COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2019/CLE/GEN/00215

BETWEEN

IRENE BURROWS

Plaintiff

AND

ISLAND HOTEL COMPANY LIMITED
d/b/a ATLANTIS PARADISE ISLAND, BAHAMAS

Defendant

Before: The Hon. Madam Justice G. Diane Stewart

Appearances: Mr. Edward Turner for the Plaintiff

Mrs. Lakeisha Hanna and Mrs. Viola Major for the Defendants

Hearing Dates: 24th, 25th, 25th June 2019

Judgment Date: 13th May, 2020

Civil - Employment - Frustration of Contract - Negligence - Wrongful Dismissal - Slip and Fall - Severance - Contributory Negligence - Safe system of work - Frustration of Employment Contract - Duty to Accommodate without incurring economic hardship - Deed of Release - Duress - Burden of Proof - Plaintiff to pay half Defendant's Costs

Held: The Plaintiff's action against the Defendant for Negligence and Wrongful Dismissal is dismissed due to the Plaintiff's execution of a Deed of Release signed on the 3Qth January, 2017 when the Defendant severed ties with the Plaintiff. The Plaintiff's contract of employment with the Defendant was not frustrated by the Plaintiff prior to the termination. The Defendant did attempt to accommodate the Plaintiff by seeking to find another position for her, however no such position was available. The Defendant's attempt does not satisfy the test for accommodation established in Island Hotel Company Limited v Cheryl Carey-Brown. The Defendant did not coerce the Plaintiff into signing the Deed of Release in order to receive her final cheque as she was given an opportunity to leave the meeting to make a phone call to discuss the same before signing the release and was also given the option to apply for a Review Board Hearing. The Defendant is awarded three quarters of its costs to be taxed if not agreed.

JUDGMENT

1. By a Specially Endorsed Writ filed 28th February, 2018 Ms. Irene Burrows ("the Plaintiff') commenced an action against Island Hotel Company Limited ("The Defendant / Hotel") for negligence and wrongful dismissal and severance pay, damages, interest and costs.

2. The Plaintiff, was employed by the **(the "Hotel")** as a Stewarding Manager and was at work on 30th March 2016 when she slipped, fell and sustained injuries to her right shoulder and knee after falling on a flight of stairs in the Hotel. She claimed that the area where she fell was a dark blind area and was wet and the Hotel neglected to erect signage to warn of the stairway.

3. As a result of the fall and the injuries sustained, she underwent surgery on her right shoulder in October 2016 and subsequently on her right knee which left her only able to perform sedentary employment tasks and unable to perform her duties as a Stewarding Manager. The Plaintiff claimed that the Defendant was unwilling to offer the Plaintiff a sedentary type of employment.

4. On 30th January, 2017 the Plaintiff was terminated by the Defendant, which she claims was wrongful. Since her termination, she was unable to obtain employment suitable to her medical condition which has caused her continuing economic hardship.

5. The Plaintiff further claimed that the severance paid to her after her dismissal of, $12,637.75, reflected compensation for line staff rather than a manager's pay and seeks the balance of $20,724.57 she says is owed to her.

6. The Plaintiff in her closing submissions sought the following awards comprising both general, special damages and interest:

1. Remainder of Termination Pay	$11,053.15
2. Special Damages	$20,430.00
3. Pain, suffering and loss of amenities	$150,000.00
4. Past Loss of Earnings	$32,922.00
5. (a) Future Loss of Earnings	$77,832.38
(b) Continued loss of earnings	$359,174.40
(c) Loss of Congenial Employment	$10,000.00
6. Smith v Manchester Award	$179,613.21
	$646,463
Interest	$38,787.83

Total $685, 251.67

7. By its Defence filed 6th April, 2018, the Hotel denied that the termination was wrongful and claimed that the Plaintiff's employment contract was frustrated by her inability to perform her required duties and that the Plaintiff was not entitled to the severance and compensation claimed.

8. It also denied that the stairway had any moisture, that there was no visibility nor that it required signage. It further denied that the Plaintiff's alleged accident and injuries were occasioned by any negligence or breach of duty of care on the part of the Hotel.

9. The Hotel put the Plaintiff to proof of any injuries and damages claimed but claimed that in any event no permanent alternative employment was available which met the Plaintiff's sedentary work requirements.

10. The Hotel alternatively claimed that the Plaintiff was contributorily negligent as she failed to take any or any reasonable care for her own safety, properly secure her footing and take reasonable care in the circumstances to avoid any injury to herself.

11. Finally the Hotel claimed that the Plaintiff discharged and renounced any right of action against the Hotel in exchange for the severance received pursuant to signing a written release on 30th January, 2017.

Agreed Statement of Facts and Issues

12. On 17th June, 2019 the parties filed an Agreed Statement of Facts and Issues. The Agreed Facts are:

    12.1 The Plaintiff is a former employee of the Defendant.

    12.2 The Plaintiff alleges that, on the 30th March, 2016, while on duty, she fell on a stairway.

    12.3 The Plaintiff's employment with the Defendant was terminated.

    12.4 The Plaintiff signed a document entitled "Release", which purports to release and discharge the Defendant from any and all claims, demands,

actions or suits arising out of or in connection with the termination of the Plaintiff's employment.

The Agreed Issues are:

12.5 Whether or not the Defendant owed the Plaintiff a common duty of care and, if so, what was the standard of the common duty of care owed.

12.6 Whether or not the Defendant was in breach of the common duty of care, whether that breach caused damage to the Plaintiff.

12.7 If the Defendant was in breach of the common duty of care, whether that breach caused damage to the Plaintiff.

12.8 If the breach caused damage to the Plaintiff, what was the damage caused.

12.9 Whether or not the Plaintiff is entitled to an award of Special Damages and, if so, in what amount.

12.10 Whether or not the Plaintiff is entitled to an award of General Damages and, if so, in what amount.

12.11 Whether or not the Release signed by the Plaintiff releases the Defendant from liability for the Plaintiff's claim for wrongful dismissal and, if not, whether or not the Plaintiff was wrongly dismissed by the Defendant.

12.12 Whether or not the Plaintiff is entitled to receive severance pay and or damages from wrongful dismissal by the Defendant.

12.13 Whether the Plaintiff is entitled to recover interest on any such damages awarded by the Court and, if so, in what amount.

12.14 Whether the Plaintiff is entitled to recover costs in connection with this action and, if so, in what amount.

13. Accordingly, the issues for the Court to determine would be:

13.1 Whether the employment contract was frustrated by the Plainitff?

13.2 Whether the Plaintiff is estopped from bringing the claim against the Hotel as a result of signing the release upon termination;

13.3 If not whether the Plaintiff's slip and fall was as a result of the Hotel's negligence;

13.4 If the Hotel breached its duty of care of the Plaintiff, what damages are owing to the Plaintiff;

13.5 Whether the Plaintiff was wrongfully dismissed by the Hotel and if so what is owed to the Plaintiff;

13.6 Whether the severance paid to the Plaintiff by the Hotel was in accordance with the Plaintiff's salary scale.

13.7 If the Plaintiff is successful in proving any of the above, what relief she would be entitled to?

The Plaintiff's Evidence

14. On the first day of trial, Counsel for the Plaintiff, Mr. Edward Turner **("Mr. Turner")** made an ex-temporae application to visit the locus in quo as he felt there were facts that could only be appreciated upon visiting the locus. Counsel for the Defendant, Mrs. Viola Major **("Mrs. Major")** initially objected but later agreed and a visit to the locus in quo was conducted on 26th June, 2019.

