IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2006HCV0338

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| BETWEEN | ELAINE DOTTING | CLAIMANT |
| AND | CARMEN CLIFFORD **(Executrix of the Estate of Dr. Royston Clifford)** | FIRST DEFENDANT |
| AND | THE SPANISH TOWN FUNERAL HOME LTD. | SECOND DEFENDANT |

IN CHAMBERS

Ms. Georgette Scott instructed by Caribbean Advocates for the Claimant.

Mr. Kevin Williams instructed by Grant, Stewart &Phillips for the Defendants.

February 8, & March 19, 2007

McDONALD-BISHOP, J. (Ag.)

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 was abroad. His body was taken to the second defendant's funeral home by his children for storage pending the claimant'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 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. Subsequently, following on discussions between herself and Dr. Royston Clifford, a director of the second defendant, a settlement was arrived at for

compensation to be made to the claimant by the second defendant. This agreement was reduced into writing in a document titled "Settlement" dated October 6, 2003. Pursuant to this settlement, the claimant and the second defendant agreed to settle the claimant's claim for damages in the sum of $500,000.00. Upon the signing of the agreement, the second defendant paid the sum of $250,000.00 and failed to pay the balance by the agreed date of November 30, 2003 or any at all. The sum is still outstanding.

3. In light of the default of the second defendant, the claimant initiated court proceedings by claim form filed January 30, 2006 for damages for negligence against the first and second defendants. She asserts that consequent on the breach by the second defendant, there is now no legally binding agreement between the parties and she is entitled to revert to her original claim for negligence against both defendants.

4. On February 21, 2006, upon being served the claim form, the defendants filed an acknowledgment of service indicating an intention to defend along with a notice of application for court orders. They have filed no defence. By virtue of this notice of application they seek the following orders: (1) that the claim be struck out against the first defendant on the basis that the claimant's statement of case does not reveal any reasonable or any claim whatsoever against the first defendant; (2) that the claim against the second defendant also be struck out; (3) a declaration that the extent of the claimant's claim is "circumscribed by the terms of the Release and Discharge signed by the claimant on the 6th day of October, 2003."

5. The claimant thereafter, by notice of application filed April 4, 2006, applied for summary judgment against both defendants on the ground that they have no real prospect of defending the claim.

6. There are, therefore, two applications before me for consideration. Both applications have been heard together as a matter of convenience since the issues of

law and fact are common to both. The defendants' application, being first in time, was heard first and will be considered accordingly.

APPLICATION TO STRIKE OUT CLAIMANT'S STATEMENT OF CASE

7. On the first limb of their application, the defendants are asking that the statement of claim against the first defendant be struck out on the basis that it discloses no reasonable cause of action against the first defendant. In support of this application, Mr. Williams contended that it is trite law that a registered company has its own distinct personality apart from its officers and/ or shareholders. He argued that there is nothing in the pleadings or the affidavit evidence or otherwise to suggest that the second defendant is not a registered company and that, in any event, it has been joined as a party to the suit. As such, there is no basis to add Dr. Clifford or his estate as a party to the claim. Further, there is no pleading indicating what tortious action was undertaken by Dr. Clifford in his personal capacity. All that was done was that Dr. Clifford had signed the agreement as director of the second defendant. There is a bald assertion of negligence by the claimant against the defendants but no particulars or material averments are given to show how and in what manner Dr. Clifford was personally negligent.

8. Miss Scott responded that Dr. Clifford was agent of the second defendant and owed a duty of care to the claimant. She stated that he was the pathologist who was vested with the duty of care to manage the receipt of bodies in preparation for funerals. In relying on a principle that she has taken from **Gower and Davies, Principles of Modern Company Law**, pages 169-170, she submitted:

> **"The general principle is that Directors of a company who commit tortious acts are liable in their individual capacity. The general doctrine of vicarious liability for the acts of their employees or agents would be applicable."**

She then continued:

> **"In light of the subsequent death of the tortfeasor, the Claimant's right of action would devolve to his personal representative. Therefore, the fact that Dr. Clifford as a director of the Second Defendant is also the**

