JUDGMENT : His Honour Judge Peter Coulson QC: TCC. 20th January 2006.

1. This is an unusual dispute in which the only outstanding claim is for interest, in the maximum sum of £2,482.60, and costs. In those circumstances, I am surprised that the parties have not been able to reach some form of compromise. However, both parties did accept my suggestion that, in order to save costs, I should deal with this dispute entirely on paper, without the need for an oral hearing. For the avoidance of doubt, the documents to which I have had regard are:
   a) the statement of Laura Harry dated 16 December 2005 and the three exhibits thereto;
   b) the statement of Martin Gledhill, dated 9 January 2006 and the two exhibits attached thereto;
   c) the statement of Terrance Damms, dated 12 January 2006 and the two exhibits attached thereto;
   d) the claim form of 19.12.05 and the correspondence between the solicitors which they have copied to the court.

2. On 25 October 2004 the Defendant, as the main contractor, employed the Claimant, as a sub-contractor, to supply and install dry wall partitioning at a site for the Health and Safety Executive, in Bootle on Merseyside. Disputes arose which were the subject of an adjudication. The adjudicator's decision, dated 1 December 2005, was in the Claimant's favour, in the sum of £181,895.60. The adjudicator ordered that that sum should be paid by 8 December 2005. The Defendant failed to pay that figure, or any other amount, by the due date.

3. On 13 December 2005 the Claimant wrote to the Defendant making a pre-action offer in accordance with CPR Part 36. It was headed "without prejudice save as to costs". The relevant part of the letter was expressed in these terms: *"Baris Ltd hereby offer to fully and finally settle their rights given by the adjudicator if Kajima Construction Europe (UK) Ltd pay the total sum in the decision, namely £181,895.60 only within 21 days of this letter, ie 3 January 2006, plus the costs to be taxed if not agreed on a simple basis incurred by Baris Ltd in issuing and serving proceedings in the High Court."*

4. On 14 December 2005, the Defendant, by fax and recorded delivery, responded to this offer in writing, and stated: *"We acknowledge receipt of your letter dated* 13 December 2005, and confirm that funds will be in your account on or before 3 January 2006."

5. There is no dispute that the Claimant received this letter by fax on 14 December 2005. There is no suggestion that this letter was considered by the Claimant to be unclear or uncertain in any way. The sum of £181,895.60 was duly paid into the Claimant's bank account on 3rd January, 2006.

6. At the time of this exchange of correspondence, there were no High Court proceedings. However, on 19 December 2005, which was the Monday of Christmas week, the Claimant commenced proceedings in the TCC for the sum of £181,895.60, together with interest and costs on an indemnity basis.

7. Having commenced proceedings, the Claimant applied for directions in accordance with the TCC's special procedure for the summary enforcement of adjudicator's decisions: see paragraph 9.2 of the second edition of the TCC Guide, published in October 2005, and Appendix F attached to it. The application was supported by a statement from the Claimant's company solicitor, Ms Laura Harry, dated 16 December 2005. Remarkably, this statement made no reference whatsoever to the exchange of correspondence on 13 and 14 December 2005. A timetable was set down leading to an oral hearing on Friday 20 January 2006.

8. On 9 January 2006, a Director of the Defendant company, Mr Martin Gledhill, provided a signed statement in accordance with the court's directions. This was the first time that the court was made aware of the exchange of correspondence in December 2005. He also confirmed that, in accordance with his letter of 14 December, payment of the £181,895.60 had been made on 3 January 2006. His defence, therefore, was that his letter of 14 December had accepted the offer of 13 December; that the agreement had come into existence on 14 December, when his response was faxed to the Claimant; that there was therefore a compromise before proceedings commenced; and that, as a result, the Defendant had a complete defence to the claim now being made, on the basis of accord and satisfaction.

9. On 12 January 2006, the Claimant's Managing Director, Mr Damms, produced a further witness statement in which he objected to the inclusion, within the evidence, of the letter of 13 December, on the basis that it was clearly marked "without prejudice save as to costs". This position was maintained, in aggressive terms, in subsequent correspondence from Ms Harry. On the substantive point, Mr Damms contended that there was no binding agreement between the parties, because the Defendant had not agreed or paid any sums in respect of interest and had not accepted any liability in respect of costs. Accordingly, he maintained that the action had not been compromised in December. Again, he chose to offer to the court no explanation whatever of the Claimant's decision to commence High Court proceedings when, on one view of the correspondence of December 2005, there was an apparent agreement between the parties, and, even on the Claimant's own case, there was an agreement on everything except interest.

