JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 49 OF 2007

BEFORE: **THE HON. MR. JUSTICE SMITH, J.A.**
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MISS JUSTICE SMITH, J.A. (Ag.)

BETWEEN	**SPANISH TOWN FUNERAL HOME LIMITED**	**APPELLANT**
AND	**ELAINE DOTTING**	**RESPONDENT**

Mr. Kevin Williams, instructed by Grant, Stewart, Phillips and Co. for the Appellant.

Ms. Georgette Scott, instructed by Caribbean Advocates for the Respondent.

January 14, and January 23, 2008

SMITH, J.A.

I have read in draft the judgment of Cooke, J.A. I entirely agree with his reasons and conclusions and there is nothing further I wish to add.

COOKE, J.A.

1. The background to this case is set out in the introductory paragraph of the judgment of McDonald-Bishop, J. (Ag.) which reads:

> "1. The facts of this case are unusual and are not so pleasant. The claimant's husband died on February 13, 2003 while the claimant (respondent) was abroad.

> His body was taken to the second defendant's (appellant's) funeral home by his children for storage pending the claimant's (respondent's) arrival for proper funeral arrangements to be made. When the children returned for the body of the deceased, it was discovered that it had badly deteriorated almost beyond recognition. The claimant, upon her arrival on the island, also viewed the remains of her late husband. Upon seeing the body, she fell ill and according to her averments, as supported by the medical report of a consultant psychiatrist, she suffered, inter alia, nervous shock, adjustment disorder, depression, trauma and emotional devastation."

2. The respondent being justifiably aggrieved, apparently threatened legal action against the appellant. Discussion between the parties resulted in the execution of a document headed "SETTLEMENT". This is now reproduced.

> "An Agreement made this 6th day of October 2003 BETWEEN Spanish Town Funeral Home Limited and Mrs. Elaine Dotting, wife of Clement Dotting, deceased.
>
> WHEREAS Clement Dotting died on the 13th day of February 2003 and was taken to the Spanish Town Funeral Home.
>
> AND WHEREAS whilst at the Funeral Home the condition of the body of the deceased deteriorated to the point where family members could not recognize it.
>
> AND WHEREAS the wife of the deceased suffered shock, trauma, and severe depression as a result of viewing the body of her deceased husband in the said deteriorated condition
>
> NOW THIS IT IS AGREED as follows:—
>
> 1. The Spanish Town Funeral Home Limited shall pay to Mrs. Elaine Dotting, wife of Clement Dotting, deceased the sum of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) inclusive of costs in full and

final settlement of all claims, damages and costs that the said Elaine Dotting may have against the Spanish Town Funeral Home Limited to be paid in full on or before the 30th November 2003.

2. Mrs. Elaine Dotting accepts the said sum of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) inclusive of costs in full and final settlement of all claims, damages and cost she may have whether now or in the future against the Spanish Town Funeral Home Limited arising out of the said incident whereby the condition of the body of her late husband clement dotting (sic) deteriorated whilst it was in the possession of the Spanish Town Funeral Home Limited and Mrs. Elaine Dotting acknowledges the receipt 01208 dated 6th October 2003 in the sum of TWO HUNDRED AND FIFITY THOUSAND DOLLARS ($250,000.00) towards liquidation of the said sum.

Signed by the said Mrs. Elaine Dotting)
in the presence of) Sgd: Elaine Dotting
Sgd: Attorney at law

SIGNED by the Spanish Town Funeral Home)
Limited by Dr. Royston Clifford, a Director)
duly authorized before me:—) Sgd: R. Clifford

Sgd: (Signature not legible)
Attorney at law
15B Old Hope Road
Kingston 5"

3. Two Hundred and Fifty Thousand Dollars ($250,000.00) was received by the respondent at the date of the execution of the settlement agreement. However, not having received the balance of agreed amount the respondent on the 30th January, 2006 filed a claim form seeking against the appellant damages in negligence. In the court below, the appellant sought to strike out the claim on the ground that the executed settlement agreement extinguished any claim in

negligence which the respondent may have previously had. There had been accord and satisfaction. The appellant failed — thus giving rise to this appeal.

