QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Colagrande & Ors v D A Radic Pty Ltd trading as David Radic Prestige Homes* [2020] QCATA 86
PARTIES:	**CES COLAGRANDE** (first applicant) **REBECCA COLAGRANDE** (second applicant) **ANTI-AGING AUSTRALIA PTY LTD** (third applicant) **v** **D A RADIC PTY LTD TRADING AS DAVID RADIC PRESTIGE HOMES** (respondent)
APPLICATION NO/S:	APL081-18
ORIGINATING APPLICATION NO/S:	BDL118-16
MATTER TYPE:	Appeals
DELIVERED ON:	15 June 2020
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Senior Member Brown Member Olding
ORDERS:	**1. D A Radic Pty Ltd trading as David Radic Prestige Homes must pay to Ces Colagrande, Rebecca Colagrande and Anti-Aging Australia Pty Ltd costs in proceeding APL081-18 fixed in the amount of $21,702.93 within 28 days of the date of this order.** **2. Ces Colagrande, Rebecca Colagrande and Anti-Aging Australia Pty Ltd must pay to D A Radic Pty Ltd trading as David Radic Prestige Homes costs in proceeding BDL118-16 fixed in the amount of $5,380.50 within 28 days of the date of this order.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL MATTERS - POWER TO AWARD GENERALLY –

GENERALLY – whether the appeal tribunal has power to deal with costs of proceedings at first instance – where the tribunal has power to make an costs order after a proceeding has ended – where the tribunal may be constituted as the appeal tribunal – where the appeal tribunal has broad powers to make a costs order – where the preferred construction of s 106 of the QCAT Act is consistent with the objects of the Act

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – WHEN APPEAL LIES – ERROR OF LAW – where errors of law found in the decision below – where appeal allowed – where the applicants were successful in reducing the amount payable to the respondent

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – PARTIAL SUCCESS – where the applicants were successful in the appeal – where no disentitling conduct on the part of the applicants ousting the presumption

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – PARTIAL SUCCESS – where both parties were successful in the proceedings below – where the respondent's overall success was substantial albeit reduced – where a costs order is warranted – where no suggestion of delinquency on the part of the applicants – consideration of the extent to which respondent successful at first instance and the entitlement to recover costs – where costs should be awarded on the standard basis

Domestic Building Contracts Act 2000 (Qld), s 18, s 55, s 60, s 84
Queensland Building and Construction Commission Act 1991 (Qld), s 77(3)(h)
Queensland Building Services Authority Act 1991 (Qld), s 77(1), sch 2
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 3(b), s 6(2), s 102(1), s 106, s 146, s 147, sch 3
Uniform Civil Procedure Rules 1999 (Qld), r 766(1)(a)

Colagrande & Anor v D A Radic Pty Ltd trading as David Radic Prestige Homes [2019] QCATA 176
Colgate-Palmolive Co v Cussons Pty Ltd (1993) 46 FCR 225
Elite Protective Personnel Pty Ltd v Salmon (No 2) [2007] NSWCA 373
Hamod v State of New South Wales & Anor [2011] NSWCA 375

James v Australian and New Zealand Banking Group Limited [2016] NSWSC 833
John Urquhart t/as Hart Renovations v Partington [2016] QCA 199
Kaines (UK) Limited v Osterreichische Warrenhandelsgesellschaft (formerly CGL Handelsgesellschaft MBH) [1993] 2 Lloyds Rep 1
Lee Manson t/as Manson Homes v Brett & Anor [2018] QCATA 109
Leichhardt Municipal Council v Green [2004] NSWCA 341
Lollis v Loulatzis (No 2) [2008] VSC 35
Lyons v Dreamstarter Pty Ltd [2011] QCATA 142
Olindaridge Pty Ltd & Wagner v Tracey [2015] QCATA 175
Oshlack v Richmond River Council (1998) 193 CLR 72
Partington & Anor v Urquhart (No 2) [2018] QCATA 120
Partington & Anor v Urquhart (No 4) [2019] QCATA 96
Partington v Urquhart [2015] QCATA 67
Pivovarova v Michelsen [2016] QCATA 45
Rogers v Roche & Ors [2017] QCA 145
Stuart v Queensland Building and Construction Commission [2016] QCATA 135
Tamawood Ltd v Paans [2005] QCA 111
Todrell Pty Ltd v Finch & Ors; Croydon Capital Pty Ltd v Todrell Pty Ltd & Anor [2007] QSC 386
Tomanovic v Global Mortgage Equity Corporation Pty Ltd (No 2) [2011] NSWCA 256
Urquhart v Partington [2013] QCAT 133
Waterman v Gerling (Costs) [2005] NSWSC 1111
Wharton v Duffy Constructions (QLD) Pty Ltd [2016] QCATA 12