**Pathologist who is vested with the duty of care to manage the receipt of the bodies in preparation for funerals, would make him jointly and severally liable."**

9. This application for the court to strike out the claimant's statement of case on the basis alleged derives its legitimacy from the **Civil Procedure Rules, 2002 (CPR), rule 26.3 (c)** which provides that the court may strike out a [claimant's] statement of case or part of it if it appears to the court that the statement of case or the part to be struck out discloses no reasonable grounds for bringing the claim. The court is also empowered to enter summary judgment on a claim if it considers that the claimant has no real prospect of succeeding on the claim or an issue: **CPR r. 15.2 (a).**

10. In considering this application to strike out, I am mindful that such a course is only appropriate in plain and obvious cases. The authorities have established that a claim may be struck out where it is fanciful, that is, entirely without substance or where it is clear that the statement of case is contradicted by all the documents or other material on which it is based (**Three Rivers District Council v Bank of England (No.3) [2003] 2 A.C., 1).** It may also be said, on the guidance of the relevant authorities, that in determining the issue as to whether the claim should be struck out one may seek to ascertain, among other things, whether the claimant's pleadings have given sufficient notice to the defendant of the case she wishes to present and whether the facts pleaded are capable of satisfying the requirements of the tort alleged. The ultimate question that should be considered in determining whether to strike out the statement of case on the basis that it discloses no reasonable cause for bringing the claim seems to be, essentially, the same as that in granting summary judgment, that is: is the claim against the defendant one that is not fit for trial at all?

CLAIMANT'S CASE AGAINST THE FIRST DEFENDANT

11. Upon an examination of the claimant's pleadings in respect of the first defendant, it is seen that there are no facts pleaded supporting Miss Scott's submission that Dr. Clifford was the pathologist who had the duty to deal with the

body personally or to receive it into his care. The affidavit of the claimant for summary judgment also provides no such evidence. The pleadings must disclose the facts on which the claimant is relying to satisfy the requirements of the tort as alleged and also at the same time be such as to give sufficient notice to the defendant of the case it will have to answer. The most the claimant stated in relation to Dr. Clifford was that when she returned to Jamaica she spoke to the proprietor of the funeral home who was Dr. Clifford. Following on that, an agreement was arrived at between the second defendant and the claimant with Dr. Clifford acting in a representative capacity, that is, as a director of the second defendant and not in his personal capacity.

12. Upon a close examination of the claimant's pleadings and of the evidence contained in her affidavit for summary judgment, I find that there is merit in Mr. Williams' contention that the statement of case fails to disclose a reasonable ground for bringing the claim against the first defendant. There is no pleading of facts that the claimant had dealings with Dr. Clifford in his personal or professional capacity as a pathologist who personally attended to or failed to attend to the body. There is nothing within the terms of the agreement that can suggest that Dr. Clifford, at any time, acted in his personal capacity and/or personally assumed responsibility for the body of the deceased. There are no particulars of negligence pleaded separately and independently in respect of Dr. Clifford in his personal or professional capacity.

13. The written settlement is cogent evidence of what the parties had in their contemplation at the time. The written agreement that stands as evidence of the parties' intention demonstrates that the claimant had expressly recognized and evidently accepted the second defendant as the liable party. She has averred in her statement of case that the first defendant and second defendant admitted that the body of the deceased was removed by them and that whilst in their possession the condition of the body of the deceased deteriorated. This is contradicted by the unchallenged written settlement. Dr. Clifford was not made a party to the agreement in his personal capacity or otherwise. He made no admissions personally. Any

admissions of facts, as shown in the settlement, were by the second defendant with Dr. Clifford signing as its authorized officer and not in his personal capacity. It is, therefore, inaccurate to allege that the first defendant has made admissions concerning the claimant's claim.

