Costs of appeal proceedings — *De Rose*

De Rose v South Australia (No 3) [2005] FCAFC 137

Wilcox, Sackville and Merkel JJ, 28 July 2005

Issue
This case deals with whether the parties to an appeal against a determination of native title under the *Native Title Act 1993* (Cwlth) (NTA) should bear their own costs.

Background
In *De Rose v South Australia* (No 1) (2003) 133 FCR 325, the Full Court allowed an appeal against O'Loughlin J's decision in *De Rose v South Australia* [2002] FCA 1342: see *Native Title Hot Spots* Issue 8 and Issue 3 respectively. In *De Rose v South Australia* (No 2) [2005] FCAFC 110 (summarised in *Native Title Hot Spots* Issue 15), their Honours made a determination of native title in favour of the Aboriginal persons who are Nguraritja for the determination area according to the traditional laws and customs of the Western Desert Bloc. The court also ordered that, unless the parties filed submissions within 21 days seeking a different costs order, the first and second respondents pay the appellants' costs of the appeal.

The first respondent (the state) and the second respondents (the Fullers) filed submissions that the appropriate order was that each party bear its or their costs of the appeal, referring to s. 85A(1), which provides that, unless the court orders otherwise, each party to a proceeding must bear their own costs. The Fullers also relied on an affidavit sworn by their solicitor which established they had received public funding for the trial and the appeal but had not yet received an indemnity in respect of any costs that might be awarded against them.

The court noted (among other things) that there was no dispute that:
- section 85A of the NTA, rather than s. 43 of the *Federal Court Act 1976* (Cwlth), applied to the appeal in this case; therefore
- unless it was otherwise ordered, each party to the appeal must bear its or their own costs—at [6] to [7].

Justices Wilcox, Sackville and Merkel agreed Lee J's approach to the application of s. 85A in *Ward v Western Australia* (1999) 93 FCR 305, i.e. that the starting point is that each party to a proceeding will be left to bear his or her own costs unless the court considers it appropriate in the circumstances to make a costs order. The starting point is not that costs ordinarily follow the event—at [8] to [10].

In the present case, the court did not consider the circumstances warranted a costs order in favour of the appellants because:
- the respondents (the state and the Fullers) succeeded at the trial and it was the appellants (the native title party) who appealed;

- the appeal was the first to address the complex interaction between native title and pastoral leases in South Australia;
- the case could fairly be regarded as a test case in the sense that it was likely to have ramifications for the resolution of other native title claims in South Australia;
- once the parties had the benefit of the first decision by the court, the respondents participated in mediation which narrowed the issues and resulted in the state proposing a form of native title determination that was largely adopted by the court;
- while the Fullers persisted with arguments that were ultimately unsuccessful on the appeal, their contentions were not unreasonable or clearly untenable; and
- contrary to the appellants' submissions, their Honours did not think that the appeal was unnecessarily prolonged by the conduct of the Fullers—at [12] and see 85A(2).

Decision

The earlier order was vacated. No order as to costs was made—at [13].