**NOVA SCOTIA COURT OF APPEAL**

**Citation:** Meredith Estate v. Orlandello, 2005 NSCA 98

**Date:** 20050622
**Docket:** CA 236171
**Registry:** Halifax

**Between:**

Cheryl White, as a representative of the Estate of Luke James Meredith, a deceased person, and Jill Chase

Appellants

v.

Bernice Orlandello and the Attorney General of Nova Scotia

Respondents

| | |
|---|---|
| **Judge(s):** | Roscoe, Bateman, Fichaud, JJ.A. |
| **Appeal Heard:** | May 24, 2005, in Halifax, Nova Scotia |
| **Revised judgment:** | The text of the original judgment has been corrected according to the erratum dated **July 25, 2005.** |
| **Held:** | Leave to appeal granted, appeal allowed per reasons for judgment of Fichaud, J.A., Roscoe and Bateman, JJ.A. concurring. |
| **Counsel:** | John Rafferty, Q.C. and Melanie Perry, articled clerk, for the appellants<br>Donald Shewfelt, for the respondent Orlandello<br>Richard Southcott, for the respondent, AGNS |

Reasons for judgment:

[1] Ms. Orlandello was injured after being struck by a vehicle while she was disembarking from a ferry. She settled her claim against the driver and owner of the vehicle, and signed a release of any claims against them and against "all other persons". Ms. Orlandello then sued the ferry operator for negligently directing traffic. The ferry operator third partied the driver and owner of the vehicle. Does Ms. Orlandello's signed release bar her claim against the ferry operator?

## *1. Background*

[2] On July 21, 1999 the respondent Ms. Orlandello was a passenger on the Country Harbour Ferry, owned by the Province of Nova Scotia. Ms. Orlandello was on the vehicle deck. She was struck and injured by a truck-trailer, owned by the appellant Jill Chase and driven by Luke Meredith. Mr. Meredith, now deceased, is represented on this appeal by the appellant Cheryl White as representative of the Estate of Luke James Meredith ("Estate").

[3] Shortly after the accident Ms. Orlandello advanced a claim against Ms. Chase, who resides in Massachusetts. Ms. Chase responded through Premier Insurance Company of Massachusetts ("Premier"), insurer of the Chase vehicle. Throughout that claim and its settlement Ms. Orlandello acted by her Massachusetts counsel.

[4] Ms. Orlandello settled her bodily injury claim against Ms. Chase and Premier for $100,000, the coverage limit under the Chase - Premier insurance policy. In return for the payment, Ms. Orlandello and her husband signed a release and indemnity ("Release") on March 27, 2001. The Release states:

> General Release, Husband and Wife
>
> *Know all Men by these Presents*
>
> That we, Joseph Orlandello and Bernice Orlandello, husband and wife, and each being of lawful age, for the sole consideration of One Hundred Thousand Dollars ($100,000.00**), to us in hand paid, the receipt whereof is hereby jointly and severally acknowledged, ***have remised released and forever discharged*** and by these presents do, severally and jointly, for ourselves and for

our heirs, executors, administrators, and assigns, do hereby remise, release and forever discharge ***Jill Chase and Luke Merredith*[*sic*]*** ***and Premier Insurance Company*** of Massachusetts, and his, her, their, or its successors and assigns, heirs, executors, administrators, ***and all other persons, firms, and corporations, of and from any and all claims***, demands, rights or causes of action of whatsoever kind or nature, arising from or by reason of any and all known and unknown, foreseen and unforeseen bodily or personal injuries, and the consequences thereof, ***resulting, or to result from a certain loss which happened on or about July 21, 1999 and*** do hereby for myself, my heirs, executors, administrators, successors, assigns and next of [kin] ***covenant to indemnify and save harmless the above named Releasees*** from all claims, demands, costs, loss of services, expenses and compensation on account of or in any way growing out of personal injuries resulting from said accident. [emphasis added]

*It is expressly understood and agreed* that the acceptance of said above amount is in satisfaction of a disputed claim and that the payment of the said above amount is not an admission of liability.

*In Witness Whereof* we have hereunto set out hands and seals the 27 day of March in the year two thousand one.

