

JUDGMENT : HIS HONOUR JUDGE COULSON QC: TCC. 17th January 2005.

1. This is the first day of the trial in this action. However, as a result of a hearing last week on 12th January, it has been agreed by both parties that I would address at the outset the issue as to whether or not this action was compromised either in November or December 2004. If I find that it has been compromised, then that is the end of the case; if not, the parties are agreed that it would then be necessary to continue immediately with the substantive trial. This agreement is now reflected in the order of the Court dated 12th January 2004.
2. Before turning to the documents and the oral evidence, it is necessary to set out the relevant principles which I must apply in reaching my decision as to whether or not there has been an effective compromise. I summarise them as follows:
 - (a) Unless all the material terms of the proposed contract are agreed, there is no binding agreement: *Foley v. Classique Coaches* [1934] 2 KB 1 ;
 - (b) Where it is plain that a material element in the negotiations remains unresolved, the Court is likely to conclude that no binding agreement has been reached : *Yorwerth v Sonnyplaster* (1973) C.A.T. 255 , cited at paragraph 3-50 of the 5th Edition of **The Law and Practice of Compromise** by David Foskett ;
 - (c) Where the parties' agreement is expressed in terms that are too vague to be enforced, the Court will decline to hold that a sufficiently certain agreement has been reached: *Wilson & Whitworth Limited v. Express and Independent Newspapers Limited* [1969] 1 WLR 197 ;
 - (d) An agreement to agree is not a binding agreement: *Walford v. Miles* [1992] A.C. 128.
3. For the purposes of this Judgment, I shall call the Claimant "APL" and the Defendant "PDRL". In dealing with the compromise issue, it is unnecessary for me to set out any of the terms of the contract between the parties or any of the details concerning the claims and cross-claims in these proceedings.
4. APL's primary case is that Mr Dunne of APL, and Mr Carter Barnard of PDRL, reached a binding oral agreement on the telephone on the 25th November 2004. That is denied by PDRL. In the alternative, APL contend that the same two gentlemen agreed all the relevant terms on the telephone a month later, on Christmas Eve. I heard evidence from both men, and I have also been taken carefully through the relevant documents. I set out below the sequence of events.
5. There were at least two meetings in August and October 2004, to try and resolve this litigation. They took place at the Holiday Inn near Heathrow, and were attended by, amongst others, Mr Dunne of APL and Mr Carter Barnard of PDRL. Some time before the first meeting, Mr Dunne had discovered that PDRL had entered into a Creditor's Voluntary Arrangement, or CVA. After the second meeting, it was agreed that PDRL would make a specific proposal to APL, but Mr Carter Barnard of PDRL went on holiday almost immediately after the second meeting, so that the first real event in the sequence was the letter from Mr Dunne to Mr Carter Barnard on the 8th November 2004. In that letter, Mr Dunne said: *"Further to our various recent meetings and discussions regarding the above. Unfortunately since our last meeting we have heard nothing further from you. We received an enquiry for various types of roof decking, including aluminium for a project in Mile End - we went back to your technical people with various technical queries and have heard nothing since! Regrettably, unless we can achieve a resolution/detailed proposals in writing by Thursday 11th November to settle this matter and the outstanding monies, we will have no alternative but to proceed. If possible, we would prefer to avoid this, but it would appear that the lack of response would regrettably leave us with no other alternative."*
6. On the 11th November, Mr Carter Barnard responded in the following terms:

"Following various meetings between our companies, we outline below our proposed offer, which we trust proves acceptable. We would advise that our offer has had to be in accordance with our CVA administrators, who will not allow preferential payments and have somewhat tied our hands.

Proposal:

(1) Include a value of £45,631.29 within the CVA at 51p in the pound, which equates to £23,271.95.

(2) The addition of the balance between the above and your proposed agreement of £34,000, which equates to £10,728.05.

Our proposal would be to pay the £10,728.05 over three equal payments, for which we would require an invoice for, say, warranties, so as to keep within the CVA rules. We would further propose we work together in an attempt to reduce the figure of £23,271.95 over the next 18 months with the hope of being in a position to remove the claim within the CVA altogether. We trust you can accept our offer, which should enable the first payment to your good selves being December 2004."

