IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC 86
ARC 7/09

AND IN THE MATTER OF a challenge to a determination of the Employment Relations Authority

AND IN THE MATTER OF an application to strike out proceedings

BETWEEN	GEOFFREY GWILT Plaintiff
AND	BRIGGS & STRATTON NEW ZEALAND LIMITED Defendant

Hearing: 22 June 2010
(Heard at Auckland)

Appearances: Garry Pollak, counsel for the plaintiff
Margaret Lewis, counsel for the defendant

Judgment: 6 July 2010

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

---

[1] The defendant has applied for an order striking out the plaintiff's proceedings, which are set down for hearing on 26 July 2010, on the grounds that the matter has now been settled by the defendant accepting an offer made on behalf of the plaintiff in a letter dated 23 March 2010.

[2] The defendant has filed an affidavit from its National Manager, Glenn Woollett, and the plaintiff has responded with a notice of opposition and an affidavit of his own. The plaintiff was also granted leave to file a further affidavit after the 22 June hearing which confirms he had purchased non-refundable tickets for himself and his wife on 9 May 2010 to enable them to fly from Perth to attend the 26 July hearing. The defendant was given leave to file further submissions on the supplementary evidence, which Ms Lewis, the defendant's barrister, did on 30 June. Mr Pollak, the plaintiff's solicitor replied on 2 July.

Factual background

[3] In case this matter goes further I will make no reference in this judgment to the terms of the purported settlement, except insofar as it is necessary to explain the reasons for my conclusion.

[4] On 2 March 2010 Ms Lewis received a letter from Mr Pollak marked "Without Prejudice" and containing a settlement proposal.

[5] On 3 March that proposal was forwarded to the defendant's head office in the United States for instructions.

[6] The parties were unsuccessful in attempting to settle the matter in mediation on 19 March 2010. The defendant left an offer on the table at the end of the mediation, which was rejected by the plaintiff on 22 March. It is common ground that the defendant's offer had the effect of rejecting the plaintiff's 2 March offer.

[7] On 23 March 2010 Mr Pollak sent a facsimile letter to Ms Lewis marked "Without Prejudice Save as to Costs", which contained the following:

> Please note this offer from the Plaintiff is by way of a Calderbank letter and the Plaintiff reserves the right to raise this offer in any matter to do with costs before the Employment Court.
>
> … the Plaintiff's offer to resolve this matter is a settlement as follows:

[8] After setting out the substance of the offer, it concludes:

> The above offer is made in good faith and in an attempt to resolve the current litigation before the Employment Court.

[9] The terms on which the plaintiff was prepared to settle, according to the tenor of this letter, were precisely the same as those contained in the 2 March letter, previously rejected by the defendant. The only new matter was that the letter now included the reference to the plaintiff using "this offer" in relation to costs in a "Calderbank" setting. On the same day Mr Pollak wrote an open letter to Ms Lewis

seeking payment of the remedies awarded by the Employment Relations Authority[1], together with interest and advising that unless that sum was paid by 6 April 2010 they would proceed to get a certified judgment from the Employment Relations Authority and seek a summary judgment and winding up orders.

[10] On the same day Mr Pollak also wrote to the Registrar of the Employment Court stating "Matters remain unresolved following last Friday's mediation (19 March), and Counsel are in agreement that the matter must now proceed to a hearing."

[11] This last facsimile letter to the Court produced a response from Ms Lewis by way of a memorandum of counsel dated 24 March, the opening two sentences of which state:

> 1. As indicated in correspondence from Counsel, the parties attended mediation last week but ultimately were unable to settle the matter. Counsel for the plaintiff now requests that the proceeding be set down for hearing, without the interlocutory matters being resolved and without the usual call-over hearing.

[12] The balance of the memorandum sets out the defendant's objections to the substantive matter being set down without first disposing of the interlocutory applications, which included a stay on condition that the amount of the Authority's remedies would be paid into Court, security for costs on the grounds that the plaintiff was overseas and issues as to disclosure of documents.

[13] Mr Woollett's affidavit acknowledges that on 24 March on behalf of the defendant a memorandum was sent to the Court setting out the issues which the defendant wished to have determined before the matter was set down for hearing as requested by the plaintiff. However, although Mr Woollett's affidavit exhibits what are said to be the exchange of letters and other relevant correspondence running to 40 pages, rather curiously, this memorandum is not included. What is included is an email exchange between the parties apparently on 24 March, regarding the sums that the Authority's determination required the defendant to pay. These included a statement that the plaintiff intended to enforce payment.

