

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2017] NZEmpC 70
EMPC 80/2016**

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

BETWEEN JOHN EDMINSTIN
 Plaintiff

AND SANFORD LIMITED
 Defendant

Hearing: 12, 13, 14 and 15 December 2016, 27, 30 and 31 January, and 2
 and 3 February 2017
 (Heard at Invercargill, in Chambers in Auckland on 27 January,
 and at Auckland on 2 and 3 February 2017)

Appearances: J Katz QC, counsel for plaintiff
 P Wicks QC and K Dunn, counsel for defendant

Judgment: 6 June 2017

JUDGMENT OF CHIEF JUDGE G L COLGAN

- A The plaintiff’s “marks” with which the defendant was required contractually to provide the plaintiff, are navigational records (paper and electronic) of the location of dredge-oyster beds and related nautical features in the OY5 (Foveaux Strait) fishery, made by the plaintiff in the course of his life as an oyster boat skipper. “Marks” include electronic information created by and stored on electronic devices identifying “tracks” and “trawls”, that is information about the course a vessel skippered by him has taken on any voyage.**
- B The plaintiff’s “marks” as defined above are the property solely of the plaintiff and the defendant was not and is not entitled to their retention and/or use.**
- C The plaintiff’s application for a compliance order is dismissed.**
- D Costs are reserved with leave for either party to apply within one month of the date of this judgment for an order.**

REASONS

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Introduction

[1] This case has considered a time span of events from about 1830, before dredge oysters were harvested commercially from Foveaux Strait, to the present, and from sailing ships to modern fishing vessels equipped with electronic technology engaged in this fishery. It is a case about who owns information on where the best and most easily harvested oysters are located in the Foveaux Strait seabed between South Island and Rakiura (Stewart Island). It raises issues of custom and practice, both as they affect the interpretation of employment agreements and parties' true intentions when they use imprecise language in settlement agreements for the ending of employment relationships.

[2] The biography of paramount chief, Te Rauparaha, in the Dictionary of New Zealand Biography records that in about 1830:¹

[Te Rauparaha's] attack on Ngai Tahu was resumed. Captain John Stewart took about 100 Ngati Toa warriors to Akaroa, hidden in the brig *Elizabeth*. He lured Ngai Tahu chief Tama-i-hara-nui aboard by offering to trade for muskets. Tama-i-hara-nui was taken, together with his wife and daughter, tortured and put to death at Kapiti. On the ship, he strangled his daughter to prevent her from being enslaved.

¹ Stephen Oliver, "Story: Te Rauparaha" Dictionary of New Zealand Biography 1990.

[3] Anthony Fowler gave evidence, as told to him by his oyster-skipper father, about the associated legend arising out of Ngai Tahu Chief Tama-i-hara-nui's killing of his daughter, Roimata:

... the chief strangled his daughter and pushed her overboard out a porthole to avoid a life of slavery for her and prayed to Tawhirimatea, the god of the winds and storms, to look after her. Tawhirimatea swooped down and gathered her up in his arms, sorrowful that the Pakeha had become involved in Maori issues, and traversed the South Island in a storm that lasted three weeks before coming to rest in the Western approaches to Foveaux Strait. Roimata believed she would never again see the place of her birth and as she looked down and saw the Waiau, the Oreti, the Titi Islands and Rakiura, she began to cry. Tawhirimatea took her tears as being so beautiful he encased them in shells and placed them in the Western approaches to Foveaux Strait. And that is how the oysters began.

[4] The custom and practice of commercial oyster fishers of the Bluff or dredge oyster in Foveaux Strait, goes back to the 1860s. The fishery is said to be now unique, certainly by reference to its scale even though this has reduced significantly over the last decades. It is important to the small community of Bluff which depends for its livelihood and even survival on harvesting oysters and related businesses. Another lifeblood of the town is said to have ebbed away with the closure of the Ocean Beach freezing works in the 1990s and it is at further risk with the constant uncertainties of the future of the nearby aluminium smelter.

Issues in the case

[5] This case is about property in oyster boat skippers' "marks" where skippers are employees of a separate company or other entity that owns oyster quota and operates the vessels. Although involving only one such skipper (John Edminstin) and his former employer Sanford Ltd (Sanford), the issues and decision of the case have wider implications for other oyster boat skippers operating out of the port at Bluff and, perhaps, other fishing industry employers and employees in analogous situations. I do not agree with Sanford's overall analysis that the case's significance is limited strictly to Mr Edminstin and Sanford. That is, if nothing else, antithetical to the significant energy and financial resources committed to the case by both parties and the potentially broader implications of the judgment I inferred from the evidence of Sanford's (former) human resources manager.

[6] Because what constitutes “marks” is in part at least in issue in this case, I will describe them for the purposes of this introduction generally and uncontroversially as follows. Marks are a navigational record of, or leading to, oyster beds and other relevant seabed features on which a skipper may wish to rely in future for the economical and productive harvesting of oysters.

[7] In a determination issued on 29 February 2016,² the Employment Relations Authority declined Mr Edminstin’s application for an order requiring Sanford to comply with the terms of a settlement of a personal grievance which had been agreed between the parties and was certified by a mediator under s 149 of the Employment Relations Act 2000 on 24 February 2015.

[8] The case raises issues about the use of electronic technology to record and subsequently locate skippers’ marks. The making, retention and use of, and property in, marks, pre-date electronic recording so that the issues in the case include the effects of modern electronic technology on a traditional practice recorded by pencil or pen on paper.

[9] The issue for decision in this case is how the phrase “collect his marks” in a contract between the parties, is to be interpreted and applied. This throws up a number of subsidiary issues (not necessarily dealt with in the following order), including:

- What are an oyster boat skipper’s “marks” and whether these include what are known as “tracks” and “tows” or simply a start point of a trawl?
- 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?
- Can reliance be placed on historical custom, practice and usage of oyster vessel skippers in the Bluff oyster fishery?

² *Edminstin v Sanford Ltd* [2016] NZERA Christchurch 18.

- The effect, if any, of the parties' former individual employment agreements and, in particular, information confidentiality provisions.
- The relevance of contractual conduct of the parties.
- 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?
- 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?

[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. The only remedy sought by Mr Edminstin now is an order for compliance by Sanford with the parties' mediated settlement agreement. Whether or not they were provided by Sanford as agreed, Mr Edminstin now has only a copy of his "marks" in electronic and paper form from the vessel's electronic devices. Whilst Sanford has made a now longstanding offer of the two relevant hardware devices (a GPS plotter device known as a "Koden" and the on-board computer) to Mr Edminstin, only in final submissions did his counsel confirm the plaintiff's acceptance of these devices on which the electronic records were and are. In this sense, the plaintiff has "his marks" although he also seeks an assurance that no copy or other version of these may henceforth be held or used by Sanford or anyone else on its behalf.

[11] This remaining question which now continues to drive the plaintiff's claim, relies on an interpretation of cl 6 of the settlement agreement which adds a necessarily implied term to the agreement. It is that Sanford must also provide to Mr Edminstin, or otherwise delete, any further copies of that information to which Mr Edminstin is entitled, consistently with the plaintiff's case that the information is his exclusive property and not in any respect Sanford's. The defendant balks at this for several reasons. It says that there can be, and is, no such implied term in the

settlement agreement; and that although it has been prepared to provide Mr Edminstin gratuitously with the required information (and more), it does not concede either that he is entitled to the information he has been given, or that it is his exclusive property.

