JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 106/2002

BEFORE: THE HON. MR. JUSTICE FORTE, P
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

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| **BETWEEN** | **ALCAN JAMAICA COMPANY** | **APPELLANT** |
| **AND** | **DELROY AUSTIN** | **1ST RESPONDENT** |
| **AND** | **HYACINTH AUSTIN** | **2ND RESPONDENT** |

**Christopher Kelman** and **Nigel Jones** instructed by **Myers Fletcher and Gordon** for the appellant
**Maurice Frankson** instructed by **Gaynor and Fraser** for the respondents

**November 24, 25, 2003 and December 20, 2004**

**SMITH, JA:**

The appellant is a division of Alcan Aluminium Ltd. a company incorporated under the laws of Canada. The respondents are taxi operators and owners of land situate at Windsor Lodge in the parish of Manchester. In 1991 the appellant leased a parcel of land at Windsor Lodge located atop a slope which said land is contiguous to land at the foot of the slope owned and occupied by the respondents.

During the month of May,1991 the appellant was engaged in the excavation of its land and the construction of pipe culverts from Alcan Kirkvine Plant to Comfort Bauxite loading area.

On or about the 20th May, 1991 Windsor Lodge experienced flood rains. There was a heavy flow of water from the appellant's land onto the land occupied by the respondents. In consequence the respondents' dwelling house was rendered unwholesome and dirty and their furniture, clothing and other household articles were damaged or destroyed.

On the 14th April, 1994 the respondents filed a Writ of Summons in the Supreme Court against the appellant seeking to recover damages for negligence and nuisance.

The appellant in its defence denied liability averring that the movement of water onto the land occupied by the respondents was as a result of the natural topography and/or of the Act of God. Further or in the alternative, the appellant relied on a Release and Discharge entered into on or about the 30th May, 1991. The appellant also by way of a Counterclaim claimed damages against the respondents for breach of the Release and Discharge.

On the 5th July, 2002 W. James J gave judgment for the respondents on the Claim and the Counterclaim in the sums of $33,132.00 and US$10,265.00 with interest at 6%.

This is an appeal against the judgment of W. James, J. Four grounds of appeal were filed. We were of the view that if ground 2 were decided in favour of the appellant that would put an end to this appeal.

**Ground 2 reads:**

> "The learned trial judge erred in failing to appreciate that upon payment to the respondents of the sum of $23,000 the original cause of action to sue the appellant in nuisance and negligence was extinguished by accord and satisfaction and did not relate only to the question of general damages as the learned trial judge found. Therefore the respondents were not entitled to sue the appellant as they did."

The pleadings and the evidence indicate that in the interest of good community relations the appellant entered into "without prejudice" negotiations with the respondents. The result of these negotiations was that on the 30th day of May, 1991, the first respondent executed a form of Release and Discharge thereby releasing the appellant from all legal actions in relation to claims outlined in a Memorandum of Agreement. In consideration thereof the appellant paid the first respondent the sum of $23,000.00 and compensated the respondents for cleaning and repairing their house, replacement of cupboard, subsistence and loss of income. However, the 1st respondent testified that when he signed the document he was not releasing the appellant from all claims. The learned trial judge found that the Release and Discharge was valid. But went on to say:

> "However, having regard to the wording of the Memorandum of Agreement, where it said under

> the heading 'Household Furniture and Accessories' damage will be assessed. This is clear language that even at the time, notwithstanding the release, the Release did not cover this aspect, so notwithstanding my finding that the Release is valid, the parties made provisions for works not yet concluded. The words are clear to indicate that some further assessment of damage would be done."

The learned judge was of the view that the appellant was not released from all claims. Mr. Kelman for the appellant submitted that the Release and Discharge provided positive evidence which refuted the oral evidence of the respondents that they did not intend to release the appellant from every claim. He contended that the issue as to whether there remained further assessment of damages to be done did not affect the enforceability of the Release.

Mr. Frankson for the respondents submitted that the findings and conclusion of the learned trial judge were correct. The terms of the Memorandum of Agreement and the Release and Discharge are reproduced below for easy reference.

> **"MEMORANDUM OF AGREEMENT**
>
> **CLEANING AND REFURBISHING OF PREMISES**
>
> This summarizes the agreements we reached in respect of the cleaning and refurbishing of your premises at no.6 Windsor Lodge, when you visited us at the Alcan Head Office at Kirkvine Works this morning.

**Cleaning**

Mrs. Austin will organize cleaners and materials necessary to sanitize and clean the floors of the house. Alcan will provide four pairs of gloves and four pairs of water boots sizes 8 to 11. An advance of Five Hundred dollars ($500.00) on cleaning costs will be made.

**Repainting**

Mr. Austin will organize for the repainting of the interior of the house. The cost for labour and materials of Eleven Thousand Dollars ($11,000.00) will be paid in advance.

**Replacement of floor Cupboard in the Kitchen**

Alcan will handle.

**Cleaning of Cesspit**

- Alcan to handle when cleaning of house complete.