---

[1] AA35/09, 9 February 2009.

[14] By contrast the plaintiff's affidavit does annex Ms Lewis's memorandum. He states that on 24 March he was sent a copy of it by Mr Pollak. He refers to the two sentences I have set out above, and states:

> This was precisely my understanding. We were all of the same view and reflected the discussions to date. As at 23 March 2010, any offers made had been unequivocally rejected. My position, and that of the Defendant were not even remotely close.

[15] Mr Pollak responded to Ms Lewis's memorandum to the Court on 25 March, dealing with the interlocutory matters and the payment of the Authority's awards. Both counsel then attended a telephone chambers conference on 26 March 2010 at which consent orders were made granting the defendant a stay on condition of the payment of the awards into Court, recording the plaintiff's agreement to provide security for costs in the sum of $8,000 and dealing with the issues of disclosure. The substantive matter was set down for a four day hearing. Various other directions concerning the preparation of a bundle of documents and the exchange of evidence were made. Costs were reserved. The monies were duly paid into Court by both the plaintiff and the defendant.

[16] No evidence of any other communications between the parties in the period 26 March to 11 May was produced to the Court. On 11 May Ms Lewis wrote to Mr Pollak, referring to the terms of the offer to settle in his facsimile letter dated 23 March 2010 and accepting the proposal offered.

[17] Mr Pollak responded by a facsimile letter dated 17 May in which he stated:

> The purpose of this letter is to set out Mr Gwilt's position, which should have been quite self-evident.
>
> We wrote to you on 23 March 2010, following the mediation. The letter sent to you on the 23rd that you refer to was a 'without prejudice' communication. It was a Calderbank offer and it was intended to resolve the matters which have been the subject of contentious correspondence before the Employment Court.
>
> With that letter was also further correspondence sent to you at the same time and to the Court's Registrar. You responded subsequently in a number of letters and clearly the 'without prejudice' offer was not acceptable to your client.

[18] The "number of letters" in which the defendant's counsel had allegedly responded rejecting the 'without prejudice' offer were not produced to the Court.

[19] Mr Pollak's 17 May letter also observed that there had been a Court conference, an exchange of further correspondence, an affidavit filed, a fixture set down and that the plaintiff had incurred considerable expense by having obtained non-refundable air tickets and had arranged annual leave to come to New Zealand for the hearing. It stated witnesses had been and were in the process of being arranged and the plaintiff's solicitor had started to prepare his case. The letter concludes by stating that the purported acceptance was too late and that the Calderbank letter had lapsed with the passage of time and the course of events. It claimed that matters were not settled and the matter was therefore to proceed to a hearing as previously agreed.

[20] Ms Lewis responded on 24 May contending that if the plaintiff had intended not to be bound by his offer once he started preparation for the hearing, the offer should have been withdrawn and referring to the recent Supreme Court decision, *Dysart Timbers Ltd v Nielsen*[2].

[21] Mr Woollet's affidavit purports to explain the delay in accepting the settlement offer of 23 March and states that as far as he was aware there was no communication relating to the settlement proposal until 11 May 2010. He deposes that the defendant remains ready and willing to implement the settlement and so advised the plaintiff's solicitors on 24 May but on 4 June the plaintiff had responded refusing to implement the settlement. The defendant now sought a ruling from the Court.

[22] Mr Gwilt has deposed in his affidavits that as a result of the matter being set down he has booked non-refundable airfares from Perth to New Zealand, for himself and his wife, who is to be a witness at the trial, has arranged accommodation and has made various arrangements with Mr Pollak to prepare the case for the Employment Court. None of this was communicated to the defendant prior to 11 May.

---

[2] [2009] NZSC 43, [2009] 3 NZLR160.

