CLAIM NO. HC2013000358

2016 [EWHC] 1614 (Ch)

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

MR ANDREW HOCHHAUSER QC

B E T W E E N:

DB UK BANK LIMITED (T/A DB MORTGAGES)

Claimant

-and-

JACOBS SOLICITORS

Defendant

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Imran Benson for the Claimant

Mr Simon Wilton for the Defendant

Hearing 28 June 2016

Judgment handed down 4 July 2016

Introduction

1. By a Claim Form dated 3 October 2013 the Claimant, DB UK Bank Limited (t/a DB Mortgages) ('the Bank'), brought a claim for professional negligence against the Defendants, Jacobs Solicitors ('the Solicitors'). The essence of the allegation of negligence is that in 2007 the Solicitors failed adequately to report on the fact that the Bank's borrower, a Mr David Aston was purchasing a new-build property at Flat 43, Crick Court, Spring Place, Barking 1G11 7GN by way of a form of sub-sale. It is alleged that the Bank would not have made its loan if the Solicitors had reported properly. The Bank claims damages for all its losses suffered as a result of making the loan. A sum of £162,410.48, together with interest and costs is claimed.

2. Although there is a partial admission in relation to breach of duty, the Solicitors have defended the claim on the basis of no liability or causative loss. It is averred that the Bank would have made the loan in any event. There is also a plea of contributory negligence.

3. The case was listed to come on for a three day trial in the week commencing Monday 27 June 2016.

4. On 22 June 2016 the Bank's solicitors, Rosling King LLP ('Rosling') sent a letter by fax and post to the Solicitors' solicitors, Caytons Law ('Caytons'), which stated that they were accepting an offer made by Caytons, contained in a Without Prejudice Save As to Costs letter dated 28 August 2015 from that firm ('the Solicitors' WPSAC Letter'). Rosling enclosed a draft Tomlin Order, which they had signed, "*for your consideration and signature on behalf of your client*." I shall set out the relevant correspondence when dealing with the procedural history. There was no response by Caytons to Rosling's letter.

5. The Solicitors deny that the claim has been settled and they rely on a number of matters to which I shall shortly refer. The Bank's position is that the claim has been settled and the trial date should be vacated. I therefore have to decide whether or not there has been a binding settlement.

Representation

6. At the hearing before me on 28 June 2016, the Bank was represented by Mr Imran Benson and the Solicitors by Mr Simon Wilton. I am grateful to them for their oral and written submissions.

The Procedural History

7. Proceedings were issued on 3 October 2013. The particulars of claim were served on 11 September 2014, and the defence on 5 November 2014. Directions were given on 24 August 2015. Disclosure took place on 7 October 2015. Witness statements were exchanged on 5 February 2016. Lending experts' reports were exchanged on 6 April 2016 and a joint statement of those experts is dated 13 May 2016.

8. Shortly after directions were given, as stated above, on 28 August 2015 Caytons sent their WPSAC Letter in the following terms:

> "Dear Sirs,
>
> WITHOUT PREJUDICE SAVE AS TO COSTS
>
> **DB UK Bank Ltd ("DB UK") v Jacobs Solicitors ("Jacobs")**
>
> 28 August 2015
>
> We have had the opportunity to take instructions on settlement. Subject to the conditions below regarding payment terms our client is prepared to make the offer of £ [ ], including interest plus costs (to be assessed on the standard basis, if not agreed), in full and final settlement of all current and future claims by DB UK against Jacobs arising out of or connected to the same subject matter as the current claim. The offer is divided into £[ ] for liability, based on the so-called *SAAMCo* cap, and £[ ] for interest[1]. We have then rounded this figure up to £[ ].
>
> If this offer is accepted we require a Tomlin Order to be entered into which makes no admission of liability and confidentiality provisions.
>
> Payment terms
>
> As you are aware, our client's insurer, Balva Insurance Company AAS ("Balva"), has been declared in default, however the Financial Services Compensation Scheme ("FSCS") has confirmed that our client is eligible for cover. This means that the FSCS will indemnify 90% of the liability claim minus the policy excess (in the case of this offer - £[ ]) and 90% of your client's determined or agreed costs.
>
> The 10% shortfall will be paid by our client. We have taken instructions and understand that 4 months is required to make this payment.

[1] We have calculated interest between 4 February-2009 and today's date at a rate of [ ]%.

