SCC File No. 39122

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR)

BETWEEN:

THE CITY OF CORNER BROOK

APPELLANT

- and **-**

MARY BAILEY

RESPONDENT

FACTUM OF THE RESPONDENT MARY BAILEY

(Rule 42 of the *Rules of the Supreme Court of Canada)*

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal concerns the interpretation of a release by which a claim for personal injury and property damage arising from a motor vehicle accident was settled.

2. The accident involved the Respondent Mary Bailey (**"Mrs. Bailey"**) and her husband (together, the **"Baileys"**), the Appellant The City of Corner Brook (the **"City"**), and David Temple (**"Mr. Temple"**), an employee of the City. The Baileys settled their claim against the City (the **"Bailey Action"**)[1] for a payment to them of $7,500, in exchange for a release (the **"Release"**) releasing the City from all claims of any kind or nature arising out of the accident.[2]

3. At the time the Release was signed, Mr. Temple had issued his own claim against Mrs. Bailey (the **"Temple Action"**) [3], although the City was unaware of the claim when it received the Release. The insurer for the Baileys defended the Temple claim by alleging his injuries were caused either wholly or partly by the City's breach of its duties to him. It issued a third-party claim seeking contribution and indemnity against the City to avoid Mrs. Bailey having to bear responsibility to Mr. Temple for harm caused by the City.

4. This appeal arises because the City moved for judgment staying Mrs. Bailey's third-party claim on the basis that the Release barred Mrs. Bailey from seeking contribution and indemnity against the City. The trial judge granted judgment on a summary trial and stayed Mrs. Bailey's third party claim against the City on the basis of the broad language of the Release. [4]

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[1] See Statement of Claim in action number 2011 04G 0062, between Mary and Gerald Bailey, Plaintiffs, and the City of Corner Brook, Defendant. [Tab 10, vol. 1, pp. 97-103 of the Record of the Appellant].
[2] Full and Final Release. [Tab 20, vol. 2, pp. 74-77 of the Record of the Appellant].
[3] See Statement of Claim in action number 2011 04G 0049, between David Temple, Plaintiff, and Mary Bailey, Defendant. [Tab 3, vol. 1, pp. 41-44 of the Record of the Appellant].
[4] *Temple v. Bailey*, 2018 NLSC 177 (the **"Trial Decision"**) [Tab 1B., vol. 1, pp. 3-20 of the Record of the Appellant].

5. The Court of Appeal of Newfoundland and Labrador reversed the Trial Decision. [5] It was right to do so. It interpreted the Release as a contract, following this Court's guidance in *Hill* to ascertain what the parties *"were really contracting about."*[6]

6. The Release foreclosed forever the Baileys' right to make any claim for injuries suffered by them because of the accident. But nothing in the Release was intended to allocate to the Baileys the City's responsibility for Mr. Temple's injuries. The Release cannot be said to have been a contract about an agreement by the Baileys to assume responsibility for any breach of the City's duties to Mr. Temple.

7. The Court of Appeal's decision applied established principles of contractual interpretation affirmed by this Court in *Sattva*[7] and *Ledcor*[8], appropriately referencing the interpretation of releases affirmed by this Court in *Hill* and most recently outlined by the British Columbia Court of Appeal in *Kaiser*[9].

8. This appeal presents this Court opportunity to consider how modern principles of contractual interpretation articulated in *Sattva* and *Ledcor* apply to a release. The City's appeal also invites consideration of the rule in *London and South Western Railway*[10] and the Court of Appeal's finding that the rule has, by the evolution of contract law in Canada, been subsumed by the general principles of contractual interpretation.

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[5] *Bailey v. Temple,* 2020 NLCA 3 (the **"Appeal Decision"**) [Tab 1D., vol. 1, pp. 22-37 of the Record of the Appellant].
[6] *Hill v. Nova Scotia (Attorney General)*, 1997 CanLII 401 (SCC), [1997] 1 S.C.R. 69 (**"*Hill*"**), at p. 79.
[7] *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53, [2014] 2 S.C.R. 633 (**"*Sattva*"**).
[8] *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23 (**"*Ledcor*"**).
[9] *Bank of British Columbia Pension Plan v. Kaiser*, 2000 BCCA 291, [2000] B.C.W.L.D. 645 (**"*Kaiser*"**).
[10] Articulated in *London and South Western Railway Co. v. Blackmore* (1870), L.R. 4 H.L. 610 (U.K. H.L.) (**"*London and South Western Railway*"**) [Tab 2 of the Book of Authorities of the Appellant].

9. However this Court resolves the status of the rule in *London and South Western Railway,* it should not affect the outcome here. Either under the traditional rule or under a straightforward application of *Sattva* and *Ledcor*, there is no justification for interpreting the Release as allocating a different risk (responsibility for Mr. Temple's damages) from the risk the parties were contracting about (the City's alleged responsibility for the Baileys' damages).

10. That being said, whether the rule in *London and South Western Railway* is viewed as rule of law or simply a guide to ascertaining parties' intentions, the facts of this case illustrate its soundness. Releases must be interpreted to apply to the subject matter mutually contemplated by the parties, for which they bargained, and nothing more. If interpreted over-broadly, releases will confer inequitable windfalls on releasees by barring claims of releasors related to subject matter other than that for which the parties bargained, which can only discourage settlement by amplifying the consequences to releasors of any agreed compromise. This will only deter potential releasors from settling their claims until all other claims involving the releasees as potential defendants or third parties have arisen and been made part of the settlement agreement.

B. Factual Background

11. The Respondent adds the following relevant facts:

a. The City and Mrs. Bailey knew at the time of execution of the Release that Mr. Temple and another employee of the City had been struck by the Baileys' motor vehicle in the accident.[11]

b. The negotiations leading to settlement of the Bailey Action and execution of the Release were documented in correspondence exchanged between the parties' solicitors, as follows:

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[11] Statement of Claim in action number 2011 04G 0062, between Mary and Gerald Bailey, Plaintiffs, and the City of Corner Brook, Defendant. [Tab 10, vol. 1, p. 98 of the Record of the Appellant].

i. On August 10, 2011, the Baileys' solicitor wrote to the City's solicitor on a without prejudice basis, stating:

> "I have given this matter some thought. My client advises that the symptoms related to the injuries to her chest, legs and finger have largely resolved, but that she still experiences numerous disturbing memories of the accident, along with sleep interruptions and occasional headaches related to same. She remains emotionally labile in any discussion of the accident, which has left her somewhat traumatized to this day.
>
> I would be prepared to advise her to accept $10,000.00 in full settlement of her claims."[12]

ii. On August 12, 2011, the City's solicitor responded to the Baileys' solicitor on a without prejudice basis, stating:

> "Further to your email below and our telephone call yesterday, I have corresponded with my client in respect of this matter.
>
> As discussed in our call, my client feels strongly on liability and as you have noted, your client's physical injuries have largely resolved. Also, if the matter were to proceed, there would be some issue relating to whether a claim for mental distress can be borne out in light of the SCC decision in *Mustapha v. Culligan*. We therefore cannot agree to settle at $10,000.00 as proposed.
>
> Notwithstanding the foregoing, my client is aware that all litigation carries risks and costs and that even a summary trial to dispose of the matter would only likely net party-and-party costs. Therefore and in all the circumstances, they would be prepared to make an offer of $7,500.00 (all-inclusive) to resolve this matter, contingent on the usual discontinuance and execution of a Full and Final Release to our satisfaction. This is higher than we were initially thinking, but is extended to try and reach a fair compromise with your client.
>
> Please note that this offer is only open for acceptance for ten (10) days, and we would appreciate your client's earliest response to same."[13]

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[12] Supplementary Affidavit of Dale Park, Exhibit D [Tab 20, vol. 2, p. 83 of the Record of the Appellant].

