# Employment Court of New Zealand



## Lancom Technology Limited v Forman [2018] NZEmpC 30 (10 April 2018)

Last Updated: 17 April 2018

**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**[2018] NZEmpC 30**
**EMPC 272/2017**

| | |
|---|---|
| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | LANCOM TECHNOLOGY LIMITED<br>Plaintiff |
| AND | SEAN FORMAN<br>First Defendant |
| AND | CHARLIE KANG<br>Second Defendant |

| | |
|---|---|
| Hearing: | On the papers filed on 27 September, 14 and 28 November 2017 |
| Appearances: | A Schirnack, counsel for plaintiff T Oldfield, counsel for defendants |
| Judgment: | 10 April 2018 |

**JUDGMENT OF JUDGE J C HOLDEN**

### Introduction

[1] This is a challenge by the plaintiff Lancom Technology Ltd (Lancom) to a costs determination of the Employment Relations Authority (the Authority) dated 1 September 2017 (the costs determination).1 The defendants, who in fact lost the case before the Authority and were ordered to pay significant penalties, succeeded in a costs claim because of a Calderbank offer made prior to the hearing. The Authority ordered Lancom to pay $7,000 in costs to the first defendant, Mr Forman, and

$6,000 to the second defendant, Mr Kang.

1 *Lancom Technology Ltd v Forman* [2017] NZERA Auckland 264 (costs determination).



[2] In the substantive determination of the Authority, Mr Forman was held to have breached obligations in his employment agreement with Lancom, and the second defendant Mr Kang was held to have aided and abetted Mr Forman's breach and to have breached his employment agreement by soliciting Mr Forman away from his employment with Lancom. Each of the defendants was ordered to pay a penalty of $4,000. The penalties were ordered to be paid to Lancom in their entirety.2

[3] Lancom challenges the Authority's costs determination and says that costs in the Authority ought to lie where they fall.

[4] For the reasons that follow, Lancom's challenge succeeds. The costs in the Authority are to lie where they fall.

### The Court has regard to the Authority's determinations

[5] The starting point in considering this challenge is cl 15 of sch 2 to the Employment Relations Act 2000 (the Act). The Authority may order any party to a matter to pay to any other party such costs and expenses as the Authority thinks reasonable. The general approach of the Authority is by way of application of a notional daily tariff. Here the Authority's starting point was $9,000, applying a daily tariff of $4,500 to what was a two-day investigation meeting.3

[6] This is a de novo challenge to the Authority's costs determination. The Court must make its own decision, which then stands in the place of the Authority's costs determination.4

[7] Given the nature of the process by which costs determinations are made, however, this is not without difficulty as the Court does not have the detailed knowledge of the way in which the case proceeded that the Authority had. In *Metallic Sweeping (1998) Ltd v Ford* Judge Couch, dealing with a similar situation, took the approach that:5

2 *Lancom Technology Ltd v Forman* [2017] NZERA Auckland 221 (substantive determination).

3 *Lancom* (costs determination), above n 1 at [8].

4 Employment Relations Act 2000, s 183.

5 *Metallic Sweeping (1998) Ltd v Ford* [2010] NZEmpC 129; [2010] ERNZ 433 at [14] (EmpC).

In areas of uncertainty, the Court will need to have regard to the Authority's assessment of matters in a manner it would not do when deciding a substantive challenge by way of a hearing de novo. It may also be helpful and appropriate for the Court to have regard to the Authority's substantive determination.

[8] I also take that approach.

**Lancom succeeded in the substantive case**

[9] In the substantive case, the Authority determined:6

> (i) Mr Forman was liable to a penalty for breaching clause 30 of his employment agreement by conducting private work in [Lancom's] time without written permission; and
> (ii) Mr Kang was liable to a penalty for breaching clause 43 of his employment agreement by soliciting Mr Forman away from his employment with [Lancom] and, under s 134(2) of the Act, for aiding and abetting Mr Forman's breach of duty to [Lancom].

[10] The harm caused to Lancom by the breaches included the cost of legal fees incurred for attendances about the issue prior to the commencement of proceedings. Those fees had been the subject of a claim for special damages but the Authority treated them as a factor only relevant to the assessment of penalties and not to be double counted for any other purpose.

[11] The Authority said that Mr Forman and Mr Kang acted deliberately in their preparations for a future business and that their respective breaches were "serious and of some gravity" because they each broke contractual obligations of importance to Lancom's business.7

[12] On that basis, and because employment agreements are made to be kept by both parties, the Authority held that a penalty was warranted to deter other parties breaching such terms in the future.