[12] The defendant further denies the plaintiff's claim that their mediated settlement agreement was subject to the custom, practice or usage of the Bluff oyster fishery and should be interpreted and applied accordingly. Alternatively, Sanford denies that any relevant custom, practice or usage either varied the settlement agreement, or that the agreement was subject to a term necessarily to be implied; that is, that the terms of a document known as the Bluff Oyster Fishery Agreed Code of Practice were part of the settlement so that it is to be interpreted in accordance and consistently with thus code.

[13] Sanford says that it provided Mr Edminstin with an electronic copy of his marks on an electronic data stick on 5 March 2015, followed by a hard (paper) copy of them on 20 March 2015. Further, it says that it has subsequently offered to give Mr Edminstin the vessel's Koden GPS plotter and the computer that was on board *Toiler*, the defendant's vessel skippered by the plaintiff, at the time his employment ended. It says it has never deleted any or all of Mr Edminstin's marks from any electronic storage device held by it, although asserting that it was entitled to retain and use these. Sanford also denies Mr Edminstin's allegation that it has made available to another or others a copy of those marks for use by such third parties, or has otherwise enabled such to occur.

[14] Remedies sought by Mr Edminstin include a compliance order directing Sanford to deliver his marks to him, within 10 working days, whether in electronic or hard copy format, and in readable form, and directing Sanford to erase and permanently remove from all its computer systems or electronic storage devices or any hard copy format, all evidence of his marks. The plaintiff no longer seeks compensation under s 162 of the Act for any losses suffered by him arising out of any breach by the defendant of the settlement agreement.

Relevant background facts

[15] After almost 40 years in the industry, including many as skipper of his own and others' vessels, Mr Edminstin was employed seasonally by Sanford as skipper of its vessel *Toiler* from February 2009 until the end of the 2014 Bluff oyster season. This season runs from about 1 March to about 31 October each year.

[16] Sanford had acquired *Toiler*, and the necessary quota for taking Bluff oysters, in late 2008. It had not previously been engaged in the oyster fishery as a quota holder or as a boat owner.

[17] A matter of only a few days before the start of the 2009 season on 1 March, Mr Edminstin signed a largely standard form of a skipper's individual employment agreement for the fixed term of the 2009 season. The agreement was, in some respects, however, personalised to Mr Edminstin. His remuneration was set by the quantity and quality of the oysters he harvested, as were the wages of his three crew on *Toiler*. His employment agreement contained provisions relating to confidentiality of information acquired by Mr Edminstin. I will return to these terms and conditions because they form a major plank of Sanford's defence.

[18] New to *Toiler* for the 2008-2009 season was an on-board computer able to store information entered into it about the locations of the voyages undertaken. When engaged in fishing, these operations are called tracks, trawls and tows.³ Not long afterwards, Sanford purchased a Koden GPS plotter which displayed this information on a screen as well as storing it for future use and supplying it to the memory of the vessel's computer.

[19] Starting with his engagement on *Toiler* in 2009 and continuing from time to time over the six seasons that he worked sequentially as skipper, Mr Edminstin was able to enter information into the Koden relevant not only to the locations of previously productive oyster bed, but also of identifiable underwater features and

³ A generic, industry description of the tracks taken by the vessel when its oyster dredge was deployed, between "chucking" it into the water, and "hauling", its recovery on board.

hazards, to enable him to undertake safer voyages without danger or loss of valuable gear.

[20] In the course of his last employment season with Sanford, there arose employment relationship problems, the details of which do not affect the outcome of the issues now before the Court.

[21] At the conclusion of the season in early November 2014 Mr Edminstin was told by Sanford that he was not to return to the vessel which was then tied up at Bluff. It was clear that the company would be unlikely to both re-engage him as skipper for the 2015 season beginning on 1 March of that year or, as had happened in the past, intermittently during the off-season for repairs, maintenance and like purposes. Mr Edminstin formally raised a personal grievance.

[22] On 5 November 2014 and without Sanford's knowledge or consent, Mr Edminstin engaged an electronics technician who had performed work previously for Sanford including the electronic installation and servicing work on *Toiler*. Steven Frame of BHM Electronics travelled to Bluff and met Mr Edminstin on the vessel that day. At Mr Edminstin's request, Mr Frame had acquired and brought with him a Kodex data disk onto which it was hoped information could be copied from the Kodex's memory. On Mr Edminstin's instructions Mr Frame copied the Kodex information from the on-board Kodex's internal memory. Mr Frame's advice was, however, that there was a risk to the viability of the device's memorised information if an attempt was made to duplicate and download this. That expert apprehension of risk, and of the plaintiff's unpreparedness to take it, persisted until midway through the hearing. So Mr Edminstin was unsuccessful in obtaining a copy of the Kodex's memorised information.

[23] On 24 February 2015 the parties attempted to resolve their employment relationship problems by attending mediation with a statutory mediator. A record of settlement of the employment relationship problem (the grievance) was entered into by the parties and signed and certified pursuant to s 149 of the Act. The essential part of that agreement, for the purposes of this case, was cl 6 which provided:

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

[24] Most other provisions of the settlement agreement do not affect the interpretation and application of cl 6. For reasons which do not relate to the questions at issue in this case, Mr Edminstin did not collect all the marks with which this case is concerned, either on that day or subsequently. He had already taken his collection of historic handwritten marks in the form of navigational references, but he did not collect or otherwise obtain what he asserted were his electronic marks. That was at least until a number of months later when an enormous printout of electronic records of the vessel’s computer was delivered to him. Even then he was unable to use readily the information in that form.

[25] Mr Edminstin eventually sought an order from the Authority that Sanford comply with cl 6 of the parties’ settlement agreement. This claim was opposed by Sanford, saying it had complied with its contractual obligations and that Mr Edminstin was, at most, entitled to a copy of the electronic information that had been supplied to him.

[26] In the Authority Mr Edminstin claimed that Sanford had not complied with this clause by providing him with his marks, either on 27 February 2015 or otherwise. As already noted, that was because although an electronic record of them in the memory of the onboard computer had been given to Mr Edminstin on a data stick, he could not decipher and download those records. A paper print-out of these, that was also provided to the plaintiff, occupies more than 600 A4 pages and is in computer code-like format rather than as it would appear on a GPS or computer screen and as would have been its representation in operation.

[27] Mr Edminstin’s concern was also that Sanford had kept a copy of his marks and, according to Mr Edminstin, had used them or allowed *Toiler’s* replacement skipper to dredge for oysters in the 2015 season using those marks.

[28] In addition to seeking an order requiring Sanford to comply with cl 6, Mr Edminstin also claimed compensation and penalties against the company and,

originally at least, against his replacement as skipper of *Toiler* for the 2015 season. These claims against the subsequent skipper were dismissed as frivolous and vexatious in a determination issued by the Authority on 7 October 2015 and there is no challenge to that.⁴ Subsequently, Mr Edminstin withdrew his applications for compensation and penalties so that the sole issue for the Authority (and now for this Court) was and is one of compliance with the settlement agreement.