[13] *Ibid.* [Tab 20, vol. 2, p. 86 of the Record of the Appellant].

iii. On August 16, 2011, the Baileys' solicitor responded to the City's solicitor, stating:

> "My client accepts. Please forward the funds and documents to our office as soon as possible. I'd like to close the file this month."[14]

iv. On August 18, 2011, the City's solicitor responded to the Baileys' solicitor indicating he would prepare the Release and requesting the Baileys' solicitor prepare the Notice of Discontinuance.[15] The Baileys' solicitor responded, agreeing.[16] The City's solicitor responded, attaching the Release and stating: *"Please find attached the Full and Final Release for your review."*[17]

v. On August 26, 2011, the City's solicitor wrote the Baileys' solicitor, questioning: *"can you confirm that everything is in line for the Release to be executed by your clients and the Discontinuance without costs to be filed?"*[18] The Baileys' solicitor responded: *"Signed Release is on the way to your office. Discontinuance on the way to Court."*[19]

vi. On August 29, 2011, the City's solicitor wrote to the Baileys' solicitor, stating:

> "We write further to our email exchange of August 19, 2011 and enclose herewith our firm cheque in the amount of $7,500.00 (all inclusive) as full and final settlement of Ms. Mary Bailey's claim.
>
> We trust the enclosed is in order and look forward to receiving the executed original Full and Final release as well as a copy of the Notice of Discontinuance and confirmation that same has been filed with the Supreme Court of Newfoundland and Labrador."[20]

c. Neither the correspondence exchanged between the parties' solicitors nor the Release made reference to (i) Mr. Temple or any other injured party other than Mrs. Bailey, (ii)

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[14] *Ibid.* [Tab 20, vol. 2, p. 89 of the Record of the Appellant].
[15] *Ibid.* [Tab 20, vol. 2, p. 89 of the Record of the Appellant].
[16] *Ibid.* [Tab 20, vol. 2, p. 89 of the Record of the Appellant].
[17] *Ibid.* [Tab 20, vol. 2, p. 94 of the Record of the Appellant].
[18] *Ibid.* [Tab 20, vol. 2, p. 123 of the Record of the Appellant].
[19] *Ibid.* [Tab 20, vol. 2, p. 131 of the Record of the Appellant].
[20] *Ibid.* [Tab 20, vol. 2, p. 139 of the Record of the Appellant].

the Temple Action, or (iii) the possibility that at some future date a third party claim might be made by Mrs. Bailey against the City in an action brought by Mr. Temple or any other party for recovery of his, or that other party's, own damages resulting from the accident.[21] [22]

d. The Bailey's allegations of negligence against the City in the Bailey Action are distinct from those against the City in the Temple Action. In the Bailey Action, Mrs. Bailey's allegations were that the City failed to meet the standard of care owed to her as a motorist by, among other things, failing to use appropriate warning devices so as to not create a hazard to the public.[23] In the Temple Action, Mrs. Bailey's allegations were that any damages incurred by Mr. Temple were caused or contributed to by the City's breach of duties it owed to Mr. Temple as an employee performing his employment duties. These are completely different from the allegations in the Bailey Action. They included, among other things, failing to maintain a safe working environment, failing to provide the necessary equipment to ensure Temple's safety, failing to provide adequate training and instruction to Temple, directing Temple to work at a time and place and in conditions which it knew or ought to have known were unsafe, and failing to adhere to the standards and duties imposed on the City as set out in the applicable occupational health and safety legislation.[24]

e. As a result of the accident, the City was charged under occupational health and safety legislation[25], and the City paid a fine for not having proper safety procedures in place.[26]

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[21] Correspondence exchanged between the parties' solicitors appears in the Supplementary Affidavit of Dale Park, Exhibit D. [Tab 20, vol. 2, pp. 82-167 of the Record of the Appellant].
[22] Full and Final Release. [Tab 20, vol. 2, pp. 74-77 of the Record of the Appellant].
[23] Statement of Claim (in the Bailey Action), at paragraph 6. [Tab 12, vol. 1, pp. 98-99 of the Record].
[24] Statement of Claim Against the Third Party (in the Temple Action), at paragraph 7 [Tab 4, vol. 1, p. 52 of the Record].
[25] Affidavit of Dale Park, at paragraph 5. [Tab 19, vol. 2, p.59 of the Record of the Appellant].
[26] Supplementary Affidavit of Dale Park, at paragraph 7. [Tab 20, vol. 2, p.63 of the Record of the Appellant].

f. Mrs. Bailey's claims against the City in the Bailey Action are distinct from those against the City in the Temple Action. In the Bailey Action, Mrs. Bailey's claims were for general and special damages respecting her personal injuries and damage to the Baileys' motor vehicle.[27] In the Temple Action, Mrs. Bailey's claims were for an indemnity or contribution from the City *"[i]n the event that [Bailey] is found liable to [Temple]"* for any amount found due from Mrs. Bailey to Mr. Temple in respect of his claims of general damages and special damages respecting his personal injuries, the costs Mrs. Bailey incurred in defending against Mr. Temple's claim and the costs of the third party proceeding.[28] The claims raised by Mrs. Bailey in the Temple Action were not raised in the Bailey Action, nor was it possible for her to have raised them in the Bailey Action.

g. The Release generalized that the released claims included all Mrs. Bailey's claims *"of any kind or nature whatsoever arising out of or relating to the accident which occurred on or about March 3, 2009"*.[29]

h. The Release specified that the released claims included all Mrs. Bailey's claims *"for compensation, loss of use, loss of time, loss of wages, expenses, disability, past, present or future, and any aggravation, foreseen or unforeseen"*.[30]

i. The Release further specified that the released claims included *"without limiting the generality of the foregoing"* Mrs. Bailey's 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 Release further specified that these claims

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[27] Statement of Claim (in the Bailey Action), paragraphs 8-10. [Tab 12, vol. 1, p. 101 of the Record].
[28] Statement of Claim Against the Third Party (in the Temple Action), paragraphs 5 and 9. [Tab 4, vol. 1, pp. 51-53 of the Record].; Statement of Claim (in the Temple Action) [Tab 4, vol. 1, pp. 61-63 of the Record].
[29] *Ibid.* [Tab 20, vol. 2, p. 74 of the Record of the Appellant].
[30] Full and Final Release. [Tab 20, vol. 2, p. 74 of the Record of the Appellant].

included, but were not restricted to, *"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; pre-judgment and post-judgment interest; such further and other relief as this Honourable Court may deem just."*[31]

j. The Statement of Claim of Mrs. Bailey against the City as a third party in the Temple Action was not filed until March 2016, and as such the City was not exposed to a third party claim by Mrs. Bailey at the time the Release was signed in August 2011.[32]

C. Proceedings Below

i. ***Decision of the Supreme Court of Newfoundland and Labrador, General Division***

12. By judgment filed August 28, 2018, the trial judge concluded that the Release covered the third party claim filed by Mrs. Bailey against the City in the Temple Action and ordered the third party claim stayed with costs to the City. The trial judge relied on the broad language of the Release for his conclusion that the Baileys had not only released the City from their claims for personal injury and property loss arising out of the accident, but also agreed 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 contribution for damages suffered by another person.

13. The trial judge reasoned that there was nothing in the words used in the Release that limited the Release to cover only the Baileys' personal injury and property damage claims arising out of or related to the Bailey Action.[33]

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[31] *Ibid.* [Tab 20, vol. 2, pp. 74-75 of the Record of the Appellant].
[32] Statement of Claim Against the Third Party (in the Temple Action). [Tab 4, vol. 1, pp. 51-53 of the Record]
[33] Trial Decision, *supra* note 4, at paragraph 21. [Tab 1B., vol. 1, p. 13 of the Record of the Appellant].

