Employment Court of New Zealand

Edminstin v Sanford Limited [2018] NZEmpC 37 (2 May 2018)

Last Updated: 9 May 2018

IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2018] NZEmpC 37
EMPC 80/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	JOHN EDMINSTIN Plaintiff
AND	SANFORD LIMITED Defendant

Hearing:	on the papers, 8, 22 and 29 September 2017
Appearances:	P Andrew, counsel for the applicant P Wicks QC and K Dunn, counsel for the defendant
Judgment:	2 May 2018

JUDGMENT OF JUDGE K G SMITH - COSTS

[1] On 6 June 2017, former Chief Judge Colgan delivered a judgment in proceedings by John Edminstin in which he claimed a compliance order against Sanford Limited. The case involved navigational records known as marks.1 Issues about ownership and use of the marks materialised from a dispute over interpreting a settlement agreement between Mr Edminstin and Sanford.

[2] Mr Edminstin was employed by Sanford to skipper a vessel called *Toiler*, which he did in each oyster season from February 2009 until the end of the 2014 season.2 His remuneration was set by the quantity and quality of oysters harvested.3

1 *Edminstin v Sanford Ltd* [2017] NZEmpC 70, (2017) 15 NZELR 64.

2 At [15].

3 At [17].

[3] During the 2008-2009 season, *Toiler* was equipped with an on-board computer capable of storing information about its voyages.4 *Toiler* also had a GPS plotter, called a Koden, which displayed information and could also store it for future use. The Koden supplied information to the vessel's on-board computer.5

[4] Mr Edminstin entered information onto the Koden about the locations of previously productive oyster beds, underwater features and hazards to enable him to undertake voyages safely.6 This information was his 'marks'. At all times he kept his original notes from which the information entered into the Koden was obtained. The information was retained on the Koden and on-board computer.

[5] Mr Edminstin's employment ended in November 2014, following which he raised a personal grievance.7 Mediation

resulted in a record of settlement pursuant to s 149 of the Employment Relations Act 2000 (the Act). This litigation arose from the disputed interpretation of cl 6 of that agreement, which reads: 8

6. The applicant [John Edminstin] may collect his "marks" off the Toiler on February 27, 2015 after making appropriate arrangements with the respondent [Sanford].

[6] Mr Edminstin believed the marks were his exclusive property so Sanford could not use or copy them, meaning it could not keep or use the information he had placed on the Koden or that was stored in the on-board computer.

[7] He sought a compliance order from the Employment Relations Authority to compel Sanford to comply with his interpretation of cl 6 by not retaining or using a copy of his marks.9 Sanford disputed Mr Edminstin's claim and maintained it had complied with the settlement agreement.10 It said the application to the Authority went beyond compliance with the agreement and he was entitled, at the most, to a copy of the information held. A copy had already been supplied to him.11

4 At [18].

5 At [18].

6 At [19].

7 At [21].

8 At [23].

9 *Edminstin v Sanford Ltd* [2016] NZERA Christchurch 18 at [9].

10 At [10].

11 At [25]-[28].

[8] Mr Edminstin was unsuccessful in the Authority.12 By the time this challenge reached the Court, in addition to a dispute over the interpretation of the phrase "collect his marks" in cl 6, the judgment recorded the following subsidiary issues:13

(a) What are oyster boat skipper's "marks" and whether these include what are known as "tracks" and "tows" or simply a start point of a trawl?
(b) Does collecting a skipper's marks from a vessel mean obtaining one electronic copy of those marks or, effectively, the originals and any or all copies of them?
(c) Can reliance be placed on historical custom, practice and usage of oyster vessel skippers in the Bluff oyster fishery?
(d) The effect, if any, of the parties' former individual employment agreements and, in particular, for information confidentiality provisions.
(e) The relevance of contractual conduct of the parties.
(f) Does copying of the plaintiff's own intellectual property in marks onto the defendant's electronic devices change the property in that information from being the plaintiff's exclusively?
(g) Does this transform it to shared intellectual property or even the sole property of the defendant, albeit which the defendant may have been able to share with the plaintiff as it says it did?

[9] Despite the potential complexity the list of issues in [8] suggests the Court described the proceedings as follows:

12 At [55]-[56].

13 *Edminstin v Sanford Ltd*, above n 1, at [9].