[29] After investigations of two preliminary questions and issuing two determinations resolving those,⁵ the Authority issued its substantive determination on 29 February 2016.⁶ Ironically, perhaps, one of those preliminary determinations refused Mr Edminstin's application to remove the proceeding for hearing at first instance in the Employment Court. The Authority declined to remove the proceedings on grounds including that the case would not have any broader significance by its interpretation of the parties' bespoke settlement agreement. With the inestimable benefit of hindsight and reflecting the plaintiff's dogged determination, the matter is now before the Court including for questions of law to be determined. Because Mr Edminstin's challenge has elected a hearing *de novo*, it is unnecessary to analyse the Authority's determination in detail.

[30] The Authority concluded that the marks which Mr Edminstin sought were the property of Sanford exclusively although, as the company did in this case, it agreed sometimes to share them with its skipper. The Authority said that the marks created and stored during Mr Edminstin's employment were the company's confidential information, the originals or other copies of which it was entitled to retain under the settlement agreement as this was interpreted by the Authority taking account of the parties' employment agreement. The Authority declined Mr Edminstin's application for a compliance order, leaving it to the parties' attempt to ensure that Mr Edminstin obtained a readily understandable and usable copy of those marks as Sanford agreed to give him. That did not happen, perhaps in part because Mr Edminstin challenged the whole of the Authority's determination electing a hearing *de novo*.

⁴ *Edminstin v Sanford Ltd* [2015] NZERA Christchurch 145.

⁵ *Edminstin*, above n 4; *Edminstin v Sanford Ltd* [2015] NZERA Christchurch 158.

⁶ *Edminstin*, above n 2.

[31] Although much time was spent calling and refuting evidence about events from the time of the plaintiff's original grievance until the hearing, and of people's motivations and bona fides, little if any of these sometimes disputed accounts is relevant to determining the questions now at issue. It is sufficient to say that over the 2016/2017 Christmas-New Year break between the two hearings, it became clear that copying and downloading the Koden's memory would not put data at risk, and this copying was done shortly before the hearing resumed in late January. It was then able to be shown to the Court that the Koden recorded, cumulatively, tracks and trawls undertaken during its voyages as well as marker points and brief notations entered into it by the vessel's skipper as operator of the GPS plotter.

[32] As already noted, Sanford had long offered to give Mr Edminstin the relevant on-board electronic hardware devices from *Toiler*, that is the Koden and the on-board computer. Whilst not expressly rejecting this offer, Mr Edminstin had not accepted it but eventually did so, through counsel, at the hearing. In this sense, Mr Edminstin may be said to have obtained his marks from *Toiler*, and Sanford says so. The question remained, however and in light of Sanford's assertion of at least a joint proprietorship of them, whether it may have used those marks during subsequent oyster seasons. Also in issue is whether Sanford may have retained copies of these marks that may be available for its use in future.

[33] In support of his claim to exclusivity of property in marks, the plaintiff relies on a document signed up to by most (but not all) Bluff oyster skippers in 2015, described as the "Agreed Code of Practice: Bluff Oyster Fishery 2015". The plaintiff says this records persuasively longstanding custom and usage in the Bluff oyster fishery dating back to the 1860s. This document contains an acknowledgement that marks are the personal, individual and confidential property of skippers of oyster vessels and may be used by them as they see fit. It reads:

1. Our Skippers' Marks are our personal individual and confidential property as they have been for generations whether kept in our heads, or recorded on pieces of paper, in notebooks, on maps or charts on personal computers or CDs or memory sticks or on on-board computers or other devices.

2. It is our tradition and custom that our Marks can be passed to other skippers and friends by gift, sharing or being inherited or passed in Wills.
3. We can identify and recognise other Skipper's Marks by reference to our own Marks. Mollyhawking on other [skippers'] marks is unacceptable.
4. As agreed with the Bluff Oyster Management Company in 2004 and as a compromise arrangement we provide a grid reference and Log Book data of the areas fished at the agreed 2004 rate of \$20.00 a day.
5. All skippers in the Bluff Oyster Fishery are aware of these customs and traditions and agreements.

[34] The plaintiff says that this Code of Practice has been in effect, albeit not written down, in the same or similar terms for about the last 150 years. The defendant asserts, however, that this document was created by the plaintiff's solicitor for use in the Authority and does not govern or record industry practice, nor is it binding on any person or entity. It purports to be a statement only by skippers and not including boat or quota owners who are not skippers. In any event, the defendant says that any industry custom or practice would have to be subject to any contrary provisions of the plaintiff's employment agreement of which it says there are some in Mr Edminstin's. I examine and interpret these provisions later in this judgment.

[35] The plaintiff says, however, that Sanford had knowledge of the Code as it was in 2009, not only because it was a shareholder in Bluff Oyster Management Co Ltd (BOMCo), but also through its local Bluff manager, Thomas Foggo, who was a director of BOMCo. The plaintiff says that BOMCo knew of, approved and adhered to that Code. Sanford denies having "direct and extensive involvement in the industry" in Bluff and says, therefore, that it cannot be fixed with knowledge of the Code and, thereby, bound by it.

[36] There was unchallenged evidence that Mr Edminstin, and other oyster boat skippers, have continued (including after 2009) to record traditional marks (single latitude/longitude points) manually on oyster sack or bin tags provided on the vessel by Sanford. These supplies of tags were principally for the purpose of labelling individual sacks or bins of oysters into which the harvest was sorted on-board at sea for the purpose of identifying them as Sanford oysters for further processing on land.

In addition to that primary use of the tags, skippers including Mr Edminstin continued to write traditional marks on these as these locations were discovered by them at sea and, along with historical manual records, these tags were kept in their own bags by the skippers for future reference on subsequent voyages. Although property in the media (that is the tags) remained with Sanford, the plaintiff says that did not change the status of the property in the information recorded on them. Put another way, whilst Mr Edminstin may have been liable to Sanford for the few cents' cost of each tag by using it for his own purposes and not Sanford's, he claims that the marks information recorded on such tags did not thereby become the property of Sanford.

Interpretation of contracts generally

[37] An agreement to settle litigation is a contract (but not an employment agreement) to be interpreted as such. The judgments of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd* are the leading New Zealand authority on contract interpretation.⁷ The principles are both uncontroversial and binding and may be summarised as follows:

- The starting point is an assessment of the natural and ordinary meaning of the words themselves.
- Not only if there is ambiguity, but even if the words used are apparently plain and unambiguous, there should be a cross-check of their interpretation by reference to the context in which the contract was entered into.
- Arriving by this methodology at a different interpretation than was produced by the preliminary assessment, may arise occasionally but not commonly. That is because plain words are not generally intended to be understood in any other sense.