14. Regarding the context in which the Release was signed, the trial judge concluded that the Baileys were aware or ought to have been aware of the Temple Action on the date the Release was executed, given that they had been served with the statement of claim in March 2011. The trial judge did not consider the fact that the Baileys had delivered the statement of claim to their insurers, who promised to take care of the matter, as 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.[34]

15. The trial judge examined the exchange of correspondence between the parties' solicitors to assist in his assessment of what was in the parties' contemplation when the Release was signed. The trial judge found that when the Baileys' solicitor emailed the City's solicitor on August 10, 2011 stating that he was prepared to advise the Baileys to accept $10,000 in full and final settlement of their claims that he *"may have only been contemplating [Bailey's] claim for personal injury and property damage."*[35] However, the trial judge found that when the City's solicitor 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 the City's solicitor became *"of critical importance in determining what was in the contemplation of the City".*[36] 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 against it as a result of the Accident*".[37]

16. The trial judge concluded that in light of the Baileys' knowledge of the Temple Action and the City's objective to rid itself of any possible claim by Mrs. Bailey, the broad wording of the Release was sufficient to cover the third party claim.[38] The trial judge further reasoned that neither of the parties *"was thinking of any particular type of claim by the*

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[34] *Ibid*, *supra* note 4, at paragraph 25. [Tab 1B., vol. 1, p. 14 of the Record of the Appellant].
[35] *Ibid*, *supra* note 4, at paragraph 36. [Tab 1B., vol. 1, p. 18 of the Record of the Appellant].
[36] *Ibid*, *supra* note 4, at paragraph 38. [Tab 1B., vol. 1, p. 18 of the Record of the Appellant].
[37] *Ibid*, *supra* note 4, at paragraphs 39-40. [Tab 1B., vol. 1, p. 19 of the Record of the Appellant].
[38] *Ibid*, *supra* note 4, at paragraph 43. [Tab 1B., vol. 1, p. 20 of the Record of the Appellant].

Baileys or Mrs. Bailey, including a third party claim" when executing the Release, but also that it was not necessary that the parties be specifically contemplating a particular type of claim.[39] Instead, the trial judge found that it was sufficient that the parties *"were contemplating any and all types of claims relating to a particular event such as the Accident"*.[40]

ii. ***Decision of the Court of Appeal of Newfoundland and Labrador***

17. By judgment filed on February 4, 2020, the Court of Appeal determined that the trial judge incorrectly applied the principles applicable to the interpretation of the Release, and that the mistaken approach had a material effect upon the result.[41] The Court of Appeal found error with the trial judge's approach as *"[f]irstly, what was in contemplation of the City in drafting the Release is not determinative of mutual intent"*, *"[s]econdly, it was in fact necessary to determine what was "specifically" contemplated by both parties"*, and *"[t]hirdly, 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."*[42] Such being the case, the Court of Appeal concluded that the trial judge had committed an extricable error in principle amounting to an error of law, which attracted a correctness standard.[43] The Court of Appeal was therefore free to replace the opinion of the trial judge with its own.[44]

18. The Court of Appeal held that the correct approach to interpreting the Release involved assessing the circumstances surrounding its execution for the purpose of determining what an objective bystander would conclude was the specific intent of both parties, and the scope of their understanding.[45] The Court of Appeal recognized the rule from *London and South Western Railway* historically applicable to the interpretation of releases, which directed:

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[39] *Ibid*, *supra* note 4, at paragraph 44. [Tab 1B., vol. 1, p. 20 of the Record of the Appellant].
[40] *Ibid*, *supra* note 4, at paragraph 44. [Tab 1B., vol. 1, p. 20 of the Record of the Appellant].
[41] Appeal Decision, *supra* note 5, at paragraph 55. [Tab 1D., vol. 1, p. 33 of the Record of the Appellant].
[42] *Ibid, supra* note 5, at paragraphs 50-52. [Tab 1D., vol. 1, p. 33 of the Record of the Appellant].
[43] *Ibid, supra* note 5, at paragraph 55. [Tab 1D., vol. 1, p. 33 of the Record of the Appellant].
[44] *Ibid, supra* note 5, at paragraph 55. [Tab 1D., vol. 1, p. 33 of the Record of the Appellant].
[45] *Ibid, supra* note 5, at paragraph 53. [Tab 1D., vol. 1, p. 33 of the Record of the Appellant].

> "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."[46]

19. Rather than explicitly apply the rule from *London and South Western Railway,* the Court of Appeal concluded that the general principles of contractual interpretation were applicable, as the rule *"[had] over time, been subsumed into the principles of contractual interpretation affirmed by the Court in Sattva and Ledcor"*.[47] The Court of Appeal held that the rule was, 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.[48] The Court of Appeal endorsed the structure of analysis to the interpretation of releases outlined by the British Columbia Court of Appeal in *Kaiser*[49], 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.

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[46] *Ibid, supra* note 5, at paragraphs 27-29. [Tab 1D., vol. 1, pp. 27-28 of the Record of the Appellant].
[47] *Ibid, supra* note 5, at paragraph 31. [Tab 1D., vol. 1, p. 28 of the Record of the Appellant].
[48] *Ibid, supra* note 5, at paragraph 31. [Tab 1D., vol. 1, p. 28 of the Record of the Appellant].
[49] *Kaiser*, *supra* note 9, at paragraph 17.

> 5. The construction of any individual release will necessarily depend upon its particular wording and phraseology."[50]

20. The Court of Appeal held that there being no evidence of the City having been aware of the Temple Action at the time of execution of the Release, it was not possible for the trial judge to have concluded that the Temple Action was within the contemplation of both parties at the relevant time.[51]

21. In conducting its own interpretation of the Release, the Court of Appeal reasoned that the general language used to describe the released claims were to be considered against more specific references in the Release, in order to determine those things – the particular subject matter or specific types of claims – which were specially in the contemplation of the parties at the time the Release was given.[52] The Court of Appeal identified numerous specific references in the language of the Release that were assistive to the interpretation, as follows:

a. Recognizing that the Release specified that the released claims included, but were not restricted to, the claims in the Bailey Action, which the Release itemized, the Court of Appeal held that the claims in the Bailey Action were *"the focus of the Release"* and that these claims were *"clearly the Bailey's own claims in the Bailey action."*[53] The Court of Appeal further held that the itemized claims did not contemplate losses unrelated to the Baileys' damages, such that the specific phrasing served to limit the general words used earlier in the Release.[54]

b. Recognizing that the Release used the phrase *"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]"*, the third party claim

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[50] Appeal Decision*, supra* note 5, at paragraph 33. [Tab 1D., vol. 1, pp. 28-29 of the Record of the Appellant].
[51] *Ibid, supra* note 5, at paragraphs 41-43. [Tab 1D., vol. 1, p. 31 of the Record of the Appellant].
[52] *Ibid, supra* note 5, at paragraph 58. [Tab 1D., vol. 1, p. 34 of the Record of the Appellant].
[53] *Ibid, supra* note 5, at paragraphs 60-61. [Tab 1D., vol. 1, p. 34 of the Record of the Appellant].
[54] *Ibid, supra* note 5, at paragraph 61. [Tab 1D., vol. 1, p. 34 of the Record of the Appellant].

for contribution in the Temple Action was not one raised in the Bailey Action.[55] It was not possible for the third party claim to have been raised in the Bailey Action since the Baileys were only claiming in respect of their own personal injury and property damage.[56] Mr. Temple's claim for damages resulting from the accident, and the City's liability to Mr. Temple for failing to meet the standard of care it owed him as his employer was subject matter materially different from that at issue in the Bailey Action.

c. Recognizing that the quantum of settlement referenced in the Release was only $7,500, the Court of Appeal observed that it was an amount not inconsistent with the conclusion that what was in the contemplation of both parties was settlement of only the Baileys' own claims, and not also 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.[57]

d. 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.[58]

22. Next, the Court of Appeal considered the context in which the Release was signed to assist with understanding the words used. The Court identified numerous contextual factors relevant to the interpretation, as follows:

a. The exchange of correspondence between the parties' solicitors in negotiating settlement of the Bailey Action made no reference to the Temple Action or the possibility that at some future date any third party claim might be considered by the Baileys against the City in the Temple Action, supporting the conclusion that what the parties were contracting about was, solely, the settlement of the Baileys' personal injury and property damage claims.[59]