REPRESENTATION:

Applicant:	J Faulkner, instructed by Fraser Lawyers
Respondent:	J Hitchcock, solicitor of AJ & Co Lawyers
APPEARANCES:	This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld)

REASONS FOR DECISION

[1] These are the reasons for decision in relation to the costs of an appeal and the proceedings at first instance.

[2] The Applicants were successful in appealing the decision of the tribunal by which they were ordered to pay Radic $59,477.83.[1] On appeal the amount was reduced to $7,250.00.

[3] No decision was made about costs in the proceedings below, this appeal having been commenced before the issue of costs was determined.

[4] The costs of the appeal and the proceedings below fall for determination.

The proceedings below and in the appeal

[5] It is useful to briefly summarise the claims made by the parties below in order to give some context to these reasons.

[6] At the time of handover following completion of the building works, Radic sought payment from the Applicants of a final amount of $191,482.73. The amount comprised $114,556.80 being the practical completion stage payment and $76,925.93 being a combined variation claim and contract adjustment. The Applicants paid the final payment after deducting an amount of $53,047.30 comprising $27,177.63 for disputed variations and $25,250.00 for liquidated damages.

[7] In the proceedings below Radic sought payment of the balance of the monies it said remained owing and which had been retained by the Applicants. Radic was awarded an amount for variations that did not comply with the provisions of the *Domestic Building Contracts Act* 2000 (Qld). The Applicants' counter claim, including a claim for the payment of liquidated damages, was dismissed.

[8] On appeal the Applicants were entirely successful. Radic was not entitled to recover any amount for the non-compliant variations and the Applicants were successful in the counter claim for liquidated damages.

The powers of the appeal tribunal to deal with costs of proceedings at first instance

[9] The first issue to address is whether the appeal tribunal can deal with the costs of the proceedings at first instance.

[10] Rule 766(1)(a) of the *Uniform Civil Procedure Rules* 1999 (Qld) confers upon the Court of Appeal all the powers and duties of the court that made the decision appealed from. Those powers include the power to award costs of the proceedings below. Neither the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act') nor the *Queensland Civil and Administrative Tribunal Rules* 2009 (Qld) ('QCAT Rules') confer upon the appeal tribunal any such express power.

[11] In *Partington & Anor v Urquhart (No 4)*[2] the QCAT appeal tribunal considered the issue of costs of the proceedings at first instance. The Partingtons were unsuccessful at first instance and were ordered to pay an amount to Mr Urquhart. An order was made that both parties pay their own costs.[3] On appeal, the decision at first instance

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1 *Colagrande & Anor v D A Radic Pty Ltd trading as David Radic Prestige Homes* [2019] QCATA 176.

2 [2019] QCATA 96.

3 *Urquhart v Partington* [2013] QCAT 133. Specific orders were made for the payment of costs of an adjournment.

was set aside and the matter remitted for reconsideration.[4] On appeal to the Court of Appeal, the decision of the appeal tribunal was set aside and the matter remitted to the appeal tribunal for reconsideration.[5] After a rehearing the appeal tribunal set aside the decision at first instance, ordering that the builder was entitled to a quantum meruit and awarding the Partingtons damages.[6] Following the final appeal tribunal decision, the Partingtons sought their costs of the proceedings at first instance.

[12] The appeal tribunal held:[7]

> The Appeal Tribunal has power to consider the costs of the original proceeding in which we conducted a rehearing significantly affecting the outcome, irrespective whether an appeal about costs was made. The Partingtons claim the costs at first instance and the costs of the appeal proceedings in their application for costs submitted to the Tribunal on 5 October 2018.

[13] The appeal tribunal did not elaborate further upon the source of the power to make an order for the costs of the proceeding at first instance.

