

Costs in native title proceedings — s. 85A

Jagera People #2 v Queensland [2006] FCA 708

Spender J, 31 May 2006

Issue

The question in this case was whether a respondent seeking leave to discontinue proceedings to strike out a claimant application made under the *Native Title Act 1993* (Cwlth) (NTA) should pay a proportion of the applicant's costs.

Background

On 8 February 2006, a notice of motion was filed by the Thompson family (the second respondent to the Jagera People #2 claimant application) seeking to strike out that application. Orders were subsequently made for the hearing of the strike-out application. On 25 May 2006, Shane Coghill (on behalf of the Thompson family) sought leave to discontinue the strike-out application. In support of the leave application, Mr Coghill stated that:

- the strike-out application was 'filed in good faith', under instructions, 'to assist the Thompson Family in their Native Title interests and in the public interest';
- however, having failed to get any legal assistance, and having being advised that it was unlikely to succeed, Mr Coghill was now instructed to seek leave to discontinue—at [1].

The applicant for the Jagera People (the native title claimants) did not object to leave being granted but sought orders that Mr Coghill pay a fixed proportion of the Jagera People's costs—at [2].

Law in relation to costs

Justice Spender noted that, in ordinary Federal Court proceedings, O 22 r 3 of the Federal Court Rules (FCR) would apply but that there was no provision in that rule to covering a case like this, where the leave of the court to discontinue was obtained. In such a case, the court 'would be conscious of the need to address and make appropriate orders as to costs to meet the justice of the case'—at [4].

However, as the court noted, where (as in this case) the matter involves the NTA, reference must be made to s. 85A of the NTA. That section provides (in paraphrase) that:

- unless the court orders otherwise, each party to a proceeding must bear their own costs;
- without limiting the court's power to make such orders, the court may order a party to pay some or all of those costs if it is satisfied that a party to a proceeding has, 'by any unreasonable act or omission, caused another party to incur costs in connection with the institution or conduct of the proceeding'—at [5].

As his Honour noted, the following points emerge from the cases dealing with the interpretation of s. 85A:

- subsection 85A (1) was intended to remove any ground for anticipation or expectation that, unless cause is shown for another order, costs will follow the event;
- nonetheless, s. 85A acknowledged that the court had an overriding discretion as to costs and did not expressly impose a limit on the scope of the discretion;
- there was no requirement that a threshold condition be met before the court was empowered to make a costs order;
- therefore, the exercise of the discretion was not conditional upon proof of the occurrence of unreasonable conduct or the existence of special circumstances;
- subsection 85A (2) put beyond doubt the extent of the discretion in cases where a party acted unreasonably but did not control or limit the discretion available under s. 85A (1);
- the matters to be taken into account in making a costs order were left to the court's discretion, which must be exercised judicially;
- however, the starting point is that each party will bear their own costs unless the court determines it is appropriate in the circumstances to make an order for costs - at [6], referring to *Ward v Western Australia* (1999) 93 FCR 305 at [31] to [37] and *De Rose v South Australia (No 2)* [2005] FCAFC 137 at [8], summarised in *Native Title Hot Spots Issue 16*.

Submissions of Jagera People

In support of their application for costs, counsel for the Jagera People submitted (among other things) that the following aspects of Mr Coghill's conduct were relevant:

- failing to communicate with the Jagera People about this matter;
- failing to respond in a timely manner to a facsimile of 23 May 2006 advising him that, if he did not withdraw the application by 24 May 2006, the Jagera People would seek costs against him if the strike-out application was unsuccessful – at [7].

The court noted (among other things) that, while Mr Coghill did not reply to the facsimile, he did file the notice of discontinuance the following day – at [8].

Not appropriate to make costs order

In the light of all the material before the court, including observations about attempts to resolve disputes about the Jagera People's claims put to the court by the representative body for the area, Spender J was not satisfied that it was appropriate to make any order as to costs because:

- this was not a case where 'an unmeritorious claim has been progressed in circumstances where costs are caused to another party';
- the failure to act by the close of business on 24 May 2006, being the deadline imposed by the Jagera people, was not an unreasonable act or omission which comes within s. 85A(2);

- while the court had as general power to make orders for costs, and a specific power where s. 85A(2) is satisfied, those considerations did not apply in this case—at [9] and [12] to [14].

Need for cooperation to resolve the dispute

His Honour commented that, while the court was conscious that there are further opportunities available to attempt to resolve what seemed to be genuine disputes:

- there seemed to be a ‘great deal of lack of co-operation, if not lack of goodwill’ in relation to the disputes between the Thompson family and the applicant in the Jagera # 2 claim;
- this case proved ‘another illustration’ that, unless the matters were ‘dealt with constructively and in good faith, ... acrimony will prevent the progression of any persons [sic] legitimate expectations as to native title rights’ —at [10] to [11].

Decision

Spender J gave Mr Coghill leave to discontinue the strike-out application and noted that, pursuant to s. 85A, each party was to bear their own costs—at [15].