*Joseph A. Orlandello* {L.S.}

*Bernice Orlandello* {L.S.}

Certificate of Witness

I certify that this release for the sum of $100,000 was signed in my presence by Joseph Orlandello and Bernice Orlandello, who stated to me that they understood it fully released and discharged all claims of every kind.

Witness [signed by witness]

Address _____

[5] On July 19, 2001 Ms. Orlandello filed an originating notice (action) in the Supreme Court of Nova Scotia against the Attorney General of Nova Scotia as the representative of Her Majesty in Right of the Province ("Province"). Ms. Orlandello's statement of claim alleged that her injuries on July 21, 1999 occurred

because of the negligence of the Province's employee who directed traffic on the vehicle deck of the Country Harbour Ferry.

[6] The Province filed an originating notice (third party) against Ms. Chase and the Estate. The third party statement of claim seeks reimbursement for any amount payable by the Province to Ms. Orlandello.

[7] Ms. Chase and the Estate then counterclaimed against Ms. Orlandello based on the indemnity in the Release. They counterclaimed for all amounts expended by Ms. Chase and the Estate as a result of this litigation.

[8] Ms. Chase and the Estate applied to the chambers judge of the Nova Scotia Supreme Court for (1) summary judgment to dismiss both Ms. Orlandello's claim against the Province and the Province's third party claim; (2) in the alternative, a stay of both Ms. Orlandello's claim against the Province and the Province's third party claim; and (3) summary judgment on their counterclaim against Ms. Orlandello for indemnity against expenses of the litigation. Justice Cacchione dismissed all three applications for reasons I will discuss later.

[9] Ms. Chase and the Estate apply for leave to appeal and, if granted, appeal from the dismissal of their applications.

## *2. Issues*

[10] The issues are whether the chambers judge committed appealable error by dismissing the Chase/Estate applications for (1) summary judgment to dismiss Ms. Orlandello's claim against the Province; (2) a stay for abuse of process of Ms. Orlandello's claim against the Province; and (3) summary judgment on the counterclaim for indemnity against Ms. Orlandello.

## *3. Standard of Review*

[11] To the extent that the chambers judge has exercised a discretion, this court will not interfere unless there is an error of law or manifest injustice: *Sezerman v. Youle* (1996), 150 N.S.R. (2d) 161 (C.A.), at ¶ 9; *Eikelenboom v. Holstein Canada*, 2004 NSCA 103 at ¶ 17. The issues here do not involve the exercise of discretion by the chambers justice. The outcome turns on the interpretation of the

written Release and the legal consequences of that interpretation. These are questions of law to which I will apply a correctness analysis: e.g. *Sinanan v. Woodyer* (1999), 176 N.S.R. (2d) 201 (CA) at ¶ 42-51.

### *4. First Issue*
### *- Summary Judgment to dismiss Orlandello claim against Province*

[12] *Rule* 13.01 permits a defendant to apply for summary judgment on the ground that the claim raises no arguable issue. *Rule* 17.04(2)(a) allows a third party to invoke *Rule* 13.01 to challenge a plaintiff's claim. In *Eikelenboom*, after reviewing the authorities, this court stated the test:

> [25] Applying these authorities to the circumstances of this case, it is apparent that in order to show that summary judgment was available to it, [the defendant] had to demonstrate that there was no arguable issue of material fact requiring trial, whereupon [the plaintiffs] were then required to establish their claim as being one with a real chance of success.

See also: *United Gulf Developments Ltd. v. Iskandar*, 2004 NSCA 35 at ¶ 9; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at ¶ 15; *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at ¶ 27.

[13] The chambers judge referred to this test. The issue is whether he erred in its application.

