IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2022] NZEmpC 120
EMPC 413/2019
EMPC 444/2019

IN THE MATTER OF	matters removed from the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	SMITHS CITY (SOUTHERN) LIMITED (IN RECEIVERSHIP) Plaintiff
AND	JEREMY WALTER ETTLES CLAXTON First Defendant
AND	CANDO CREATIVE FLOORING LIMITED Second Defendant
AND	CANDO CREATIVE INSTALLS LIMITED Third Defendant
AND	MELANIE DOUGLAS Fourth Defendant

Hearing:	On the papers
Appearances:	C Morris, J Libbey and R Towner, counsel for plaintiff K Dalziel, counsel for the first, second and fourth defendants No appearance for third defendant
Judgment:	6 July 2022

COSTS JUDGMENT OF JUDGE K G SMITH

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[1] Smiths City (Southern) Ltd (in receivership) issued proceedings against its former employee, Jeremy Claxton, claiming damages from him arising from breaches of the employment agreement between them. It also sought a penalty from him for allegedly aiding and abetting breaches of an employment agreement by another employee, Nicholas Milne.[1]

[2] Judgment was entered in favour of Smiths City against Mr Claxton, and he was ordered to pay damages of $732,399.[2] The claim for a penalty to be imposed on him failed. Smiths City also failed in its claims for penalties against the other defendants: Cando Creative Flooring Ltd, Cando Creative Installs Ltd and Melanie Douglas. It had alleged that they aided and abetted Mr Claxton's breaches. Mr Claxton unsuccessfully counterclaimed against Smiths City seeking payment of allegedly unpaid bonuses.

[3] The judgment reserved costs.[3] The parties were unable to agree on costs and a decision about them is required.

[4] Smiths City is seeking what it described as indemnity costs from Mr Claxton. The total expense it incurred in litigation against Mr Claxton and Mr Milne was $197,082 excluding GST.[4] This claim included a sum for costs in the Authority before the proceedings were removed to the Court. Disbursements were also claimed.

[5] Initially, Smiths City sought to apportion its costs claim between Mr Claxton and Mr Milne on the basis that the majority of the hearing was occupied by establishing breaches by Mr Claxton. It calculated that 78 per cent of the time was attributed to litigation with him and sought $153,723.96 excluding GST. Since the submissions on costs were filed, Smiths City and Mr Milne have reached a confidential settlement of all matters between them.

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1 Employment Relations Act 2000, s 134. Mr Milne was a defendant in related proceedings heard at the same time as the claim against Mr Claxton.

2 *Smiths City (Southern) Ltd (in rec) v Claxton* [2021] NZEmpC 169 at [249].

3 At [251]. The judgment was stayed pending an unsuccessful application by Mr Claxton seeking leave to appeal to the Court of Appeal, see *Smiths City (Southern) Ltd (in rec) v Claxton* [2022] NZEmpC 17; and *Claxton v Smiths City (Southern) Ltd (in rec)* [2022] NZCA 173.

4 While the parties referred to costs excluding GST, no one sought an uplift to take account of that tax.

[6] In response to an inquiry from the Court about whether the settlement with Mr Milne had any bearing on the costs claim, Smiths City's counsel took the opportunity to submit that it had no effect but that there should be a reconsideration of the apportionment previously requested.[5] The company sought to increase its claim by recovering 90 per cent of its actual costs from Mr Claxton.

[7] To justify this claim Smiths City relied on the judgment making adverse findings about Mr Claxton's evidence and two comparisons under the Court's Guideline Scale.[6] The first comparison was made as if costs were assessed on a category 3C basis for all steps in the proceedings. The second comparison used 2C for each step. The category 3C calculation produced an amount of $206,152. The category 2C calculation produced approximately $185,000. Smiths City submitted that this comparative approach supported using its actual expenses in this assessment.

[8] In addition to Smiths City's costs arising from its claims against Mr Claxton, it sought costs from him on a category 2B basis because it successful defended his counterclaim. The amount claimed was $4,780.