Moreover, the time taken to obtaining the 90% compensation from the FSCS is variable. The offer of compensation needs to be signed off by Balva and, due to the complicating factor of Balva's insolvency, this is generally the rate determining step for the timing of payment. Thereafter, actual payment from the FSCS proceeds relatively rapidly.

As a general comment we can confirm that Claimants usually receive compensation from the FSCS after approximately six to eight weeks.

This offer is conditional upon this being agreed, and incorporated into an appropriate Tomlin Order.

Whilst we recognise that this offer is not compliant with CPR Part 36, solely due to the unusual circumstances of the Balva position meaning the payment cannot be made within 14 days, we expect it to attract cost consequences/protection. If this offer is not accepted we will seek Part 36 cost consequences should the matter proceed to trial, in view of the complicating fact of Balva's default.

In addition if this offer is refused we will seek a Lockley order (as per *Lockley v National Blood Transfusion Service* [1992] 1 WLR 492) against your client and set off any cost order in our client's favour against any potential damages awarded. As you will appreciate, that could have a very serious effect on your client.

We look forward to hearing from you as soon as you have taken instructions.

Yours faithfully

Caytons Law"

9. At the request of the parties, I have excised all references to the amounts offered by way of damages and interest, because they were to be kept confidential.

10. Although the Solicitors' WPSAC Letter stated that "*Whilst we recognise that this offer is not compliant with CPR Part 36, <u>solely</u> due to the unusual circumstances of the Balva position meaning the payment cannot be made within 14 days*…" [emphasis added], in the course of his oral submissions, Mr Wilton accepted that the WPSAC Letter also did not comply with the provisions of CPR 36.5(1)(c), which provides that "*A Part 36 Offer must – …(b) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.13 or 36.20 if the offer it is accepted."*. For that reason, in my view it was not compliant with Part 36 and therefore would not attract the benefit of Part 36 costs protection. Any argument to the contrary would fail. In reaching this conclusion, I rely upon the judgment of Lloyd LJ (with whom Stanley Burnton and Rix LJJ agreed) in ***Phi Group Ltd v Robert West Consulting Ltd*** [2012] EWCA Civ 588, [2012] 4 Costs LO 523, on which Mr Benson relied.

11. In that case, Lloyd LJ said at paragraphs 28-30:

> " 28. In *C v D* (cited above) my Lords Rix LJ and Stanley Burnton LJ, together with Rimer LJ, had to consider an offer which was expressed to be open for 21 days and which, if that was sufficient (as they held it was), complied with Part 36. The offeree had accepted it well after the 21 days and the offeror argued that it was no longer open for acceptance at that time. Rimer LJ referred to the fact that the offer stated that it was an offer to settle under Part 36 and that it was intended to have the consequences set out in the rule. He then said this at paragraph 75:
>
> "Of course, that does not mean that it did in fact comply with Part 36 and therefore must, come what may, somehow be shoehorned into the confines of its four corners: a stated bid to attain a particular goal does not also mean that the goal has been attained. The answer to the critical question still turns on how the reasonable man would read the offer. The relevance, however, of the claimant's expressed intention to make its offer a Part 36 offer is that, if there are any ambiguities in it raising a question as to whether the offer does or does not comply with the requirements of Part 36, the reasonable man will interpret it in a way that is so compliant. That is because, objectively assessed, that is what the offeror can be taken to have intended."
>
> 29. Correspondingly Stanley Burnton LJ said this at paragraph 84:
>
> "Any ambiguity in an offer purporting to be a Part 36 offer should be construed so far as reasonably possible as complying with Part 36."
>
> 30. Mr Jones submitted that, following that approach, the February offer in the present case should be construed so as to find an implicit specification of a 21 day period for the purposes of rule 36.2(2)(c). I cannot accept that argument. The requirement in the rule that a period of not less than 21 days must be specified requires some explicit identification of a period of 21 or more days. Ambiguity may come in, and with it the principle of construction described, if a period is specified but there is some doubt as to the purpose for which it is specified. Here no period was specified at all, so there is no ambiguity which falls to be resolved."