#### *(a) Ambiguity on the Release*

[14] The chambers judge held that the Release was ambiguous, which would permit the admission of extrinsic evidence to determine whether the Release discharged Ms. Orlandello's claim against the Province. This would be an arguable issue of fact for trial. So the chambers judge dismissed the application for summary judgment. His reasoning that there was an ambiguity appears in the following passages from his decision:

> [40] If one were to break down the present release it would fall into two sections. The first being a release of Jill Chase, Luke Meridith and Premier Insurance, their heirs, successors etc. and all other persons, firms, and corporations from any and all claims demands, rights or causes of action whatever

> kind or nature. The second part of the release refers to the respondents indemnifying and saving harmless the releasees from all claims, demands, costs, loss of services, expenses and compensation on account of or in anyway growing out of personal injuries resulting from the accident.
>
> [41] The first portion of the release is unambiguous and releases and discharges all of the named releasees as well as all other persons firms and corporations. Standing alone, the release clause leaves no room for argument. . . .
>
> [42] The respondent concedes that this was clearly intended to release the named third parties. Although not admitted by the respondent these words are clear in applying to all other persons, firms, and corporations. It would appear that the release is universal. Based on these phrases alone there would appear to be no genuine issue of material fact requiring trial.
>
> [43] Any controversy as to the meaning of the release, that is any arguable issue, arises from the second part of the release where the respondent covenants to "indemnify and save harmless" the "above named releasees" (i.e. Jill Chase, Luke Meridith and Premier Insurance) from all claims resulting from the accident. On its face this means that the entire world is released from liability but the named releasees will be indemnified from any claims that may arise. This provision appears to be inconsistent with the release. If there can be no further liability arising from the accident, then an indemnification clause of this kind should be meaningless.

[15] The ruling that the Release was ambiguous was, in my respectful view, an error of law.

[16] The Release expressly discharges all claims against, Chase, Meredith, Premier and "all other persons". Her Majesty in Right of the Province of Nova Scotia is a "person". Whether the Crown is a natural person, embodied by Her Majesty, or a corporation sole, has been subject to debate which is unnecessary to resolve in this case. Either way, Her Majesty in Right of the Province is a "person": *J.E. Verreault & Fils Ltee. v. Quebec (Attorney General)*, [1977] 1 S.C.R. 41, at p. 47; *Quebec (Attorney General) v. Labrecque*, [1980] 2 S.C.R. 1057, at 1082; *Canada (Attorney General) v. Newfield Seed Ltd.* (1989), 63 D.L.R. (4th) 644 (S.C.A.) at 660-61; Lordon, *Crown Law* (Butterworths, 1991), at pp. 4-5 and authorities cited; Hogg, *Liability of the Crown* 2nd ed.) pp. 12, 163-4, 214-16; *Marble (Litigation Guardian of) v. Saskatchewan*, [2003] S.J. No. 479 (S.Q.B.) at

¶ 25, 46-47, 50. At the hearing of this appeal, counsel for Ms. Orlandello acknowledged that the Province was a legal person.

[17] I agree with the chambers judge's conclusion that, standing alone, the release of "all other persons" leaves no room for argument. The claim would raise no genuine or arguable issue of fact requiring trial.

[18] The chambers judge dismissed the application because the indemnity which follows the release "appears to be inconsistent with the release". If the claims were released, he reasoned, then an indemnity would be "meaningless". So there was ambiguity whether the claim was truly released.

[19] I disagree that the indemnity renders the release ambiguous. Despite that the claim was fully released, the releasors could still file an originating notice. The releasees would incur defence expenses notwithstanding that the claim ultimately would be dismissed because of the release. An indemnity is neither meaningless nor necessarily inconsistent with a release.

[20] Given that "all other persons" in the Release includes the Province, the chambers judge's reasoning would apply equally to a claim against the named releasees such as Ms. Chase. If the indemnity neutralizes the releasing words, then Ms. Orlandello could sue Ms. Chase or the Estate as well as the Province. This would defy the clear intent of the Release. Even Ms. Orlandello's counsel acknowledges that such a result was not contemplated.

[21] The Release unambiguously discharged Ms. Orlandello's cause of action against the named releasees and all other persons, which includes the Province.