[10] By the end of the hearing, not only had the matters originally in issue narrowed significantly but, with one important exception, it might have been said that the case had effectively resolved itself.

[10] The exception referred to was in two parts. First, whether cl 6 meant Sanford must provide to Mr Edminstin, or delete, any further copies of the marks on the Koden and on-board computer. Second, whether Sanford had an interest in the marks, had used them in oyster seasons after Mr Edminstin's employment ended, or had retained copies.14

[11] In the third amended statement of claim,15 the relief sought was confined to a compliance order, directing Sanford to deliver the marks to Mr Edminstin in readable form whether in electronic or hard copy. The relief sought included an order that Sanford erase and permanently remove his marks from all of its computer systems. The Authority's costs determination was also challenged, but there was no claim for compensation.16

[12] In its defence, Sanford pleaded that the settlement agreement provided for the collection of an electronic copy of the marks, but that did not mean they belonged exclusively to Mr Edminstin, or that it was compelled to delete them. It pleaded it had complied by providing an electronic copy of the marks to him on 5 March 2015, a hard copy on 20 March 2016, and had offered to give him the Koden and on-board computer at the time his employment ended.

[13] The Court held that Sanford had complied with the settlement agreement and declined to make the compliance order sought.17 Mr Edminstin failed to prove a breach, or breaches, of the settlement agreement by Sanford. Despite that outcome, the then Chief Judge concluded the marks were Mr Edminstin's exclusive property.18 A finding about custom, practice and usage of marks in this industry was pivotal to

14 At [11] and [32].

15 Filed on 5 December 2016.

16. See also *Edminstin v Sanford Ltd*, above n 9, at [9], where Mr Edminstin withdrew from consideration by the Authority an application for compensation and penalties.

17 *Edminstin v Sanford Ltd*, above n 1, at [105].

18 At [96].

that conclusion. The Court held that "collect[ing] his marks" in cl 6 included not only a copy of the electronical marks but all copies of them:19

As it has transpired in the period since the settlement agreement was entered into, this has indeed been effected in substantial part. That was by Sanford relinquishing the Koden GPS plotter and the on-board computer containing this information, to Mr Edminstin: however, in my view he is entitled, also, to a resilient assurance that any further copies of this information are not available to Sanford and have not been used by it.

[14] Throughout the hearing, Sanford denied it had copied or used the marks after Mr Edminstin's employment ended.

Costs application

[15] Mr Edminstin seeks an order that Sanford pay to him costs of $187,467.06, calculated at 80 per cent of his actual legal costs for senior counsel for proceedings in the Court, the same percentage of Mr Andrew's fees for attendances in the Authority and 50 per cent of Ms Goffin's fees and disbursements. He also seeks reimbursement for fees and disbursements for engaging expert witnesses of

$16,202.69 and disbursements of $1,388 for his travel to Auckland for the final part of the hearing.

[16] Mr Edminstin considers he was successful and is, therefore, entitled to an order in his favour. In supporting this claim, Mr Andrew's submissions relied on the discretion to award costs in cl 19 of sch 3 of the Act and on the principles derived from three Court of Appeal decisions: *Victoria University of Wellington v Alton- Lee,20 Binnie v Pacific Health Ltd,21* and *Health Waikato v Elmsly.22* Initially, no submissions were made about the appropriateness, or reasonableness, of applying the Court's Guideline scale for costs that has been in use since 1 January 2016.

[17] Using the principles in those cases, Mr Andrew submitted costs usually follow the event and should be calculated on the basis that the successful party is to be awarded a reasonable contribution to costs actually and reasonably incurred.

19 At [97].

20 *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305 (CA).

21 *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 (CA).

22 *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 (CA).

[18] He relied on the two-step approach in *Binnie*. The first step is to decide if the costs actually incurred by the successful party were reasonably incurred, followed by an adjustment if they were not. The second step is to decide, after appraising all relevant factors, what level of costs is appropriate for the losing party to contribute.23

Mr Edminstin's first calculation of costs

[19] Using this method, a schedule containing a breakdown of the fees incurred was provided to demonstrate the basis for this claim. The amount claimed was broken down as follows:

80% of John Katz QC's fees of $148,997.66	$119,198.12
80% of PJ Andrew's fees of $27,460	$21,968.00

Court and Authority fees	$3,562.38
50% of Ms Goffin's costs	$25,147.87
Witnesses' expenses	$16,202.69
Plaintiff's disbursements including airfares and taxi	$1,388.00
Total	**$187,467.06**

(a)

(b)

(c)

(d)

(e)

(f)

[20] The amount in the schedule for senior counsel's fees included disbursements.