⁷ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

- The Court will ascribe to the contracting parties a common intention that a sufficiently informed and reasonable person would ascribe to those words when aware of the circumstances in which the contract was made.
- If other than an apparently plain and ordinary meaning may be arrived at by the cross-checking process, this should not lead to a nonsensical result contrary to commercial (or other relevant) commonsense.⁸
- On occasions, however, words may be construed as having another meaning if parties have adopted a special meaning or where there is an estoppel.
- An objective approach to contract interpretation is required, rather than a subjective approach.
- An objective approach requires an examination of facts, circumstances and conduct leading to the contract illustrating objectively the meaning the parties intended to convey.
- Evidence of post-contractual performance conduct may be relevant if this is capable of demonstrating objectively a commonality of application of the contractual words in practice.

The law of custom, practice and usage in contract interpretation

[38] I deal first with the circumstances in which recourse to these principles of law is necessary. The plaintiff says that an important principle in interpreting the parties' settlement agreement and, in particular, to determine the meaning of the phrase "his marks" in an exclusive possessory sense, is the custom, practice and usage of long standing in the Foveaux Strait oyster fishery. This principle is said to be that a skipper's marks are the property of that skipper and no one else unless or until the

⁸ In employment-related interpretation, "commercial common sense" may be augmented or replaced by employment common sense: see *Air New Zealand Ltd v New Zealand Air Line Pilots' Assoc Inc* [2016] NZCA 131, [2016] 2 NZLR 829.

skipper releases proprietorship in those marks to another or others, whether exclusively or on a shared basis. Mr Edminstin says he has not relinquished his proprietorship in his marks, certainly not to Sanford or its other skipper(s) on *Toiler*.

[39] The defendant says that even if this is a custom, practice or usage as between skippers in the fishery, it does not extend to employer vessel/quota owners generally or, in particular, to Sanford which only became involved in the fishery for the first time in about 2009 with a single vessel when it purchased the assets (the vessel *Toiler* and quota) from another company. The defendant's case is that any custom, practice or usage by which employers generally, and it in particular, are said to be constrained, is not one to which it is bound, or has accepted or, in its case at least, even known about at the relevant times. The defendant says that even if a custom, practice or usage is established by the plaintiff, this cannot be allowed to influence the meaning of the phrase "his marks". The defendant further says that even if it were subject to custom, practice or usage in the interpretation of that phrase in its settlement agreement, that unwritten and implied element is trumped by the overriding express provision of cl 15 of Mr Edminstin's individual employment agreement with Sanford set out at [63]. This, it says, provided that property in the plaintiff's marks was to be with Sanford exclusively, at least in respect of marks obtained and recorded between the 2009 and 2014 seasons when Mr Edminstin was employed by it.

[40] Turning to the relevant law generally, there is influential legal precedent about the nature and effect of custom, practice and usage in interpreting and applying both employment agreements and other related contracts as is the settlement agreement in this case.

[41] A starting point for examination of custom and practice or usage in contract law is the leading local contract text, Burrows, Finn and Todd, *Law of Contract in New Zealand*.⁹ This says, broadly:

The contents of the contract are not necessarily confined to those that appear on its face. The parties may have negotiated against a background of

⁹ John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2016) at 172.

commercial or local usage the implications of which they have tacitly assumed, and to concentrate solely upon their express language may be to minimise or to distort the extent of their liabilities. Evidence of custom may thus have to be admitted.

[42] The text goes on to describe as “well-established” the rule that a contract may be subject to terms that are sanctioned by custom.¹⁰ However, this is qualified by the assumption that it represents the wishes of the parties and express language to the contrary prevents the importation of custom.¹¹ Difficulties may lie where the express words of a party’s contract appear to conflict with what is established to be custom and, thereby, arguably implied terms of the contract.

[43] The Court’s inquiry into whether there may be terms implied by custom and practice will be highly dependent on the facts and circumstances of each case. Case law in the United Kingdom is more numerous and informative than that which has developed in New Zealand, even in the general law of contract beyond the employment sub-species of the common law. The first and essential question to be answered is whether custom or practice established by evidence creates an implied term. Implied terms must be reasonable, certain and notorious/universal. Even then, implied terms may be ousted by parties’ clearly expressed terms where they conflict.

[44] Largely in the absence of local authority, I have looked first to the UK cases. The old judgment in *Devonald v Rosser & Sons* is authority for the proposition that a custom that may lead to an implied term; must be reasonable in addition to being sufficiently certain. It must be so universal that no person could be supposed to have entered into the agreement without looking to it as an element of the contract.¹²

[45] More recently and as to evidence of custom, in *Henry v London General Transport Services Ltd* the UK Court of Appeal concluded:¹³

... the burden of proof on custom and practice, ... is upon the balance of probabilities. ... Clear evidence of practice is, however, required to establish something as potentially nebulous as custom and practice, and there should be a scrutiny commensurate with the particular circumstances.

¹⁰ At 194.

¹¹ At 194.

¹² *Devonald v Rosser & Sons* [1906] 2 KB 728.

¹³ *Henry v London General Transport Services Ltd* [2002] EWCA Civ 488, [2002] IRLR 472 at [26].

[46] *Henry* also confirmed the old UK position that the test for a custom of trade must consist of the tripartite elements of reasonableness, certainty and notoriety.

[47] This was applied in a more recent employment case in the United Kingdom, *Park Cakes Ltd v Shumba* concerning redundancy payments.¹⁴ Contractual provisions made no reference to any entitlement to enhanced redundancy payments although other documents and evidence addressed previous practice and knowledge of this. The Court in *Park Cakes* drew on the judgment of Browne-Wilkinson J in *Duke v Reliance Systems Ltd* to conclude as follows:¹⁵

On the evidence ... we do not think that it can be right to imply into the contracts of employment of all the female clerks of 1978 any term that the age of 60 was the normal retiring age. There was no evidence that the employers' policy of retirement for women at the age of 60 had been communicated to such employees in 1978 nor was there evidence of any universal practice to that effect. A policy adopted by management unilaterally cannot become a term of the employees' contracts on the grounds that it is an established custom and practice unless it is at least shown that the policy has been drawn to the attention of the employees or has been followed without exception for a substantial period.

[48] The redundancy payment cases are in some ways analogous to this of skippers' marks in the sense that both deal with the conferring of benefits on employees after the conclusion of the employment relationship.

[49] The reference to a requirement that custom or practice has been in place for "a substantial period" has, however, not received universal approval. For example, in *Quinn v Calder Industrial Materials Ltd* it was said:¹⁶

... in our view, the question is not whether the period for which a policy has been followed is 'substantial' in some abstract sense, but whether, in relation to the other circumstances, it is sufficient to support the inference that that policy has achieved the status of a contractual term.

[50] Further, in *Solectron Scotland Ltd v Roper* (an employment case) the Employment Appeal Tribunal (UK) said:¹⁷

¹⁴ *Park Cakes Ltd v Shumba* [2013] EWCA Civ 974, [2013] IRLR 800.

¹⁵ *Duke v Reliance Systems Ltd* [1982] IRLR 347 (EAT) at 349.

¹⁶ *Quinn v Calder Industrial Materials Ltd* [1996] IRLR 126 at [7].

¹⁷ *Solectron Scotland Ltd v Roper* [2004] IRLR 4 (EAT).

