IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Orlandello v. Nova Scotia (Attorney General), 2004 NSSC 223

Date: 20041104
Docket: SH 171556
Registry: Halifax

Between:

Bernice Orlandello

Plaintiff

-and-

Attorney General of Nova Scotia

Defendant

-and-

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

Third Parties

And Between:

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

Plaintiff by Counterclaim

-and-

Bernice Orlandello

Defendant by Counterclaim

Judge: The Honourable Justice Felix A. Cacchione

Heard: August 26th, 2004, in Halifax, Nova Scotia

Counsel: Donald L. Shewfelt , for the Plaintiff/Defendant by Counterclaim
Richard F. Southcott, for the Defendant
John T. Rafferty, for the Third Parties/Plaintiffs by Counterclaim

By the Court:

[1] This is an interlocutory application brought by the third party and plaintiff by counterclaim, Cheryl White, a representative of the Estate of Luke James Meredith and Jill Chase (the applicant) under Civil Procedure Rule 13 for summary judgment or in the alternative for a dismissal or a stay of proceedings of the main action under subsection 41(e) of the *Judicature Act* and Civil Procedure Rule 14.25(1)(d) and 37.10(a).

[2] The application is supported by the defendant in the main action, Province of Nova Scotia (the defendant).

[3] The plaintiff, (defendant by counterclaim, and respondent in this application (the respondent) is an American citizen who was injured as a result of the alleged negligent operation of a motor vehicle owned and operated by the applicant on a provincial ferry operated by the defendant.

[4] The respondent's injuries occurred on July 21st, 1999. She suffered significant injuries to her legs and head. It is contended that she is permanently disabled as a result of those injuries. The respondent was initially treated in Nova Scotia and later on in the United States of America.

[5] The respondent advanced two claims against Jill Chase, the owner of the motor vehicle, through Premier Insurance Company of Massachusetts (Premier) the insurer of the Chase vehicle. No action was ever commenced. One claim, for personal injury protection, was paid in the fall of 1999. The second claim, for damages against the owner driver and Premier, was settled for the full policy limits. In return for the settlement the respondent and her husband signed a release on March 27th, 2001 which is the subject matter and central issue in the present application.

[6] The release signed by the respondent and her husband and entitled "General Release, Husband and Wife" states as follows:

> 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 discharged Jill Chase and Luke Merredith 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 ken (sic) 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.
>
> 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 our hands and seals the 27 day of March in the year two thousand one.

[7] In July 2001 the respondents commenced an action against the defendant. On September 19th, 2002 a defence was filed which was subsequently amended by consent on December 12th, 2003. The defendant, on March 18th, 2004 then brought a third party action against Luke James Meridith, the driver of the vehicle that is alleged to have caused the respondent's injuries and Jill Chase, the owner of the said vehicle.

[8] The third party claim, together with a defence to the main action was filed on June 24th, 2004.

[9] The applicant (third party) then brought the present application for summary judgment dismissing the respondent's claim against the defendant and the defendant's claim against the third party, or in the alternative, for an order for summary judgment on the counterclaim for the plaintiff by counterclaim. The application was later amended to include relief by way of a stay of proceedings or dismissal of the respondent/plaintiff's claim against the defendant and the

defendant's claim against the third party pursuant to the *Judicature Act* and the Civil Procedure Rules.

[10] The first issue to be determined is whether the respondent's claim should be dismissed summarily. Civil Procedure Rule 13 states as follows:

> **13.01** After the close of pleadings, any party may apply to the court for judgment on the ground that:
>
> (a) there is no arguable issue to be tried with respect to the claim or any part thereof;
>
> (b) there is no arguable issue to be tried with respect to the defence or any part thereof; or
>
> (c) the only arguable issue to be tried is as to the amount of any damages claimed.
>
> **13.02** On the hearing of an application under rule 13.01, the court may on such terms as it thinks just,
>
> (a) give such directions as may be required for the examination of any party or witness, or for the production of any books or document or copy thereof, or for the making of any further inquiries;
>
> (b) grant judgment for any party on the claim or any part thereof;
>
> (c) impose terms upon the plaintiff, including in particular a stay of execution of any judgment until the determination of the defendant's counterclaim or third party proceeding;
>
> (d) allow the defendant to defend the claim or part thereof, either unconditionally or on terms relating to giving security, time, the mode of trial, or otherwise;
>
> (e) where the defence is to amount only, order and assessment of the amount or reference or accounting to determine the amount;
>
> (f) give directions as to the trial or hearing of the claim or part thereof;