[9] Ms Dalziel, counsel for the defendants, submitted that Mr Claxton's exposure to costs should be calculated using 2B, resulting in potential liability to pay $66,800.50.[7] In this exercise she excluded Smiths City's claim for a second representative at the hearing.

[10] Mr Claxton and the other defendants claimed costs from Smiths City on a 2B basis because the penalty claims against them failed. The claim was for $49,473.

Analysis

[11] The starting point is cl 19(1) of sch 3 to the Employment Relations Act 2000 (the Act) pursuant to which the Court is empowered to order any party to a proceeding to pay any other party such costs and expenses as are considered reasonable.

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5 Smiths City's present counsel did not appear at the hearing or prepare the company's initial costs claim.

6 *Smiths City (Southern) Ltd (in rec)*, above n 2; "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 16.

7 This calculation continued an error made by Smiths City as to the number of hearing days occupied by the trial.

[12] Awarding costs is discretionary, but that discretion must be exercised on a principled basis and in the interests of justice. The primary principle is that costs follow the event. The point of them is for the unsuccessful party to make a reasonable contribution to the costs incurred by the successful party.[8] While the discretion is broad, it is to be exercised in light of the Court's equity and good conscience jurisdiction.[9]

[13] Clause 19 is supplemented by reg 68 of the Employment Court Regulations 2000. It provides that, in exercising the discretion, regard may be had to any conduct of the parties tending to increase or contain costs.

[14] The Guideline Scale mentioned earlier was introduced in 2016. The scale is intended to support, so far as possible, the policy objective that determining costs should be predictable, expeditious and consistent. The scale is an aid to exercising the Court's discretion but does not replace it.

The issues

[15] The issues in this case are:

(a) Who is entitled to costs?

(b) Should indemnity costs be ordered?

(c) What amount is appropriate to order?

(d) What costs (if any) should be awarded for steps in the Authority?

(e) What amount should be awarded for disbursements?

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8 *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA); and *Head v Chief Executive of the Inland Revenue Department* [2021] NZEmpC 198.

9 *Head*, above n 8, at [71].

Who is entitled to costs?

[16] Smiths City's representatives submitted the company was entitled to costs because it succeeded in its major claims. Ms Dalziel submitted that it achieved only mixed success. She was referring to Smiths City's unsuccessful claims that Mr Claxton:

(a) solicited the company's staff to leave;

(b) removed carpet and racks belonging to it;

(c) breached the Fair Trading Act 1986 which pleading was withdrawn during the hearing; and

(d) failed in its penalty claim.

[17] I do not agree that Smiths City had only mixed success against Mr Claxton. While some causes of action were abandoned or failed, that does not alter the fact that the hearing was dominated by the company's claim against him for breaching the employment agreement and duties owed to it. Smiths City was entirely successful in those claims.

[18] The amount of hearing time dedicated to the unsuccessful claims was vanishingly small compared to the rest of the case. This is not a situation where any deduction should be made for the time and effort required to deal with Smiths City's unsuccessful claims. It is entitled to an award of costs against Mr Claxton for its claims against him and in successfully defending his counterclaim.

[19] Ms Douglas and Cando Creative Flooring are in a different position from Mr Claxton. They were entirely successful in resisting the claim for penalties against them. They are, therefore, entitled to costs.

[20] For completeness, Cando Creative Installs Ltd was the subject of a failed claim for penalties. That company has elected not to make a claim for costs.

Should indemnity costs be ordered?

[21] Smiths City's claim seeks a costs order based on its actual costs incurred in establishing Mr Claxton's liability. In its initial submissions this approach was confined to using comparisons prepared by its representatives under categories 2C and 3C but with the emphasis on the latter rather than the former. In responding to submissions made for Mr Claxton a second Smiths City argument emerged to support the claim. It was that the company's approach was justified as approbation for the "guileful" manner in which Mr Claxton chose to defend the primary claims and made his unsuccessful counterclaim.

