Court of Appeal
Supreme Court

New South Wales

Case Name:	AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces
Medium Neutral Citation:	[2021] NSWCA 112
Hearing Date(s):	26 April 2021
Date of Orders:	03 June 2021
Decision Date:	3 June 2021
Before:	Meagher and Leeming JJA at [1]; Preston CJ of LEC at [31]
Decision:	(1) Grant leave to appeal. (2) Direct Dartbrook to file a notice of appeal amended in accordance with its written submissions in reply and otherwise dispense with the rules as to service. (3) Appeal allowed. (4) Set aside the orders made by the Land and Environment Court on 20 November 2020. (5) In lieu thereof, dismiss paragraph 3 of the notice of motion filed 9 November 2020, without prejudice to HTBA's entitlement to seek to be heard as to the making of orders pursuant to s 34(3) of the Land and Environment Court Act 1979 (NSW), with any amended notice of motion seeking to be heard to be filed and served within 7 days of today. (6) Order HTBA to pay Dartbrook's costs of proceedings in this Court.
Catchwords:	PRACTICE AND PROCEDURE – joinder – appeal against refusal of application to modify development consent – parties agree on terms of a decision to dispose of appeal – intervenor raising jurisdictional issue that court has no power to so dispose of the appeal – source of power to join intervenor – whether s

8.15(2) Environmental Planning and Assessment Act available power for joinder – section 8.15(2) not an available power of joinder for this appeal - whether r 6.24 Uniform Civil Procedure Rules alternative source of power for joinder – whether joinder as a party necessary to determine all matters in dispute - whether power to amend modification application – whether error in exercise of discretion to join intervenor – whether joinder legally unreasonable

Legislation Cited:	Civil Procedure Act 2005 ss 64, 75, 76, 173 Corporations Act 2001 (Cth) s 411 Environmental Planning and Assessment Act 1979 ss 8.6, 8.15(2) Part 3A, ss 75B, 75K, 75W, Part 4 Environmental Planning and Assessment Amendment Act 2017 sch 10, sch 13 Environmental Planning and Assessment Amendment Regulation 2018 sch 1 Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 sch 2, cl 3BA, cl 12 Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011 Environmental Planning and Assessment Amendment (Part 3A Repeal) Regulation 2011 sch 1, sch 2 Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005 cl 2 Environmental Planning and Assessment Regulation 2000 Part 1A, cl 8J Judicature Act 1873 (UK) Sch 1 r 9 Judicature Act 1875 (UK) Sch 1 Order XVI r 13 Land and Environment Court Act 1979 ss 34(3), 38(2), 57 Mining Act 1992 State Environmental Planning Policy (Major Development) 2005 Sch 1, cl 2, cl 6 State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 State Environmental Planning Policy (State Significant Development) 2005 Uniform Civil Procedure Rules 2005 rr 6.23, 6.24
Cases Cited:	1643 Pittwater Road Pty Ltd v Pittwater Council [2004]

NSWLEC 685
Al Maha Pty Ltd v Huajun Investments Pty Ltd (2018) 233 LGERA 170; [2018] NSWCA 245
Amon v Raphael Tuck & Sons Ltd [1956] 1 QB 357
Attorney General (SA) v Corporation of the City of Adelaide (2013) 249 CLR 1; [2013] HCA 3
Australian Education Union v Department of Education and Children's Services (2012) 248 CLR 1; [2012] HCA 3
Barrick Australia Ltd v Williams (2009) 74 NSWLR 733; [2009] NSWCA 275
Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v DAS [2012] NSWCA 164
Bondi Beach Astra Retirement Village Pty Ltd v Assem [2020] NSWSC 1814
Boyd v Thorn (2017) 96 NSWLR 390; [2017] NSWCA 210
Brown v West (1990) 169 CLR 195; [1990] HCA 7
Burton v Babb [2020] NSWCA 331
Corporate Affairs Commission v Bradley [1974] 1 NSWLR 391
Delta Electricity v Blue Mountains Conservation Society Inc (2010) 176 LGERA 424; [2010] NSWCA 263
Double Bay Marina Pty Ltd v Woollahra Municipal Council (1985) 54 LGRA 313
Eastman v Director of Public Prosecutions (ACT) (2003) 214 CLR 318 at 362
Ervin Mahrer and Partners v Strathfield Council (No 2) (2001) 115 LGERA 259; [2001] NSWLEC 140
Ferella & Anor v Chief Commissioner of State Revenue [2014] NSWCA 378
Fire Auto and Marine Insurance Ltd v Greene [1964] 2 QB 687
Flaherty v Hawkesbury City Council (2020) 244 LGERA 51; [2020] NSWLEC 29
Gordon & Valich Pty Ltd v City of Sydney Council [2007] NSWLEC 780
Hunter Industrial Rental Equipment Pty Ltd v Dungog Shire Council (2019) 101 NSWLR 1; [2019] NSWCA 147
Independent Holdings Ltd v City of Adelaide Planning Commission (1994) 85 LGERA 339
Jaimee Pty Ltd v Council of the City of Sydney [2010]

NSWLEC 245
John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd (2010) 241 CLR 1; [2010] HCA 19
Johns v Australian Securities Commission (1993) 178 CLR 408; [1993] HCA 56
King v Bathurst Shire Council (2006) 150 LGERA 362; [2006] NSWLEC 505
Ku-ring-gai Council v Bunnings Properties Pty Ltd (2019) 236 LGERA 35; [2019] NSWCA 28
Leimroth v Wingecarribee Shire Council [2012] NSWLEC 256
Levy v State of Victoria (1997) 189 CLR 579; [1997] HCA 31
Milne v The Queen (2014) 252 CLR 149; [2014] HCA 4
Minister for Immigration and Border Protection v WZARH (2015) 256 CLR 326; [2015] HCA 40
Mirvac Projects Pty Ltd v Ku-ring-gai Council (2007) 159 LGERA 151; [2007] NSWLEC 540
Morrison Design Partnership Pty Ltd v North Sydney Council (2007) 159 LGERA 361; [2007] NSWLEC 802
News Ltd v Australian Rugby Football League Ltd (1996) 64 FCR 410; [1996] FCA 870
North Sydney Council v Michael Standley & Associates Pty Ltd (1998) 43 NSWLR 468; [1998] NSWSC 163
Pegang Mining Co Ltd v Choong Sam [1969] 2 MLJ 52
Pilkington v Secretary of State for the Environment (1973) 26 P&CR 508; [1974] 1 All ER 283
Positive Change for Marine Life Inc v Byron Shire Council [2015] NSWLEC 147
Progress and Securities Pty Ltd v North Sydney Municipal Council (1988) 66 LGRA 236
Qantas Airways Ltd v AF Little Pty Ltd [1981] 2 NSWLR 34
Re Will of Gilbert (1946) 46 SR(NSW) 318
Ross v Lane Cove Council (2014) 86 NSWLR 34; [2014] NSWCA 50
State of Victoria v Sutton (1998) 195 CLR 291; [1998] HCA 56
The Age Company Ltd v Liu (2013) 82 NSWLR 268; [2013] NSWCA 26
Toplace Pty Ltd v The Council of the City of Sydney [2020] NSWLEC 121
Valhalla Cinemas Pty Ltd v Leichhardt Municipal