7. Mr Carter Barnard explained the rather odd figures in this letter in this way: he said that in the discussions in August and October, Mr Dunne had indicated that he would accept an overall figure of £34,000. Mr Carter Barnard therefore explained that the figures in the letter (with the split between the money to be paid up front and the money that would be paid as part of the CVA) were designed to achieve a total payment to APL of £34,000.
8. It appears that little happened over the next fortnight, until the 25th November 2004, which was the day before the Pre-Trial Review fixed in this Court. On that day, during the late afternoon or evening, Mr Dunne and Mr Carter Barnard spoke again and reached what has been called (by both parties) "*an agreement in principle*". It is the terms and effect (if any) of that agreement in principle which are now disputed. In accordance with the legal principles which I have already outlined, I have to satisfy myself that this was not merely an agreement to agree; that it was not too vague; and that it dealt with all relevant matters. As a starting point, so it seems to me, it is necessary to look at the document which was immediately generated by this conversation, namely the letter of 25th November written by Mr Dunne, to see if it demonstrates the binding agreement on which APL seek to rely.
9. In relation to this letter, I should say at the outset that I accept Mr Burr's submission that this was not a case of an executory contract. The agreement, if that is what it was, that was reached by the two men on 25th November was oral and there was no term of that agreement that it had to be put in writing before it was binding or had legal effect. The only issue for me is whether Mr Dunne and Mr Carter Barnard did in fact reach such a binding oral agreement on 25th November and, given the way in which Mr Dunne's evidence was put forward, the first question becomes: is that what his letter of 25th November actually says?
10. Mr Dunne's letter to Mr Carter Barnard of the 25th November was in the following terms:
*"I refer to your letter of 11th November and our conversation this afternoon.
It needs to be recorded that it was your decision alone not to include our claim within your company's CVA and we are not bound by the same. We respond to your proposal as:*
 - (1) *We would accept a payment of £9,000 (nine thousand pounds) by three monthly £3,000 (three thousand pounds) instalment payments on:*
 - (a) *1st January 2005 and*
 - (b) *1st February 2005 and*
 - (c) *1st March 2005.*
 - (2) *As regards the balance, there are additional costs that have been incurred since our account was submitted.*
 - (3) *On such basis, we are prepared for a sum of £59,804.40 (fifty nine thousand eight hundred and four pounds and forty pence) to be included in the CVA.*
 - (4) *This is on the express basis that you will use your best endeavours to reduce that figure by placing work with us over the next 18 months subject to our normal trading terms.*
 - (5) *On acceptance of our quotation for the supply of materials for a project, a sum equivalent to an addition of 20 per cent to be added to all billings, plus VAT, to reduce the sum to be paid out under the CVA – which would be reduced accordingly by the same figure.*
 - (6) *The CVA percentage, whether it be 51 per cent or such as is paid out to all other creditors, becomes payable to us in one sum on the 30th April 2006 unless agreed by us in writing to the contrary.**If you are in agreement with these terms, would you please sign the bottom of this letter where indicated, or fax it direct to Mr T. J. D. Reynolds at Constant & Constant, fax number 0207 401 2161, by 10 am on Friday the 26th November 2004?
Thank you for all your assistance in settling this matter."*

The letter is signed by Mr Dunne, and there is a part of the letter at the bottom of the second page which Mr Carter Barnard could sign if he accepted the terms of the letter.
11. A number of points should be noted about this letter. It is expressly said to be APL's response to PDRL's proposal of the 11th November 2004. It does not, on its face, purport to be a record of an agreement reached between Mr Carter Barnard and Mr Dunne either on the 25th November or at any other time. It seems to me that that is confirmed by the penultimate paragraph, which does not assume that PDRL would accept or had already accepted these terms: they are to sign the letter only if, having considered them, they decided that they could accept these terms.
12. It therefore seems to me, on the face of the letter, to be a little difficult to construe it as anything other than a counter proposal, and not the record of an agreement reached on the telephone.

