Neutral Citation Number: [2018] EWHC 1056 (Comm)

Case No: CL-2018-000090

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 9 May 2018

Before :

MR JUSTICE MALES

- -

Between :

Goodwood Investments Holdings Inc.	**Claimant**
- and -	
Thyssenkrupp Industrial Solutions AG	**Defendant**

M/Y "PALLADIUM"

- -
- -

Alec Haydon (instructed by **Bargate Murray Ltd, Solicitors**) for the **Claimant**
David Bailey QC and Jessica Sutherland (instructed by **Reed Smith, LLP**) for the **Defendant**

Hearing date: 3 May 2018

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Judgment Approved

Mr Justice Males :

Introduction

1. This is an application under section 45 of the Arbitration Act 1996 for determination by the court of a question of law arising in the course of an arbitration. In my experience this section is relatively little used but, as this application shows, it has a useful role to play. The question, in short, is whether an arbitration claim under a shipbuilding contract has been settled in without prejudice correspondence between the parties' solicitors. The claimant ("the Purchaser") contends that it has been, the defendant ("the Builder") that it has not.

2. As the arbitrators pointed out in giving permission for this application to be made, all concerned in the arbitration would be uncomfortable if the arbitrators were to consider this without prejudice correspondence only to determine that no settlement had been concluded. They would then be faced with either having to resume the arbitration, excluding from their minds material which it would be better if they had not seen, or being replaced with a new and untainted tribunal. An application under section 45 avoids that danger.

3. Because I am giving this judgment in public and because my conclusion is that there has been no settlement of the arbitration, I shall confine my account of the matter to what is necessary in order to explain and determine the question of law. For the same reason I shall avoid going into the details of the parties' settlement offers and counter offers.

Section 45

4. Section 45 of the 1996 Act provides, so far as relevant:

> "(1) Unless otherwise agreed by the parties, the court may on the application of a party to arbitral proceedings (upon notice to the other parties) determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties. …
>
> (2) An application under this section shall not be considered unless –
>
> (a) it is made with the agreement of all the other parties to the proceedings, or
>
> (b) it is made with the permission of the tribunal and the court is satisfied –
>
> (i) that the determination of the question is likely to produce substantial saving in costs, and
>
> (ii) that the application was made without delay."

5. The parties agreed that an application under section 45 would be useful in order to obtain a decision whether the claim had been settled, but did not agree on the precise formulation of the question to be determined. Accordingly the arbitrators formulated the question and gave permission for the application to be made pursuant to subsection (2)(b). They did so on 16 January 2018, necessarily in the circumstances without sight of the relevant correspondence.

6. The question formulated by the arbitrators was:

> "Whether or not the Purchaser's response contained in either: (a) Bargate Murray's letter dated 11 October 2017, or (b) alternatively, Bargate Murray's letter dated 24 October 2017, to the Builder's settlement offer contained in Reed Smith's letter dated 9 October 2017, in light of the legally relevant exchanges between 9 October and 30 November 2017, created a binding and enforceable Settlement Agreement between the Purchaser and the Builder."

7. Bargate Murray were the Purchaser's solicitors. Reed Smith were the Builder's. All the relevant exchanges were in writing between the parties' solicitors. I shall therefore refer to messages as coming from the Purchaser or the Builder, without spelling out in each case that they were sent by the solicitors.

8. Prior to the commencement of the hearing before me, the Purchaser abandoned any case that the Builder's offer was accepted by its letter dated 24 October 2017. Accordingly the remaining question for which the arbitrators have given permission is effectively whether the Builder's offer of 9 October 2017 was accepted by the

Purchaser's letter of 11 October 2017. I conclude, in agreement with the parties and the arbitrators, that the statutory criteria required to be satisfied before the court can determine this question are satisfied.

9. Following the arbitrators' formulation of the question of law, the Purchaser considered further the way in which it would seek to put its case. It identified two further questions which it wished the court to determine, namely:

(1) whether a binding settlement agreement arose on the terms of the Builder's offer of 9 October 2017 as clarified by the Purchaser's letter of 11 October 2017 as a result of the parties agreeing to the adjournment of the arbitration hearing; and

(2) whether its acceptance of the Builder's offer gave rise to a legally binding obligation on the Builder to seek formal approval of its board for the terms agreed and not to do anything in the meantime which would prevent approval of those terms from being granted.

