party claim by the Baileys against the City resulting from the Temple action.

The Context, Including Exchange of Correspondence

[66] Canadian appellate courts accept that Lord Westbury's reference in *London and South Western Railway* to context can be explained as follows:

> [33] By referring to what was in the contemplation of the parties, Lord Westbury was, of course, not opening the door to adducing evidence of what was actually going on in their minds, still less to making inferences about it. Such considerations are relevant solely to issues such as undue influence, mistake, fraud and the like which have no application here. What the statement quoted means is that in determining what was contemplated by the parties, the words used in a document need not be looked at in a vacuum. The specific context in which a document was executed may well assist in understanding the words used. It is perfectly proper, and indeed may be necessary, to look at the surrounding circumstances in order to ascertain what the parties were really contracting about. …

(*Strata Plan*, at para. 22 citing *White v. Central Trust Co.* (1984), 54 N.B.R. (2d) 293 (N.B. C.A.), at para. 33).

[67] The specific context in which a document is executed may well assist in understanding the words used. In this case, the exchange of correspondence made no reference to the Temple action or the possibility that at some future date any third party claim may be considered by the Baileys against the City in the Temple action. In fact, the trial judge concluded that the exchange of correspondence to August 10, 2011 reflected that what the parties were really

contracting about (to that date) was settlement of Ms. Bailey's personal injury claim and Mr. Bailey's property damage claim. I agree.

[68] I disagree however with the trial judge's conclusion that the City's counter offer of $7,500, on condition of a release, was sufficient to change the characterization of "what the parties were really contracting about" to something more than merely resolving the Bailey action. To similar effect in *Resolute*, the Court concluded that the motion judge had erred in placing "too much emphasis on a change in language" causing him to "misconstrue the bargain struck in the" Indemnity (para. 31).

[69] It would be standard practice for an insurance company to require a release on settlement of a personal injury or property claim and the Release itself referenced release only of "any and all rights which they may have as against the Releasees and the issues raised in the Action". The action was defined on page one as the Bailey action and it related to the losses suffered by the Baileys, not a third party.

[70] It was also relevant that a third party claim "had not emerged" when the Release was signed in August 2011. The third party claim was not filed until March 2016 and the question therefore could be said to have "not at all arisen". It follows that in August 2011 the respondent could not have regarded itself as exposed to a third party claim by the Baileys. These facts were relevant to context and a proper application of the accepted jurisprudential approach to interpretation of a release.

Conclusion on Interpretation of the Release

[71] The words used, the context, and the exchange of correspondence were all consistent with the Release being interpreted as a release only of the Baileys' claims in the Bailey action (whether asserted directly by the Baileys, indirectly by some other person on their behalf, or by subrogation) and not a claim to recover damages of a third party. The trial judge erred in putting too much weight on the broad, general language of the Release, in failing to consider "those things that were specially in the contemplation of the parties" at the time when the Release was given and in considering a "dispute that had not emerged" and/or a "question that had not at all arisen" when the Release was signed, as relevant to the interpretation of the Release.

CONCLUSION

[72] I would therefore allow the appeal, reverse the trial judge's decision and reinstate the third party notice with costs to the Appellants to be taxed on column 3, here and in the court appealed from.

_____

G. D. Butler J.A.

I Concur: _____

J. D. Green J.A.

I Concur: _____

F. P. O'Brien J.A.