13. In my judgment, that conclusion is confirmed by the evidence of Mr Dunne of APL. In his evidence, Mr Dunne accepted that even before the telephone conversation he had worked up a draft of the letter of the 25th November which contained some elements drafted by his solicitor, Mr T.J.D Reynolds, who is referred to in the text of the letter itself. On that point, Mr Dunne expressly said that Mr Reynolds' suggestions "had been incorporated" into the letter which he then sent out. He made it clear that that incorporation had occurred before his conversation with Mr Carter Barnard. On that basis alone it seems to me that it could not be said that the letter even purported to be a record of an oral conversation or an oral agreement.
14. As to the second paragraph of the letter, which makes the statement that it was PDRL's decision not to include the APL claim within the CVA, Mr Dunne in cross-examination accepted that this was not something that had been discussed in the telephone conversation on the 25th and it was not something which had been expressly agreed between himself and Mr Carter Barnard. There was therefore nothing to suggest that this was a matter on which they were agreed on 25th November.
15. More importantly still, Mr Dunne could not say that clause 6 of the letter (which was set out at the bottom of the first page of the letter and identified the date of the 30th of April 2006 as the date when the balance within the CVA would be paid) was discussed or agreed on the telephone on the 25th November. Mr Dunne's evidence indicated that this was effectively a point which he had proposed, for the first time, in the letter itself.
16. His oral evidence in-chief on this point was pretty clear. As to the date of 30th April 2006 he said: "*That date had been given to us by Mr Carter-Barnard at the meeting at the Holiday Inn.*" In cross-examination, he said that what he was referring to was a period for the CVA of 18 months (which led to his calculation of the April 2006 date) which had been mentioned in those earlier discussions by Mr Carter Barnard. When it was expressly put to him that Mr Carter Barnard had not mentioned the April date in the conversation on the 25th November, Mr Dunne said that he could not remember whether he had or not.
17. For the avoidance of doubt, therefore, and on the basis of Mr Dunne's own evidence, I find that the point at clause 6 of the letter was not even discussed, let alone agreed, in the telephone conversation of 25th November. His evidence, so it seems to me, confirms the conclusion that I had reached on the general wording of his letter, namely that this was just a proposal by Mr Dunne and not a record of a binding agreement reached over the telephone.
18. Mr Carter Barnard's evidence was to this same effect. For instance, in relation to clause 5 of the letter and the addition of 20 per cent to all billings, Mr Carter Barnard said that that had never been discussed during the telephone conversation on the 25th November, but having considered it for the first time once he received a copy of the letter he decided that it was not unreasonable and that it was something that he could accept. Again, therefore, it seems to me that that demonstrates that this was an offer letter, not the confirmation of a pre-existing agreement.
19. Mr Carter Barnard's evidence was that he could not accept clause 6 in the terms in which it was set out in any event. This was because, he said, although he was happy for APL to go into the CVA for the balance figure of £59,804.40, he felt that he simply could not agree to a date of the 30th April 2006, or, indeed, any date which gave or might give APL rights or entitlements which were different to those of other unsecured creditors within the CVA. This was a fundamental objection in principle to the terms of Mr Dunne's proposal. Mr Carter-Barnard put it in this way in his evidence before me this morning. He said:
"You're either in the CVA or you're not. I couldn't give dates for when people will be paid within the CVA."
20. Additional support, were it necessary, for the conclusion that the letter of 25th November was an offer and not the record of an agreement can be found in PDRL's response of the 29th November 2004. I shall deal with that letter in a little more detail below, but for now it is sufficient to say that that letter made it clear that whilst PDRL thought that the letter of the 25th November "*outlines our agreement*", there were two particular points which they did not accept, including clause 6 of the letter. APL did not immediately write back to say that both these points were not open to PDRL because, for instance,

they had already agreed to them orally on the 25th November. It seems to me that the PDRL letter which responded to the APL letter of the 25th November had been expressly invited by the last paragraph of the APL letter and it showed a process of ongoing negotiation whereby the disputes between the parties were plainly narrowing but had not all been resolved.