[22] The Court was also invited to take into account a settlement offer proposed at an early stage by Smiths City.

[23] Determining costs based on criticisms of the behaviour of the unsuccessful party would be an exception to the normal basis on which costs are ordered. Generally, it is accepted that scale costs reflect the complexity and significance of the proceeding but there are circumstances where that approach can be departed from. The High Court Rules 2016 offer assistance because they provide for circumstances where the scale might be departed from, or where increased costs might be ordered.[10]

[24] Rule 14.6(3)(b) of the High Court Rules deals with increased costs and indemnity costs. So far as increased costs are concerned they can be ordered where:

> (b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—
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> (1) failing to comply with these rules or with a direction of the court; or
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> (2) taking or pursuing an unnecessary step or an argument that lacks merit; or
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> (3) failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or
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> (4) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under these rules; or

[10] Applicable via Employment Court Regulations 2000, reg 6.

(5) failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding.

[25] Indemnity costs arise under r 14.6(4) where:[11]

(a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or

(b) the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party; or

(c) costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding; or

(d) the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to it; or

(e) the party claiming costs is entitled to indemnity costs under a contract or deed; or

(f) some other reason exists which justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

[26] Examples of circumstances in which courts have been prepared to order indemnity costs were given by the Court of Appeal in *Bradbury v Westpac Banking Corp*.[12] They can be described as incidences of misconduct, making false allegations of fraud, starting the proceeding with an ulterior motive, wilfully disregarding the evidence or the law or unduly prolonging a hopeless case by groundless contentions.[13]

[27] Smiths City's counsel quoted passages from the judgment where Mr Claxton was described as being less than candid and submitted this showed him as having behaved in a "guileful" way.[14] Adverse findings were made about Mr Claxton, but they were not of the sort identified in r 14.6(4) or in *Bradbury*. In resisting Smiths City's claims he required the company to prove the serious allegations it made about him, but it would mischaracterise his defence or behaviour to accept the company's criticism. The passages relied on only explain why his evidence was rejected, but that is not enough to reach the threshold required to consider costs on an indemnity basis.

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11 High Court Rules 2016, r 14.6(4)(a)–(f).
12 *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400 at [29].
13 At [29].
14 *Smiths City (Southern) Ltd (in rec),* above n 2, at [47], [65], [67] and [122].

[28] That assessment leaves Smiths City's comparative claim. Essentially the argument was that selecting the proper scale and applying it to this proceeding would produce a higher amount than the company's actual costs supporting the contention that it was those costs that should be awarded. The primary comparison was a calculation under category 3C.

[29] Category 3 applies where a representative must have special skills or experience in the Employment Court because of the complexity or significance of the proceeding. Band C is normally applied to time allocations if a comparatively large amount of time for a particular step is reasonable.

[30] The factors said to create the complexity supporting using 3C were the:

(a) nature of the claims which involved allegations of a breach of contract and of the duty of fidelity;

(b) evidential matrix which extended back six years;

(c) significant issues relating to the damages based on an accounting for profit analysis;

(d) significant number of witnesses called for the plaintiff;

(e) number of witnesses called by Mr Claxton;

(f) large number of documents consisting of approximately 3,700 pages that had to be compiled, analysed and understood;

(g) issues relating to claims of "champerty and maintenance" raised by Mr Claxton in his application for a stay arising from Smiths City's receivers selling the business to Smiths City (2020) Ltd;[15]

(h) significant and complex submissions required to bring all of the claim's evidential matters together; and

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[15] *Smiths City (Southern) Ltd (in rec) v Claxton* [2021] NZEmpC 25, [2021] ERNZ 61.

(i) the length of the hearing.