15. The Plaintiff as Stewarding Manager attested that her job was to ensure that a number of kitchens were set up and broken down each day, as well as to assist in transporting the necessary items to these kitchens. On the 30th March, 2016, while at work at The Hotel she slipped and fell on a dark stairway near her office, sustaining severe injuries to her right shoulder and both her knees ("the accident") which caused her to be unable to perform her duties. She blamed the accident on an accumulation of water being on the stairs, which she said occurred on a regular basis causing previous accidents that were reported but nothing had been done about it. She further stated that there were no warning signs in the area.

16. The Plaintiff stated that she was terminated by the Hotel, causing her to incur additional expenses. She further stated that the amount given for her termination was not what was lawfully due to her as she was a manager and should have received more. The Plaintiff claimed that it was the Hotel's negligence that caused her injuries and that she was forced to execute a release under duress as she was told by Mr. Marlon Bethel in the presence of Mr. Rendol Rolle that she would not receive any money if she did not sign the release.

17. As a result of her termination, her salary deductions to Bank of The Bahamas **("BOB")** stopped and caused BOB to foreclose on her home. The Plaintiff additionally stated that she had been unable obtain other employment because her legs were weak and she was not able to stand for long periods of time resulting in her having to sell lunch from home to earn a living. .

18. As Stewarding Manager, the Plaintiff was responsible for six kitchens and it was usual for her to attend each restaurant during her shift. She also had to ensure that the loading dock was properly cleaned at the end of each shift.

19. She further testified that the stairway in addition to not being well lit did not have rubber grooves or slips. The Plaintiff maintained that it was a policy of the Hotel to place a "Caution Wet Floor Sign" if there was a pipe leaking however, the Hotel did not have enough to put in that particular area and that the area was wet. It was not a policy of the Hotel to place a large container to catch any leaks but the Engineering Department should be contacted to have someone fix the leak and the area should be dried with a mop.

20. The Plaintiff further stated that if she encountered a wet floor, she would take it upon herself to place a "Caution Wet Floor Sign" and dry the wet area with rags from laundry until someone from the Engineering Department came, who would have been called.

21. After the accident she attended the Nurse's office to complete an 'Employee Work Related Accident Report', which she said was filled out by the Nurse and was not based on information that she had given her. Despite the report stating that she wore tennis, she did not wear tennis but wore heavy duty, slip resistant, leather shoes with appropriate heels. She explained that this type of shoe was necessary because the kitchen was full of grease at all times. On re-examination, the Plaintiff stated that she told the nurse that she fell from upstairs by the Stewarding Office to down in the muck, by the pastry shop because of the busted pipes overhead. She remained on sick leave from the day of the accident, 30th March 2016, up to the day of her termination, 30th January, 2017. She claimed that she signed the Employee Work Related Accident Report without knowing the contents because she was in extreme pain.

22. Immediately after the accident and attending the nurse's station the Plaintiff went to Doctor's Hospital's Emergency Room. She also attended other doctor's offices from May 2016 to September 2016. In October 2016 the Plaintiff had surgery on her right shoulder. She also needed knee surgery which she claimed that N.I.B. was not willing to pay for. However, after being shown a 17th May, 2018 Letter of Guaranty by N.I.B which showed that N.I.B had agreed that they would pay for the surgery, she accepted that they would.

23. The Plaintiff, was 51 at the time of the accident, a widow, who now cooked from home as a business and lived with one of her four children, her daughter Derene Burrows ("Ms. Burrows"). She stated that Loretta Culmer, her friend of 10 years ("Ms. Culmer"), gave her a bill for $2,400 for transporting her between April 2016 and December 2017, which has not been paid because she had no money. The bill was to cover the cost of transportation to church, the grocery store, the doctor's office, the therapist's office, to pick up medicine and occasionally to the beach daily every week.

24. The Plaintiff further stated that her daughter Ms. Burrows who was 15 at the time of the accident gave her a bill dated April 2016 for $8,400 for services rendered for in house care. Ms. Burrows would clean the house (before and after school), cook, buy groceries and assist the Plaintiff financially with money received from a summer job salary and survivor's benefit from N.I.B.

25. She claimed that her daughter was able to calculate the sum owed based on what she had received from N.I.B and what she was actually spending on the home.

26. Under cross-examination she admitted that her house was never foreclosed by BOB, as she was never removed from her home but only received a summons to attend court but she never did.

27. The Plaintiff then stated that a bill she received for $8,400 from Vancroud Darville, a man whom she dated ("Mr. Darville"), was to repay him, inter alia, for a car which he had purchased for her, money he paid towards her mortgage payments before the accident and for assisting with her care after the accident, which included mowing her lawn, fixing her fence and buying a motion light. Mr. Darville's bill was also issued in April 2016. He was to be reimbursed as his contributions were not a gift.

28. The Plaintiff admitted under cross-examination that the bills of Ms. Burrows and Mr. Darville were only created for the Plaintiff's action against the Hotel but that it only coincidental that both totalled $8,400.00. She testified that prior to Mr. Darville mowing her lawn it would be high because there would be no one to mow it.

29. The Plaintiff testified that between the months of August and October 2016, the Hotel had called her in for two meetings to bring in medical reports in order to provide them with an update on her medical status and to find out when she would be able to return to work. She stated that she was happy that they had

called because she wanted to know why they had stopped her pay. The second meeting was held after the surgery on her shoulder on 20th October, 2016 but the Plaintiff did not have the medical reports for the Hotel at that time, only a sick slip.

30. A third meeting was held on 30th January, 2017 when the Hotel presented the Plaintiff with a termination letter and cheque. (the "30th January 2017 Meeting") The cheque included the Plaintiff's notice entitlement, plus a payment of two weeks salary for each year of employment up to the maximum of 16 weeks. Upon being referred to a document entitled "Release" the Plaintiff stated that she did not sign that document but admitted that the signature looked like her signature. She claimed that she had signed another document called a Release under duress as she was told that she would not receive any money if she did not sign it. That other document she claimed was for the turning in of her uniform, radio, name tag and swipe card **(the "Hotel Property")** That document was not produced by either party in the action, but the Plaintiff admitted that it did not contain a release from liability. The Release which was produced and shown to her was accepted by her as an agreed document **(the "Agreed Release")**.

31. The Plaintiff denied asking the Hotel to prepare letters for the U.S. Embassy, Pension Fund or N.I.B on her behalf. She further denied being told that she could request a Review Hearing of her termination. She also admitted that she had had about five to six other accidents on the Hotel's property.

32. Loretta Culmer gave evidence on behalf of the Plaintiff. She knew that the Plaintiff had an operation on her knee and shoulder and that she had driven the Plaintiff around from April 2016 to December 2017.

33. Under cross examination she testified that she has been a friend of the Plaintiff for about nine to ten years. She worked at Electronic Doctors from 10:00 a.m. to 6:00 p.m. Tuesday to Saturday. Her invoice of $2,400.00 was only for services rendered on the days she was not working and on the days when she had to work she would ask someone else to take the Plaintiff around. To arrive at the amount of the invoice she and the Plaintiff took into consideration the price of a tune up and gas. They had also discussed the option of the Plaintiff renting a car in order to get around.

34. Ms. Burrows also gave evidence on behalf of her mother. She swore that her mother had an accident while employed with the Hotel after which she had an operation on her shoulder and her knee. Ms. Burrows further stated that she had to assist her mother around the house from April 2016 to December 2017 as her

mother was unable to complete her household chores since she had her accident.

35. Ms. Burrows worked during the summer after graduating from high school. She assisted by mopping, sweeping, washing dishes and ensuring the doors were locked. She had performed those tasks before the accident but had never charged her mother.

36. She had prepared the $8,400 invoice in April 2016 after her mother suggested that she should charge for the services because she knew "it took a lot out of her". The reference to past care on the invoice was a reference to work done around the house between April 2016 and December 2017. She chose the date of December 2017 because she would be turning 18 and it would then be her decision whether to charge her mother or not. The $8,400 reflected a monthly rent of $600.00 which she equated to an allowance and which she required her mother to pay even though the house they lived in was her mother's house.