	Council (1986) 60 LGRA 240 Valiant Timber and Hardware Co Pty Ltd v Blacktown City Council (2005) 144 LGERA 33; [2005] NSWLEC 747 Vandervell Trustees Ltd v White [1971] AC 912 Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc (2014) 86 NSWLR 524; [2014] NSWCA 105 Waverley Council v Hairis Architects (2002) 123 LGERA 100; [2002] NSWLEC 180 Werdeman v Societe Generale d'Electricite (1881) 19 Ch D 246
Category:	Principal judgment
Parties:	AQC Dartbrook Management Pty Ltd (Applicant) Minister for Planning and Public Spaces (First Respondent) Hunter Thoroughbred Breeders Association Inc (Second Respondent)
Representation:	Counsel: Mr R P Lancaster SC, Ms N A Wootton (Applicant) Submitting appearance (First Respondent) Mr G R Kennett SC, Mr A Stafford (Second Respondent) Solicitors: Sparke Helmore Lawyers (Applicant) Crown Solicitor's Office (First Respondent) Beatty Legal (Second Respondent)
File Number(s):	2020/357637
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Land and Environment Court
Jurisdiction:	Class 1
Citation:	[2020] NSWLEC 159
Date of Decision:	20 November 2020
Before:	Duggan J

File Number(s): 2019/346483

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

AQC Dartbrook Management Pty Ltd ("Dartbrook") had made an application to modify a development consent for an underground coal mine ("the Dartbrook Mine") in the upper Hunter Valley. The modification application ("Mod 7 Application") was made under s 75W of the *Environmental Planning and Assessment Act 1979 Act* ("EPA Act") by means of legislation that saved these (now repealed) provisions. The Independent Planning Commission ("IPC"), as delegate of the Minister for Planning and Public Spaces ("Minister") approved in part and refused in part the Mod 7 Application. Dartbrook appealed to the Land and Environment Court ("the Court") against the IPC's decision.

Dartbrook and the Minister participated in a conciliation conference under s 34 of the *Land and Environment Court Act 1979* ("Court Act") and an agreement was reached. After the agreement was published online, HTBA applied to be joined as a party to the proceedings. The primary judge ordered that HTBA be joined as a party to the proceedings under s 8.15(2) of the EPA Act. The primary judge's main basis for joinder was to allow HTBA to raise the contention that the decision, agreed under s 34(3) of the Court Act, was not a decision that the Court could have made in the proper exercise of its functions. Dartbrook sought leave to appeal against the primary judge's decision to join HTBA.

The questions for the Court of Appeal included:

(i) Whether power of joinder was available under s 8.15(2) EPA Act;

(ii) Whether joinder was capable of being supported by an alternative source of power, being r 6.24 UCPR;

(iii) Whether the primary judge erred in joining HTBA on the basis that it would raise contentions regarding the question of jurisdiction;

(iv) Whether the primary judge erred in concluding that merit considerations warranted joinder;

(v) Whether joinder was legally unreasonable.

The Court granted leave to appeal and held:

In relation to (i)

(Per Preston CJ of LEC, Meagher and Leeming JJA agreeing)

(1) Section 8.15(2) EPA Act is not available to support HTBA's application for joinder. The right of appeal provided by s 75W(5) EPA Act continued in force by the transitional provisions and this constituted a distinct right of appeal. The consequence is that Dartbrook's appeal against the IPC's determination of the request to modify the development consent was an appeal under s 75W(5), which is not an appeal under Division 8.3 of the EPA Act: [3], [142]-[154].

In relation to (ii)

(Per Meagher and Leeming JJA):

(1) Rule 6.24 UCPR is an available source of power for HTBA's joinder: [3];

(2) Following the agreement between Dartbrook and the Minister, the Court must be satisfied that the decision to which the parties have agreed is one which the Court could have made in the proper exercise of its jurisdiction: [9];

(3) A person who contends that a court lacks power to dispose of proceedings pursuant to s 34(3) is not thereby a necessary party to those proceedings. The fact that an objector wishes to make submissions on whether a decision is one which the Court could have made in the proper exercise of its powers, which would not otherwise have been raised by the parties, does not make the objector a necessary party: [12];

(4) HTBA was not a “necessary” party within the meaning of the second limb of r 6.24. First, HTBA does not enjoy any legal interest which is affected by the outcome of the litigation. Second, the statutory scheme reflected in s 34 would be subverted if, by reason of a willingness to make a submission on the precondition to the power, an objector was entitled to become a party. Thirdly, there are other mechanisms for addressing the position where there is doubt whether the decision is one which could have been made in the proper exercise of its functions short of joining the objector as a party. One is by participation as an amicus. [15], [17], [19].

(Per Preston CJ of LEC)

(5) The validity of the primary judge’s decision to join HTBA as a party to the appeal is not necessarily affected by the primary judge mistaking the source of power to make the decision: [155];

(6) Rule 6.24(1) UCPR is not an available source of power capable of supporting the primary judge’s decision to join HTBA to the proceedings because the primary judge did not consider and form an opinion of satisfaction regarding all of the requirements upon which a valid exercise of power in r 6.24(1) depends: [175];

(7) The jurisdictional question raised by HTBA was a matter in dispute in the proceedings, regardless of whether it was a matter in dispute between the parties: [179]-[181];

(8) Circumstances in which courts have held joinder of a person as a party is “necessary” fall into two main categories: first where the determination of the matters in dispute in the proceedings will affect the person to be joined in some material respect, such as directly affecting their rights or interests, and secondly, where the person to be joined can assist the Court in the determination of the matters in dispute: [187];

(9) Besides being joined as a party, there are two potential other modes of presence of a person in an administrative or merits review appeal in the Court – under s 38(2) Court Act, and as an amicus curiae. The availability of these powers to allow a person to be present at the conciliation conference in order

to assist the Court in the determination of the matters in dispute in the proceedings has the consequence that the joinder of a person as a party, the particular mode of presence allowed by r 6.24(1), may not be necessary to the determination of the matters in dispute in these proceedings: [196], [197], [199].