10. Accordingly, the issues for me to decide are:
 a) whether or not the offer letter of 13 January 2006 is admissible in these proceedings;
 b) whether the offer of 13 December was fully accepted by the Defendant on 14 December so as to give rise to a defence of accord and satisfaction.

 As noted above, it was agreed that I would provide a judgment on these issues in writing, without the need for the parties to incur the costs of the proposed hearing on 20th January. Accordingly, I set out below my decision on these issues.

Admissibility

11. A letter marked "***without prejudice save as to costs***" should not ordinarily be considered by the court until all substantive matters have been dealt with. However, if an offer embodied in a without prejudice letter has been accepted, so that there is a binding compromise between the parties, then the "***without prejudice***" tag falls away and the letter can be referred to . The authority for that well-known principle is **Walker v Wilsher** (1889) 23 QBD 335. The case referred to by the Claimant in correspondence, **Rush and Tompkins v GLC** [1988] 3 WLR 939, is largely concerned with a completely different point, namely the inadmissibility in court of without prejudice admissions, although the speeches by the House of Lords in that case also make clear that, for the limited purpose of deciding whether or not there has been a settlement, the court can, and should, have regard to without prejudice correspondence.

12. In the present case, the Defendant asserts that there is a binding compromise because the without prejudice offer was accepted. Accordingly, the letter of 13 December is admissible in order for the court to see whether or not there has indeed been the binding compromise alleged by the Defendant. Denying the court a sight of the offer letter would be absurd, because it would effectively deprive the Defendant of the opportunity of raising the compromise point as a defence to the claim. Accordingly the letter is admissible on the issue as to whether or not there has, in fact, been accord and satisfaction.

13. If I conclude that there was a binding agreement in this case prior to 19 December 2005, the Claimant would fail and that will be the end of the action. If I considered that there was no binding agreement between the parties, the Defendant's only defence would fail and the Claimant would be entitled to judgment in respect of interest, which it has calculated at £2,482.60. In that event, the letter would be inadmissible for any purpose other than the question of costs. Although it does not arise here, in some cases where it is found that there has been no compromise, the fact that the assigned TCC judge has seen an inadmissible document would mean that another TCC judge would have to take over the case.

14. On the crucial issue as to whether there was a binding compromise, there are essentially two sub-issues, as identified above. First, I have to determine whether there was a binding agreement between the parties in respect of the sums to be paid by the defendant, including (if appropriate) any sums by way of interest. Secondly I have to determine whether or not there was a binding agreement between the parties on the question of costs, and, if so, what that agreement was. The Defendant needs to be successful on both sub-issues in order to rely upon the defence of accord and satisfaction.

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Interest

15. The Adjudicator's decision, at Section 4.3, concluded that the Claimant was entitled to interest as a result of late payment. He said: "*I find that Kajima shall pay to Baris due to the late payment, which up to the date of this Decision is the sum of £1,675.49 (excluding VAT) and thereafter at the rate of £62.06 (excluding VAT) per day until payment is made.*"

16. However, it was also clear from Section 4.6 of the Adjudicator's decision that he did not intend that the Defendant should pay interest between the date of the award (1 December 2005) and 8 December 2005. That is because the figure of £1,675.49 was a component part of the total of £181,895.60 which he found due to the Claimant and which he ruled "shall be paid within seven days of the date of my Decision" (i.e. by 8 December 2005).

17. The offer letter referred, in one of its paragraphs, to the £62.06 daily rate in respect of continuing interest after 8 December 2005. However, the Claimant's offer itself, which I have set out at paragraph 3 above, made no reference to any figure other than the £181,895.60. It confined itself to an offer that, if the sum of "£181,895.60 only" was paid by 3 January 2006 at the latest, the claimant's claims arising out of the adjudicator's decision would be compromised. The offer did not stipulate that interest up until 3 January 2006 was to be added to the sum of £181,895.60. It made no mention of any figure in addition to the £181,895.60. The offer was expressly confined to "£181,895.60 only".

18. Accordingly, as a matter of simple construction, the claimant's offer did not include or incorporate any request for the payment of any sum in addition to the £181,895.60. The offer was therefore limited to that lump sum.