21. Accordingly, on the evidence, I reject the suggestion, and APL's primary case on the face of Mr Dunne's statement, that there was a binding oral agreement on the 25th November. Neither APL's letter of that date, nor the evidence of Mr Dunne, nor the evidence of Mr Carter-Barnard, nor APL's response to PDRL's letter of the 29th November, supports any such conclusion.
22. It is therefore necessary to turn to look at APL's alternative case, namely that there was an oral agreement (in slightly different terms) reached on the 24th December 2004. In order to set this alleged agreement in context it is sensible to look at some of the documents that led up to the conversation on Christmas Eve.
23. On 29th November, Devonshires, PDRL's solicitor, wrote to APL's solicitors and said, amongst other things: *"As we understand the document put forward by your client [it] is an attempt to formalise the agreement reached in principle between the parties, and the agreement itself will be signed when it accurately reflects the agreement reached between the two. I am sure there will be no difficulties in this regard and that you also fully understand our client's wish to ensure that his own legal advisors have the opportunity to review it on the basis that it was sent to our client at 9:45 am and asked for return at 10 am. This is not entirely realistic."*
24. On the same day, PDRL responded to APL's letter of the 25th November. This is the letter to which I have previously made reference (paragraph 20 above). The letter in full reads as follows:
"We are in receipt of your letter dated the 25th November 2004, which we have duly passed to our lawyers for comment. Whilst the letter clearly outlines our agreement there are, however, a few ambiguities which we will need you to amend to enable us to sign. These are as follows:
 - (1) *The sentence referring to the fact that you will not be bound by the CVA has to be removed (second paragraph).*
 - (2) *In relation to paragraph 6 [which I have called clause 6] as numbered on the proposal, this clause is too ambiguous. In accepting the CVA, you will be paid as an unsecured creditor, the same as all the other unsecured creditors, in accordance with the Voluntary Agreement. We cannot have any separate collateral voluntary arrangement that is not supervised formally by the practitioner.**Can you please amend the agreement in accordance with the above, which will then be signed by ourselves"*
25. From that letter, it can be seen that in relation to the proposal of the 25th November, large swathes of it were agreed by PDRL. Mr Burr rightly refers to clauses 1 to 5 of that letter as having been agreed no later than this reply of the 29th November. There were just those two outstanding points : first, the second paragraph recital which referred to the non-disclosure of the CVA and the non-inclusion of the APL claims in the CVA, and, secondly, and much more significantly, the point about clause 6 and the concern expressed by PDRL that the proposal represented what they called a *"separate collateral voluntary arrangement"*.
26. It was this second point that mattered. As Mr Carter Barnard memorably put it in cross-examination, it was his position that *"the whole of clause 6 was wrong "*.
27. During the early part of December, there was correspondence between Constant & Constant, who were APL's solicitors, and Devonshires, who were PDRL's solicitors. I do not, in the interests of time, set out all that correspondence. However, it should be noted that Constant & Constant were taking the unequivocal position that there already was a binding agreement in place, which was something that Devonshires repeatedly denied.
28. The solicitors do not appear to have been involved in trying to resolve the two outstanding points. That seems to have been a matter that was left to the clients themselves. And except for a separate conversation that occurred on the 3rd December 2004, it seems that there was no progress made on the PDRL letter of the 29th November for many days. As a result of that, on the 7th December 2004, Mr Carter Barnard wrote again to Mr Dunne to say this:
"Further to our letter dated the 29th November, we still await your revised agreement, taking into consideration items 1 and 2 of our letter. This is after speaking with you on Friday the 3rd December, when you confirmed that you would deal with this issue. Obviously, as we both have always maintained, reaching an agreement is by far the best way forward, and to this end

request you forward the document for our signing. We trust you can deal with this within a sensible timescale to avoid the inevitable. Finally, I enclose your previous proposal with the relevant paragraphs that need to be deleted."

