2021 SCC 29 (CanLII)

SUPREME COURT OF CANADA

CITATION: Corner Brook (City) *v.* Bailey, 2021 SCC 29

APPEAL HEARD: March 23, 2021
JUDGMENT RENDERED: July 23, 2021
DOCKET: 39122

BETWEEN:

City of Corner Brook
Appellant

and

Mary Bailey
Respondent

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT: (paras. 1 to 59) Rowe J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Martin and Kasirer JJ. concurring)

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City of Corner Brook *Appellant*

v.

Mary Bailey *Respondent*

Indexed as: Corner Brook (City) *v.* Bailey

2021 SCC 29

File No.: 39122.

2021: March 23; 2021: July 23.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND AND LABRADOR

Contracts — Interpretation — Releases — Scope of release — City employee struck by car — Driver suing city — Driver and city entering into release agreement to settle action — Driver subsequently bringing third party claim against city in separate action by employee against her — City applying for summary trial on basis that third party claim barred by release agreement — Application judge staying

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claim — Court of Appeal reinstating claim — Whether special interpretive rule applies to releases — Whether application judge made reviewable error in interpretation of release.

While driving her husband's car, B struck a City employee who was performing road work. The employee sued B for injuries he sustained in the accident. In a separate action, B and her husband sued the City for property damage to the car and physical injury suffered by B. B and her husband settled with the City, and released the City from liability relating to the accident and discontinued their action. Years later, B brought a third party claim against the City for contribution or indemnity in the action brought against her by the employee. The City brought a summary trial application, on the basis that the release barred the third party claim. B's position was that it did not, because the third party claim was not specifically contemplated by the parties when they signed the release. The application judge concluded that the release barred B's third party claim against the City and stayed the claim. The Court of Appeal unanimously allowed the appeal and reinstated the third party notice.

Held: The appeal should be allowed and the order of the application judge reinstated.

There is no special rule of contractual interpretation that applies only to releases. A release is a contract, and the general principles of contractual interpretation apply. The rule set out in *London and South Western Railway v. Blackmore* (1870), L.R. 4 H.L. 610 ("the Blackmore Rule"), which stated that the general words in a

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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, has been overtaken by the general principles of contract law set out in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633. Courts are directed to 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.

The Blackmore Rule and the jurisprudence pursuant to it should no longer be referred to, as the function that it had served has been subsumed entirely by the approach set out in *Sattva*. Historically, the Blackmore Rule allowed courts to consider factual context when that was not the general rule, but this has been overtaken by a general rule that factual context is considered in interpreting contracts. Further, the Blackmore Rule has been interpreted narrowly. First, the Blackmore Rule does not allow courts to consider the subjective intentions of the parties. This is consistent with the current approach to contractual interpretation in *Sattva* which clarified that the relevant surrounding circumstances consist only 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 the time of contracting. Second, the Blackmore Rule does not preclude parties from releasing unknown claims. A release can cover an unknown claim with sufficient language, and does not necessarily need to particularize with precision the exact claims that fall within

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its scope. Accordingly, the Blackmore Rule no longer adds to or deviates from the general principles of interpretation that apply to all contracts.

Any judicial tendency to interpret releases narrowly is not a function of any special rule, but rather a function of releases themselves. Releases may tend to lead to dissonance between the words of the agreement on their face and what the parties seem to have objectively intended based on the surrounding circumstances, with greater regularity than other types of contracts. In resolving this tension, courts can be persuaded to interpret releases narrowly more so than other types of contracts, not because there is any special rule of interpretation that applies to releases, but simply because the broad wording of releases can conflict with the circumstances, especially for claims not in contemplation at the time of the release. The broader the wording of the release, the more likely this is to be so. The drafter of a release might consider wording that makes clear whether the release will cover unknown claims and whether the claims must be related to a particular area or subject matter. Also, releases that are narrowed to a particular timeframe or subject matter are less likely to give rise to tension between the words and what the surrounding circumstances indicate the parties objectively intended. Distinctions can be drawn between claims based on facts known to both parties and claims based on facts that were not known to both parties. Such distinctions may be relevant when interpreting a release and assessing whether the claim at issue is the kind of claim the parties mutually intended to release. The ultimate question is whether the claim is of the type of claim to which the release is directed.

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This will depend on the wording and surrounding circumstances of the release in each case.

With respect to the standard of review, *Sattva* explained that contractual interpretation is a fact specific exercise, and should be treated as a mixed question of fact and law for the purpose of appellate review, unless there is an "extricable question of law". Extricable questions of law in the context of contractual interpretation include the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor. The circumstances in which a question of law can be extracted will be uncommon. Whether something was or should have been within the common knowledge of the parties at the time the contract was entered into is a question of fact.

In the instant case, the application judge made no extricable errors of law warranting appellate intervention. There is no reviewable error in the application judge's conclusion that the release includes B's third party claim and his order should be reinstated. The claim comes within the plain meaning of the words of the release, the surrounding circumstances confirm that the parties had objective knowledge of all the facts underlying B's third party claim when they executed the release, and the parties limited the scope of the release to claims arising out of a particular event. Whether one approaches the matter on the basis of the Blackmore Rule or not, the result is the same, and the application judge's reliance on the Blackmore Rule is of no moment.