14. There is nothing in the claimant's statement of case, when viewed in conjunction with the available undisputed documentary evidence on which the claimant seeks to rely, that discloses any basis for liability- vicariously or otherwise- in Dr. Clifford in his personal capacity. The question is whether this could be cured by disclosure, requests for information or witness statements before trial. This consideration is imperative because while a party may plead to facts on which he intends to rely, there is no duty to provide in his pleadings the means by which he intends to prove such facts; that is a matter of evidence. The evidence on which he may seek to rely may be in different forms. This may include documents and evidence from persons to be called by the claimant; or may include evidence from the defendants themselves or their witnesses following on cross –examination during trial; answers to requests for information (interrogatories) and evidence contained in documents disclosed between the parties. I have, therefore, recognized that evidence may come prior to and during the course of the trial that could well disclose a reasonable case against the first defendant. For those reasons, I am mindful that I must be slow to strike out the claim at such an early stage of the proceedings in order to prevent the claimant being deprived of her right to have her case disposed of on the merits.

15. I have duly noted that upon receipt of the defendants' application to strike out, the claimant has applied for summary judgment and has furnished an affidavit in support of her application. This is the evidence on which she intends to rely to establish her case against the defendants. In light of this application, one would expect that the evidence put forward at this stage would be such as to disclose a reasonable ground for bringing the claim against the defendants. I have found though that the evidence contained in this affidavit has done nothing to cure the factual

deficiencies and inaccuracies in the claimant's pleadings in relation to the first defendant. No reasonable factual or legal basis has been revealed, on the available material, for a claim to be brought against Dr. Clifford in his personal capacity and, by extension, against the first defendant as his personal representative. There seems to be no likelihood that such factual deficiencies can be cured by the claimant if the matter were to proceed to trial.

16. I find that the claim against the first defendant is thus contradicted by the claimant's own pleadings and by undisputed documentary evidence before me that would not necessitate any investigation at a trial. Miss Scott, in the end, relented and conceded that her argument in relation to the first defendant is not her strongest point. As Mr. Williams himself indicated, this is an appropriate case to be struck out as the resolution of the issue does not involve any mini-trial given that there are no 'mountain' of documents and no substantial dispute as to facts.

17. Accordingly, I conclude that the claimant's pleadings are contradicted in a material particular by undisputed documentary evidence disclosed by her. In light of this, even if she were to proceed to trial and sought to prove all the facts as she has pleaded them and deposed to in her affidavit, she would not be entitled to a remedy against the first defendant. Any prospect of success against the first defendant would thus be fanciful. It leads me, therefore, to conclude that the claimant's statement of case has failed to disclose a reasonable claim against the first defendant as personal representative of Dr. Clifford. It is inevitable then that the claim against the first defendant should be struck out on that basis.

**CLAIMANT'S CASE AGAINST THE SECOND DEFENDANT**

18. The second limb of the defence's application, as filed, is that the claim be struck out also against the second defendant. On the hearing of the application however, Mr. Williams stated that he concedes that there is a claim against the second defendant but only to the extent of $250,000.00 on which judgment may be entered against the second defendant only. His application is for a declaration that

the extent of the claimant's entitlement as against the second defendant is $250,000.00 with interest. His application is for the case to be disposed of summarily in this regard.

19. Mr. Williams contended that the claim against the second defendant for damages in negligence should not be allowed to stand on the ground that the settlement entered into by the claimant and the second defendant is a valid release and discharge of the second defendant from liability and the claimant cannot revert to her original claim as it has been extinguished. It is his contention that there was accord and satisfaction and as such the only remedy is for the claimant to sue on the agreement for the outstanding balance with interest and nothing else.

20. Miss Scott, in her response, pointed to the general principle at common law as stipulated in **Halsbury's Laws of England, 4th ed. vol. 9 (1) paragraph 1053** that: ***"The normal rules as to construction of written contracts apply to a release".*** As such, she submitted that the ordinary rules as they relate to agreement, consideration and performance are applicable in considering the settlement signed between the parties. The thrust of her submission is that there is no accord and satisfaction and also that the failure of the second defendant to comply with the strict date stipulated amounts to repudiation and the claimant is now free from those terms. She argued that on that basis, she is entitled to have her damages assessed for negligence in the absence of a compromise.