[13] The Authority also found that Mr Forman and Mr Kang, having denied that they committed any breaches, did not show any real remorse for them. However, Mr

6 *Lancom* (substantive determination), above n 2, at [89].

7 At [91].

Forman had attempted to mitigate Lancom's concerns, including by handing over the relevant software. He also provided a statutory declaration confirming he had returned all copies of any Lancom information.

[14] At the conclusion of the substantive determination, the Authority commented that, in light of the mixed result for the parties on both sides of the proceeding, they might be able to resolve costs on the basis that they would lie where they fall.

[15] That did not happen and Mr Forman and Mr Kang applied for costs.

**Costs awarded to defendants**

[16] In applying for costs Mr Forman and Mr Kang advanced four reasons:8

(a) Twelve weeks before the Authority's investigation meeting they had made an offer on a "without prejudice save as to costs" basis to settle Lancom's claim by paying an amount that proved to be more than the Authority ordered by way of penalty (the Calderbank offer);
(b) Lancom failed to seek mediation before lodging a statement of problem;
(c) Lancom pursued "judicial intervention" by refusing reasonable settlement proposals;
(d) Lancom made an inflated and unrealistic claim for damages in which it did not succeed, and responding to its claim had unnecessarily increased their costs.

[17] The Authority did not consider that an uplift was due for the reasons set out above as (b)-(d) but did accept that Lancom's failure to accept the Calderbank offer meant that despite Lancom's "success" in the substantive proceedings, Mr Forman and Mr Kang were entitled to a reasonable contribution to their reasonably incurred costs, and also to an uplift on the costs to be awarded. It was on that basis that the Authority made the costs orders totalling $13,000.

8 *Lancom* (costs determination), above n 1, at [3]-[6].

**Settlement offers were exchanged**

[18] The first settlement offer in these proceedings was made by Lancom on 9 September 2016. That offer was rejected by Mr Forman on 13 September 2016. It was following that rejection that Lancom issued proceedings in the Authority.

[19] The parties subsequently went to mediation but that was unsuccessful.

[20] By letter dated 23 February 2017, Mr Forman and Mr Kang made the Calderbank offer. The Calderbank offer was that each of them would pay $7,500 to Lancom in full and final settlement of the proceedings and all matters arising out of or related to them.

[21] It was this offer that was key to the Authority's costs determination.

**Lancom challenges costs determination**

[22] Lancom challenges the costs determination and says that costs in the Authority proceedings ought to lie where they fall on the basis that:

(a) Lancom was successful in three of its claims against Mr Forman and Mr Kang, and penalties were awarded against them;
(b) The Calderbank offer was ineffective;
(c) It was reasonable in the circumstances for Lancom to reject the Calderbank offer;
(d) It is inappropriate to depart (or significantly depart) from normal costs principles on the basis of a Calderbank offer having been made in circumstances where statutory penalties are imposed;
(e) Mr Forman and Mr Kang were not put to any additional or unnecessary costs by Lancom not proposing mediation prior to filing its statement of problem;

(f) Lancom's claim for damages did not materially increase the defendants' costs in defending the proceedings;
(g) The Authority appeared to have contemplated the costs incurred by Mr Forman and Mr Kang when quantifying the penalties imposed upon them.

[23] The defendants' position on these issues can be summarised:

(a) Lancom could have secured more money than it was awarded if it had accepted the Calderbank offer; it wasted everyone's money and the Authority's resources by pursuing the case to a hearing. That ought to be reflected in costs;
(b) The Calderbank offer was effective; confidentiality was not one of the conditions, and it was an "all in" offer;
(c) It was not reasonable for Lancom to reject the Calderbank offer; as noted, it could have secured more money by accepting the Calderbank offer, there were no reputational factors at play and to the extent vindication was a justifiable motivation, the offer of a substantial sum of money on a non-confidential basis provided all the vindication needed. Further, Mr Forman attempted to mitigate Lancom's concerns;
(d) That a statutory penalty has been imposed may be a factor in the exercise of the Authority's discretion and the weight given to any Calderbank offer, but it depends on all the circumstances. Here there were no public interest issues;
(e) A delay in mediation until after a statement of problem is filed can potentially lead to the early hardening of

positions, costs being incurred that could have been put towards resolution, and the formalising of employment relationship problems. Therefore, in

principle, Lancom's failure to consider and engage in mediation should result in an uplift in costs;

(f) Lancom's "exaggerated approach to damages" could be a factor in favour of an increase in the daily tariff, even though it would be very difficult to identify any discrete, additional costs that were incurred as a result; and

(g) It was not clear that the Authority's contemplation of costs precluded an award to the defendants and in any event, even with the award they still had irrecoverable legal costs.