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[55] *Ibid, supra* note 5, at paragraph 62. [Tab 1D., vol. 1, pp. 34-35 of the Record of the Appellant].
[56] *Ibid, supra* note 5, at paragraph 62. [Tab 1D., vol. 1, pp. 34-35 of the Record of the Appellant].
[57] *Ibid, supra* note 5, at paragraphs 63-64. [Tab 1D., vol. 1, p. 35 of the Record of the Appellant].
[58] *Ibid, supra* note 5, at paragraph 65. [Tab 1D., vol. 1, p. 35 of the Record of the Appellant].
[59] *Ibid, supra* note 5, at paragraph 67. [Tab 1D., vol. 1, pp. 35-36 of the Record of the Appellant].

b. The standard practice of insurance companies requiring a release on settlement of a personal injury or property claim, together with the Release referencing release of *"any and all rights which [the Baileys] may have as against the Releasees and the issues raised in the Action"* supported the conclusion that the Release related only to the losses suffered by the Baileys and not losses suffered by any third parties.[60]

c. The fact that the third party action in the Temple Action *"had not emerged"* at the time of signing the Release, the Court of Appeal reasoned the City *"could not have regarded itself as exposed to a third party claim by the Baileys".*[61]

23. The Court of Appeal concluded that 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, and not a claim to recover damages of a third party.[62] The Court of Appeal allowed the appeal, reversed the trial judge's decision and reinstated the third party notice, with costs awarded to the Baileys.[63]

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[60] *Ibid, supra* note 5, at paragraph 69. [Tab 1D., vol. 1, pp. 34-35 of the Record of the Appellant].
[61] *Ibid, supra* note 5, at paragraph 70. [Tab 1D., vol. 1, p. 36 of the Record of the Appellant].
[62] *Ibid, supra* note 5, at paragraph 71. [Tab 1D., vol. 1, p. 36 of the Record of the Appellant].
[63] *Ibid, supra* note 5, at paragraph 62. [Tab 1D., vol. 1, pp. 34-35 of the Record of the Appellant].

PART II – STATEMENT OF ISSUES IN QUESTION

24. The issues in question in this appeal are as stated at paragraph 34 of the Appellant's Factum:

a. What is the standard of review?

b. What is the law of contractual interpretation that applies to releases?

c. Did the Court of Appeal err in its interpretation of the release by failing to give effect to the literal meaning of the words used in the Release?

d. How are Canadian appellate courts interpreting releases?

e. What are the policy implications of interpreting releases as the Court of Appeal did?

25. The Respondent submits that this appeal can be resolved by answering the questions:

a. Did the trial judge make an extricable error of law in interpreting the Release as covering the third party claim brought by Mrs. Bailey against the City in the Temple Action?

b. Did the Court of Appeal correctly interpret the Release as not covering the third party claim brought by Mrs. Bailey against the City in the Temple Action?

PART III – STATEMENT OF ARGUMENT

A. The Standard of Review is Correctness

26. The Respondent agrees that the appropriate standard of review in this case is correctness.

27. In the case at bar, the issue of whether the trial judge incorrectly applied the interpretative principles applicable to the Release, including whether the trial judge failed to give sufficient regard to the factual matrix when interpreting the scope of the Release, are questions of law that attract a standard of review of correctness.

B. The Law of Contractual Interpretation Applicable to Releases

i. The Court of Appeal Correctly Stated the Law of Contractual Interpretation Applicable to Releases

28. The Respondent submits that the Court of Appeal correctly stated the law of contractual interpretation applicable to releases.

29. Releases are to be interpreted according to the general principles articulated by this Court in *Sattva*.[64] Interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction.[65] The overriding concern of the approach is determination of the intent of the parties and the scope of their understanding.[66] To achieve such an approach, 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.[67] 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

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[64] *Sattva, supra* note 7.
[65] *Ibid, supra* note 7, at paragraph 47.
[66] *Ibid, supra* note 7, at paragraph 47.
[67] *Ibid, supra* note 7, at paragraph 47.

immutable or absolute meaning.[68] No contracts are made in a vacuum, rather there is always a setting in which they have to be placed.[69] A 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 and the market in which the parties are operating.[70]

30. This Court directed in *Sattva* that the object of contractual interpretation is to ascertain the objective, mutual intentions of the parties.[71] It has also described the object of contractual interpretation as discerning the parties' *"reasonable expectations with respect to the meaning of a contractual provision"*.[72] In meeting these objects, the Court has signaled a shift away from an approach to contractual interpretation that is *"dominated by technical rules of construction"* to one that is instead rooted in *"practical[ities] and common-sense"*.[73] This requires courts to read a 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"* (emphasis added).[74]

31. The Court of Appeal recognized that the trial judge correctly cited paragraph 47 of *Sattva* as directing the general principles governing the interpretation of contracts.[75] The Court further recognized that the trial judge had been guided by[76] Geoff R. Hall's description of the rule in *London and South Western Railway* in *Canadian Contractual Interpretation Law*:

> 8.10.1 The Principle

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[68] *Ibid, supra* note 7, at paragraph 47.
[69] *Ibid, supra* note 7, at paragraph 47.
[70] *Sattva, supra* note 7, at paragraph 47.
[71] *Ibid, supra* note 7, at paragraph 55.
[72] *Ledcor*, *supra* note 8, at paragraph 65.
[73] *Sattva, supra* note 7, at paragraph 47.
[74] *Ibid, supra* note 7, at paragraph 47.
[75] Appeal Decision, *supra* note 5, at paragraph 25, referencing the Trial Decision, *supra* note 4, at paragraph 14. [Tab 1D, vol. 1, p. 27 of the Record of the Appellant].
[76] Appeal Decision, *supra* note 5, at paragraph 24, referencing the Trial Decision, *supra* note 4, at paragraph 12. [Tab 1D, vol. 1, p. 26 of the Record of the Appellant].

> 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.[77]
>
> [Emphasis added.]

32. The Court of Appeal correctly determined that the approach to contractual interpretation in Canada has evolved such that the general principles of interpretation articulated in *Sattva,* and in *Ledcor,* have subsumed the *"superadded"* rule of interpretation applicable specifically to releases.[78] The Court of Appeal reasoned that the rule in *London and South Western Railway*:

> "…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."[79]
>
> [Emphasis added]

33. The Court of Appeal correctly identified that the *"particular application"* of the general approach to contractual interpretation respecting releases does not discount the underlying rationale for the rule in *London and South Western Railway*, but rather considers a release

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[77] Geoff R. Hall, *Canadian Contractual Interpretation Law,* 3d ed. (Toronto: LexisNexis Canada, 2016) at p. 260.

[78] Appeal Decision, *supra* note 5, at paragraph 31**.** [Tab 1D, vol. 1, p. 28 of the Record of the Appellant].

[79] Appeal Decision, *supra* note 5*,* at paragraph 31. [Tab 1D, vol. 1, p. 28 of the Record of the Appellant].

in a way that respects that underlying rationale.[80] The Court of Appeal endorsed the structure of analysis outlined by the British Columbia Court of Appeal in *Kaiser,* 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 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."[81]
>
> [Emphasis added.]

34. The Court of Appeal correctly held that the result of the appeal would have been the same whether based on application of the rule in *London and South Western Railway* or based on application of the *"particular application"* of the general principles of contractual interpretation.[82]

35. The City's argument that *"[t]here is nothing about a release that justifies the application of any special interpretive rules"*[83] does not give sufficient weight to the fact that releases are a unique kind of contract, and wrongly suggests that decision-makers should ignore the

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[80] Appeal Decision, *supra* note 5, at paragraphs 31-33. [Tab 1D, vol. 1, pp. 28-29 of the Record of the Appellant].
[81] Appeal Decision, *supra* note 5*,* at paragraph 33, citing *Kaiser*, *supra* note 9, at paragraph 17. [Tab 1D, vol. 1, pp. 28-29 of the Record of the Appellant].
[82] Appeal Decision, *supra* note 5, at paragraph 32. [Tab 1D, vol. 1, p. 28 of the Record of the Appellant].
[83] Appellant's Factum, at paragraph 38.

rationale that underlay the rule in *London and South Western Railway*. Moreover, the City argues that the rule in *London and South Western Railway*, in practice, protected releasors by *"narrowing the scope of the release"*[84] rather than by directing an approach to interpretation of the release that would reveal its true scope, determined not only by the words of the release, but also its context and surrounding circumstances.