In relation to (iii)

(Per Meagher and Leeming JJA)

(1) Having allowed the appeal on ground 1A, it is inappropriate to address ground 1. There is no good reason to resolve a point which the appellant would prefer not to be decided, in circumstances where that point was not advanced at first instance and where it was not as fully argued as it might be in this Court, and which (as is noted below) may not need to be decided at all. The Court below can determine on remitter whether the decision reached following the conciliation conference is one which the Court could have made in the proper exercise of its functions; if so, then the Court must dispose of the proceedings in accordance with that decision: [20], [28]

(Per Preston CJ of LEC)

(2) The jurisdictional question raised by HTBA was that the Court had no jurisdiction to dispose of the appeal in accordance with the decision agreed between the parties because the terms of that decision require the Court, first, to grant leave to Dartbrook to amend the application it had made under s 75W(2) requesting the Minister to modify the development consent and, second, to approve the application to modify the consent as so amended. The primary judge did not err in joining HRBA to raise this jurisdictional question as it was reasonably arguable: [207];

(3) Contrary to the assumption of the parties, there is no power to amend a request or an application to modify a development consent or an approval. No question therefore arises as to the scope of the power to allow the amendment of the request to modify the development consent sought by Dartbrook and the Minister: [227];

(4) There is no express or implied authority in the EPA Act allowing a proponent to amend its application to modify a development consent or an approval, or to allow a proponent to amend an application to modify a development consent or an approval prior to determining the application. The Court, on an appeal against the determination of a consent authority of an application or request to modify a development consent or an approval, therefore has no power to allow an applicant to amend the application to modify the development consent or approval. Nor does the Court have any power under s 64 of the Civil Procedure Act 2005 or Part 19 of the UCPR to amend, or to allow the amendment of, the application or request for modification of a development consent or an approval: [228], [252], [256], [260];

(5) The decision to allow the "minor amendments" of the application to modify the development consent is not a decision that the Court could have made in the proper exercise of its functions. The primary judge, therefore, committed no error in holding that HTBA's contention that the Court lacked jurisdiction to allow the amendment of the application to modify the development consent was reasonably arguable. Indeed, it was more than reasonably arguable, it was correct. Despite being for incorrect reasons, the outcome is the same: [270]

In relation to (iv)

(Per Preston CJ of LEC)

(1) The reasoning of the primary judge has a logic and a foundation in the operation of s 34(3) and (4) of the Court Act. It does not reveal a material error of law sufficient to warrant appellate intervention in a discretionary decision on a matter of practice and procedure. Even if there were to be error, it would not be vitiating: [306], [307]

In relation to (v)

(Per Preston CJ of LEC)

(1) Dartbrook has not established that the primary judge made an error of law of a kind sufficient to found an appeal under s 57(1) of the Court Act: [319].

JUDGMENT

1 **MEAGHER and LEEMING JJA**: Many issues were argued in this procedural appeal but on the view we take it may be resolved concisely and by the disposition of ground 1A. It should be said at the outset that the primary judge, called upon while sitting as Duty Judge to resolve an urgent application for a stay, produced a substantial judgment in short order, without the benefit of written and oral submissions of the calibre received by this Court.

2 We gratefully adopt the background contained in the judgment of Preston CJ of LEC, and will use the same abbreviations. We agree, for the reasons his Honour gives, that when Dartbrook's application under s 75W of the EPA Act to modify its existing development consent was refused by the Minister's delegate (the Independent Planning Commission), it had a right of appeal, under s 75W(5) as preserved by the transitional provisions, to the Land and Environment Court. The appeal fell within that court's Class 1 jurisdiction.

3 We also agree, for the reasons given by Preston CJ of LEC, that s 8.15 was not available in support of HTBA's application for joinder, but that r 6.24(1) of the Uniform Civil Procedure Rules (which HTBA had invoked in the alternative) was available. This seems not to have been appreciated by the parties until Dartbrook's written submissions in reply in this Court. Certainly, the primary judge did not receive submissions on the operation of the transitional provisions governing the applicable rule.

4 Rule 6.24 provided:

> "If the court considers that a person ought to have been joined as a party, or is a person whose joinder as a party is necessary to the determination of all matters in dispute in any proceedings, the court may order that the person be joined as a party."

5 In order to analyse whether the rule could support HTBA's joinder, it is to be recalled that Dartbrook had commenced proceedings in the Land and Environment Court in the exercise of its right of appeal. The parties to that appeal were, no differently from other appeals of this nature, Dartbrook and the Minister. HTBA's application to be joined as a party was made after Dartbrook and the Minister had reached agreement following a conciliation conference.

6 The Court was empowered, by s 34 of the *Land and Environment Court Act 1979* (NSW), to arrange a conciliation conference between the parties, and the parties were required to participate, in good faith, in that conference: s 34(1A). There is no suggestion that the agreement was reached other than in good faith.

7 The parties reached agreement about the terms of a decision acceptable to both of them. Section 34(3) of the *Land and Environment Court Act* provides:

> "If, either at or after a conciliation conference, agreement is reached between the parties or their representatives as to the terms of a decision in the proceedings that would be acceptable to the parties (being a decision that the Court could have made in the proper exercise of its functions), the Commissioner—
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> (a) must dispose of the proceedings in accordance with the decision, and
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> (b) must set out in writing the terms of the decision."

8 That subsection distinguishes the parties' "agreement" and the "decision" which will resolve the proceedings. The parties' agreement may be limited to a decision which will resolve the proceedings, or it may extend beyond such a decision. Either way, the Court is then commanded to dispose of the proceedings in accordance with the decision, so long as the decision is one which "the Court could have made in the proper exercise of its functions".

9 At that point, the only issue for the Court is whether the decision to which the parties have agreed is one which the Court could have made in the proper exercise of its jurisdiction.

10 It is trite that a court must always be satisfied that it has jurisdiction before exercising jurisdiction in a matter. Further, a court must always be satisfied before making an order that there is power to do so. An example may be seen in *Milne v The Queen* (2014) 252 CLR 149; [2014] HCA 4 at [42]. The fact that the parties agree as to jurisdiction or power does not avoid the need for the Court to be satisfied, and, significantly for present purposes, the parties' agreement can mean that the Court may not receive the benefit of opposing submissions on the point. Where the question of jurisdiction or power is straightforward, nothing much turns on that. Difficulties may arise in cases where the position is not straightforward.