> (g) with the consent of all the parties, dispose of the proceeding finally in a summary manner, with or without pleadings or affidavits and without appeal;
>
> (h) where the claim is for the delivery up of a specific article, order the delivery up of the article;
>
> (i) where the claim is for the possession of land on the ground of forfeiture for non-payment of rent, grant relief against the forfeiture;
>
> (j) award costs;
>
> (k) grant any other order or judgment as it thinks just.
>
> **13.03** Where a party obtains judgment under rule 13.02, the plaintiff may continue the proceeding in respect of any remaining part of the claim or any other claim or against any other defendant.
>
> **13.04** The court may grant a summary judgment or order under rule 21.03 on an application based on admission of facts or documents in a pleading or otherwise.
>
> **13.05** The provisions of this rule shall apply, with any necessary modification, to a counterclaim or third party proceeding to the same extent as if the counterclaim or third party proceeding was a separate proceeding.

[11] The law regarding what must be established on an application to obtain summary judgment is contained in *Carl B. Potter Ltd. v. Antil Canada Ltd.* (1976), 15 N.S.R. (2d) 408. This case was decided at a time when the Civil Procedure Rules provided that only a plaintiff could bring such an application. Summary judgment could be granted then if the plaintiff could establish his claim clearly and if the defendant was unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried.

[12] Saunders, J. (as he was then) set out the applicable law on summary judgment applications in *Ocean Contractors Ltd. v. Acadian Construction Ltd. et al.* (1991), 107 N.S.R. (2d) 366 where he stated at page 371:

> On an application for Summary Judgment the plaintiff is bound to prove by affidavit its entitlement to judgment as alleged in the Statement of Claim. The burden then moves to the defendant to satisfy the court either that it has a legitimate defence or that it has a fairly arguable point to raise in defence...

[13] Recent amendments to the Civil Procedure Rules now allow any party to apply for summary judgment. Moir, J. considered the proper approach to be taken when summary judgment is requested by the defendant in the case of *Binder v. Royal Bank of Canada* (2003), 216 N.S.R. (2d) 363. He stated at page 368:

> Now any party may apply for summary judgment. And, the express standard picks up something of the approach adopted by the courts under the old rule. Now, the application is made on the ground that "there is no arguable issue to be tried with respect to the claim": 13.01(a) or "there is no arguable issue to be tried with respect to the defence": 13.01(b). In my opinion, no substantive distinction can be made between "no genuine issue for trial" and "no arguable issue to be tried". Thus, the approach adopted by the Supreme Court of Canada in **Hercules** and in **Guarantee Company of North America** applies to summary judgment applications before this Court. The applicant must meet a threshold. Generally, that threshold is met when the case is such that the Court should properly inquire into the presence or absence of a genuine issue (**Hercules**, para. 5 and 15), which I would equate with a reasonably arguable issue. Specifically, the threshold is met in cases where "there is no genuine issue of material fact requiring trial" (**Guarantee Company of North America**, para. 27, emphasis added). Once the threshold is met, the respondent is required to show a real chance of success in its claim or defence. This is not much different from the approach we are used to and, like it, this approach places incentive on both parties to produce evidence justifying their positions.

[14] The applicant submits the cases of *Sinclair-Cockburn Insurance Brokers Ltd. v. Richards*, [2001] O.J. No. 3487; *Kothke v. Ekblad*, [1999] A.J. No. 664(CA); *Paletta v. Agro*, [1990] O.J. No. 1417 (O.P.S.C.); *Ysselstein v. Tallon*, [1992] O.J. No. 881 (O.G.D.) and *Waldman v. D.N. Kimberley Insurance Brokers*, [1998] O.J. NO. 4974 (O.G.D.) in support of this application. It is argued that these cases should be followed by this court because they all involve situations where claims have been dismissed because of the existence of a release signed by the plaintiff.