37. Ms. Burrows also testified that she knew Mr. Darville as her mother's previous boyfriend. He did not mow the lawn as her mother would pay people to do it. He did not help Ms. Burrows with any of her chores and only drove the Plaintiff around a couple of times.

38. She also added that Ms. Culmer would only perform a minimum amount of chores whenever she came to visit.

DEFENDANT'S EVIDENCE

39. The Hotel relied on the testimony of two witnesses. Mr. Rendol Rolle, the Director of Stewarding **("Mr. Rolle")** and Mr. Marlon Bethel the Associate Director of Labour Relations ("Mr. Bethel") Mr. Rolle testified that after the Plaintiff's alleged fall he attempted to reach her by telephone, at first unsuccessfully but was eventually able to speak to her. He stated that after the accident, the Plaintiff went to the nurse's station for medical treatment but did not report the incident to security which was the usual procedure. He explained that the heavily trafficked stairway by the Stewarding Office was covered with rubber, non-slip covering with horizontal grooves to increase traction and was well-lit with a fluorescent strip/bar lighting throughout. It consisted of two flights of stairs, which extended from the staff only area of the basement up to a corridor on the lobby level; the stairway being located between the basement level and the lobby level is mopped once a day in the morning and a "caution wet floor" sign is placed at the entry point to the stairs when this occurs.

40. On the day of the accident there were no reports of a leaking pipe outside the stairway by the Plaintiff or any of the other Managers and in fact there were no overhead pipes at the basement or at the level containing the Stewarding Office He had received a number of sick certificates from the Plaintiff and had attended two meetings with her to attempt to ascertain her medical condition and when she would be able to return to work. The first meeting was conducted by Mr. Samuel Rahming, the Hotel's then President of Labour Relations. A medical report was received but the Hotel was not informed when she would be able to return to work. The second meeting was when Mr. Bethel informed the Plaintiff that the Hotel was parting ways with her due to non-performance of work. Mr. Rolle stated that the Plaintiff was given an opportunity to review the document entitled the Release accompanying the cheque and that the Plaintiff stated that she understood the document.

41. Under cross examination Mr. Rolle stated that he did not see the accident. He stated that there are fluorescent lights outside of the Stewarding Office and over and down the three tier stairway. On the day of the accident, he was in the Stewarding Office and noticed that all of the lights were working. He also testified that towels are not used to absorb any moisture in the area and that the towels could be on the floor having fallen out of the laundry bins because the Stewarding Office is close to the laundry. The area always had to be dry because it was where the main swipe clock for staff is located. The area is mopped once a day between 7:00 – 9:00 a.m. If there was a leak it should be included in the Manager's report.

42. Mr. Rolle stated that the procedure for reporting any accidents was to report it to a manager and then attend the Nurse's office to give a statement and if a person leaves immediately to go to the doctor then the first day back to work the incident should be reported to Investigations/security.

43.. The first meeting was conducted by Mr. Rahming who asked the Plaintiff about her health and injuries and when she would be returning to work. He also asked her to provide a letter from the doctor stating when she would be returning to work.

44. The second meeting was held with Mr. Bethel who informed the Plaintiff that the Hotel had made the decision to sever ties with her. Mr. Rolle stated that he knew the purpose of the meeting beforehand. During the meeting, Mr. Bethel showed the Plaintiff the termination letter, read it to her and asked her if she understood everything. Mr. Rolle further stated that the Plaintiff was calm during the meeting, like she expected the termination and even went out of the meeting to make a

phone call. Upon her return she said she would sign the Release. She also handed over the Hotel's Property at the same time.

45. Mr. Rolle did not recall Mr. Bethel telling the Plaintiff that she would not receive the cheque if she did not sign any documents. He also testified that the Plaintiff brought a bag to the meeting which he later found out held the Hotel's Property. He also recalled Mr. Bethel asking the Plaintiff whether she needed a resume or letter or anything else the Hotel could assist her with. He testified that the Plaintiff never asked to return to work in an alternative position.

46. The Hotel's second witness, Mr. Bethel, attested that as Associate Director of Labour Relations with the Hotel, one of his responsibilities was managing the status of employees who were on extended sick leave. In that capacity he had telephoned the Plaintiff to ask her to come in for a meeting. At that meeting in early January 2017 he asked her how she was doing and when she was expected to return to work. She was upset that she was called in from her sick leave and he advised her that the Hotel needed to know her medical prognosis. He stated that the Plaintiff wanted to know what the company was going to do for her and what she was going to get after being out for a long time. Mr. Bethel stated that the Plaintiff agreed that the Hotel could write to her doctors to request the updated medical prognosis.

47. The Hotel wrote to the Plaintiff's doctor requesting a prognosis and Mr. Bethel stated that he had tried to find alternative positions for her but there were none available for which she was suited. One of the responses from the Plaintiff's doctors came after the Hotel had severed ties with the Plaintiff. The Plaintiff was called in for a second meeting with Mr. Bethel to advise her that the Hotel was severing ties with her due to her non-performance of her duties. He advised her that there was a cheque for her which included her entitlements and two weeks salary for each year of employment up to a maximum of sixteen weeks. He also presented the Agreed Release to the Plaintiff for her signature which did not prevent her from making a future claim for the claimed injuries but only related to her termination from the Hotel.

48. Mr. Bethel maintained that the Plaintiff looked over the Release and cheque, asked to step outside to consult with someone by phone and upon her return signed the Agreed Release and accepted the cheque. He further stated that he reminded the Plaintiff that she had the option of requesting a Review Board hearing and thanked her for her years of service and a week later provided her with a letter to N.I.B, the Pension Fund and the U.S. Embassy for Visa as requested by the Plaintiff.

49. Under cross examination he spoke to the Hotel's policy on sick leave which was looked at on a case by case basis. If a person was injured in or outside the job, whenever that person returned and the physical skills were diminished, the Hotel would sometimes offer an alternative position. He further stated that employees would be welcomed back into the working field once confirmation was received from the attending physician. Mr. Bethel looked for an alternative position for the Plaintiff but because of head count restraints from the Hotel's parent company it would have been difficult. He did however check with the Cove Hotel to look for a job answering the phone which is a sedentary job, but was advised that no job was available.

50. At the time the decision was made to terminate the Plaintiff, the Hotel had not received a sick slip confirming that the Plaintiff would be off from work until February 2017. He maintained that no staff member is treated differently upon termination except a Manager's rate of pay would be higher than a staff member.

51. Mr. Bethel confirmed that Mr. Rolle was in attendance at the termination meeting but only to witness what was said and did not participate in the meeting. A week before the meeting he had discussed with the Plaintiff, by telephone, separating from the Hotel and the possible monies she would be paid upon separation. It was during that call that the 30th January, 2017 meeting was scheduled. Mr. Bethel stated that the Plaintiff seemed fine with the amount being offered to her at the meeting. She did not appear confused or angry. He maintained that there was no pressure or coercion to sign and she in fact left the meeting to make a phone call to consult with someone, and upon her return agreed to and did sign the Agreed Release. The cheque was handed to the Plaintiff and she asked for a letter for the U.S. Embassy and N.I.B. She then returned after the meeting to turn in the Hotel's Property.