11 The foregoing applies whenever agreement is reached at a s 34 conference. It also applies all the time in a range of other circumstances, including (a) approval of the compromise of representative proceedings under s 173 of the *Civil Procedure Act 2005* (NSW); (b) approval of schemes of arrangement under s 411 of the *Corporations Act 2001* (Cth) and (c) approvals of compromises where persons are under legal incapacity under ss 75 and 76 of the *Civil Procedure Act*. There are many other examples. Many are more complicated than the position which obtained after agreement had been reached at the conciliation conference. The *only* issue where agreement has been reached following a conciliation conference is whether the decision is one which the Court could have made in the proper exercise of its functions.

12 We agree, consistently with the reasoning of Preston CJ of LEC, that a person who contends that a court lacks power to dispose of proceedings pursuant to s 34(3) is not thereby a necessary party to those proceedings. The Land and Environment Court must be satisfied that the decision is one which could properly have been made. The Land and Environment Court may be concerned that that precondition is not satisfied, and that it has not received full submissions on the point. However, the fact that an objector wishes to make submissions on a point which would not otherwise have been raised by the parties does not make the objector a necessary party.

13 Our conclusion follows from three considerations.

14 First, rules permitting the joinder of persons as parties because they ought to have been joined, or whose joinder is necessary to ensure that all matters in dispute may be effectually and completely determined upon, have a long history. Materially equivalent language to r 6.24 may be seen in Order XVI r 13 reproduced in *Werdeman v Societe Generale d'Electricite* (1881) 19 Ch D 246 at 251. This was directed to the doing away with the rule that proceedings were not defeated by the misjoinder or non-joinder of parties (the current form of that rule is found in UCPR r 6.23, but both rr 6.23 and 6.24 derive from a single rule originally enacted as r 9 of the schedule to the original *Judicature Act 1873* which later became Order XVI r 13). The essential language and structure of the rule has been in place for some 150 years, although its introduction in New

South Wales was delayed until 1972 (see *Boyd v Thorn* (2017) 96 NSWLR 390; [2017] NSWCA 210 at [96]-[102]).

15 The rule has two overlapping limbs: persons who "ought to have been joined" and persons "whose joinder as a party is necessary to the determination of all matters in dispute". It is clear that HTBA was not a person which ought to have been joined by Dartbrook when the Class 1 appeal was commenced. Nor did HTBA become a "necessary" party within the meaning of the second limb of r 6.24 after Dartbrook and the Minister reached agreement following a conciliation conference. One reason for this is that HTBA does not enjoy any legal interest which is affected by the outcome of the litigation. As Brennan J said in *Levy v State of Victoria* (1997) 189 CLR 579 at 602; [1997] HCA 31 "[n]othing short of [a substantial] affectation of legal interests will suffice" to permit an application to intervene. Another reason is that there are other mechanisms which permit HTBA to advance the submissions it wishes to advance (see the third point below).

16 Secondly, the statutory scheme reflected in s 34 is one which encourages the parties to participate in good faith to settle their dispute. If agreement is reached, then the Court's role is very significantly circumscribed: the only issue is whether the resultant decision is one which could have been made in the proper exercise of the Court's functions.

17 That scheme would be subverted if, by reason of a willingness to make a submission on the precondition to the power, an objector was entitled to become a *party*. *Ex hypothesi,* the objector is not in agreement with the original parties to the litigation. By becoming a party there will no longer be agreement between all parties.

18 Indeed, one of the very issues as to which HTBA seeks to be heard – that arising under s 34(3), namely, whether the decision to which the parties have agreed is one that the Court could have made in the proper exercise of its functions – vanishes upon HTBA being joined as a party without any limitation. What is left is the appeal on the merits from the refusal by the Minister's delegate of Dartbrook's application under s 75W. That is not a matter as to which HTBA was a necessary or proper party.

19 Thirdly, there are other mechanisms for addressing the position where there is doubt whether the decision is one which could have been made in the proper exercise of its functions short of joining the objector as a party. One is by participation as an amicus. That is a further reason why the joinder is not "necessary".

20 If an objector seeks to make submissions on a point which the Court would otherwise not receive submissions on, which is live between the parties, then it is open to that objector to apply to be heard as an amicus. The distinction between joining a person as a party, and permitting the person to be heard as an amicus was explained by Brennan J in *Levy v State of Victoria* at 604:

> "The hearing of an amicus curiae is entirely in the Court's discretion. That discretion is exercised on a different basis from that which governs the allowance of intervention. The footing on which an amicus curiae is heard is that that person is willing to offer the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would not otherwise have been assisted. In *Kruger v The Commonwealth*, speaking for the Court, I said in refusing counsel's application to appear for a person as amicus curiae:
>
>> 'As to his application to be heard as amicus curiae, he fails to show that the parties whose cause he would support are unable or unwilling adequately to protect their own interests or to assist the Court in arriving at the correct determination of the case. The Court must be cautious in considering applications to be heard by persons who would be amicus curiae lest the efficient operation of the Court be prejudiced. Where the Court has parties before it who are willing and able to provide adequate assistance to the Court it is inappropriate to grant the application.'"

21 It follows that HTBA was not a necessary party within the meaning of r 6.24. Had the primary judge been directed to r 6.24, her Honour would have erred if she came to the contrary conclusion.

Orders

22 For those reasons, the discretion exercised by the primary judge miscarried. There should be a grant of leave, the appeal allowed, and the orders made on 20 November 2020 set aside. It is not necessary separately to address grounds 2 and 3, which overlap with the misapprehension of the power to join.

23 Dartbrook's primary position was that this Court also should not determine ground 1 if it succeeded, as it has, on ground 1A. It concluded its oral submissions in this Court as follows: "On our primary position the appeal will be allowed and her Honour's decision to join set aside and then the Senior

Commissioner would be presented with the s 34 agreement and have to form a view that it's able to be made a decision of the Court". That would leave it to the Senior Commissioner to determine, inter alia, HTBA's submission that the amendment to Dartbrook's modification application to which the Minister had agreed was beyond power, as ground 1 contends.