21. ... A custom or established practice applied with sufficient regularity may eventually become the source of an implied contractual term. That occurs where the point is reached when the courts are able to infer from the regular application of the practice that the parties must be taken to have accepted that the practice has crystallised into contractual rights.
22. The parties must be shown to be applying the term because there is a sense of legal obligation to do so. That will often be a difficult matter to prove. For example, if a practice is adopted because a party does so as a matter of policy rather than out of a sense of legal obligation, then it will not confer contractual rights: see *Young v Canadian Northern Railway Company* [1931] AC 32 (PC). Again the practice must be “reasonable, notorious and certain”: see *Devonald v Rosser & Sons* ...

[51] Turning to New Zealand authority, the tripartite requirements of notoriety, certainty and reasonableness were adopted by Henry J in *Woods v N J Ellingham & Co Ltd*¹⁸ although this was more in reliance on United Kingdom law from *Halsbury's Laws of England*, than on an identified and established body of local case law.

[52] In this jurisdiction, in *Asure New Zealand Ltd v New Zealand Public Service Association*, there was a claim to an implied term of employment as a result of custom and practice, that certain employees would be provided with separate rest facilities from those of other employees undertaking meat inspections.¹⁹ It was, however, unnecessary strictly for the Employment Court to decide whether there was such an implied term arising from custom and practice. Even if there had been, this would not have attached to the provider of such facilities in any event, the meat plant operator rather than the independent inspection company which was the employer.

[53] Even if, in this case, the Court finds that a custom or practice exists sufficiently to create an implied term of Mr Edminstin's employment agreement with Sanford, that alone may be insufficient in view of the defendant's argument that the parties' express terms in their employment agreement negative any such implied term. That, in turn, will require a consideration of the relevant express terms of the agreement and, in particular, whether they provide that Mr Edminstin's marks

¹⁸ *Woods v N J Ellingham & Co Ltd* [1977] 1 NZLR 218 (SC).

¹⁹ *Asure New Zealand Ltd v New Zealand Public Service Association* [2005] ERNZ 789 (EmpC).

became either Sanford's exclusive property or became the joint property of both parties. The latter position now appears to be adopted by Sanford.²⁰

Custom and practice affecting this case

[54] What is encapsulated in the phrase 'custom and practice' is the history of a particular working arrangement in the same industry or field. In this case the significance of custom and practice is two-fold. First, can it be said that, in the absence of an express provision in the parties' employment agreements, what is established as a relevant custom and practice constitutes an implied term or condition of that employment? Second, and particularly in this case, how does established custom and practice affect the interpretation of a word or phrase in the parties' settlement agreement concerning ongoing elements of that former employment relationship?

[55] It is necessary at the outset to say that in this exercise, I have disregarded the contents of the document set out at [33], or identical copies thereof, which, unilaterally, purport to establish the existence of a custom or practice. Each of those skippers who signed this document and gave evidence was entitled to depose to his knowledge and experience of, the existence of a custom and practice, and to give historical evidence in support of that knowledge. However, the document does not as such add legal weight to the plaintiff's case of the existence of such a custom and practice. It is a self-serving statement created for the purposes of this litigation. Not only was the document prepared by Mr Edminstin's lawyer (not Mr Katz) for the purpose of a hearing of his claims in the Authority (and subsequently in this Court), but it does not address, adequately or at all, the nature of skippers' marks, the significance of the reference therein to the Bluff Oyster Management Company or the position of boat owners as employers generally or of Sanford in particular. There is, however, other admissible and relevant evidence of custom, practice and usage.

[56] The custom and practice contended for is said to be of very long standing and much longer than Sanford has been a player, including as employer, in the Bluff

²⁰ In the Authority, Sanford appears to have argued for exclusivity of property in the marks following cl 15 of the employment agreement. The Authority upheld that contention.

oyster industry. As already noted, however, the recent arrival in the industry of one of the parties to the contract (Sanford) does not necessarily immunise it from being subject to the custom and practice, especially if this is long-established and well-known in the industry, as I have concluded is the case here. Independently of the document referred to, I am satisfied on the balance of probabilities that there is a very long established and respected custom, practice or usage, that oyster boat skippers' marks are their exclusive property. That was confirmed by the parties' use of the phrase "his marks" in cl 6 of their settlement agreement and by Sanford's dealing with these accordingly and not as its exclusive property, or even that this was shared between them.

[57] As did Mr Edminstin himself until when he ceased work as skipper on *Toiler*, vessels' masters carried written records of their marks onto and off their vessels before and after each voyage. In Mr Edminstin's case, these were kept and conveyed by him in a mature and non-descript plastic shopping bag. The records consisted of a variety of notebooks, scraps of paper and oyster bin tags, some of these (or the information on them) passed down from father to son. As well as being available onboard to assist with setting a course or courses, these records were taken home by skippers for updating or augmentation and were guarded jealously by them. There was no suggestion that the owners of the vessels of those skippers in the oyster fishery had a proprietorial interest in these records or in the information contained in them.

[58] I conclude that had a reasonable and objective observer of skippers' practices asked skippers, crew, vessel owners and others involved in the industry who owned the information in these handwritten mark records, the unhesitating responses would have been that these were a skipper's, and exclusively so. This would have been reinforced, in my conclusion, by the equally unanimous, immediate and sure response to a related inquiry about who decided the course or courses to be followed by an oyster vessel in the harvesting season. These were the decisions of the skippers alone, and a non-skipper owner of a vessel would not have directed its skipper where to harvest oysters in the fishery. These are longstanding and well-established practices in the oyster fishery known to, and followed by, all involved.

They were not practices departed from by Sanford in the period of its participation in the fishing industry from 2008 to 2014.

[59] But for the potential effect of cl 15 of the parties' employment agreement about confidentiality of information, I would conclude that the plaintiff has established by admissible and persuasive evidence that custom, practice and usage in the Foveaux Strait oyster fishery meant that skippers' marks were the exclusive property of each individual skipper.

[60] As can occur in law, do the parties' expressed written contractual terms override or modify this custom, practice or usage? It is Sanford's case that they do, and by interpretation and application of cl 15 (information confidentiality and ownership) of the parties' former employment agreements. It is necessary, therefore, to examine that clause in the context of the whole employment agreement and in the context in which it was entered into, to interpret it and to consider whether it negates or modifies what I am satisfied was the custom and practice of Bluff oyster skippers.

The employment agreements' influence on custom and practice

[61] Sanford relies on a number of terms together contained in the "Sanford Bluff – Seasonal/Fixed Term Individual Employment Agreement (Oyster Boat Skipper) John Edminstin", the last of a seasonal series of such materially similar employment agreements. Before turning to those particular provisions in cl 15, a number of the agreement's other relevant provisions affect its interpretation. I use the last (2014) seasonal agreement for ease of reference, but its predecessors contained very similar, if not identical, provisions.

[62] Clause 3.7 of the parties' employment agreement provided: "The terms and conditions set out in this Agreement replace any previous Agreements and/or understandings between the Employer and the Skipper."