52. Mr. Bethel explained that the cheque dated 27th January, 2017, showed a breakdown of the total amount paid to the Plaintiff which included her vacation pay, monies for hours worked, workman's compensation and severance less deductions for the month of January. The Plaintiff's cheque was not calculated by the statutory provisions for termination because the Hotel was of the view that the Plaintiff frustrated her contract. The Plaintiff had the opportunity to request an internal review or file a complaint, which she did not do

53. The Plaintiff did not work from the date of the accident, March 2016, to the date of her termination, 30th January, 2017. The Hotel allows twenty four sick days per year. If an employee used the full complement of sick leave at one time then the employee would be paid 100% of her salary for the first three days and for the remaining days she would receive 33% of her pay. She would then receive her sick leave entitlement from N.I.B.

SUBMISSIONS

Negligence

54. The Plaintiff alleged that because she was employed with the Hotel she was owed a duty of care which was breached by the unsafe and dangerous conditions that caused her to slip and fall on the stairs and suffer a torn right rotator cuff and injuries to both knees for which surgery was required, The injuries were continuous as she continues to suffer pain in both knees and her right shoulder. In 2015, prior to the accident, the Plaintiff had also fallen on the job injuring her knee and the present slip and fall aggravated that injury thus necessitating the surgery. The Plaintiff also admitted to falling several times before this accident.

55. The Plaintiff relied on **the Health and Safety at Work Act,, Clerk & Lindsell on Torts Paras 1 – 83 and 10 – 112 and Dawson v Murex Ltd. [1942] 1 ALL E.R. 483** in support of her claim.

56. Section 4 of the Health and Safety at Work Act **(the "Health Act")** provides;

> **"4. (1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.**
> **(2) Without prejudice to the generality of an employer's duty under subsection (1) the matters to which that duty extends include in particular –**
> **(a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;**
> **(b) arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;**
> **(c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practical; the health and safety at work of his employees;**
> **(d) so far as is reasonably practicable as regards any place of work under the employer's control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without risks;**
> **(e) the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work."**

57. She further submitted that the evidence of the Hotel as to the condition of the premises where the accident occurred, was contradicted by her evidence. Additionally, the Plaintiff suggested that at the visit to the premises, the lighting in the Stewarding Office was visibly new and that at the time of the accident the light was not working. The Plaintiff also suggested that the fluorescent lights seen during the visit were also recently improved and did not exist at the time of the accident, but if they did exist the wiring for the light would have been in the wall and not on the surface of the wall hooked up to a temporary security light, as seen during the visit.

58. The Plaintiff further submitted that she did not have to prove precisely how the accident happened when it can be shown by competent evidence that her explanation of what happened is the more probable one as Lord Greene M.R. held in the case of **Dawson v Murex Ltd. [1942] 1 ALL E.R. 483.**

59. Moreover, the Plaintiff submitted that her injuries had disadvantaged her on the open labour market causing her to be incapable of working in her pre accident employment position.

60. The Hotel submitted that it provided a safe place of employment for the Plaintiff in accordance with the duty of care owed by employers to employees which is *"not merely to warn against unusual dangers known to them, and not to the Plaintiff, but also to make the place of employment, and the plant and material used, as safe as the exercise of reasonable skill and care would permit."* **Naismith v London Film Productions Ltd. [1939] 1 ALL E.R. 794 cited with approval locally in Dawndenzza Sands v Hutchison Lucaya Ltd. SCCiv App No. 201 of 2016**.

61. It denied that it was in breach of its duty of care owed to the Plaintiff as the place of employment was "as safe as the exercise of reasonable skill and care would permit" as the stairway was well-lit and dry at all material times. In any event, as a matter of policy, there is a system in place such that when a report is made of a stairway or any area being wet, persons are immediately dispatched to dry the area and place "caution wet floor" signs and if water is leaking from a pipe a container is placed to capture the water and the engineering department is called to address the leak. The Hotel submitted that if the Plaintiff fell, it was as a result of her own negligence.

62. The Hotel submitted that the Plaintiff's pleadings lack the necessary ingredients to establish the duty and nature of care owed to the Plaintiff by the Hotel.

63. Moreover, the Hotel further submitted that the oral evidence given by the Plaintiff on the accident refuted her sworn written evidence. The Hotel also submitted that the Plaintiff's evidence that she had multiple accidents while carrying out her employment duties at the Hotel suggested that she was 'accident prone' as opposed to the accident being caused as a result of the Hotel's negligence and if she did fall it was as a result of her own clumsiness as was supported by the Employee Work Related Accident Report and relied on **Williams v Island Hotel Company Limited d/b/a Atlantis Paradise Island [Supreme Court Action No. 2002/CLE/gen/2462]**. In the alternative, if it is found that the Hotel was negligent any finding should take into account that the Plaintiff was contributorily negligent.

64. In **Williams** (supra) the Court had to determine whether to believe the plaintiff who testified that she tripped over a strip of metal which ran across a carpet in a hallway or the defence's witnesses who testified that the strip was always in place, that there were no complaints before or after the incident and that there was nothing wrong with the metal strip. The court considered the totality of the evidence, assessed the demeanor of the witnesses and considered that the plaintiff had several accidents in which she slipped and fell and hurt herself on the job. The Court found that the plaintiff was prone to accidents at work and those accidents were not caused by the negligence of the defendant.

65. As it pertains to quantum of damages, the Hotel submitted with respect to general damages that the medical documentation provided by the Plaintiff was unsatisfactory as they did not explicitly state the cause of the Plaintiff's injuries. On the question of special damages, the Hotel submitted that the three invoices submitted by the Plaintiff's Witnesses, for services rendered after her injury, were reaching, unconvincing and contradictory.

Wrongful Dismissal

66. The Plaintiff submitted that her employment contract with the Hotel was not terminated as a result of frustration and contended that it was as a result of the Hotel's own negligence that solely caused the injuries which rendered her incapacitated and unfit for work and the termination by the Hotel for frustration was wrong.

67. The Plaintiff, in her closing submissions, submitted that on the day she was terminated, she was confused because of the oppressive environment, the recent surgery and her home being foreclosed, all which caused her to be unable to process what was happening and resulting in her signing the Agreed Release to obtain the cheque. She felt isolated and abandoned by the Hotel and even though she signed the Agreed Release she wanted to ensure her option to sue the Hotel remained intact. The Plaintiff further submitted that she did not know

she was being terminated and in her cross-examination she testified to that effect.

68. Additionally the Plaintiff submitted that contrary to Mr. Bethel's evidence, a sick slip was provided to the end of December as she had had surgery in October 2016 which the Hotel just could not find and that Mr. Bethel was not aware because he came in at the end of the matter. Accordingly, she maintained that there was no good reason to fire her as her doctor had indicated that she was due back on the job in February, 2017.

69. The Plaintiff also submitted that the Hotel cannot rely on the contract being frustrated when its own negligence contributed solely to her injuries which left her incapacitated and unfit to work and seeks the remainder of her termination pay in the amount of $60,781.73,. She contended that a frustrating event must take place without blame or fault on the side of the Party seeking to rely on it.

70. The Hotel submitted that the Plaintiff's contract of employment was terminated due to the Plaintiff frustrating the contract as she was unable to perform her contractual obligations after being absent from work due to illness for nearly a year by the time she was terminated. **Notcutt v Universal Equipment Co. (London) Ltd. [1986] EWCA Civ J0314-2** Accordingly there could be no dismissal or any obligation to provide notice or pay severance.

