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**MAGISTRATES COURT OF QUEENSLAND**

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

PARTIES: **Aaron John Guilfoyle** (Complainant/Respondent)

 **v**

 **Niepe Constructions Pty Ltd** (Defendant/Applicant)

FILE NOS: MAG 33501/20(0)

ORIGINATING COURT: Magistrates Court

PROCEEDING: Application for costs

DELIVERED ON: 29 June 2021

DELIVERED AT: Toowoomba

HEARING DATE: On the papers

MAGISTRATE: G. Lee

ORDER: **(1) The Complaint is struck out for want of jurisdiction.**

**(2) The complainant pay the defendant’s costs in the amount of $13,834.52.**

CATCHWORDS: COSTS – where Complaint struck out due to lack of jurisdiction of court to hear and determine the Complaint – whether costs that are “just and reasonable” should be awarded – whether those costs should be as per scale in the Justices Regulation 2014, Schedule 2 – whether a higher amount is justified because of the “special difficulty, complexity or importance” of the case

*Justices Act 1886 (Qld), ss 157, 158, 158B & 159*

 *Justices Regulation 2014, Schedule 2*

 *Baker v Smith (No 2)* [2019] QDC 242

*Bell v Townsend* [2014] QMC 30

*Cullinane v McCahon* [2014] QDC 120

 *Durant v Gardner* [2000] QDC 198

 *Fletcher v Demag Cranes and Components Pty Ltd* [2020] QMC 9

 *Hickey v Crime and Misconduct Commission* [2008] QDC 340

 *Interclean Services Ltd v Auckland Regional Council* [2002] 3 NZLR 489

 *Latoudis v Casey* (1990) 170 CLR 534

 *Morley v Senewiratne* [2008] QDC 296

 *Schloss v Bell; Bell v Schloss* [2016] ICQ 17

 *Travers v McDonagh; Carey v La Rocca* [2013] QDC 177

 *Whitby v Stockair Pty Ltd & Jackson* [2015] QDC 79

COUNSEL: Ms A Sanderson for the Complainant/Respondent

 Mr P Roney QC for the Defendant/Applicant

SOLICITORS: Office of the Work Health and Safety for the Complainant/Respondent

 Herbert Smith Freehills for the Defendant/Applicant

[1] On 29 April 2021 I delivered judgement in Niepe’s application to stay a complaint made on 13 February 2020 charging it with two offences under the *Work Health and Safety Act* 2011 finding that the complaint was void ab initio[[1]](#footnote-1). Formal orders were deferred to afford the parties the opportunity of considering the reasons for judgment and to hear submissions as to costs at a later date when formal orders would then be made[[2]](#footnote-2).

[2] Directions were subsequently made for the filing and serving of submissions on Niepe’s application for costs. Written submissions for Niepe (with annexures) are dated 24 May 2021 and, for the complainant, dated 2 June 2021. The parties agreed to the issue of costs being decided on the papers.

[3] The annexures to Niepe’s submissions were:

* A letter dated 3 September 2020 from Niepe’s solicitors to the prosecution inviting a withdrawal of the complaint for reasons along similar lines as outlined in my judgement.
* A letter from the prosecutor in response dated 22 October 2020 declining that request.
* Thirteen monthly invoices for professional services of Herbert Smith Freehills charged to Niepe.
* Two Memorandum of Fees of Mr Roney QC.

**Statutory provisions**

[4] Provisions for costs in relation to proceedings for simple offences under the *Justices Act 1886* (JA) are contained in Division 8 (Costs) of Part 6.

**Division 8 Costs**

**158 Costs on dismissal**

(1) …

(2) When a complaint is before a Magistrates Court which the

court has not jurisdiction to hear and determine the court shall

order the complaint to be struck out for want of jurisdiction

and may order that the complainant pay to the defendant such

costs as to the court seem just and reasonable.

…

**158B Costs for division**

(1) In deciding the costs that are just and reasonable for this

division, the justices may award costs only—

(a) for an item allowed for this division under a scale of

costs prescribed under a regulation; and

(b) up to the amount allowed for the item under the scale.

(2) However, the justices may allow a higher amount for costs if

the justices are satisfied that the higher amount is just and

reasonable having regard to the special difficulty, complexity

or importance of the case.

**159 The sum allowed for costs to be specified in the**

**conviction or order**

The sum so allowed for costs shall in all cases be specified in

the conviction or order or order of dismissal, or order striking

out a complaint for want of jurisdiction.

