

Costs – s. 85A applies to appeal proceedings

Foster v Que Noy (No 2) [2008] FCAFC 137

Finn, North and Reeves JJ, 24 July 2008

Issue

The issue in this case was whether s. 85A of the *Native Title Act 1993* (Cwlth) applied to appeal proceedings. It was held that s. 85A did apply and that there was no factor present that would warrant the making of a costs order.

Background

In *Foster v Que Noy* [2008] FCAFC 56 (summarised in *Native Title Hot Spots Issue 27*), the Full Court of the Federal Court dismissed two appeals by Marjorie Foster against findings that she should be removed as a member of the group comprising ‘the applicant’ for two claimant applications. (Her removal was ordered pursuant to applications made under s. 66B of the NTA.) The respondents argued that s. 85A did not apply because these were appeal proceedings and sought an order as to costs.

Section 85A applies if proceeding is within the scope of s. 81

Under s. 81, the Federal Court has jurisdiction over applications that ‘relate to native title’ and it is ‘exclusive of the jurisdiction of all other courts except the High Court’. Their Honours Justices Finn, North and Reeves were of the view that:

- ‘in the scheme of Pt 3 Div 1 of the Act’, an application made under s. 66B ‘directly affects the authority of the applicant’ to deal with a claimant application;
- ‘accordingly’, a s. 66B application was ‘within the exclusive jurisdiction’ found in s. 81;
- as such, it was an application to which s. 85A applies—at [2], referring *The Lardil Peoples v Queensland* (2001) 108 FCR 453 at [68] and [156].

It was noted that:

It is clear...that an application for leave to appeal and/or an appeal from a proceeding within s 81...attracts the provisions of s 85A no less so than the proceeding at first instance from which leave to appeal is sought, or the appeal is brought—at [4], referring to *De Rose v South Australia (No 3)* [2005] FCAFC 137; *Davidson v Fesl (No 2)* [2005] FCAFC 274 and *Gumana v Northern Territory (No 2)* [2007] FCAFC 168, summarised in *Native Title Hot Spots Issue 16*, *Issue 17* and *Issue 27* respectively.

Decision

The court decided that no order as to costs should be made because:

- the ‘starting point’ when applying s. 85A was that the parties will bear their own costs unless the court considers it appropriate to make a costs order;
- while there were ‘obvious difficulties’ with aspects of Ms Foster’s case, there was nothing that would ‘warrant a departure’ from that starting point;
- the fact that the respondents were wholly successful, both at first instance and on appeal, was not a circumstance that warranted making a costs order—at [6].