**Is there accord and satisfaction?**

21. A very concise and clear explanation of accord and satisfaction is contained in the dictum of Smith, J.A. in **Alcan Jamaica Company v Delroy Austin and Another, SCCA No. 106/2002** delivered December 20, 2004, where he stated at page 8 of the judgment:

> **"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."**

22. In **British Russian Gazette and Trade Outlook Ltd. v Associated Newspapers Ltd. [1933] 2 K.B. 616** at page 643, the nature and effect of accord and satisfaction is encapsulated thus: ***"The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative."***

23. Further, **Chitty on Contracts, General Principles, 25th edn., paragraph 1461,** explains:

> **"In the first place, the doctrine of consideration, which plays so important a role in the formation of a binding contract, has also been applied to its discharge. Thus a distinction has to be drawn between those contracts which have been wholly executed on one side (i.e. where one party has performed all his obligations under the agreement) and those which are executory on both sides (i.e. where both parties still have some obligations to perform). In the former case the party seeking to be discharged must prove either a release under seal or some consideration agreed by the other party (accord and satisfaction) in place of his existing obligation or in addition to it. In the latter case, consideration can usually be found in the mutual release by each party of his rights under the contract."**

24. It follows then on this exposition that a distinction has to be drawn between a contract that is wholly executed, on the one hand, and one that is executory, on the other. In the case where the contract is executed by one party, the person seeking discharge must prove a release under seal (where consideration would not be required) or, if not under seal, some valuable consideration agreed by the other party. This is accord and satisfaction. Where the contract is executory, the consideration is usually found in the mutual performance by each party of his obligations under the

contract and the release of each party's rights under it. A mere parol release, whether oral or in writing, without valuable consideration is normally not sufficient to effect a discharge either at law or in equity. The critical question, therefore, in seeking to find if there is accord and satisfaction, given there is no agreement under seal, is whether there has been valuable consideration given in exchange for the claimant's agreement to release the defendant from liability.

25. It is also established on good authority that in construing a release no particular form of words is necessary to constitute a valid release and so any words which show an evident intention to renounce a claim or discharge the obligation are sufficient. The authorities do support Miss Scott's contention that the normal rules relating to the construction of a written contract also apply to a release and so a release in general terms is to be construed according to the particular purpose for which it was made.

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.

SETTLEMENT

**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**

27. From this agreement it is seen that the second defendant first agreed to pay the claimant the sum of $500,000.00 on or before the 30th November, 2003 in full and final settlement of the claim that she might have against the said defendant. The claimant, for her part, agreed to accept the said sum specified by the second defendant on the date stipulated in full and final settlement of the claim she might have against it. She then acknowledged receipt of $250,000.00 "towards liquidation of the debt." Clearly, she did not accept the lesser sum in satisfaction of the whole.

28 In the Australian case of **McDermott v Black and Another (1940) 63 CLR 161**, at pages 183 and 184, Dixon, J provided a useful guide as to the analysis of the document. He stated:

> **"The essence of accord and satisfaction is the acceptance by the plaintiff of something in place of his cause of action. What he takes is a matter depending on his own consent or agreement. It may be a promise or contract or it may be the act or thing promised. But whatever it is, until it is provided and accepted the cause of action remains alive and unimpaired. The accord is the agreement or consent to accept the satisfaction. Until the satisfaction is given the accord remains executory and an accord and cannot bar the claim. The distinction between an accord executory and accord and satisfaction remains as valid and as important as ever. An accord executory neither extinguishes the old cause of action nor affords a new one.... If the agreement is to accept the promise in satisfaction, the discharge of the liability is immediate. If the performance, then there is no discharge unless and until the promise is performed."**(Emphasis added).