[5] The *Justices Regulation* 2014 relevantly provides:

**Part 6 Costs and fees**

**19 Scale of costs for Act, pt 6, div 8 and pt 9, div 1—Act, ss**

**158B(1)(a) and 232A(1)(a)**

The scale of costs for part 6, division 8 and part 9, division 1

of the Act is in schedule 2.

**Schedule 2 Scale of costs for Act, part 6,**

**division 8 and part 9, division 1**

**Part 1 General**

**1 Scale sets out amounts up to which costs may be**

**allowed**

This scale sets out—

(a) the only items for which costs may be allowed for part

6, division 8 and part 9, division 1 of the Act; and

(b) the amount up to which costs may be allowed for each

item.

**2 Item of costs covers all legal professional work**

An item in part 2 covers all legal professional work, even if

the work is done by more than 1 lawyer.

**3 Only necessary or proper costs may be allowed**

A cost is to be allowed only to the extent to which—

(a) incurring the cost was necessary or proper to achieve

justice or to defend the rights of the party; or

(b) the cost was not incurred by over-caution, negligence,

mistake or merely at the wish of the party.

**Part 2 Amounts up to which costs**

**may be allowed for legal**

**professional work**

**Work for hearing of complaint up to and**

**including day 1**

1 Instructions and preparation for the hearing, including

attendance on day 1 of the hearing .….up to $1,500.00

**After day 1**

2 For each day of the hearing after day 1 up to $875.00

**Other court attendances**

3 Court attendance, other than on the hearing of the

complaint ………………………………up to $250.00

**Part 3 Disbursements (including**

**disbursements to witnesses**

**and interpreters)**

**5 Disbursements, other than to witness for attending**

Court fees and other fees and payments (other than allowances

 to witnesses to attend proceedings) including allowances to

interpreters, and travelling, accommodation and other expenses

 of a lawyer acting as advocate, may be allowed to the extent

they have been reasonably incurred and are paid or payable.

**History of proceedings**

[6] The complaint was made 13 February 2020 and served with an accompanying Statement of Facts on Niepe shortly thereafter[[3]](#footnote-3).

[7] The matter was first mentioned in court on 17 April 2020 followed by further mentions on 22 May 2020, 17 July 2020 and 28 August 2020.

[8] On 3 September 2020, the day before the next mention, the prosecution received Niepe’s submissions inviting withdrawal of the complaint on the grounds raised in this application. The matter was adjourned on 4 September 2020 and 12 October 2020 to consider the submission. It was rejected by letter dated 22 October 2020.

[9] After the rejection, the matter was mentioned again on 30 October 2020 and 20 November 2020. The current application for a direction hearing to strike out dated 3 December 2020 was listed for a pre-trial hearing on 8 March 2021. No evidence has been given.

**Submissions**

[10] It was submitted for Niepe that as the complaint is void *ab initio*, it should be struck out for want of jurisdiction. Then, on the question of costs, this engages section 158(2) JA so that it is not necessary for the court to take into account those factors set out in section 158A JA[[4]](#footnote-4) relating to dismissal of complaints. This is not disputed by the prosecution[[5]](#footnote-5). I agree.

[11] In exercising the discretion to award costs under section 158(2) JA, the general principles outlined in *Latoudis v Casey* (1990) 170 CLR 534 apply[[6]](#footnote-6). At 542 Mason CJ said[[7]](#footnote-7):

In ordinary circumstances it would not be just or reasonable to deprive a defendant who has secured the dismissal of a criminal charge brought against him or her of an order for costs. To burden a successful defendant with the entire payment of costs of defending the proceedings is in effect to expose the defendant to a financial burden which may be substantial, perhaps crippling, by reason of the bringing of a criminal charge which, in the event, should not have been brought. It is inequitable that the defendant should be expected to bear the financial burden of exculpating himself or herself, though the circumstances of a particular case may be such as to make it just and reasonable to refuse an order for costs or to make a qualified order for costs.

[12] Section 158B was inserted into the JA in response to *Latoudis v Casey* limiting the discretion to award costs. Costs are to be awarded in accordance with the scale in Schedule 2, *Justices Regulation* 2014 unless “having regard to the special difficulty, complexity or importance of the case” a higher amount is considered just and reasonable[[8]](#footnote-8).