12. Thereafter, between 18 September 2015 and 24 March 2016 there were a series of without prejudice letters and without prejudice telephone conversations between the parties' solicitors. For the purposes of today's hearing, it is not necessary for me to refer to the content of those letters and discussions. This is because in a further WPSAC letter dated 24 March 2016, Caytons wrote to Rosling, stating; "*We are not instructed to make any further offers to your client. We restate the terms of our offer dated 28 August 2015 which we do not anticipate your client will beat. We would urge your clients to accept this offer sooner rather than later*."

13. On 12 May 2016, Caytons wrote again to Rosling, saying "*As requested, I write to confirm our client's position. We do not have any instructions to make any further offers of settlement and refer you to our most recent offer dated 28 August 2015 which I attach here for convenience*." The terms of the Solicitors' WPSAC Letter were reiterated once more. It was accepted by Mr Wilton that, subject to his submission that this was not an offer capable of acceptance (see below), this offer remained available for acceptance at that time.

14. He submitted, however, that the position changed once Rosling sent a WPSAC letter dated 19 May 2016, containing a Part 36 offer ('the Bank's Part 36 Offer'). It is common ground that this offer was compliant with the provisions of CPR Part 36. It is not necessary for me to recite its terms. The parties' views differed as to the effect of the Bank's Part 36 Offer on the Solicitors' WPSAC Letter. Mr Wilton submitted that the Bank's Part 36 Offer was a counter-offer and in law had the effect of rejecting the Solicitors' WPSAC Letter. Thereafter, he contended, it was no longer open for acceptance. Mr Benson for the Bank argued that because it was a valid Part 36 offer, it did not have this effect.

15. On 22 June 2016, Rosling sent Cayton a letter and a draft Tomlin Order in the following terms:

"We refer to your letter dated 28 August 2015, your email dated 12 May 2016 and the telephone conversation between our Helen Thurkettle and your Peter Tsimonos on 16 May 2016.

Our client has confirmed that, to avoid the costs of trial, it would be prepared to resolve this matter on payment by your client of £[ ] plus costs, to be assessed if not agreed. Our client therefore accepts the offer contained within your letter dated 28 August 2015.

Our client accepts the payment terms proposed. Our client also agrees to your proposals for a Tomlin with no admission of liability and standard confidentiality provisions. A Tomlin Order is enclosed for your consideration and signature on behalf of your client.

We look forward to receiving a signed copy of the enclosed Tomlin Order as soon as possible

Yours faithfully,

Rosling King LLP"

TOMLIN ORDER

UPON the parties having agreed terms of settlement as set out in a confidential settlement agreement dated 22 June 2016, a copy of which is held at the offices of the Claimant's solicitors.

AND BY CONSENT

IT IS ORDERED that:

1. All further proceedings in this claim be stayed except for the purpose of carrying such terms into effect and there be liberty to apply as to carrying such terms into effect;

2. The Defendant shall pay the Claimant's costs on the standard basis to be subject to a detailed assessment in default of agreement; and

3. This order shall be served by the Claimant on the Defendant.

We consent to an Order in the above terms:

Rosling King LLP [this was signed by them] Caytons Law

SCHEDULE TO THE TOMLIN ORDER DATED 22 JUNE 2016

TERMS OF SETTLEMENT

BETWEEN

(1) DB UK Bank Limited t/a DB Mortgages a company incorporated and registered in England under company number 00315841 and whose registered office is at 23, Great Winchester Street, London, EX2P 2AX ("DB"); and

(2) Jacobs Solicitors (A Firm) a partnership previously practising as such from offices at 451 Barking Road, London, E6 2JX ("Jacobs").

Each separately known as a "Party" and together known as the "Parties".

RECITALS

(i) DB has brought a claim against Jacobs arising from a Certificate of Title in relation to the property known as Flat 43, Crick Court, Spring Place, Barking, IG11 7GN (formerly known Unit E43, Gladale, Discover Development, Abbey Road, Barking, IG11 7GS) dated 4 October 2007, as detailed in the Letter of Claim sent by DB dated 25 October 2013 and as identified in the action under Claim Number HC-2013-000358 (the "Claim").

(ii) The parties wish to enter into this Agreement in order to settle the Claim on the basis of a commercial compromise and with no admission as to liability.

IT IS HEREBY AGREED that:-

1. Jacobs shall pay directly to DB's solicitors, Rosling King LLP, the sum of £[ ] in full and final settlement of the Claim for damages and interest (the "Settlement Sum").
2. The Settlement sum shall be paid in the following Instalments:

   (i) £[ ] in cleared funds by no later than 4.00pm on 8 August 2016; and,

   (ii) £[ ] in cleared funds by no later than 4.00pm on 22 October 2016."

