Costs — Blue Mud Bay appeal

Gumana v Northern Territory (No 2) [2007] FCAFC 168

French, Finn and Sunderg JJ, 9 November 2007

Issue

The issue in this case was what cost orders, if any, should be made in relation to the proceedings determined in *Gumana v Northern Territory* [2007] FCAFC 23 (*Gumana No 1*, summarised in *Native Title Hot Spots* Issue 24).

Background

Gumana No 1 dealt with proceedings in the Full Court of the Federal Court, namely:

- an appeal related to issues arising under the *Native Title Act 1993* (Cwlth) (NTA) (native title appeal), which was dismissed, and cross-appeals by the Northern Territory and the Commonwealth, which succeeded to the extent that the native title right to control access to the inter-tidal zone by other Aboriginal people was removed from the determination that was made at first instance;
- an appeal that dealt with issues arising under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (ALRA appeal), in which the appellants were successful.

Costs under the native title appeal

Section 85A of the NTA provides that:

- unless the court orders otherwise, each party to a proceeding must bear their own costs;
- without limiting the court's power to make orders as to costs, if the court 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, the court may order that party to pay some or all of those costs.

In joint reasons for judgment, Justices French, Finn and Sundberg noted that all parties submitted that each party should bear its own costs.

The ALRA appeal

In the ALRA appeal, which related to proceedings under the *Judiciary Act 1903* (Cwlth) for declaratory relief, the appellants sought the costs of the appeal. The Commonwealth (as intervenor) relied upon the public interest dimension of the case, saying that the appellants were seeking to have the law as to the rights in respect of the inter-tidal zone conferred by a grant of fee simple under the ALRA settled while the respondents, in resisting the appeal, relied on the law as it had been declared to that point.

Decision

The court ordered that:

- the appropriate disposition of the native title appeal is that each party bear its own costs; and
- the costs of the ALRA appeal should follow the event—at [7], [13] and [14].

In relation to the ALRA appeal, it was said that:

> The question was one of great public interest. It was no doubt their perspective on the public interest that led the governments concerned to resist the appeal. That the costs of the appeal should be met by the public in the ordinary exercise of the Court's discretion on the basis that the costs follow the event is, in the circumstances, quite appropriate—at [13].

Postscript — High Court appeal

In relation to the ALRA matter, the High Court granted special leave to appeal in June 2007 and the appeal was heard in December 2007. Judgment was reserved—see *Northern Territory v Arnhem Land Aboriginal Land Trust* [2007] HCATrans 324, [2007] HCATrans 721 and [2007] HCATrans 722.