Costs — to be paid 'forthwith'

O'Mara v Minister for Lands (NSW) [2008] FCA 84

Reeves J, 1 February 2008

Issue

The issue in this case was whether, upon dismissal of an interlocutory injunction application, the applicants should pay the respondents' costs 'forthwith'.

Background

This case relates to *O'Mara v Minister for Lands (NSW)* [2008] FCA 51, summarised in *Native Title Hot Spots* Issue 27, where it was found that, pursuant to s. 43 of the *Federal Court Act 1976* (Cwlth), the applicant should pay the respondents' costs 'forthwith', rather than awaiting the outcome of the 'underlying primary proceedings' i.e. an application under the *Native Title Act 1993* (Cwlth) for a determination of native title. Justice Reeves noted that, where there has been no hearing on the merits of a matter and no party wishes to proceed, the court will ordinarily order that each party bear their own costs but this was an exceptional case because the applicants no longer wished to proceed—at [1], referring *Minister for Immigration and Ethnic Affairs ex parte Lai* (1997) 186 CLR 622.

Decision

His Honour found that:

- it was not necessary to consider whether the conduct of the applicants was reasonable or otherwise because the 'plain fact' that they decided, 'obviously in their own best interests', not to proceed justified the exercise of the discretion to order they pay costs;
- the respondents' costs should be paid forthwith because the 'underlying primary proceedings 'were 'likely to be on foot for some time'; and
- execution of the costs order should be stayed pending expiration of the appeal period—[4] to [6].