[15] The applicant also cites the Ontario Court of Appeal decision in *Van Patter v. Tillsonburg Hospital*, [1999] O.J. No. 2477 as an example of where an application for summary judgment by a released party has been denied, but argues that this decision has been overtaken by the principles set out by the Supreme Court of Canada in *Fraser River Pile & Dredge v. Can-Dive Services*, [1999] S.C.J. No. 48. It is submitted that the *Fraser River* decision relaxed the strictures

of the doctrine of privity of contract upon which the Ontario Court of Appeal based its decision in *Van Patter*.

[16] It is submitted that a release is stronger than a mere covenant not to sue because the release extinguishes all future rights. The applicant's position is that the document signed by the respondent is not simply an indemnification document, as argued by the respondent, but rather a broader all encompassing release.

[17] The respondent's position is that summary judgment is not a proper remedy in this case because the release signed by the respondent does not contain a covenant not to sue and that the inclusion of an indemnification clause in that document is indicative of the releasee's foresight that it might be sued.

[18] The defendant acknowledges that an order for summary judgment dismissing the respondent's claim would be a windfall to the defendant. The defendant supports the applicant's position for an order for summary judgment and points out that the defendant has pleaded the release in its defence. It is argued that because the defendant has pleaded the release in its defence the applicant can therefore step into the defendant's shoes and bring an application for summary judgment.

[19] In *Paletta v. Agro,* [1990] O.J. No. 1417 (Ont. H.C.J.) the court dealt with two releases entitled "Final Release" and "Mutual Release Of All Claims". In each release the parties undertook to:

> ...take no action or proceeding whatsoever against any person not a party to this Release that does or could result in a claim over against the Releasees. (Q.L. p.3)

[20] The plaintiff in *Paletta* also undertook to limit the relief sought to damages for which the defendant's were solely liable. The main issue was whether the third party had a valid claim over. The court ruled that it did and held in dismissing the action that the plaintiff could not:

> ...now, a number of years after the fact, try to dilute the effects of the covenants by his letter of undertaking..." (Q.L. p.5)

[21] In *Ysselstein v. Tallon,* [1992] O.J. No. 881 (Ont. C.J. - Gen. Div.) the plaintiff was injured in a motor vehicle accident and settled with the driver (third

party) but later on sued the doctors who had failed to diagnose her broken neck. The doctors brought a third party action against the driver. The third party obtained summary judgment dismissing the plaintiff's claim against the doctors. The release in this case was entitled "Final Release" and the plaintiff agreed under this release:

> ...not to make any claim or take any proceedings against any other person or corporation who might claim contribution or indemnity under the provisions of the Negligence Act... from the person, persons or corporation discharged by this release. (Q.L. p.3)

[22] After deciding that the third party claim should not be dismissed the court held that:

> Once it is determined... that the defendants when sued in this action have the right to claim contribution or indemnity from the third party the Final Release is engaged, with the result that the third party is entitled to a judgment dismissing the action against the defendants on the ground that whatever rights the plaintiff may have had against the defendants were bargained away in the settlement, as clearly expressed in the broad and inclusive terms of the Final Release. (Q.L. p.18)
>
> ...
>
> Among the things bargained for by the third party, as part of the consideration for the settlement moneys paid to the plaintiff, was the right not to have to defend any claims arising in connection with the accident. She bought and paid for peace in that regard, and she is entitled in law to have it. (Q.L. p.19)

[23] In *Waldman (c.o.b. Eshkol Products) v. D.N. Kimberley Insurance Brokers Ltd.*, [1998] O.J. No. 4974 (Ont. C.J. Gen. Div.) the third party moved to dismiss the action or alternatively the third party claim. The release contained wording similar to those in *Paletta* and *Tallon* whereby the plaintiff agreed:

> ...not to continue or make any claims or take any proceedings against any other person or corporation who claims or might claim contribution or indemnity under the Negligence Act...or under any contractual, statutory, common law or equitable rights from the Releasee. (para. 3)

[24] The court rejected the plaintiff's argument that the third party should be summarily dismissed as disclosing no cause of action and concluded that the

release governed. This was because the action was of the type contemplated by the release as one in which another person might claim contribution.

