QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*The Sands Gold Coast Pty Ltd v The Body Corporate for the Sands CT 14967* [2020] QCATA 105
PARTIES:	**THE SANDS GOLD COAST PTY LTD** (applicant/appellant) **v** **THE BODY CORPORATE FOR THE SANDS CT 14967** (respondent)
APPLICATION NO/S:	APL368-16
ORIGINATING APPLICATION NO/S:	OCL026-14
MATTER TYPE:	Appeals
DELIVERED ON:	24 July 2020
HEARING DATE:	18 February 2019
HEARD AT:	Brisbane
DECISION OF:	Judge Sheridan Member Howe
ORDERS:	**1. The respondent body corporate pay the appellant contractor the costs of the proceeding of matter OCL026-14 and the within appeal including reserved costs and the miscellaneous application filed 6 June 2016, as agreed or, failing agreement, to be assessed.** **2. The costs be assessed on the standard basis by a cost assessor, agreed between the parties within 14 days of the making of this order and in default of agreement appointed by the principal registrar, using the District Court scale of costs.** **3. The respondent body corporate will pay the appellant contractor's costs (as agreed or to be assessed) within 28 days of such agreement or assessment.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL MATTERS – POWER TO AWARD GENERALLY - where the appellant failed in the hearing below but was successful on appeal – whether the appeal tribunal could

make orders for costs of the appeal and hearing below — where the circumstances were generally common to both the proceeding below and the appeal – whether the circumstances warranted a cost order in favour of the appellant - whether the costs could be fixed by the appeal tribunal – whether it was appropriate that the costs be assessed – whether the costs should be assessed on the standard basis – whether the appropriate scale for assessment was the Supreme Court scale of costs

Queensland Civil and Administrative Tribunal Act 2009 (Qld) s Act s 3(b), s 4(c), s 9, s 28(1), s 28(3)(d), s 100, s 102, s 107, s 146, s 147, s 165
Queensland Civil and Administrative Tribunal Rules 2009 (Qld) r 87
Uniform Civil Procedure Rules 1999 (Qld) r 766(1)(a), r 782, r 785

4D Electrical Qld v Greyburn Pty Ltd [2020] QCAT 74
Ascot v Nursing & Midwifery Board of Australia [2010] QCAT 364
Grassby v. R (1989) 168 CLR 1
Grice v State of Qld [2005] QCA 298
Lyons v Queensland Building and Construction Commission & Dreamstarter Pty Ltd (in liquidation) [2016] QCAT 218
Mobile Building System International Pty Ltd v Hua [2014] QCATA 336
Pelechowski v Registrar, Court of Appeal (1999) 198 CLR 435
Queensland Racing Integrity Commission v Vale [2017] QCATA 110
Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2) [2010] QCAT 412
Tamawood Ltd & Anor v Paans [2005] QCA 111
The Sands Gold Coast Pty Ltd v Body Corporate for the Sands [No 2] [2016] QCAT 365
Toivanen v Body Corporate for Aspect Caloundra [2013] QCATA 248
Turner v Macrossan & Amiet Pty Ltd (No 2) [2016] QCAT 255

APPEARANCES & REPRESENTATION:

Applicant:	B Kidston of counsel instructed by Mahoneys Lawyers
Respondent:	J C Faulkner of counsel instructed by Mathews Hunt Legal

REASONS FOR DECISION

[1] The appellant (**the contractor**) successfully appealed a decision made in the tribunal that the respondent body corporate was entitled to give effect to a resolution to terminate the Grounds Maintenance Agreement (**GMC**) in effect between the parties relying upon certain Remedial Action Notices (**RANs**).

[2] Prior to the appeal tribunal decision being handed down the body corporate had acted on the decision of the tribunal below to claim the GMC was terminated and no further payments would be made to the contractor after 31 October 2016. The body corporate indeed engaged a new contractor from 1 November 2016. The contractor claimed the purported termination was a repudiation of the agreement which repudiation was not accepted. In light of the subsequent decision of the appeal tribunal, that was correct.

[3] At the appeal, counsel for the contractor advised the repudiation was accepted and as part of the appeal sought an order for damages for breach of contract to be assessed.

[4] The appeal tribunal gave its decision allowing the appeal on 7 November 2018. The matter of damages for breach of the GMC was returned to the tribunal for determination and on 4 November 2019 damages were assessed in favour of the contractor in an amount of $220,451. The matter of costs in the decision below was not determined.