16. As I have mentioned above, there was no response by Caytons to that letter.

The Issues to be decided

17. Although the stance taken by Mr Wilton orally at the hearing altered from that taken in his initial skeleton for this hearing, and was supplemented by a further skeleton dated 27 June 2016, there were essentially three issues raised by him on behalf of the Solicitors:
    (1) Did the Solicitors' WPSAC Letter amount to an offer capable of acceptance?
    (2) If it was an offer, was it implicitly rejected by the Counter-offer contained in the Bank's Part 36 Offer?
    (3) If the Solicitors' WPSAC Letter remained capable of acceptance, what was the true meaning of the offer, and was the letter of 22 June 2016, properly construed an acceptance of it?

18. For completeness I should add that there was initially an additional ground advanced by Mr Wilton, which he abandoned in the course of argument, namely that in all the circumstances, the Solicitors' WPSAC letter could be set aside on the grounds of unilateral mistake on the part of the Solicitors.

19. I will take each of the three outstanding issues in turn.

Was the Solicitors' WPSAC Letter in fact an offer capable of acceptance?

20. Mr Wilton submitted that because there was no precise indication within the Solicitors' WPSAC Letter as to when the proportion of the settlement payment emanating from the Financial Services Compensation Scheme ('the FSCS') would be made, and because the practice of six to eight weeks referred to was only an imprecise estimate, it was too uncertain to amount to a binding offer capable of acceptance. He further submitted that properly understood, it was at best an invitation to treat.

21. I reject those submissions. Certainly when it was made and subsequently restated, it was regarded as and referred to as an 'offer'. As Mr Benson pointed out, had the Bank not beaten the sum contained in the Solicitors' WPSAC Letter, it would, no doubt, have been relied upon by the Solicitors as a valid offer, and the Court would have been invited to take it into account when deciding what the appropriate costs order should be. Mr Wilton gracefully conceded this.

22. In my judgment, this was clearly an offer capable of acceptance. It was made clear that 90% of the settlement sum would be made by the FSCS and the Bank would have to be prepared to wait for payment until it was processed by them. I see no reason why an offer on those terms was not capable of acceptance. It is trite law that the court should be slow to set aside bargains on the grounds of uncertainty. There is no reason to do so here.

What was the effect in law of the Bank's Part 36 Offer on the Solicitors' WPSAC Letter?

23. At common law, a counter-offer will amount to a rejection of the earlier offer – see the cases referred to in Chitty, 31st Edn, Vol 1, paragraph 2-097 at footnote 290, starting with ***Hyde v Wrench*** (1840) 3 Beav. 334, a case well known to law students. It was submitted by Mr Wilton that the fact that this counter-offer was in the form of a Part 36 offer did not displace the common law rule.

24. Mr Benson submitted that this made all the difference. There is apparently no authority directly on point. He, however, relied upon the Court of Appeal decision in ***Gibbon v Manchester City Council*** [2010] EWCA Civ 726, [2010] 1 WLR 2081, and in particular paragraphs 5, 6 and 16, where Moore-Bick LJ (with whom Carnwarth LJ (as he then was) and Sir Anthony May P agreed) stated:

> "5. Part 36 is drafted as a self-contained code. It prescribes in some detail the manner in which an offer may be made and the consequences that flow from accepting or failing to accept it. In some respects those consequences reflect broadly the approach the court might be expected to take in relation to costs; in others they do not; for example, rule 36.14(3) allows the court to award a claimant who has obtained a judgment at least as advantageous as his offer

interest on the sum for which he has obtained judgment at an enhanced rate of up to 10% over base rate, costs on the indemnity basis and interest on those costs at an enhanced rate as well.

6. Basic concepts of offer and acceptance clearly underpin Part 36, but that is inevitable given that it contains a voluntary procedure under which either party may take the initiative to bring about a consensual resolution of the dispute. Such concepts are part of the landscape in which everyone conducts their daily life. It does not follow, however, that Part 36 should be understood as incorporating all the rules of law governing the formation of contracts, some of which are quite technical in nature. Indeed, it is not desirable that it should do so. Certainty is as much to be commended in procedural as in substantive law, especially, perhaps, in a procedural code which must be understood and followed by ordinary citizens who wish to conduct their own litigation. In my view, Part 36 was drafted with these considerations in mind and is to be read and understood according to its terms without importing other rules derived from the general law, save where that was clearly intended…..