10. These questions are not within the scope of the permission given by the arbitrators, but the Builder agrees that I should determine them. Accordingly there is jurisdiction to do so pursuant to subsection (2)(a). I am satisfied that it is appropriate to do so. It would be most unfortunate if this application did not finally resolve the question whether the Purchaser's claim in the arbitration has been settled. I proceed, therefore, on the basis that the Purchaser has had the opportunity in this application to put forward all its arguments in support of its case that the arbitration has been settled, and that determination of these questions adversely to the Purchaser would mean that the arbitration has not been settled. Mr Alec Haydon for the Purchaser confirmed that this is indeed the position.

11. In the course of the hearing before me Mr Haydon confirmed also that the only way in which the Purchaser now puts its case is that the Builder came under a legally binding obligation to seek formal approval of its board for the terms agreed and not to do anything in the meantime which would prevent approval of those terms from being granted. Mr Haydon described this as an "Interim Obligation".

Background

12. The arbitration concerns a claim by the purchaser of a luxury superyacht known as M/Y "Palladium" for breach of a warranty contained in a shipbuilding contract dated 31 May 2006 between the Purchaser and the Builder. In fact the Builder sub-contracted the entire construction of the yacht to what was then a subsidiary company.

13. It was the Purchaser's case in the arbitration that:

(1) Shortly after the yacht was delivered to the Purchaser on 16 September 2010, cracks started to appear in the yacht's paint system.

(2) The Purchaser required the Builder to repair the cracking pursuant to the "Builder's Warranty" contained in the shipbuilding contract.

(3) Several attempts were made by the Builder to repair the paint system but the repairs failed to prevent further cracking from appearing over time.

14. The Purchaser therefore commenced arbitration, claiming declaratory relief and either an order for specific performance or damages. The main issue to be resolved in the arbitration was whether or to what extent the paint system needed to be replaced or repaired in accordance with the warranty. The arbitrators fixed a hearing which was scheduled to last for five weeks, beginning on 9 October 2017.

15. There had been previous unsuccessful attempts to settle the case, but in the period leading up to the hearing, from 8 September 2017 onwards, these efforts resumed. Settlement was considered at various times on two possible bases, one of which involved agreement by the Builder to carry out further repair or replacement work while the other involved a money payment. All of the settlement offers and counter offers were headed "without prejudice save as to costs". In some cases the offers were said to be made by analogy with Part 36 in order to pave the way for a submission when the arbitrators came to deal with costs that the same or similar consequences should follow as when a Part 36 offer is not accepted in court proceedings. I say nothing about the merits of any such submission. So far the occasion for making such a submission has not arisen.

16. On 8 September 2017 the Purchaser made an offer to settle the case by means of a money payment. It explained that the figure proposed was calculated as being a sum sufficient to enable it to have certain parts of the vessel refaired and repainted plus a measure of compensation for the remainder of the paint system, together with a further specified payment for legal costs. In response, the Builder sought clarification of the precise extent of the hull and superstructure which the Purchaser envisaged would have to be refaired and repainted. This was provided on 21 September 2017. The offer was rejected on 26 September 2017.

17. In a second letter of 26 September 2017 the Builder offered a lower sum by way of settlement, which was said to represent its own calculation of the cost of the refairing and repainting work in the Purchaser's previous offer as clarified. There was no suggestion that, following the Purchaser's clarification of 21 September 2017, the scope or extent of such work remained unclear. The Builder offered also a contribution to the Purchaser's costs. This offer introduced for the first time a requirement that there be "a formal settlement agreement to include, prior to signature, formal approval of the settlement by the competent corporate body of the Builder". Previously there had been no such requirement and it appears that the parties had contemplated that acceptance of the offers made would result in a binding settlement.

18. There were further attempts to settle on the basis of a money payment before the commencement of the hearing, the detail of which does not matter for present purposes. On the Builder's side its proposals always included the requirement of a formal settlement agreement.