[21] Mr Andrew acknowledged a conventional starting point of 66 per cent of actual and reasonable costs, but an uplift to 80 per cent of senior counsel's fee and his fee was sought. To support an uplift, he submitted the case was not an ordinary one. In duration, complexity and importance, it was said to be significant and exceptional. He referred to five expert witnesses giving evidence and that the backdrop to the proceeding was a breach of the settlement agreement by Sanford.

23 *Binnie v Pacific Health Ltd*, above n 21, at [13]-[16].

[22] An uplift was also supported by a submission about the significance of the marks to Mr Edminstin. They represent the accumulation of knowledge gained during his working life in the Bluff oyster industry. In that situation, the inevitability, and reasonableness, of him having applied significant resources to securing the return of his property was said to justify an uplift.

[23] An aggravation feature assisting in justifying an uplift was a claim that Sanford had breached the settlement agreement.

[24] For comparative purposes, a notional assessment of costs was included in the submissions prepared using the High Court Rules 2016. If those rules applied, the costs order would be $49,945, which was said to be unrealistic and disproportionate.

Sanford's reply

[25] A stark contrast in the approach to costs was evident from Sanford's reply. While acknowledging Mr Edminstin established the marks were his property, the company said it was the successful party, because the orders sought were not made. Furthermore, a breach of the settlement agreement was not established.24 Sanford's submission was that this outcome meant that, while it could have made its own application for costs, the appropriate result was for costs to lie where they fall.

[26] Two alternative submissions were made. First, if costs are ordered, this Court's scale should apply and not *Alton-Lee*, *Binnie* and *Elmsly*. If that happened, a reduction from the scale costs was requested to recognise the success it had. Second, the amount sought was said to be excessive.

[27] Allied to these submissions was a claim that the hearing was really about a hypothetical question because Sanford had offered to give the Koden, and the on- board computer, to Mr Edminstin many months before the trial. On 5 May 2016, Sanford's lawyers wrote to counsel for Mr Edminstin in the following terms:

"Sanford has reflected on its position in the ongoing litigation. It is confident that the Court will come to the same conclusion as the Authority regarding

24 *Edminstin v Sanford Ltd* [2017] NZEmpC 70, above n 1, at [105].

its ownership of the marks. There is, however, little to be gained in continuing to litigate a matter that is hypothetical, given Sanford is not using the marks or the equipment upon which the marks are stored. As such, I am instructed that Sanford will give Mr Edminstin its obsolete Koden and the computer that was [on board] the Toiler at the time Mr Edminstin's employment with it ended. The computer and Koden will be dropped at your offices later this week."

[28] That was an open letter coupled with an invitation to reflect on the utility of the proceeding. The offer was repeated on 13 September 2016. It was not a C*alderbank* offer, but the proceeding was said to have been unnecessary because Mr Edminstin could have taken possession of that equipment, making the trial unnecessary. This offer was repeated in closing submissions, and was taken up after the judgment was issued. The submission that the proceeding was hypothetical stems from this offer.

[29] Sanford also submitted the hearing was unnecessarily prolonged by:

(a) Mr Edminstin not withdrawing a claim for compensation until 24 November 2016, despite being on notice that it was not an available remedy; and
(b) calling 15 witnesses, including three experts who were of little assistance to the Court.

[30] An order covering Ms Goffin's attendances relating to the proceedings before the Court was disputed as inappropriate because she was a witness. Her evidence was also criticised as unnecessary because it included reviewing undisputed correspondence included in the bundle of documents.

[31] Costs were said to have unnecessarily increased in two ways. Between the Court sittings in December 2016 and January 2017, Mr Edminstin disclosed for the first time that he had previously engaged a person, who had already been called as a witness by Sanford, to obtain a copy of the marks from the Koden on *Toiler*. Both Mr Edminstin and the witness had to be recalled, extending the hearing time by about a day.