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Cases Cited

Applied: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; **considered:** *London and South Western Railway Co. v. Blackmore* (1870), L.R. 4 H.L. 610; *Bank of Credit and Commerce International S.A. v. Ali*, [2001] UKHL 8, [2002] 1 A.C. 251; *Biancaniello v. DMCT LLP*, 2017 ONCA 386, 138 O.R. (3d) 210; *Bank of British Columbia Pension Plan, Re*, 2000 BCCA 291, 137 B.C.A.C. 37; **referred to:** *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23; *Grant v. John Grant & Sons Pty. Ltd.* (1954), 91 C.L.R. 112; *Lyall v. Edwards* (1861), 6 H. & N. 337, 158 E.R. 139; *White v. Central Trust Co.* (1984), 54 N.B.R. (2d) 293; *Hill v. Nova Scotia (Attorney General)*, [1997] 1 S.C.R. 69; *Strata Plan BCS 327, Owners v. IPEX Inc.*, 2014 BCCA 237, 358 B.C.A.C. 124; *Privest Properties Ltd. v. Foundation Co. of Canada* (1997), 36 B.C.L.R. (3d) 155; *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63; *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.*, 2020 SCC 29; *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60; *Chartbrook Ltd. v. Persimmon Homes Ltd.*, [2009] UKHL 38, [2009] 1 A.C. 1101.

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APPEAL from a judgment of the Newfoundland and Labrador Court of Appeal (Green, O'Brien and Butler JJ.A.), 2020 NLCA 3, 443 D.L.R. (4th) 633, 48 C.P.C. (8th) 215, 58 M.V.R. (7th) 186, [2020] N.J. No. 23 (QL), 2020 CarswellNfld 23 (WL Can.), setting aside a decision of Murphy J., 2018 NLSC 177, 37 C.P.C. (8th) 40, [2018] N.J. No. 266 (QL), 2018 CarswellNfld 328 (WL Can.). Appeal allowed.

Erin E. Best and *Giles W. Ayers*, for the appellant.

J. Alexander Templeton, for the respondent.

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The judgment of the Court was delivered by

ROWE J. —

I. Introduction

[1] This appeal is about the proper approach to interpreting the scope of a release, whether there is any special interpretive rule that applies specifically to releases, and if not, how the general principles of contractual interpretation this Court set out in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, apply to the release at issue here.

[2] The respondent Mary Bailey struck David Temple, an employee of the appellant City of Corner Brook, with her husband's car. Mr. Temple sued Mrs. Bailey. In a separate action, Mrs. Bailey sued the City. Mrs. Bailey and the City settled, and Mrs. Bailey released the City from liability relating to the accident and discontinued her action. Years later, Mrs. Bailey brought a third party claim against the City for contribution or indemnity, in the action brought against her by Mr. Temple. The City says the release bars Mrs. Bailey's third party claim. Mrs. Bailey says it does not.

[3] There is no special interpretive principle that applies to releases. The decisions below refer to the rule from the House of Lords decision in *London and South Western Railway Co. v. Blackmore* (1870), L.R. 4 H.L. 610, in which Lord Westbury stated, at p. 623: "The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when

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the release was given." As I will explain, this "Blackmore Rule" has been overtaken by the general principles of contract law in *Sattva*. The Blackmore Rule has outlived its usefulness and should no longer be referred to. Any judicial tendency to interpret releases narrowly is not a function of any special rule, but rather a function of releases themselves.

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[4] In the instant case, the application judge interpreted the release broadly to include Mrs. Bailey's third party claim in accordance with *Sattva*, and his reasons should have been reviewed on a palpable and overriding error standard. As the application judge made no reviewable error in his interpretation of the release, I would allow the appeal and reinstate his order.

II. Facts

[5] On March 3, 2009, Mrs. Bailey struck Mr. Temple while driving a car owned by her husband. Mr. Temple was an employee of the City of Corner Brook, and was performing road work at the time. The Baileys commenced an action against the City for property damage to the car and physical injury suffered by Mrs. Bailey ("Bailey Action").

[6] Meanwhile, Mr. Temple commenced a separate action against Mrs. Bailey seeking compensation for the injuries he sustained in the accident ("Temple Action"). Mrs. Bailey was served with the statement of claim in the Temple Action on March 24,

2011. Once served, Mrs. Bailey brought the statement of claim to her insurance representative.

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[7] Subsequently, the Baileys and the City entered into settlement discussions via their counsel. On August 10, 2011, counsel for the Baileys wrote to counsel for the City by email. After discussing Mrs. Bailey's lingering injuries from the accident, the Baileys' counsel stated that he would be prepared to advise his client to accept $10,000 in full settlement of their claims. On August 12, 2011, counsel for the City replied. He rejected the $10,000 settlement offer, noting that his client "feels strongly on liability", but explained that his client was "aware that all litigation carries risks and costs" and was therefore prepared to make an offer of $7,500 to resolve the matter, contingent on discontinuance and execution of a full and final release to the City's satisfaction. On August 16, 2011, counsel for the Baileys said that his clients accept. The Baileys signed the release on August 26, 2011. The relevant excerpt of the release reads as follows:

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

[8] Later, on March 16, 2016, Mrs. Bailey commenced a third party claim against the City in the Temple Action, claiming contribution or indemnity from the City in the event she is found liable to Mr. Temple in his claim against her.