[31] Reliance was also placed on the opening paragraph of my interlocutory judgment on Mr Claxton's stay application which described the proceeding as complex.[16]

[32] In response Ms Dalziel submitted that the comparison using 3C was inappropriate because:

(a) category 3 cases are rare; and

(b) this proceeding was not complex within the meaning of the scale because:

(i) breaches of contract, fidelity and good faith are not out of the ordinary in this Court;

(ii) any complexity was caused by two unsuccessful claims made by Smiths City; it alleged but withdrew the claim of a breach of the Fair Trading Act and it failed to establish that any of the defendants aided and abetted breaches by Mr Claxton;

(iii) when the complexity of the proceeding was commented on in the interlocutory judgment, the Fair Trading Act claims were still being advanced;

(iv) there were no conceptually difficult issues of law and fact raised by the proceeding;

(v) raising champerty, maintenance and unlawful assignment was caused by Smiths City's initial failure to disclose its litigation funding; and

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16 At [1].

(vi) the fact that a substantial sum of money was involved is not enough to equate to complexity for costs purposes.

[33] Ms Dalziel also drew attention to the fact that the Court provisionally assigned category 2B to the proceeding at a directions conference.

[34] To determine what category of the scale is appropriate requires a realistic appraisal of the issues raised by the proceeding. While the scale provides no assistance in determining what is or is not complex, the fact that the proceeding involved more than one party or was the subject of technical evidence does not necessarily mean it should be determined to be complex.[17]

[35] There are two difficulties facing Smiths City's comparative use of 3C. First, while the category assigned by the Court was only provisionally 2B, that decision was made in consultation with the parties' representatives at a conference after the matter was removed by the Authority and pleadings were filed in Court.

[36] A reasonable assumption is that Smiths City agreed to the appropriateness of 2B in the knowledge of what was needed to establish its claims. Notably, Smiths City did not prepare a comparison between its actual costs and 2B costs under the scale.

[37] Second, no application was made to review the costs category before or during the hearing. That meant the parties conducted the litigation in the expectation that success or failure would probably result in costs calculated by reference to 2B. Such an approach accords with costs being predictable, expeditious and consistent.

[38] I consider a compelling reason is required to explain why after the event costs should be assessed by comparison with a category different from the one the parties were satisfied with previously.[18] The fact there was a hearing, and it became apparent to one party that the original categorisation may not adequately reflect the proceeding, is unlikely to be a sufficient reason to make the change. One way of looking at this

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17 See generally David Bullock and Tim Mullins *The Law of Costs in New Zealand* (LexisNexis, Wellington, 2022) at 24–25.

18 See *Paper Reclaim Ltd v Aotearoa International Ltd [Costs]* [2007] NZCA 544, (2007) 18 PRNZ 743 at [29]–[33]; and *Intercity Group (NZ) Ltd v Nakedbus NZ Ltd* [2014] NZHC 1299, (2014) 22 PRNZ 152 at [4]–[11].

issue is to ask whether Smiths City would be content to have costs move from 2B to 3C if it had completely failed against Mr Claxton and was faced with having to pay him. The answer to that question is likely to be no.[19]

[39] Smiths City has not provided an adequate explanation for using 3C as a comparator to justify seeking an order based on its actual costs. There is considerable force in Ms Dalziel's submission that the difficulties Smiths City relied on to justify changing the category are insufficient. I agree with Ms Dalziel that claims for breach of an employment agreement and the duty of fidelity are reasonably common in this Court.

[40] While Smiths City was confronted by a defendant who was uncooperative and denied his breaches in the face of ever-mounting evidence of them, that is not enough. I accept the evidence was lengthy and Mr Claxton's conduct required considerable effort to discover and unravel, but that does not make the proceeding complex in the category 3 sense. There was a sameness to the breaches arising from the pattern of Mr Claxton's behaviour.

[41] The fact that his breaches stretched back over six years is neither here nor there. That span of time was a function of Mr Claxton's ongoing breaches but does not alter the nature of them.

[42] The number of witnesses called, and the volume of documents used, was not so out of the ordinary as to justify the requested change.