[14] In *Stuart v Queensland Building and Construction Commission*[8] the QCAT appeal tribunal considered an application for costs in the appeal and in the review proceedings resulting in the decision under appeal. As in *Partington* the appeal tribunal proceeded on the basis that it had the power to make an order for costs in the review proceedings.

[15] We note that where, as in the present appeal, no decision about the costs at first instance has been made, the operation of s 142(3)(a)(iii) of the QCAT Act does not arise for consideration.

[16] In deciding an appeal under either s 146 or s 147 of the QCAT Act, the appeal tribunal may set aside the decision and substitute its own decision.[9] The 'appeal tribunal' means 'the tribunal' constituted to hear and decide an appeal.[10] The tribunal has a general power to award costs in a proceeding.[11] A proceeding includes a proceeding before the appeal tribunal.[12] If the tribunal may award costs under the QCAT Act or an enabling Act, the costs may be awarded at any stage of a proceeding or after the proceeding has ended.[13] Neither s 146 nor s 147 of the QCAT Act constrain the power of the appeal tribunal to make costs orders either in deciding an appeal or in relation to the costs of the proceedings resulting in the decision under appeal.

[17] In our view, the reference to *tribunal* in s 106 of the QCAT Act should be construed as including the appeal tribunal. Section 106 expressly confers upon the tribunal the power to make an order for costs after a proceeding has ended. Section 106 does not confine the power to make a costs order to the tribunal as constituted for a particular

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4 *Partington v Urquhart* [2015] QCATA 67.
5 *John Urquhart t/as Hart Renovations v Partington* [2016] QCA 199.
6 *Partington & Anor v Urquhart (No 2)* [2018] QCATA 120.
7 *Partington & Anor v Urquhart (No 4)* [2019] QCATA 96, [70].
8 [2016] QCATA 135.
9 QCAT Act ss 146(b), 147(3)(b).
10 Ibid sch 3.
11 Ibid s 102(1).
12 Ibid sch 3.
13 Ibid s 106.

proceeding. Nor does s 106 impose any time limit upon a party to file an application for a costs order. Indeed, applications for costs orders are not infrequently made a considerable time after a final decision in a proceeding is made. It follows that a differently constituted tribunal may make an order for costs in a proceeding. As we have observed, the QCAT Act provides that the tribunal may be constituted as the appeal tribunal.

[18] When read together, the provisions to which we have referred confer upon the appeal tribunal broad powers to make a costs order. In our view in a proceeding before the appeal tribunal, where no order for costs has been made in the proceedings at first instance, it is open to the appeal tribunal, as the tribunal for the purposes of s 106 of the QCAT Act, to award costs both in the appeal proceedings and the proceedings at first instance. This construction of s 106 is also consistent with the objects of the QCAT Act which include dealing with matters in a way that is accessible, fair, just, economical, informal and quick.[14] It would be inconsistent with those objects to impose further delay and expense upon the parties by remitting the determination of costs of the proceedings below to the tribunal as originally constituted or to a differently constituted tribunal when the appeal tribunal is in a position to do so.

[19] We therefore conclude that we have the power to deal with the costs of the proceedings at first instance.

The costs of the appeal

Submissions by the Applicants

[20] The Applicants say that costs fall to be determined under the QCAT Act. They say that the claim by Radic was brought pursuant to the *Domestic Building Contracts Act* 2000 (Qld) ('DBCA') which contains no provision enabling the tribunal to make an order for costs. They say that the appropriate order is that Radic pay their costs of the appeal on the standard basis to be assessed on the District Court scale.

Submissions by Radic

[21] Radic says that the costs fall for consideration under s 77(3)(h) of the *Queensland Building and Construction Commission Act* 1991 (Qld) ('QBCC Act'). It says that the discretion to award costs is a general one. Radic says that the appeal was of limited compass and that the final decision of the appeal tribunal did not entirely replace the original determination.

[22] Radic says that while the 'appeal has succeeded in trimming the amount payable to (Radic) under the original decision' the end result is that money is payable to Radic and the counter claim by the Applicants was dismissed.

[23] Radic seeks its costs of the appeal on the indemnity basis referring to the conduct of the Applicants as justifying such an order.

[24] In the alternative, Radic says that costs should be fixed and made payable by the Applicants 'as a percentage of the actual sums paid less the $2000 unpaid costs order'. The costs should be assessed in accordance with the Magistrates Court scale given the size of the claim and complexity of the issues.