[22] There is ample authority that a court may summarily dismiss, before trial, a claim which has been discharged by an unambiguous written release: e.g. *Begg v. East Hants (Municipality)* (1986), 75 N.S.R. (2d) 431 (C.A.), at ¶ 26-29; *Canasia Industries Ltd. v. May* (2000), 204 N.S.R. (2d) 88 (C.A.) at ¶ 30-31; *CIBC Mortgage Corp. v. Ofume* (2002), 208 N.S.R. (2d) 185 (C.A.), affirming 206 N.S.R. (2d) 234 (S.C.); *Nowe v. Allstate Insurance Co. of Canada* (1996), 157 N.S.R. (2d) 148 (S.C.), at ¶ 11; *McQuaid v. Lapierre* (1993), 128 N.S.R. (2d) 327 (S.C.), at ¶ 11-14; *Dipersio v. Nova Scotia (Workers' Compensation Appeals Tribunal),* 2004 NSCA 139, at ¶ 49; *Canada (Attorney General) v. Veinotte*

(1987), 81 N.S.R. (2d) 356 (S.C.), at ¶ 22-31; *Kothke v. Ekblad*, [1999] A.J. No. 664 (A.C.A.); *Paletta v. Agro*, [1990] O.J. No. 1417 (S.C. - H.C.J.); *Waldman v. D. N. Kimberley Insurance Brokers Ltd.*, [1998] O.J. No. 4974 (C.J. - Gen. Div.); *Ysselstein v. Tallon*, [1992] O.J. No. 881 (C.J. - Gen. Div.).

*(b) Absence of covenant not to sue*

[23] Counsel for Ms. Orlandello says that many of these authorities considered releases with a covenant not to sue. Counsel attempts to distinguish those authorities because Ms. Orlandello's Release does not contain an express covenant not to sue. In my view, this is a distinction without a difference.

[24] The covenant not to sue arose as a response to the "release bar" rule for joint tortfeasors. At common law, the release of one joint tortfeasor released all joint tortfeasors. This is because a joint tort signifies a single wrongful act, committed by several individuals. The "release bar" rule resulted in the unintended release of joint tortfeasors, which discouraged the settlement of claims for joint torts. To deal with these difficulties, the courts permitted settlement with one joint tortfeasor if the releasor merely covenanted not to sue that tortfeasor. The covenant would not discharge the cause of action. This permitted the claimant to sue other joint tortfeasors. For a discussion of these principles see: *S. Bransfield Ltd. v. Fletcher* (2003) 264 N.B.R. (2d) 366 (C.A.); *Flynn v. Halifax (Regional Municipality)*, 2005 NSCA 81 at paras. 99-102 and authorities there cited; Law Reform Commission of Nova Scotia, *Joint Tortfeasors & the Common Law "Release Bar Rule"* Final report, July 2002.

[25] This principle which gives significance to the covenant not to sue has no application here. If the Province were responsible in tort, from the negligence of its employee directing traffic on the vehicle deck, the Province or its employee would not be a joint tortfeasor with the operator of the Chase vehicle. Fridman, *The Law of Torts in Canada* (1990, Carswell), vol. 2, pp. 347-8 states:

> For two or more persons to be considered to be joint tortfeasors, the tort in question must be committed by one of them on behalf of or in concert with another. The acts must be performed in furtherance of a common design. Mere similarity of design is not enough, there needs to be concerted action to a common end.

Examples of joint tortfeasors are a master and servant acting in the course of his employment, a principal and agent in the scope of his authority, and partners or joint venturers pursuing their common enterprise. See *Flynn*,¶ 99-102 and authorities there cited. The operator of the Chase vehicle and the Province's employee on the vehicle deck did not act "in concert" or with a "common design" to commit a unified tort within this definition.

[26] If the Province's employee committed a tort, he would be a concurrent several tortfeasor with the operator of the Chase vehicle; that is, each would have committed a separate tort which combined to cause the injury. They would not be joint tortfeasors. The "release bar" rule has no application. Given the full release and discharge of Ms. Orlandello's claim, the absence of a covenant not to sue in Ms. Orlandello's Release has no legal significance to her potential claims against the operator of the Chase vehicle and the Province.

[27] We are left simply with the wording of the signed Release. The Release "released and forever discharged" the releasees from "all claims, demands, rights or causes of action of whatsoever kind and type" arising from the accident. A complete discharge of the cause of action is broader than a mere covenant not to sue for a subsisting cause of action.

[28] For those reasons I disagree with the suggestion by counsel for Ms. Orlandello that the absence of a covenant not to sue in Ms. Orlandello's Release is of any assistance to Ms. Orlandello's submissions on this appeal.