[32] The other matter said to have increased costs was an application to recall the judgment. Mr Edminstin sought to recall part of the judgment, at [97] and [105]. Paragraph [97] is in a section entitled "Who owns the plaintiff's marks?" in which the Judge held that it was necessarily implicit in the terms of the settlement agreement that cl 6 referred not only to copies of the electronically recorded marks but to "...all copies and the originals of those marks". The judgment went on to say that anything less was inconsistent with Mr Edminstin's exclusive property in the marks. The Court held that compliance by Sanford with cl 6 included steps to ensure that the marks were not available for it to use. However, [97] also included the following:

As it has transpired in the period since the settlement agreement was entered into, this has indeed been effected in substantial part. That was by Sanford relinquishing the Koden GPS plotter and the on-board computer containing this information, to Mr Edminstin...

[33] The Court followed this paragraph with a statement of Mr Edminstin's entitlement to a resilient insurance that there were no copies. The Court then dismissed Mr Edminstin's application for a compliance order.25

[34] If a recall was granted, Mr Edminstin sought two orders. First, for Sanford to provide to him a USB memory stick containing data consisting of his marks taken from *Toiler's* computer. Second, an order requiring Sanford to return to him any copy of his marks and to delete any copies it held.

[35] The first proposed order was opposed by Sanford because the USB memory stick was held by Sanford's solicitor and had been available for collection from February 2017. The second was opposed because granting it would have been inconsistent with the judgment. After considering a transcript of closing submissions, this application was discontinued.

Sanford's first alternative: scale costs

[36] Sanford relied on the Court's scale which had been the subject of a telephone conference recorded in a minute of 31 May 2016. The agreement of senior counsel

25 At [105].

for both parties to the proceeding being assigned to Category 2, Band B, of the scale, was recorded. Sanford submitted that the agreement should still apply.

[37] It calculated the costs on a 2B basis as $44,823, after deducting the step for preparing the bundle of documents which it had done when the task should have been undertaken by the plaintiff. A further 50 per cent reduction was proposed to reflect its success in resisting an order being made, reducing the amount to

$22,411.50.

Experts and Disbursements

[38] The claim for expert witnesses totalling $16,202.69 was disputed. Mr Edminstin sought $15,148.08 to recover fees for two expert witnesses, Keith Ingram and Matthew Kemp. Sanford submitted neither witnesses' evidence was relevant. Mr Ingram's evidence was challenged because it related to general practice about marks. Mr Kemp's evidence was said to be irrelevant because he estimated the value of the marks, but compensation was not a live issue.

[39] The $600 claimed for Dr Marten, who undertook legal research, was disputed as not being a disbursement but an expense encompassed by any award of costs that might be made.

[40] The remaining balance of $454.61, for Marintec, was incurred because Mr Edminstin disclosed that a second copy of the marks had been taken in November 2015. The objection to this part of the claim was because of the Court's interlocutory judgment26 recording a concession that an award of costs for this work would be inappropriate.

[41] The claim for disbursements for Mr Edminstin's travel from Invercargill to Auckland was disputed as unnecessary because arrangements had been made for an audio-visual link between Auckland and Invercargill. Sanford submitted he travelled for his own reasons and should bear his own costs.

26 *Edminstin v Sanford Ltd (No 2)* [2017] NZEmpC 5 at [15].

Sanford's second alternative; there should be no uplift

[42] Sanford accepted the case was "somewhat" complex, but disputed any uplift being made on that basis. Specifically, it rejected describing the proceeding as being about a breach of the settlement agreement, because the Court found it had complied and what was in issue was interpreting it.

The Authority

[43] Sanford disputed the claim for costs in the Authority being determined as a percentage of the legal costs incurred by Mr Edminstin, rather than by using the Authority's daily tariff. At the time of the investigation meeting, the daily tariff was

$3,500. The Authority had determined that the costs of the investigation should lie where they fall, but had awarded $1,750 to Sanford for two interlocutory applications where it was successful: to dismiss the proceeding against the skipper who replaced Mr Edminstin on *Toiler* and in resisting the application to remove the matter to the Court.

[44] Aside from relying on the tariff, assessing costs at 80 per cent of Mr Andrew's fee was challenged because many of his attendances were at mediation and in relation to advice on the unsuccessful interlocutory applications. Following that analysis, Sanford submitted that only one invoice, for $9,260, could be said to have been incurred for the investigation meeting.