36. In recognizing that the rule in *London and South Western Railway* had been subsumed by the general principles of contractual interpretation, the Court of Appeal did not signal that the particular nature of releases should be suddenly irrelevant to the interpretative process. To the contrary, the rationale for conducting an interpretation beyond the technical rules of construction that was recognized in *London and South Western Railway* should continue in the approach articulated in *Sattva* and *Ledcor*. That rationale is that it would be inequitable to allow releasees to use the general words of a release as a means of escaping the fulfilment of obligations and liabilities that fall outside the true scope and purpose of the release.

37. The rule in *London and South Western Railway* does not *"contradict"* the general principles of contractual interpretation, as argued by the City[85], but rather is consistent with those principles and informs a *"particular application"* of those principles to a release as a particular type of contract.

38. Likewise, the rule in *London and South Western Railway* does not *"[have] the effect of rendering meaningless or reversing the broad and inclusive language used to describe the subject matter of a release",* as argued by the City[86], but rather, like the general principles of contractual interpretation articulated in *Sattva*, requires the court to consider the language of a release in light of the context and surrounding circumstances to understand the parties' mutual intention. Neither the *"practical, common-sense approach not dominated by technical rules of construction"* articulated in *Sattva* nor the rule in *London*

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[84] Appellant's Factum, at paragraph 39.
[85] Appellant's Factum, at paragraph 46.
[86] Appellant's Factum, at paragraph 51.

and South Western Railway permits violating the ordinary and grammatical meaning of words to the degree of making them meaningless. What is required is to assess the meaning of those words in the context of the contract as a whole, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.

39. The Court of Appeal's statement of the law of contractual interpretation applicable to releases was correct. It rightly recognized that there is no reason to jettison more than a century of established jurisprudence interpreting a particular and common class of contract. As this Court has recently observed, the common law and the principles it develops can be described as *"the general bank and capital of nations and of ages"*[87]; a storehouse of collective experience with commonly encountered contracts. While the court should not slavishly adhere to strict rules in interpreting contracts, it can and should look to established approaches for guidance. That is all the Court of Appeal did here.

i. ***The Court of Appeal's Statement of the Law is Consistent with Appellate Jurisprudence***

40. Other appellate courts have similarly approached interpretation of releases based on the evolved general principles of contract interpretation, appropriately adjusted to recognize the context of the nature of the contract, without explicitly applying the rule in *London and South Western Railway*.[88]

41. The Court of Appeal referenced two such cases: the Ontario Court of Appeal's decision in *Biancaniello*[89] and the British Columbia Court of Appeal's decision in *Strata Plan BCS 327*[90].

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[87] *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.,* 2020 SCC 29, at paragraph 44.
[88] See *White v. Central Trust Co.* (1984), 7 D.L.R. (4th) 236 (N.B.C.A.) at pp. 247-8; *Hannan v. Methanex Corp.* (1998), 46 B.C.L.R. (3d) 230 (B.C.C.A.) at p. 241; *Kaiser*, *supra* note 9, at para. 17.
[89] *Biancaniello v. DMCT LLP,* 2017 ONCA 386, 138 O.R. (3d) 210 (**"*Biancaniello*"**).
[90] *Strata Plan BCS 327 v. Ipex Inc.,* 2014 BCCA 237 (**"*Strata Plan BCS 327*"**).

42. In stating the law applicable to the interpretation of releases, the Ontario Court of Appeal in *Biancaniello* noted first this Court's approval of the rule in *London and South Western Railway* in *Hill*[91], wherein Cory J. for the Court stated:

> "What the statement quoted ["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 the release was given"] 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." [92]
>
> [Emphasis added.]

43. The Ontario Court of Appeal went on to examine *Ali*[93] in which the United Kingdom House of Lords reexamined the rule in *London and South Western Railway*[94]. The Ontario Court of Appeal observed of the decision for the majority in *Ali*, written by Lord Bingham of Cornhill:

> "[28] … [Lord Bingham of Cornhill] explained that in interpreting the release, as in interpreting any contractual provision, "the object of the court is to give effect to what the contracting parties intended": at para. 8. The court does not inquire into the parties' subjective states of mind, but makes an objective assessment based on the contract as a whole, the impugned words in their ordinary meaning and in the context of the agreement, the parties' relationship, and all relevant facts surrounding the transaction so far as known to the parties.
>
> [29] Lord Bingham reviewed the jurisprudence from the English and Australian courts on the interpretation of releases. The jurisprudence established that, by using appropriate language, a party can release claims that the party neither knew nor could have known, nor even imagined. However, "in the absence of clear language", the court "will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware": at para. 10. At para. 14, Lord Bingham quoted from a decision of Dixon C.J. of the High Court of

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91 *Hill, supra* note 6, at p. 79.
92 *Ibid, supra* note 6, at p. 79.
93 *Bank of Credit and Commerce International SA v. Munawar Ali,* [2001] UKHL 8, [2001] 1 All E.R. 961 (**"*Ali*"**).
94 *Biancaniello, supra* note 89, at paragraphs 26-41.

Australia in *Grant v. John Grant and Sons Pty. Ltd.* (1954), 91 C.L.R. 112, at pp. 129-130:

> From the authorities which have already been cited it will be seen that equity proceeded upon the principle that a releasee must not use the general words of a release as a means of escaping the fulfilment of obligations outside the true purpose of the transaction as ascertained from the nature of the instrument and the surrounding circumstances including the state of knowledge of the respective parties concerning the existence, character and extent of the liability in question and the actual intention of the releasor.[95]

[Emphasis added.]

44. The Ontario Court of Appeal further observed of the concurring reasons in *Ali* written by Lord Nicholls of Birkenhead:

> "[32] … [Lord Nicholls of Birkenhead] pointed out the problem that often arises when interpreting a release: in settling a dispute, the parties want to wipe the slate clean, but then when an unexpected claim comes to light, it is unclear whether the broad general language used was intended to cover the unexpected claim.
>
> [33] In addressing the problem, he refuted the suggestion that unknown claims are not covered by broad general language. I quote his discussion, at para. 27:
>
> > The wording of a general release and the context in which it was given commonly make plain that the parties intended that the release should not be confined to known claims. On the contrary, part of the object was that the release should extend to any claims which might later come to light. The parties wanted to achieve finality. When, therefore, a claim whose existence was not appreciated does come to light, on the face of the general words of the release and consistently with the purpose for which the release was given the release is applicable. The mere fact that the parties were unaware of the particular claim is not a reason for excluding it from the scope of the release. The risk that further claims might later emerge was a risk the person giving the release took upon himself. It was against this very risk that the release was intended to protect the person in whose favour the release was made.
>
> [34] That said, Lord Nicholls cautioned that this approach "should not be pressed too far". He explained, at para. 28:

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[95] *Ibid, supra* note 89, at paragraphs 28-29.

> However widely drawn the language, the circumstances in which the release was given may suggest, and frequently they do suggest, that the parties intended or, more precisely, that the parties are reasonably to be taken to have intended, that the release should apply only to claims, known or unknown, relating to a particular subject matter. The court has to consider, therefore, what was the type of claims at which the release was directed.
>
> [35] For example, Lord Nicholls explained, a mutual general release on a settlement of final partnership accounts might properly be interpreted as being confined to claims arising in connection with the partnership business. It would not extend, for example, to a later claim by one partner against the other that the tree roots of his neighbouring property were encroaching."[96]
>
> [Emphasis added.]

45. Having discussed the opinions in *Ali* at length *"because the Law Lords considered virtually every interpretive issue that could arise in applying the concept of what was "in the contemplation of the parties" when faced with a broadly-worded release"*[97], the Ontario Court of Appeal distilled a list of interpretative principles to apply to releases, as follows:

> "[42] … One can distill the following principles from these reasons:
>
> 1. One looks first to the language of a release to find its meaning: at para. 8.
>
> 2. Parties may use language that releases every claim that arises, including unknown claims. However, courts will require clear language to infer that a party intended to release claims of which it was unaware: at paras. 9-10.
>
> 3. General language in a release will be limited to the thing or things that were specially in the contemplation of the parties when the release was given: at para. 13.
>
> 4. When a release is given as part of the settlement of a claim, the parties want to wipe the slate clean between them: at para. 23

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[96] *Ibid*, *supra* note 89, at paragraphs 32-35.
[97] *Ibid, supra* note 89, at paragraph 42.

