JUDGMENT : HIS HONOUR JUDGE DAVID WILCOX : TCC : 10th June 2003.

1. This matter originally came before me as a Part 24 claim. The claimants sought summary judgment to enforce two adjudication awards. It was apparent from the defence filed and the supporting documentation, that the claims may have been the subject of compromise. The Part 24 application was therefore adjourned to enable the issue as to compromise to be determined, and to give the parties the opportunity to adduce oral evidence.

BACKGROUND

2. The claimants entered into a contract for building works at 1 Hurst Road, Horley, Surrey on 26th March 2001, using a JCT Agreement for Minor Works 1998 Edition incorporating amendments one and paragraph 2. The Contractor was described as Graham Billinghurst of Advance Building Technology Ltd.

3. The architect/contract administrator was Mark Pellant an architect of Koru Design.

4. Clause 2.1 of the Contract provided that work would commence 31st March 2001 and that the works would be completed by 13th July 2001. A dispute arose as to costs of additional temporary structural propping works. The C Contractor left the site until the Employer agreed to bear the costs. The Employer thereupon determined the employment of the Contractor and the Contract. A dispute arose and under Article 6 of the standard Agreement for Minor Building Works it was referred to adjudication. KA Slegg Esq. was duly appointed.

5. As a preliminary issue he considered who was the appropriate respondent to the reference. Mr Billinghurst contended that the Contractor was Advanced Building Technology Limited. All correspondence had been on the company headed writing paper, and the architect/administrator addressed his instructions to the company and referred to the Company as being the contractor in all correspondence with the claimant's solicitors James R. Knowles.

6. On the 20th August 2001 the architect wrote to the defendant's solicitors saying
"I acknowledge receipt of your letters dated 10th August 2001 and 17th August 2001.
My letter dated 15th August 2001 was address ed and directed toward ABT Limited and is not a response to your first letter. My letter was a statement of the facts in a request, for recovery o mªterials removed by your client and not returned to .site.
I remind you that your letter advised that it we *was not necessary for me to respond directly to you the employer has not yet seen your first letter as you failed to send them a copy. The decision to determine the employment of ABT Limited was made prior to my receipt of your letter ...*
ABT was in default of the contract by suspending the carry out of the works without due course for a period of .3_5 days. s. The contract makes provision for seven days within which to end t he default. Since this time your client has maintained that no work could *be progressed until after temporary propping works had been concluded .... The employer thus decided to determine the employment of ABT Limited under Clause 7.2.1 of the contract an action they could have taken 28 days earlier ...*

7. The anticipated initial costs of completing the works will be as follows: *increase in labour and material costs over the last 10 months (*since ABT Limited submitted its tender*) additional preliminary costs to the new contractor to familiarise with the project and set up on site and ..... costs incurred by the new contractor for completing another contactor's job.* (emphasis provided)

8. On the 4th **December 2001 the** claimants' then solicitors ors James R. Knowles wrote to Advance Building Technology Limited in the following terms: *"We have been retained by Ms Anne Tricket and Mr A Bracken to represent their interests in the determination of your employment concerning the extension at 1 Hurst Road, Hawley ... "* (emphasis provided)

9. Apparently neither of the architect/administrator or the claimants solicitors were under any doubt as to proper identity of the employer and con tractor under the contract.

10, The Adjudicator found that the contract was in fact entered into by Mr Billinghurst personally and not by the company. This was a decision within the competence of the Adjudicator under the reference.

11. He awarded the claimants £9,099.68 and ordered that tie defendant should pay £235 in respect of the Adjudicator's nomination fee, and £4,071.38 70% of the Adjudicator's total fee of £5,825.

12. The claimants embarked upon a second adjudication to recover the costs of completing the building works. The defendants submitted that the contract was between Advance Building Technology Limited (ABT I imited) that they had done at the earlier adjudication. The Adjudicator declined to consider the matter holding himself bound by the decision of the first Adjudicator

13. The second adjudicator made an award of £31,274.9 L to be paid to the claimants by the 21st May 2002 and awarded interest at the rate of 9% thereafter. He ordered the respondent to pay his fee of £680 plus VAT and the nomination fee of £235.

14. The claimants' application is for summary judgment in the sum of the two awards together with accrued interest amounting to a total of £ (3,984.66.

THE PRELIMINARY ISSUE : was there an a agreement to compromise the claims?