[63] Clause 15 (Confidentiality) is at the heart of Sanford's defence and was as follows:

- 15.1 All information which may be supplied to the Skipper by the Employer or of which the Skipper may become aware from the Skipper's employment by the Employer, or from the Skipper's dealing with the Employer or which is in any way related to or connected with the business of the Employer ("**the Confidential Information**") is the property of the Employer.
- 15.2 The Skipper will take all reasonable steps to prevent the disclosure of, and to protect, the Confidential Information.
- 15.3 The Skipper will not make any copies or records of any of the Confidential Information except as expressly permitted by the Employer, and must, when demanded, by the Employer, return to the Employer all material supplied by the Employer and any copies or records of any of the Confidential Information and the other material pertaining to that Confidential Information.
- 15.4 The Skipper must not use, or attempt to use, any of the Confidential Information in any manner or for any purpose other than for the purpose of the business of the Employer.

[64] Under cl 23 (Implied Terms) the following appears:

- ...
- 23.2 This Agreement sets out all the express terms of the Agreement. The terms which are implied by law in Agreements of employment will be recognised to the extent that they are not contrary to these express terms or contrary to the true intent and purpose of this Agreement.

[65] I interpret the intent of cl 3.7 set out above was to clarify that each seasonal fixed term employment agreement was independent of its predecessors and that any expressed variations from season to season would clearly apply. That cl 15 was set out in materially identical terms in all of the seasonal agreements means that it operated in the same way in respect of each of those agreements. Clause 3.7's phrase "understandings between the Employer and the Skipper" did not have the effect of overriding longstanding custom, practice and usage which preceded Sanford's engagement of Mr Edminstin in 2009.

[66] Clause 23.2 simply reiterates the common law position as I have outlined it previously whereby custom, practice and usage can create an implied term but not contrary to an express provision and to what cl 23.2 describes as "the true intent and purpose of this Agreement".

[67] I interpret the confidentiality clause (15) accordingly. Turning first to cl 15.1, I conclude that information about the skippers' marks (coordinates of geospatial positions in which the vessel operated in the course of harvesting oysters) was not "supplied" to Mr Edminstin by Sanford. The course and other location information relating to the vessel's operation was created as a direct result of Mr Edminstin's own decisions in commanding and piloting the vessel and being responsible for its catch. The defendant argues that this locational information was "supplied" to Mr Edminstin by Sanford because the electronic devices on the vessel belonging to Sanford provided that information. I have concluded, however, that this was not the parties' intention by their use of these words and phrases in cl 15 of their employment agreement. The defendant's is a strained and artificial interpretation that conflates ownership of the electronic storage device with ownership of the information stored on it. Had, for example, Sanford directed that Mr Edminstin harvest oysters from a particular place or places that Sanford itself knew would be productive and had it entered that information itself on the relevant electronic device, or had supplied it in some other fashion, such information may have been covered by cl 15.1. All of the undisputed evidence is, however, that Mr Edminstin was given a free hand by Sanford (and exercised by him) as to where oyster dredging would be conducted and how it would be recorded. It relied upon his knowledge and experience in that regard. Clause 15.1 so interpreted does not negate the custom and practice of skippers' proprietorship in their marks.

[68] Next is the alternative description of confidential information in cl 15.1 "All information ... of which the Skipper may become aware from the Skipper's employment by the employer ...". Again, although it may be argued that some of Mr Edminstin's marks were information of which he became aware whilst skippering Sanford's *Toiler*, much also of that information preceded his engagement by Sanford but was used by him in oyster dredging activities for the defendant. Even newer information acquired after 2009, was not the result of his "awareness" attributable to Sanford. Again I do not consider the parties' use of this phrase to describe Sanford's confidential information was intended to capture information about voyages undertaken by Mr Edminstin on *Toiler* pursuant to his sole entitlement to determine where the vessel fished under his command.

[69] The defendant's post-contractual conduct is inconsistent with its contended interpretation now. Such a definition of Sanford's confidential information is inconsistent with what it readily agreed, in settling Mr Edminstin's personal grievance, to allow the plaintiff to do, that is to remove his marks from the vessel. These marks must have included information recorded by him of oyster beds fished by him on *Toiler*. This cl 15.1 provision does not negate or modify custom and practice.

[70] Nor do I consider that the third definition in cl 15.1 of confidential information was intended to capture what I have concluded constituted Mr Edminstin's marks. The phrase "All information ... from the Skipper's dealing with the Employer or which were in any way related to or connected with the business of the Employer ..." was likewise not intended to encompass the plaintiff's marks and his knowledge of them, as I have defined marks and as they were created, kept and used in practice over a lifetime of oyster boat skippering.

[71] I conclude, therefore, that the relevant express terms of the parties' employment agreement did not contradict, and thereby negate, the established custom and practice of property in marks of Bluff oyster boat skippers. They were the property of those skippers and not of others including vessel owners/employers, at least not unless acquired by them by gift, bequest, purchase for value or other recognised consensual form of transfer of property. Sanford was not entitled to proprietorship in these marks, whether contractually, by unilateral declaration of its entitlement or otherwise. The settlement agreement's words "his marks" meant the plaintiff's marks that were his exclusive property. I consider that if the parties had meant the interpretations now contended for by Sanford, they would have used a phrase such as "a copy of his marks" or "a copy of the parties' marks". They did not: rather they used language consistent with the plaintiff's exclusive proprietorship of them.

The relevance of the judgment in *JP Morgan Chase Bank NA v Lewis*

[72] Although finding in the plaintiff's favour, as I have, on the effect of cl 15, I should also deal briefly with what is strictly a now unnecessary argument raised by

Mr Edminstin. In answer to the defendant's submission that cl 6 of the settlement agreement is required to be interpreted and applied in light of cl 15 of the parties' employment agreement, the plaintiff submitted that the judgment of the Court of Appeal in *JP Morgan Chase Bank NA v Lewis* means that cl 15 (of the employment agreements) is irrelevant because when cl 6 (of the settlement agreement) was entered into, the parties' employment agreement was spent.²¹

[73] To determine this fundamental question requires an analysis of the judgment of the Court of Appeal in *JP Morgan* and a decision whether the relevant principles stated in it are applicable to this case.

[74] *JP Morgan* involved an application to strike out a claim by a former employee for remedies for breach of a settlement agreement which, among other things, provided for the employee's resignation within a short time after the settlement agreement was signed.

[75] The particular passages of the Court of Appeal's judgment in *JP Morgan* relied on by the plaintiff are as follows. At [69] of the judgment of Cooper J on behalf of the Court, it acknowledges that provisions in a settlement agreement may be determined by reference to the content of the parties' employment agreement, at least where that was still executory, unlike in the present case. In *JP Morgan* the settlement agreement provided that the employer was to pay the employee "entitlements including salary up to and including the Termination Date". As the Court of Appeal noted:²²

What those entitlements were was left to be calculated under the employment agreement, and use of the word "entitlements" is consistent with the original provisions under the employment agreement continuing to apply up to termination. In other words, it would be the employment agreement that gave rise to and defined the entitlements, and the settlement agreement made it plain those entitlements would continue to apply.

[76] The defendant may, however in my assessment, rely on the following passage of the Court of Appeal's judgment:²³

²¹ *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255, [2015] 3 NZLR 618.

²² At [69].

²³ At [72].

