In the County Court at Romford | Claim No. A63YM233

2a Oaklands Avenue
Romford
Essex

Monday, 16th February 2015

Before:

DISTRICT JUDGE GOODCHILD

Between:

FEHINTOLA OLUBUKOLA AKINRODOYE
Claimant

-v-

ESURE SERVICES LIMITED
Defendant

Counsel for the Claimant: MR. LAUDER

Counsel for the Defendant: MISS CHRISTINE RUTKOWSKI

JUDGMENT
(APPROVED 16/9/15)

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1. THE DISTRICT JUDGE: I have to say that it does not sit particularly comfortably with me, I admit, but I am with the defendant as regards their application for summary judgment.

2. In brief terms, as I understand it, this is a low-value RTA claim that went into the MoJ Portal, as is the standard practice. Liability was admitted at stage 1 by the defendant. A stage 2 pack was provided on 16th May 2014, together with an offer at that stage at £19,672.57.

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3. My understanding of the matter was that the defendant – and I am relying upon the witness statement attached to the application in this regard – had concerns with regard to the medical evidence. It wished for medical records to be obtained and considered the possibility of Part 35 questions being asked. For those reasons it fell out of the Portal. It was removed on 21st May 2014, I believe. Because the matter had left the Portal, the claimant, quite rightly in those circumstances, commenced Part 7 proceedings. As part of those Part 7 proceedings, the claimant obtained further medical evidence. The case naturally and understandably progressed thereafter in the normal fashion with regard to medical evidence etc and otherwise.

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4. I am advised, although it is not expressly contained within the witness statement in support of the application, that there were exchanges between the parties in attempts to settle and negotiate the matter post it leaving the Portal and during the Part 7 proceedings. In particular, Mr Lauder, for and on behalf of the claimant, refers expressly to those negotiations in support of his position. In particular that there was a Part 36 offer made on 27th August 2014 at £6,625, and then a subsequent counteroffer, I will call it for these purposes, on 10th September 2014 at £15,634.80. Mr Lauder relies upon that exchange, upon which I will comment further below, in support of his position of an acceptance of an offer some way after the event.

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5. Effectively, as the matter progressed and things were naturally reviewed, whether that be by fresh solicitors, fresh eyes, because of fresh medical evidence or otherwise, it was ultimately determined by the defendant that what I will call the "first offer", that of £19,672.57, should be accepted. It was therefore duly accepted on 19th December 2014. It is not in dispute the date that that the email was sent on the defendant's behalf.

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6. The dispute has arisen since then on the basis that the claimant contends that the first offer was not capable of acceptance at that late stage. This is on two bases, as I understand it. Not wishing to overtly summarise Mr Lauder's submissions, but namely: one, that by virtue of the matter being taken outside of the Portal, there is in some way a 'wiping of the slate' in terms of the offers that are made. I accept Miss Rutkowski's position that we are not, strictly speaking, in a position where we can say that everything is wiped clean going into Part 7, but for offer purposes Mr Lauder is of the view for and on behalf of the claimant that the mere act of the coming out of the Portal somehow formally automatically or otherwise withdraws any prior offer. Secondly, that, in any event, there was an exchange between the parties, counteroffers backwards and forwards, post removal from the Portal, that means – and these are my words, not Mr Lauder's – that there is some sort of contractual alteration of position, arguably some sort of estoppel, preventing the defendant from going back to the first offer when there has quite clearly been negotiation and discussion at lower levels and regarding different offers from the offer that that was ultimately accepted.

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7. With regard to the first position, namely the removal from the Portal in some way negating the first offer made, I have to say I struggle with that argument. By the pure fact of the matter coming out of the Portal, the offer is automatically withdrawn. For a start – and it does not appear to be disputed between the parties – the Portal provisions sadly have a drafting 'gap' in that they do not expressly contemplate that position. However, it does contemplate the position whereby, for example, the claimant wishes to formally withdraw the offer and thereby fall outside the Portal, or the position on any defendant's counteroffer and what happens as a consequence regarding the Portal of that.

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8. However, I cannot escape the fact that the Portal does not say anything about any automatic offer withdrawal or otherwise in coming out of the Portal. To my mind, it is not for me to somehow imply that automatic consequence. It is somewhat counterintuitive, from my perspective, and goes against the grain of what I understand to be the whole principle of the CPR and the rules in that regard. I remind the parties, and have had discussions in submissions with both counsel, on the provisions of CPR 36. It is an express provision of Part 36 that offers are capable of acceptance, subject to the court's permission and subject obviously to cost consequences, at any stage, even after the expiry of the standard 21-day period. It would seem to me to be somewhat contradictory that, just by virtue of an exit from the Portal, that there would be some form of automatic withdrawal of offers. That does not follow suit, to my mind.