[25] In *Van Patter v. Tillsonburg District Memorial Hospital*, [1999] O.J. No. 2477, (1999), 45 O.R. (3d) 223 the plaintiff was a passenger in a car that was involved in an accident. She settled with the driver, agreeing:

> ...not to make a claim or take proceedings against any other person or corporation who might claim contribution or indemnity under the provisions of any statute or otherwise. (Q.L. p.3)

[26] The plaintiff later discovered that the doctors had failed to diagnose a broken neck and sued them for negligence. The doctors third partied the releasees who, in turn, defended (in the main action) on the basis that the main claim was estopped or barred by the release. The defendants did not rely upon the release in their defence. The motions judge granted summary judgment dismissing the plaintiff's claim, following the reasoning in *Ysselstein*. The doctors in the *Van Patter* case, unlike those in *Ysselstein* had not pleaded the release in their defence, and conceded that they had no rights under it.

[27] The Court of Appeal reversed the chambers judge's decision on the basis of privity of contract, stating:

> ...Simply put, as the doctors were not parties to the release, they derived no rights under it... (Q.L p.9)

[28] The third party was limited to the defences available to the defendant (under the Rules of Practice). In bringing a motion for summary judgment it stepped into the shoes of the defendant - which could not rely upon the release - and so it likewise could not rely on the release.

[29] The releases in the above noted cases each referred to the right of the third party releasee to be protected against defending against a claim over. In the case at bar no such language appears. As well in each of those cases apart from the Court of Appeal decision in *Van Patter*, the main action was dismissed on the basis that the plain wording of the release precluded a claim that could result in a claim over.

[30] In *Kothke v. Ekblad*, [1999] A.J. No. 664 (Alta.C.A.) the plaintiff settled with the insurer for the driver of the car in which he was riding when an accident occurred. He then sued the driver of the other vehicle, who sought summary judgment on the basis that the release should apply. The release discharged the named releasees and:

> ...any other person, firm, or corporation charged or chargeable with responsibility or liability...from any and all claims, demands, damages, costs, expenses, loss of services, actions and causes of action, arising from any act or occurrence up to the present time and particularly on account of all personal injury, disability, property damage, loss or damages of any kind already sustained or that [she] may hearafter sustain [in consequence of the July 28, 1994 accident]...(Q.L. p.2)

[31] By the plain wording of the release, anyone whose liability to the plaintiff arose from the accident was released, including the defendant; The court held at paragraphs 4 and 8 that to hold otherwise would be a case of possible hard facts making bad law. The court rejected the plaintiff's arguments that the defendant, having given no consideration, could not rely upon the release.

[32] The release in *Kothke* resembles the Orlandello release more so than any of the other releases in the cases cited. It is in the nature of a release and discharge of claims, rather than a specific covenant not to sue. Both the applicant and defendant rely on the Supreme Court of Canada decision in *Fraser River Pile & Dredge Limited v. Can-Dive* to rebut the ratio in the Court of Appeal decision in *Van Patter*. The *Fraser River* judgment expanded an exception to the privity doctrine by which a third party beneficiary of a contract may, in some circumstances, claim benefits under the contract. The court held that a nonparty (third party beneficiary) could rely on a waiver of subrogation clause to defend against a subrogated claim.

[33] The respondent argues that the *Fraser River* case did not cite or apply the *Van Patter* decision and that it dealt with a subrogated action in a corporate or commercial setting. The respondent argues that *Van Patter* is more relevant because it dealt with a motor vehicle accident.

[34] The defendant in the present application acknowledges that it can only make this argument (third party beneficiary) at trial. In *Owen v. Zosky*, [2000] O.J. No. 4838 (Ont. C.A.), the court held that in order for the defendant to take advantage of a release to which it was not a party pursuant to *Fraser River*, it would be necessary for the defendant to await trial in order to establish the relevant facts. In

the *Zosky* case the plaintiff had settled a negligence claim against her dentist with a "Full and Final Release". The releasor agreed not to:

> ...make any claim or take any proceedings against any other person or corporation who might claim contribution or indemnity under the provisions of the Negligence Act... (para. 2)

[35] The plaintiff then sued another dentist who had been involved in the procedure out of which the claim arose. The defendant, in turn third party the releasee, who brought an application to stay the third party proceeding and the main action as an abuse of process. The motions judge stayed both actions, reasoning that the plaintiff was "seeking to resile from the terms of the release" (paragraph 8).