Mr Edminstin's response

[45] Not surprisingly, Mr Edminstin did not accept Sanford's contentions. He disputed the proceeding was hypothetical because there was a live issue about ownership of the marks. The offer by Sanford, to give him the Koden and on-board computer, was acknowledged, but his reason for not accepting it was said to be an impediment encountered over being able to check the equipment before possession of it was taken.

[46] The need for expert witnesses was explained as providing contextual evidence of custom and practice and that the marks had value. Ms Goffin's evidence was said to have been necessary to address problems about the offer by Sanford to gift the Koden and computer.

[47] A schedule to the reply prepared using the Court's scale on a Category 3, Band C basis was provided as a further comparator. Category 3 is reserved for proceedings which, because of their complexity or significance, require a representative to have special skill or experience in the Employment Court. It attracts the highest daily recovery rate of $3,300.

[48] The schedule assumed each step in the proceeding required the same level of complexity and significance, and produced an indicative total for costs of $104,610, well short of Mr Edminstin's claim.

Analysis

[49] In any proceeding, the Court may order the payment of costs and expenses, including witnesses' expenses, as it thinks reasonable.27 An apportionment of costs and expenses between the parties is permissible if the Court thinks fit.28 An order must be made on a principled basis. In exercising it's discretion, the Court may have regard to any conduct of the parties tending to increase or contain costs.29

[50] Apart from the plaintiff and defendant agreeing that the Court can order a party to pay costs, there is little else about which they agree. Both parties claimed success. The stark reality of these differences is illustrated by the range of costs canvassed in the submissions; from zero to $187,467.06. Even Sanford's alternative submissions would see any order being only a modest percentage of the total amount claimed.

[51] Before considering what, if anything, should be ordered for costs, it is necessary to establish who the successful party was.

27 Employment Relations Act 2000, sch 3, cl 19.

28 Schedule 3, cl 19(2).

29 Employment Court Regulations 2000, reg 68.

Who won?

[52] Establishing who the successful party was is not a straight-forward exercise. On the face of the judgment, Mr Edminstin did not achieve any of the orders he sought. However, Mr Andrew submitted that on the critical issue of ownership of the marks, Mr Edminstin prevailed, because the Court concluded they were his exclusive property. The Judge's findings were said to be an "emphatic rejection of the defendant's arguments across a range of issues, including the matter of custom and practice...".

[53] On the theme of Mr Edminstin's success, Mr Andrew submitted Sanford had unsuccessfully sought to portray the claim as trivial, but the Judge had accepted the marks have real economic value.30 He submitted it would be wrong to conclude there should be a reduction in the amount for costs because claims for compensation were not pursued.

[54] Mr Edminstin needed to overturn the Authority's determination about the marks if he was to have any prospect of success. He needed to establish the marks were his exclusive property so that cl 6 could be interpreted in the way he considered it should be. That subject remained live until the end of the trial as is evident from closing submissions.

[55] Extensive submissions were directed at defeating Mr Edminstin's case premised on the exclusivity of his marks. Amongst the points made were the following:

(a) there was significant evidence that a skipper's marks have a significant degree of commonality;
(b) the areas where oysters are found in sufficient density for commercial fishing are well known;
(c) skippers' can see other boats fishing on most days;

30 *Edminstin v Sanford Ltd*, above n 1, at [81].

(d) skippers' can identify and recognise other skippers' marks and know where some of those other marks are;

(e) if a skipper can see where someone else is fishing, it is possible to plot that location as a mark;

(f) skippers' marks overlap to a degree;

(g) some skippers' give marks to each other;

(h) skippers have access to information about the quality/quantity of the catches of other skippers, so if one of them is doing well, the information can be used by others to identify where to fish next; and

(i) skippers have access to NIWA surveys and catch information to determine good fishing spots.

[56] Mr Wicks QC submitted that the parties agreed, for the purposes of cl 6, that Mr Edminstin was to be provided with an electronic version of the marks held by Sanford on the *Toiler's* equipment. However, that clause did not require Sanford to delete all electronic records of the marks because that was not part of the agreement. An electronic version of the marks was provided to Mr Edminstin on 5 March 2015, which included a Koden card and a memory stick containing a copy of the information from the on-board computer. On that basis, Sanford said it had complied with the settlement agreement. From those submissions, it is apparent that, while Sanford maintained it had complied, it claimed to retain a legal interest in the

information.