[13] In this respect, *Interclean Industrial Services Ltd v Auckland Regional Council* [2002] NZLR 489 (Interclean) was referred to. It has been cited with approval in a number of Queensland cases[[9]](#footnote-9). In that case *Interclean* pleaded guilty to two charges and the prosecution unsuccessfully sought costs above the scale based on “special difficulty, complexity or importance”. At 496-7, Randerson J said;

[32] As observed in Tipping J in T v Collector of Customs (High Court, Christchurch, AP 167/94, 28 February 1995) at p 2

‘The use of the word ‘special’ when applied to the concepts of difficulty, complexity or importance means that it is not enough simply to say that the case was difficult, complex or important. The necessary difficulty, complexity or importance must be such that it can be said to be significantly greater than is ordinarily encountered. Similarly the focus on the case itself means that it is not enough for the applicant to be able to say that by dint of its features the case had special importance to him’.

[34] In my view, each case must be considered on its own facts. I do not accept the appellant’s submission that it is necessary for the prosecutor to demonstrate that the case is one of special difficulty, complexity or importance when compared with other prosecutions of the same type. The question is whether, having regard to the general run of criminal cases, the particular case is one of special difficulty, complexity or importance. Just as murder trials are not necessarily complex or difficult, summary cases are not always straight forward and may give rise to unusual complexity. Prosecutions under s 338 may often be of some complexity but it will not always be so.

[14] It was submitted for Niepe that there has been a significant change in the way charges have been brought having departed from recent previous practices. It is of special importance going to the proper administration of justice and concerns fundamental principles underpinning the criminal justice system. It was submitted that the application has wide ranging implications. In this respect, reiterating his Honour’s remarks in *Cullinane v Mc Cahon* [2014] QDC 120 at [35], Farr SC DCJ in *Whitby v Stockair Pty Ltd & Anor* [2015] QDC 79 at [37] said[[10]](#footnote-10):

In relation to the second point, I accept that this case was important to the appellant, as no doubt every criminal case is to every defendant. To invoke special importance however, the case must involve more than the charge merely relating to a defendant in his/her professional capacity. ‘Special importance’ is clearly a reference to the importance of the case generally, in terms of questions of law or public interest (this list is not exhaustive) and is not intended to refer to the subjective assessment of a defendant as to whether the case is important to him or her.

[15] Further, it was submitted for Niepe that the case was one of special difficulty and complexity because it involved a detailed analysis of case law and legal principles including the interaction of common law and statute law, the extent of the court’s power to amend and the extent of the invalidity of the complaint. Senior Counsel for both parties were engaged with detailed written submissions and many case authorities. While the length of the hearing was short, that is not determinative of a finding that the case involves special difficulty complexity or importance[[11]](#footnote-11).

[16] It was submitted for Niepe that it is just and reasonable to award costs above the scale because[[12]](#footnote-12):

* The complaint was found to be a nullity due to the failure to plead essential factual ingredients
* Senior counsel was engaged. Significant costs have been incurred.
* The prosecution was put on notice inviting withdrawal of the complaint. This was rejected giving Niepe no choice but to bring this application.
* Niepe, a small sole director company, was at a significant disadvantage to the prosecution in relation to resources in bringing this successful application.
* Niepe has not engaged in any disentitling conduct and should not have to bear the burden of legal costs to establish that the complaint was void.
* Niepe is only seeking costs in accordance with established principles and is not seeking indemnity costs.

[17] On the other hand, as to the discretion to award costs at all, the prosecution submits there is no suggestion that the investigation or prosecution was conducted in an inappropriate way; that proceedings were brought and continued in good faith; that the allegations were made plain to Niepe by the provision of sufficient Statement of Particulars in a separate document; that the argument was a purely technical one[[13]](#footnote-13). I note these reflect section 158A (2) factors in respect of dismissal.

[18] It was further submitted for the prosecution that this case is not one of special difficulty, complexity or importance because there is 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’ citing *Senior Constable Sheehan v Leo* [2016] QDC 131 at [29]; this case did not involve unprecedented factual circumstances as they were considered in *S Kidman v Lowndes* (2016) NTCA 5; submissions were distilled in writing in advance of the hearing; that while the length of the hearing is not determinative, the hearing took less than four hours; engagement of Senior Counsel by the parties is not in itself sufficient to elevate the case to special difficulty, complexity or importance[[14]](#footnote-14).

[19] *Bell v Townsend* [2014] QMC 30 was cited in support of these submissions. In that case there were three defendants two of whom engaged Senior Counsel as well as the prosecution. After the complaint was struck out because the complainant’s appointment had not commenced on the day the complaint was made[[15]](#footnote-15), it was determined that the matter was not of special difficulty, complexity or importance[[16]](#footnote-16).