The legal position

[23] *Dysart* is the leading case from the Supreme Court on whether an offer of settlement had lapsed before it was accepted. The reasons of Elias CJ and Blanchard J, given by Blanchard J, opened by preferring the legal analysis of Tipping J to that of McGrath J. They then stated:

> [2] It is open to someone who makes an offer to stipulate the circumstances in which it will lapse. If the offeror does not do so expressly, it may none the less be apparent to an objective observer that the offer was made on the basis of the existence of certain circumstances.
>
> [3] It is not, of course, every change in circumstances which will cause the offer to lapse, that is, make it no longer open for acceptance. A rule as wide as that would be productive of great uncertainty for offerees and, indeed, for offerors. Case law, as Tipping J demonstrates, has always required a change which an objective observer will see as very considerable in its consequences for the offeror.
>
> [4] We are of the view that, in the absence of an express term in the offer, the level of change of circumstance which is required for it to lapse is that of a fundamental change, which may occur all at once or by gradual development. An offeree cannot reasonably expect to accept an offer if the basis on which it was made has fundamentally changed. Furthermore, because it was possible for the offeror to specify the events in which the offer would lapse and, normally, to revoke the offer at any time without having to give a reason, in determining what must be taken to be, or amount to, a fundamental change the court should give less weight to the occurrence of any event which an offeror must have had in contemplation when making the offer, and about which the offeror chose to be silent. That silence when the offer was made, or when it could have been revoked, may indicate that the offeror did not regard such a matter as fundamental to the continuance of the offer.

[24] The reasons of Tipping and Wilson JJ, given by Tipping J, held that it was common ground that an offer may lapse upon the occurrence of a change of circumstance prior to acceptance:

> [28] An offeree cannot reasonably expect to be able to accept an offer if the basis on which it was made has fundamentally changed. Conversely an offeror must ordinarily be expected to provide expressly for the circumstances in which the offer will lapse. The need for there to be a fundamental change in circumstances before an offer will lapse gives appropriate weight to the interests of both offerors and offerees. The reasonable expectations of both parties are thereby accommodated.

[25] In *Dysart*, Elias CJ, Blanchard and McGrath JJ, the later for somewhat different reasons, dismissed the appeal and upheld the decisions of the High Court and Court of Appeal that there had been an accord and satisfaction. They found there had been no fundamental change before the offer was accepted. The Nielsens had offered to settle while they were awaiting the outcome of their application for leave to appeal to the Supreme Court. Their offer of settlement made on the morning of 9 August 2007 required payment to be made on 13 August 2007 whereupon their application for leave to appeal would be discontinued. The Supreme Court granted them leave to appeal on that same day and this was communicated to the parties at 12.30pm. Some 42 minutes later, Dysart's solicitors purported to accept the offer. An hour and a half later the Nielsen's solicitors replied that the offer was no longer capable of acceptance as the condition upon which it was based, the withdrawal of their application for leave to appeal, was no longer possible. Tipping and Wilson JJ were of the view that Dysart was aware of the facts constituting the change before it purported to accept the offer and they were therefore not called upon to decide whether an offeree's ignorance of the change could affect the issue. They considered that the offer was being made on the assumption that the application for leave would not have been resolved before the performance of any resulting contract took place. There was then a fundamental change and the offer was no longer open for acceptance. Therefore there was no accord.

Applying Dysart

[26] Mr Pollak first submitted that at the point the Calderbank letter was sent, the plaintiff knew his offer on the same terms and conditions had been rejected and therefore at the point that the Calderbank letter was sent and received it had already been rejected and did not constitute an offer capable of being accepted.

[27] I reject that submission. The letter refers to itself being an offer in no fewer than four places. Mr Pollak's letter of 17 May also states that it was a "Calderbank offer", intended to resolve the matters between the parties. The nature of a Calderbank offer, following the decision in *Calderbank v Calderbank*[3], is helpfully

[3] [1975] 3 All ER 333.

summarised in the decision of Judge Couch in *T&L Harvey Ltd v Duncan*[4]. It is an offer capable of being accepted; the consequences of non-acceptance fall on the offeree if the offeree does not do better at trial. It also has the effect of encouraging settlement and avoiding the offeror incurring the costs of an unnecessary trial. Although, in this case, the original offer in the same terms had been rejected, repetition of the offer, but with the Calderbank conditions, added a new element. It is always open to an offeror to repeat the exact terms of a previously rejected offer and the renewed offer, until it is either withdrawn or has lapsed according to its terms, is capable of being accepted.

[28] Mr Pollak's third submission was that if the events of 24-26 March did not amount to a rejection of the Calderbank offer, or a fundamental change of circumstances which made the offer incapable of being accepted, then such changes occurred after 26 March when the plaintiff incurred the costs of preparing for trial including the non-refundable airfares from Perth to Auckland.

