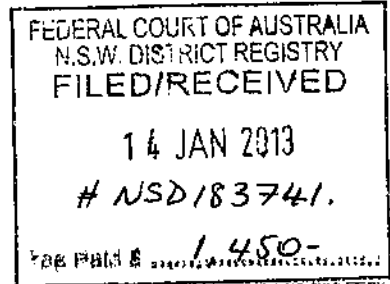


Application for leave to appeal

NSD 31 / 2013

No. ~~NSD500-12012~~

Federal Court of Australia
District Registry: New South Wales
Division: General



Michael Daniel Harmer

Applicant

Peter Slipper and another according to schedule

First Respondent

To the Respondents

The Applicant (Mr Harmer) applies for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing: ~~Date and time to be advised by the registry~~ *Wednesday 6 February 2013 at 9:30am*
Place: Level 17, Law Courts Building, Queens Square, Sydney NSW 2000

Date: 14 JAN 2013



Signed by an officer acting with the authority of the District Registrar

Filed on behalf of (name & role of party) Michael Harmer, Applicant
Prepared by (name of person/lawyer) Sandra Marks and settled by David Pritchard SC
Law firm (if applicable) Harmers Workplace Lawyers
Tel 02 9267 4322 Fax 02 9264 4295
Email sandra.marks@harmers.com.au / michael.harmer@harmers.com.au
Address for service Level 28, 31 Market Street, SYDNEY NSW 2000
(include state and postcode)

Mr Harmer applies for leave to appeal from the judgment of the Federal Court (Rares J) given on 12 December 2012 at Sydney (*Ashby v Commonwealth of Australia (No 4)* [2012] FCA 1411).

Leave to appeal is required by section 24(1A) of the *Federal Court of Australia Act 1976* and because Mr Harmer was not a party to the proceedings in which the judgment was given, but is aggrieved by the judgment, prejudicially affected by the judgment and/or is sufficiently interested in the judgment.

Grounds of application

1. The primary judge erred in finding that the predominant purpose of the Second Respondent (Mr Ashby) for bringing the proceedings was to pursue a political attack against the First Respondent (Mr Slipper) and not to vindicate any legal claim he may have for which the right to bring proceedings exists and accordingly that the proceedings were an abuse of process.
2. The primary judge erred in finding that Mr Harmer intended to cause harm to Mr Slipper by including scandalous and irrelevant allegations in the originating application and accordingly that the proceedings were an abuse of process.
3. The primary judge consequently erred in dismissing the proceedings pursuant to r 26.01 of the *Federal Court Rules 2011* in reliance upon the findings identified in paragraphs 1 and 2 above.
4. Substantial injustice would be caused if leave is refused as the judgment:
 - a. has denied Mr Ashby a hearing on the merits;
 - b. has resulted in an order that Mr Ashby pay Mr Slipper's costs of the proceedings, despite the limitation on the awarding of costs imposed by section 570(1) of the *Fair Work Act 2009*;
 - c. contains serious adverse findings impacting upon the professional reputation and standing of Mr Harmer, an experienced practitioner, in circumstances where:
 - i. the practitioner had given unchallenged evidence contrary to the majority of those findings;
 - ii. inferences were drawn by the primary judge in relation to the practitioner in the absence of, or contrary to, the evidence;
 - iii. the practitioner's ability to give evidence was expressly limited by his legal and professional obligations with respect to his client's claims for client legal privilege;



- iv. the practitioner was not given any or any adequate prior notice of the primary judge's intention to make the majority of these findings;
 - v. the practitioner was not cross examined in relation to his sworn evidence; and
 - vi. the practitioner was not a party to or represented in the proceedings in which the judgment was given and was called to give and gave evidence in the interests of his client.
- d. has resulted in an application by Mr Slipper on 19 December 2013 for orders that Mr Ashby and Harmers Workplace Lawyers (being the trading name of Mr Harmer) pay Mr Ashby's costs on an indemnity basis; and
 - e. has exposed Mr Harmer to the potential of professional disciplinary action.
5. The appeal involves important questions as to:
- a. how evidence on an application for the summary dismissal of proceedings for abuse of process is to be evaluated and assessed;
 - b. the role of pleadings in such an application;
 - c. the provision of procedural fairness in such an application;
 - d. how evidence of a legal practitioner called to give evidence in the interests of his client and instructed to claim client legal privilege is to be evaluated and assessed; and
 - e. the professional obligations of solicitors when filing originating applications or pleadings in the Court.
6. As noted in the summary of the reasons of the primary judge, the case below was of "*public interest*". Moreover, the matter generally is of importance due to the serious nature of the allegations made in the primary proceedings by both Mr Slipper and Mr Ashby and the seriousness of the findings made by the primary judge with regard to Mr Ashby, Mr Harmer and other third parties.

Other applications

1. An order that the application for leave to appeal be heard by a Full Court of this Court.
2. An order that Mr Harmer's application for leave to appeal be heard together with Mr Ashby's application for leave to appeal and that evidence and submissions in each such application, be evidence and submissions in the other.



3. An order that subject to any contrary direction of the Full Court, the application for leave to appeal be heard concurrently with or, alternatively, immediately before the appeal described in the draft notice of appeal filed with this application.
4. A direction that the parties comply with Part 36 of the *Federal Court Rules 2011* and Practice Notices APP1 and APP2 of 2011 as though leave to appeal has been granted.

Accompanying documents

This application is accompanied by the following:

1. the judgment or order from which leave to appeal is brought;
2. the reasons for the judgment or order;
3. an affidavit stating the facts that support the application; and
4. a draft notice of appeal that complies with rules 36.01(1) and (2).

Applicant's address

Mr Harmer's address for service is:

Place: Level 28, St Martins Tower, 31 Market Street, Sydney NSW 2000

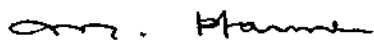
Email: sandra.marks@harmers.com.au / michael.harmer@harmers.com.au

Mr Harmer's address is c/o Harmers Workplace Lawyers, Level 28, 31 Market Street, Sydney NSW 2000

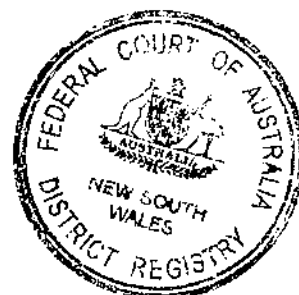
Service on the Respondents

It is intended to serve this application on Mr Ashby and Mr Slipper.

Date: 14 January 2013



Signed by Michael Daniel Harmer
Applicant



SCHEDULE

No NSD580 of 2012

Federal Court of Australia
District Registry: New South Wales
Division: General

On appeal from the Federal Court

Michael Daniel Harmer
Appellant

Peter Slipper
First Respondent

James Hunter Ashby
Second Respondent