15. On the 22nd August 2002 the first complainant Mr Bracken wrote to the defendant proposing a settlement:
"Dear Graham
OUR ONGOING DISPUTE
I feel that the time has come in this long ana protracted dispute to propose to you a settlement so that the whole ca se can, be dropped.
As you know we have now been through two ad)udications which have essentially found totally in our favour and the r result of those you owe us a considerable amount of money. We have now come to the point where we look to enforce the, adjudication ana we have now sought council's (sic) opinion and a great deal of legal advice to consider our next move. I see from correspondence from your solicitor that you are taking similar action ...
... I want to give you the option now to pay us a s settlement figure so we can all walk away from this dispute and we can end any dealing with you. "
As you appreciate from the correspondence which has gone back and forth we have had to incur all the adjudicator's costs, even though a high proportion of these had been apportioned, to you. In addition to this, the adjudicator has also found that you are liable for the difference between the two contracts, which is a considerable amount of money.
I therefore make the proposal to you that we should drop the whole case immediately on receipt of a figure of £6,000. This, of course, goes nowhere near to recouping the costs that we have had to incur on this project as a result of your actions (although the Adjudicator has awarded us), but I am inclined to feel that lift! *is short we all need to move on and not have these issues hanging over our heads. Therefore I am suggesting the six thousand figure primarily because I feel it covers the costs incurred by us in paying the Adjudicator, that work apportioned to you. ...*
I hope you feel able to accept this figure, but i F *not I instruct my legal team to continue this dispute and I will do al' I can to discredit you and your business. All of this has the potential of getting very unpleasant and I hope you consider logic in is settling this matter now*

16. On the 30`h August 2002 Mr Bracken wrote to the defendant's solicitors:
"Dear Mr Arscott
Reference: ***Your letter dated 23rd August 2002 - Graham Billinghurst***
Thank you for your letter of 23rd August 2002 in response to my letter sent directly to Graham Billinghurst. I am pleased to see he's taking my offer seriously and I obviously hope that he accepts the compensation figure of £6,000 as a way of resolving this issue immediately".

17. He went on to express the hope that Mr Billinghurst would agree to the settlement of £6,000 in order that no further contact with legal parties was necessary and that the matter could be dealt with expeditiously.
"You have obviously indicated in your letter that I can hope to receive response in the week commencing Monday 2nd September 2002. I therefore think that it makes sense to ask you to make a decision by Friday of that week and I hope that Graham is able to confirm that he is willing to pay us compensation of £6,000. I have thought hard about the amount of money which I wish to receive in order to resolve this and I am not prepared to accept any figure less than the amount quoted".

18. As promised the defendant's solicitors wrote to Mr Bracken on the 6th September 2002 and indicated that there w were other monies which were outstanding to their client for which it should be given credit. It was made clear from the subject heading of the letter that their client was Advance Building Technology Limited and this was made clear beyond doubt on the second page of the letter:

"My client which for these purposes is ABT Limited (represented by Mr Billinghurst) does accept that a pragmatic approach is required to bring this unfortunate matter to an end but most certainly without acceptance of liability.

19. The letter then went on to make a very clear r counter offer on behalf of Advance Building Technology Limited:
"My client, however, is not willing to pay this sum of £6,000 but will come close to that figure. We a e therefore instructed. to forward immediately to you. the cheque for the sum of £5,000 on the strict understanding that this sum i s offered to you in full and final settlement of all issues b between yourself, Mr Billinghurst and Advance Building Technology Limited in relation to all, matters of dispute concerning 1 Hurst Road Hawley. The payment is tendered as a compromise settlement. The payment. is tended as an offer of, settlement which will deemed to have accepted by you and therefore be contractually binding if it is presented to your bank and cleared for payment. If you are not willing to accept the payment on these terms, would you please return the payment and we will assume therefore that the dispute will have to continue.
I should make it clear of course that this offer applies to both yourself and Ms Trickett and the enclosed cheque is made out to you both jointly. In the circumstances, neither of you would be entitled to pursue this matter any further upon payment in of the cheque.

20. A considerable time lapsed before the cheque was presented for payment. It was presented on the 23rd September 2002 and cleared on the 24th. On the 26th September 2002 Mr Bracken wrote on behalf o F himself and Ms Trickett:
"Dear Graham
Further to our letters of 22nd and 30'h August 2002 I am writing to inform you that I hereby withdraw all previous offers o *f settlement made on behalf of myself and Anne. I am advised that I am entitled to the full amount awarded to me by the Adjudicators and I now intend to pursue the* full *amount of the claim unless payment is made in* full".

21. Mr Bracken gave evidence before me at the preliminary hearing confirming what he had said in his statement of evidence namely that he had the benefit of informal advice from a criminal silk. In consequence he changed his legal advisors from James R Knowles who mindful of having the benefit of two adjudicators awards were nonetheless "far from positive but (his) prospects" Doubtless they were aware that a valid adjudication award is only final pending the ultimate resolution of the disputes by agreement, arbitration or litigation as appropriate. Mr Stephen Fairbum a legal executive from his newly instructed solicitors also wrote a letter dated the 26th September 2002: "**...** *It is unclear who* is *making the payments . Our clients are not prepared to accept payment of the sum of £5000 ,from Mr Billinghurst in settlement of their claim against him which amounts to £48,217.95 following two adjudication awards made in their favour or enter into the. compromise proposed for which there is no apparent consideration ion. Our clients accept the payment of £5000 only on account of Mr Billinghurst's indebtedness to them. Our clients have written to Mr Billinghurst confirming that their offer to settle is withdrawn. It seems to us that your client is Mr Billinghurst as shown on your letterhead and as shown on the re verse of the cheque. The payment has not been accepted as payment made on behalf of the third party or is the payment mad made on behalf of Advance Building Technology Limited who you claim to be your client for these purposes' whatever that may mean ... "*

22. Construction of a document is a matter of law. When considering whether an agreement. exists, and if so its ambit a court is entitled to consider the factual matrix.