[20] Regarding the amount of costs above the scale should section 158B (2) JA be invoked, the submissions referred to principles outlined in *Hickey v Crime and Misconduct Commission* [2008] QDC 340 (Hickey) per Shanahan DCJ at [43][[17]](#footnote-17):

To my mind, it is clear that the legislature has limited the discretion to award costs to successful defendants in criminal prosecutions as a matter of policy. That policy is based on the public interest of ensuring that the bringing of proper prosecutions is not fettered by the prospects of extensive costs orders being made in the event of unsuccessful prosecutions. Any award of above the scale must be made with that principle in mind. No authorities have been placed before me where solicitor/client costs or indemnity costs have been awarded in these circumstances. The costs to be awarded must be “just” in relation to the appeal and “just and reasonable” in relation to the summary trial. The amounts to be awarded must be made bearing in mind the policy of the legislation. The scale in the regulation is a clear indication of that policy as it bears little relation to present day economics. However, to my mind, the legislative intent is clear.

[21] It is common ground that in determining costs that are just and reasonable, the starting point is by reference to the scale of costs in the *Justices Regulation* 2014 and then applying a multiplier if the discretion in section 158B(2) is exercised. Legal fees for “legal professional work” on the scale come to $2,049.86 for this matter[[18]](#footnote-18).

[22] It is also common ground that counsel’s fees are not considered a disbursement under the scale and do not fall within “legal professional work” referred to in the scale. The general practice is that, in addition to costs under “legal professional work” in the scale, an allowance for counsel’s fees has generally been awarded in accordance with the Federal Court of Australia’s National Guide to Counsel’s Fees (effective 1 July 2013) (Federal Court Scale)[[19]](#footnote-19).

[23] Niepe seeks costs for “legal professional work” with a multiplier of nine totalling $18,448.74 ($2,049.86 x 9) which is less than 35% of the total fees incurred[[20]](#footnote-20). In addition, Niepe seeks $35,177.50 counsel’s fees according to the Federal Court Scale made up of $7,650 for attendance at the hearing (item “Fee on Brief including preparation at discretion of taxing officer and appearance on the first day of a hearing”) and $27,527.50 for preparation, conferences and settling the application and submissions.

[24] If costs are to be awarded above the scale, the prosecution submit that the multiplier should be three ie $6,149.58 ($2,049.86 x 3) for “legal professional work” under the scale and counsel’s fees of $6,400 for appearance on the day of the hearing as per the Federal Court Scale under the item “Appearance a hearing (daily rate including conference)”.

[25] Disbursements of $34.94 under section 5, Schedule 2 *Justices Regulation* 2014[[21]](#footnote-21) are not in dispute.

**Primary order for costs – ss. 158 (2) & 158B (1) Justices Act 1886**

[26] At first, the prosecution identifies the issue at paragraphs [1] & [2] of submissions, whether costs should be awarded above the scale and submit that this is not a case of “special difficulty, complexity or importance”. However, at paragraph [33] of submissions, the prosecution’s first position is that it is not “just and reasonable” to award any costs.

[27] If the latter is maintained, in applying the principles outlined *in Latoudis v Casey* (1990) 170 CLR 534, I am clearly of the view that it is just and reasonable to award costs to Niepe. Niepe was successful in the application; the prosecution was put on notice; there was no disentitling conduct on the part of Niepe. Costs are not a punishment to the unsuccessful party. Rather they are compensatory. Exercising the discretion to award costs that are “just and reasonable” under section 158 (2) JA should not be influenced by a submission that public officers will be deterred from prosecuting cases in fear of a costs order[[22]](#footnote-22). This may be relevant however, when exercising the discretion under section 158B (2) JA to award costs above the scale[[23]](#footnote-23).

[28] If the discretion under section 158B (2) is not exercised, the total costs in favour of Niepe would be $2,084.80 ($2,049.86 + $34.94)[[24]](#footnote-24).

[28] Two issues remain:

1. whether costs above the scale should be awarded on the basis of special difficulty, complexity or importance under section 158B (2) JA; if so,
2. the quantum of those costs.