[9] The City brought a summary trial application pursuant to Rule 17A of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D. The City's position was that the release barred the third party claim. Mrs. Bailey's position was that it did not, because the third party claim was not specifically contemplated by the City and the Baileys when they signed the release.

III. Decisions Below

A. *Supreme Court of Newfoundland and Labrador, 2018 NLSC 177, 37 C.P.C. (8th) 40*

[10] Justice George L. Murphy concluded that the release barred Mrs. Bailey's third party claim against the City and stayed the claim. He began by acknowledging that whether Mrs. Bailey's third party claim against the City was barred depended on the interpretative approach applied to releases: the Blackmore Rule. He explained that in interpreting a release, the goal is to ascertain the intention of the parties. The court must first look to the words of the release. It may also look to the context in which the release was signed to interpret those words. The review must be carried out from an objective perspective.

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[11] The application judge concluded that based on the words of the release alone, it covers Mrs. Bailey's third party claim. However, this did not end his analysis, because the Blackmore Rule required him to consider what was in the contemplation of the parties at the time the release was signed and the specific context in which it was signed. The application judge noted that Mrs. Bailey had already been served with the Temple Action when she signed the release, and that the statement of claim in the Bailey Action demonstrated that she was aware of the facts underlying the third party claim when she signed the release. He then reviewed the correspondence between counsel leading up to the release, and concluded that the parties contemplated any and all types of claims relating to the accident.

B. *Court of Appeal of Newfoundland and Labrador, 2020 NLCA 3, 443 D.L.R. (4th) 633*

[12] The Court of Appeal unanimously allowed the appeal. The Court of Appeal concluded that the Blackmore Rule has, over time, been subsumed into the principles of contractual interpretation affirmed by this Court in *Sattva* and *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23. Rather, it is a particular application of the general approach to contractual interpretation. Whether one approaches the appeal based on the Blackmore Rule or not, the result in this case would be the same.

[13] The Court of Appeal concluded that the application judge made three extricable errors of law, in holding that: (1) what was in the contemplation of the City

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was determinative of mutual intent, (2) it was not necessary to determine what was "specially" in the contemplation of the parties, and (3) it was sufficient that the broad general wording of the release covered the third party claim when the surrounding circumstances suggested otherwise. The Court of Appeal concluded that these errors had a material effect on the result, entitling the Court of Appeal to review the decision below on a correctness standard. It reasoned that the broad phrases in the release should be considered against the more specific references to the Bailey Action, and that the pre-contract exchange of correspondence made no reference to the Temple Action or any future third party action. The Court of Appeal concluded that the words, 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. The Court of Appeal reinstated the third party notice.

IV. Submissions of the Parties

[14] The City argues that the Blackmore Rule is no longer applicable and that the release should be interpreted in accordance with the normal rules of contractual interpretation. It submits that the words of the agreement plainly describe its subject matter as all claims arising from the accident, and that there is nothing in the factual matrix that could narrow this subject matter without departing from the words of the agreement.

[15] Mrs. Bailey agrees the Blackmore Rule has been subsumed into the general principles of contractual interpretation articulated in *Sattva*, and submits that whether

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the release is interpreted using the Blackmore Rule or not, the result is the same. The release foreclosed the Baileys' right to make any claim for injuries suffered by them arising from the accident, but the release was not intended to allocate to the Baileys the City's responsibility for Mr. Temple's injuries.

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V. Issues

a) What is the law governing the interpretation of releases?

b) What is the standard of review?

c) Did the application judge make a reviewable error in his interpretation of the release?

VI. Analysis

A. *The Law Governing the Interpretation of Releases*

[16] In order properly to consider the issues in this case, I will begin the analysis that follows with an outline of the guiding rule for the interpretation of contracts as set out by this Court in *Sattva*.

[17] *Sattva* marked a significant change in the jurisprudence. Traditionally, the interpretation of contracts was a matter of law, not mixed fact and law. This was

because interpretation was seen primarily as an exercise in giving meaning to words. Circumstances were generally relevant to interpretation only where there was an ambiguity.

[18] The Blackmore Rule was formulated in the traditional period to which I have just referred. In that view, courts were reluctant to have regard to the facts surrounding the formation of a contract, as an aid to its interpretation. The words of a contract were given their "black letter" meaning. This was problematic from the view of releases; the Blackmore Rule addressed this problem.

[19] But 150 years after the *Blackmore* decision, things have changed. The facts surrounding the formation of a contract are relevant to its interpretation. The jurisprudential concerns that gave rise to the rule in *Blackmore* no longer exist. It is no longer needed. It has outlived its usefulness and should no longer be referred to.