The Builder's Offer

19. Finally, on 9 October 2017, the first day of the arbitration hearing, the Builder made a new offer which reverted to the proposal that the case should be settled by the Builder performing further repair work. I shall refer to this letter as "the Builder's Offer". Like its predecessors, it was also headed "without prejudice save as to costs". It provided, so far as relevant:

"This sets out the Builder's offer to settle all and any claims of whatever nature, whether known or unknown arising out of the aforementioned SBC [shipbuilding contract] (including those pending in the present arbitration) by way of the payment of a liquidated sum. …

Replacement Works

The Builder remains of the view that no further works are required to implement a full and complete repair to the Vessel's paint system, than the works offered in the Builder's part 36 offer of 9 July 2014.

However, in the interests of arriving at a commercial settlement of this claim (which is, in any case, a claim for specific performance of the warranty works), the Builder is prepared to perform the repair works which the Purchaser has stated in its [*sc.* letter] of 8 September 2017 are necessary, and according to which the Purchaser's offer of 8 September 2017 was calculated. That is to say, the Builder is prepared to remove the paint system, and replace it with the same or an equivalent paint system, including any with widely-available commercial superyacht fairing compound, and the same topcoat colour scheme as presently applied, in the following areas of the Vessel ('the **Replacement Works**'): …

In all other respects, the Builder is prepared to conduct the Replacement Works in the same manner, and on the same terms, as set out in the Builder's part 36 offer of 9 July 2014, Schedule 1 to that letter, and the Builder's clarification letter of 29 July 2014.

Costs

… in order to reach a commercial settlement of this dispute, the Builder is prepared to offer the Purchaser the sum of €… in respect of the Purchaser's costs. …

Offer in Full and Final Settlement

In view of the foregoing, the Builder's offer is as follows:

1. The Replacement Works; and

2. Costs – €…

Accordingly, the total net payment to be made by the Builder, in addition to performing the Replacement Works at its own cost will be €…

Additional Settlement Terms

The conclusion of a final settlement will remain subject to the following terms:

1. A full release of any existing or future (known or unknown) claims arising out of or in connection with the SBC, whether against the Builder, B+V, or any other sub-contractor, and to include the Straub-coupling warranty claim.

2. The Purchaser formally to withdraw its deceit allegation(s) against the Builder and/or B+V and/or against any individual employed during the material time by the Builder and/or B+V (as a term of settlement).

3. Return and cancellation of all outstanding guarantees.

4. Conclusion of a formal settlement agreement to include, prior to signature, formal approval of the settlement by the competent corporate body of the Builder.

Duration and implications of this Further Offer

If this offer is accepted by the Purchaser, payment will be made by the Builder to a bank account nominated by the Purchaser within 14 days from the conclusion of the formal settlement agreement referred to above. Details of the Purchaser's nominated bank account are to be provided to the Builder within 7 days from the conclusion of the formal settlement agreement.

Given the proximity of the hearing date, this offer will remain open for acceptance until 17:00 on Wednesday 11 October 2017 and, if not accepted, will expire and be withdrawn and will no longer be open for acceptance.

In the event this offer is not accepted, the Builder reserves the right to bring this letter to the attention of the Tribunal in the context of any submissions as to how the Tribunal should exercise its broad discretion on the question of costs. In particular, in the event (as the Builder anticipates) the Tribunal orders the Builder to carry [*sc*. out] repair works which are equal to or less than the works specified in the Purchaser's Offer of 8 September 2017, the Builder will invite the Tribunal to order that the Purchaser pays all of the Builder's costs from 11 October 2017 in any event on an indemnity basis. …"

20. Despite what was said in the opening paragraph of the letter, it is clear that this was not in fact an offer to settle by way of the payment of a liquidated sum, although a figure was given for costs.

The Purchaser's Response

21. On the morning of 11 October 2017, while the Builder's counsel was making opening submissions to the arbitrators, the Purchaser sent the letter which is said to constitute acceptance of the Builder's Offer. I shall refer to it as "the Purchaser's Response". This stated, so far as relevant:

"… the Further Offer is accepted by the Purchaser, subject only to the following points of clarification that are needed for logistical reasons:

1. The Further Offer does not say at which yard the work will be carried out. Can you please state which yard the Builder proposes to use? For the avoidance of doubt, the Purchaser would be prepared for that to be Blohm + Voss, or its new owner, Lurssen, or another European yard of comparable standing and quality.