[36] On appeal the Ontario Court of Appeal referred to its comments in *Van Patter* as to the application of the doctrine of privity in such a situation, but went on to acknowledge that subsequently, in *Fraser River*, the Supreme Court of Canada

> carved out an exception to the privity of contract doctrine and stated that in limited circumstances, a third party beneficiary of a contract may be permitted to claim benefits accorded by the terms of that contract. (para. 6)

[37] The Court of Appeal reinstated the main action apparently because the defendants had not moved to dismiss the proceedings against them based on the release. The defendants did not appeal the dismissal of the third party proceedings. Further, the plaintiff's counsel gave an undertaking not to pursue any claim that could result in a claim by the defendants against the third party, and the third party accordingly admitted that it had no exposure from a continuation of the main action.

[38] A comparison between the release in the present case and the releases referred to in the cases pleaded discloses some moderate amount of ambiguity. Although the release in the present case purports to be a full release, it incorporates an indemnification clause. None of the cases reviewed contained a release like this. Very few contained indemnifications at all, at least as far as can be discerned from the cases, and where they did, those indemnification clauses appear to have been ignored in the face of covenants not to sue.

[39] The difficulty here is that this is not a case where it can be said that the words of the release are utterly clear and incapable of more than one interpretation. In the cases referred to by the applicant and defendant the courts have been able to conclude that the clauses before them are liable to only one interpretation. Such is not the case in the present matter.

[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. As in *Kothke v. Ekblad* the plain meaning is that:

> ...anyone whose liability...arises from [**the accident**] is released. (Emphasis Added)

[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.

[44] The release in the present case does not precisely reflect any of the releases upon which summary judgment or an abuse of process motion were granted. Virtually all of the releases in the case law referred to contain a clear covenant not to sue anyone who could then take third party proceedings against the releasee. Very few of the releases in the cases referred to contained a clause similar to the indemnify and save harmless provision in the present release. The exceptions are the cases of *Sinclair-Cockurn Insurance Brokers Ltd. v. Richards* (supra) and *Bank of Montreal v. Irwin* (1995), 124 D.LR. (4th) 73 (B.C.C.A.). Both cases involved the releases which had clear covenants not to sue as well as indemnification clauses. Unfortunately the courts did not address the indemnification aspect of the releases in any detail and it might be inferred that the indemnification clauses were regarded as meaningless in face of the clearly expressed intention not to sue.

[45] In my opinion there is an arguable issue to be tried in the present case and that relates to the scope of the release and whether or not the indemnification clause contained in that release is meaningless. The release before the court is ambiguous. There is a genuine issue of material fact which requires a trial in this matter. Accordingly the applicant's request for summary judgment is dismissed.

[46] The applicant also argues that the plaintiff's claim should be dismissed on the basis of an abuse of process under s.41(e) of the *Judicature Act* and Rule 14.25 (1)(d).

[47] Both the applicant and defendant argue that this court should follow the reasoning in *Sinclair-Cockburn Insurance Brokers Ltd. v. Richards* and issue a dismissal or a stay of proceeding of the plaintiff's action. The *Sinclair* case involved an attempt by an insurance broker to sue an ex broker for funds it had been obliged to payout on account of her fraud. The plaintiff had provided a release to the third party providing that it:

> ...shall not make any claim or take any proceedings against any other person, corporation, or other entity who might claim contribution or indemnity from---[the third party]... with respect to any matters to which this release relates, and shall indemnify...[the third party]...against any such claim. (Q.L. para. 2)

[48] The defendant sought contribution and indemnification from the third party. The plaintiff undertook not to seek recovery of amounts for which the defendant

could claim contribution from the third party. The third party, however successfully sought to stay the third party claim and a portion of the statement of claim in the main action on the ground of an abuse of process.