**Subsistence**

Subsistence was agreed on at Eight Thousand Dollars $8,000.00 per week. The first sum for subsistence will take effect from Friday 24 May to Thursday 30 May 1991.

**Loss of Income**

Loss of income calculated at the rate of Five Hundred Dollars ($500.00) per day, will be paid for the period Monday, May 20 to Sunday, May 26 which totals Three Thousand Five Hundred Dollars ($3,500.00). this sum represents the only loss of income payment to be made.

A cheque for Twenty-Three Thousand ($23,000.00) will be paid this week to cover the above costs.

It is expected that the cleaning and painting will be completed within 3 weeks and that Mr. Austin and family will resume occupation of their house within this time frame.

**Furniture and Household Accessories**

Damaged goods as a result of the flooding of the floors in the house will be assessed by a representative of Alcan along with Mr. Austin, with a view to working out the cost of repairs/replacement which will be for Alcan's expense.

Signed: Delroy Austin Date 30/5/91

Signed: H.J. Salmon Date 30/5/91

Witnessed: Date 30/5/91

**Release and Discharge**

THIS RELEASE is made the 30 day of May1991 by Mr and Mrs. Delroy Austin of Windsor Lodge in the parish of Manchester (hereinafter called ("the Releasors").

The Releasors in consideration of cash in the amount of Twenty Three Thousand Dollars ($23,000.00) hereinafter called "the sum now paid to us by ALCAN JAMAICA COMPANY a division of Alcan Aluminium Limited (hereinafter called "Alcan") having its principal office at Kirkvine in the parish of Manchester.

DO HEREBY RELEASE AND DISCHARGE Alcan or any affiliated or parent or subsidiary company or their servants, agents, employees, contractors, successors and assigns in respect of claims made as outlined in the Memorandum of Agreement dated 30th May, 1991 (a copy of which is attached hereto, acknowledged and marked Attachment I) from all actions proceedings, claims and demands in respect of such demands arising out of or connected with the damage to our premises at 6 Windsor Lodge resulting from the spillage of marl which occurred on the 20th day of May, 1991 which we our heirs, or administrators may have against Alcan or any

affiliated parent or subsidiary company or their servants, agents, employees, contractors, successors and assigns.

FURTHER the aforesaid sum is paid by Alcan to the Releasors upon condition that same is not (sic) be construed as an admission of liability by Alcan.

IN WITNESS WHEREOF I have hereunto set my hand this 30 day of May 1991.

CLAIMANT WITNESS

CLAIMANT WITNESS

Cheque No.0246587."

It is not in dispute that the respondents received $23,000.00 from the appellant at the time of the signing of the instrument of Release and Discharge. The respondents received subsistence from the appellant from the last week in May, 1991 to the end of July 1991 at $8,000 per week. They said that the kitchen cupboards were partially repaired by the appellant (they were without drawers). The house was repainted at the expense of the appellant. The cesspit was cleaned. During the time when the house was being repaired, the respondents were accommodated at a hotel for a short while. Their hotel expenses were met by the appellant. The respondents complained that they received no money for household goods and clothing which were damaged as a result of the flooding.

The learned trial judge accepted the respondents' evidence in respect of the damaged household goods. The judgment for the respondents was based on this item of claim.

**The law as to Release and Discharge**

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. Where the demand is disputed or the amount unliquidated, payment of any sum agreed upon by the parties is a good satisfaction –**ibidem.**

**Analysis of law and evidence**

The instrument of Release and Discharge states that the consideration was the payment of $23,000 to the respondents by the appellant. Both respondents, as stated before, admitted that this

payment was made at the time of signing the instrument. Thus the consideration was executed.

The payment of $23,000 having been made the effect of the Release and Discharge was that the appellant was released and discharged from all actions, proceedings, claims and demands in relation to claims outlined in the Memorandum of Agreement. These claims, of course, arose out of the damage to the respondents' premises as a result of the flooding on May 20, 1991. There had been accord and satisfaction. Consequently, the original right of action was discharged. The commencement of the action by the respondents against the appellant to recover damages for negligence and nuisance was clearly in breach of the accord and satisfaction. The learned trial judge having found that the Release and Discharge was valid, should have concluded that on the signing of the Instrument the appellant was forthwith released from the actions of nuisance and negligence. Any action to be brought must be based upon the agreement. As Mr. Kelman submitted, the learned judge did not construe the words "now paid" in the release as indicating that the satisfaction was executed. Had he correctly construed the Instrument he would no doubt have concluded that the original right of action was extinguished and that the issue whether there remained further assessment of damages to be done did not affect the enforceability of the release. The error by the learned judge in construing the Instrument of

Release and Discharge critically affected the reasoning which led to his decision to give judgment for the respondents.

**Conclusion**

For the reasons given we accepted the submissions of counsel for the appellant as being correct. Having decided ground 2 in favour of the appellant it was not necessary to consider the other grounds. We therefore allowed the appeal, set aside the judgment of the court below and ordered costs to be paid by the respondent to be taxed if not agreed.