24 Preston CJ of LEC has expressed the view that there was no power to amend Dartbrook's modification application. Whether or not that is so is a pure question of law, and one which is capable of being determined for the first time in this Court. However, we are of the view that it is inappropriate to address that question. That is because it was common ground in the court below that there was power, in accordance with decisions such as *Jaimee Pty Ltd v Council of the City of Sydney* [2010] NSWLEC 245. It was also common ground in the parties' submissions in this Court; the debate instead was whether the alterations were so significant as to amount to a "new" modification application. True it is that in the course of argument, it was suggested that there was an anterior point, namely, whether there was power to accede to *any* amendment of a modification application. The fact that this was only raised during the hearing meant that this Court received incomplete submissions on the point. There is no good reason to resolve a point which the appellant would prefer not to be decided, in circumstances where that point was not advanced at first instance and where it was not as fully argued as it might be in this Court, and which (as is noted below) may not need to be decided at all.

25 The position now, in May 2021, is quite different from the extreme urgency which attended HTBA's application in November 2020. This has consequences for the future conduct of the litigation.

26 HTBA's notice of motion sought joinder as a party or "[s]uch further or other orders that the Court deems fit". It will be clear from the foregoing that there is an overlap between the submissions HTBA sought to advance if joined as a party, and an application to be heard as an amicus. As a matter of substance, HTBA is entitled to apply to be heard, as an amicus, on issues arising on the application for orders pursuant to s 34(3) which will not be fully addressed by the parties. Further, HTBA has more recently advised that it wishes to make

submissions which have not hitherto been made on that issue. If HTBA seeks to make such an application, it should file an amended notice of motion.

27 By the same token, Dartbrook and the Minister are free to alter the terms of their agreement if they so choose. There is no reason why they are bound to the terms reached last November, or why they should be precluded from reaching an agreement which avoids the need to resolve some of the issues agitated in the litigation subsequently. The legislative purpose of s 34 is, where possible, to avoid the need for litigation.

28 The orders we propose leave it to the Land and Environment Court to determine whether the decision reached following the conciliation conference is one which the Court could have made in the proper exercise of its functions; if so, then the Court must dispose of the proceedings in accordance with that decision. In circumstances where, even today, the parties have not fully been heard on that issue, it is unnecessary to address any of the aspects which were debated, and which may, depending on the attitude of Dartbrook and the Minister, go away. To be clear, nothing in this judgment prevents HTBA seeking to be heard, as an amicus, on that issue. Nor does anything in this judgment prevent the Minister and Dartbrook from reaching an altered agreement in light of the arguments which have been presented. Whether HTBA makes such an application, and if it is made, whether the Land and Environment Court accedes to it, are not determined by the outcome of this appeal.

29 Costs in this Court should follow the event. The primary judge reserved costs of the application at first instance.

30 We propose the following orders:

(1) Grant leave to appeal.

(2) Direct Dartbrook to file a notice of appeal amended in accordance with its written submissions in reply and otherwise dispense with the rules as to service.

(3) Appeal allowed.

(4) Set aside the orders made by the Land and Environment Court on 20 November 2020.

(5) In lieu thereof, dismiss paragraph 3 of the notice of motion filed 9 November 2020, without prejudice to HTBA's entitlement to seek to be heard as to the making of orders pursuant to s 34(3) of the *Land and Environment Court Act 1979* (NSW), with any amended notice of motion seeking to be heard to be filed and served within 7 days of today.

(6) Order HTBA to pay Dartbrook's costs of proceedings in this Court.

31 **PRESTON CJ OF LEC:**

A decision to join a party to an appeal is challenged

32 The applicant, AQC Dartbrook Management Pty Ltd (Dartbrook), seeks leave to appeal against an interlocutory decision of practice and procedure of a judge of the Land and Environment Court, Duggan J, to order the joinder of the second respondent, Hunter Thoroughbred Breeders Association Inc (HTBA), as a party to an appeal in the court below. That appeal is against the decision of the Independent Planning Commission (IPC), as delegate of the second respondent, the Minister for Planning and Public Spaces (Minister), to refuse Dartbrook's request under s 75W of the *Environmental Planning and Assessment Act 1979 Act* (EPA Act) to the Minister to modify a development consent for an underground coal mine (the Dartbrook Mine) in the upper Hunter Valley.

33 Dartbrook contends that the primary judge erred in law in joining HTBA as a party to the appeal. Dartbrook raised, in its proposed grounds of appeal if leave to appeal were to be granted, four grounds. First, Dartbrook contends (in proposed ground 1A) that the primary judge did not have jurisdiction to join HTBA as a party to the appeal under s 8.15(2) of the EPA Act. Section 8.15(2) permits the joinder of a person as a party to an appeal "under this Division", being Division 8.3 of the EPA Act. Pursuant to s 8.6(1), decisions subject to appeal under Division 8.3 are decisions of a consent authority under Part 4 of the EPA Act. The decision of the IPC, the subject of Dartbrook's appeal, was not made under Part 4 of the EPA, but rather, by operation of transitional provisions, under s 75W in the repealed Part 3A of the EPA Act, so that Dartbrook's appeal was also made under the repealed Part 3A. Section 8.15(2) did not apply to an appeal under the repealed Part 3A.

34 Secondly, and alternatively if ground 1A is not accepted, Dartbrook contends (in proposed ground 1) that the primary judge erred in the exercise of the

power under s 8.15(2), if the power were to be available, to join HTBA to raise the jurisdictional issue of whether the terms of the decision agreed between the original parties to the appeal was "a decision that the Court could have made in the proper exercise of its functions", so that the Commissioner was bound to dispose of the proceedings in accordance with the decision under s 34(3) of the *Land and Environment Court Act 1979* (the Court Act). Dartbrook identifies three errors of the primary judge for this ground.

35 Thirdly, Dartbrook contends (in proposed ground 2) that the primary judge erred in deciding to join HTBA as a party in order to permit HTBA to raise three issues involving merit considerations, when all merit considerations were no longer in contention between the parties as a result of the parties having reached agreement under s 34(3) of the Court Act and hence did not need to be considered by the Court.

36 Fourthly, Dartbrook contends (in proposed ground 3) that the primary judge's decision to join HTBA as a party to the appeal was legally unreasonable, in the sense that the decision reveals serious irrationality or illogicality.