[5] The contractor now seeks fixed costs in both the hearing below and of the appeal. The parties were directed to file submissions about that, which they did and they were heard on the matter of costs on 18 February 2019.

Costs of appeal and trial in the tribunal

[6] The body corporate challenges whether the appeal tribunal has jurisdiction to make orders for costs below in circumstances where there is no order for costs made.

[7] Counsel for the contractor submitted that there were no express rules dealing with the issue however the appeal tribunal was entitled to substitute its own orders for those of the tribunal below and to make such orders as were appropriate.

[8] Counsel for the body corporate said he was not aware of any authority on the jurisdictional point but submitted that the jurisdiction was circumscribed by the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (**QCAT Act**) and if the power was granted it should be specifically referred to in the Act, and it was not. The submission was that the matter as to costs below must be sent back to the tribunal for determination, there being no power in the appeal tribunal to determine them.

[9] Counsel for the contractor submitted that it was common practice for appellate courts to decide matters, such as the costs below, without being required to return the issue to the court below for decision.

[10] It is to be noted that appellate courts have express powers to do that, although the power to decide the costs below must surely be part of the inherent power of the Court of Appeal as a superior court, and the statutory provisions concerning that as it applies to the court of appeal are purely declaratory.

[11] By rule 766(1)(a) of the *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**):

> "**[r 766] General powers**

(1) The Court of Appeal—

(a) has all the powers and duties of the court that made the decision appealed from"

[12] In respect of other courts, the UCPR provides that in other appeals, save for certain exceptions, the same powers as apply to appeals in the court of appeal apply there:

"**[r 782] Application of pt 3**

Subject to any Act, this part applies to an appeal or case stated to a court other than the Court of Appeal.

[r 785] Application of rules to appeals and cases stated under this part

(1) Part 1, other than rules 746, 753, 758, 766(3), 767, 776 and 777, applies to appeals under this part, with necessary changes, and subject to any practice direction of the court in which the appeal is brought."

[13] Thus the power to make orders granting costs on appeal "here and below" has a statutory basis.[1]

[14] The appeal powers granted the appeal tribunal are very much truncated versions of those found in the UCPR. That indeed applies generally to the QCAT Act when compared to the UCPR, the latter having no application to the tribunal.

[15] The appeal provisions are to be found in s 146 and s 147 of the QCAT Act:

"**146 Deciding appeal on question of law only**

In deciding an appeal against a decision on a question of law only, the appeal tribunal may—

(a) confirm or amend the decision; or

(b) set aside the decision and substitute its own decision; or

(c) set aside the decision and return the matter to the tribunal or other entity who made the decision for reconsideration—

(i) with or without the hearing of additional evidence as directed by the appeal tribunal; and

(ii) with the other directions the appeal tribunal considers appropriate; or

(d) make any other order it considers appropriate, whether or not in combination with an order made under paragraph (a), (b) or (c).

147 Deciding appeal on question of fact or mixed law and fact

(1) This section applies to an appeal before the appeal tribunal against a decision on a question of fact only or a question of mixed law and fact.

(2) The appeal must be decided by way of rehearing, with or without the hearing of additional evidence as decided by the appeal tribunal.

(3) In deciding the appeal, the appeal tribunal may—

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[1] The Northern Territory rules of court makes specific provision for an order for costs "here and below" - O63.02 of the Supreme Court Rules 1987 (NT), whereas Queensland and the other State jurisdictions do not appear to do so.

> (a) confirm or amend the decision; or
>
> (b) set aside the decision and substitute its own decision; or
>
> (c) set aside the decision and return the matter to the tribunal or other entity who made the decision for reconsideration."

[16] As with the UCPR, in the QCAT Act, there is separate provision made about costs. The appeal provisions occur in Chapter 2, Part 8, Division 1 of the QCAT Act, entitled Appeals etc. Costs are provided for in Chapter 2, Part 6, Division 6, entitled Costs.

[17] By Division 6, s 106 provides:

> "**106 Costs awarded at any stage**
>
> If the tribunal may award costs under this Act or an enabling Act, the costs may be awarded at any stage of a proceeding or after the proceeding has ended."