> 5. One can look at the circumstances surrounding the giving of the release to determine what was specially in the contemplation of the parties: at para. 28."[98]
>
> [Emphasis added.]

46. The list of interpretative principles listed in *Biancaniello* is substantively similar to that listed in *Kaiser* and adopted by the Court of Appeal in the present case.

47. Similar to the Ontario Court of Appeal in *Biancaniello*, the British Columbia Court of Appeal in *Strata Plan BCS 327* noted the House of Lords' reexamination of the rule in *London and South Western Railway* in *Ali*. Bennett J.A., for the British Columbia Court of Appeal, wrote:

> "[26] The law is very clear. While releases signed in the course of a settlement of a dispute are often worded in a broad and general fashion, appearing to cover the end of the world, they must be considered in the context of the dispute. This context often provides a limiting background from which an inference that the parties meant to apply it to the claims from the dispute may readily be made (see [*Ali*])."[99]
>
> [Emphasis added.]

48. The approaches of the appellate courts in *Biancaniello* and *Strata Plan BCS 327* are consistent with the *"particular application"* of the general approach to contractual interpretation applied to the Release by the Court of Appeal in the present case.

iii. ***The Court of Appeal's Statement of the Law is Consistent with the United Kingdom House of Lords Decision in Ali***

49. The Court of Appeal's statement of the law applicable to the interpretation of releases is consistent with the United Kingdom House of Lords' decision in *Ali.* As the reexamination of the rule in *London and South Western Railway* in *Ali* was favourably cited by the Ontario Court of Appeal in *Biancaniello* and the British Columbia Court of Appeal in *Strata Plan*

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[98] *Ibid, supra* note 89, at paragraph 42.
[99] *Strata Plan BCS 327, supra* note 90, at paragraph 26.

BCS 327, the decision warrants further examination in considering the law articulated by the Court of Appeal in this case.

50. *Ali* concerned interpretation of a general release containing widely drawn general words releasing all claims that one party might have against the other. The releasor had accepted a payment from the releasee *"in full and final settlement of all or any claims ... of whatsoever nature that exist or may exist".*[100] The question at issue was "*whether the context in which the general release was given is apt to cut down the apparently all-embracing scope of the words of the release."*[101]

51. Similar to the Court of Appeal's finding in the present case that the rule in *London and South Western* Railway has been subsumed by the general principles of contractual interpretation through the evolution of the law of contract in Canada, Lord Nicholls of Birkenhead acknowledged a similar evolution in the United Kingdom, as follows:

> "[25] … It is part of the history of the law of interpretation, described vividly in *Wigmore on Evidence* (1981), vol 9, paragraph 2461, as 'the history of progress from a stiff and superstitious formalism to a flexible rationalism'. Today there is no question of a document having a legal interpretation as distinct from an equitable interpretation.
>
> [26] Further, there is no room today for the application of any special 'rules' of interpretation in the case of general releases. <u>There is no room for any special rules because there is now no occasion for them</u>. A general release is a term in a contract. The meaning to be given to the words used in a contract is <u>the meaning which ought reasonably to be ascribed to those words having due regard to the purpose of the contract and the circumstances in which the contract was made</u>. This general principle is as much applicable to a general release as to any other contractual term. Why ever should it not be?[102]
>
> [Emphasis added.]

52. Lord Nicholls of Birkenhead went on to discuss the interpretation of the scope of a release, as follows:

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[100] *Ali*, *supra* note 93, at paragraph 22.
[101] *Ali, supra* note 93, at paragraph 23.
[102] *Ali*, *supra* note 93, at paragraph 25-26.

> "[28] … It does not mean that once the possibility of further claims has been foreseen, a newly emergent claim will always be regarded as caught be a general release, whatever the circumstances in which it arises and whatever its subject matter may be. However widely drawn the language, the circumstances in which the release was given may suggest, and frequently they do suggest, that the parties intended or, more precisely, the parties are reasonably to be taken to have intended, that the release should apply only to claims, known or unknown, relating to a particular subject matter. The court has to consider, therefore, what was the type of claims at which the release was directed. For instance, depending on the circumstances, a mutual general release on a settlement of final partnership accounts might properly be interpreted as confined to claims arising in connection with the partnership business. It could not reasonably be taken to preclude a claim if it later came to light that encroaching tree roots from one partner's property had undermined the foundations of his neighbouring partner's house. Echoing judicial language used in the past, that would be regarded as outside the 'contemplation' of the parties at the time the release was entered into, not because it was an unknown claim, but because it related to a subject matter which was not 'under consideration'.
>
> [29] This approach, which is an orthodox application of the ordinary principles of interpretation, is now well established. Over the years different judges have used different language when referring to what is now commonly described as the context, or the matrix of facts, in which a contract was made. But, although expressed in different words, the constant theme is that the scope of general words of a release depends upon the context furnished by the surrounding circumstances in which the release was given. The generality of the wording has no greater reach than this context indicates."[103]
>
> [Emphasis added.]

53. In the result, Lord Nicholls of Birkenhead held that the general release at issue was confined to claims arising out of the releasor's employment relationship. Concurring, Lord Clyde similarly reasoned that the approach to be applied in interpreting releases is one that *"looks to commercial reality or common sense".*[104] Likewise concurring, Lord Bingham of Cornhill confined the application of the words of the release to those types of claims that were in the parties' mutual contemplation, noting that the words describing the scope of

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[103] *Ali*, *supra* note 93, at paragraphs 28-29.
[104] *Ali, supra* note 93, at paragraph 79

the release as not meaning *"all it might be thought to say"*[105] and concluding that the relevant clause *"cannot be read literally"*[106].

54. The approach of the House of Lords in *Ali* is therefore consistent with the *"particular application"* of the general approach to contractual interpretation applied to the Release by the Court of Appeal in the present case.

iv. ***The Court of Appeal's Statement of the Law is Consistent with this Court's Decision in Resolute***

55. The Court of Appeal's adopted approach to interpretation of the Release is also consistent with this Court's approach to interpretation of an indemnity articulated in its decision in *Resolute.*[107]

56. In *Resolute*, this Court addressed the issue of whether the scope of an 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, this Court distinguished third party pollution claims brought against the former mill owners from direct first party claims against the former mill owners. The majority of this Court 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. The majority adopted the dissenting reasons of Laskin, J.A. of the Ontario Court of Appeal, who wrote:[108]

> "[236] The scope of the 1985 Indemnity must be assessed not only from the words the parties used, but as well from the context in which they used those words. In Dumbrell v. Regional Group of Companies Inc., my colleague

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[105] *Ali, supra* note 93, at paragraph 18.
[106] *Ali*, *supra* note 93, at paragraph 18.
[107] *Resolute FP Canada Inc. v. Ontario (Attorney General),* 2019 SCC 60, 44 D.L.R. (4th) 77 (**"*Resolute*"**).
[108] *Resolute, supra* note 107, at paragraph 3, referencing the dissenting reasons of Laskin, J.A. in *Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONCA 1007, 77 B.L.R. (5th) 177.

> Doherty J.A. concisely stated the cardinal principle of contract interpretation:
>
> > The text of the written agreement must be read as a whole and in the context of the circumstances as they existed when the agreement was created. The circumstances include facts that were known or reasonably capable of being known by the parties when they entered into the written agreement.
>
> See also: Sattva Capital Corp. v. Creston Molly Corp.
>
> [237] Although the motion judge stated this principle, I do not agree with my colleague that he correctly applied it. The motion judge's starting point for interpreting the 1985 Indemnity was to look at the words of the document in isolation, and then only secondarily at the "surrounding circumstances". His two-stage approach to the interpretation of the 1985 Indemnity is not the proper approach. Context controls meaning. Rarely can the words of an agreement be understood without some knowledge of their context. Thus, as Doherty J.A. said in Starrcoll Inc. v. 2281927 Ontario Ltd.: "The words of an agreement, and the context in which those words are used, cannot be separated and approached at different stages of the interpretative process."[109]"
>
> [Emphasis added.]