[24] The defendants also suggest there is an argument that the tariff ought to have been applied to each defendant, rather than globally as it was here.

**Refining the issues**

[25] Most of the matters raised by the parties can be dealt with quite briefly.

[26] Lancom says the Calderbank offer was ineffective as it was not sufficiently clear as to its terms in two respects, first, whether it was subject to confidentiality; and second, whether it was inclusive of all costs to 23 February 2017.

[27] Neither of those arguments is persuasive. The Calderbank offer was not said to be to confidential. Without that being part of the offer, Mr Forman and Mr Kang could not later assert confidentiality. The Calderbank offer was in full and final settlement of all matters arising out of, or related to, the proceedings. There would be no basis for Mr Forman or Mr Kang to have argued that they were entitled to other costs if the offer had been accepted. It was an "all in" offer.9

[28] As noted by the Authority, mediation did occur after the statement in reply was lodged. That was still reasonably early in the process. It was unsuccessful. Although the defendants point to what they say was Lancom's "exaggerated approach to damages" this was not reflected in the length or complexity of the

9 *Health Waikato Ltd v Van der Sluis* [1997] ERNZ 236 (CA) at 244–245.

investigation process. Without any link to an increase in the defendants' costs, neither Lancom's failure to propose mediation prior to filing its statement of problem, nor its approach to its claims, provide a basis to adjust the costs award in favour of the defendants.

[29] In fixing the amount of the penalties, the Authority said that it took into account the defendants' stress and the cost to them of having been involved in the Authority proceedings.10 When the Authority Member addressed this issue in his costs determination, he noted that Mr Forman and Mr Kang were still left with some of their own costs as well as a penalty to pay, so a deterrent factor remained in effect.11 While I can understand Lancom raising the point, the Authority's comment in the substantive determination is general, with no particular discount allowed for the defendants' stress or for their costs. The Authority did not adjust the penalties in any formulaic way, so its comment must be read as just pointing to a general deterrent, which was satisfied.

[30] On the point made by the defendants that perhaps the tariff ought to have been applied to each defendant, rather than globally, I note that they were jointly represented and invoiced. In those circumstances, I consider it appropriate to treat their costs globally.

[31] The key issues in this case then are:

- how Lancom's success in three of its claims ought to be reflected in costs;
- whether it was reasonable for Lancom to reject the Calderbank offer, given there was no acknowledgment in the offer of the breaches of the defendants' obligations; and
- to what extent the approach to Calderbank offers is affected because the amounts paid to Lancom were for penalties.

10 *Lancom* (substantive determination), above n 2, at [99].

11 *Lancom* (costs determination), above n 1, at [29]–[30].

**Principles have been developed to guide Court's discretion**

[32] The Act and the Employment Court Regulations 2000 provide for the Court to use its discretion in dealing with costs.12 Beyond those provisions, the High Court Rules 2016 act as a guide to the Employment Court where the Act is silent.13

[33] In considering costs, the starting point is that the losing party should pay the costs of the successful party, absent exceptional reasons.14 This includes where there is only partial success.15

[34] The unreasonable rejection of a Calderbank offer is a reason that may justify a shift from that starting point. Rule 14.11 gives specific guidance on matters related to Calderbank offers. It provides:

**14.11 Effect on costs**

(1) The effect (if any) that the making of an offer under rule 14.10 has on the question of costs is at the discretion of the court.

(2) Subclauses (3) and (4)—

(a) are subject to subclause (1); and
(b) do not limit rule 14.6 or 14.7; and
(c) apply to an offer made under rule 14.10 by a party to a proceeding (**party A**) to another party to it (**party B**).

(3) Party A is entitled to costs on the steps taken in the proceeding after the offer is made, if party A—

(a) offers a sum of money to party B that exceeds the amount of a judgment obtained by party B against party A; or
(b) makes an offer that would have been more beneficial to party B than the judgment obtained by party B against party A.