[57] While there was considerable force in Sanford's submission about the outcome of the proceeding, the judgment clearly favoured Mr Edminstin's view of the dispute. A compliance order was not made, probably because the trial Judge had concluded that the case had more or less resolved itself, but the judgment did resolve questions about ownership.

[58] Sanford's approach to identifying the successful party concentrates too narrowly on the Court's decision not to make an order and gives inadequate weight to the success Mr Edminstin had in establishing his exclusive ownership of the marks. The Judge considered Mr Edminstin was entitled to an assurance that his marks had not been used.

[59] In those circumstances, it is more accurate to see Mr Edminstin as the successful party rather than Sanford or to conclude this case was one of mixed success.

Costs in the Court

[60] The Court's Guideline Scale provides for costs to be assessed by applying a daily recovery rate to the time considered appropriate for each step reasonably required in the proceeding. Reasonable time for a step is generally stated in schs 3 and 4 to the guideline, and the determination of what is reasonable time for each step is made by referring to bands A, B and C.

[61] Statements about the purpose of the guideline have been made in several cases, such as in *Xtreme Dining Ltd v Dewar*, where the full Court said:31

...the guideline scale was intended to support, as far as possible, the policy objective that the determination of costs be predictable, expeditious and consistent; but it was not intended to replace the Court's ultimate discretion under the statute as to whether to make an order for costs and award of costs and, if so, against whom and how much. The Guideline Scale would be a factor in the exercise of that discretion.

[62] While the Court must exercise its discretion in a principled way, it would not be consistent with the policy objective in the guideline, of making the determination of costs predictable, expeditious and consistent, to depart from it without a proper reason for doing so.

[63] Before this proceeding reached trial, the parties agreed that it would be allocated 2B in accordance with the guideline scale. That allocation was agreed to

31 *Xtreme Dining Ltd v Dewar* [2017] NZEmpC 10 at [25].

by both senior counsel and was not re-visited until Mr Andrew provided a calculation on a 3C basis in submissions in reply.

[64] In this case, Mr Andrew's submissions are predicated on an assumption that it would be unjust not to reflect Mr Edminstin's success in the amount Sanford is ordered to pay. The underlying point is that it has cost him a substantial amount of money to establish his exclusive ownership of the marks, which outcome was resisted by Sanford, and that expense should be reflected in an order.

[65] Mr Andrew's initial submissions claiming costs on the basis of the principles in *Alton Lee*, *Binnie* and *Elmsly*, were made without reference to the Court's guideline scale. However, his subsequent submissions invited an unfavourable comparison between what might be ordered by applying the scale and Mr Edminstin's actual legal costs. I am not persuaded that a comparison between the scale, and the actual expenses incurred, by itself is a principled reason to depart from it. Making a comparison of that sort would be to depart from the purposes for which the guideline was created. My preference is to assess the costs that might be ordered using the scale and then to consider if a departure from scale is appropriate in light of any relevant factors.

[66] The first task is to consider the category and band to use. Applying 2B leads to a possible order of $49,283. Sanford prepared an assessment using 2B but deducted $4,460 for preparing the common bundle of documents. That deduction ought not to have been made and adding back that sum produces $49,283.

[67] Mr Andrew's submissions in reply attempted to calculate costs on a 3C basis, as has been mentioned, by reference to each of the steps in the proceeding which Sanford had included in its calculations. There was a minor mismatch between them over some steps in the proceeding, but they are immaterial.

[68] Category 2, Band B, is appropriate. This case was not of such significance or complexity to be reclassified as 3C. Senior counsel agreed on the costs category to use during a conference covering matters for trial such as dealing with any outstanding interlocutory applications, the filing of briefs of evidence and the

preparation of a bundle of documents. By that stage, counsel must have had an appreciation of the issues and the evidence that would

be needed to address them. The election of 2B as the appropriate costs category was a considered one and reflected the nature and complexity of the proceeding as it was known to senior counsel. That allocation was provisional, but it was not reviewed at any time, and a possible re-classification was not mentioned in closing submissions.

