Costs – review of registration decision under AD(JR) Act

Northern Territory v Doepel (No. 2) [2004] FCA 46

Mansfield J, 3 February 2004

Issue
This decision deals with whether an unsuccessful applicant to an application (the review application) made under the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth)(AD(JR) Act) should pay the costs of a respondent to that application.

Background
On 28 November 2003, the Federal Court dismissed an application made under the AD(JR) Act by the Northern Territory of Australia for an order setting aside the decision of the Native Title Registrar to accept a claimant application for inclusion on the Register of Native Title Claims—see *Northern Territory v Doepel* (2003) 203 ALR 385, summarised in *Native Title Hot Spots* Issue 8. The second respondent, the Northern Land Council (NLC), on behalf of the native title claim group, sought costs in relation to the review application.

Contentions of the territory
As was noted, the court has a discretion to award costs that is absolute and unfettered. It must, however, be exercised judicially, and it cannot be exercised on grounds unconnected with the litigation—at [4].

Within that general discretion, it is accepted that:
- ordinarily the rule is that costs follow the event and a successful litigant receives costs in the absence of special circumstances justifying some other order;
- where a litigant has succeeded only upon a portion of the claim, the circumstances may make it reasonable that the litigant bear the expense of litigating that portion upon which he or she has failed;
- a successful party who has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the other parties' costs of them. In this sense 'issue' does not mean a precise issue in the technical pleading sense but any disputed question of fact or law—*Ruddock v Vardalis (No 2)* (2001) 115 FCR 229 at [11], Black CJ and French J.

The territory contended that there were special circumstances justifying the departure from the ordinary rule because:
- the review application raised novel questions of general importance under the NTA;
- it was in the public interest that the law be clarified by the court determining those questions;

- the territory's approach to the application had been a reasonable one, in that it sought to explain to the NLC the reasons for the review application (i.e. the novelty and general importance of the questions raised) and sought to conduct the application expeditiously and cooperatively;
- the application concerned the construction of provisions under the NTA which are of general significance and, so, that the 'spirit' of s. 85A of the NTA should be applied. That section provides that, unless a party has acted unreasonably, and unless the court otherwise orders, each party to a proceeding under the Act should bear that party's own costs;
- the public benefit of the application was illustrated by the funding of the second respondents by the NLC (an Aboriginal/Torres Strait Representative Body as defined in the NTA funded by ATSIS) and hence, ultimately, by the Commonwealth government;
- the payment of costs would, in reality, be a payment of the costs from the territory to a body funded by the Commonwealth rather than to an individual person or company.

His Honour Justice Mansfield made a number of findings as to the benefits of a review application, including that:

- the application required careful consideration of the provisions of the NTA, particularly those concerning the functions of the Registrar when considering, under ss. 190A to 190C, whether to accept a claimant application for registration;
- consideration of the proper construction of those sections in the review proceedings gave rise to many issues that had not previously been the subject of judicial consideration;
- there were a number of contentions raised by the territory that did not lend themselves to ready resolution by analogy with decisions under other provisions of the NTA or under comparable legislative provisions;
- judicial consideration was of benefit to both the Registrar in determining whether to accept a claimant application for registration and to those confronted with the issue of whether the Registrar will accept their application for registration;
- recent High Court decisions in *Western Australia v Ward* (2002) 191 ALR 1 and in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 provided a further reason to revisit the registration test provisions—at [9].

Notwithstanding these findings, his Honour concluded that:

- the particular features of the review application were not such as to lead to the conclusion that there should be no costs order;
- the application by the territory did raise the construction of ss. 190A to 190C and the other provisions;
- however, resolution of the various issues did not turn exclusively, or indeed largely, simply upon the territory's construction—at [12].

His Honour then outlined the extent to which he considered that the resolution of the various issues did not turn exclusively, or indeed largely, simply upon the territory's construction—at [13] to [18].

Conclusions

The court found that:

> [T]he [review] application involved consideration not simply of the proper construction of...[certain provisions of the NTA] but to a significant degree also turned upon its own particular facts and circumstances. In the latter respect, it was of no particular importance other than to the parties. Each application for the determination of native title which the Registrar has to address to determine whether to enter it on the Register of Native Title Claims will similarly have to be addressed in its own context and in its own particular circumstances. Moreover, whilst certain aspects concerning the proper construction of sections of the Act which arose in the review application are of general importance, that cannot be said of all the issues of construction which arose. There were several contentions of the applicant concerning features of the primary application which could not readily be described as giving rise to issues which are likely to arise in considering the registrability of all or many other applications for the determination of native title. The consequence is that the particular provisions of the Act to which those contentions directed attention are not ones which are of high public importance or which give rise to commonly raised issues. The construction of a provision of legislation does not, in every instance, attract the description as being of significant public importance—at [14].

Section 85A

Mansfield J held that the court should have regard to the 'spirit' of s. 85A but that there was no such general rule: each case should be considered on its merit. In this case, s. 85A was relevant because the review application concerned the validity of a function undertaken by the Registrar under the NTA and involved consideration of the particular sections directing how that function was to be considered—at [17].

Decision

Mansfield J accepted the public importance of some of the issues that arose and the novelty of those issues and also took into account what was put as to the reasonableness of the territory's conduct. However, overall, notwithstanding both the public interest in the judicial resolution of certain issues and the relevance of s. 85A, his Honour considered that the territory should be ordered to pay the NLC's costs of the review application. The nature and the range of the issues addressed, both legal and factual, led his Honour to the view that, on balance, the ordinary rules as to costs should apply—at [18].