71. The Hotel sought to obtain a report of the medical prognosis of the Plaintiff on more than one occasion, but received no answer. Further, the Hotel tried to accommodate her elsewhere but no position was available in an effort to avoid perceived discrimination against the Plaintiff while she was disabled after the accident. The Hotel should not be expected however, to go to unreasonable lengths to seek to accommodate a sick employee. In **Garricks (Caterers) Ltd. v Nolan [1980] IRLR 259 (EAT)** Slynn J stated:-

> **".....Clearly, employers cannot be expected to go to unreasonable lengths in seeking to accommodate someone who is not able to carry out his job to the full extent. What is reasonable is very largely a question of fact and degree for the Industrial Tribunal. If, here, it had been shown to their satisfaction that this temporary special arrangement could not reasonably be continued for a longer period, then no doubt the Tribunal would have been entitled to come to the conclusion that the company had done all that was reasonable."**

72. The Hotel further submitted that where a contract of employment is frustrated there is no obligation to provide notice or payment in lieu of notice, nor is there

an obligation to provide severance pay. In **G.F Sharp & Co. Ltd. v McMillan [1988] IRLR 632 EAT** the Court held:-

> **"We are equally satisfied, having regard to the terms of Section 86(1) which is the precursor and foundation of the statutory provisions in the 1996 Act with regard to the minimum periods for notice and payment in lieu thereof, that such are all concerned with situations where a contract is terminated and, by definition, do not apply when a contract is frustrated, that, by definition, having occurred through no fault or act on the part of the parties designed to achieve such a result. Payments in lieu of notice are the price the employer has to pay for terminating the contract. When a contract is terminated by operation of law under the doctrine of frustration, the relevant provisions do not apply."**

73. Additionally, the Hotel submitted that the Plaintiff was barred from bringing any action against it because she signed the Release on 30th January, 2017, which was produced and agreed by both parties in this action and which the Hotel submitted was a valid agreement of accord and satisfaction The Hotel submitted that the wording of the release is similar to the wording considered in the case of **Provenzano v Island Seas Investment Ltd/ [FP-137 of 2002]** where the Court had to determine whether a release signed by the Plaintiff was a valid agreement of accord and satisfaction. That Court held that the Plaintiff knew fully well the import of what he was signing and if there were any doubts he could have consulted an attorney before doing so because he was not under any duress to sign.

Economic Duress

74. The Plaintiff submitted that to establish economic duress, three features were required; namely

(1) illegitimate pressure or threat,

(2) which caused the victim to act as she did, and

(3) which would have caused a reasonable person in the victim's position to act in the same way.

She further submitted that the Hotel's threat not to release the cheque unless the Agreed Releases were executed established that she executed the Agreed Release under economic duress and relied on **D.C. Builders Ltd v. Rees [1965] 3 ALL ER 837**. In **D.C. Builders (supra)** the Plaintiff company was a jobbing builder which included both a decorator and a builder. They conducted work for the Defendant to the value of £482 13s. 1d. The Plaintiff sought payment from

the Defendants for several months. The Defendant's wife, knowing the financial situation of the Plaintiff told the Plaintiff that if they did not accept £300 then they would receive nothing. The Plaintiff then accepted the cheque for £300.00 which was given in settlement of the account. The Plaintiff then sued for the balance of the amount. The court upheld that there was economic duress as there was no true accord and satisfaction because the Defendant's wife put pressure on the Plaintiff to accept the money and ordered the Defendant to pay the full amount owed to the Plaintiff who was offered a lesser amount by the Defendant.

75. Similarly the Plaintiff relied on **Atlas Express Ltd. v Kafco [1989] 1 ALL ER 641**, where a small basket weaving firm contracted with a haulage company to supply Woolworth goods at 1.10 per unit. A manager of the Plaintiff, who over estimated the value of the contract, attempted to renegotiate the contract. This renegotiation however would involve the Defendant engaging other haulers which they could not afford however, because they could not afford to lose the contract they agreed to a price increase. The Court held that the Defendant's agreement to alter the contract was procured through economic duress.

76. The Hotel submitted that before the Plaintiff signed, she was given an opportunity to review, consider and consult on the Release and she was not under duress when she signed, thus she is bound by it and estopped from asserting a further claim for further compensation. Mr. Bethel denied telling the Plaintiff that if she did not sign the Release she would get nothing. See **Adderley et al v Bahamas Oil Refining Company International Limited (trading as Vopak Terminal Bahamas) [Supreme Court Action No. 2009/CLE/gen/fp/283]**.

DECISION

77. This Court is of the view that the main issues to be decided are whether or not the Plaintiff's employment contract was frustrated and whether or not the Plaintiff was estopped from bringing this claim against the Hotel after signing the release on 30th January, 2017. If the Court finds that the employment contract was frustrated or that the Plaintiff was estopped from bringing any claim as a consequence of her signing the Agreed Release, then the remaining issues would fall away. Conversely, if the Court were to find otherwise, then the remaining issues would need to be determined.

Frustration

78. In **Island Hotel Company Limited v Cheryl Carey-Brown SCCivApp No. 13 of 2017**, the Court of Appeal set out the guidelines to be followed when considering whether an employee may be dismissed for frustration of an employment

contract. In considering whether to dismiss an employee, Acting Barnett JA provided a helpful analysis of authorities and legislation of other jurisdictions when addressing the issue. He stated:-

> **"10. In our view, the modern law with respect to the doctrine of frustration in employment contracts in the circumstances of an employee's disability is summed up in the decision of the English Employment Appeal Tribunal in Warner v Armfield Retail & Leisure Limited [2013] All E.R [2104] ICR 239.**
>
> **11. The Appeal Tribunal confirmed the position as set out in Egg Stores v Leibovici [1977] ICR 260. In the Egg Stores case the court said that in considering whether an employment contract has been frustrated as a result of an employee's disability a court must take into account**
>
> **(1) the length of previous employment,**
>
> **(2) how long it had been expected that the employment would continue,**
>
> **(3) the nature of the job,**
>
> **(4) the nature, length and effect of the illness or disabling event,**
>
> **(5) the need of the employer for the work to be done and the need for a replacement to do the job,**
>
> **(6) the risk to the employer of acquiring obligations in respect of redundancy payments or compensation for unfair dismissal to the replacement employee,**
>
> **(7) whether wages have continued to be paid,**
>
> **(8) the acts and the statements of the employer in relation to the employment, including the dismissal of, or failure to dismiss, the employee, and**
>
> **(9) whether in all the circumstances a reasonable employer could have been expected to wait any longer.**
>
> **12. The Appeal Tribunal then considered how those factors should be modified to take into account the provisions of the English Equality Act which had been enacted in 2010 subsequent to the decision in the Egg Stores case.**
>
> **13. The material part of the Equality Act for the purposes of an employment contract is in Part 5 Chapter 1 section 39 of the Act. It provides:**
>
> **"39 Employees and applicants**
> **(2) An employer (A) must not discriminate against an employee of A's (B)— 9**
>
> **(a) as to B's terms of employment;**
>
> **(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;**
>
> **(c) by dismissing B;**
>
> **(d) by subjecting B to any other detriment. [Emphasis added]**

14. Section 15 of the Equality Act, 2010 then defines discrimination in relationship with disability. It provides:

> 15 Discrimination arising from disability
> (1) A person (A) discriminates against a disabled person (B) if—
>
> > (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> >
> > (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

15. Then section 39(5) provides that a "duty to make reasonable adjustments applies to an employer."

16. That duty to make adjustment is defined in section 20 of the equality Act. It provides:

> "20 Duty to make adjustments
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. 10 (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid."