4. In **British Russian Gazette and Trade Outlook Ltd. v. Associated Newspaper Ltd.** [1993] 2 K.B. 616 the headnote succinctly explained the concept of accord and satisfaction: —

> "Accord and satisfaction is the purchase of a release from an obligation arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged, and *the satisfaction is the consideration which makes the agreement operative.* It is not necessary that the consideration should be executed; the consideration on each side may be an executory promise, the two mutual promises making an agreement enforceable at law." (Emphasis mine)

This Court per Smith, J.A. (the president of this panel) in **Alcan Jamaica Company v. Delroy Austin and Hyacinth Austin and Another** S.C.C.A. 106/2002 delivered December 20, 2004 stated as follows:

> "Any person who has a cause of action against another may agree with him to accept in substitution for his legal remedy any consideration. The agreement by which the obligation is discharged is called Accord and the consideration which makes the agreement binding is called Satisfaction — see Clerk and Lindsell on Torts 17th edition 30 — 06 p. 1559.
> Thus Accord and Satisfaction is the purchase of a release from an obligation arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. *When the satisfaction agreed upon has been performed and accepted, the original right of action is discharged and the Accord and satisfaction constitute a complete defence to any further proceedings upon that right of action.*" (Emphasis mine)

5. In resolving the issue before the court below the learned trial judge embarked on the right path. She said in para. 26 of her judgment.

> "26. Before examining the defendant's contention that there is accord and satisfaction and the claimant's assertion that there is none, it is considered only prudent to set out verbatim the words of the settlement in question. For, it is only upon a construction of its terms that one may properly conclude whether it serves to release and discharge the second defendant from liability on the claim for negligence."

In the **British Russian Gazette** case Scrutton, L.J. after reviewing a number of authorities said at p. 645:

> "The document (constituting the agreement as to accord and satisfaction) is to be construed in accordance with the intention of the parties as expressed in it, and if there is doubt, as Parke B. says in one of the cases cited, the construction which makes it effective to carry out that intention prevails."

In **Jameson and Another v. Central Electricity Generating Board and Others** [1998] UKHL 51, Lord Hope of Craighead in his speech said:

> "The significance of the agreement is to be found in the effect which the parties intended to give to it."

6. In para. 35 of her judgment the learned trial judge said:

> "35. In this case, the terms of the settlement provide that the sum offered by the second defendant and accepted by the claimant should have been paid by 30th November, 2003. A date was thus set for performance of both parties obligation. The timing of

> the discharge was subject to payment by the second defendant on the due date. The effect of the settlement was clearly suspended until the sum due under it was paid and accepted. The fact of no performance by the second defendant on the date simply means no discharge. No discharge means, without more, that the claimant's original cause of action is not extinguished. The settlement need not have provided for a condition subsequent in such circumstances."

The last sentence in this excerpt disposes of the contention of the appellant that for the respondent to institute a claim in damages the settlement agreement should have contained an explicit condition subsequent. It is clear that the parties intended the settlement to become operative only on the payment of the additional Two Hundred and Fifty Thousand Dollars ($250,000.00) on or before November 30, 2003. It is the payment at that time which would provide a benefit to the respondent, not payment at some unascertained distant future if at all. The construction of the agreement document by the learned trial judge is the one "which makes it effective to carry out that intention". That was the "significance" of the agreement. Accordingly the learned trial judge was not in error in refusing to strike out the respondent's claim in negligence. The respondent chose not to sue on the agreement which she could have done but opted to pursue her cause in negligence. This she was perfectly entitled to do. Of course in any award of damages the amount of Two Hundred and Fifty Thousand Dollars ($250,000.00) which has already been paid to the respondent must be taken into account.

7. It is for the reasons above that on the 14th January, 2008 we dismissed the appeal and awarded costs to the respondent to be agreed or taxed.

G. SMITH, J.A. (Ag.)

I have read the judgment of Cooke, J.A. I agree with his reasoning and conclusions and there is nothing further I wish to add.

SMITH, J.A.

ORDER

The appeal is dismissed. Costs are awarded to the respondent to be agreed or taxed.