(4) The offer may be taken into account, if party A makes an offer that—

(a) does not fall within paragraph (a) or (b) of subclause (3); and

12 Employment Relations Act 2000, sch 3, cl 19; Employment Court Regulations 2000, reg 68.

13 Employment Court Regulations 2000, reg 6(2)(a)(ii).

14 *Weaver v Auckland Council* [2017] NZCA 330 at [20].

15. *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172, (2004) 17 PRNZ 16 (CA), at [40]; see also the discussion in *Coomer v JA McCallum and Son Ltd* [2017] NZEmpC 156.

(b) is close to the value or benefit of the judgment obtained by party B.

[35] The Court of Appeal in *Moore v McNabb*16 explained the policy reasons for this procedure. These amount to protection for litigants against impossibly high fees and protection of public expenditure; the Courts have a duty to ensure litigation operates effectively. The Court said:

> [56] It is as well to articulate the reasons for this important procedure in our law. Litigation is today potentially a very costly exercise. Clients pay for legal services essentially on an hourly basis. The more complex and prolonged the litigation, the higher the final bill is going to be. And it is not only single party costs which are in issue: the underlying principle of New Zealand law in relation to costs is that the losing party pays a reasonable proportion of the winning party's costs calculated in accordance with the rules of Court (see *Glaister v Amalgamated Dairies* [2004] NZCA 10; [2004] 2 NZLR 606 (CA)). Even with the assistance of the new rules, calculating the amount of costs involved can still be a difficult burden. Costs can outstrip the value of the subject matter in dispute and for a losing party, the costs of losing a case can be ruinous. It follows that litigants should have some means of limiting their exposure to this risk. A claimant may avoid this risk by abstaining from taking legal proceedings; but a party who is sued has no such alternative. It follows that, in fairness, defendants must have the means of gaining some protection from costs by making offers to settle by in some way meeting the claim. Plaintiffs should also have protection where defendants decline reasonable settlement offers.
> [57] Then there are the "public" aspects of litigation. If the parties resort to formal adjudication through state-supported litigation there is distinct public expenditure involved. It was therefore important, as Lord Woolf MR pointed out in *Access to Justice,* the Interim Report on the civil justice system in England and Wales, to have a policy "... to develop measures which will encourage reasonable and early settlement of proceedings". (Ch 24, para 1. See also Final Report, ch 11.)
> [58] In summary, it is a requirement of fairness that litigants – particularly defendants - have some economic means of limiting their exposure to the risk of costs; and secondly the Court itself must ensure that a procedure of this character operates as an effective encouragement to settle.

[36] However, the rule does not displace the Court's discretion. This is confirmed in the Court of Appeal judgment in *Farrimond v Caffe Coffee (NZ) Ltd*, which said:17

[13] We accept ... that, while r 14.11 creates a presumption that there is an entitlement to costs under the circumstances described within the rule,

16 *Moore v McNabb* (2005) 18 PRNZ 127 (CA).

17 *Farrimond v Caffe Coffee (NZ) Ltd* [2017] NZCA 34.

that presumption does not translate into an entitlement and it is still subject to the overriding discretion of the Court recorded in r 14.11(1).

> [37] Relevant too is the dicta of the Court of Appeal in *Holdfast NZ Ltd v Selleys Pty Ltd*, that "any party seeking increased costs on the basis of the other's failure 'without reasonable justification' to accept a settlement proposal will need to establish clearly that the failure was unreasonable."18

**Calderbank offers in the Employment Court**

> [38] The Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell* made the statement generally regarded as modern authority for the approach to be taken to Calderbank offers in the Employment Court.19 In addition to emphasising that the developed jurisprudence applies to employment relationships, and reiterating the need for a "steely" approach,20 it said:21

It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered. Where defendants have acted reasonably in such circumstances, they should not be further penalised by an award of costs in favour of the plaintiff in the absence of compelling countervailing factors. The importance of Calderbank offers is emphasised by reg 68(1). It is the only factor relevant to the conduct of the parties specifically identified as having relevance to the issue of costs.

> [39] These comments apply also with respect to Calderbank offers made before an Authority investigation meeting.22
>
> [40] In *Xtreme Dining Ltd t/a Think Steel v Dewar* the full Court uplifted costs from 66 per cent to 80 per cent based on the plaintiff's refusal to consider the merits of a Calderbank offer.23 In so doing the Court noted that the correct question was whether the plaintiff had acted unreasonably in rejecting the settlement offer, at the time that it did so.