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9. Secondly, I am also aware of the discussions that have been ongoing between the parties. Mr Lauder relies on that, to some extent, to create some sort of contractual argument. I suppose what he is effectively saying is it is disingenuous for the defendant to now try and accept an offer some stage after the event, with a lapse of time and there having been exchanges on offers in the meantime. I have some sympathy with him in that it does not sit entirely comfortable with me what the defendant is now seeking to do after negotiations. Nevertheless, as I have outlined, the whole principle of CPR, of Part 36, of offers and the like, is that they are capable of acceptance up until the point in time when they are accepted or formally withdrawn, subject to court's permission and subject to any cost consequences etc. I should add that the defendant has been entirely frank in that regard; they accept that position and are not seeking to make any argument on the cost consequences of having accepted an offer very late in the day.

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10. To that extent, the claimant is not prejudiced, so whether or to what extent there has been a lapse of time or otherwise and there have been further Part 7 costs incurred, that is for the defendant to meet. However, it still does not alter the position that, in terms of the offer, it is in this court's view still capable (until withdrawal) of being accepted, subject to the court's permission. This is effectively what this application amounts to: an ability for the defendant to accept the offer late, in the knowledge that there will be cost consequences for them in doing so.

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11. The mere fact of there having been an exchange on offers, to be frank, is part and parcel of the normal course of events. That is part of ongoing discussions between the parties, negotiations and the like. The fact that there are multiple Part 36 offers does not prevent – and no-one has taken me to any authority to the contrary on this point – a party from accepting any Part 36 offer at any stage, with / without the court's permission and subject to cost consequences, as part and parcel of the normal negotiations. To that extent, the fact that we are talking about whether we are in or out of the Portal is, I

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believe and with due respect to Mr Lauder, somewhat of a red herring. The usual CPR provisions and spirit of the rules with regard to offers are binding here.

12. I should add that I am also persuaded to some extent by the only case that I have been directly referred to, the matter of *Purcell v McGarry*. In that particular case the matter had moved from stage 2 to stage 3. The judge in that case, His Honour Judge Gore QC, was clear that in such circumstances, where there was a perfectly good offer that was accepted at a later stage, under the Portal provisions it makes no odds. The claimant in that scenario was still bound by that offer until such time as the offer had been formally withdrawn.

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13. I take due heed of Mr Lauder's position that that case could and perhaps should be distinguished here, because what we are talking about here is not an entirely Portal case, but, rather, a Portal case exiting into a Part 7 claim. However, I do not understand nor do I follow the logic that, because of that pure distinction alone, the fundamental principle, i.e. that an offer is a capable of acceptance until it is formally withdrawn, in some way is distinguishable purely because a case goes from being Portal to non-Portal. I am not persuaded that *Purcell v McGarry* is distinguishable. In fact I find it persuasive here.

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14. Accordingly, I grant the defendant's application for summary judgment in the sum of £19,672.57.

(Further discussions as to costs follow)

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15. The parties will be aware that, having established, as far as I am concerned, that costs should in principle follow the event, when it comes to the cost schedule I have to be satisfied as the reasonableness and proportionality of the costs incurred. I have to say, £3,000 for 3 months from December to February, subject to correspondence between the parties, does strike me as disproportionate, particularly disproportionate to the issues that have been resolved here, on what is to be quite frank, quite a distinct, short issue, albeit with potentially significant legal consequences.

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16. I do have a couple of concerns about the schedule as outlined, with due respect to Miss Rutkowski, at the level of counsel involved in the matter. I am very concerned at eight hours being undertaken on documents, particularly three and a half hours with regard to the brief to counsel and preparation of those documents alone, which does cause me quite some considerable concern. There are letters out and there will naturally be attendances between the parties and engagement between the parties in seeking to negotiate the application, which is always the requirement, to discuss and talk about matters. I am under no illusion in that regard.

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17. However, the bottom line principle is, as far as I am concerned, these costs are disproportionate. Whilst an extent of them will be necessarily incurred, I am going to apply a very broad-brush approach to the overall entitlement to recover the costs on the basis of the issues that had to be determined here and award the defendant £1,500 for costs.

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(End of judgment)

(Discussions as to further directions follow)

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