[69] This case was about interpreting cl 6. There were some factual complexities arising from describing what marks are and how they are used for effective oyster harvesting. However, the task of providing evidence and submissions to assist in interpreting cl 6 was insufficient to justify reclassifying costs from 2B to 3C.

[70] That leaves for consideration whether an adjustment from the scale should be made. I reject Sanford's submission that a reduction should be made to reflect its success in resisting the compliance order. That leaves for consideration a possible uplift. Mr Andrew submitted the case was not an ordinary one because of its duration, complexity and importance. That led him to submit it was a significant and exceptional case.

[71] By itself, the duration of the hearing does not stand out as a reason for an uplift. The length of time for a trial is addressed in the scale. Supporting the complexity and importance of the trial was the number of witnesses and expert witnesses who gave evidence. The number of witnesses, and the fact that some of them gave expert opinion evidence, is not sufficient to justify an uplift. One of the expert witnesses, Mr Kemp, gave evidence about valuation of the marks, but that cannot have been anything other than peripheral to the Court's finding about ownership of them. Compensation was not being pursued, and it is difficult to see how the value of the marks could have affected the interpretation of cl 6. Another witness, Mr Ingram, was an expert in the fishing industry, and his evidence was about the role of marks. That evidence supported what was said by eight oyster boat skippers over how they treated marks of their own. That expertise was helpful to the Court but does not lift this proceeding to the point where it could adequately be described as complex or important in a general sense.

[72] There was nothing in the closing submissions to support the submission that the case was significant and exceptional. It was significant to the parties, but that is the situation in every proceeding. Beyond that, it is doubtful the decision has wider application for the oyster harvesting industry because what was in issue was the interpretation of cl 6 of the settlement agreement. Sanford's contrary argument, about its entitlements in relation to those marks, was not based on any aspect of the fishing industry generally, but relied on interpreting cl 6 and on the terms and conditions of the employment agreement it had with Mr Edminstin. As an exercise in interpreting a clause in an agreement, the closing submissions show that the analysis and authorities relied on were conventional and do not support the claim that this case was exceptional.

[73] Finally, there is no justification for an uplift in the submission that Sanford had aggravated the situation by breaching the settlement agreement. There was no evidence that Sanford breached the agreement and, even if there had been, that would not have altered the nature of the case.

[74] No basis has been made out for an uplift from scale costs.

Witnesses' expenses

[75] Mr Edminstin claimed witnesses' expenses of $16,202.69. Of that sum,

$11,415.48 was for fees incurred for Mr Kemp, about the value of the marks. The balance of $4,787.21 was for the expert witness, Mr Ingram, Dr Martin who provided research assistance about international law of the sea, and Marintec, for an expert report about reading the Koden card.

[76] I accept Sanford's submission that evidence of valuation should not be reflected in costs. That evidence was irrelevant to a possible compliance order and to ownership of the marks.

[77] Sanford's criticism of Dr Martin's fee being claimed as a disbursement is that, by its nature, it was research-related and should form part of costs for legal representation to be reflected in that part of any costs order. I consider it is

appropriate for this discrete topic to be addressed as a disbursement. The fees for Marintec were $454.61. Those costs were incurred because of the late disclosure by Mr Edminstin about a second copy of the marks taken by him in November 2015. That fee is not recoverable. The Court issued an interlocutory judgment on 27 January 2017, recording a concession by Mr Edminstin's counsel that it would not be appropriate to seek to recover this amount.32

[78] The total amount to be included in a costs order should cover expenses in engaging Mr Ingram and Dr Martin's fee, which total $4,332.60.

Ms Goffin's fee

[79] A contribution towards the costs incurred for Ms Goffin's attendances relating to the Court proceeding was claimed. While costs for legal attendances are dealt with by applying the scale, a separate comment about this aspect of the costs submissions needs to be made.

[80] Despite what was said in submissions, there is no record that the Judge granted permission for Ms Goffin to be a witness and to appear as counsel. In a minute dated 28 November 2016, the Judge's concerns about her role were raised with senior counsel, who confirmed she could not act as junior counsel if she was to give evidence. She gave evidence. As a consequence, and as might therefore be expected, the judgment does not name her as counsel. There is no basis for any costs order to reflect Ms Goffin's attendances during the trial.