(1) The Blackmore Rule Has Been Overtaken by *Sattva*

[20] This Court set out the current approach to contractual interpretation in *Sattva*. *Sattva* directs courts to "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": para. 47. This Court explained that "[t]he meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement", but that the surrounding circumstances "must

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never be allowed to overwhelm the words of that agreement": paras. 48 and 57. "While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement": para. 57. This Court also clarified that the relevant surrounding circumstances "consist only 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.

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[21] A release is a contract, and these general principles of contractual interpretation apply: G. R. Hall, *Canadian Contractual Interpretation Law* (4th ed. 2020), at p. 286; F. D. Cass, *The Law of Releases in Canada* (2006), at p. 71. However, in the 1870 House of Lords *Blackmore* decision, Lord Westbury set out a particular approach to the interpretation of releases, at pp. 623-24:

> 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.

[22] The appellant refers to this as the "Blackmore Rule". In *Canadian Contractual Interpretation Law*, Hall describes it as a "special rule which is superadded onto the regular ones": p. 286. This rule has deep roots, as reviewed by Lord Bingham in *Bank of Credit and Commerce International S.A. v. Ali*, [2001] UKHL 8, [2002] 1 A.C. 251, at paras. 9-16, and the High Court of Australia in *Grant v. John Grant &*

Sons Pty. Ltd. (1954), 91 C.L.R. 112; see also D. Whayman, "The modern rule of releases" (2021), *L.S.* 1 (online), at pp. 5-11; P. H. Winfield, *Pollock's Principles of Contract* (13th ed. 1950), at pp. 412-13; *Chitty on Contracts*, vol. I, *General Principles* (33rd ed. 2018), at pp. 1642-44. It is not necessary to repeat the history of the Blackmore Rule here. Suffice it to say that "[i]t is a principle long sanctioned in Courts of equity, that a release cannot apply, or be intended to apply to circumstances of which a party had no knowledge at the time he executed it, and that if it is so general in its terms as to include matters never contemplated, the party will be entitled to relief": *Lyall v. Edwards* (1861), 6 H. & N. 337, 158 E.R. 139, at p. 143, per Pollock C.B.

[23] Lord Hoffmann observed in *Ali* that judges in the 18th and 19th centuries were "less sensitive to context" and "were reluctant to admit what was called 'extrinsic evidence', that is to say, evidence of background which would put the language into context": para. 54; see also Cass, at pp. 74 and 87; *Chitty on Contracts*, at pp. 1041-43. While the Blackmore Rule would no doubt have had utility within that "black letter" framework, this is no longer the case. In *Sattva*, this Court directed judges to look to the surrounding circumstances known to the parties at the time of contract in interpreting the meaning of the words of a contract: para. 47. The Blackmore Rule, which allowed courts to consider factual context when that was not the general rule, has been overtaken by a general rule that factual context is considered in interpreting contracts.

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[24] The Blackmore Rule was adopted in Canada, but as I will explain, it was interpreted narrowly. It no longer adds anything new to the regular repertoire of contractual interpretation principles in the wake of *Sattva*. There are two ways in which the Blackmore Rule was narrowly interpreted.

[25] First, the Blackmore Rule does not allow consideration of the subjective intention of the parties. While it is not immediately obvious what "specially in the contemplation of the parties" means, La Forest J.A. (as he then was) held in *White v. Central Trust Co.* (1984), 54 N.B.R. (2d) 293 (C.A.), that this does not refer to the subjective intention of the parties, but merely permits courts to look to the surrounding circumstances to give meaning to the words the parties used. He stated that "[b]y referring to what was in the contemplation of the parties, Lord Westbury was, of course, not opening the door to adducing evidence of what was actually going on in their minds, still less to making inferences about it": para. 33. It is well-established that the Blackmore Rule does not allow courts to consider the subjective intentions of the parties: see *Hill v. Nova Scotia (Attorney General)*, [1997] 1 S.C.R. 69, at paras. 18-22; *Strata Plan BCS 327, Owners v. IPEX Inc.*, 2014 BCCA 237, 358 B.C.A.C. 124, at paras. 22-23; *Biancaniello v. DMCT LLP*, 2017 ONCA 386, 138 O.R. (3d) 210, at para. 28; Hall, at pp. 291-92; C.A. reasons, at paras. 22 and 66.

[26] Second, the Blackmore Rule does not preclude parties from releasing unknown claims. It is not immediately obvious what "a question which had not at all arisen, cannot be considered as bound and concluded by the anticipatory words of a

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general release" means. However, this too has been interpreted narrowly in a way that is consistent with ordinary contract law principles. In *Biancaniello*, the Court of Appeal for Ontario applied the Blackmore Rule and held that where sufficiently clear wording is used, releases can include claims unknown to the parties: para. 42, point 2. In reaching this conclusion, the court relied heavily on the House of Lords decision in *Ali*. In that case, Lord Bingham reviewed the jurisprudence from English and Australian courts, and concluded that "[a] party may . . . agree to release claims or rights of which he is unaware and of which he could not be aware, even claims which could not on the facts known to the parties have been imagined, if appropriate language is used to make plain that that is his intention": para. 9. Lord Nicholls agreed, and wrote, 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. [Emphasis added.]

