

Case law update for prosecuting agencies

ABOVE SCALE COSTS IN SUMMARY PROCEEDINGS – “SPECIAL DIFFICULTY, COMPLEXITY OR IMPORTANCE”

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The recent case of *Guilfoyle v Niepe Constructions Pty Ltd*¹ is the latest Magistrates Court decision to consider the award of above-scale costs in regulatory proceedings.

The power to order costs in Magistrates Court proceedings

The provisions for costs in relation to proceedings for summary offences are contained in the *Justices Act 1886* ('the Act') and also the *Justices Regulation 2014* ('the Regulation').

The Act stipulates that costs are to be awarded in accordance with the scale in Schedule 2 of the Regulation, unless "having regard to the special difficulty, complexity or importance of the case" a higher amount is considered just and reasonable.²

Guilfoyle v Niepe Constructions Pty Ltd (No 2) (2021) QMC 3

Background

Niepe Constructions Pty Ltd ('Niepe') was charged in February 2020 with two offences under the *Work Health and Safety Act 2011* ('WHS Act'). Specifically, it was alleged that Niepe failed to comply with its duty to ensure the health and safety of its workers and other persons under the WHSA.

The body of the complaint contained only the charge – it did not set out any particulars. Following an unsuccessful submission to the prosecution (inviting their withdrawal of the complaint), Niepe applied to the Magistrates Court for the complaint to be dismissed.

Niepe's application was successful,³ and the complaint was dismissed. The parties were afforded the opportunity to provide submissions as to costs.

¹ *Guilfoyle v Niepe Constructions Pty Ltd (No 2) (2021) QMC 3*.

² Pursuant to s158B of the Act.

³ *Guilfoyle v Niepe Constructions Pty Ltd [2021] QMC 1*. Though it is now understood to be under appeal.

The issue of costs

The Court determined that costs should be ordered against the prosecution. The residual questions were:

1. Whether costs above the scale should be awarded on the basis of special difficulty, complexity to importance (s158B(2)); if so,
2. The quantum of those costs.

Submissions on costs

Niepe sought costs for legal professional by applying a multiplier of nine to its scale costs - totalling \$18,448.74 (\$2,049.86 x 9). In addition, Niepe sought \$35,177.50 in Counsel's fees according to the Federal Court Scale (\$7,650.00 for attendance at hearing and \$27,527.50 for preparation, conferences and settling the application and submissions). It was submitted that the above scale costs sought were just and reasonable because:

1. The complaint was found to be a nullity due to the failure to plead essential factual ingredients.
2. Senior counsel was engaged. Significant costs were incurred.
3. The prosecution was put on notice inviting withdrawal of the complaint. This was rejected giving Niepe no choice but to bring this application.
4. Niepe had not engaged in any disentitling conduct and should not have to bear the burden of legal costs to establish that the complaint was void.
5. Niepe was only seeking costs in accordance with established principles and was not seeking indemnity costs.

Conversely, the prosecution, relying on *Bell v Townsend* [2014] QMC 30,⁴ submitted that the case was not one of special difficulty, complexity or importance because there was nothing unusual about challenging the validity of the complaint; that a departure from previous pleading practices does not make the case one of special difficulty, complexity or importance; 'unusual' is not synonymous with 'difficult'; the case did not involve unprecedented factual circumstances; submissions were distilled in writing in advance of the hearing; the hearing took less than four hours; engagement of Senior Counsel is not in itself sufficient to elevate the case to special difficulty, complexity or importance.

It was contended that if costs were to be awarded above the scale, the calculation should involve a multiplier of three, namely \$6,149.58 (\$2,049.86 x 3) for legal professional work and

⁴ Two out of three defendants engaged senior counsel. After the complaint was struck out because the complainant's appointment had not commenced on the day the complaint was made, it was determined the matter was not of special difficulty, complexity or importance.

counsel's fees of \$6,400.00 for an appearance on the day of the hearing as per the Federal Court Scale.

The decision

In applying *Latoudis v Casey*,⁵ the Court concluded that it was just and reasonable to award costs to Niepe. It reasoned that Niepe was successful in the application; the prosecution was put on notice by virtue of the earlier submission, and there was no disentitling conduct on the part of Niepe. The Court commented that costs were not a punishment to the unsuccessful party, rather they were compensatory.⁶

As for the quantum of costs to be awarded, the Court accepted that there was a degree of difficulty and/or complexity attached to the matter, but it did not find that the difficulty and complexity was 'special'.⁷

The Court did however find that the matter was one of 'special importance'. In doing so, the Court accepted that the complaint in Niepe's case had departed from the manner of particularising complaints in similar recent cases. To this end, the Court referred to *Whitby v Stockair Pty Ltd & Jackson* [2015] QDC 79 in which Farr SC DCJ held that special importance is a reference to the importance of the case generally, and is not intended to refer to the subjective assessment of a defendant as to whether the case is important to them.⁸

In determining quantum, the Court followed the approach taken in *Hickey v Crime and Misconduct Commission* [2008] QDC 340 and *Schloss v Bell; Bell v Schloss* [2016] ICQ 17, allowing costs for legal and professional fees by adopting a multiplier of three (\$6,149.58).

The Court also found that it was just and reasonable to allow counsel's fees under the Federal Court Scale item 'Fee on Brief' which included preparation and the first day of a hearing (\$7,650.00).

Overall, Niepe was awarded costs in the sum of \$13,834.52.

For further inquiries or assistance, please contact Sarah Ford, Senior Associate, on 3361 00248, or on sford@gnl.com.au.

⁵ (1990) 170 CLR 534.

⁶ *Guilfoyle v Niepe Constructions Pty Ltd (No 2)* (2021) QMC 3 at [27].

⁷ In making that finding, the Court had regard to *Cullinan v McCahon* [2014] QDC 120 and *Bell v Townsend* [2014] QMC 30.

⁸ *Whitby* at [37].