Summary of Costs in the Court

[81] The summary of the position at this stage is that Mr Edminstin is entitled to an order for costs in the Court calculated on a 2B basis of $49,283, together with expert witness fees of $4,332.60. Although not addressed separately in Mr Andrew's submissions and for the avoidance of doubt, Mr Edminstin is entitled to the disbursements incorporated as part of senior counsel's fee of 22 February 2017 totalling $1,738.26 covering courier charges, photocopying and binding, library

32 *Edminstin v Sanford Ltd (No 2)*, above n 26, at [15].

charges and expenses associated with travel. There is no dispute that court and Authority fees of $3,562.38 are payable.

The Authority

[82] The balance of the costs claimed are for attendances in the Authority. Mr Andrew's submissions used the same approach to them as was used when seeking an order for costs in Court, by seeking 80 per cent of the actual and reasonable costs incurred for his attendances and 50 per cent for Ms Goffin's attendances.

[83] Sanford relied on the daily tariff usually applied by the Authority which, for a two-day investigation, amounted to $7,000. It concentrated on the Authority's usual approach under cl 15 of sch 2 and *PBO Ltd v Da Cruz*.33

[84] Mr Edminstin's submissions in reply did not address the principles to apply in fixing costs in the Authority. Copies of Mr Andrew's invoices were provided. Two of them, totalling $18,200, describe attendances at mediation and for advice regarding Mr Edminstin's two unsuccessful interlocutory applications. No basis has been made out for costs to cover attendances at mediation. The third invoice, for

$9,260, relates to the investigation.

[85] Ms Goffin's invoices were rendered on 1 February 2015 for $6,325, 7 October 2015 for $6,625.09, 9 November 2015 for $2,024, 4 December 2015 for

$5,634.14, and 18 February 2016 for $6,600 for attendances relating to the investigation meeting. Some of those invoices include disbursements.

[86] Having achieved success in the Court, it follows that Mr Edminstin is entitled to favourable consideration for costs in the Authority. However, he is seeking a departure from the tariff usually applied by the Authority by carrying into the assessment the same approach he urged on the Court arising from *Alton Lee*, *Binnie* and *Elmsly*.

33 *PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808 (EmpC).

[87] In *PBO Ltd v Da Cruz*, the full Court held that the principles in those cases are not applicable to the Authority, given the way in which its investigation meetings are conducted and how it resolves employment relationship problems.34 The approach to costs Mr Andrew submitted is inconsistent with *Da Cruz*, and no other submissions were made to justify departing from it.

[88] In those circumstances, it would not be appropriate to order anything other than the daily tariff. A small deduction should be made to recognise Sanford's success in the interlocutory applications mentioned, but only for dismissing the proceeding against the skipper. The removal application is subsumed into the overall outcome. I consider the Authority costs order should be $6,500.

Disbursements

[89] Mr Andrew did not make submissions on recovering disbursements. Senior counsel's invoice of 22 February 2017 included in its calculation $1,738.26 for GST inclusive disbursements charged to Mr Edminstin. Invoices from Mr Andrew and Ms Goffin contain items for expenses that are usually considered to be disbursements such as for travel, copying, binding and similar expenses. In the absence of submissions all that can realistically be achieved is to make an allowance based on the available information. For those disbursements I allow $3,000. The combined total for disbursements is therefore $4,738.26.

[90] The additional amount claimed by Mr Edminstin is for his airfares between Auckland and Invercargill and taxi fares in Auckland. Those expenses were incurred because, by agreement, the final two days of this proceeding were conducted in Auckland. As has been noted earlier, arrangements were made for Mr Edminstin to hear the presentation of closing submissions in Auckland by audio-visual link from Invercargill. He elected to travel to Auckland for his own reasons and will need to bear that expense himself.

34 At [37]-[42]. See also *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

Conclusion

[91] Mr Edminstin is entitled to an award of costs against Sanford for this proceeding and in the Authority. Sanford is ordered to pay:

(a) For costs in the Court $49,283 and disbursements of $4,738.26.
(b) Expert witness fees of $4,332.60.
(c) Court and Authority fees of $3,562.38.
(d) Costs in the Authority of $6,500.

[92] There is no order for costs for preparing the application for costs.

K G Smith Judge

This judgment is signed at 4:50 pm on 2 May 2018

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