Costs—discontinuance of claimant application

McKenzie v South Australia [2006] FCA 891

Finn J, 30 June 2006

Issue
The issue in this case was whether the Federal Court should allow a motion to discontinue a claimant application and, if so, whether there should be an order as to costs.

Background
The native title claim group represented by the applicant in this matter had already had a claimant application made under the *Native Title Act 1993* (Cwlth) (NTA) struck out. Before it was struck out (for reasons relating to the identification of the claim group and the alleged authority of the applicant), the application was amended on a number of occasions. Following the strike-out decision, a fresh application was filed in February 2006 resulting in the present proceedings—at [2] and see *McKenzie v South Australia* [2005] FCA 22 (*McKenzie*), summarised in *Native Title Hot Spots* Issue 14.

The Aboriginal Legal Rights Movement (ALRM, the representative body for the area concerned and a respondent in these proceedings) notified the applicant of perceived deficiencies in the fresh application which essentially related to the same matters that gave rise to the earlier application being struck out. Initially, the applicant's response was to simply amend the application. The court made it plain that leave to amend was required. ALRM opposed the grant of leave to amend on the ground that the fresh application would still be defective. The application for leave to amend was adjourned to allow the applicant to address the ALRM's concerns but, instead, he purported to discontinue the proceeding. Mr McKenzie subsequently conceded it was not within the applicant's power to discontinue as of right. Leave of the court was required. Hence, the application for leave to discontinue dealt with in this decision.

The basis for discontinuance was that the applicant's solicitor had realised that an apical ancestor had been excluded from the claim group description without due consideration. The solicitor was therefore instructed by the applicant to discontinue the proceedings and lodge a fresh application to avoid any argument in relation to a perceived lack of authorisation in relation to the proceedings.

Decision
Justice Finn granted leave to discontinue having determined this would occasion no injustice to the defendants, subject to the question of costs—at [5] and [11].

Costs

Section 85A of the NTA provides that, unless the court orders otherwise, each party to a proceeding must bear their own costs. Among other things, in the event of a party behaving unreasonably, the court may make a cost order against that party—at [6] to [8], referring to *Ward v Western Australia* (1999) 93 FCR 305; [1999] FCA 580, endorsed by the Full Court in *De Rose v South Australia (No 3)* [2005] FCAFC 137 (summarised in *Native Title Hot Spots* Issue 16).

Finn J concluded that: '[I]t is ... perfectly clear that a costs order should be made in favour of the two respondents' because, in this case, they had to perform a 'tutelary' function in relation to the conduct of the proceeding (which had been discharged, primarily by the ALRM but concurred with by the State of South Australia) 'in the interests of the orderly conduct of these proceedings and has assisted to that end'—at [9].