

Costs—discontinuance of notice of motion

Yalanji People v Queensland [2006] FCA 1103

Allsop J, 21 August 2006

Issue

The issue in this case was whether the Federal Court should make an order for costs after the discontinuance by the applicant of a notice of motion.

Background

This matter had been in mediation by the National Native Title Tribunal and subject to intensive case management by Registrar of the Federal Court for some years. The court was of the view that there was likely to be an agreed outcome based on a consent determination and a number of related indigenous land use agreements. However, by the end of 2004, when most other aspects were proceeding satisfactorily, a dispute between the applicant and some of the respondents over land at Cow Bay arose that ‘appeared intractable and, to a degree, attended by personal animosity’. This was ‘perceived by the applicant to threaten the prospects of an overall settlement’ —at [4].

On 29 November 2004, the relevant respondents filed a notice of motion seeking discovery and particulars. The applicant filed a notice of motion in January 2005 seeking the removal of those respondents as parties or the separate determination of their interest in the proceedings. By late 2005, the parties had resolved many of their differences and the applicant proposed to discontinue its motion. However, the respondents would not consent to this without their costs being paid. The parties agreed to have the issue dealt with on the papers—at [8] to [9].

Decision

Justice Allsop noted s. 85A of the *Native Title Act 1993*(Cwlth), s. 43(2) of the *Federal Court of Australia Act 1976* (Cwlth) and the relevant authorities before concluding that:

- section 85A removed the notion of costs following the event and, while unreasonable conduct was a ground for an award of costs, the discretion is not so limited;
- it did not appear that the applicant took an unreasonable stand and it was not possible to assess who, if anyone, was being unreasonable in the lead up to the filing of the respective motions;
- there should be no order for costs—at [13] to [15].