15. Dr. Friston, who appeared on behalf of Mrs. Gibbon, submitted that, although no formal steps were taken by her solicitors to withdraw the Part 36 offer made on 18th November, its rejection by the Council on 24th November 2008 rendered it incapable of acceptance thereafter in accordance with general principles of law. Alternatively, he submitted that the solicitors' letter of 18th February rejecting the Council's offer of £2,500 made it quite clear that she was unwilling to accept that amount in settlement of her claim and thus amounted to an implied withdrawal of her Part 36 offer sufficient to satisfy the requirements of rule 36.3(7). The offer was therefore no longer open for acceptance.
16. In my view, attractive though these arguments are, they cannot be reconciled with the clear language of Part 36, or indeed with the scheme which it embodies. Rule 36.9(2) is quite clear: a Part 36 offer may be accepted *at any time* unless the offeror has withdrawn the offer by serving notice of withdrawal on the offeree. Moreover, it may be accepted whether or not the offeree has subsequently made a different offer, a provision which is contrary to the general position at common law. The rules state clearly how a Part 36 offer may be made, how it may be varied and how it may be withdrawn. They do not provide for it to lapse or become incapable of acceptance on being rejected by the offeree. That would be the case at common law, but it is inconsistent with the concepts underlying Part 36, which proceeds on the footing that the offer is on the table and available for acceptance until the offeror himself chooses to withdraw it. There are good reasons for that. An offer which appears unattractive when made, and which is therefore rejected, may become more attractive as the proceedings progress and the parties reassess the strength of their respective cases. A defendant who chooses to leave his offer on the table may tempt the claimant into accepting it, with the benefit to himself of the consequences for costs of an offer made at an early stage. Part 36 allows a defendant (or for that matter a claimant) to decide whether to leave his offer open for acceptance or to withdraw it and make another offer later. To import into Part 36 the common law rule that an offer lapses on rejection by the offeree would undermine this important element of

> the scheme. It could give rise to disputes about whether the offer had been rejected in any given case so as render it incapable of acceptance. In *Sampla v Rushmoor Borough Council* [2008] EWHC 2616 (TCC) Coulson J. held, largely for these reasons, that the rejection of a Part 36 offer does not render it incapable of later acceptance. In my view he was right to do so. …."

25. Although in that case, the Court was concerned with competing Part 36 offers, Mr Benson submitted that the analysis conducted by Moore-Bick LJ, and his observation that CPR Part 36 is a 'self-contained' code, indicate that when a Part 36 offer is made in response to an existing non-Part 36 offer, the common law principle of implied rejection does not apply. He drew my attention to the fact that no mention of the doctrine of implicit rejection by reason of a counter-offer appears in Part 36. He further relied on the fact that had the first offer had been a Part 36 offer and the counter-offer was one which fell outside the Part 36 regime, the latter would not extinguish the former. By parity of reasoning and in the interests of even-handedness, there should not be a different answer when the order was reversed.

26. Mr Wilton accepted there was an asymmetry to the outcome, when reversing the order of the Part 36 offer and non-Part 36 offer. He submitted that this was because the perspective to be adopted differed. When looking at the effect on a common law, non-Part 36 offer of a counter-offer, the common law rule had to be applied. It made no difference whether the counter-offer was one which was compliant with Part 36 or not. It was still a counter-offer and therefore amounted to a rejection of the earlier, common law, non-Part 36 offer. By contrast, the effect on a Part 36 offer of any counter-offer, whether Part 36 compliant or not, had to be addressed by reference to the Part 36 "self-contained" regime. That produced a different result and the justification was to be found in the potential benefits conferred on the maker of a Part 36 offer, or indeed counter-offer.

27. I prefer the submission of Mr Wilton. In my judgment, because one is dealing with an initial common law offer, the impact on it of any counter-offer has to be addressed by reference to common law principles. A Part 36 counter offer is still a counter-offer.

28. The result therefore is that once the Bank's Part 36 offer was made on 19 May 2016, the Solicitors' WPSAC Letter was rejected as a result and was no longer available to be accepted.