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[14] QCAT Act s 3(b).

The costs of the proceedings below

Submissions by the Applicants

[25] The Applicants say that Radic failed to lead any evidence capable of supporting an entitlement to be paid for the disputed variations. As Radic was legally represented, they say the inference may be drawn that there was no evidence capable of supporting an entitlement to payment. Therefore, the Applicants say, Radic's case was 'hopeless' and should not have been commenced in the absence of sufficient evidence.

[26] The Applicants also say that Radic's application to extend the date for completion was bound to fail and refer to the absence of any attempt by Radic to comply with the contractual requirements to extend time and the failure by Radic to seek to bring itself within s 18 of the DBCA.

[27] On this basis, the Applicants say that they were entirely successful in the appeal and partially successful in their counter application.

[28] The Applicants say that the appropriate order is that Radic pay their costs of the proceedings below on the standard basis assessed on the District Court scale. Alternatively, the Applicants seek to have the costs fixed in the amount of $90,902 being 70% of the total legal costs they have incurred in the proceedings at first instance and the appeal proceedings.

Submissions by Radic

[29] Radic says that the tribunal's discretion to award costs is a broad and general one. Radic points out that the amount in dispute was over $100,000 being the difference in position between the claims by the parties. Radic says that it was almost entirely successful at first instance and the Applicants were almost entirely unsuccessful. Radic also says that the case was substantially determined on findings of fact.

[30] Additionally, Radic says that Dr Colagrande made a determined refusal to pay Radic anything whatsoever and to pursue any kind of allegation against the builder regardless of prospects or evidence. Radic says that Dr Colagrande was prepared to say and do anything in pursuit of his case and arguments, regardless of how unreasonable or strange the case itself was, and how unlikely or incredible the evidence might be.

[31] Radic also says that the Applicants' expert witness did not believe there was an overpayment for the work performed, that he relied upon certain factual assumptions and that his report was misleading.

[32] In the end result, says Radic, the appeal has succeeded in 'trimming' the amount payable to Radic under the original decision however the Applicants are still required to pay money to Radic. Radic says that it is appropriate that the Applicants pay its costs of the proceedings at first instance on the indemnity basis.

Costs pursuant to the QCAT Act or the QBCC Act?

[33] Prior to the enactment of the DBCA, the regulation of domestic building contracts had formed part of the *Queensland Building Services Authority Act* 1991 (Qld) ('QBSA Act', now called the QBCC Act). The DBCA was enacted in order to enshrine consumer rights. However, the source of the tribunal's jurisdiction to resolve building disputes remained in the QBSA Act.

[34] The contract between the parties was entered into in May 2014. In addition to the application of the DBCA, the QBSA Act was applicable in respect of the dispute. By s 77(1) of the QBSA Act, a person involved in a building dispute was entitled to apply to the tribunal to have the tribunal decide the dispute. A building dispute was defined to include a domestic building dispute.[15] A domestic building dispute was defined to include a dispute between a building owner and a building contractor relating to the performance of reviewable domestic work or a contract for the performance of reviewable domestic work.[16] Reviewable domestic work was defined as work under the QBSA Act.[17]

[35] An enabling Act is an Act, other than the QCAT Act, that confers original, review or appeal jurisdiction on the tribunal.[18] The essential thrust of the submission by the Applicants appears to be this: the relevant enabling Act for the purposes of the dispute between the parties was the DBCA and, in the absence of the DBCA providing to the contrary, costs fall for consideration under the QCAT Act.

[36] We accept that the DBCA was, until its repeal, an enabling Act. Various provisions of the DBCA conferred jurisdiction on the tribunal to: adjust the contract completion date;[19] award a builder costs for work performed pursuant to a cost plus contract;[20] reduce a building owner's liability in respect of prime cost items and provisional sums;[21] and approve the recovery of variation amounts by a builder.[22] A claim by a builder to recover an amount for a non-compliant variation would also be a 'claim' or a 'dispute' arising between a building owner and a building contractor relating to the performance of reviewable domestic work or a contract for the performance of reviewable domestic work, and thus a 'domestic building dispute' under the QBCC Act.