Finally, once the settlement agreement was executed, it could not be said that it was possible for both agreements to be performed. This follows from the fact that the employment agreement envisaged [the employee's] ongoing employment; the settlement agreement put that prospect to an end. Plainly, he was no longer obliged to continue in JP Morgan's employment and it had been agreed that he would not do so. It would be entirely artificial to describe the situation as one involving the ongoing performance of both contracts.

[77] In this case, however, Sanford is not seeking to apply or enforce a term or condition of the parties' employment agreement. Rather, its case is that the interpretation that the Court should give to the settlement agreement, and cl 6 in particular, should take into account relevant dealings between the parties including, particularly, pertinent terms and conditions of their recently concluded employment agreement. I conclude both that this distinguishes the case from *JP Morgan*, and was properly one of a number of relevant considerations in the central task of interpreting and applying cl 6.

[78] Although only one of a number of indicia to be taken into account, there is no warrant to reject consideration of cl 15 of the individual employment agreement as irrelevant and inadmissible, as the plaintiff submits on these grounds. I have decided the cl 15-influence question on its merits and in favour of the plaintiff.

Do "marks" have an economic value?

[79] This, too, was eventually a peripheral issue in the proceeding and one that did not assume the importance ultimately that must have been anticipated by the plaintiff at the start of the hearing. It, too, can be dealt with briefly.

[80] Mr Edminstin called the evidence of Matthew Kemp, a forensic accountant with experience in the valuation of intangible assets. The thrust of Mr Kemp's evidence was that Mr Edminstin's marks had a monetary value both to him and to Sanford if available to, and used by, the latter. No countervailing expert evidence was called by the defendant: rather, it relied on counsel's cross-examination of Mr Kemp in an effort to negate or minimise the strength of his evidence.

[81] Without necessarily accepting the dollar figure ranges of value put on Mr Edminstin's marks for both him and Sanford, I accept that an oyster skipper's marks, and Mr Edminstin's in particular, are a monetarily valuable, albeit intangible, asset of a skipper. Mr Edminstin was engaged as skipper in significant part for his skill and experience, the latter attribute being reflected in the use by him of his marks which brought mutual benefits of efficiency and quality to his harvesting of oysters for Sanford. Any future engagement of Mr Edminstin as a skipper would be on the same basis. I accept that there are elements of the current fishery which may have reduced the former value of marks, but that is not to the point in this case. Any proprietary interest that either party has in Mr Edminstin's marks is a real interest with actual or potential economic value.

Public information about skippers' voyages

[82] There are two aspects of confidentiality of skippers' marks that the defendant has raised in opposition to the plaintiff's claim to exclusivity of rights in them.

[83] Although oyster boats may often dredge within sight of each other and so might know approximately of another skipper's marks, there is said to be (and I accept there is) an unwritten but closely adhered-to agreement between skippers of vessels, that they will not trespass on others' marks being information about oyster grounds currently or recently worked. Doing so is known colloquially as 'mollyhawking', imitating the sea birds that fly behind fishing vessels hoping for fish scraps. Vessels operating even in close proximity, however, are not necessarily mollyhawking and there is not infrequently some sharing of harvesting among skippers. These practices do not, however, either diminish the value of a skipper's marks or detract from the skipper's exclusive property in them.

[84] Some time during the hearing was also occupied with evidence that was intended to deal with disputed property in skippers' marks. This addressed a relatively recent practice of industry-wide information sharing co-ordinated by a company (BOMCo) representing quota and vessel owners, and the National Institute of Water and Atmospheric Research (NIWA). In the end, however, this evidence

also does not affect materially the questions at the heart of this case for reasons that I will explain briefly.

[85] In order to preserve and harvest sustainably the Foveaux Strait oyster fishery, at relevant times vessel skippers provide some information about their catches to all relevant BOMCo stakeholders and NIWA on an ongoing season-by-season basis. This information is based on oyster catches within one square nautical mile grids covering the OY5 fishery and skippers are paid, albeit modestly, for providing this information to others about their harvests.²⁴ I infer also that vessel quota owners who are not skippers (including Sanford) participated at times relevant to this case in this universally beneficial practice. The information collected about large parts of the OY5 fishery allows NIWA to assess and advise on the overall long-term sustainability of the fishery and particular parts of it, I assume to avoid over-fishing and long-term unsustainability for all.

[86] The large scale of a one square nautical mile grid does not impinge on the confidentiality of any skipper's information about their individual voyages recorded as "marks". The difference in scale between the two sets of information is simply so great that a skipper's publicly available information about a catch within a one square mile grid does not threaten the confidentiality of either a skipper's marks within that grid, or information about particular tows or trawls in the same area. This information-sharing scheme does not adversely affect the proprietorship of a skipper's marks by lessening its confidentiality.

[87] I note also that neither counsel relied on that evidence in final submissions affecting the questions at the heart of the case.

What are "his" marks?

[88] I start with what I understand to be the common ground on this question. The parties agree that these include, in this case, not only handwritten location records but also equivalent electronic notations and other electronic grid references. They

²⁴ The modest amounts of these payments indicate that they are for transactional costs incurred rather than in return for the value of the catch information or of the precise locations fished.

disagree about whether what were referred to variously as “tracks” and “trawls” or “tows” (a continuous record of the vessel’s track coinciding with a record where it trawled for oysters) undertaken by *Toiler*, fall within this definition of “marks”.

[89] Relevant history about marks is instructive in this interpretive exercise. Until about the latter half of the 20th century, skippers’ marks were recorded in the form of descriptions of alignment of physical features on nearby land. It was possible, also, to transpose these descriptions onto paper charts by the creation of points of intersection between those sight lines. Approximate latitude/longitude references could then be given for those points on a chart. A “mark” then marked the general vicinity of oyster beds and consisted of a single point described in latitudinal and longitudinal degrees, minutes and possibly seconds. There is no dispute that these records, and the information in them, constitute a skipper’s marks and some records of marks in this form still exist and are used by skippers.

[90] The next significant development in the establishment and recording of marks came with the installation of marine radar on Bluff oyster vessels. Not only did these instruments enable vessels to operate in foggy or otherwise restrictive weather conditions, but distance recordings could be taken from radar information and transformed to latitude and longitude references on paper charts. This development enabled locations to be established and recorded beyond the sight of land as some of the Foveaux Strait fishery is, especially in conditions of restricted visibility. So far as the evidence goes, however, such “marks” continued to be recorded manually on skippers’ charts, in notebooks, on pieces of paper and similarly, so that they could be carried onto a vessel for a particular voyage and removed at its end by a skipper. These radar-created marks were likewise agreed to be a skipper’s marks. The information obtained and recorded was essentially the same as previously; only the technology in their acquisition differed.

[91] It has been with the advent of both on-board computers and GPS plotters that the most recent progress with the recording of marks (and other information) has been able to be made by the skippers of oyster vessels. Previously hand-recorded co-ordinates are able to be entered into and recorded on a GPS system such as the Koden in this case, either before or during a voyage and the vessel steered to those

points. New courses taken are likewise stored and can be followed subsequently. Skippers' notations not only of the starting point for a potentially productive trawl, but also of information about fouls, shoals, sand banks and the like can also be 'marked' as such on the GPS system and displayed on subsequent voyages. Further, the precise course that a vessel takes from a starting mark when the dredge is "chucked", until it is "heaved" at the conclusion of a trawl, is able to be recorded as a continuous line by the GPS device joining location points recorded from periodic satellite signals. Given variable features such as tides and wind, such "tracks" can now enable a skipper not only to start a trawl from the same mark as previously, but to follow the line of a former productive trawl or to eliminate that line and undertake an alternative trawl. It is these trawl or tow tracks recorded electronically, which Sanford says are not "marks" as that word was intended to mean in cl 6 of the settlement agreement.