[43] The argument about whether there was an unlawful assignment was dealt with separately and did not feature in the hearing.[20]

[44] Smiths City has not established a basis for indemnity costs arising from Mr Claxton's conduct or, for that matter, by comparison with categories 2C or 3C. The proper approach in this case is to assess what costs might have been imposed on Mr Claxton by applying category 2B, before considering if the circumstances may justify an uplift; that issue is discussed shortly.

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19 See *Paper Reclaim*, above n 18, at [30].
20 *Smiths City (Southern) Ltd (in rec)*, above n 15.

[45] That brings this assessment to the costs of Mr Claxton's unsuccessful counterclaim. Smiths City prepared an assessment using 2B claiming only one step, for commencing its defence, totalling $4,780.

[46] Ms Dalziel did not dispute the use of 2B for the counterclaim but submitted an allowance should be made to avoid inadvertently double counting steps in the proceeding already provided for in Smiths City's main costs claim. She submitted the sum Mr Claxton should be ordered to pay was $1,792.50, derived by allowing 0.5 of a daily allocation under 2B for commencing the claim and 0.25 for an appearance at the hearing.[21] I am not persuaded that the company's claim involved any duplication and an adjustment is not required.

[47] Turning to the costs claimed by Mr Claxton, Ms Douglas and Cando Creative Flooring, the parties remained well apart. Ms Dalziel provided a break down using 2B totalling $49,473. She submitted those costs were appropriate as these defendants had an interest in ensuring all the evidence, including Mr Claxton's evidence, was before the Court.

[48] Mr Morris, counsel for Smiths City, criticised the defendants' claim as unjustified because the amount sought was 55 per cent of the defendant's actual costs whereas the bulk of the hearing was about the claim against Mr Claxton. He noted that Ms Douglas did not give evidence and had not even provided a brief of her anticipated evidence. Cando Creative Flooring was similarly silent. He submitted they should not receive any costs or, alternatively, that they should only receive a modest amount of $2,500 each.

[49] The claim gives the impression that more than half the actual costs incurred by all of the defendants was for representing Ms Douglas and Cando Creative Flooring, but that is an unrealistic assessment of the role they played in the proceeding. Their actual involvement in the litigation was peripheral at best.

[50] I am not satisfied that it would be just to rely on the defendants' calculations to come to a sum for Smiths City to pay. However, I do not accept the company's submission that no order should be made. A modest sum should be awarded to each

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[21] 0.5 * $2,390 = $1,195, 0.25 * $2,390 = $597.50 for a total of $1,792.50.

of them in recognition of the fact that they needed to defend the claims, maintained at least a watching brief during the hearing and took some steps to protect their interests.

[51] That leaves for completeness whether Mr Claxton is entitled to an award for successfully resisting the penalty claim by Smiths City. Little in the way of submissions was provided on this subject and, to the extent that Mr Claxton made a claim, it was wrapped up in the 2B calculations submitted by Ms Dalziel. For the reasons given in paragraph [17], I would not make an award in his favour.

What amount is appropriate to order?

[52] Ms Dalziel submitted that Smiths City's costs should be fixed on a 2B basis. As previously mentioned, her calculation took into account each required step in the scale and arrived at a total costs figure of $66,800.50. That calculation did not allow for a second representative at any of the interlocutory stages or during the hearing.[22] But it included a minor adjustment relating to Smiths City filing a notice of opposition to the interlocutory application for a stay that resulted in the interlocutory judgment.[23]

[53] The proposed reduction was supported by an observation that my interlocutory judgment commented that the application was not surprising given the late disclosure by Smiths City of its litigation funding.[24] The failure by Smiths City to promptly disclose the existence of its funder, as required by *Waterhouse v Contractors Bonding Ltd*, was said to have left Mr Claxton with no choice other than to make the urgent application he filed.[25] Essentially the argument was that his hand was forced because of a default by Smiths City. I have some sympathy for that point of view. The litigation funding should have been disclosed far earlier than it was, and I agree that the requested deduction is appropriate.