[37] The claim by Radic was for the recovery of outstanding variation claims and a contractual adjustment. As set out in the amended Application, at completion of the works, Radic had claimed an amount for the final progress payment and variations.[23] The counter claim by the Applicants included claims for negative variations, liquidated damages and the cost of the construction of a roof deck.[24]

[38] The claims by the parties in the proceedings below are, in our view, properly characterised as a 'domestic building dispute'. Costs in proceedings for building disputes are subject to the QBCC Act[25] and not the QCAT Act. This applies to the costs of proceedings at first instance and on appeal.[26]

[39] Accordingly, the costs of the appeal and of the proceedings at first instance fall to be determined pursuant to the QBCC Act.

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15 QBSA Act sch 2.
16 Ibid.
17 Ibid.
18 QCAT Act s 6(2).
19 DBCA s 18.
20 Ibid s 55.
21 Ibid s 60.
22 Ibid s 84.
23 Amended application for domestic building disputes filed 22 September 2016 in BDL118-16.
24 Amended response filed 5 October 2016 in BDL118-16.
25 QBCC Act s 77(3)(h).
26 See *Olindaridge Pty Ltd & Wagner v Tracey* [2015] QCATA 175 followed in *Pivovarova v Michelsen* [2016] QCATA 45. See also *Wharton v Duffy Constructions (QLD) Pty Ltd* [2016] QCATA 12 followed in *Lee Manson t/as Manson Homes v Brett & Anor* [2018] QCATA 109.

Consideration – costs of the appeal

[40] The approach to the determination of costs in building disputes was stated by the QCAT appeal tribunal in *Lyons v Dreamstarter Pty Ltd*: [27]

> Section 77 of the QBSA Act confers jurisdiction on the Tribunal to determine building disputes such as the one brought by Dreamstarter. Section 77(1)(h) provides that, in such proceedings, the Tribunal may award costs. The section does not provide further guidance or prescription about the occasions for or conditions of exercise of that power.
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> A jurisdiction given in general terms allows the Tribunal to make an order as to costs that is justified in the circumstances. It is a broad general discretion which must be exercised judicially, not upon irrelevant or extraneous considerations but upon facts connected with or leading up to the litigation.
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> Accordingly an enabling Act, the QBSA Act, does, provide otherwise. As a result, the usual position as to costs in the Tribunal is displaced. That result is reinforced by other provisions dealing with the relationship between the QCAT Act and enabling Acts.

[41] In *Partington v Urquhart (No 4)*[28] the QCAT appeal tribunal stated:

> We have a discretion under s 77(3)(h) of the QBCC Act to award costs and can make an order for the whole or any part of the costs of the appeal as we, in the circumstances, consider to be just. In exercising such a discretion, it is usual that the general costs of an appeal follow the event. (footnotes omitted)

[42] The comments by the appeal tribunal in *Partington* reflect the general principle articulated by the Queensland Court of Appeal in *Tamawood Ltd v Paans*:[29]

> In the absence of countervailing considerations, where a party has reasonably incurred the cost of legal representation, and has been successful before the Tribunal, it could not rationally be said to be in the interests of justice to allow that success to be eroded by requiring that party to bear the costs of the representation which was reasonably necessary to achieve that outcome.

[43] A successful party has a 'reasonable expectation' of being awarded costs against the unsuccessful party.[30] Are there relevant countervailing considerations justifying an order for costs other than in favour of the Applicants? In our view there are none.

[44] In *Tomanovic v Global Mortgage Equity Corporation Pty Ltd (No 2)*[31] Campbell JA adopted a list of factors, set out by McHugh J (in dissent but not on this issue) in *Oshlack v Richmond River Council*,[32] relevant to ousting the presumption that costs follow the event:

(a) where the successful party effectively invited the litigation;

(b) where the successful party unnecessarily protracted the proceedings;

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27 [2011] QCATA 142, [32]-[34].
28 [2019] QCATA 96, [44].
29 [2005] QCA 111, [33].
30 *Oshlack v Richmond River Council* (1998) 193 CLR 72.
31 [2011] NSWCA 256, [97].
32 (1998) 193 CLR 72, [69].

(c) where the successful party succeeded on a point not argued before a lower court;

(d) where the successful party prosecuted the matter solely for the purpose of increasing the costs recoverable;

(e) where the successful party had obtained relief which the unsuccessful party had already offered in settlement of the dispute.