[27] A release can cover an unknown claim with sufficient language, and does not necessarily need to particularize with precision the exact claims that fall within its scope. In entering into a release, the parties bargain for finality, or as Lord Nicholls put it, "to wipe the slate clean": *Ali*, at para. 23. The releasor takes on the risk of

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relinquishing the value of the claims he or she might have had, and the releasee pays for the guarantee that no such claims will be brought. The uncertainty or risk that is allocated to the releasor is precisely what the releasee pays for. Of course, difficulty can arise in deciding what wording is sufficient to encompass the unknown claim at issue in a given case. However, it is clear that releases can encompass such claims, and the Blackmore Rule has not been interpreted to hold otherwise.

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[28] In light of the narrow manner in which the Blackmore Rule has been interpreted, and in light of *Sattva* which explicitly directs decision-makers to consider the meaning of the words in the surrounding circumstances when interpreting any contract, the Blackmore Rule no longer adds to or deviates from the general principles of interpretation that apply to all contracts. I agree with Hall that the Blackmore Rule "is entirely consistent with the law of contractual interpretation generally": p. 286.

[29] While some Canadian appellate courts have purported to apply the Blackmore Rule, the way in which the Rule is expressed in these cases is no different from ordinary principles of contractual interpretation. For example, the Court of Appeal for British Columbia summarized the interpretive principles that apply to releases in *Bank of British Columbia Pension Plan, Re*, 2000 BCCA 291, 137 B.C.A.C. 37, at para. 17, quoting *Chitty on Contracts*, vol. I, *General Principles* (27th ed. 1994), at pp. 1074-75. Among the principles summarized, the court mentioned that a release "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". This resembles the Blackmore Rule, but it is applied in a way that is entirely consistent with the approach set out in *Sattva*. In *Bank of British Columbia*, the court interpreted a release between a bank and a former CEO broadly to include any rights the CEO might have had to a staff pension plan, even though his rights to the staff pension plan were not explicitly mentioned in the release. In other words, the staff pension plan was held to be within the contemplation or mutual intention of the parties, even though that intention was not made explicit in the release.

[30] More recently, in *Biancaniello*, the Court of Appeal for Ontario, drawing on *Ali*, distilled the principles of contractual interpretation that apply to releases, some of which also echo the Blackmore Rule. For example, the Court of Appeal noted that "[g]eneral 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": para. 42, point 3. However, as in *Bank of British Columbia*, the Court of Appeal for Ontario interpreted the release at issue in *Biancaniello* broadly. The release was between an accounting firm and its client, signed in the context of a dispute over fees, but the Court of Appeal interpreted it to include subsequently discovered negligence on the part of the firm. In other words, negligence that was unknown to the parties at the time of contract was held to be within their contemplation or mutual intention given that the claim fell within the "subject matter" covered by the release: para. 49. The way the Blackmore Rule is formulated and applied in both these cases reveals no inconsistency with the general principles of contractual interpretation.

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[31] It is true that the application of the Blackmore Rule can yield a narrow interpretation of releases, because courts can rely on it to hold that a claim that arose after the release was signed was not in the contemplation of the parties and is therefore not covered: see Hall, at pp. 288-89. For example, in *Privest Properties Ltd. v. Foundation Co. of Canada* (1997), 36 B.C.L.R. (3d) 155, the Court of Appeal for British Columbia applied the Blackmore Rule to interpret a release narrowly and hold that it did not apply to all potential future litigation. It stated, at para. 13: ". . . it appears to have been the parties' intention that by inserting the words 'from the beginning of the construction to the date of these presents', claims which later came to their knowledge would be excluded". Similarly, in *Hill*, this Court relied on the Blackmore Rule in reading a release narrowly and held that "[c]onsidering this release in the context of the expropriations proceedings it becomes clear that an essential and integral element of the consideration was the equitable interest in [the] land", and the release therefore could not constitute a bar to compensation to the appellants for the taking of their equitable interest in the land: para. 21. However, it seems to me that the same conclusion could have been reached in these cases by simply applying the principles set out in *Sattva*.

[32] Therefore, as the Court of Appeal concluded in the present case, whether one approaches the matter on the basis of the Blackmore Rule or not, the result is the same, and the application judge's reliance on the Blackmore Rule is of no moment. As I read the application judge's reasons, his conclusion about what the parties

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"contemplated" is synonymous with the language from *Sattva* about what the parties mutually, objectively intended: *Sattva*, at para. 57.

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[33] The Blackmore Rule and the jurisprudence pursuant to it should no longer be referred to, as the function that it had served has been subsumed entirely by the approach set out in *Sattva*. There is no principled reason to have a special rule applicable only to releases, in light of the contemporary approach to contract interpretation. As Lord Nicholls put it in *Ali*, at para. 26:

> . . . there is no room today for the application of any special "rules" of interpretation in the case of general releases. There is no room for any special rules because there is now no occasion for them. A general release is a term in a contract. The meaning to be given to the words used in a contract is 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. This general principle is as much applicable to a general release as to any other contractual term. Why ever should it not be?

[34] This uniform understanding of the principles of contractual interpretation is consistent with this Court's guidance in *Sattva* that "the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction": para. 47. There is no special rule of contractual interpretation that applies only to releases.