17. After considering those provisions of the Equality Act 2010, the Employment Appeal Tribunal concluded:

> "In the case of a disabled person, before the doctrine of frustration can apply there is an additional factor which the tribunal must consider over and above the factors already identified in the authorities--namely whether the employer is in breach of a duty to make reasonable adjustments. While there is something which (applying the provisions of the Equality Act 2010) it is reasonable to expect the employer to have to do in order to keep the employee in employment the doctrine of frustration can have no application." [Emphasis added]

18. The Equality Act 2010 is not part of the laws of The Bahamas.

19. However, sections 6 and 7 of the Employment Act provide:

> 6. No employer or person acting on behalf of an employer shall discriminate against an employee or applicant for employment on the basis of race, creed, sex, marital status, political opinion, age or HIV/Aids by-
>
> (a) refusing to offer employment to an applicant for employment or not affording the employee access to opportunities for promotion, training or other benefits, or by dismissing or subjecting the employee to other detriment solely because of his or her race, creed, sex, marital status, political opinion, age or HIV/Aids;
>
> (b) paying him at a rate of pay less than the rate of pay of another employee, for substantially the same kind of work or for work of equal value performed in the same establishment, the performance of which requires substantially the same skill, effort and responsibility and which is performed under similar working conditions except where such payment is made pursuant to seniority, merit, earnings by quantity or quality of production or a differential based on any factor other than race, creed, sex, marital status, political opinion, age or HIV/Aids;
>
> (c) pre-screening for HIV status: 11 rovided that this section does not affect any other law or contract term which stipulates a retirement age.
>
> 7. Section 6 shall apply mutatis mutandis to disabled employees unless the employer can show that the job requirements relied on as grounds for hiring the disabled person at a lesser rate of pay are reasonable or the disabled person cannot be accommodated without undue hardship. [Emphasis added]

20. In the Warner case the Tribunal found that the employer was aware of its duty to make adjustments and that it had discharged that duty.

21. In our view the analysis of the law with respect to the doctrine of frustration in relation to employment contracts in The Bahamas is similar to the law as expressed in Warner v Armfield, substituting the provisions of sections 6 and 7 of the Employment Act for the provisions of the Equality Act of England. That is to say, in the case of a disabled person, before the doctrine of frustration can apply, in addition to the factors identified in the Egg Stores case, a court must consider whether the employer is in breach of his duty to accommodate. An employment agreement cannot be held to be frustrated by an employee's disability unless the employer can show that he could not accommodate the disabled employee without incurring undue hardship...

30. The issue is whether the appellant in these circumstances could rely on the doctrine of frustration as bringing the employment contract to an end.
Did the appellant discharge its duty to accommodate?

31. Unlike the English Equality Act which defined the "duty of adjustment", the Employment Act does not define or give any indication as to what is meant by the duty to accommodate. However, the concept of the "duty to accommodate" employees with a disability unless it causes undue hardship is not peculiar to Bahamian law...

33. The American with Disabilities Act provides examples of what is meant by "reasonable accommodation". It provides:

> " (9) Reasonable accommodation

The term "reasonable accommodation" may include-

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." [Emphasis added]

34. That statute also goes further and defines "undue hardship" as follows:

"(A) In General

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered.

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity."

35. Regrettably our Employment Act does not provide similar guidance as to what is meant by 'reasonable accommodation' and/or 'undue hardship'.

37. In a very helpful article "The Duty to Accommodate in the Canadian Workplace" Professor Michael Lynk of the Faculty of Law of the University of Western Ontario summarized the Canadian jurisprudence on the subject. He said:

1. Leading Principles of Accommodation

The essence of the duty to accommodate is straight-forward to state: employers and unions in Canada are required to make every reasonable effort, short of undue hardship, to accommodate an employee who comes under a protected ground of discrimination within human rights legislation. In most cases, the protected ground requiring an accommodation is a disability, although recent accommodation cases have involved other grounds such as religion, gender, and race.

While the general rule is easy to state, the outer boundaries of accommodation are much harder to determine. But this much is clear to

> **date: the duty requires more from the employer than simply investigating whether any existing job might be suitable for a disabled employee. Rather, the law requires an employer to determine whether existing positions can be adjusted, adapted or modified for the employee, or whether there are other positions in the workplace that might be suitable for the employee. The employer must accommodate up to the point of "undue hardship". While there is no single definition in law of this term, the various decisions on accommodation make it clear that this effort must be substantial. The case law has clearly said that the employer's must show that its attempts to accommodate were "serious", "conscientious", "genuine", and demonstrated its "best efforts." The Supreme Court of Canada in 1999 endorsed this threshold, stating that employers must establish that it is "impossible to accommodate individual employees ...without imposing undue hardship." Once the employee has established a prima facie case that she or he has a mental or physical disability that requires employment accommodation, the burden then shifts to the employer to prove that every reasonable effort was made to accommodate the employee's disability."[Emphasis added]**
>
> **39. As we have said earlier, in determining whether a contract has been frustrated as a result of an employee's disability we are obliged to take into account whether the employer has discharged its duty to accommodate."**

79. In Carey-Brown The Court of Appeal found that the contract had not been frustrated.

80. The burden therefore rests on the Hotel to prove that it took the necessary steps to attempt to find reasonable accommodation for the Plaintiff who is disabled as a result of her accident, suitable to her skills and disability that would not cause economic hardship. Additionally, the Court must consider the factors as outlined in **Eggs Store** before determining whether there was frustration of the contract.

81. I now consider the factors that must be taken into account when deciding whether or not the Plaintiff's employment contract was frustrated.

81.1 Length of previous employment

81.1.1 The Plaintiff commenced her employment with the Hotel on 25th July, 2005. She had been employed 11 years and 6 months.

81.2 How long it had been expected that the employment would continue

81.2.1 There was no evidence to suggest that there was any reason to terminate the Plaintiff if the accident had not occurred and it would be safe to say that the Plaintiff would have continued with the Hotel until her retirement.

81.3 Nature of the Job

81.3.1 The Hotel's Job Description of a Stewarding Manager lists the main duties as including *inter alia*, inspecting kitchens and storerooms, ensuring good safety practices and correct use of cleaning chemicals, setting up and organizing work stations with designated supplies, stocking the kitchen lines and service areas, organizing the break down area, maintaining cleanliness and organization and transporting mats and garbage containers etc.

81.3.2 The Plaintiff testified that she was responsible for the overseeing of a number of kitchens on the Hotel's property and if her staff was late then she would set the kitchens up herself. From the evidence given, it is clear that even though the Plaintiff's role was more of a supervisory one, on occasion she would still be required to physically assist the staff with setting up the kitchens to ensure that the required tasks were performed. The tasks would require full mobility on the part of the Plaintiff. Additionally, overseeing numerous kitchens on the Hotel's property would require a significant amount of walking which also necessitated full mobility.

81.4 Nature, length and effect of the illness or disabling event

81.4.1 The Plaintiff fell at work on 30th March, 2016. From the day of the accident until the day she was released on 30th January, 2017 she did not return to work due to her injuries sustained as she claimed that she was unable to work as she usually did.

81.4.2 The Plaintiff produced medical letters which confirmed that she had a torn rotator cuff for which she had physical therapy and surgery on 20th October, 2016. On 1st November, 2016, Dr. Robert L. Gibson sent a letter to the Hotel confirming the injury and informing the Hotel that if her job required her to lift more than 10lbs she was expected to require a minimum of four post-operative months prior to her return to work. The Plaintiff's job then would have required her to lift more than ten pounds and so she would have been expected to have a minimum of four months recovery from the date of surgery, after which she would then begin physical therapy and would continue the therapy until she was fit to resume her pre-injury job. At the time of termination the Plaintiff was not fit to return to her regular employment.

81.4.3 In addition to the rotator cuff injury the Plaintiff was being treated for chronic bilateral knee pain with a persistent Baker's cyst. Dr. Gibson further stated that she had not yet arrived at optimum recovery and

follow up treatment was required. This confirmed that the Plaintiff was still not fit for work on 30th January, 2017 when she parted with the Hotel and in fact at July 2017 she was still not fit.

81.5 Need of Employer for work to be done and need for a replacement to do the job

83.5.1 There was no evidence presented by the Hotel that the Plaintiff's job was not being done while she was on sick leave.