[18] There is a similarly worded provision in the UCPR, but where that talks of a court, the QCAT Act reference to tribunal is slightly more complicated. The tribunal has three distinct jurisdictions: original, review and appeal.[2] Despite that, however, there is only the one tribunal, established by s 161 of the QCAT Act.

[19] Section 165 provides:

> "**165 Constitution generally**
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> (1) The president must choose 1, 2 or 3 members, or an adjudicator, to constitute the tribunal for a particular matter.
>
> (2) The person or persons chosen by the president under subsection (1) constitute, and may exercise all the jurisdiction and powers of, the tribunal in relation to the matter.
>
> (3) For an appeal, or a proceeding relating to an application for leave to appeal to the appeal tribunal, a reference in this Act to the tribunal includes a reference to the appeal tribunal constituted, or to be constituted, for the appeal or proceeding.
>
> (4) Subsection (3) does not limit another reference in this Act to the tribunal being taken to include a reference to the tribunal as constituted by the appeal tribunal, if the context requires or permits."

[20] As explained by Thomas J (then President of the tribunal) in *Mobile Building System International Pty Ltd v Hua*[3] this provision enables the appeal tribunal to rely on all the powers contained in the QCAT Act, and ensures that the appeal tribunal's powers are not limited to those in Chapter 8 only.

[21] Accordingly for the purpose of applying s 106, the expression appeal tribunal might be substituted for tribunal where it occurs there. The question becomes, is the power of the appeal tribunal to order costs "at any stage of a proceeding or after the proceeding has ended" under s 106 to be construed as extending to making orders about the costs of the proceeding below?

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2 QCAT Act, s 9.

3 [2014] QCATA 336,

[22] Proceeding is given a broad definition, and is defined as:

> "a proceeding before the tribunal, including an appeal before the appeal tribunal and a proceeding relating to an application for leave to appeal to the appeal tribunal…"[4]

[23] In *Grassby v R,*[5] Dawson J discussed the implied powers of inferior courts as contrasted with the inherent jurisdiction of superior courts:

> "On the other hand, a magistrate's court is an inferior court with a limited jurisdiction which does not involve any general responsibility for the administration of justice beyond the confines of its constitution. It is unable to draw upon the well of undefined powers which is available to the Supreme Court. However, notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise (ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest). Those implied powers may in many instances serve a function similar to that served by the inherent powers exercised by a superior court but they are derived from a different source and are limited in their extent. The distinction between inherent jurisdiction and jurisdiction by implication is not always made explicit, but it is, as Menzies J. points out, fundamental."[6]

[24] The matter of construction of the legislation may not be easy. Indeed in *Grassby,* which concerned the question whether a magistrate had power to order a stay of committal proceedings as an abuse of process, Deane J concurred with the comments of Dawson J with respect to implied powers, but disagreed about:

> "… the effect of the statutory provisions directly involved in this case. My view on that narrow question of construction leads, however, to a different conclusion about the outcome of the appeal from that reached by Dawson J."[7]

[25] Whilst the tribunal's jurisdiction and power is limited to that specifically stated in the QCAT Act, the tribunal's powers are supplemented by jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise.

[26] The objects of the QCAT Act are important factors available in aid of construction of provisions of the QCAT Act. They are not simply aspirational statements. The tribunal is established to deal with matters in a way that is accessible, fair, just, economical, informal and quick.[8] It is certainly much quicker and economical to deal with all cost matters in the appeal tribunal if possible, particularly where most of the issues raised about costs are common considerations in both the decision below and the appeal.

[27] There are a number of other provisions in the QCAT Act that suggest the appeal tribunal should have the power. They are helpfully noted in *4D Electrical Qld v Greyburn Pty Ltd*[9] by Senior Member Brown:[10]

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4 QCAT Act, Schedule 3.
5 [1989] HCA 45; (1989) 168 CLR 1 (***Grassby***).
6 *Grassby*, [21].
7 Ibid, [1].
8 QCAT Act, s 3(b).
9 [2020] QCAT 74.
10 [2020] QCAT 74, [24].