29. It is evident, upon a proper construction of the agreement that on the date of signing neither party's obligation under the settlement was performed. The sum agreed to be paid for the claimant's release was not paid by the defendant on the date of signing. It goes without saying that the said sum was not provided to be accepted by the claimant to constitute a discharge at the time of the agreement. A date was set for the second defendant to fully and completely perform its obligation and for the claimant to do likewise. The discharge was thereby suspended until performance by both sides. It is clear, without the need for deep analysis, that the agreed consideration for the discharge was the payment of the full sum of $500,000.00 by the second defendant. What the claimant had agreed to accept was not the second defendant's promise or undertaking to pay but the actual payment of the sum agreed to be paid. Clearly, nothing short of actual payment of the agreed sum was what was accepted in full and final settlement of all claims. This was not paid at the time of signing. The discharge of the liability was thus not immediate. I reject Mr. Williams' submission that the discharge was effected at the time the agreement was entered into. To date, the accord has remained merely executory and there is no satisfaction. There was, therefore, no release and discharge at the time the agreement was entered into.

30. In **Morris v Baron & Co.** [1918] A.C. 1, Lord Atkinson stated at page 35:

> **"Whether an accord does or does not have the effect of achieving a discharge depends upon the terms of the agreement. <u>There is no doubt that the general principle is that an accord without satisfaction has no legal effect, and that the original cause of action is not discharged as long as the satisfaction agreed upon remains executory.</u> That was decided so long ago as 1611 in Peytoe's Case (1611) 9 Rep. 77b, 79b). If, however it can be shown that what a creditor accepts in satisfaction is merely his debtor's promise and not the performance of that promise, the original cause of action is discharged from the date when the promise is made."**(Emphasis added)

31. The claimant upon the basis of the intended settlement received $250,000.00. The payment and acceptance of the lesser sum in these circumstances was not accepted as discharge of the defendant's obligation to pay the whole as a date was agreed for the payment of the whole. That due date has passed and yet the balance has not been paid. The second defendant has failed to date, being three years, to pay the sum agreed for the claimant's discharge of its obligation. The law is clear that there is no satisfaction unless and until the promise to pay the full sum is performed. No performance by the second defendant means no valuable consideration moved from it to the claimant. There is thus no accord and satisfaction as a matter of fact and law.

32. Even on the basis of fundamental contract law, an important ingredient is absent for the settlement to be a binding and enforceable contract-there is no valuable consideration. An agreement without valuable consideration, unless under seal, is not binding. Likewise, an accord without satisfaction is of no legal effect.

33. In **Jameson and Another v Central Electricity Generating Board and Others [1999] 1 All ER, 193,** Lord Hope of Craighead summed it up aptly in the following terms at page 203:

> **"But it is well known that many claims are settled without the amount due as damages having been adjudicated by the court. They are settled by**

**agreement between the parties...In the typical case the plaintiff agrees to accept the sum which the defendant is willing to pay in full and final settlement of his claim. Such a settlement normally involves an element of compromise on both sides. ..But, whatever the nature and extent of the compromise, one thing is common to all these cases. This is that the agreement brings to an end the plaintiff's cause of action against the defendant for the payment of damages. The agreed sum is a liquidated amount which replaces the claim for an illiquid sum. The effect of the compromise is to fix the amount of his claim in just the same way as if the case had gone to trial and obtained judgment. Once the agreed sum has been paid, his claim against the defendant will have been satisfied. Satisfaction discharges the tort and is a bar to any further action in respect of it:** *United Australia Ltd. v. Barclays Bank Ltd.* **[1941] A.C. 1, per Viscount Simon L.C...**" (Emphasis supplied).

34. The authorities are all agreed that it is satisfaction that discharges the tort and is a bar to further action in respect of it. In this case there is no satisfaction. It would stand to reason, therefore, that the tort is not discharged. Mr. Williams, however, contended that the agreement did not provide what should happen in the event of default. According to him, the settlement did not expressly provide a condition subsequent and so the claimant cannot revert to the original claim because that is not provided for. It is accepted that a release may be made subject to a condition subsequent: ***Newington v Levy (1) (1870) L.R. Vol 6. 180*** but that is by no means mandatory. The issue as to when a discharge is satisfied has to be resolved on the analysis of the terms and effect of the settlement. In considering this issue, Lord Hope of Craighead in **Jameson v Central Electricity** (supra) at page 206 stated that the issue is whether the settlement was subject to a condition which suspended its effect for any purpose until the sum due to be paid under it had been fully paid or whether it was subject to a resolutive condition that the discharge of the plaintiff's claim was to be treated as void ab initio if the sum due under it was not paid.