2. The Further Offer is unclear about a start date for the work. For your information, the Purchaser's preferred start date is about October 2018, after the next summer cruising season. We suggest, therefore, that the parties liaise about an exact date convenient to both parties.

3. Whilst the Purchaser is content for the work to be overseen by Wrede, the Purchaser must have the right to send its own consultants to assist Wrede, and receive reports and updates from Wrede, as it is in the interests of both the Purchaser and the Builder that any further dispute be avoided.

4. We understand that the settlement requires approval from the Builder's board. Whilst that is understood by the Purchaser, your and Mr Bracker's recommendation ought, we assume, [*sc*. to] ensure it is forthcoming. Regarding the arbitration hearing, our view is that it should be adjourned *sine die* pending formal board approval.

5. The Further Offer, taking account of the foregoing points, should be set out in a formal short settlement agreement to be executed by both the Purchaser and the Builder (once board consent is obtained) and that settlement agreement must expressly provide it is in full and final settlement of all disputes and differences arising out of or in connection with the subject matter of the Arbitration, and all the further matters that you mention in your Further Offer. It must be common ground that neither party is 'buying litigation' in order to end this long running paint dispute."

Adjournment of the arbitration

22. After this letter had been sent and following the midday adjournment, the parties made a joint request to the arbitrators "to adjourn this hearing, without a specific date for coming back, in the hope that it will not be appropriate to come back, but without being able to say that is necessarily the case". In response to a question as to how long an adjournment was contemplated, Mr David Bailey QC for the Builder said that the arbitrators would certainly not be needed that week, and the parties hoped to be able to give "a crystal clear indication" as to where they were in the following week. He added that "if we do need to re-engage with you, then we will have to come back and work a timetable out to do that". Mr Simon Salzedo QC for the Purchaser agreed that there was no prospect of returning to the hearing that week, but invited the arbitrators to keep themselves available for the remainder of the five-week hearing for the time being.

23. The arbitration was therefore adjourned, on the basis that the arbitrators would keep themselves available to resume the hearing if necessary and that the hearing room booking including shorthand writers would also be maintained.

Further exchanges

24. Later that day the Purchaser sent a draft settlement agreement, noting that it had been produced as quickly as possible "following agreement in principle (i.e. subject to [Builder's] board approval) to settle all disputes and differences in line with [the

Builder's Offer]" and that it was "subject to contract". The draft included clause 9, headed "Authority to Settle", as follows:

> "This Deed is subject to the approval of the Board of the Builder, and it will only become valid and binding on the Builder when executed on its behalf by an authorised signatory(ies)."

25. Despite repeated requests for a response from the Builder, the Builder did not respond. On 13 October 2017 (i.e. the Friday of the first week of the hearing) the Purchaser wrote to the arbitrators on behalf of both parties to say that "the parties are currently engaged in settlement negotiations to determine the dispute" and that it was now their joint view that "if the hearing continues, it is not likely to be resumed before Thursday 19 October at the earliest".

26. On 19 October 2017 the Purchaser complained that because of the Builder's delay it was now impossible for its witnesses to be made available at short notice. It pressed again for a response, but none was forthcoming.

27. On 23 October 2017 the Purchaser indicated that in the absence of a constructive response by noon on the next day, it would have no alternative but to request that the hearing be re-convened to take stock and to consider how the proceedings could be compressed into the three weeks that remained available. It observed that "settlement was agreed in principle and subject only to finalising a settlement agreement to be signed off by the Builder's Board".

28. Finally, on 24 October 2017 the Builder did respond. Its response was to deny that there had been a clean acceptance of the Builder's Offer, and to enclose an extensively revised draft settlement agreement. It said that when this was agreed, it would prepare a specification for the Replacement Works and obtain quotes from suitable shipyards and that only then would its board be asked to approve the settlement. It was apparent, therefore, that the Builder's position was that no binding settlement had been concluded. In a separate open letter of the same date, the Builder maintained that there was no agreement on the terms of any settlement, whether binding, in principle or otherwise. It made proposals for the resumption of the arbitration hearing.