[54] I do not agree, however, that the calculation should remove all allowances for a second representative. Attendances by a second representative were not required during the interlocutory stages of the proceeding, but the volume of documents and

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22 27.95 days at $2,390.
23 *Smiths City (Southern) Ltd (in rec)*, above n 15; a reduction from 0.6 to 0.4 days.
24 At [18].
25 *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91.

number of witnesses justifies that assistance during the hearing. Making that allowance results in a provisional sum for costs on a 2B basis of $72,178.[26]

[55] In addition to costs of pursuing its claim Smiths City is entitled to them for defending Mr Claxton's counterclaim. The amount is $4,780.

[56] Smiths City has established that it is entitled to an uplift of its costs claim to take into account a settlement offer made in July 2019. At that time the defendants in this litigation, and Mr Milne, were represented by the same advocate. Smiths City's then representatives wrote to the advocate proposing to settle. The offer was made "without prejudice save as to costs" in anticipation of the Authority conducting an investigation meeting in November 2019. The offer's purpose was stated to be to avoid incurring significant costs and to resolve all proceedings. At that stage they were claims by Smiths City against all of the defendants (including Mr Milne) and, although it is not entirely clear from the correspondence, probably included counterclaims against the company.

[57] The offer was that Smiths City would accept the "global sum" of $200,000 as damages and $50,000 plus GST towards its legal costs. The defendants were left to decide between themselves how they might apportion the settlement sum. The offer was open to accept for ten days. The defendants were advised that if it was not accepted, the correspondence would be produced for the purposes of seeking "full indemnity for costs". The offer was made before the Authority removed the matter to the Court and well ahead of any step taken in the proceedings before the Court.

[58] Smiths City submitted that this offer ought to be taken into account because, had it been accepted, the expense of a hearing would have been avoided.

[59] Mr Claxton is opposed to the offer playing any part in assessing costs. Ms Dalziel pointed out that it was made at a time when Smiths City's claims had not "crystallised" in full. She was critical of the offer as unreasonable because, at the time it was made, the company had not provided disclosure and did not do so until an order was made, so the defendants did not have sufficient information to assess the merits of Smiths City's claim.

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[26] And also making a correction for the number of hearing days.

[60] The offer was also criticised as not containing a genuine element of compromise or differentiation between the contributions expected from Mr Claxton and Mr Milne.

[61] The offer is relevant. It was an attempt at an early stage to obtain resolution to the company's claims and to contain costs. Had it been accepted Smiths City would not have incurred the expense of the proceeding.

[62] I do not accept that there is any weight in the submission that the offer was made to all the defendants with inadequate differentiation between them. It was still made to, and could have been accepted by, Mr Claxton, and the reality was that he was the central figure in the litigation. Nor do I place any weight on the argument that the offer was premature because disclosure had not been completed. Mr Claxton knew the extent of his activities and must have appreciated that the proposal was for an amount significantly less than the damage he caused to Smiths City.

[63] The existence of the offer justifies an uplift from scale costs. I consider an uplift of 25 per cent from scale is appropriate.[27] That brings the amount to $90,222.50 which I would round to $90,200.

[64] Ms Douglas and Cando Creative Flooring's calculation of costs against Smiths City on a 2B basis incorporates all of the steps taken in the proceeding. For example, they included an allocation for preparing for directions conferences, briefs of evidence, preparing for hearing and attendance at the hearing. While they did have to take some steps in the proceeding, most of them were taken by Mr Claxton to assist his defence. It would not be just to grant the substantial sum claimed to defendants who took almost no active part in the litigation. They are entitled to a modest amount to represent the fact that their interests needed to be protected of $5,000 each.

[65] The remaining issue that needs to be mentioned is a payment Mr Claxton made to a stakeholder of $50,000 as a condition on which the judgment was stayed pending his application for leave to appeal to the Court of Appeal.[28]

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27 See High Court Rules 2016, r 14.6 and the discussion in *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897 (CA); an uplift should not be more than 50 per cent.