Dartbrook needs leave to appeal

37 Dartbrook's appeal against the IPC's decision to refuse the request to modify the development consent is in Class 1 of the Court's jurisdiction. Dartbrook's request to modify the development consent was made under the former s 75W of the EPA Act. Section 75W(5) of the EPA Act entitled a proponent of a project who is dissatisfied with the determination of a request under s 75W to appeal to the Court. Such an appeal was assigned to Class 1 of the Court's jurisdiction: s 17(d) of the Court Act before amendment. As I explain when dealing with proposed ground 1A, HTBA contests that Dartbrook's appeal is under s 75W(5) of the EPA Act, rather than s 8.9 of the EPA Act, but this does not affect the class of jurisdiction to which the appeal is assigned. Even if the appeal were to be under s 8.9 of the EPA Act, it still would be assigned to Class 1 of the Court's jurisdiction: s 17(d) of the Court Act.

38 The primary judge's decision to join HTBA as a party to Dartbrook's appeal was, therefore, a decision in proceedings in Class 1 of the Court's jurisdiction. Dartbrook, as a party to proceedings in Class 1, has a right to appeal to this

Court against the primary judge’s decision and order under s 57(1) of the Court Act. An appeal under s 57(1) is limited to being on a question of law. Because the primary judge’s decision and order to join HTBA as a party to the proceedings are interlocutory ones, an appeal does not lie to this Court except by leave of this Court: s 57(4)(d) of the Court Act.

The arguments for and against leave being granted

39 Dartbrook argues that leave to appeal should be granted in order for Dartbrook to raise the four foreshadowed grounds of appeal. Dartbrook accepted that the principles to be applied are those stated by Basten JA in *Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v DAS* [2012] NSWCA 164 at [32]-[38] and summarised by Bathurst CJ in *The Age Company Ltd v Liu* (2013) 82 NSWLR 268; [2013] NSWCA 26 at [13] as:

> “Generally speaking, it is only appropriate to grant leave in matters that involve issues of principle, questions of public importance or in circumstances where it is reasonably clear that an injustice has occurred by reason of error in the judgment, going beyond what is merely arguable.”

40 Dartbrook submits that leave should be granted because:

> (a) the primary judge’s decision involves errors on questions of law, being the four grounds of appeal foreshadowed;
>
> (b) these errors raise questions of significance to the determination of Dartbrook’s appeal in circumstances where the parties had reached agreement under s 34(3) of the Court Act;
>
> (c) these errors materially and adversely affect the interests of Dartbrook because, as a result of the joinder of HTBA, the proceedings are likely not to be disposed of in accordance with the parties’ agreement but instead Dartbrook is faced with a contested hearing on the merits of multiple issues in the appeal; and
>
> (d) the primary judge’s decision works an injustice to Dartbrook. HTBA had no right to appeal against the Minister’s decision or to be heard on an appeal by Dartbrook against the Minister’s decision. Yet the primary judge’s decision to join HTBA achieved that result of entitling HTBA to participate as a party to Dartbrook’s appeal. As a party, HTBA can displace the agreement the other two parties have reached to dispose of the proceedings and force the matter to a contested hearing. This causes injustice to Dartbrook.

41 HTBA contests that Dartbrook has demonstrated an accepted basis for leave to appeal to be granted. First, HTBA notes that because the primary judge’s

decision is an interlocutory decision on a point of practice and procedure, appellate restraint is warranted, as identified in *Re Will of Gilbert* (1946) 46 SR (NSW) 318 at 323 and *Delta Electricity v Blue Mountains Conservation Society Inc* (2010) 176 LGERA 424; [2010] NSWCA 263 at [177]. Second, the decision to join a person as a party to proceedings is a discretionary one, both as to the constraints that apply to the exercise of the power and the exercise of the power if the constraints are found to be satisfied: *Delta Electricity v Blue Mountains Conservation Society Inc* at [178]. Third, the primary judge's decision as to the circumstances in which, and the conditions under which, the proceedings in the Land and Environment Court may be maintained are matters as to which an appellate court should accord a measure of deference in granting leave to appeal, and in reviewing on appeal, the decision of the primary judge: *Delta Electricity v Blue Mountains Conservation Society Inc* at [179].

42 Fourth, there is no question of broader principle or public importance raised by Dartbrook's proposed grounds of appeal. The proposed grounds 2 and 3 concern only the primary judge's particular exercise of the power to join HTBA to Dartbrook's appeal and turn on the circumstances of the case and not any point of principle. Proposed ground 1, although concerning the jurisdictional question of whether the decision agreed between the parties was a decision the Court could have made in the proper exercise of its functions (the condition in s 34(3) of the Court Act), also turns on the facts and not a point of principle. The principles concerning determination of Class 1 proceedings where a s 34 agreement has been reached have already been settled, including by this Court in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245, as noted by the primary judge. The basis on which joinder was ordered by the primary judge – the arguable case of an absence of jurisdiction to allow an amendment of the modification application and to approve the amended modification application – involved merely an application of the settled principle that a Commissioner has no power to dispose of proceedings in accordance with a decision agreed between the parties if the decision is not one that the Court could have made in the proper exercise of its functions. As such, the primary judge's decision, and Dartbrook's proposed

ground 1 challenging that decision, have no broader significance for litigants who have executed a s 34 agreement.

43 As to proposed ground 1A, which concerns the applicability of s 8.15(2) of the EPA Act as a source of power to join a person to an appeal under the former s 75W(5) of the EPA Act, the question is unlikely to arise again given that s 75W of the EPA Act has been repealed and the transitional provisions that preserve the entitlement of a proponent to request modification under s 75W only apply to requests for modification made before the cut-off date of 1 March 2018. Hence, even if proposed ground 1A could be seen to raise a matter of principle, it is of no importance for future joinder applications as it is unlikely to arise again.

44 Fifth, even if the primary judge's decision were to involve some identifiable error on a question of law, it is not clear what injustice has occurred. Dartbrook will have the opportunity to argue fully before the Commissioner both the jurisdictional question of whether the decision agreed between the parties is one the Court could have made in the proper exercise of its functions and any merit issues the Court allows HTBA to raise. It is not injustice, but it is desirable, that the Court should have the benefit of all the evidence and full submissions to consider both the jurisdictional question and the merit issues.

45 HTBA also made a particular submission as to why leave to appeal should not be granted to Dartbrook to raise proposed ground 1A. The point raised by proposed ground 1A was not argued in the court below. Uniform Civil Procedure Rules 2005 (UCPR) r 6.24(1) was capable of sustaining the order for joinder made by the primary judge and was expressly identified as an alternative source of power for joinder in HTBA's notice of motion. However, in the court below, both parties' arguments focused on the power in s 8.15(2) of the EPA Act. Had Dartbrook raised the argument it now raises in proposed ground 1A, that s 8.15(2) of the EPA Act is not an available source of power to join a person to an appeal under s 75W(5) of the EPA Act, attention would have been directed to the alternative source of power in r 6.24 instead of, or as well as, s 8.15(2). HTBA submits that Dartbrook should not be permitted to raise for the first time on an application for leave to appeal a point which, even

if successful, leads only to the reconsideration of the same interlocutory point of whether joinder should be ordered under a different source of discretionary power.

