Dismissal application – leave to appeal and extension of time

Wharton v Queensland [2004] FCA 1761

Emmett J, 4 February 2004

Issue
This case concerns an application for leave to appeal against a decision to dismiss an application for the dismissal of a claimant application brought by Wayne Wharton on behalf of the Kooma People (Kooma People's claim). Those seeking leave are referred to as the Bradfield applicants.

Background
The Bramfield applicants had previously applied for dismissal of the Kooma People's claim under s. 84C of the *Native Title Act 1993* (Cwlth) (NTA), broadly on the ground of lack of authorisation.

On 3 December 2003, Justice Emmett published reasons concluding that cl. 21 of the transitional provisions to the *Native Title Amendment Act 1998* (Cwlth) applied and that the application need only comply with ss. 61 and 62 of the old Act. It was common ground that it did comply with those provisions. Accordingly, on 10 December 2003, the motion was dismissed—at [3] and [4] and see *Native Title Hot Spots* Issue 8.

The Bramfield applicants sought leave to appeal from those orders and an order extending the time within which to make the application for leave. On the day of hearing, counsel for the Bramfield applicants also requested that the whole of the motion be referred to a Full Court. The request was opposed by Mr Wharton.

Decision
His Honour concluded that, having regard to the history of the application, the question of authorisation should be resolved by a Full Court. While he did not doubt the conclusion he had reached on 3 December 2003, his Honour considered the matter was one of some significance and 'it may be that there would be, in some circumstances, a conflict between [his] reasons and reasons of other judges of the court'. For that reason he was be disposed to grant leave to appeal—at [5].

Emmet J was not, however, persuaded that the explanation for the failure to comply with the rules as to time was totally satisfactory but noted that refusal of an extension would be fatal to any application for leave to appeal. Therefore, rather than form a final view as to the appropriateness of an extension of time, his Honour considered it preferable to accede to the request and refer the notice of motion to a Full Court—at [6].

On the question of costs he noted that the parties had prepared their case on the assumption that the motion would be dealt with on the day. It was not until the day of hearing that the applicants made clear the intention that the matter not proceed today. In the circumstances, his Honour considered it appropriate to order the applicants to pay the costs of the parties thrown away by a need to refer the notice of motion to a Full Court—at [9].

Accordingly his Honour ordered that:

- the notice of motion filed on 9 January 2004 be referred to the Full Court of the Federal Court;
- the applicant on the motion pay the costs of the parties thrown away by reason of the referral of the motion to the Full Court—at [10].

Comment

This decision was handed down some time ago. It is included for completeness. The decision of the Full Court, in refusing to grant leave to appeal the decision of Emmett J, is summarised in *Native Title Hot Spots* Issue 10 (Bramfield v Wharton).