> "(a) The tribunal must ensure proceedings are conducted in an informal way that minimises costs to parties, and is as quick as is consistent with achieving justice;[11]
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> …….
>
> (c) The tribunal may do all things necessary or convenient for exercising its jurisdiction;[12]
>
> (d) The procedure for a proceeding is at the discretion of the tribunal, subject to the QCAT Act, an enabling Act and the rules;[13]
>
> (e) In conducting a proceeding the tribunal must act with as little formality and
>
> technicality and with as much speed as the requirements of the QCAT Act, an enabling Act or the rules, and a proper consideration of the matters before the tribunal, permit."[14]

[28] As explained in *Grassby*, the grant of power to the appeal tribunal to award costs carries with it everything necessary for its exercise. The word 'necessary' is to be understood in the sense of reasonable rather than essential as explained by the majority in *Pelechowski v Registrar, Court of Appeal*:[15]

> "The term "necessary" in such a setting as this is to be understood in the sense given it by Pollock CB in *The Attorney-General v Walker*, namely as identifying a power to make orders which are reasonably required or legally ancillary to the accomplishment of the specific remedies for enforcement provided in Div 4 of Pt 3 of the *District Court Act*. In this setting, the term "necessary" does not have the meaning of "essential"; rather it is to be "subjected to the touchstone of reasonableness".[16]

[29] We conclude the power to make an order about the costs below is reasonably necessary to make the power granted the appeal tribunal to make orders about costs effective. It is a quick and convenient application of power ensuring proceedings are conducted in an informal way that minimises the costs to parties in a way which is consistent with achieving justice.

[30] Given that finding, whether or not cost orders should be made in either or both proceedings falls for consideration.

Exercise of discretion to award costs

[31] Counsel for the contractor submits the discretion to order costs in favour of the contractor should be exercised separately in respect of the proceeding below and the appeal proceeding. That is true, however as previously stated, there is significant overlap and commonality in respect of relevant factors for consideration.

[32] Pursuant to s 100 of the QCAT Act, generally, each party to a proceeding must bear their own costs. That presumption may however be displaced and a party ordered to pay costs if the interests of justice require it.[17]

[33] Section 102(3) sets out matters the tribunal may have regard to in deciding whether to make an order for costs which include the following:

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11 QCAT Act, s 4(c).
12 QCAT Act, s 9(4).
13 QCAT Act, s 28(1).
14 QCAT Act, s 28(3)(d).
15 [1999] HCA 19; (1999) 198 CLR 435 (***Pelechowski***).
16 Ibid, [51] (Citations Omitted).
17 QCAT Act, s 102(1).

> "(a) whether a party to a proceeding is acting in a way that unnecessarily disadvantages another party to the proceeding, including as mentioned in section 48(1)(a) to (g);
>
> (a) the nature and complexity of the dispute the subject of the proceeding;
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> (b) the relative strengths of the claims made by each of the parties to the proceeding;
>
> …
>
> (c) the financial circumstances of the parties to the proceeding;
>
> (d) anything else the tribunal considers relevant."

[34] These factors are not grounds for awarding costs but factors to be taken into account in determining whether, in a particular case, the interests of justice require a costs order.[18]

Whether a party has acted in a way that has unnecessarily disadvantaged another party including as mentioned in s 48(1)(a) to (g)

[35] The contractor says that whilst it was the applicant commencing proceedings it did so in response to unlawful and unjustified actions taken by the body corporate. The true aggressor was the body corporate. The contractor had no choice other than to commence the proceedings below and seek the relief it did from the tribunal. That is correct.

[36] The learned Member below made no finding that the body corporate acted in a way that unnecessarily disadvantaged the contractor in acting as it did. On appeal however it was found that it was unreasonable to issue the four 16 May 2014 RANs when their contents could have been given in one notice. The only possible explanation for doing that was to take advantage of the provisions of clause 8.1 of the GMC. That made the notices invalid.

[37] The contractor also points to the body corporate only pressing 14 of 74 breaches alleged in the first RAN. The contractor says it was put to the trouble and expense of preparing to deal with the other 60 at hearing, only to find them abandoned at hearing. The work done in preparing for them was wasted.

[38] The learned Member below said this about them:[19]

> "Of these 74 items, only 14 were formally pressed at the hearing. These are the "pressed breaches". It was said that this was to save time at the hearing. I heard no evidence about the other 60 items although they can be seen in Mr Leary's report and are described in the RAN. I propose not to make any findings about them or reach an inference about them."[20]

[39] It does appear these 60 items were maintained as complaints required to be addressed by the contractor in preparing for the hearing and only advised as abandoned at the hearing. This was an unnecessary burden and therefore cost to the contractor and is a factor favouring a cost order.