18 *Holdfast NZ Ltd v Selleys Pty Ltd* [2005] NZCA 302; (2005) 17 PRNZ 897 (CA) at [29].

19 *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [18]- [20].

20 At [20], referring to *Elmsly*, above n 15, at [53].

21 At [20].

22 *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135, (2015) NZELR 1 at [109].

23 *Xtreme Dining Ltd t/a Think Steel v Dewar* [2017] NZEmpC 10.

**Vindication is a fair consideration**

> [41] The Court in *Bluestar* accepted that vindication was a fair consideration, but noted that, if an offer was at a reasonable level, it might be taken as conveying vindication. The Court said:24
>
> > [19] We accept that there may be cases where vindication through seeking a statement of principle in the employment context may be relevant to the exercise of the Court's discretion. Thus the relevance of reputational factors means that costs assessments are not confined solely to economic considerations. But equally, an offer to pay compensation at a level that is reasonable might well be regarded as conveying a distinct element of vindication to the plaintiff.
> > [20] We consider that the potential for vindication to be a relevant factor does not mean that the developed jurisprudence under the High Court Rules costs regime should be ignored. We reject Mr Churchman's submission that the principles applicable to Calderbank offers should be adjusted or ignored in employment cases merely because of the nature of the employment relationship and because employees may in certain cases be motivated in part by the desire for vindication. As this Court has previously said a "steely" approach is required.

> [42] In *Farrimond*, the Court of Appeal, in dismissing the appeal, affirmed that vindication is a legitimate interest in pursuing legal proceedings. It said:25
>
> > [20] While accepting that in certain circumstances, such as where reputational damage has occurred, a plaintiff may have a legitimate interest in seeking vindication via legal proceedings, Mr Patterson submits that Caffe Coffee, being a

corporation, cannot suffer hurt feelings, nor can the justification of vindication trump the interest in having judicial resources efficiently used.
[21] We consider that Mr Clark is correct in his submission that the Judge's use of the word vindication was not directed to reputational issues but simply reflected the point made in *Elmsly* that, where a party has to resort to Court proceedings to obtain relief, conventional practice has been to regard a plaintiff in that situation as having an entitlement to costs.

[43] The comment referred to by the Court of Appeal was from the costs decision in the Employment Court, where Judge Corkill accepted the argument brought by Caffe Coffee:26

24 *Bluestar*, above n 19.

25 *Farrimond v Caffe Coffee (NZ) Ltd,* above n 17.

26 *Caffe Coffee (NZ) Ltd) v Farrimond* [2016] NZEmpC 105. (footnotes omitted)

[17] For Caffe Coffee, Mr Clark submitted in essence the company should be regarded as the successful party, because it had to commence proceedings in order to uphold the provisions of the employment agreement. Significantly, those terms had been upheld. A significant part of its success was to achieve the vindication of its employment terms and its reputation; Caffe Coffee had obtained a finding that Mr Alford had been deliberately misled.

[18] Mr Clark relied on dicta of the Court of Appeal in *Elmsly* that where a party has had to go to Court to achieve relief "conventional practice ... has been to regard a plaintiff in this situation as having an entitlement to costs".

[44] In *Campbell v The Commissioner for Salford School*, the Employment Court considered and rejected the argument that the offer made there had in itself an element of vindication.27

[45] The Court of Appeal affirmed the Employment Court decision and its reasons for recognising vindication as a factor in turning down the offer. 28 It dismissed the appeal after noting with approval that:29

... although the final Calderbank offer made by the Commissioner on 17 April 2014 (including a payment of $100,000) slightly exceeded the monetary value of the judgment she obtained, it would not have achieved the restoration of reputation that Ms Campbell sought; the terms of settlement and all matters related to it were to be confidential, and there would be no public acknowledgement that the dismissal was unjustified.

[46] In *Wellington Racing Club Inc v Welch* the Employment Court drew a distinction between a case that is "purely about money" and one where there was a significant element of personal vindication.30 In the context of that case, the Court accepted that the degree of the appellant's refusal to accept responsibility for what it was held to have done meant that it could not expect its monetary offer to be accepted.

[47] In summary, while the Court of Appeal in *Bluestar* warned against reliance on the element of vindication where the offer of money reasonably contained an element of vindication, the courts also have recognised that not all monetary offers deal adequately with this issue.

27 *Campbell v The Commissioner of Salford School* [2015] NZEmpC 186 at [56]- [58].