*(c) Absence of privity*

[29] *Rule* 17.04 (2)(a) gives a third party the same rights and obligations in the main proceeding as has the defendant. The defendant, the Province, was not a party to Ms. Orlandello's Release contract. There was no privity of contract between the Province and Ms. Orlandello. The third parties, Ms. Chase and the Estate, on their application to dismiss the plaintiff's claim against the defendant, may not rely on the privity of contract between the third parties and the plaintiff. Ms. Chase and the Estate stand in the shoes of the Province and may succeed only if the Province could succeed with a summary judgment application. In *Van Patter v. Tillsonburg District Memorial Hospital* (1999), 45 O.R. (3d) 223, in similar circumstances, the Ontario Court of Appeal cited the absence of privity to deny a

third party's summary motion to dismiss the plaintiff's action against the defendants.

[30] After the Court of Appeal's decision in *Van Patter*, the Supreme Court of Canada issued its decision in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108. The Supreme Court extended the exception to the privity requirement which had been introduced in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299. In *Fraser*, Justice Iacobucci for the Court stated:

> [32] In terms of extending the principled approach to establishing a new exception to the doctrine of privity of contract relevant to the circumstances of the appeal, regard must be had to the emphasis in *London Drugs* that a new exception first and foremost must be dependant upon the intention of the contracting parties. Accordingly, extrapolating from the specific requirements as set out in *London Drugs*, the determination and general terms as made on the basis of two critical and cumulative factors: (a) Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? and (b) Are the activities performed by the third party seeking to rely on the contractual provision, the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?

Justice Iacobucci (¶ 44) stated that the exception to privity applies when the third party beneficiary uses the contractual term to defend an action, not to advance a claim.

[31] Under the *Fraser River* test, the "intentions of the parties" may be determined from the document itself, without extrinsic evidence, when those intentions are manifested by unambiguous wording of the written contract. Justice Iacobucci stated:

> [33] . . . Accordingly, there can be no question that the parties intended to extend the benefit in question to a class of third-party beneficiaries whose membership includes Can-Dive. Given the lack of ambiguity on the face of the provision, there is no need to resort to extrinsic evidence for the purposes of determining otherwise. If the parties did not intend the waiver of subrogation clause to be extended to third-party beneficiaries, they need not have included such language in their agreement.

[32] Ms. Orlandello's Release unambiguously satisfies both conditions from *Fraser River*. First, the Release discharged all Ms. Orlandello's claims against "all other persons" which, as discussed, included the Province. Second, the Release discharged those claims "resulting, or to result from a certain loss which happened on or about July 21, 1999", the incident on the Country Harbour ferry. Ms. Orlandello was represented by counsel when she signed the Release. Above the witness' signature is a statement that Ms. Orlandello told the witness that she "understood it fully released and discharged all claims of every kind". Ms Orlandello's intentions, as determined from her signed Release, are clear. There is no scope for extrinsic evidence.

[33] The Province, as third party beneficiary of the contract, would be entitled to use the Release to defend against Ms. Orlandello's claim. The third parties, Ms. Chase and the Estate, are entitled by *Rule* 17.04(2) to stand in the shoes of the defendant Province.

*(d) Conclusion - Summary Judgment*

[34] I would grant leave to appeal and allow the appeal by granting summary judgment to dismiss Ms. Orlandello's claim against the Province. It follows that the Province's third party claim against Ms. Chase and the Estate also would be dismissed.

## *5. Second Issue - Stay for Abuse of Process*

[35] Ms. Chase and the Estate applied in the alternative for an order staying both Ms. Orlandello's action against the Province and the Province's third party claim. The interlocutory notice requests that the court "stay or dismiss" the claims under s. 41(e) of the *Judicature Act* R.S.N.S. 1989 c. 240 and *Rule* 14.25(1)(d). In argument, counsel for Ms. Chase and the Estate focused on the request for a stay.

[36] The chambers judge dismissed this application for the following reasons:

> [52] In the present case, there might well be an abuse of process if the respondent went forward in the face of a clearly expressed covenant not to sue. However, as with the summary judgment portion of this application, the ambiguity of the release is a complicating factor. Because of the ambiguity of the release in the present case it is not clear whether the release precludes any further action by the

> respondent. This, in my opinion, makes it impossible to say with certainty that the respondent's action constitutes an abuse of process. Accordingly, the application for a dismissal or a stay of the respondent's claim is dismissed.