[45] We are satisfied that there has been no disentitling conduct on the part of the Applicants. By this we refer not to misconduct on the part of the Applicants but rather conduct calculated to increase cost and expense.[33] Nor are we satisfied that the conduct of the Applicants falls within any of the circumstances referred to in *Tomanovic*.

[46] It follows that the Applicants are entitled to their costs of the appeal.

[47] The tribunal should, if making an order for costs, fix the costs if possible. Doing so avoids the risk of protracted, and expensive, disputes about the quantum of costs. Factors to be considered in deciding whether to fix costs include:

(a) The amount of the costs involved;

(b) Can the tribunal fix the costs fairly between the parties;

(c) Is there sufficient evidence before the tribunal to undertake a rational and reasonable assessment of the costs including costs estimates or bills;

(d) Will the costs of the evidence relevant to the assessment of a gross sum be proportionate to the amount of the costs claimed;

(e) Where the evidence is inadequate as to a particular aspect of the costs, should a discount be adopted rather than refusing to fix the costs. [34]

[48] The Applicants rely upon an affidavit by Mr Michael Campbell.[35] Mr Campbell, a barrister, is a Queensland Supreme Court approved costs assessor. Mr Campbell assesses the Applicants' costs of the appeal, on a standard basis, at between $17,984.22 and $23,954.98. He arrives at these figures by discounting by one half and one third the total legal costs and outlays paid by the Applicants.

[49] Attached to Mr Campbell's affidavit are various tax invoices rendered by the Applicants' legal representatives and experts in addition to relevant cost agreements and costs disclosure statements. We are satisfied, based upon the affidavit of Mr Campbell, that there is sufficient evidence to undertake a rational and reasonable assessment of the costs.

[50] Adopting the mid point in Mr Campbell's range of costs, one arrives at a figure of $20,969.60. It is appropriate that some allowance is made for the costs of the assessment. Mr Campbell's fee for the preparation of the costs assessments of the appeal proceedings and the proceedings below is $2,200.00. We apportion one half of this amount, or $1,100.00, to the assessment of the costs of the appeal. Applying a one third discount to this amount, we allow $733.33 for Mr Campbell's fees.

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33 *Lollis v Loulatzis (No 2)* [2008] VSC 35.

34 *James v Australian and New Zealand Banking Group Limited* [2016] NSWSC 833; *Hamod v State of New South Wales & Anor* [2011] NSWCA 375; *Rogers v Roche & Ors* [2017] QCA 145.

35 Affidavit of Michael John Campbell dated 21 April 2020.

[51] We fix the total costs payable by Radic to the Applicants in the appeal proceedings in the amount of $21,702.93.

Costs of the proceedings at first instance

[52] As we have observed, the result of the appeal was that the final decision in favour of Radic was modest. Similarly the Applicants' success in the counter application was limited. Accordingly both parties were, to an extent, successful in the proceedings below.

[53] A party which has not been entirely successful is not normally deprived of at least some of its costs however the exercise of discretion will often depend upon matters of impression and evaluation.[36] However a defendant who has restricted the plaintiff's success may have an argument that it should pay only part of the costs or be paid part of the costs.[37] In *Waterman v Gerling (Costs)*[38] Brereton J stated:

> The starting point is that the plaintiff, having been successful, is entitled to his costs. It is for the defendants to establish a basis for departing from that rule. A successful plaintiff who has failed on certain issues may be deprived of costs on those issues, or even ordered to pay the defendant's costs of them [Hughes v Western Australia Cricket Association Inc (1986) ATPR ¶40-748, 48, 136]. But this course, while open, is one on which the court embarks with hesitancy [Mobile Innovations Limited v Vodafone Pacific Limited [2003] NSWSC 423, [4]; Cretazzo v Lombardi (1975) 13 SASR 4, 16; Dodds Family Investments Pty Ltd v Lane Industries Pty Ltd (1993) 26 IPR 261; Trade Practices Commission v Nicholas Enterprises Pty Ltd (No. 3) (1979) 28 ALR 201; Waters v P C Henderson (Aust) Pty Ltd (NSWCA, 6 July 1994, unreported); NRMA Limited v Morgan (No. 3) [1999] NSWSC 768]. From these cases emerge consistent themes that:-
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> - Justice may not be served if parties are dissuaded by the risk of costs from canvassing all issues which might be material to the decision in the case; but
> - It may be appropriate to award costs of a separate issue where a clearly definable and severable issue, on which the otherwise successful party failed, has occupied a significant part of the trial.