[92] Having regard to this history of the nature of handwritten latitude/longitude co-ordinates accumulated over several generations of skippers and still used by some of them, I conclude as follows. Reference to Mr Edminstin's "marks" in cl 6 of the parties' settlement agreement was intended to apply to the electronic versions of what were originally starting point latitudinal/longitudinal co-ordinates handwritten and retained by skippers. It referred, as well, to similarly recorded information about the sea floor including fouls, shoals, sand banks and the like.

[93] Deciding this question turned not on the significance of any changes from the traditional handwritten recording of marks to their electronic recording. I do not consider that there is, in principle, any material or substantive difference between the old and new media affecting how the word (marks) should be interpreted and was intended by the parties in this case. Nor is the interpretation exercise dictated, as the defendant contends, by the fact of the employer's property in the electronic devices on which marks were recorded. Again, in principle, it does not make any difference that, whereas previously, a skipper's marks were recorded manually on his own paper-based media or even on paper-based media owned, strictly or in theory, by his

employer.²⁵ There is nothing in principle to require that one person's ownership of the storage medium will necessarily dictate the property in the information recorded and displayed on that medium. Rather, whether electronic records of "tows" and "trawls" are now included within the phrase (referring to a skipper) "his marks", turns on what that phrase was intended to mean by those who used those words.

[94] So I have concluded that a skipper's "marks" are (and were intended by the parties to the settlement agreement to be) a record of the locations at sea where the most efficient trawling for the best quality oysters has been carried out previously to enable these locations to be returned to in the future. This definition encompasses not only the traditional latitudinal/longitudinal start point for a wide variety of trawls, but also the location of seabed hazards and the like to be avoided. But, importantly for this case, electronic trawl and tow lines on a GPS plotter and/or a vessel's computer record are, in essence, the same information as was historically recorded in handwritten marks. That is, electronic records of tows and trawls act in the same way as a handwritten record to enable a skipper to return to an oyster bed which has previously produced quality oysters efficiently harvested. Put another way, it would be illogical for a vessel/quota owner to accept, as Sanford's case does, that traditional latitudinal/longitudinal references are a skipper's marks and the property of a skipper but, at the same time, to assert that electronic records of tows and trawls²⁶ are to be categorised very differently in definitional and ownership terms.

[95] Having decided that tracks, tows and trawls are marks recorded electronically, and the plaintiff's property and not the defendant's exclusively, it is nevertheless necessary to deal with the defendant's next contention that all such marks are not Mr Edminstin's exclusive property.

²⁵ There is, for example, evidence of the plaintiff writing his "marks" on oyster bin cardboard tags, provided by Sanford on the vessel, but each having an inherent value of only a few cents at most.

²⁶ A collection of discrete points which, when joined, plot the path of a voyage.

Who owns the plaintiff's marks?

[96] I have concluded that “marks” as construed above were, and are, Mr Edminstin’s property exclusively. As already analysed and determined, they were, and are, not Sanford’s confidential information by virtue of the exclusive proprietorship provisions of cl 15 of Mr Edminstin’s individual employment agreements for each of the 2009-2014 seasons, or otherwise. Nor are they shared property. Custom, practice and usage dictates that his marks are the plaintiff’s exclusive property.

[97] It is, therefore, necessarily implicit in the terms of the settlement agreement that the collection by Mr Edminstin of his marks from *Toiler* included not only a copy of the electronically recorded marks but all copies and the originals of those marks. Any lesser collection of “his marks” by Mr Edminstin would be inconsistent with his exclusive property in them. Given the nature of their electronic storage on, and accessibility from, the then on-board Koden and computer devices, compliance by the defendant with cl 6 necessarily included steps to ensure that these marks were not available to Sanford for use by it. 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.

[98] Has Sanford used Mr Edminstin’s marks since late 2014? The evidence has not established, on the balance of probabilities, that either Sanford or Mr Edminstin’s successor as skipper on *Toiler*, Gordon Johnson, used Mr Edminstin’s marks contrary to the parties’ obligations under cl 6 as I have concluded they agreed.

Decision – all information or a copy of all information?

[99] Clause 6 means that Mr Edminstin was entitled to collect any and all originals and copies of his marks as I have defined them. The defendant’s intention that this meant “a copy of his marks” is unsustainable, both as a matter of interpretation of cl 6 on its face, but also taking into account admissible interpretive

evidence about the exclusivity of property in skippers' marks in the Bluff oyster fishery. In the circumstances where these marks were stored electronically (as well as being able to be copied electronically), the rights and obligations created by cl 6 of the settlement agreement included impliedly the deletion by Sanford of originals or copies of Mr Edminstin's marks after one of those versions of them had been collected by him.

[100] For Sanford to have retained the originals or copies would defeat the principle of exclusivity of property in them that I have determined was the case with the plaintiff's marks. Although absent any express requirement to relinquish all originals and copies of the marks, and not to retain any for Sanford's own use, it is necessarily implicit in cl 6 that these were intended by the parties in executing that agreement.

[101] These necessary requirements meet the accepted tests for implied terms, namely reasonability and equitability; necessity to give effect to business efficacy; obviousness; and non-inconsistency with the expressed terms of the employment agreement.²⁷

Summary of judgment and orders

[102] The plaintiff's challenge and application for a compliance order are dismissed, albeit for different reasons than were determined by the Authority. The determination of the Authority to which this is a challenge, is, however, set aside and this judgment stands in its place: see s 183(2) of the Employment Relations Act 2000.

[103] Mr Edminstin's "marks" which he was entitled contractually to collect from Sanford's vessel *MV Toiler*, are all navigational records of voyages undertaken by Mr Edminstin as skipper of *Toiler*. These marks comprise not only paper writing records but also electronic records including information of tracks, trawls and tows undertaken by *Toiler* while skippered by Mr Edminstin. These marks include those

²⁷ *BOP Refining (Westernport) Ltd v Shine of Hastings* [1977] 16 ALR 363,367 followed in New Zealand by *Tucker Wool Processors v Harrison* [1999] 3 NZLR 576 (CA).

obtained and retained electronically on devices including a GPS plotter (Koden) and an onboard computer.

[104] Mr Edminstin's marks as defined above are his sole property in which Sanford does not share and so cannot be retained or used by it (or any other person) unless authorised expressly by Mr Edminstin to do so.

[105] As already noted, the plaintiff's application for a compliance order is dismissed because Sanford has now complied with its obligations under cl 6 of the settlement agreement, and because Mr Edminstin has failed to prove a breach or breaches by Sanford of its obligations not to retain or use his marks.

[106] Costs are reserved with leave for either party to apply within one month of the date of this judgment for an order.

GL Colgan
Chief Judge

Judgment signed at 12.20 pm on 6 June 2017