[40] The body corporate, on the other hand, claims there was a consistent failure by the contractor to abide by directions which added to costs and inconvenience suffered

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18 *Ascot v Nursing & Midwifery Board of Australia* [2010] QCAT 364, [9]

19 *The Sands Gold Coast Pty Ltd v Body Corporate for the Sands [No 2]* [2016] QCAT 365.

20 Ibid, [185].

by the body corporate, both in the appeal and the hearing below. The contractor challenges that and contends there is no substantiation of those claims. There is no evidence to indicate the body corporate incurred unnecessary costs through the failure of the contractor to comply with directions.

[41] Given the parties were limited to eight page submissions on costs, says the body corporate, the capacity to particularise is difficult but refers in particular to orders made in the appeal on 6 December 2016 requiring the contractor to file submissions and cases by 18 January 2017. The contractor delayed doing that and time to comply was extended to 14 April 2017 and then to 26 May 2017, the last subject to a guillotine order with failure to comply resulting in the application for leave to appeal and appeal being dismissed. The contractor complied on 25 May 2017.

[42] It is to be noted that the body corporate was allowed time to respond to the submissions and cases eventually filed. Perhaps the contractor was tardy, but it is unclear how this delay contributed to extra costs being incurred by the body corporate.

Nature and complexity of the dispute

[43] The dispute was complex as is quite often the case with disputes under the *Body Corporate and Community Management Act* 1997 (Qld) (**BCCM Act**).[21] It involved voluminous material and five days of hearing and raised significant questions for resolution requiring statutory and contractual interpretation. Expert evidence was called. The issues were of significance and of some general importance. Counsel for both parties agree the matter was complex and legal representation was necessary.

[44] As stated, although the contractor was the applicant, the contractor was effectively forced to bring the proceedings to protect its commercial interests under the GMC. The contractor's claims in that regard have been vindicated but it was necessary to do that on appeal. The attempt by the body corporate to utilise clause 8(c) of the GMC was contrived and unreasonable.

Relative strengths of the claim of each party

[45] The contractor says the body corporate's reliance on clause 8(c) was an obvious attempt by it to impermissibly contract out of the BCCM Act. The attempt to pass the termination resolution without secret ballot as required by the BCCM Act was also an obvious deficiency in the body corporate's case.

[46] At least in respect of the second contention, we agree the body corporate's case was weak and fairly obviously deficient.

The financial circumstances of the parties to the proceeding

[47] The contractor says it has incurred $539,141.60 costs in conducting the proceedings below. It calculates it has incurred costs of $185,312.45 in the appeal.

[48] The assessment of damages for the body corporate's repudiation of the GMC was referred back to the learned Member below and that has meant yet further costs for both parties. The damages have been assessed at $220,451.

[49] The contractor has funded its legal costs by loans from its director and the litigation has placed it in a financially precarious position.

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21 *Toivanen v Body Corporate for Aspect Caloundra* [2013] QCATA 248 [9].

[50] The contractor's financial circumstances and the overall cost of the litigation weigh in favour of the contractor being awarded costs. If there is no such order, it is clear the contractor will be far worse off in having successfully pursued its legal entitlements to an appropriate outcome than if it had done nothing to resist the body corporate's wrongful repudiation of the GMC.[22]

[51] The body corporate has also incurred large costs but it is backed by the assets of 99 lot owners. A cost order of say $500,000 will mean a levy of just over $5,000 for each lot owner. There is no suggestion that the body corporate (with funding by the lot owners) will not be in a position to meet a cost order or that it would cause excessive hardship.[23] Certainly no evidence was presented by the body corporate about that.

Anything else the tribunal considers relevant

[52] This matter involved a commercial dispute about commercial interests and was conducted as commercial litigation. From the outset the parties advised that there would be a claim for the costs of the proceedings from the other.