58. The approach to contractual interpretation articulated in the dissenting reasons of Laskin, J.A. adopted by the majority of this Court in *Resolute* are consistent with the approach set out in *Biancaniello* and *Strata Plan BCS 327,* the House of Lords decision in *Ali*, and the Appeal Decision in this case.

59. Despite the guidance of the authorities of this Court, the City rejects that surrounding circumstances and specific references in the Release should inform the broad words used in the Release in the manner determined by the Court of Appeal. Rather, the City argues that the broad words used in the contract ought to be determinative as directing that the Release is applicable to both the Baileys' claims for damages in the context of the Bailey Action and Mrs. Bailey's claim for contribution in the context of the Temple Action, and that to do otherwise is to allow the surrounding circumstances to *"overwhelm the words"* of the contract. The proper determination of this question in the context of a release is what

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[109] *Ibid, supra* note 107, at paragraphs 236-237.

an objective bystander would conclude was the specific intent of both parties and the scope of their understanding.

60. This question, and guidance for its resolution, was discussed in the dissenting reasons of this Court in *Resolute*, as follows:

> "[76] Contractual interpretation begins with reading the words of the contract. A legitimate interpretation will be consistent with the language that the parties employed to express their agreement (G. R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at p. 11). As this Court stated in *Sattva*, the meaning of a contract is rooted in the actual language used by the parties (para. 57). A meaning that strays too far from the actual words fails to give effect to the way in which the parties chose to define their obligations (*Canadian Contractual Interpretation Law*, at p. 9).
>
> [77] This is not to say that the words of the contract are to be read in isolation. This Court's direction in *Sattva* was that the words of the contract are to be read in light of the surrounding circumstances – sometimes referred to as the "factual matrix" – which consists of "objective evidence of the background facts at the time of the execution of the contract, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting" (para. 58 (citation omitted)). An interpretation that ignores the context in which the contract was formed will not accurately discern what the parties intended too achieve, even if the interpretation is "literally correct" (*Canadian Contractual Interpretation Law,* at p. 9; see also *Sattva,* at para. 57). Put simply, contractual text derives its meaning, in part, from the context.
>
> [78] We stress that text derives its meaning from context *in part.* This leads to an important caveat: the context – that is, the factual matrix – cannot "overwhelm the words" of the contract or support an interpretation that "deviate[s] from the text such that the court effectively creates a new agreement" (*Sattva*, at para. 57). The factual matrix assists in *discerning the meaning* of the words that the parties chose to express their agreement; it is not a means by which to *change* the words of the contract in a manner that would modify the rights and obligations that the parties assumed thereunder (*Canadian Contractual Interpretation Law*, at pp. 33-34).[110]"
>
> [Emphasis added.]

[110] *Ibid, supra* note 107, at paragraphs 76-78.

61. Bailey submits that the approach articulated in the foregoing passage in *Resolute* coincides with that articulated by Lord Nicholls and Lord Bingham in *Ali*, with the latter accounting for the specific context of the contract at issue being a release.

C. The Court of Appeal Correctly Held that the Trial Judge Erred in Interpreting the Release

62. The Court of Appeal correctly found that the trial judge erred by considering what was in the contemplation of the City in drafting the Release as being determinative of the parties' mutual intent, and by considering it unnecessary to determine what was specially contemplated by both parties at the time when the Release was given.

63. The Court of Appeal further correctly found that the trial judge erred by putting too much weight on the broad words of the Release, and thereby not allowing the meaning of the Release to be properly informed by the context, the circumstances surrounding the giving of the release, and the correspondence exchanged between the parties' solicitors.

64. The Court of Appeal's conclusion that the trial judge committed an extricable error in principle amounting to an error of law was also correct.

D. The Court of Appeal Correctly Interpreted the Release

65. Having determined the trial judge committed an extricable error that had a material effect upon the result, the Court of Appeal was required to interpret the Release itself in accordance with established principles. The Court of Appeal moved forward with its analysis and correctly interpreted the Release.

66. The Court of Appeal correctly examined the circumstances surrounding the Release's execution to determine what an objective bystander would conclude was the specific intent of both parties, and the scope of their understanding. The general words of the Release were to be interpreted as limited to those things which were specially in the contemplation of the parties at the time when the Release was given. The correct approach required taking account of surrounding circumstances known to the parties at the time of contracting to

give meaning to the words used. Disputes that had not emerged or questions which had not at all arisen could not be considered as bound and concluded by the general language of the Release.

67. The Court of Appeal correctly considered the broad language of the Release in the context of the more specific references in it, in order to determine the things that were specially in the contemplation of the Baileys and the City, mutually, at the time the release was given. In particular,

a. The specific words describing the released claims informed that the parties' focus was clearly the Baileys' own claims in the Bailey Action.
b. Moreover, the specific words describing the released claims did not point to losses unrelated to the Baileys' damages.
c. The specific references to claims raised or that could have been raised in the Bailey Action are inconsistent with an intention to cover the third party claim, as it was not possible for that claim to have been raised in the Bailey Action.
d. The $7,500 settlement payment is consistent with the parties' having contemplated releasing only the Baileys' claims for the own damages, and not unspecified claims that someone else could make against the Baileys and for which they would seek contribution from the City.
e. There is no hint of a reference to the Temple Action or specific words informing that the released claims were to include a claim by the Baileys against the City resulting from the Temple Action.

68. The Court of Appeal moreover correctly considered the context informing the meaning of the words of the Release. The Court of Appeal correctly considered that there being no evidence of the City having been aware of the Temple Action at the time of execution of the Release, it was not possible for the trial judge to conclude that the Temple Action was within the contemplation of both parties at the relevant time.

69. The Court of Appeal further correctly considered that the exchange of correspondence between the parties' solicitors negotiating settlement of the Bailey Action made no

reference to the Temple Action or the possibility of a third party claim by the Baileys against the City in the Temple Action. The Court of Appeal was right that the parties were contracting about the settlement of the Baileys' personal injury and property damage claim.

70. The Court of Appeal further correctly considered that the standard practice of insurance companies requiring a release on settlement of a personal injury or property claim, together with the Release referencing release of *"any and all rights which [the Baileys] may have as against the Releasees and the issues raised in the Action"* supported the conclusion that the Release related only to the damages suffered by the Baileys and not to claims arising in the context of actions by others for damages suffered by those others.

71. The Court of Appeal was right to emphasize the distinction between the damages suffered by the Baileys and the entirely distinct damages suffered by Mr. Temple. The Release settled the Baileys' claim for their own damages, a claim that alleged a breach of duties owed by the City to the Baileys. The claim for contribution and indemnity concerned a fundamentally different claim. A claim for contribution and indemnity is not a claim for damages based on a breach of duty – it is a claim to avoid the unjust enrichment that would otherwise occur if a defendant is required to bear losses that are, because of some duty relationship *between the third party and the plaintiff*, properly the responsibility of that third party.[111]

72. The Court in *Hill* affirmed that the exercise of interpretation must involve ascertaining *"what the parties were really contracting about."*[112] Interpreting the Release as covering the City's responsibility for damages suffered by Mr. Temple because of a breach of a duty the City owed to him greatly expands the scope of the Release. There is no evidence on the record before either Court below that would support construing the Release as a transfer from the City to the Baileys of economic responsibility for a breach of any duty the City may owe to Mr. Temple. This was not an agreement by the Baileys to accept responsibility

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[111] See *Placzek v. Green,* 2009 ONCA 83, at paragraph 38.
[112] *Hill*, *supra* note 6, at p. 79.

for damages caused to others by the City. The trial judge was wrong to give the Release that effect.