[49] The Ontario Court of Appeal held that the third party was entitled to all the benefits that flowed from the unqualified release, including the interest of his reputation and its interest in not being drawn into a law suit. Had the plaintiff wanted to preserve its rights against the defendant it ought to have tried to preserve such a concession in the release. The effect of a stay for an abuse of process was simply to hold the plaintiff to its bargain. It made no difference that the defendant benefited from the stay: This was reasonably foreseeable to the plaintiff when it negotiated the settlement, and there was no privity issue because it was not the defendant who was seeking the stay. The court distinguished the *Zosky* case on the basis that in that case there was no appeal of the stay of the third party claim, and the third party admitted that it had no exposure from a continuation of the main action. The court also distinguished *Van Patter*, on the basis of the different procedure in that case: an attempt by the third party to obtain summary judgment on the basis of the release, which failed because the third party was limited to the defences available to the defendant, and the defendant, not being privy to the release, could not rely upon it.

[50] In the present application the respondent agrees that the release was intended to release the named third parties and that those parties should be indemnified for any further damages or costs. It says however that since the province (defendant) was not a party to the release it cannot rely upon it. The respondent also states that pursuant to Civil Procedure Rule 17.04(1), since the defendant cannot raise any defence relying on the release, the third party cannot rely upon it. The respondent also argues that the doctrine of *contra preferentem* should apply. Both the applicant and defendant argue for an exception to the privity doctrine based on the *Fraser River* decision in order to found their claim for summary judgment arguing that if the defendant can be regarded as a third party beneficiary of the release and therefore have the release available to it as a defence that defence would also be open to the third party.

[51] This argument might carry more weight if the release in the present case was phrased in similar terms to those in most of the cases reviewed previously. Virtually all of those cases contained a specific promise not to bring any action that could lead to a claim over against the releasee. The release in the present case

however refers to indemnification but does not contain a specific covenant not to sue. It is by no means clear from the wording that the release precludes any further action by the plaintiff.

[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.

[53] The final issue is whether the third party is entitled to summary judgment on its counterclaim. The applicant argues that there is good reason to dismiss the third party claim. The applicant argues that because the release was signed before the respondent's claim against the defendant commenced, the third parties were not within the meaning of the provision of s. 3(c) of the *Tortfeasers Act,* at the time the release was signed.

[54] The defendant argues that the *Tortfeasers Act* should not be interpreted so as to support the argument that the third party, because they have been released, are not tortfeasers who are or could be liable to the plaintiff. The defendant argues that the respondent's release of the third party does not preclude the third party claim.

[55] In support of its argument on this point the third party relies upon *Westcoast Transmission Company v. Interprovincial Steel and Pipe Corporation,* [1985] B.C.J. No.943 (B.C.S.C.) and *Northland Bank v. Willson,* [1998] A.J. No. 820 (Alta. Q.B.).

[56] In *Westcoast Transmission* the third party settled with the plaintiff and obtained a release. The third party subsequently moved to have the third party claim struck. The court held that the defendant could not bring a third party action seeking indemnity. The plaintiff could not recover anything further on account of the third party's negligence. As such, the defendant could not claim contribution or indemnity from the third party.

[57] In *Northland Bank* the plaintiff bank settled with the third party auditors, giving a covenant not to sue, and agreed to indemnify them for any orders against them in third party proceedings by the defendants. When the plaintiff commenced an action against the defendant and the defendant commenced a third party proceeding, the third party applied to summarily strike the third party notices. The court held that:

> ...any distinction between a covenant not to sue and a settlement or release is immaterial for the purposes of section 3(1)(c). **of the Alberta *Tortfeasers Act***. (emphasis added) (para. 22)

[58] This section is virtually identical to s.3(c) of the Nova Scotia *Tortfeasers Act.* The effect of either a release or a covenant not to sue in *Northland Bank* was to preclude the auditors from being tortfeasers who, if sued, could be liable to the plaintiffs as required by the subsection. Since the third parties could not be liable to the plaintiffs, the defendant could not recover from them. Further, the plaintiffs represented to the court that they were only seeking the defendant's proportionate share of damages and would not seek to recover any portion of the damages that the third parties may have caused. The court held that the defendant could only be liable for his own damages. The defendant thus would not be required to pay to the plaintiffs any amount resulting from the third party's negligence, and had no claim for indemnification from the third parties.

