Costs –review of ILUA registration decision

Murray v Registrar [2003] FCA 45

Marshall J, 6 February 2003

Issue

The question in this case was whether the applicant in *Murray v Registrar* [2002] FCA 1598 (summarised in *Native Title Hot Spots* Issue 2) should pay the respondents' costs in relation to an unsuccessful application for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) (AD(JR) Act) of a decision to register an Indigenous Land Use Agreement.

Background

Ms Murray was unsuccessful in her application under the AD(JR) Act for judicial review of a decision of a delegate of the Native Title Registrar made under the *Native Title Act 1993* (Cwlth) (NTA) to register an indigenous land use agreement (ILUA). Blairgowrie Safe Boat Harbour Limited (Blairgowrie) was a party to the ILUA and the second respondent in the review proceedings. In the review proceedings, Blairgowrie's joinder application (based on the company's interests in maintaining the registration of the ILUA) had been unsuccessfully opposed by Ms Murray in circumstances where the Registrar did not propose to take any active role, other than providing evidence going to the circumstances of registration i.e. there would be no other contradictor.

It was not in dispute that:

- the ordinary rule is that costs should follow the event and a successful party should receive its costs unless special circumstances justify some other order;
- an order for costs is discretionary and that discretion must be exercised judicially—at [7].

Although the review application was not brought under the NTA, Justice Marshall noted that it involved 'a consideration of the meaning of important provisions in that legislation concerning the entering into and registration of ILUAs' and was the 'first one of its kind'—at [8].

Marshall J considered that the provisions of the NTA, specifically those concerning the registration of ILUAs, were central to the review proceedings. Therefore, it was 'appropriate' to take into account the 'legislative intention' that matters which raise the correct interpretation of the NTA may be considered 'in a different context from what would otherwise ordinarily apply'—at [9].

Section 85A of the NTA provides that each party is to bear their own costs, unless the court is satisfied that any unreasonable act or omission by one party has caused another party to incur costs.

Decision

In relation to the review proceedings, Marshall J was of the view that, having regard to the public interest in determining the correct construction of the ILUA provisions, it was in the interests of justice that no order for costs should be made against Ms Murray, other than that Blairgowrie should have its costs in respect of the joinder application. His Honour considered that opposition to that application was unreasonable, given that:

- Blairgowrie had an obvious interest in the outcome of proceedings; and
- when the joinder application was opposed, there was no other contradictor—at [10].