28 *The Commissioner for Salford School v Campbell* [2016] NZCA 126 at [14].

29 At [9].

30 *Wellington Racing Club Inc v Welch* [2002] NZEmpC 131; [2002] 1 ERNZ 685 (EmpC) at [14]- [15].

**Relevance of a penalty**

[48] A penalty is primarily penal rather than compensatory. Its purpose is to punish wrongdoing.

[49] Of course, it is often the case that parties will, in addition to claiming damages, make a claim for a penalty. In those circumstances, the Court's approach is that a penalty should not be imposed unless there are special facets of the breach calling for punishment on top of any award of compensation or damages.31 In looking at what level of penalty ought to be ordered the Court in *Xu v McIntosh* noted:32

...A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?

[50] The default position is that a penalty is paid to the Crown, but the Court can direct some or all of the penalty is paid to an injured party.33 However, such a direction does not change the nature of the payment; it remains penal.

[51] Further, as noted in *Borsboom v Preet PVT Ltd* the exercise of the Court's discretion under s 136 does not affect the Court's costs regime so that, potentially, a breach may be met with an award of monetary compensation to the aggrieved party, a penalty payable to the Crown and/or the aggrieved party, and an order for costs payable by the breacher.34

[52] The seeking of a penalty, or even that one is ordered, is not of itself a shield against being found to have unreasonably turned down a Calderbank offer. However, where an offer is made, but without acknowledgment of wrongdoing, that will go to whether it is reasonable for a party to reject that offer and pursue a penalty

31 *Xu v McIntosh* [2004] NZEmpC 125; [2004] 2 ERNZ 448 (EmpC) at [45].

32 At [47].

33. *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143 at [50]; Employment Relations Act 2000, s 136(2).

34 At [50].

in the Authority. If a penalty then is ordered, that is relevant because it supports that the refusal of the offer was not unreasonable.

**Balancing the factors here**

[53] The Authority ordered that the penalties, totalling $8,000, be paid to Lancom in full on the basis that Lancom bore whatever harm resulted from the established breaches by Mr Forman and Mr Kang, who had breached terms of their employment agreements, not statutory duties.35 That was, of course, well short of the $15,000 Lancom would have received if it had accepted the Calderbank offer.

[54] The Authority notes Mr Forman's attempts to mitigate Lancom's concerns, including by handing over the relevant software, and his provision of a statutory declaration confirming he had returned all copies of any Lancom information.

[55] In addition, as the Calderbank offer was not made subject to confidentiality, Lancom could have made the settlement public, which would have gone some way towards vindicating Lancom.

[56] However, Lancom's case was not just about money. It was concerned at employees and former employees breaking contractual obligations that were important to its business, when it relied on those obligations being honoured. Neither Mr Forman nor Mr Kang accepted they had acted in breach of their agreements; the Calderbank offer makes no such acknowledgement.

[57] The Authority's findings, that led to the imposition of the penalties, were that the defendants acted deliberately and showed a lack of acceptance of responsibility or remorse. It found that the breaches were serious and of some gravity. This is reflected in the significant penalties ordered.

[58] The starting point here is that Lancom (as the successful party) was entitled to costs, which, using the daily tariff the Authority identified here, would have amounted to $9,000. This meant that the Authority moved from a starting point of

35 *Lancom* (substantive determination), above n 2, at [101].

$9,000 payable by the defendants to Lancom, to Lancom paying $13,000 in costs to the defendants, a shift of $22,000.

[59] Of course, Lancom could have simply accepted the Calderbank offer but that would not have given it confirmation, by admission or by a finding of the Authority, that the defendants' actions were wrong.

[60] To the extent Lancom was being stubborn in pressing ahead with the litigation to get the vindication and the finding of wrongdoing it felt it needed, that is reflected in its seeking an order that costs lie where they fall. I consider that is the appropriate order in the circumstances.

**Lancom's challenge is successful**

[61] Accordingly, Lancom's challenge to the Authority's costs determination is successful. Costs in the Authority will lie where they fall. The Authority's costs determination is set aside and this judgment stands in its place.

[62] Lancom seeks costs. The defendants ask that costs be reserved. The parties are encouraged to agree costs. If they are unable to do so, Lancom is to file and serve any memorandum and documentation in support of its application within 28 days of this judgment. Mr Forman and Mr Kang then have a further 14 days to file and serve their response.

J C Holden Judge

Judgment signed at 11.30 am on 10 April 2018

---