29. That disposes of this matter, but because the final issue was fully argued and because this may go further, I turn to consider that issue.

If the Solicitors' WPSAC Letter remained capable of acceptance, what was the true meaning of the offer, and was the letter of 22 June 2016, properly construed, an acceptance of it?

30. Mr Wilton submitted that on its proper construction, although there was no express time for acceptance, it was implicit in the Solicitors' WPSAC Letter that it was subject to a 21 day period in which it could be accepted, and being a common law, non-Part 36 offer, it thereafter lapsed and was no longer available for acceptance. Mr Wilton relied upon the fact that Caytons had intended that the Solicitor's WPSAC Letter should have the benefit of Part 36 costs consequences, even though for the reasons I have given in paragraph 10 and 11 above, it did not. He submitted the basis for the implication was necessity to give business efficacy. Given the Solicitors' WPSAC Letter was repeated on 12 May 2016, the 21 days expired on 11 June, well before Rosling's purported acceptance on 22 June 2016.

31. I reject that submission. I was referred to two recent decision of the Supreme Court decisions: ***Arnold v Britton*** [2015] UKSC 36, [2015] AC 1619, where guidance was given on the interpretation of contractual provisions and ***Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited*** [2015] UKSC 72, [2015] 3 WLR 1843, where the Court drew attention to the factors to be considered when determining whether a term should be implied into a contract. I would refer in particular to paragraphs 14-23 of the judgment of Lord Neuberger in the ***Arnold v Britton*** case (with whom Lords Sumption, Hodge and Hughes agreed) and to paragraphs 14-20 of the judgment of Lord Neuberger in the ***Marks and Spencer*** case (with whom all the other members of the Court agreed).

32. At paragraph 20 of the ***Arnold v Britton*** case, Lord Neuberger stated:

"The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for

people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

33. In my view, there is no basis for implying any time limit for acceptance. One cannot on the one hand seek to take advantage of the fact that this is not a Part 36 offer, for the purpose of invoking the common law rule of rejection by reason of making a counter offer, and then, when it suits, pray in aid the Part 36 regime to import a time period of 21 days. Further, as I pointed out to Mr Wilton in argument, there is no default position of 21 days in Part 36, as CPR 36.3(g) and 36.5(1)(c) make clear. Unlike a common law offer, a Part 36 offer may still be accepted after the date of expiry. If a party wishes to make a non-Part 36 offer, it can do so without any time limit, and it will still be efficacious from a business perspective, because it can always be withdrawn at any time prior to acceptance. This argument therefore fails.

34. The final submission made by Mr Wilton is that, properly construed, the Rosling letter of acceptance on 22 June 2016 was not in fact an acceptance of the terms of the Solicitors' WPSAC Letter, but in one respect put forward different terms. He submitted that, although the covering letter stated that "*Our client accepts the payment terms proposed*…", sub-paragraph 2(i) of the Tomlin Order contained a fixed date for the FSCS payment of some 8 weeks, whereas that was a guideline only and the FSCS may well have taken longer than that. In the circumstances, this did not amount to an acceptance of the Solicitors' WPSAC Letter.

35. I reject that submission. In my judgment, if the Solicitor's WPSAC Letter remained open for acceptance on 22 June 2016 (which I have found it did not for the reasons set out in paragraphs 27-29 above), the terms of the Rosling letter of acceptance on 22 June 2016 was a true acceptance of that offer. It provided a draft Tomlin Order for the *'consideration'* of Caytons and in my view that did not detract from the terms of the earlier explicit acceptance of the payment terms in the letter itself. The fact that the Tomlin Order remained unsigned did not in itself prevent an agreement having already been made, which envisaged a Tomlin Order being made in due course (see

Foskett on Compromise 8th Edn at paragraphs 5-48 to 5-52). Indeed there was no reliance placed by Mr Wilton on the mere fact that the Tomlin Order remained unexecuted; rather he complained of the terms of sub-paragraph 2(i). Had the Solicitor's WPSAC Letter remained open for acceptance, I would, therefore, have found that the Bank was entitled to its costs to be assessed on a standard basis to the date of acceptance.

Conclusion

36. For the reason set out in paragraphs 27 to 29 above, I find that there has not been a settlement of this claim and the claim must now proceed to trial.