19. It is plain that, as a matter of construction, the Defendant's letter of 14 December 2005 was an acceptance of that offer. I have already pointed out that there was no request for clarification of the acceptance letter and, had there been any doubt as to its effect, such doubts could have been raised with the Defendant. They would have been dispelled in any event by the fact that, as the letter promised, on 3 January, the full amount of £181,895.60 was paid into the Claimant's bank account.

20. Accordingly, as a matter of construction of the written offer and acceptance, there was complete agreement between the parties that the sum of £181,895.60 was to be paid into the Claimant's bank account no later than 3 January 2006 and that such agreement was in full and final settlement of all claims arising out of the adjudication. Thus the Claimant's argument that, in some way, there was no binding agreement between the parties because the Defendant never offered to pay and/or never paid any sum in respect of interest is palpably incorrect. No sum for interest over and above the £181,895.60 formed part of the claimant's offer and it therefore formed no part of the defendant's acceptance.

Costs

21. The offer part of the letter of 13 December (paragraph 3 above) referred to costs, although these were expressly limited to those costs "incurred by Baris Ltd in issuing and serving proceedings in the High Court." At the time that the offer was made there were no such proceedings. It seems to me that, as a matter of commercial common sense, the costs that were being referred to by the Claimant in the relevant paragraph of the offer letter of 13 December 2005 must have been the costs of issuing and serving proceedings in the High Court **if any such costs were incurred before the acceptance of the offer.** In other words, it would be a nonsense to read the offer as somehow suggesting that, if the parties compromised the claim in the sum of £181,895.60 before the commencement of proceedings in the High Court, the Claimant was still entitled both to commence such proceedings and to recover its costs of so doing.

22. The offer of 13 December was accepted on 14 December. Accordingly there was a binding agreement in existence before High Court proceedings were issued and served, and therefore before any costs were incurred in issuing and/or serving such proceedings. There is no detailed evidence in the statement of Mr Damms of 12 January 2006 that any such costs had been incurred by 14 December. In addition, of course, there was no need for the Claimant to issue and serve such proceedings. There was certainly no agreement that the Defendant would pay the costs of such a pointless exercise.

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23. Accordingly, the reference in the offer letter to costs must be read as being limited, not only to any costs incurred by the Claimant in issuing and serving proceedings (because that is what the letter says), but also to any such costs that may have been incurred before the offer was accepted. Any other interpretation does not make commercial sense. At the time that the offer was accepted on 14 December there were no such costs. No such costs therefore formed part of the Defendant's acceptance.

24. For the reasons I have given, it would be wholly wrong to find on the facts that there was no binding agreement between the parties prior to 19 December 2005. And I consider that it would be absurd to make the Defendant liable to pay the Claimant's costs of issuing and serving High Court proceedings:
    a) which were not commenced until after the parties had reached an agreement;
    b) which therefore had no discernible purpose;
    c) in which the Claimant has chosen not to explain why they were commenced without any reference to the relevant correspondence;
    d) prior to the commencement of which, neither the Claimant, nor its solicitor, had thought it appropriate to raise expressly with the Defendant the only point which, even on their case, remained in issue, namely the question of interest.

Conclusions

25. There was a binding compromise between the parties as a result of the exchange of faxed letters on 13 and 14 December 2005. The principal term of that agreement was that the Defendant would pay the Claimant "***£181,895.60 only***" by 3 January 2006. That is what the Defendant agreed to do on 14th December and that is what happened. The agreement was not subject to the payment of any additional sums – by way of interest or anything else – because it was expressly agreed that a fixed lump sum of "***£181,895.60 only***" was sufficient to settle all the matters arising out of the adjudication. The compromise was not subject to any further term as to the payment of costs by the Defendant because the compromise was reached before any of the costs referred to in the offer paragraph of the letter, namely the costs of issuing and serving proceedings, had been incurred.

26. Accordingly there was a binding agreement between the parties and the defence of accord and satisfaction is successful. The letter of 13 December 2005 is admissible to demonstrate that there was such a binding agreement. The Claimant's claim is therefore dismissed. I will address any argument as to the costs of the action, and any summary assessment of such costs, on paper.

Davies Arnold Cooper, Solicitors for the Claimant
Beachcroft Wansboroughs, Solicitors for the Defendant