73. The Court of Appeal correctly concluded that 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, and not a release of claims arising in other actions relating to recovery of damages of third parties.

E. The Policy Implications of Interpreting Releases as the Court of Appeal Did

74. The Court of Appeal was correct in interpreting the words of the Release according to the common sense approach stated in *Sattva*, thereby ensuring that the scope of the agreement did not exceed that intended by the parties. In doing so, the Court of Appeal upheld the finality of settlement respecting the subject matter of the Release, and only that subject matter: the Baileys' claims for their own damages relating to the accident. The City and the Baileys bargained in respect of this subject matter, and nothing more. That bargain remains intact following the Appeal Decision.

75. Had the Court of Appeal interpreted the Release to include subject matter that was unintended by the parties, it would have conferred a windfall on the City regarding the City's potential liability for Mr. Temple's damages, to the detriment of the Baileys. Such an approach to interpretation of releases would deter claimants from settling their own claims for damages, due to concern that their releases will bar their ability as defendants to have other claimants' own damages flow through to releasees.

76. The Court of Appeal's approach shows common sense respecting freedom of contract. Had the Baileys and the City wished to agree to (i) finality of the Baileys' claims for their own damages and (ii) finality of the Baileys' ability to bring third party claims against the City in circumstances where other claimants have made claims for their own damages, the parties were free to contract respecting that expanded subject matter. In such circumstance, the Baileys and the City's common intent to address both those subject matters would be

reflected in the wording of the Release, and that meaning of the words used would be reflected in the context and circumstances of the settlement.

77. When parties draft and sign a contract, what they are doing is documenting what they intended to agree to. The words of the agreement are objective evidence of the agreement. If the context and circumstances of the agreement confirm the words used in the agreement, there is no concern as to the context overwhelming the words. In such cases, the context confirms the meaning of the words used by the parties.

78. The context and surrounding circumstances of the Release in the present case confirmed that the general words used by the parties in the Release – releasing claims *"of any kind or nature whatsoever arising out of or relating to the accident which occurred on or about March 3, 2009"* – were mutually intended to apply to claims for the Baileys own damages arising out of or relating to the accident, but not intended to apply to any other claims.

79. The Court of Appeal's approach does not encourage one party withholding information from the other. To the contrary, the approach encourages parties to clearly define the scope of their agreements in not only the words they choose, but also in the context and circumstances surrounding their agreement. The approach does not restrict the ability of parties to agree respecting known and unknown claims relating to a defined scope. The approach does restrict the ability of one party from using an agreement respecting known and unknown claims relating to a defined scope from attempting to have it apply to known and unknown claims relating to a different scope for which there was no bargain.

80. The City misstates the impact of the Appeal Decision. While litigants obtain releases so that they can settle known and unknown claims, such contracts apply only to their subject matter, and nothing more. A release obtained in respect of one subject matter does not bar claims respecting different subject matters, for which the contracting litigants did not bargain. The Appeal Decision does not violate the concept of finality achieved by use of a release. Rather, the decision holds that such finality applies only to the subject matter of

the release, which is to say the known and unknown claims specially contemplated by the releasor and the releasee. The Appeal Decision is consistent with the goal of settlement.

81. The City further misstates the Court of Appeal's reasons. The Appeal Decision did not adopt an interpretation of the Release that was unduly narrow, nor one that contradicted or ignored the express words of the contract, nor one that allowed the factual matrix to overwhelm the words of the contract. Rather, the interpretation adopted by the Court of Appeal is consistent with the approach to contract interpretation espoused by this Honourable Court in *Sattva, Ledcor,* and, most recently, *Resolute*, as well as with the interpretative approaches articulated in the appellate jurisprudence addressing, specifically, the interpretation of releases.

82. The Appeal Decision does not render parts of the Release meaningless, nor does it create any tension between the rule in *London and South Western Railway* and the general principles of contract interpretation set out in *Sattva.* The third-party claim brought by Mrs. Bailey in the Temple Action is not a claim for recovery of the Baileys' own damages; it is a claim for indemnity or contribution from the City for recovery of Mr. Temple's damages. The indemnity clause is not rendered meaningless by the Appeal Decision; rather, its scope is justifiably limited to that which was specially contemplated by the parties, being claims for recovery of the Baileys' damages. The Court of Appeal reflected this outcome in stating that the Release properly interpreted was *"…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"*.[113]

83. The City misstates the impact of the Appeal Decision in claiming that releasees will not be able to negotiate for the release of unknown claims, and that litigants will not be able to close their files with finality. In the case at bar, the releasees negotiated for and obtained a release that applies to known and unknown claims by the Baileys for their own damages; the Release simply does not apply to known or unknown claims relating to damages of

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[113] Appeal Decision, *supra* note 5, at paragraph 71. [Tab 1D., vol. 1, p. 36 of the Record of the Appellant].

others. The Court of Appeal referenced that it is standard practice in the insurance industry for an insurer to require a release on settlement of a personal injury or property claim, and that the release in this case 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 the first page of the Release as the Bailey Action and it related to the losses suffered by the Baileys, not damages suffered by any third party.

84. The Appeal Decision does not impede litigants from negotiating releases in the future that will cover known and unknown first and third party claims, where that is the litigants' mutual intent. In such cases, the settling litigants may clearly indicate by the words used in their release, the context, and the exchange of correspondence between them, their mutual intent to cover both the releasors' claims for their own damages and the releasors' claims for contribution arising in claims by third parties for their own damages, both known and unknown. The decision has not created disruptive uncertainty to the insurance industry.

85. The Appeal Decision does not cause litigants, nor the insurance industry at large, any risk of financial uncertainty, nor does it discourage settlement of personal injury claims. The suggestion that the Appeal Decision represents a dramatic change in the *status quo* for Canadian litigants because it somehow invalidates the portions of the agreement that defendants regularly rely on to close their files is simply false. What the Appeal Decision represents, rather, is a confining of the effect of a release to that subject matter for which the releasor and releasee bargained, and no more. To allow a releasee to use a release obtained in one context (in settling claims for the releasor's damages) as a bar against claims in a different context (indemnity in connection with claims by third parties for their own damages), for which the releasee did not bargain, would be an unjust and inequitable result. The Appeal Decision held, correctly, justly and equitably, that the releasee should not be allowed such a windfall.

PART IV – SUBMISSION ON COSTS

86. The Respondent requests that it be awarded costs of this appeal.

PART V – ORDER SOUGHT

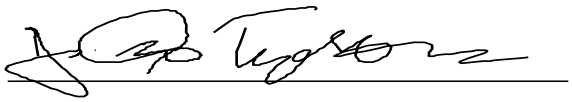
87. The Respondent respectfully requests an order dismissing the appeal, with costs.

PART VI – SUBMISSIONS ON CONFIDENTIAL INFORMATION

88. There is no sealing or confidentiality order, publication ban, classification of information in the file as confidential under legislation or restriction on public access to information in the file that could have any impact on the Court's reasons in the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED this 18th day of January, 2021.



J. Alexander Templeton
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Scott Rollwagen
Counsel for the Respondent Mary Bailey

PART VII – TABLE OF AUTHORITIES

No.	Jurisprudence	Paragraph Cited
1.	*Bailey v. Temple*, 2020 NLCA 3	5
2.	*Bank of British Columbia Pension Plan v. Kaiser,* 2000 BCCA 291, [2000] B.C.W.L.D. 645	7, 19, 33
3.	*Bank of Credit and Commerce International SA v. Munawar Ali*, [2001] UKHL 8, [2001] 1 All E.R. 961	43, 50, 51, 52, 53
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7.	*Hill v. Nova Scotia (Attorney General)*, [1997] 1 S.C.R. 69	5, 42, 72
8.	*Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23	7, 30
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10.	*Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.,* 2020 SCC 29	39
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13.	*Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53, [2014] 2 S.C.R. 633	7, 29, 30
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15.	*Temple v. Bailey,* 2018 NLSC 177	4
16.	*Weyerhaeuser Company Limited v. Ontario (Attorney General),* 2017 ONCA 1007, 77 B.L.R. (5th) 177	57