23. Mr Bracken gave oral evidence. He candidly accepted n evidence that the wording in the letter of the 6th September was clear to him and on receipt of that letter he as anyone objectively considering the offer must have appreciated that it. was made by ABT Limited, a third party in order to settle all disputes in relation to building works including but not limited to those the subject of the adjudications made against Mr G Billinghurst. The payment was clearly made by the solicitors as agents for their clearly described client ABT Limited and after almost t hree weeks of possession was then cashed without demur by the claimants.

THE LEGAL PRINCIPLES

24. The offer "in full and final settlement" of the dispute is made at the time the cheque is sent. There must be clear evidence of actual or potential disputes at that time. The presentation of the cheque may amount to an acceptance of the **offer** giving rise to an accord. In **Day v. McLean** (1889) 22 QBD 610 at page; 613 Bowen LJ said *"If a person sends a sum of money on the terms that it is to be taken if at all,, in satisfaction of a larger claim; if the money is kept, it is a question of fact as to the terms upon which it is so kept. The accord and satisfaction imply an*

agreement to take the money in satisfaction of the claim in respect of which it is sent. If accord is a question of agreement, there must be either two minds agreeing or one of the two persons acting in such a way as to induce th? other to think that the money is taken satisfaction of the claim, and according to act upon that view".

25. In either case it is a .question of fact, of course where there is documentation as in this case the construction of such documentation is a matter of law and will give rise to facts which are part of the material events which must then be judged objectively by the court. See **Stow Valley Builders v. Stuart** (1974) 2 Lloyds Reports p. 1.3 C.A. where Lloyd I,J said: *"As with any other bilateral contract what natters is not what the creditor himself intends but what by his words and conduct he has led the other party as a reasonable person ... to believe".*

26. Also in that judgment Lloyd LJ expressed a view as to the significance of the encashment of a cheque: *"Cashing the cheque is always strong evidence of acceptance especially if it is not accompanied by immediate rejection of the offer. Retention of the cheque without rejection is al so strong evidence of acceptance depending on the length of delay But neither of these factors are conclusive; and it would ... be artificial to draw a hard and fast line between cases where payment is accompanied by an immediate rejection of the offer and, cases where sere objection comes within a day or two days".*

27. In **Hirachand Punanchand and others v. Temple** (1911) 2 KB page 330 C.A. the Court of Appeal upheld the defendant's appeal against t he judgment in favour of the plaintiffs at first instance. There Indian money lenders had advanced sums of monies to a young army officer against a promissory note and upon the security of 'a bond. He could not pay. The plaintiffs sought payment from hi 3 father who offered an amount less than the debt in full settlement of his son's debts and enclosed a draft for that amount. The plaintiffs cashed the draft and retained the proceeds of the draft and brought an action against the debtor for the balance. Fletcher Moulton LJ at page 340 said: *"In the present case you are dealing with the question in respect of money paid by a third person. In such a case there is no difference between payment of the total amount and payment of a proportion of it only, so long as it is paid in settlement of the debt. If a third person steps in and gives consideration for the discharge e of the debtor, it does not matter whether he does it in meal or in malt, it, or what proportion the amount given bears to the amount of the debt. . Here the money was paid by a third person, and I have no doubt the* that *upon acceptance of that money by the claimants the* full, *knowledge of (the terms on which it was offered, the debt was absolutely extinguishes!".*

CONCLUSION

28. The original offer made by the claimant made it clear that a response was to be as soon as possible, and in his letter of the 30th August 2002 he said he looked forward to hearing from the defendant's solicitors as to the offer by the 6th September 2002 within the week. In relation to the counter offer of the 6th September 2002 indicating further areas of dispute, the claimants received the cheque tendered on behalf of the company on the 7th September and delayed by retaining it until presentation on the 23rd September 2002. Neither the claimant or his solicitor wrote until the 26th September indicating the basis upon which the cheque had already been presented and encashed.

29. Had the offer of compromise been made by Mr Billinghurst the defendant, I would have had no difficulty in concluding that there was accord, because the claimants had acted in such a way as to induce the defendant to think that the money was taken in satisfaction of the claims in dispute, and had caused ed him to act on that view. However, that is not the position when one considers the clear terms of the counter offer set out in the letter of the 6th September of 200:;. The counter offer admits of only one construction. Namely, that it was an offer ma made by a third party, and that the presentation and encashment of that cheque paid on l behalf of the third party by, its agent's solicitors constituted the clearest acceptance of that offer of compromise (see **Hirachand Punanchand v. Temple.)**

30. The claimants' application for summary judgment is misconceived. The defendant has a complete defence to the claimants' claim. I do not intend to embark upon a consideration of the second award, and a second adjudicator's refusal to consider who were the proper parties to the contract.

31. The claimants will pay costs of both the summary judgment application and the preliminary issue hearing on a standard basis.

Mr Samuel Townend (instructed by Healys) for Claimants : Mr Charles Taylor (instructed by Arscotts) for the Defendant