29. The Purchaser replied by insisting that it had accepted the Builder's Offer by its letter of 11 October 2017, adding that "for the avoidance of any doubt, and without prejudice to the Purchaser's earlier acceptance by the letter of 11 October 2017, the Purchaser accepts the Builder's offer contained in its letter of 9 October 2017". Whether the Builder's Offer had been accepted by means of this letter was the alternative question of law for which the arbitrators gave permission pursuant to section 45(2)(b) but, as already indicated, the Purchaser does not pursue this argument. It is clearly right not to do so. Whether or not the Builder's Offer was an offer capable of being accepted so as to give rise to an immediately binding contract, it had clearly been taken off the table by the Builder's letters of 24 October 2017.

Legal principles

30. I summarised the principles to be applied in deciding whether the parties have concluded a contract in *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc*

[2012] EWHC 3162 (QB), [2013] 1 Lloyd's Rep 63 at [5] to [12], citing the leading cases of *RTS Flexible Systems Ltd v Molkerei Alois Mueller GmbH & Co KG* [2010] UKSC 14, [2010] 1 WLR 753 and *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601. Those principles are not disputed.

31. In brief, it is well established that the whole course of the parties' negotiations must be considered (a point reiterated in *Global Asset Capital Inc v Aabar Block Sarl* [2017] EWCA Civ 37, [2017] 4 WLR 163), that it is possible for parties to conclude a binding contract even though it is understood or agreed that a formal document will follow which may include terms which have not yet been agreed, and that whether this is what the parties intend to do must be determined by an objective appraisal of their words and conduct.

32. It is equally well established that words such as "subject to contract" indicate that parties do not intend to be bound until a formal contract is executed. As Lewison LJ explained in *Generator Developments Ltd v Lidl UK GmbH* [2018] EWCA Civ 396 at [79]:

> "… The meaning of that phrase is well-known. What it means is that (a) neither party intends to be bound either in law or in equity unless and until a formal contract is made; and (b) each party reserves the right to withdraw until such time as a binding contract is made. It follows, therefore, that in negotiating on that basis [both parties] took the commercial risk that one or other of them might back out of the proposed transaction … In short a 'subject to contract' agreement is no agreement at all. …"

33. The same applies to an agreement which is stated to be subject to the board approval of one or both parties. When a person concludes an agreement on behalf of a company which is stated to be subject to its board approval, he makes clear that he does not have authority, or at any rate is not prepared, to commit the company unless and until the approval is given (cf. *Warehousing & Forwarding Co of East Africa Ltd v Jafferali & Sons Ltd* [1964] AC 1). Since the directors are required to exercise an independent judgment whether the transaction is in the best interests of the company, it is very hard to see how there could in such circumstances be any implied promise binding the company to the effect that approval will be forthcoming or that it is a mere formality or a "rubber stamping" exercise. Even an express promise would be problematical. If the negotiator makes clear that he is not authorised to commit the company, he can hardly be authorised to commit the board of directors to commit the company. Accordingly, when an agreement is concluded which is subject to board approval, neither party is bound until the approval is given.

The parties' submissions

34. For the Purchaser Mr Haydon submitted, in summary, that:

(1) The Builder's Offer was an offer capable of being accepted so as to create an immediately binding contract. That must follow from the fact that it was headed "without prejudice save as to costs" and was intended to provide costs protection for the Builder if not accepted by 17:00 on 11 October 2017.

(2) Accordingly, the reference to the need for a formal settlement agreement was not equivalent to a phrase such as "subject to contract" and did not prevent the immediate conclusion of a binding settlement agreement by acceptance of the offer.

(3) The Builder's Offer was accepted by the Purchaser's Response. The "points of clarification" did not qualify that clean acceptance.

(4) Alternatively, by agreeing to the adjournment of the arbitration, the Builder either confirmed that the Purchaser's Response constituted acceptance of the Builder's Offer or treated the Purchaser's Response as a counter offer which it accepted.

(5) In the further alternative, even if the Builder was not obliged to perform settlement terms before board approval was given and a settlement agreement was executed, on the Purchaser's acceptance of the Builder's Offer the Builder was bound to seek formal approval from its board and not to do anything in the meantime which would prevent approval of the terms from being granted. Mr Haydon described this as "the Interim Obligation", a halfway house between no binding agreement at all and an immediately binding settlement agreement. He described the board approval as a "rubber stamping" exercise so that the obligation not to prevent such approval amounted in effect to an obligation to approve the terms.