(2) Any Judicial Tendency to Interpret Releases Narrowly Is Not a Function of any Special Rule, but Rather a Function of Releases Themselves

[35] Releases tend to have certain features that may give rise to careful interpretations. Contractual interpretation requires courts to give the words of a contract their ordinary and grammatical meaning, in a way that is consistent with the surrounding circumstances known to the parties at the time of contract formation: *Sattva*, at paras. 47-48. Sometimes the ordinary meaning of the words and the surrounding circumstances come into tension, and courts must decide whether to rely on the surrounding circumstances to refine the meaning of the words, or whether doing so would impermissibly overwhelm the words of the agreements, in which case the words must override: para. 57. This tension may more often arise when interpreting releases, for two reasons.

[36] First, as Cass observes, "A distinctive feature of releases is that they are often expressed in the broadest possible words": p. 83 (footnote omitted). A general release, if interpreted literally, could prevent the releasor from suing the releasee for any reason, forever. While such a release may not be enforceable for other reasons (e.g., unconscionability), the circumstances may also often indicate that such extreme consequences are not what the parties objectively intended. As the Court of Appeal for British Columbia put it in *Strata Plan BCS 327*, "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": para. 26. This context can serve as a limiting factor to the breadth of wording found in a release.

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[37] Second, parties to a release are often trying to account for risks that at the time of contract are unknown. There is an imprecision inherent in this task; this can give rise to disagreement as to what was intended. As Lord Nicholls wrote in *Ali*, parties settling a dispute want "to wipe the slate clean", but it is not unusual for a claim to come to light whose existence was not known or suspected by either party. The emergence of such an unsuspected claim gives rise to the question of "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": para. 23.

[38] For these reasons, releases may tend to lead to dissonance between the words of the agreement on their face and what the parties seem to have objectively intended based on the surrounding circumstances, with greater regularity than other types of contracts: see Cass, at p. 89. In resolving this tension, courts can be persuaded to interpret releases narrowly more so than other types of contracts, not because there is any special rule of interpretation that applies to releases, but simply because the broad wording of releases can conflict with the circumstances, especially for claims not in contemplation at the time of the release. The broader the wording of the release, the more likely this is to be so.

[39] In *Ali*, the House of Lords unanimously agreed that it is possible for a release to include claims of which the parties were not aware at the time they signed the release. However, Lord Bingham, referencing the line of authority that includes the Blackmore Rule, stated that "in the absence of clear language, the court will be very

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slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware": para. 10. He explained that the authorities provide "not a rule of law but a cautionary principle which should inform the approach of the court": para. 17.

[40] Similarly, Lord Nicholls warned that while a release can include unknown claims, this approach "should not be pressed too far" as "the circumstances in which the release was given may suggest, and frequently they do suggest, 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": para. 28. Lord Nicholls gave the example of a mutual general release on a settlement of final partnership accounts, and explained that depending on the circumstances, such a release may be properly confined to claims arising out of the partnership, and could not be taken to preclude a claim that later came to light that tree roots from one partner's property had damaged the foundations of a neighbouring partner's house.

[41] While the House of Lords was unanimous that it is possible to release unknown claims, they did not make clear what language would be sufficient. As Lord Hoffmann pointed out in dissent, the answer is not to encourage "grosser excesses of verbiage": para. 38. Cass agrees, and writes, at p. 99: "One hopes that it is not to be expected that the release will catalogue with specificity all possible claims . . . ." Cass suggests that the drafter of a release might consider wording that makes clear whether the release will cover unknown claims and whether the claims must be related to a

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particular area or subject matter. This is a sensible approach. I would add that releases that are narrowed to a particular time frame or subject matter are less likely to give rise to tension between the words and what the surrounding circumstances indicate the parties objectively intended.

[42] *Biancaniello*, discussed above, provides an example. In that case, the Court of Appeal for Ontario applied the principles from *Ali* to interpret a release broadly to include unknown claims. At issue was a release between an accounting firm and its client signed in the context of a fee dispute. The release barred "any and all claims arising from any and all services" provided by the firm to its client through to a certain date, and "without limiting the generality of the foregoing" any and all claims, counterclaims or defences that could have been pleaded in the fee dispute action: para. 6 (emphasis deleted). Feldman J.A., writing for the court, interpreted the release broadly to include claims arising from the firm's subsequently discovered negligence. She noted that the release was limited to claims that existed up to a certain date, and to claims arising from the services provided by the accountants to their client. There was no need to further specify the types of claims that were included. She explained, at para. 49: "There is no need, for example, to say 'including tort claims, negligence claims, breach of contract claims, cost claims', etc. They are all included unless specifically excluded. The same analysis applies to unknown claims. . . . Had it said 'including known and unknown claims', that would just have been another way of saying that the release includes all claims."