Consideration

[53] In *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2)*[24] Wilson J (then President) said:

> "The phrase "in the interests of justice" is not defined in the Act but is to be construed according to its ordinary and plain meaning, which obviously confers a broad discretionary power on the decision-maker."[25]

[54] Barring a successful party from recovering costs that were reasonably necessary to achieve a satisfactory outcome may not be in the interests of justice.[26] As stated by Keane J in *Tamawood* commenting on a cost jurisdiction not dissimilar to that of the present tribunal:

> "If orders for costs were not to be made in favour of successful parties in complex cases, then just claims might not be prosecuted by persons who are unable to manage complex litigation by themselves. Such a state of affairs would truly be contrary to the interests of justice; and an intention to sanction such a state of affairs cannot be attributed to the legislature which established the Tribunal.
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> To say this is not to ignore s 71(5)(b) of the Act. There is a clear distinction, in terms of the interest of achieving justice, between the mere fact of having representation and the fact of having reasonably obtained that representation because of the complexity of the case. 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

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22 *Lyons v Queensland Building and Construction Commission & Dreamstarter Pty Ltd (in liquidation)* [2016] QCAT 218 [109].
23 *Carey v Cairns Regional Council & Ors (No 2)* [2011] QCAT 372, [27].
24 [2010] QCAT 412 (***Ralacom***).
25 Ibid, [4].
26 *Tamawood Ltd & Anor v Paans* [2005] QCA 111, 112 [33] (***Tamawood***).

> eroded by requiring that party to bear the costs of the representation which was reasonably necessary to achieve that outcome."[27]

[55] The following features lead us to conclude that the interests of justice require a cost order be made in favour of the contractor both in respect of the appeal and the hearing below.

[56] In respect of the hearing below, the contractor was put to the trouble and expense of preparing to meet 74 claimed breaches specified in a RAN where 60 were only abandoned at hearing without prior notice.

[57] The contractor was effectively forced to commence the proceedings and then pursue the appeal to protect its due commercial interests under the GMC.

[58] The litigation was sufficiently complex to require legal representation to establish the contractor's legal rights and that cost was significant, over $700,000. In light of the relatively modest award of damages now assessed, without a cost order in its favour the contractor will be worse off in having pursued its rightful legal remedies than if it had done nothing in response to the unlawful actions of the body corporate.

[59] There is nothing to suggest the body corporate will not be able to reasonably meet any cost orders made against it, most probably by levy of the 99 lot owners. By comparison the contractor has had to borrow significant funds from its director to pursue the litigation.

[60] Finally, the proceedings have been conducted throughout as a commercial dispute between commercial parties in the only forum available to it, the tribunal.

The appropriate basis of award and scale

[61] The contractor claims costs on a standard basis for the appeal, but indemnity costs in the proceeding below.

[62] Reliance is placed on an offer to settle the proceedings below made by the contractor shortly after they were commenced, which offer was refused by the body corporate.

[63] The offer was that the contractor would agree to a termination of the GMC and the contractor's letting agreement, surrender its lease over common property office and restaurant areas and transfer ownership of the contractor's unit and a website to the body corporate in exchange for a payment of $800,000.

[64] Given the award of damages has been limited to $220,000, and given there is no quantification of the value of the leases, and the unit is given an estimate of only $230,000 - $250,000 value, it is not possible to determine that the body corporate would have been in a better position had it accepted that proposal rather than continue with the litigation. As such it is not established that the refusal of the offer to settle and continuation of the litigation was imprudent or irresponsible warranting an order for indemnity costs.

[65] There is nothing about the facts and circumstances of the case or the behaviour of the body corporate, including its use of the 16 May 2014 RANs, that warrants an award of costs on an indemnity basis.[28] The appropriate award in the hearing below, as in the appeal, is the usual award of costs on the standard basis.

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27 *Tamawood,* [32]-[33].

28 *Grice v State of Qld* [2005] QCA 298 [6]; *Ralacom*, [60].

Fixing costs

[66] Counsel for the contractor asks that the costs be fixed.

[67] Section 107 of the QCAT Act provides:

> "**107 Fixing or assessing costs**
>
> (1) If the tribunal makes a costs order under this Act or an enabling Act, the tribunal must fix the costs if possible.
>
> (2) If it is not possible to fix the costs having regard to the nature of the proceeding, the tribunal may make an order requiring that the costs be assessed under the rules.
>
> (3) The rules may provide that costs must be assessed by reference to a scale under the rules applying to a court."

[68] Rule 87 of the *Queensland Civil and Administrative Tribunal Rules* 2009 (Qld) (**QCAT Rules**) provides:

> "**87 Assessing costs**
>
> (1) This rule provides for how costs are to be assessed under section 107 of the Act if the tribunal makes a costs order that requires the costs be assessed under the rules.
>
> (2) The costs must be assessed—
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> (a) by an assessor appointed by the tribunal; and
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> (b) if the tribunal directs the costs be assessed by reference to the scale of costs applying to a court—by reference to the scale of costs directed by the tribunal."