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 on the date expressly set for completion. The fact of non-performance by the second defendant on the due date (and to date) simply means no discharge. No discharge means, without more, that the claimant's original cause of action is not extinguished. It is alive and unimpaired. The settlement need not have provided for a condition subsequent in such circumstances.

36. But if, for argument sake, one were to agree with Mr. Williams and were to find that the discharge had taken effect from the date of signing, the correct view would still be that stipulated by Lord Hope of Craighead in **Jameson** (supra) at page 206 that the settlement would be subject to an "implied resolutive condition" which would render it void ab initio if the debt which was due under it was not satisfied. Following on the lead afforded by Lord Hope, after his review of some relevant authorities, I would adopt his reasoning and say that the nature of the transaction in the instant case would require, of necessity, that an implied resolutive condition be read into it. It means that with non- payment of the money by the second defendant, the settlement would be rendered void ab initio by virtue of this implied resolutive condition. In the end, whatever reasoning is adopted, it leads to the same conclusion that the absence of a condition subsequent is not fatal to the claimant's reversion to her original cause of action.

37. It is clear, on whatever analysis is employed, that for there to be release and discharge in the circumstances of this case, there must be satisfaction. I find that what the claimant accepted in settlement of her claim was not merely the promise by the defendant that it would perform its obligations under the settlement. What she agreed to do in satisfaction of her claim was to accept payment of the sum the second defendant had agreed to pay her, that being $500,000.00. So it is opened to her to

say that until that sum has been paid to her, her claim for damages had not been satisfied. This line of argument is adopted almost *verbatim* from the dicta of Lord Hope of Craighead in **Jameson** (supra) at page 205. It is so clear on all the authorities that it is satisfaction that discharges the tort and provides the bar to any further action on it. In this case, there is no satisfaction; the tort is not discharged. With the claimant's cause of action not having been extinguished by the settlement in light of the second defendant's non- performance, it means her statement of case, as it stands, discloses a reasonable cause of action against the second defendant- one with a realistic, as opposed to a fanciful, prospect of success. There is no defence filed in answer to it.

38. I, therefore, refuse the defendants' application for a declaration that the extent of the claimant's claim against the second defendant is $250,000.00 with interest and for judgment to be entered for that sum.

## THE CLAIMANT'S APPLICATION FOR SUMMARY JUDGMENT

39. The claimant has applied for summary judgment on the grounds that the defendants have no real prospect of successfully defending the claim. The fact is that the defendants have filed no defence and have not filed any affidavit in response to this application. While the claimant could have proceeded to apply for judgment in default, there is nothing to preclude an application for summary judgment in the circumstances: See **Jamaica Creditors Investigation and Consultant Bureau v Michmont Trading Limited, Suit No. C.L. J-015/2002**, delivered, May 9, 2003, (unreported). The **CPR, rule 15.4 (1)**, specifically provides that such an application for summary judgment should not be made before the defendant has filed an acknowledgment of service. The defendant has filed an acknowledgment of service and so the claimant has complied with the rules in all respects. The defendants have filed no pleadings or evidence but sought to argue on a point of law.