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[43] Distinctions can be drawn between claims based on facts known to both parties (as in this case) and claims based on facts that were not known to both parties (as in *Biancaniello*). Such distinctions may be relevant when interpreting a release and assessing whether the claim at issue is the kind of claim the parties mutually intended to release. The ultimate question is whether the claim is of the type of claim to which the release is directed. This will depend on the wording and surrounding circumstances of the release in each case. Lord Bingham's cautionary principle from *Ali* should be understood not as a rule of interpretation, but rather an observation as to the issues that releases will tend to give rise to given their subject matter. Any judicial tendency to narrow the meaning given to broad wording is not the function of any special rule, but rather a function of the context in which releases are given. Thus, the ordinary rules for contract interpretation set out in *Sattva* apply to releases as they do to other contracts.

B. *Standard of Review*

[44] In *Sattva*, this Court also explained that contractual interpretation is a fact specific exercise, and should be treated as a mixed question of fact and law for the purpose of appellate review, unless there is an "extricable question of law". The exception is standard form contracts, which is not relevant here: see *Ledcor Construction*. Extricable questions of law in the context of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor": *Sattva*, at para. 53, quoting *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA

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80, 270 Man. R. (2d) 63, at para. 21. The circumstances in which a question of law can be extracted will be uncommon. Whether something was or should have been within the common knowledge of the parties at the time the contract was entered into is a question of fact: *Sattva*, at paras. 49-55 and 58.

[45] In the present case, the Court of Appeal held that the application judge made three errors on extricable questions of law, at paras. 50-52:

> Firstly, what was in the contemplation of the City in drafting the Release is not determinative of mutual intent.
>
> Secondly, it was in fact necessary to determine what was "specifically" contemplated by both parties.
>
> Thirdly, it was not sufficient that the broad general wording of the Release potentially covered a subsequent third party action for contribution if the surrounding circumstances suggested otherwise.

[46] I disagree that any of these constitutes an error warranting appellate intervention. While this first point may describe an error as to an extricable question of law, it is not an error that the application judge made. The application judge did consider what was objectively contemplated or intended by the City, but it is clear that he did not consider this to be determinative of mutual intent. The application judge explicitly considers what was in the contemplation of both parties beginning at para. 29. He explains that the Baileys could have negotiated the terms of the release, but that they chose not to, and he concludes that "what was in the contemplation of the parties was that Mrs. Bailey could no longer bring any claim or demand whatsoever against

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the City relating to the Accident": para. 43; see also paras. 41-42 and 44. With respect, the Court of Appeal mischaracterized what the application judge did.

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[47] The second and third points are not extricable questions of law. This Court held in *Sattva* that whether something was or reasonably should have been within the common knowledge of both parties at the time a contract was entered into is a question of fact. The Court of Appeal treated the question of how the surrounding circumstances inform the words of a contract as an "extricable question of law". This undermines the deferential approach to appellate review of contractual interpretation urged by this Court in *Sattva*. The Court of Appeal simply disagreed with the application judge's interpretation of the surrounding circumstances, characterized it as a question of law, and then substituted its own factual conclusions. This does not accord with *Sattva*.

[48] The application judge considered the surrounding circumstances, and he made a finding about what was in the contemplation or mutual intention of both parties: paras. 23 and 43. The application judge went on to conclude that it was not "necessary that the parties be specifically contemplating a particular type of claim. Instead . . . it is sufficient [that] the parties were contemplating any and all types of claims relating to a particular event such as the Accident": para. 44. That is to say, he determined that the parties were specifically contemplating any and all claims relating to the accident, including Mrs. Bailey's third party claim. Even though they may not have explicitly turned their minds to the possibility of a third party claim in particular, it was their objective, mutual intent to cover such a claim within the scope of the release. This

holding is a fact-specific application of the principles of contractual interpretation, and it was owed deference.

[49] Although it is not one of the three extricable errors of law identified by the Court of Appeal, I also point out that the Court of Appeal criticizes the application judge for failing to consider "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" given that they had delivered the statement of claim in the Temple Action to their insurers: para. 39. But this is not an error either. Mrs. Bailey's subjective knowledge of the Temple Action, or lack thereof, is irrelevant under an objective theory of contract law, because unless that knowledge was communicated to the City, it is not a "surrounding circumstance" within the "common knowledge" of the parties: *Sattva*, at para. 58. What is privately in the mind of one party could not affect how that party's conduct would appear to a reasonable observer in the position of the other: see *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.*, 2020 SCC 29, at para. 33. I make no comment on the possibility that the law may provide a remedy for the sharp practice of a releasee who intentionally does not disclose the existence of a claim to the releasor, as noted by Lord Nicholls in *Ali*, at paras. 32-33, and by Lord Hoffmann, at paras. 67-71. However, the fact that Mrs. Bailey, the releasor, may have had private knowledge of a claim is irrelevant in interpreting the release to determine whether or not she accidentally released that claim. As Lord Hoffmann observed in *Ali*, at para. 49: "It would be contrary to basic principles

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of construction for the meaning of a document to be affected by facts which were known to one party but not reasonably available to the other."

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[50] The application judge did not rely on Mrs. Bailey's subjective knowledge of the Temple Action in assessing the parties' mutual intent. He did find it "noteworthy" that Mrs. Bailey was aware or ought to have been aware of the Temple Action when she signed the release, having already been served with the statement of claim, but this observation did not form part of his analysis of "what was in the contemplation of the parties": para. 29. While not a model of clarity, he therefore avoided falling into the same error as the Court of Appeal.