Leave to appeal should be granted for one ground, not the others

46 I have determined that leave to appeal should be granted to Dartbrook to raise proposed ground 1A, but not proposed grounds 1, 2 or 3.

47 With respect to ground 1A, for the reasons I give below, Dartbrook has established that the primary judge erred on a question of law in deciding to join HTBA as a party to the proceedings. The primary judge mistook the source of power to join HTBA as being s 8.15(2) of the EPA Act, which was not available in the appeal brought by Dartbrook. The alternative source of power in UCPR r 6.24(1) was not capable of supporting the primary judge's decision to join HTBA as a party to the proceedings.

48 The error of the primary judge involves issues of principle and public importance. The availability of the sources of power to join a person as a party to proceedings, in s 8.15(2) of the EPA Act and UCPR 6.24(1), raise issues of principle and public importance. Applications are regularly made to the Court by persons seeking joinder as a party to proceedings. This Court's adjudication of the issues raised by proposed ground 1A will be of assistance in future applications for joinder.

49 The particular question of the applicability of s 8.15(2) of the EPA Act as a source of power to join a person to an appeal under the former s 75W(5) of the EPA Act can still arise, notwithstanding the repeal of s 75W of the EPA Act and the transitional provisions fixing a cut-off date of 1 March 2018 for a proponent to request modification of an approved project or concept plan under s 75W. This is because the transitional provisions still allow for an approved project or concept plan to be modified under s 75W in certain circumstances (see cl 3BA(2), (3) and (4) of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017).

50 It may be accepted that the issues raised by proposed ground 1A could have been raised by Dartbrook in the court below. Dartbrook could have submitted to the primary judge that the power of joinder in s 8.15(2) of the EPA Act was

not available to be exercised on Dartbrook's appeal under s 75W(5) of the EPA Act and that the alternative source of power of UCPR r 6.24(1) identified in HTBA's notice of motion for joinder was also not available in the circumstances. No satisfactory explanation was provided for Dartbrook not raising these issues before the primary judge. It would appear from the fact that all parties only addressed the source of power in s 8.15(2) of the EPA Act, and not UCPR r 6.24(1), that the parties believed that this source of power was available to join HTBA to Dartbrook's appeal, if the primary judge was satisfied that joinder under s 8.15(2) was appropriate.

51 Nevertheless, proposed ground 1A involves error of law on material issues in the primary judge's decision to join HTBA, which goes to the power of the primary judge to have made the decision. Such issues may more readily be allowed to be raised on an appeal notwithstanding they were not raised in the court below.

52 With respect to proposed grounds 1, 2 and 3, leave to appeal should not be granted for three reasons.

53 First, Dartbrook has not established error on a question of law, which is necessary for an appeal under s 57(1) of the Court Act.

54 Secondly, the principles of appellate restraint in reviewing an exercise of discretion on a point of practice and procedure, as articulated by HTBA, support not granting leave to appeal on the grounds proposed by Dartbrook.

55 Thirdly, no matters of principle or public importance are raised by these proposed grounds of appeal. As HTBA submits, proposed grounds 2 and 3, and the second and third particulars for proposed ground 1, identify errors of fact, not errors on a question of law. The first of the particulars for proposed ground 1 does identify error on a question of law and a point of principle, but the error is not made out. Indeed, the primary judge's conclusion that the jurisdictional contention raised by HTBA was arguable was insufficiently assertive – the jurisdictional contention was correct in law.

56 I now need to explain my reasons for upholding the first proposed ground of appeal and rejecting the other three proposed grounds of appeal. In order to

understand these proposed grounds of appeal, and in particular the first two grounds concerning jurisdiction, it will be helpful to set out the factual history of and applicable law governing Dartbrook's request to modify the development consent for the Dartbrook Mine; the IPC's determination of the request; Dartbrook's appeal against the IPC's decision; the stage to which the appeal had progressed (namely the parties having reached agreement at a conciliation conference held under s 34 of the Court Act) when HTBA applied to be joined as a party to the appeal; HTBA's application for joinder; and the primary judge's decision to join HTBA as a party.

The grant of consent and later request to modify the consent

57 Underground coal mining operations at Dartbrook, near the town of Aberdeen in the upper Hunter Valley, were originally approved by the Minister for Planning granting development consent under Part 4 of the EPA Act on 2 September 1991. The consent approved longwall mining of the Wynn Seam until 2012; construction of surface facilities including the coal handling and preparation plan (CHPP), rail loop and rail loading facilities; establishment of a reject emplacement area (REA) at the base of Browns Mountain; and construction of the Hunter Tunnel.

58 In 1996, geological and geotechnical constraints and the presence of high levels of gas (methane) led the former owner to later seek approval to shift mining to the shallower Kayuga, Mt Arthur and Piercefield Seams.

59 On 28 August 2001, the Minister for Urban Affairs and Planning granted development consent DA 231-7-2000 under Part 4 of the EPA Act for extended mining operations at the Dartbrook Mine. This is the relevant development consent that Dartbrook seeks to modify. The development consent approved longwall mining operations in three coal seams, the Kayuga, Mt Arthur and Piercefield Seams, and the extraction of 6 million tonnes per annum of run-of-mine (ROM) coal. The consent also approved the continued use of the CHPP, rail loop and rail loading facilities; installation of a paste plant to blend coarse and fine rejects; construction of a pipeline to transfer reject paste to the REA and expansion of the REA; construction of a new access portal to the Kayuga Seam, the Kayuga Entry (formerly the Kayuga Seam Access Slot); and

temporary transportation of ROM coal overland via private haul road to the CHPP, until underground roadways are connected to the Hunter Tunnel.

60 The approved mining operations are split between two sites separated by four linear surface features, being the Hunter River, the Dart Brook, New England Highway and Main Northern Rail Line. Underground mining occurs at the West Site, while the East Site contains the major surface facilities, including the CHPP and rail loading facilities. The East and West Sites are connected by the Hunter Tunnel, which previously housed an underground coal conveyor system to transfer ROM coal underground without disruption to the major surface infrastructure and waterways. The consent operated for 21 years until 5 December 2022.