[37] As discussed earlier, I disagree with each of the chambers judge's reasons for dismissing the application. The wording of the Release was not ambiguous. The absence of a covenant not to sue has no significance where (1) the Release unambiguously discharges the cause of action, and (2) any torts by the vehicle operator and the Province's employee would be several, not joint. In my respectful view, the chambers judge erred in law.

[38] Unlike the summary judgment application discussed earlier, the application under *Rule* 14.25(1)(e) does not depend on an exception to the privity rule. The application does not require the third parties to stand in the shoes of the defendant under *Rule* 17.04(2). The third parties apply for the remedy in their own right. Ms. Chase and the Estate are parties to the lawsuit with Ms. Orlandello. Any party to a lawsuit may apply to challenge an abuse of process in that lawsuit: e.g. *Sinclair-Cockburn Insurance Brokers Ltd. v. Richards* (2002), 61 O.R. (3d) 105 (C.A.) at ¶ 17. The alleged abuse of process is based on the Release. Ms. Chase and the Estate enjoyed privity of contract with Ms. Orlandello in the settlement which led to Ms. Orlandello's signed Release. So it is unnecessary to consider the two conditions for the exception to the privity rule in *Fraser River*.

[39] *Rule* 14.25(1)(d) permits a court to strike a pleading which would produce an abuse of process. An action for a claim which has been released and discharged is an abuse of process. As Justice Laskin stated in *Sinclair-Cockburn* at ¶ 14-16:

> I do not accept this submission. As Mr. Cadsby, counsel for Wiggins, said during oral argument, his client paid a substantial sum of money to buy peace, not just peace from potential liability for a judgment, but peace from even having to respond to a claim from Richards. Sinclair-Cockburn signed an unqualified release. Wiggins is entitled to all the benefits that flow from that release, which include its reputational interest and its interest in not being dragged into a law suit. Wiggins was entitled to expect the party who signed the release to live up to its bargain. It is not obliged to accept something almost as good. The undertaking proffered by Sinclair-Cockburn amounts to a unilateral amendment to the release. Nothing in the settlement agreement authorizes such an amendment.

> Moreover, each party had counsel when the release was negotiated. I find no evidence in the record to suggest that its terms were the product of an error by Sinclair-Cockburn's solicitor. Had Sinclair-Cockburn wanted to preserve its right to pursue Richards on the bond she issued to Wiggins, it should have tried to procure that concession in the settlement negotiations. Apparently, it did not do so.
>
> The terms of the release plainly preclude Sinclair-Cockburn's action against Richards to recover the money it contributed to the settlement. As Mesbur, J. accurately said, "[p]arties should be held to their promises." The court is entitled to enforce these promises by exercising its stay jurisdiction under either s. 106 of the *Courts of Justice Act* or rule 21.01(3)(d) to prevent an abuse of process. A stay works no injustice on Sinclair-Cockburn because its effect is simply to hold Sinclair-Cockburn to its bargain.

[40] In *Sinclair-Cockburn*, the remedy was a stay. Nova Scotia courts have jurisdiction to grant a stay. In *Sezerman, supra,* at ¶ 59-63, Justice Chipman noted that the court's inherent jurisdiction to grant a stay for abuse of process was preserved by s. 41(e) of the *Judicature Act*, and the concluding words of *Rule* 14.25(1).

[41] In my view, however, a stay is not the most appropriate remedy in this case. A stay is an indefinite, but not necessarily permanent, remedy which may be lifted: *Sezerman*, at ¶ 61-64. Ms. Orlandello signed a release which "forever discharged" her claim. The appropriate remedy would permanently terminate this lawsuit. *Rule* 14.25(1)(d) authorizes the court to strike a statement of claim which constitutes an abuse of process. This was the remedy ordered by this court in *Sinanan*, at para. 50:

> I would set aside the order of the Chambers Judge and substitute an order allowing the application of the appellant to strike the statement of claim on the basis that the parties have settled the action.