28 *Smiths City (Southern) Ltd (in rec)*, above n 3.

[66] The condition was proposed by the parties and did not disclose whether the sum was intended to be for security for costs or to be treated as a payment on account of damages.

[67] The parties were invited to make further submissions about how that sum ought to be treated. Smiths City argued that it was paid to a stakeholder before Mr Claxton unsuccessfully sought leave to appeal and the sum should be treated as a payment towards damages. Conversely, Mr Claxton argued that there was no agreement as to how it would be applied and it should be treated as a contribution to costs.

[68] Effectively, both submissions invited the Court to attribute a condition to the sum that the parties did not give it themselves. Having made that observation, the net position is likely to be the same no matter how it is applied. On balance, however, I prefer Smiths City's argument that the amount was being held to be applied towards damages if the application for leave to appeal failed or to be returned to Mr Claxton if it succeeded. That is, in fact, how the parties subsequently treated the payment. It follows that no adjustment is required to the costs calculation.

Costs in the Authority

[69] Smiths City claimed costs for preparatory steps in the Authority before these proceedings were removed to the Court. Its initial costs were approximately $68,000 from which it subtracted what were described as irrelevant costs, reducing the claim to $23,213.

[70] Ms Dalziel submitted that a small sum was warranted for attendances in the Authority because costs in that jurisdiction are normally low and there was no investigation meeting.[29] She drew attention to the Authority's tariff of $4,500 for the first day and $3,500 for any subsequent day.

[71] Little detail was provided about the steps taken in the Authority aside from filing a statement of problem and attendance at a conference. While the absence of

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[29] Relying on cases such as *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC).

that information makes assessment difficult, I consider a reasonable sum to award is $10,000.

Disbursements

[72] Smiths City initially sought reimbursement for its disbursements of $59,623.64 excluding GST. Applying the same apportionment between Mr Claxton and Mr Milne that it used in relation to the initial costs claim, Smiths City sought $46,506.44 as Mr Claxton's contribution.[30] When the company's counsel took the opportunity to restate the amount of its claim in recent submissions an uplift was sought to $60,452.34. No explanation was provided for this change, and it would not be appropriate to look at the disbursements on this increased basis without one.

[73] Ms Dalziel accepted the disbursements initially claimed except for $962.50 plus GST (a total of $1,106.88), which was a fee paid for a transcript of an interview. Smiths City did not object to that deduction which makes the total amount for disbursements $45,755.69.[31]

Outcome

[74] Drawing these threads together, I have reached the following conclusions:

(a) Mr Claxton is to pay costs to Smiths City for costs of the proceedings in Court $90,200.

(b) Mr Claxton is to pay costs to Smiths City for defending his unsuccessful counterclaim of $4,780.

(c) Mr Claxton is to pay Smiths City's costs in the Authority of $10,000.

(d) Smiths City is to pay costs to Ms Douglas of $5,000.

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30 Calculated at 78 per cent. While submissions referred to the claim excluding GST is it apparent from Smiths City's apportionment between Mr Claxton and Mr Milne that GST has been claimed by the company.

31 $59,623.64 - $962.50 = $58,661.14. $58,661.14 * 78 per cent = $45,755.69.

(e) Smiths City is to pay costs to Cando Creative Flooring of $5,000.

(f) Mr Claxton is ordered to pay disbursements to Smiths City of $45,755.69.

(g) Mr Claxton's claim for costs against Smiths City arising from its unsuccessful penalty claim is dismissed.

[75] Smiths City applied for costs associated with preparing the application for costs and sought $2,500. Considerable work went into its application. Attached to it were copies of all relevant invoices with bank statements showing those invoices being paid. It is entitled to the amount of $2,500 for that effort, and I order accordingly.

K G Smith
Judge

Judgment signed at 3 pm on 6 July 2022