[69] Each party has filed evidence from different cost assessors about how costs on a standard basis should be fixed. Their evidence diverges quite markedly.

[70] The assessor for the body corporate suggests there should first usually be a 20-30% reduction in the time cost charges of the contractor's solicitors to convert it to the court scale amounts allowed for the work. Then usually a further reduction of 30-40% occurs on assessment.

[71] He says if there were to be a rule of thumb the percentage of solicitor own client costs recoverable on a standard basis would not be higher than 45 percent of the charges of the solicitor to the client.

[72] He says counsel's fees are also subject to significant reduction on assessment.

[73] The assessor for the contractor suggests something else. He says a rule of thumb calculation can be made of 65% of the contractor's solicitor own client costs.

[74] He says counsel's fees would be recoverable and are unlikely to be reduced. That opinion was premised however on the contractor recovering damages in excess of $750,000, which was not the case in fact.

[75] The different approaches by the two experts result in entirely different awards of substantial variation, a difference potentially of some $100,000 or even more.

[76] There is some guidance available from the UCPR provisions. Under the UCPR the courts have a broad discretion to fix costs where that will avoid undue delay and

expense. However that avenue is contingent on the court being confident of being able to fix costs on a reliable basis.[29] Similar considerations must apply to fixing costs in the tribunal.

[77] Given the basis of assessment is the standard basis rather than indemnity and the marked divergence by the experts on how to calculate fixed costs, we conclude it is not possible to reliably fix costs here and the costs should be assessed.

Applicable scale

[78] By r 87(2)(b) of the QCAT Rules, the discretion lies with the tribunal (in this case the appeal tribunal) as to the appropriate scale of costs to be applied in ordering an assessment.

[79] The contractor contends that comparable relief could only have been sought from the outset if the proceedings had been commenced in the Supreme Court. That is because the claim was only for injunctive and declaratory relief which was not available in the District Court. It is true that if the proceedings had been brought in the Supreme Court because they could not be brought in the District Court, any order for costs would most probably have been allowed on the Supreme Court scale.

[80] Against that, however, whilst it is true that damages only arose as a consequence of the body corporate acting on the order made by the member, the almost inevitable consequence was that the relief claimed would be for damages. Those damages were for the loss of income that the contractor suffered as a consequence of the termination and those losses were comparable with those recoverable in the District Court.

[81] Notwithstanding that disputes under the BCCM Act are often complex and conducted as commercial litigation with each party often appropriately legally represented, the legislature has provided that the tribunal will be the venue for hearing and deciding these kinds of disputes and, unless the interests of justice requires it, the tribunal is a no cost jurisdiction. The intention expressed in the statute is that the proceedings be conducted in a way that minimises the costs incurred. The parties and the tribunal should strive to achieve that goal. It does not seem to us that an award of costs on the Supreme Court scale in the matter at hand is consistent with that goal.

[82] It will be a matter for the costs assessor to determine whether overall the costs claimed were necessary or proper for the attainment of justice and for enforcing the contractor's rights to damages, but there is much to be said for the proposition that such an assessment should not be undertaken having regard to the scale applicable to that of proceedings conducted in a court of unlimited jurisdiction.

[83] The relevance of the applicable scale is now diminished because, for costs incurred after 24 August 2018, the UCPR contains one Scale for Costs for the Supreme and District Courts. Though it is accepted the scale does give to the costs assessor a discretion to allow such costs as is considered reasonable in relation to general care and conduct and in respect of a matter for which a cost is not provided for in the schedule and, relevant to that discretion in some respects, is whether the proceedings were in the Supreme or the District Court.

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[29] Supreme Court Practice Direction 3 of 2007.

[84] In all the circumstances, in the exercise of the appeal tribunal's discretion, we determine the appropriate scale for the assessment here and below is the District Court.

Orders

[85] The body corporate must pay the contractor the costs of the proceeding in matter OCL026-14 and the within appeal including reserved costs and the miscellaneous application filed 6 June 2016. If not agreed, the costs should be assessed on the standard basis by a cost assessor, agreed between the parties within 14 days of the making of this order and in default of agreement appointed by the principal registrar, using the District Court scale of costs.