81.6 The risk to the employer of acquiring obligations in respect of redundancy payments or compensation for unfair dismissal to the replacement employee

83.6.1 If the Hotel terminated the Plaintiff while on sick leave, it stood the risk of incurring liability for wrongfully dismissing the Plaintiff.

81.7 Whether wages have continued to be paid

83.7.1 The Plaintiff testified that the Hotel paid 33% of her salary from April to September 2016. Thereafter she only received money from N.I.B. The Hotel however submitted that the Plaintiff received the reduced salary until 2017. On 4th November, 2016 the Director of Compensation and Benefits wrote on behalf of the Plaintiff that she was currently earning $690.82 per week, suggesting that she was receiving her salary after September 2016.

81.8 The acts and the statements of the employer in relation to the employment, including the dismissal of, or failure to dismiss, the employee

81.8.1 Mr. Bethel, testified that he made contact with the Plaintiff in an attempt to follow up on her medical prognosis. He also asked the Plaintiff if the Hotel would be able to contact her doctors to do so and by letters dated 31st October, 2016, 11th January, 2017 the Hotel wrote to the Plaintiff's doctors to ascertain her medical prognosis.

81.8.2 Mr. Bethel testified that the Hotel made an attempt to accommodate the Plaintiff with another position at the Cove however there was no position available and the Hotel was under a head count restraint.

81.9 Whether in all the circumstances a reasonable employer could have been expected to wait any longer

83.9.1 The Hotel paid the Plaintiff a portion of her salary while she was on sick leave, made an attempt to find another position within the Hotel and even made attempts to confirm her medical prognosis to accommodate her. At the time of the 30th January, 2017 meeting the Plaintiff could not confirm when she would be able to return to work as the Stewarding Manager.

82. The Hotel submitted that the Plaintiff was unable to perform her duties as a Stewarding Manager. This evidence was not rebutted by the Plaintiff and the court accepts that the Plaintiff could not perform her duties as a Stewarting Manager.

83. Mr. Bethel also stated that he tried to find an alternative position within the Hotel but there was no position available to which the Plaintiff was suited. He stated that the Hotel was under head count constraints by its parent company but he had checked with the Cove to look for a sedentary job answering the phone, however but was informed that no position was available. He added that obtaining the medical reports would have been helpful as they would have helped him understand whether the Plaintiff could have returned to her position or if another position would have been better suited. It must be noted that prior to January, the Hotel had the November report of Dr. Gibson which spoke of the nature of the injury.

84. Based on the evidence given and a review of the documents produced, I am satisfied that at the time of termination the contract was not frustrated as the Hotel's attempt to find alternative employment only comprised a phone call to the Cove to enquire whether there was a position available for the Plaintiff to answer the telephone. The Hotel is required to determine whether the Plaintiff's existing position could be adjusted, adopted or modified and there is no evidence that this was done after which they should seek to accommodate her elsewhere. Finally, the only evidence of "undue hardship" was the existence of a "head count constraint". The Plaintiff was already hired so the head count would not have changed. The Hotel did not satisfy the requirements for proving frustration as set out in **Eggs Store**

Release / Economic Duress

85. I am satisfied that the Plaintiff signed the Agreed Release on the 30th January, 2017. The Plaintiff first stated that she did not sign this Release but later admitted that it was signed by her as a result of the duress of Mr. Bethel who had told her that she could not receive her severance check if she did not sign the Release.

Mr. Bethel categorically denied that he coerced her into signing the Release. There was no other document produced by the Plaintiff to evidence the "second" release. Additionally, the Plaintiff in her closing submissions admitted to signing this Agreed Release because she was in a confused state of mind at the time. The Agreed Release is set out below.

RELEASE

I, IRENE BURROWS, in consideration of the sum of Twelve Thousand Six Hundred and Thirty Seven Dollars and Seventy Five Cents ($12,637.75) (the sufficiency and receipt of which is acknowledged) do hereby release and discharge ISLAND HOTEL COMPANY LIMITED its agents, subsidiaries and assigns from any and all claims, demands, action or suits of any kind or nature whatsoever arising out of or in connection with the termination of my employment on the 31st December 2016, howsoever arising and confirm that I have no further matters outstanding with the Company as regards my employment and the termination thereof.

IN WITNESS WHEREOF I have hereto set my hand
and seal this 30th day of January, 2017

Signed IRENE BURROWS

Witnessed by Marlon Bethel

86. In **Ferguson and another v. West Bay Management Limited (t/a Sandals Royal Bahamian Spa Resort and Offshore Island) - [2019] 1 BHS J. No. 3**, the Plaintiffs, upon being terminated, signed releases preventing them from bringing any further action against the Defendant. The Plaintiffs then brought an action for, *inter alia*, wrongful dismissal against the Defendant contending that the releases were signed under duress. Winder J dismissed the Plaintiff's claim on the ground that there was no evidence to suggest that they were coerced into executing the releases. I rely on the dicta therein and refer particularly to paragraphs 22 - 24 of his judgment where he stated:-

> **"22. As to the question of signing the documents under duress, I rely on the dicta of *Osadebay JA* in *Bahamas Electricity v Smith* [2007] 5 BHS No. 244 at paras 47-52. *Osadebay JA* relied on the Privy Council decision in Pao On and ors v Lau Yin Long where Lord Scarman delivering the decision of the Board stated:**

Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree with the observation of Kerr J. in *The "Siboen" and the "Sibotre"* [1976] 1 Lloyd's Rep. 293 at p. 336 that in a contractual situation commercial pressure is not enough. There must be present some factor "which could in law be regarded as a coercion of his will so as to vitiate his consent": *loc. cit.* This conception is in line with what was said in this Board's decision in *Barton v. Armstrong* [1976] AC 104 at p. 121 by Lord Wilberforce and Lord Simon of Glaisdale-- observations with which the majority judgment appears to be in agreement. In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognised in *Maskell v. Homer* [1915] 3 K.B. 106, relevant in determining whether he acted voluntarily or not.

23. I find that there is no evidence from which any conclusion can reasonably be drawn that either of the plaintiffs were coerced into executing the Deed of Release or that duress in any form was exerted on either of them to cause them to execute the deed of release. There was no evidence or outcry as to the requirement to execute the deed either at the time of execution or thereafter. The evidence of Williams, which was not contested, was that the first time the defendant became aware that there was a problem was the receipt of the Writ of Summons commencing this action."

87. The burden of proving that the Plaintiff did not execute the Release under duress falls on the Hotel as established in the Privy Council decision of **Alexander Barton v Alexander Ewan Armstrong and others [1976] A.C. 104**. In **Barton**, the appellant entered into an agreement by deed executed on January 17, 1967 with the respondent agreeing terms on which the appellant would buy out the respondent's interest in the company. On January 10, 1968, the appellant brought a suit in equity against the respondent and other interested parties alleging that the respondent had coerced him into agreeing to the matters dealt with in the deed by threatening to have him murdered and by otherwise exerting unlawful pressure on him. The appeal was allowed and the Board held that:

"(1) that the equitable rule which enabled a contract entered into as a result of fraudulent misrepresentation to be set aside, applied in cases of duress so that if the respondent's threats were a reason for the appellant executing the deed he was entitled to relief even though he might well have entered into the contract if the respondent had uttered no threats to induce him to do so; and

(2) That it was for the respondent to prove that the threats and unlawful pressure did not in fact contribute to the appellant's decision to sign the

deed and, since the proper inference to be drawn from the facts found was that although the appellant might have executed the deed even if the respondent had not made any threats, the threats and unlawful pressure did in fact contribute to the appellant's decision to sign the deed, the deeds were executed under duress and were void so far as the appellant was concerned."