[59] The defendant argues that the *Northland* and *Westcoast* cases have been overruled or sufficiently distinguished by subsequent cases and therefore cannot be regarded as supporting the proposition for which they are advanced by the third parties.

[60] In *British Columbia (Public Trustee) v. Asleson*, [1993] B.C.J. No. 837 (B.C.C.A.) the Court of Appeal quoted with approval the trial judge who stated that there was no reason why a plaintiff settling with one joint tortfeaser should have the affect of limiting or barring another tortfeaser's rights to contribution and indemnity under s.4 of the *Negligence Act*. So long as that defendant's rights to contribution and indemnity remain in tact, the liability of all tortfeasers remain joint and several. The court treated the *Westcoast Transmission* case as inapplicable on the basis that it was a case in which there were two parties with separate contractual duties and this case is about parties whose duties sound only in tort.

[61] The *Asleson* decision seems to suggest that *Westcoast Transmission* has been superceded. The applicant seemed to have conceded that the *Westcoast Transmission* case was superceded by the decision in *Asleson* however argued that the Alberta decision in *Northland Bank v. Willson* should be more persuasive in Nova Scotia because the Alberta tortfeasers legislation more closely resembles that of Nova Scotia's.

[62] In *Vance v. MacKenzie* (1977), 19 N.S.R. (2d) 381 (S.C.A.D.), the chambers judge had denied leave to the defendant to issue third party notices where the plaintiff's potential claim against them was barred by an expired limitation period. The appeal division held that it would be unjust to deprive the defendant of possible contribution from the third parties simply because the plaintiff's right to claim against the third parties had expired. The *Tortfeasers Act* provided a defendant with a right *sui generis* to claim contribution, accruing when the defendant's liability to the plaintiff was established. The court held that it would be "absurd" if "the cause of action given by the *Tortfeasers Act* to the appellant would be barred before it accrued (paragraphs 40-42). The defendant in this case argues that the analysis in *Vance v. MacKenzie* applies equally to a third party claim against a tortfeaser who has settled with the plaintiff.

[63] In *Fraternal Order of Eagles Winnipeg Aerie No. 23 v. Blumes*, [1994] M.J. No. 347 (Man. C.A.) the court at paragraph 35 stated that,

> ...if a claim for contribution is to succeed the person from whom recovery is sought must "have been liable" to the victim. But there is clear authority for the proposition that the execution of a release does not per se immunize from third party proceedings a party otherwise liable to the victim... If the immunity from liability arises not from the circumstances that give rise to the claim itself but from an independent transaction or settlement made after the cause of action arose, this is not a bar to the released party being sued for contribution or indemnity.

[64] In *Viridian Inc. v. Dresser Canada Inc.*, [1999] A.J. No. 633 (Alta. Q.B.) the court refused to dismiss the third party proceedings. On the facts, there were issues that arose only in the third party proceeding that needed resolution. In that case the plaintiff had undertaken not to seek recovery of amounts for which the defendant would be entitled to contribution from the third party. The court distinguished cases such as *Westcoast* and *Northland* on the basis that:

> In the cases cited to me where third party proceedings have been struck in the context of a settlement agreement between the plaintiff and the third party, it has been certain that the defendant would never be required to pay a portion of the loss exceeding its own proportionate share of the fault. That is not so here. (para. 65)

[65] These cases suggest that the third party claim is a free standing one that is not necessarily foreclosed by a settlement between the third party and the plaintiff. This is particularly the case where there is some assurance that the third party is protected, as seems to be the case in the present application. The respondent 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.

[66] The applicant's application for summary judgement under Rule 13 together with its application for dismissal or stay of proceedings under the *Judicature Act* and Rule 14 are dismissed with costs to the respondent in the amount of $1,000.00. Such costs are to be costs in the cause in any event.

_____

Cacchione, J.