(6) The question whether there was a breach of the Interim Obligation is not before the court on this application.

35. I confess that I am not sure how submissions (1) to (4) are to be reconciled with Mr Haydon's clear acceptance in his reply that the only way in which the Purchaser now puts its case is by reference to the Interim Obligation. In these circumstances the safe course is to rule on each of these submissions.

36. For the Builder Mr David Bailey QC submitted, again in summary, that:

(1) The Builder's Offer and the Purchaser's Response expressly acknowledged that the parties were negotiating subject to board approval by the Builder and subject to a formal settlement agreement. Until board approval was given and a settlement agreement was executed, there was no binding or enforceable agreement between them.

(2) Even if the Builder's Offer was an offer capable of being accepted so as to give rise to an immediately binding contract, the Purchaser's Response was not a clean acceptance of that offer but rather a counter-offer and in any event demonstrates that the parties were not agreed on all essential terms of any settlement.

(3) The adjournment of the arbitration was consistent with the fact that no agreement had yet been concluded. It was not an acceptance of the Purchaser's Response.

(4) There was no obligation on the Builder to seek or obtain board approval, any such obligation being conceptually impossible.

(5) The parties' conduct considered as a whole demonstrates that no settlement of the arbitration dispute had been concluded.

The issues

37. In these circumstances the issues to be determined are as follows:

(1) Was the Builder's Offer an offer capable of being accepted so as to give rise to an immediately binding contract?

(2) Was the Builder's Offer accepted by the Purchaser's Response?

(3) Was a binding settlement concluded by the adjournment of the arbitration?

(4) Was the Builder subject to the Interim Obligation?

38. I propose to examine these individual issues and to reach provisional conclusions, which I will then review in the light of the whole course of the parties' negotiations over the relevant period.

Was the Builder's Offer an offer capable of being accepted so as to give rise to an immediately binding contract?

39. It is clear in my judgment that the Builder's Offer was an offer to settle the arbitration on terms which were subject to both (1) the approval of the Builder's board and (2) the execution by both parties of a formal settlement agreement. Accordingly it was not an offer capable of being accepted so as to give rise to an immediately binding contract.

40. I reach this conclusion for three reasons:

(1) First, the terms of the offer made this absolutely clear:

> "The conclusion of a final settlement will remain subject to the following terms: … (4) Conclusion of a formal settlement agreement to include, prior to signature, formal approval of the settlement by the competent corporate body of the Builder".

There is no reason to depart from the well-established meaning of such expressions.

(2) Second, payment by the Builder of its contribution to the Purchaser's legal costs was dependent on "the conclusion of the formal settlement agreement". Just as in *IMS S.A. v Capital Oil & Gas Industries Ltd* [2018] EWHC 894 (Comm), to hold that execution of a formal agreement was not required would require manipulation of the terms of the offer to deal with a situation (non-execution of a formal agreement) which the offer did not contemplate.

(3) In the absence of express reference to board approval and the conclusion of a formal settlement agreement there would have been no reason to hold that the Builder's Offer was too uncertain to be capable of acceptance. For example, the scope of the work to be done was sufficiently defined by reference to the

> Purchaser's offer of 21 September 2017 as subsequently clarified. However, in a case where settlement was to be on the basis of further work to be done by the Builder rather than a money payment, and in circumstances where the parties were in dispute about the quality of the work previously done by the Builder in the construction of the vessel, it made good commercial sense to clarify such matters as where and when the work was to be done, by whom it was to be overseen and what involvement the Purchaser's consultants were to have. Indeed, these were precisely the matters raised by the Purchaser's Response. There may well have been other matters for which it would be useful to provide in order to avoid so far as possible any future dispute. It is therefore not surprising that both parties should have wished to spell out the terms of any settlement agreement before being committed.

41. Mr Haydon submitted that the Builder's Offer was capable of being accepted despite the references to board approval and the conclusion of a formal settlement agreement for two reasons. The first was that the offer was intended to provide costs protection to the Builder if not accepted. He relied upon the "without prejudice save as to costs" heading, the short deadline for acceptance and the final paragraph reserving the right to bring the matter to the attention of the arbitrators in support of an application for indemnity costs. I accept that there is some force in these points. There is a tension between saying on the one hand that, if not accepted, an offer would found an application for indemnity costs and, on the other hand, that the offer was not capable of being accepted because it was subject to board approval and subject to contract. However, whatever force these points may have, I have no doubt that they are not sufficient to override or displace the express terms of the offer which made clear that it was subject to the Builder's board approval and the execution of a formal settlement agreement.