88. The Plaintiff alleged that she signed the agreed release under duress. Mr. Bethel stated that on a call days prior to the Plaintiff's termination on 30th January, 2017, he had discussed the Plaintiff's termination with her after the Plaintiff asked what the Hotel would do for her based on her being off sick for such a long time. Additionally, the Plaintiff while in the meeting was given an opportunity to consider the offer being presented to her as she was able to freely leave the meeting to make a phone call to consult before returning to sign the Agreed Release and receive the cheque. I am satisfied that the Plaintiff had the opportunity to seek independent advice on whether she should sign the Agreed Release or not before doing so, and the fact that she left and subsequently returned to the meeting to accept the cheque and sign the release indicated her consent to do so. She could have refused to sign and not return to the meeting but she did not.

89. Both of the Hotel's witnesses testified that the Plaintiff did not seem uneasy or confused. Mr. Bethel testified that he informed the Plaintiff that she could apply to the Hotel's Review Board to review her decision which the Plaintiff chose not to do. Mr. Bethel also denied stating that the Plaintiff would not receive anything if she did not sign the Agreed Release. The Plaintiff also agreed the Agreed Release in the Agreed Bundle of Documents as opposed to objecting to the automatic inclusion of the Release and did not provide the second document which she claimed she had signed.

90. The signature on the Agreed Release appears to be the same as the Plaintiff's signature on her Witness Statement and she in fact admitted that it looks like hers. I am satisfied that the Agreed Release is the only release which the Court has to make a determination on and that it accompanied the cheque which the Plaintiff received on the date of termination. I am also satisfied that the Hotel discharged its burden by proving that the Hotel did not coerce the Plaintiff into signing the Release and find that the evidence of the Hotel is to be preferred.

91. The terms of the Agreed Release are clear. By accepting the cheque and by signing the Agreed Release, the Plaintiff agreed not to commence any claims, demands, action or suits of any kind or nature whatsoever arising out of or in connection with the termination of her employment. She was not coerced into signing it. She voluntarily signed it.

92. As I have found that the Plaintiff's employment contract with the Hotel was not frustrated, the Plaintiff should have been terminated pursuant to the provisions of the Employment Act for wrongful dismissal. The question which arises however, is whether the Agreed Release is valid in light of the finding that there was no frustration of the contract.

93. In **Bank of Credit and Commerce International SA v Ali and others - [2001] UKHL 8** addresses the enforceability of a release. The main issue for determination by the House of Lords was whether an event not contemplated by the parties at the time a release was signed could be actionable after its dual execution. The Law Lords in their judgments however, discussed what should be considered when deciding whether or not a release is valid and whether any future claims could be commenced after the release was signed.

94. Lord Bingham of Cornhill held : -

> **"[8] I consider first the proper construction of this release. In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified. The general principles summarised by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, [1998] 1 WLR 896, at 912-913 of the latter report apply in a case such as this."**

95. Lord Nicholls of Birkenhead also stated:-

> **"[22] This appeal raises a question of interpretation of a general release. By a general release I mean an agreement containing widely drawn general words releasing all claims one party may have against the other. The release given by Mr Naeem was of this character. Mr Naeem accepted a payment from BCCI 'in full and final settlement of all or any claims . . . of whatsoever nature that exist or may exist'.**
>
> **[23] The circumstances in which this general release was given are typical. General releases are often entered into when parties are settling a dispute which has arisen between them, or when a relationship between them, such as employment or partnership, has come to an end. They want to wipe the slate clean. Likewise, the problem which has arisen in this case is typical. The problem concerns a claim which subsequently came to light but whose existence was not known or suspected by either party at the time the release was given. The emergence of this unsuspected claim gives rise to a question which has confronted the courts on many occasions. The question is whether the context in which the general release was given is**

undermined the foundations of his neighboring partner's house. Echoing judicial language used in the past, that would be regarded as outside the 'contemplation' of the parties at the time the release was entered into, not because it was an unknown claim, but because it related to a subject matter which was not 'under consideration'.

[29] This approach, which is an orthodox application of the ordinary principles of interpretation, is now well established. Over the years different judges have used different language when referring to what is now commonly described as the context, or the matrix of facts, in which a contract was made. But, although ex-pressed in different words, the constant theme is that the scope of general words of a release depends upon the context furnished by the surrounding circumstances in which the release was given. The generality of the wording has no greater reach than this context indicates."

96. The question therefore is what is the effect of the Release where the Plaintiff did not frustrate her employment contract and whether she would be entitled to receive any further payments. As held in Bank of Credit and Commerce International SA v Ali and as upheld in **Thompson v Bradford Grand Bahama Limited SCCivApp & CAIS No. 49of 2014,** the object of the court is to give effect to what the contracting parties intended by ascertaining their intention, reading the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. I am satisfied that the Release addressed the settlement of all obligations arising out of the termination of her employment, whether there was frustration of the employment contract or not. The Release was a general release and as such contemplated settlement of any obligations owed by the Hotel to the Plaintiff arising out of the termination.

97. As for the Plaintiff's claim against the Hotel for negligence, as earlier discussed I found the Plaintiff's evidence with respect to the accident to be unreliable and contradictory. I find that the oral evidence of the Plaintiff was contradictory of her written evidence. Further her evidence describing the area where she fell was contradicted by the visit to the area. She gave the perception that the stairway where the accident occurred was a dark dismal stairway which was seldom used by her or any of the Hotel's staff. However, upon the visit to the locus in quo I was satisfied that even if the Plaintiff fell down the stairway she could not have landed where she claimed she landed as the corridor was down two flights of stairs which were "L" shaped and around a corner and I was not satisfied that the lighting was inadequate. I saw that there were rubber treads on the stairs which did not appear to be new and there was sufficient lighting. Further I did not notice any pipes overhead.

apt to cut down the apparently all-embracing scope of the words of the release.

[26] Further, 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?

[27] That said, the typical problem, as I have described it, which arises regarding general releases poses a particular difficulty of its own. Courts are accustomed to deciding how an agreement should be interpreted and applied when unforeseen circumstances arise, for which the agreement has made no provision. That is not the problem which typically arises regarding a general release. 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. For instance, a mutual general release on a settlement of final partnership accounts might well preclude an erstwhile partner from bringing a claim if it subsequently came to light that inadvertently his share of profits had been understated in the agreed accounts.

[28] This approach, however, should not be pressed too far. It does not mean that once the possibility of further claims has been foreseen, a newly emergent claim will always be regarded as caught by a general release, whatever the circumstances in which it arises and whatever its subject matter may be. However widely drawn the language, the circumstances in which the release was given may suggest, and frequently they do suggest, that the parties intended or, more precisely, the parties are reasonably to be taken to have intended, that the release should apply only to claims, known or unknown, relating to a particular subject matter. The court has to consider, therefore, what was the type of claims at which the release was directed. For instance, depending on the circumstances, a mutual general release on a settlement of final partnership accounts might properly be interpreted as confined to claims arising in connection with the partnership business. It could not reasonably be taken to preclude a claim if it later came to light that encroaching tree roots from one partner's property had

undermined the foundations of his neighboring partner's house. Echoing judicial language used in the past, that would be regarded as outside the 'contemplation' of the parties at the time the release was entered into, not because it was an unknown claim, but because it related to a subject matter which was not 'under consideration'.

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98. Accordingly, I am not satisfied that it was the negligence of the Hotel which caused the Plaintiff's accident. The Plaintiff did admit that she had fallen several times previously and that she had bad knees which hampered her mobility.

99. The Plaintiff is estopped from bringing this claim against the Defendant for wrongful dismissal as she executed a release voluntarily. The action for negligence also fails.

100. The Hotel is entitled to three quarters of its costs of the action to be taxed if not agreed.

Dated this 18th day of May 2020

G. Diane Stewart
Justice