**Special difficulty, complexity or importance – s. 158B (2) Justices Act 1886**

[29] The principles in *Interclean* cited above at [13] were approved in *Travers v Donagh; Carrey v La Rocca* [2013] 177 per Wall QC DCJ at [23]. At [22] His Honour interpreted “special difficulty, complexity or importance” in section 158B (2) JA as meaning “special difficulty, special complexity, or special importance”. The necessary difficulty, complexity or importance of a case must be one significantly greater than is ordinarily encountered compared with the general run of cases[[25]](#footnote-25).

[30] While this case involved a degree of difficulty and/or complexity for the reasons given in Niepe’s submissions, the question is whether they are “special”. As Farr QC DCJ noted in *Cullinan v McCahon* [2014] QDC 120[[26]](#footnote-26) at [22], “special” is defined in the Macquarie Dictionary as “extraordinary; exceptional; exceptional in amount or degree”.

[31] At [25] & [26][[27]](#footnote-27) Farr QC DCJ in *Cullinan* observed that a case is not especially difficult or complex simply because the legislation is complex even if it required considerable work. These remarks in my view encompass considering case law. Further, I note that the arguments advanced in this case have been canvassed before in other courts: see for example *S Kidman & Co Ltd v Lowndes* [2016] NTCA 5 which is an almost identical scenario and *Newman v President of the Industrial Court* [2012] QSC 145.

[32] There are a number of cases referred to in submissions that were found to be especially difficult or complex. For example, the defendant in *Hickey* was found guilty of an offence under the *Crime and Misconduct Act* 2001 after a three-day trial in which both parties had briefed Senior Counsel. An appeal setting aside the conviction was successful. The court concluded that the case was one of special difficulty, complexity or importance. The focus of the reasoning in the judgement appeared to be that this was a case of considerable importance as it concerned the conduct of a local government election and had attracted substantial media attention[[28]](#footnote-28). Other factors considered included the voluminous amount of material from the CMC hearing and the way in which the prosecuting authority approached the matter[[29]](#footnote-29). Shanahan DCJ applied a multiplier of three to the scale for legal professional work and counsel’s fees under the Federal Court Scale for the three days. That case is somewhat distinguishable in that there was no evidence and no trial in the present case.

[33] In another case, the defendant successfully appealed a conviction for an offence under the *Petroleum and Gas (Production Safety) Act* 2004 in *Schloss v Bell; Bell v Schloss* [2016] ICQ 17 (Schloss) and sought costs of the trial in the Industrial Magistrates Court and of the appeal. The trial went for six days[[30]](#footnote-30) with multiple amendments to the particulars before and during the trial; it was exceptional and unique in that it was a first prosecution for non -compliance with a non -statutory safety regime (as opposed to a statute one); was “factually dense”; and Senior Counsel were briefed for both parties [[31]](#footnote-31). That case is distinguishable to the present case in that there was no trial. On its face, even though that case involved a trial, in applying the approach in *Hickey,* a multiplier of three to the scale of costs for legal professional work was adopted.

[34]In *Fletcher v Demag Cranes and Components Pty Ltd* [2020] QMC 6 (Fletcher), the prosecution offered no evidence on the first day of trial and the complaint was dismissed. The trial was listed for two and a half weeks with 29 witnesses four of whom were expert engineers. Proceedings were commenced 20 June 2014 and there were considerable difficulties particularising the charge, many directions hearings, an appeal to the District Court, and a stay application. There were ultimately seven versions of the complaint[[32]](#footnote-32). In distinguishing *Hickey* and *Schloss*, the court applied a multiplier of 15 to costs for legal professional work provided in the scale of costs. The court also allowed counsel’s fees under the Federal Court Scale for preparation as well as for court appearances[[33]](#footnote-33). That case is distinguishable from the present.

[35] In addition, there are a number of other cases such as *Archer v Simon Transport* [2016] QCA 168, *Karimbla Construction Services Pty Ltd v President of the Industrial Court* [2014] QSC 56 and *Harrison v President of the Industrial Court* [2016] QCA 89[[34]](#footnote-34) where the issue was whether the particulars in the complaint itself were defective in not pleading essential factual ingredients. That entailed an analysis of the “Particulars” in the complaints which on their face was a complex exercise in applying the principles from cases including *Kirk v Industrial Court of NSW* (2010) 239 and *John L Pty Ltd v Attorney-General (NSW)* [1987] HCA 42. In contrast, this case was factually quite straight forward as there were no particulars pleaded at all in the complaint apart from date and place: see *Guilfoyle v Niepe Constructions Pty Ltd* [2021] 1 at [3] & [49].