42. The second reason for saying that the offer was capable of being accepted despite the references to board approval and the conclusion of a formal settlement agreement was that the first three terms set out in the "Additional Settlement Terms" paragraph of the Builder's Offer (i.e. release of claims, withdrawal of the Purchaser's deceit allegations and cancellation of outstanding guarantees) were all to occur after a binding agreement had been concluded and that for the sake of consistency the fourth such condition (i.e. board approval and signature of a formal settlement agreement) should likewise be viewed as something which would happen after the parties were already bound. I do not accept this. Reading the paragraph as a whole it is clear that what was intended was a formal settlement agreement approved by the Builder's board prior to signature which would include terms dealing with release of claims, withdrawal of the deceit allegations and cancellation of outstanding guarantees.

Was the Builder's Offer accepted by the Purchaser's Response?

43. Even if, contrary to my conclusion above, the Builder's Offer was capable of being accepted, the Purchaser's Response was not a clean acceptance of it. It was expressly stated to be accepted "subject only to the following points of clarification needed for logistical reasons", but those further points included acknowledgement that "the settlement requires approval from the Builder's board" and stated that the Builder's Offer "taking account of the foregoing points, should be set out in a formal short settlement agreement to be executed by both the Purchaser and the Builder (once board consent is obtained)".

44. Thus it introduced new and additional terms concerning where and when the work was to be done, by whom it was to be overseen and what involvement the Purchaser's consultants were to have. If matters had rested there, the Purchaser's Response could have been regarded as a counter offer. However, it was itself expressly subject to the Builder's board approval and the conclusion of a formal settlement agreement.

Was a binding settlement concluded by the adjournment of the arbitration?

45. For the reasons already given, the Purchaser's Response was not a counter offer capable of being accepted so as to create a binding agreement. Accordingly the parties' agreement to adjourn the arbitration was not capable of being viewed as the acceptance of any such counter offer. While it is possible for parties negotiating a settlement "subject to contract" to agree by necessary implication to dispense with that subject (see *Jirehouse Capital v Beller* [2009] EWHC 2538 (Ch) at [38]), there is no such necessary implication in the present case.

46. In any event the terms in which the parties invited the arbitrators to adjourn the hearing were entirely consistent with having reached a non-binding agreement in principle but needing time to see whether they could conclude a binding settlement agreement. Indeed, their agreement that the arbitration might need to resume and that the arbitrators should maintain their availability during the remainder of the five weeks set aside is inconsistent with a binding agreement having been reached. If it had been, there would be no possibility of resuming the hearing of the original dispute.

Was the Builder subject to the Interim Obligation?

47. As already noted, the Purchaser's case is that the Builder undertook an Interim Obligation. This was defined by Mr Haydon as follows:

> "on the true construction of the settlement agreement, while the Builder was not obliged to perform the terms of the settlement before the formality of approval and execution of the contract had been dealt with, the Builder was bound in the meantime, to seek formal approval for those terms and not to do anything which would prevent approval of them from being granted."

48. Mr Haydon described the obligation not to prevent board approval as a "rubber stamping" exercise amounting in effect to an obligation to approve the terms at the first available opportunity.

49. As I understood the argument, this Interim Obligation arose because of the assumption stated in the Purchaser's Response, which the Builder did not correct although it did not confirm it either, that the recommendation of Reed Smith and Dr Bracker should ensure that the necessary approval was forthcoming and because of the parties' agreement to adjourn the arbitration hearing. This is said to have amounted to confirmation that board approval would be nothing more than "a form of rubber-stamping". To my mind that is a flimsy basis for the implication of an obligation which is in essence no more than an agreement to agree. Mr Haydon submitted that it was a reasonable assumption for the Purchaser to make because Reed Smith must have had authority to make the Builder's Offer in the first place. However, that is a circular argument. The offer which Reed Smith had authority to

make was an offer which was subject to board approval. That said nothing, expressly or by implication, about whether approval would be given. It may have been a reasonable expectation that it would be, but that was a risk which the Purchaser took. The agreement to adjourn takes matters no further. It is by no means uncommon for parties who believe that they are close to settlement or have reached agreement in principle to ask for time to see whether they can finalise an agreement.