[29] I accept the submissions made by Ms Lewis in response to this submission. First there is an issue as to whether the monies laid out for the non-refundable airfares have been lost or whether they can be applied as a credit towards other albeit more expensive travel. Even if the airfares are non-refundable, that was not communicated to the defendant prior to its purported acceptance of the offer, nor was it made a term of the original offer. Further it was open to the plaintiff to have withdrawn his offer once he incurred those additional expenses.

[30] Ms Lewis referred to a number of cases summarised in the Court of Appeal decision in *Dysart Timbers Ltd v Nielsen*[5]. These were, *Bright v Low*[6], *Krupp Handel GmgH v Intermare Transport GmbH*[7], *Macrae v Edinburgh Street Tramways Co*[8] and *Somerville v National Coal Board*[9]. Ms Lewis observed that the Court of Appeal had summarised the principles to be drawn from those cases as:[10]

---

[4] [2010] NZEmpC 36.
[5] [2009] 2 NZLR 9 (CA).
[6] 1940 SC 280.
[7] [1986] 1 Lloyd's Rep 176 (QB).
[8] (1885) 13 R 265 (Ct of Sess).
[9] 1963 SC 666.
[10] *Dysart* at [22].

> In each case the offer was intended to settle an entire controversy between the parties. In each case the offer was not accepted until either the controversy had been completely or substantially resolved by arbitral or judicial determination, or in Somerville by the death of the plaintiff, which rendered unrecoverable what must have been a substantial portion of the claim which was the subject of the settlement offer.

[31] Thus a Calderbank offer without limitations can remain open for acceptance right up to and including the trial of the matter, before a judgment has been issued resolving the controversy. In the present case, if the Calderbank offer had not previously either been rejected or lapsed because of a fundamental change in circumstances prior to 26 March, it remained open for acceptance on 11 May.

[32] Mr Pollak was on stronger grounds when arguing there had been a fundamental change after 24 March when the defendant's applications for stay and security for costs were resolved at the judicial conference on 26 March and the money subsequently paid into Court and a fixture allocated. However, on the basis of the authorities cited by Ms Lewis, and the principles enunciated in *Dysart*, I find that these were not fundamental changes resolving the essential controversy, which would have caused the Calderbank offer to have lapsed.

[33] Where Mr Pollak does succeed is in his submission that the Calderbank offer was rejected by the defendant's immediate response in the 24 March memorandum. This is to be read in the context of what the parties were aware had passed between them. This includes the defendant's rejection of the 2 March offer on the same terms and its renewal on 23 March with the Calderbank overlay.

[34] Although the 24 March memorandum is addressed to the Court, the plaintiff's evidence satisfies me that it was also sent to the plaintiff's solicitor, and it is referred to by Mr Pollak in his memorandum of 25 March to the Court. The 24 March memorandum refers to the correspondence from counsel which must be a reference to Mr Pollak's letter to the Court of 23 March seeking a fixture. This triggered the defendant's 24 March memorandum in response. At this point the defendant had before it a renewed offer of settlement on Calderbank terms. The defendant's response was to say that the parties had attended mediation last week but "ultimately were unable to settle the matter". The Concise Oxford Dictionary

definition of "ultimate" is "last, final, beyond which no other exists or is possible".[11] "Ultimately" is defined in the Shorter Oxford English Dictionary as "conclusively, definitively".[12]

[35] Ms Lewis submitted that the 24 March memorandum only advised that mediation had been unsuccessful and made no reference to the Calderbank offer of 23 March which remained in the background. I do not accept that submission.

[36] Objectively viewed this is an unequivocal statement from the defendant that as matters then stood, the parties had been unable to settle. The use of the word "ultimately" in its plain meaning must be taken to mean that no settlement was possible on the terms exchanged between the parties. If the word had not been included, the sentence could have meant that there had been no settlement to that point but the possibility of settlement on the basis of what had been offered still remained open. Its inclusion is inconsistent with that meaning. The plaintiff was entitled on receipt of that advice to conclude that his offer of 23 March was rejected and that the matter must now proceed to Court.

[37] The defendant's application to strike out depended upon a contract being established by the acceptance of the Calderbank offer. I find that no such contract was entered into and the strike out application must fail.

[38] Costs are reserved.

B S Travis
Judge

Judgment signed at 12.30pm on 6 July 2010

---

[11] Concise Oxford Dictionary (7th ed, University Press, Oxford, 1983).
[12] The Shorter Oxford English Dictionary on Historical Principles Volume II (3rd ed, Oxford University Press, Oxford, 1973).