29. The enclosure was a copy of the APL letter of the 25th November, with the second paragraph – namely the recital about the CVA – deleted, and clause 6 – namely the alleged separate collateral agreement – also deleted in its entirety.
30. Since I have concluded that there was no binding agreement on the 25th November, the proper analysis must be that the letter from PDRL of the 7th December with its enclosure was a counter-offer to APL.
31. The next question becomes: was that counter-offer accepted by APL? It is clear on the face of the documents that it was not. In particular, a very important fax was sent by APL to PDRL on the 8th December, the following day, responding to that counter-proposal. With hindsight, it was perhaps unfortunate that Mr Dunne was not in the office and that this document was sent by Margaret Carver. At all events, the document read:
"We refer to your fax dated 7th December. Mr Dunne is not in the office today, but Mr Reynolds has spoken to him over the telephone. We can agree the deletion of the second paragraph, although this is a statement of fact. We are not prepared to agree the deletion of paragraph 6, which was part of the agreement Mr Dunne reached with you. Please confirm, and we will re-issue the letter to you."
32. So, although on the 7th December there were two outstanding points which were the subject of PDRL's counter-proposal, by the next day one of those two outstanding points had been accepted by APL – namely the deletion of the second paragraph recital. But in clear and unequivocal terms APL did not agree to the deletion of clause 6; indeed, they maintained, in my judgment wrongly, that that had been part of the earlier agreement that had been reached between Mr Dunne and Mr Carter Barnard.
33. Accordingly, as at the 8th December, there was no binding agreement between the parties, and to the extent that the parties were still in dispute about clause 6, PDRL's latest offer on that point had been unequivocally rejected.
34. Unfortunately, over the next two weeks very little happened. Although in their letter of the 8th December Constant & Constant suggested that the ball was in Mr Carter Barnard's court, it seems to me that this was not, in fact, the case. In the absence of an agreement, it was for Constant & Constant as the Claimant's solicitors to prepare the case for trial. Alternatively, they could have agreed to the deletion of clause 6, or they could have sought to amend or modify clause 6 in some way. But, in fact, none of those things happened.
35. Mr Burr submitted that clause 6 of the letter had become irrelevant because of the deletion of the recital at paragraph 2. Now, I understand that submission and, indeed, it was a point that had occurred to me when I was considering these papers at the end of last week. On analysis, however there are two reasons why it cannot be right. The first is because, in my judgment, clause 6 as it stood in the letter of the 25th November was capable of being categorised as a separate collateral agreement as to the date for payment of the balance due to APL within the CVA, and could therefore be regarded as giving APL an advantage over the other unsecured creditors of PDRL in the CVA. That was in reality an entirely separate matter from the point in the recital. The second reason is that it is impossible for APL to argue that, by this stage, clause 6 was effectively of no or very little effect, in circumstances where PDRL had asked for it to be deleted and APL, on advice from their solicitors, had refused to agree to just such a deletion. It seems to me that in circumstances where APL had considered clause 6 carefully and concluded that it was important enough to remain as part of the proposed agreement, I cannot now find that, in fact, it was not of any significance as far as the parties were concerned.
36. On the 24th December, there was a further telephone conversation between Mr Dunne and Mr Carter Barnard, which was the first between them for three weeks. It is APL's case that in this conversation the two men reached a binding agreement, albeit in slightly different terms to those set out in the letter of 25th November. The alleged agreement was set out in Constant & Constant's fax of the same date. It consists of the letter of the 25th November, with the recital in the second paragraph deleted, and in relation to clause 6, a new form of wording as follows:

"The CVA percentage, whether it be 51 per cent or such as is paid out to all other creditors, becomes payable to us during and up to the end of 2006 unless agreed by both of us in writing to the contrary."