40. Again, it must be stated that the test as to whether to grant summary judgment against the defendant is whether the defendant has no real prospect-as

opposed to a fanciful prospect- of successfully defending the claim. This test is solidified in the dicta of Lord Woolf, MR in **Swain v. Hillman** [2001] 1 All ER 91, at 93 where he stated in respect of similar provisions in the U.K. rules:

> **"Under r 24.2, the court now has a very salutary power both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr. Bidder QC submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."**

41. Lord Hope of Craighead in **Three Rivers District Council** (supra) at page 260, in positing his view as to the scope of the enquiry of the question of whether the claim has no real prospect of success stated:

> **"I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."**

42. I am also guided by the words of Harrison J.A. (as he then was) from our own Court of Appeal where he stated in **Gordon Stewart and others v Merrick**

**(Herman) Samuels SCCA No. 2/2005** delivered November 18, 2005 in applying **Swain v Hillman,** supra:

> **"The prime test being "no real prospect of success" requires that the learned trial judge do an assessment of the party's case to determine its probable ultimate success or failure. Hence it must be a "real prospect" not a "fanciful one". The judge's focus is therefore, in effect, directed to the ultimate result of the action as distinct from the initial contention of each party. Real prospect of success is a straight forward term that needs no refinement of meaning."**

43. It has already been stated that the claimant's statement of case has failed to disclose a reasonable cause of action against the first defendant. It follows then that summary judgment cannot be entered against the first defendant, the claim having been struck out.

44. I will therefore examine the claim against the second defendant within the ambit of the principles derived from the foregoing authorities. In relation to the claim against the second defendant, the facts are not in dispute. Liability is not put in issue in so far as the tort alleged by the claimant is concerned. The defendant has sought to raise a defence in law of accord and satisfaction in respect to this claim. The defence has not been specifically pleaded. However, in the absence of a filed defence or an affidavit in response from the defendants, I do accept that a defence with a real prospect of success, may take many forms and so a defendant may show, among other things, a substantive defence or raise a point of law destroying the claimant's cause of action.

45. In the absence of the defence being specifically pleaded, I have, nevertheless, proceeded to consider the application to ascertain if, indeed, the defence has no real prospect of successfully defending the claim. If they have a defence that is bound to fail, they must know. This is not a case with substantial material or disputed facts that would propel the court at this stage of the proceedings to venture on a course of a mini -trial to determine whether summary judgment should be granted. **Blackstone's Civil Practice 2004** contains this useful note at paragraph 34.14:

**"Although summary judgment applications should not be allowed to turn into a mini trial, where the case turns on an issue of construction of a term in a contract the court will usually determine the point and give judgment accordingly** ***(Wooton v Telecommunications UK Ltd (2000) LTL 4/5/2000)."***

46. Given that the success of the defence depends wholly on the view to be taken of the written document that is available at this stage for construction, the prospect of success of the defence is thus within my competence. Having found on the defendants' application that the claimant has shown a case with a real prospect of success on the basis that there is no accord and satisfaction, it follows logically then, that the second defendant has no defence to the action. After a close examination of all the circumstances against the background of the overriding objective to deal with the case justly, I conclude that the second defendant has no realistic prospect of succeeding if the case were to proceed to trial. In the premises, the claimant is entitled to summary judgment on the claim against the second defendant.

## ORDER

47. **On the defendants' notice of application for court orders:**

1. The claimant's claim against the first defendant is struck out with costs to the first defendant.
2. Application for Declaration against the claimant refused with costs to the claimant.

48. **On the claimant's notice of application for court orders:**

1. Application for summary judgment against first defendant refused with costs to first defendant.
2. Summary judgment granted against second defendant with costs to the claimant.
3. Claimant to proceed to assessment of damages against second defendant.
4. Hearing of assessment of damages is set for July 16, 2007.

5. Ordinary witnesses limited to two (2) for the claimant and expert witnesses limited to one(1).
6. Claimant is permitted to rely on the medical report of Dr. E. Anthony Allen, Consultant Psychiatrist, dated July 10, 2003 without calling him as witness subject to obtaining certificate in compliance with CPR, r.32.13. 1(A) and 32.13(2) as far as is reasonably practicable.
7. Claimant's witness statement (s) to be filed and served on before May 31, 2007.
8. A listing questionnaire to be filed on or before July 9, 2007.
9. Claimant to file memorandum as to damages with list of authorities on or before July 6, 2007.