[42] Had Ms. Chase and the Estate addressed submissions to strike the statement of claim, I would have preferred that remedy to the summary dismissal under *Rule* 13. But no submissions were made concerning the striking of the statement of claim, and there was no discussion of authorities such as *Sinanan* which considered that sanction. At the hearing of this appeal, counsel for Ms. Chase and the Estate limited his remedial submissions, from abuse of process, to a stay of proceedings. Because striking the pleadings was not canvassed in argument, it is

not appropriate to order that remedy. I would resort to dismissal by summary judgment as discussed earlier.

### *6. Third Issue - Summary Judgment on Indemnity*

[43] The chambers judge dismissed the application brought by Ms. Chase and the Estate against Ms. Orlandello for indemnity to cover the expenses of responding to this action.

[44] The chambers judge's reasons are not entirely clear. He began his consideration by stating:

> The final issue is whether the third party is entitled to summary judgment on its counterclaim.

After discussing authorities, he concluded his analysis by stating:

> The respondent [ i.e. Ms. Orlandello] points out that the third party is fully indemnified as provided for in the release. In these circumstances, there does not appear to be a basis upon which to summarily dismiss the third party claim.

[45] The issue was whether Ms. Chase and the Estate were entitled to summary judgment on their counterclaim for indemnity. The chambers judge did not deal with that issue.

[46] As noted by the chambers judge, Ms. Orlandello's counsel "points out that the third party [i.e. Ms. Chase and the Estate] is fully indemnified as provided for in the release." Ms. Orlandello's counsel repeated this stipulation both in his factum and in his oral submissions to this court. Ms. Orlandello has filed no defence to the counterclaim for indemnity. At the hearing of this appeal, counsel for Ms. Orlandello acknowledged that this is because they have no defence to that counterclaim. At the hearing of the appeal, counsel for Ms. Orlandello acknowledged that there is no reason to deny Ms. Chase and the Estate summary judgment now for liability (with damages to be assessed separately) on the counterclaim for indemnity.

[47] This was a sound concession. The wording of the Release is clear. Mr. and Mrs. Orlandello:

> . . . covenant to indemnify and save harmless the above named Releasees from all claims, demands, costs, loss of services, expenses and compensation on account of or in any way growing out of personal injuries resulting from said accident.

Under the test set out in the authorities, cited earlier, for summary judgment: (1) the applicants for summary judgment, Ms. Chase and the Estate, have shown that there is no arguable issue of material fact requiring trial concerning their claim under the indemnity; and (2) the respondent to that application, Ms. Orlandello, has not shown any defence with a real chance of success. *Rule* 13.01(c) permits summary judgment when "the only arguable issue to be tried is as to the amount of any damages claimed". In my view, the only arguable issue relates to the amount recoverable under the indemnity.

[48] I would grant leave to appeal and allow the appeal to order that summary judgment be entered in favour of Ms. Chase and the Estate against Ms. Orlandello for indemnity according to the terms in the concluding words of the first paragraph of the Release. Quantification would involve issues of fact and should be determined by a judge after an assessment hearing.

## *7. Conclusion*

[49] I would grant leave to appeal and allow the appeal to:

(a) grant summary judgment to dismiss Ms. Orlandello's claim against the Province and the Province's claim against Ms. Chase and the Estate, and

(b) grant summary judgment to Ms. Chase and the Estate against Ms. Orlandello for liability on the indemnity contained in the concluding words of the first paragraph of the Release. Quantification of the amount of the indemnity should be determined by a judge based on evidence presented at an assessment hearing.

[50] I would make no order as to costs between Ms. Chase and the Estate, on the one hand, and Ms. Orlandello. That is because the quantum of recoverable costs is a matter of contractual interpretation under the wording of the indemnity, to be determined by the judge after the assessment hearing. That assessment would include consideration of whatever litigation expenses related to the proceeding before the chambers judge, and the proceeding in this court, should be recoverable under the wording of the indemnity. I am not saying that Ms. Chase and the Estate are disentitled to costs, just that the recoverable litigation expenses are to be considered by the assessment hearing.

[51] Between Ms. Orlandello and the Province, in my view each party should bear her or its own costs.

Fichaud, J.A.

Concurring:

Roscoe, J.A.

Bateman, J.A.