Costs—unreasonable conduct and s. 85A

Davidson v Fesl (No 2) [2005] FCAFC 274

French and Finn JJ, 23 December 2005

Issue

The issue was whether the court should exercise its discretion under s. 85A of the *Native Title Act 1993* (Cwlth) (NTA) to make a costs order against the applicants.

Background

On 30 August 2005 the Full Court of the Federal Court, constituted by Justices French, Finn and Hely, dismissed an application for leave to appeal against a judgment of Spender J given on 22 February 2005—see *Davidson v Fesl* [2005] FCAFC 183, summarised in *Native Title Hot Spots* Issue 16. At that time, counsel for the respondents sought an order for costs, which counsel for the applicants resisted on the basis of s. 85A of the NTA. The court commented that there was no demonstrable benefit to Indigenous interests flowing from the bringing of the application for leave and expressed the view that collateral litigation of this kind did not serve the purposes of the NTA. The parties were given leave to make submissions on the question of costs. However, one of the members of the Full Court died on 1 October 2005. By consent, the remaining members of the court handed down this decision—at [1].

It was noted that:

- the 'ordinary rule' is that, where the court has a discretion to award costs unfettered by any legislative presumption, as is the case with s. 43 of the *Federal Court Act 1976* (Cwlth), costs ordinarily 'follow the event' i.e. a successful litigant gets costs in the absence of circumstances justifying some other order;
- the language of s. 85A of the NTA lies against the application of the ordinary rule i.e. the starting point is that each party bears their own costs;
- one basis upon which the court may order a party to bear costs is that the party has engaged in 'unreasonable conduct' of the kind caught by s. 85A(2)—at [8] to [9].

Justices French and Finn observed:

> It suffices to say that this is a case in which the motion was not only without merit. It seemed to serve little, if any, practical purpose. In the circumstances the first respondent and the state should be entitled to their costs. The third respondents did not seem to have any distinct interest to pursue in resisting the motion and it does not seem appropriate that they should be entitled also to costs—at [12].

Decision

The applicants were required to pay the costs of the first and second respondents—at [13].