[54] The extent to which Radic's claim was successful, being a reduction from the amount claimed of $53,047.30 to $7,250.00, is significant. However while it is true that Radic was 'beaten down' considerably in respect of the amount recovered, its success could still be considered sufficiently substantial to warrant an order for costs.[39]

[55] Similarly, it may be argued that the Applicants' degree of success in the counter application was also sufficiently substantial to warrant an order for costs. However for the reasons that follow, we are persuaded that Radic's overall success in the proceedings below is determinative of the question of costs.

[56] Radic says that it incurred legal costs and outlays totalling $46,144.99 in respect of the proceedings at first instance from which an amount of $2,000.00 is required to

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36 *Elite Protective Personnel Pty Ltd v Salmon (No 2)* [2007] NSWCA 373.

37 *Todrell Pty Ltd v Finch & Ors; Croydon Capital Pty Ltd v Todrell Pty Ltd & Anor* [2007] QSC 386.

38 [2005] NSWSC 1111, [10].

39 See the comments of Steyn J in *Kaines (UK) Limited v Osterreichische Warrenhandelsgesellschaft (formerly CGL Handelsgesellschaft MBH)* [1993] 2 Lloyds Rep 1, 9.

be deducted in respect of a previous costs order made in its favour.[40] The figure of $46,144.99 is an indemnity costs amount. The relevant considerations for making an order for the payment of costs on an indemnity basis are well established.[41] The discretion to award indemnity costs should be exercised with caution.[42] We are not satisfied that the conduct of the Applicants was unreasonable or delinquent, nor is there any suggestion of fraud or misconduct. We are not satisfied that this is an appropriate case in which indemnity costs should be awarded.

[57] Relying upon the evidence of Mr Campbell, the Applicants say that their total legal costs and outlays of the proceedings below were $55,194.23. Applying a one half to two thirds discount, Mr Campbell assesses the range of the Applicants' costs on the standard basis from $27,597.11 to $36,759.35. The mid-point of this range is $32,178.23.

[58] Applying Mr Campbell's methodology to Radic's costs, one arrives at a range of standard costs of between $23,072.49 and $30,732.56. The mid-point of the range is $26,902.52.

[59] Radic was forced to bring the proceedings below in order to secure payment from the Applicants of the balance owing under the contract. Much of the time at the hearing was occupied by issues in relation to which the Applicants were ultimately unsuccessful including the construction of, and payment for, the roof deck constructed at the property. The Applicants' claims in respect of the roof deck were not accepted at first instance and the relevant findings were not appealed.

[60] Both parties were successful to an extent and unsuccessful to an extent in the proceedings below: the claim by Radic for the payment of the balance monies under the contract was allowed however was reduced on the basis that a number of variations were non-compliant; the claim by the Applicants for liquidated damages was successful as was their claim in respect of the non-compliant variations however they were unsuccessful in respect of their claim regarding the construction of the roof deck.

[61] There is not a great deal of difference in the assessment of the standard costs of the parties of the proceedings below. Ultimately the determination of costs of the proceedings at first instance comes down to the exercise of our discretion. Radic was forced to commence the proceedings to recover monies payable under the contract. In this regard, it was successful albeit to a limited extent. Radic should have its costs of the proceedings below. The costs awarded should however take into consideration the limited extent to which Radic succeeded and the extent to which the Applicants were successful in respect of their counter-application.

[62] Weighing all of the considerations to which we have referred the appropriate order is that Radic be entitled to its costs of the proceedings below. Radic is entitled to recover a proportion of its costs relative to the degree of its success. We find that a reasonable assessment of Radic's costs of the proceedings below on the standard basis is $26,902.52. It is appropriate that Radic recover 20% of this amount or $5,380.50. It is appropriate that costs are fixed in this amount.

[63] We make orders accordingly.

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40 Tribunal Directions dated 27 March 2017.

41 *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225.

42 *Leichhardt Municipal Council v Green* [2004] NSWCA 341.