37. It is said that this agreement to amend clause 6 in these terms was reached during the telephone conversation on the 24th December, and I come to that contention in a moment.
38. First, I ought to say a word about the wording of this amendment. It will be remembered that the original clause 6, which Mr Carter Barnard objected to, referred to the sum being payable on the 30th April 2006. This new form of wording had the same sum being payable *"during and up to the end of 2006"*. Not only is that vague (in the sense that no specific date is identified, simply a long stop date) but it does not seem to me that there is necessarily any concession by APL in these new words at all. The notion that payment might be made during 2006 could encompass the possibility of payment being made in advance of the 30th April 2006 rather than on that date.
39. The principal question for me, of course, is whether a term to this effect was agreed by Mr Dunne and Mr Carter Barnard on the 24th December. Mr Dunne's evidence was clear that it was. Mr Carter Barnard in his statement at paragraphs 10 and 11 said that it was not, and he said in paragraph 10 of his statement that when Mr Dunne rang him, he told Mr Dunne that no agreement had been reached because of the failure to remove that clause 6. He went on:
"He informed me that he" – that is Mr Dunne – "didn't know what his solicitor was doing but that he would try and get matters sorted out."
40. Mr Carter Barnard went on to say that when he saw the Constant & Constant fax of the 24th December, he thought that the amended proposal was still unacceptable. He also discussed the issue with his solicitors.
41. In his oral evidence, Mr Carter Barnard said that he recalled the conversation vividly. He said that Mr Dunne had spoken, or said that he would speak, to Mr Reynolds, his solicitor, to try and sort things out. He said that he did not give Mr Dunne a date for payment, and that he could not give Mr Dunne such a date because he knew that the CVA would extend to 2008. He made it plain that he wanted the whole paragraph – that is to say the whole of clause 6 – to come out of the proposed agreement altogether.
42. Effectively, Mr Carter Barnard's evidence was that history was repeating itself, and that APL were making proposals for the first time in a written document which they had sent to him for his approval but which had never been previously agreed.
43. In the circumstances, it seems to me that on the balance of probabilities this was what happened on 24th December. It does not seem to me at all likely that in a short telephone conversation on 24th December, made when Mr Carter Barnard was out Christmas shopping, he agreed to the change from April 2006 to a reference to *'during and up to the end of 2006'*. Indeed, Mr Carter Barnard has throughout made it clear both in his written statement and now orally that he would not, indeed could not, agree to clause 6 at any price. I therefore agree with PDRL's submission that it would be extraordinary if he changed his mind on Christmas Eve and embraced a very slightly modified version of the offending paragraph, to which he had always objected in principle. He said he could not agree to this proposal in any circumstances and it was a position he repeated on a number of occasions. I find that he did not agree to any such arrangement.
44. Accordingly, on the evidence that I have heard, I find on the facts that a binding oral agreement on the 24th December has not been demonstrated and was not made.
45. As I have previously noted, I did at one point wonder whether clause 6 of the letter of 25th of November was a term that was essential to the agreement, or whether this unresolved point could be treated as inessential, as per Lord Steyn's analysis in *G.Percy Trentham v. Archital Luxfer* [1993] 1 Lloyd's Rep. 25. It seems to me that, for the reasons which I have already outlined, it was an essential term. It was regarded by both parties as being important enough to prevent any binding agreement from having been concluded. Furthermore, what APL had wanted by their clause 6 was to be treated differently in the CVA from the other unsecured creditors; to have a fixed date by which the balance due to them would be paid, come what may. That was plainly important to them because they

expressly rejected the opportunity for that clause to be deleted. It was also fundamental for PDRL, for the reasons explained by Mr Carter Barnard in his evidence and set out above.

46. Accordingly, in the firm conviction that this is the only conclusion that can be reached on the evidence, but with regret that the parties allowed the point in clause 6 to remain unresolved, I find that this action has not been compromised and that there was no binding agreement as alleged by APL.
47. I should conclude by thanking counsel for their assistance on this point. In particular I should say that Mr Burr put all the points available to APL with considerable force and skill, but not even he could tie up sufficiently the loose ends that dangled from the correspondence between the parties in November and December 2004 and which led inexorably to the conclusion that there was, in fact and in law, no binding agreement between the parties.

MR ANDREW BURR (instructed by Constant & Constant) for the Claimant

MR MARK WALSH (instructed by Devonshires) for the Defendant