50. Mr Bailey made a number of submissions about the Interim Obligation. He submitted in particular that there is no reason in the circumstances of the present case why two classic indications that parties do not agree to be bound, namely "subject to contract" and "subject to board approval", should be given anything other than their usual effect, i.e. that there would be no legally binding agreement unless and until board approval was given and a formal settlement agreement was executed. In any event the Interim Obligation was a conceptual impossibility, for the reason given by Cooke P in the New Zealand Court of Appeal in *Rothmans Industries v Floral Holdings Ltd* [1986] 2 NZLR 480 at 483:

> "The very suggestion that by the actions of its directors a company could have imposed on it an obligation to use its best endeavours to obtain its own approval in general meeting presents formidable logical and practical difficulties. The class of conditional contracts suggested for the appellants as an analogy, where through the actions of the directors the company comes under an obligation to use reasonable endeavours to obtain the consent of a third party, are readily distinguishable. In such cases there is truly a contract containing a condition. Here on the straightforward view … the document … is in the category of being dependent on what is called sometimes, if a little inaccurately, a condition precedent to contract."

51. Mr Haydon had no answer to these submissions, which I accept. There was no Interim Obligation.

The whole course of the parties' negotiations

52. The provisional conclusions set out so far must be tested against the whole course of the parties' negotiations over the relevant period.

53. In my judgment it is abundantly clear from an objective consideration of the parties' exchanges as a whole that there was no shared understanding that a binding settlement had been reached. In particular:

    (1) The terms of the Builder's Offer and the Purchaser's Response are clear, as I have already explained.

    (2) The adjournment of the arbitration was inconsistent with a binding settlement agreement having been reached.

    (3) The Purchaser's email of 11 October 2017 referred to an agreement in principle which was subject to the Builder's board approval, while the attached draft settlement agreement was said to be subject to contract and contained a clause making clear that it would only become valid and binding on execution. There

was no suggestion that there was nevertheless already a legally binding agreement in being.

(4) The parties jointly told the arbitrators on 13 October 2017 that they were "currently engaged in settlement negotiations to determine the dispute".

(5) There were several references to the resumption of the arbitration hearing which were inconsistent with a binding settlement having been concluded.

(6) The Purchaser stated on 23 October 2017 that "settlement was agreed in principle and subject only to finalising a settlement agreement to be signed off by the Builder's Board".

(7) It was only on 24 October 2017 that the Purchaser first suggested that a binding agreement had already been concluded.

54. In contrast, until then there is not a single indication that either party believed that a binding settlement agreement had been concluded. I have not overlooked the reference to "the settlement" in the Purchaser's email dated 13 October 2017, but do not regard that as stating clearly that the parties were already bound. In any event, it cannot override the weight of material referred to above. Moreover, it is clear that it had not occurred to anyone on the Purchaser's side that the Builder was subject to the Interim Obligation until after the arbitrators had been asked to give permission for a different question of law to be determined. There is no hint in the contemporary exchanges of any such obligation.

Conclusions

55. The questions of law to be determined are as follows:

(1) Did the Purchaser's letter dated 11 October 2017 in response to the Builder's settlement offer of 9 October 2017 create a binding and enforceable Settlement Agreement between the Purchaser and the Builder?

(2) Did the Purchaser's letter dated 24 October 2017 in response to the Builder's settlement offer of 9 October 2017 create a binding and enforceable Settlement Agreement between the Purchaser and the Builder?

(3) Did a binding Settlement Agreement arise on the terms of the Builder's letter of 9 October 2017 as clarified by the Purchaser's response of 11 October 2017 as a result of the parties agreeing to the adjournment of the arbitration hearing?

(4) Was the Builder under a legally binding obligation to seek formal approval of its board for the terms agreed and not to do anything in the meantime which would prevent approval of those terms from being granted?

56. In each case the answer is No.

57. This means that there has been no settlement of the parties' arbitration dispute.