[36] I agree with the prosecution that *Bell v Townsend* [2014] QMC 30 is similar to this case on the question of “special difficulty or complexity”. It involved a single issue on the interpretation of the word “from” in the instrument of the complainant’s appointment[[35]](#footnote-35). While Senior Counsel were engaged, that did not in itself elevate the case to one of special difficulty or complexity. The court was assisted by written submissions as in this case although, as was noted, that should not be viewed artificially on the basis of the hearing time[[36]](#footnote-36). The court concluded that the case was not one involving special difficulty, complexity or importance

[37] In my view this case was not one of “special” difficulty or complexity within the meaning of section 158B (2) JA.

[38] The next question is whether the case was of “special importance”.

[39] On this issue, I accept submissions for Niepe that the manner of pleading in this case has departed from the manner of pleading in similar cases in the recent past[[37]](#footnote-37). No reasons were advanced by the prosecution as to why other than a rejection of the notion that this would constitute “the requisite difficulty, complexity or importance”[[38]](#footnote-38).

[40] While no evidence has been given in this case, I consider it permissible to have regard to other complaints filed in the Toowoomba region with the same pleading. I think it is reasonable to infer that this relatively recent practice has been adopted in other parts of the state. Thus, defendants are exposed to criminal consequences based on complaints that are void. In this respect I refer to *Whitby v Stockair Pty Ltd & Jackson* [2015] QDC 79 where, in adopting the approach taken in *Hickey* on the question of “special importance”, Farr SC DCJ, rejected a submission that the court is restricted to matters in evidence[[39]](#footnote-39). His Honour said at [42]:

The fact that non-evidence-based decisions have been made in the past is a relevant consideration as is the maintenance of consistency of approach. Furthermore, it is common practice that when a court is determining a costs issue, it is not necessarily restricted to consider those matters about which evidence has been placed before the court. Many factual scenarios can be reasonably envisaged where judicial knowledge applies notwithstanding the absence of evidence on a topic. For instance, a Commissioner of Police on trial for an offence of dishonesty may well be a matter that is objectively considered one of special importance for that very reason, notwithstanding the absence of evidence to that effect.

[41] Earlier at [37] Farr SC DCJ reaffirmed his statement in *Cullinane v McCahon* [2014] QDC 120 at [35] that “special importance is clearly 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 him or her”.

[42] While *Bell v Townsend* [2014] QMC 30 is in many respects similar to this case, on the question of ‘special importance’, it is distinguishable. That case was concerned with the construction of an instrument of appointment of the complainant. It was determined that the appointment did not commence until the day after the complaint was made rendering it void. Unlike the present case, this can be described as a “one off” and something that would rarely occur and therefore not of “special importance”.

[42] In the circumstances, I find that this case was one of “special importance” so that costs higher than the scale may be awarded under section 158B (2) JA provided they are “just and reasonable”.

**Quantum of costs**

**Solicitors Costs**

[43] It was submitted for Niepe that for legal professional costs a multiplier of between three and 15 should be applied to the scale costs and have nominated a multiplier of nine. That equates to $18,448.74[[40]](#footnote-40). *Hickey* and *Schloss* applied three whereas *Fletcher* applied 15. The prosecution submits that if section 158B (2) JA is invoked, the multiplier should be three giving a figure of $6,149.58[[41]](#footnote-41).

[44] In *Fletcher*, discussed above and cited in support of Niepe’s submissions as to quantum of costs[[42]](#footnote-42), after stating at [59] that the primary consideration must be what is just and reasonable, the court said at [65]:

I do not accept that the only methodology, that adequately reflects the principles to which I have referred, must incorporate a multiplier of the scale items. However, what a multiplier does, is to give the court sufficient flexibility in exercising its discretion, having regard to the relevant circumstances of the case, but at the same time allow the court to give due weight to the policy consideration. I do not accept that if a multiplier is used that it must be a multiplier of three.

[45] However, those remarks must be seen in the light of the fact that *Fletcher* was a difficult and unusual case in applying a multiplier of 15: discussed above at [34]. I agree with the prosecution that *Fletcher* is of no assistance in this case. That case is in stark contrast and materially different to the present one.

[46] I propose to follow the approach taken in *Hickey* and *Schloss* to allow costs for legal and professional fees by adopting a multiplier of three. I consider these costs are just and reasonable: $6,149.58.