C. *Application*

[51] I see no reviewable error in the application judge's conclusion that the wording of the release encompasses Mrs. Bailey's third party claim. The release includes "all actions, suits, causes of action . . . foreseen or unforeseen . . . and claims of any kind or nature whatsoever arising out of or relating to the accident which occurred on or about March 3, 2009". This wording encompasses Mrs. Bailey's third party claim, arising out of Mr. Temple's damages from the accident. If this wording is held to be insufficient to include a claim arising out of the accident, it is hard to imagine what wording would be sufficient, aside from listing every type of claim imaginable one by one (third party claims, cross claims, counter claims, subrogated claims, claims in equity and common law, statutory claims, etc.). There is no principled reason to require parties to particularize the scope of the release in this fashion.

[52] The next clause of the release affirms this broad interpretation. The contract does specifically reference "claims raised or which could have been raised in the [Bailey Action]", but it references these claims in the context of specifying that the *foregoing generality of the release is not limited to them*. This indicates that the "foregoing" is more general than claims that were or could have been raised in the Bailey Action. Otherwise the portion of the release that precedes "without limiting the generality of the foregoing" would be redundant. The application judge makes these points at paras. 21-22. There is no palpable and overriding error in his reading.

[53] There is also no palpable and overriding error in the application judge's finding that the surrounding circumstances are consistent with this reading. Both the City and the Baileys were aware that Mrs. Bailey had struck a City employee with her car, and both were aware that the other knew. This is obvious from the pleadings exchanged by the City and the Baileys in the Bailey Action. Both the City and Mrs. Bailey therefore knew, or ought to have known on an objective basis, that the City employee who had been hit may have an outstanding claim against Mrs. Bailey, or the City, or both, and that such a claim could put the City and Mrs. Bailey in an adverse position to one another, where it would be to both of their advantages to blame the damage on the other. This aspect of the factual matrix weighs in favour of interpreting the words of the release as including Mrs. Bailey's third party claim in the Temple Action. The application judge explains this at paras. 27-28 of his reasons.

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[54] The application judge concluded that "it is sufficient [that] the parties were contemplating any and all types of claims relating to a particular event such as the Accident". In other words, because the parties narrowed the subject matter of the release to claims arising out of a particular event, the application judge found no tension between the words and the surrounding circumstances. As in *Biancaniello*, the release was circumscribed, and nothing in the surrounding circumstances indicated to the application judge that the words of the release should be interpreted to depart from what on a plain reading they would mean.

[55] In its own interpretation of the release, the Court of Appeal observed that the quantum of "only $7,500" was "not inconsistent" with the conclusion that the parties intended to release only the Baileys' claims: paras. 63-64. This may be true, but the settlement quantum of $7,500 is also not inconsistent with the application judge's interpretation, and in any case, there is no evidence in the record of the City's liability against which to compare the settlement quantum.

[56] I make one final observation. The application judge also considered the pre-contract negotiations in reaching his conclusion that the parties mutually intended to release Mrs. Bailey's claim: paras. 30-38. The Court of Appeal did too, but reached a different conclusion: paras. 67-68. Neither party argued that there was anything wrong with this approach by the courts below. However, there is a longstanding, traditional rule that evidence of negotiations is inadmissible when interpreting a contract: see *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, at

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para. 100, per Côté and Brown JJ., in dissent; *Chartbrook Ltd. v. Persimmon Homes Ltd.*, [2009] UKHL 38, [2009] 1 A.C. 1101; Hall, at pp. 423-32; A. Swan, J. Adamski and A. Y. Na, *Canadian Contract Law* (4th ed. 2018), at pp. 745-48; K. Lewison, *The Interpretation of Contracts* (7th ed. 2020), at pp. 117-31; J. D. McCamus, *The Law of Contracts* (3rd ed. 2020), at pp. 809-13. Justices Côté and Brown observed in *Resolute* that this rule "sits uneasily" next to the approach from *Sattva* that directs courts to consider the surrounding circumstances in interpreting a contract: para. 100. Hall and the authors of *Canadian Contract Law* both emphasize the difficulty in drawing a principled distinction between the circumstances surrounding contract formation and negotiations.

[57] I leave for another day the question of whether, and if so, in what circumstances, negotiations will be admissible in interpreting a contract. That issue needs to await a case where it has been fully argued and is necessary in order to decide the appeal. In this case, the application judge did not consider the negotiations to be determinative in interpreting the contract one way or the other: see paras. 37-38 and 41.

[58] To conclude, there is no reviewable error in the application judge's conclusion that the release includes Mrs. Bailey's third party claim. The claim comes within the plain meaning of the words of the release, the surrounding circumstances confirm that the parties had objective knowledge of all the facts underlying

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Mrs. Bailey's third party claim when they executed the release, and like *Biancaniello*, the parties limited the scope of the release to claims arising out of a particular event.

VII. Disposition

[59] The appeal is allowed, the Court of Appeal's order is set aside and the order of the application judge is reinstated. The appellant will have its costs throughout.

Appeal allowed with costs throughout.

Solicitors for the appellant: Stewart McKelvey, St. John's.

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