**Counsel’s fees**

[47] As discussed earlier, Counsel’s fees are not considered an disbursement and that a practice has developed to allow costs according to the Federal Court Scale. The contest is what should be allowed under the scale.

[48] It was submitted for Niepe that fees for preparation and appearances should be allowed and that these costs do not have to be in accordance with the scale in the Justices Regulation. An amount of $35,177.50 is claimed by reference to the Federal Court Scale made up of $7,650 (fee on brief) for the hearing and $27,527.50 for preparation, conferences and settling the application and supporting submissions. The latter is based on an hourly rate of $715 for Senior Counsel.

[49] On the other hand, the prosecution submits that an appearance fee of $6,400 only should be allowed under the Federal Court Scale for an “Interlocutory hearing” for two hours or longer.

[50] This matter consisted of an application for directions prior to trial. Unlike *Hickey*, *Fletcher* and *Schloss*, there was no trial and no evidence has been led. The matter involved a pure question of law which, as I have said, was difficult/complex although not especially so. Entertaining this question has come about purely on the basis of special importance.

[51] In the circumstances, I adopt the approach taken in *Hickey* and *Schloss* in allowing counsels fees in the Federal Court Scale immediately associated with the hearing only. The question then is which item? Fee on brief or Interlocutory application?

[52] In terms of which item should be allowed under the Federal Court Scale, I take the view that, while the application was brought under section 83A JA, it was seeking a final order and is not in reality an interlocutory proceeding. An interlocutory proceeding is one which is taken during the course of an action and incidental to the principle object of the action, namely, the judgment. This includes all steps taken for the purpose of assisting either party in the prosecution or defence of the case[[43]](#footnote-43): see also fedcourt.gov.au/digital-lawlibrary/annual reports/2010 where “interlocutory application” is described as one which deals with a specific issue usually between the filing of the application and the giving of the final hearing and decision. In the Federal Court such applications are usually for interim relief or in relation to a procedural step such as discovery.

[53] The current case was a proceeding seeking a final order. Therefore, I take the view that it is just and reasonable to allow counsel’s fees under the Federal Court Scale item “Fee on Brief” which includes preparation and the first day of a hearing ie $7650.

**Orders**

1. The complaint is struck out for want of jurisdiction under section 158(2) JA.
2. I order the complainant pay the defendant’s costs as follows:

(a) Legal professional work (solicitors fees) $ 6,149.58

(b) Counsel’s Fees $ 7,650.00

(c) Disbursements $ 34.94

 **TOTAL** **$13,834.52**

1. *Guilfoyle v Niepe Constructions Pty Ltd* [2021] QMC 1. [↑](#footnote-ref-1)
2. Section 159 *Justices Act* 1886. [↑](#footnote-ref-2)
3. The pleaded date of the charge was “on or about the 11th September 2018. [↑](#footnote-ref-3)
4. Paras [6] to [10] submissions for Niepe citing *Bell v Townsend and Ors* [2014] QMC 30 at [56] – [58]. [↑](#footnote-ref-4)
5. Para [12] submissions for the prosecution also citing *Bell v Townsend* (supra). [↑](#footnote-ref-5)
6. Para [11] submissions for Niepe; para [13] submissions for the prosecution. *Latoudis v Casey* was a “dismissal” case. [↑](#footnote-ref-6)
7. Mason CJ, Toohey & McHugh JJ., with Brennan & Dawson JJ dissenting. [↑](#footnote-ref-7)
8. Paras [14] & [15] submissions for the prosecution. Section 158B inserted by 1997 No 38 s 60. [↑](#footnote-ref-8)
9. Para [14] submissions for Niepe; para [17] submissions for the prosecution. See *Travers v McDonagh; Carey v La Rocca* [2013] QDC 177 at [23]; *Whitby v Stockair Pty Ltd & Anor* [2015] QDC 79 at [39]; *Schloss v Bell; Bell v Schloss* [2016] ICQ 17 at [41]; *Bell v Townsend* [2014] QMC 30 at [70]. [↑](#footnote-ref-9)
10. Paras [15] to [17] submissions for Niepe. The second point referred to in the quote was a reference to the matter involving allegations against the defendant in his professional capacity; see [33]. In *Cullinane*, the issue was whether costs above the scale should be awarded under section 158B (2) JA and section 232A(2) JA (for appeals to the District Court). Note section 158B (2) refers to higher costs that are “just and reasonable” whereas section 232A refers to higher costs that are “just”. [↑](#footnote-ref-10)
11. Paras [18] to [21] submissions for Niepe. [↑](#footnote-ref-11)
12. Paras [12] – [14] submissions for Niepe. [↑](#footnote-ref-12)
13. Para [19] submissions for the prosecution. [↑](#footnote-ref-13)
14. Para [20] submissions for the prosecution. [↑](#footnote-ref-14)
15. *Bell v Townsend* at paras [3], [4] & [50]. [↑](#footnote-ref-15)
16. Paras [21] - [22] submissions for the prosecution. [↑](#footnote-ref-16)
17. Para [22] submission for Niepe; para [24] submissions for the prosecution. [↑](#footnote-ref-17)
18. Paras [25] & [28] submissions for Niepe; para [27] & [31] submissions for the prosecution. [↑](#footnote-ref-18)
19. See for example *Hickey v Crime and Misconduct Commission* [2008] QDC 340 at [48] and *Schloss v Bell v Bell; Bell v Schloss* [2016] ICQ 17 at [61] both cited with approval on appeal in *Baker v Smith* [2019] QDC 242 at [455] et seq. with respect to section 232A(2) JA which is cognate to section 158B(2) JA. [↑](#footnote-ref-19)
20. Paras [33] & [34] submissions for Niepe. [↑](#footnote-ref-20)
21. Cited at [5] above. [↑](#footnote-ref-21)
22. See *Latoudis v Casey* (1990) 170 CLR 534 at 543-4 cited in *Bell v Townsend* [2014] QMC 30 at [60]. [↑](#footnote-ref-22)
23. See *Hickey v Crime and Misconduct Commission* [2008] QDC 340 at [43] cited at [20] above. [↑](#footnote-ref-23)
24. Para [50] submissions for Niepe; paras [31] & [34] submissions for the prosecution. [↑](#footnote-ref-24)
25. See for example *Schloss v Bell* [2016] ICQ 17 at [41] and *Baker v Smith* (No 2) [2019] 242 at [227] to [229]. [↑](#footnote-ref-25)
26. The application only lasted a few hours: at [24]. [↑](#footnote-ref-26)
27. Cited with approved in *Baker v Smith* (No 2) [2019] QDC 242 at [225] – [229]. [↑](#footnote-ref-27)
28. *Hickey* at [28]. [↑](#footnote-ref-28)
29. *Hickey* at [29] & [34]. [↑](#footnote-ref-29)
30. *Schloss* at [64]. [↑](#footnote-ref-30)
31. *Schloss* at [35], [36] & [60]. [↑](#footnote-ref-31)
32. *Fletcher v Demag Cranes and Components Pty Ltd* [2020] QMC 9 at paras [23],[24], [66] & [67]. [↑](#footnote-ref-32)
33. In *Fletcher*, a number of affidavits were considered including the opinion of a cost’s expert (at [15]). The material in this case consisted of memorandums of fees only. [↑](#footnote-ref-33)
34. And others referred to in *Guilfoyle v Niepe Constructions Pty Ltd* QMC [2012] 1. [↑](#footnote-ref-34)
35. See for example *Forster v Jododix Australia Pty Ltd* (1972) 127 CLR 421. [↑](#footnote-ref-35)
36. At Para [76] *Bell v Townsend* [201] QMC 30. [↑](#footnote-ref-36)
37. Para [15] submissions for Niepe. [↑](#footnote-ref-37)
38. Para [20(b)] submissions for the prosecution citing *Senior Constable Sheehan v Leo* [2016] QDC 131 at [29] regarding Robertson DCJ’s statement that “unusual” is not synonymous with “difficult”. That passage was concerned with an “insanity” defence under s 27 Criminal Code and whether that issue was one of special difficulty in that case. I reject this quote as authority for the proposition relied on by the prosecution. [↑](#footnote-ref-38)
39. *Whitby* at [40] to [43]. [↑](#footnote-ref-39)
40. $2,049.86 x 9. [↑](#footnote-ref-40)
41. $2,049.86 x 3. [↑](#footnote-ref-41)
42. Paras [29] to [33] submissions for Niepe. [↑](#footnote-ref-42)
43. For definition of “interlocutory proceeding” see *Osbourn’s Concise Law Dictionary*, 6th edition, Sweet & Maxwell at p 182. See also the *Shorter Oxford Dictionary* which provides a definition of “interlocutory” as “pronounced during the course of an action; not finally decisive”. This point was not argued in the case. The parties simply put their respective positions. [↑](#footnote-ref-43)