61 After consent was granted, longwall mining continued in the Wynn Seam but in 2004, shifted from the Wynn Seam to the Kayuga Seam. Longwall mining continued in the Kayuga Seam until late 2006 when the mine was placed into care and maintenance.

62 On 1 August 2005, the EPA Act was amended by the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005* to insert a new part, Part 3A, providing for a new regulatory mechanism for approval of major infrastructure and other projects by the Minister and the modification of the Minister's approval to carry out a project under Part 3A. At the same time a new Part 1A was inserted into the Environmental Planning and Assessment Regulation 2000 (EPA Regulation) dealing with projects to which Part 3A of the EPA Act applied.

63 A project to which Part 3A applied was any development declared under s 75B to be a project to which Part 3A applied. One means of declaring development to be a project to which Part 3A applied was by a State environmental planning policy (s 75B(1)(a) of the EPA Act).

64 On the commencement of Part 3A on 1 August 2005, State Environmental Planning Policy (State Significant Development) 2005 was renamed State Environmental Planning Policy (Major Development) 2005 (Major Development SEPP) and provided that certain kinds of development declared under the

former Policy to be State significant development are declared instead to be projects to which Part 3A applied.

65 One of the kinds of development declared to be a project to which Part 3A applied was development of a kind described in Schedule 1 (cl 6(1)(a) of the Major Development SEPP). Clause 5 of Schedule 1 included development for the purpose of mining that is coal mining, amongst other kinds of development for the purpose of mining. However, cl 6(2) of the Major Development SEPP provided that any such development does not become a project to which Part 3A applied by operation of cl 6(1) if "the carrying out of that development has been authorised by a consent that is in force under Part 4 of the Act before development of that kind is declared under subclause (1)".

66 In this case, development consent for the Dartbrook Mine was granted by the Minister under Part 4 of the EPA Act on 28 August 2011, before coal mining was declared to be a project to which Part 3A applied. Accordingly, the development of the Dartbrook Mine did not become a project to which Part 3A applied by the operation of cl 6(1) of the Major Development SEPP.

67 Later on, on 16 February 2007, another State environmental planning policy regulating development for the purpose of mining, State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (Mining SEPP), was made but it did not declare development to which the Policy applied to be development to which Part 3A applied.

68 The upshot was that the development of the Dartbrook Mine was not declared under s 75B of the EPA Act to be a project to which Part 3A applied.

69 There was, however, another means by which Part 3A could, and did, apply to the Dartbrook Mine. On the commencement of Part 3A on 1 August 2005, a new Part, Part 1A, was inserted in the EPA Regulation. Clause 8J as made contained transitional provisions, but did not allow for the use of the mechanism for modification of an approval for a project under s 75W of the EPA Act for a development consent granted under Part 4 of the EPA Act before the commencement of Part 3A. The omission was rectified shortly afterward. The Environmental Planning and Assessment Amendment (Major Projects – Transitional Provision) Regulation 2005, although gazetted on 7

December 2005, was taken to have commenced on the date of assent of the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005*, which was 16 June 2005 (cl 2).

70 Amongst the amendments was the insertion of a new subclause (8) in cl 8J, which provided:

> "A development consent in force immediately before the commencement of Part 3A of the Act may be modified under section 75W of the Act as if the consent were an approval under that Part, but only if:
>
> (a) the consent was granted with respect to development that would be a project to which Part 3A of the Act applies but for the operation of clause 6(2)(a) of State Environmental Planning Policy (Major Projects) 2005, and
>
> (b) the Minister approves the development consent being treated as an approval for the purposes of section 75W of the Act.
>
> The development consent, if so modified, does not become an approval under Part 3A of the Act."

71 This amendment overcame the exclusion, effected by cl 6(2)(a) of the Major Development SEPP, as a project to which Part 3A applied of development that had been authorised by a consent that was in force under Part 4 of the EPA Act. It did this by taking development consents of the kind specified in cl 8J(8) to be approvals under Part 3A of the Act, but only for the purpose of modifications of such consents under s 75W of the EPA Act. Section 75W(2) simply provides: "The proponent may request the Minister to modify the Minister's approval for a project…". The term "Minister's approval" was defined in s 75W(1) to mean "an approval to carry out a project under this Part…". The effect of cl 8J(8) was that certain development consents were taken to be such a Minister's approval, so as to allow a proponent to request the Minister under s 75W to modify such a development consent. The development consent, if so modified, did not, however, become an approval under Part 3A of the EPA Act.

72 In late 2006, the Dartbrook Mine was placed in care and maintenance. The longwall mining equipment was removed, the Hunter Tunnel for the conveyance of coal from the Wynn Seam to the East Site was decommissioned, and the underground coal conveyor system was removed. The mine has remained in care and maintenance since that time.

73 On 1 October 2011, Part 3A of the EPA Act was repealed by the *Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011*. Schedule 1

to this Amendment Act inserted a new Sch 6A to the EPA Act, which provided for transitional arrangements on the repeal of Part 3A. One of the arrangements (in cl 3(1)) was for Part 3A to continue to apply to "transitional Part 3A projects", which were defined in cl 2 (Sch 1, s 1.7 [2]). The Dartbrook Mine was not a transitional Part 3A project as defined.

74 Clause 3(4) of Schedule 6A revoked any declaration of development as a project under Part 3A, such as the declaration under the Major Development SEPP, if the development is not, or ceases to be, a transitional Part 3A project.

75 The transitional arrangements in the Schedule 6A to the EPA Act were revised by various Regulations. One was the Environmental Planning and Assessment Amendment (Part 3A) Regulation 2011, the revised arrangements commencing on the repeal of Part 3A, and another was the Environmental Planning and Assessment Further Amendment (Part 3A Repeal) Regulation 2011, which commenced on 1 December 2011. Neither of these amendments to Schedule 6A to the EPA Act caused the Dartbrook Mine to become a transitional Part 3A project.

76 The Environmental Planning and Assessment Amendment (Part 3A Repeal) Regulation 2011 did, however, amend Schedule 6A to add a new clause that continued the application of Part 3A to modifications of certain development consents. Clause 12 of Schedule 6A provided:

> "Section 75W of Part 3A continues to apply to modifications of the development consents referred to in clause 8J(8) of the Environmental Planning and Assessment Regulation 2000, and so applies whether an application for modification is made before or after the commencement of this clause."

77 The Environmental Planning and Assessment Amendment (Part 3A Repeal) Regulation 2011 also amended Part 1A of the EPA Regulation, to convert it from dealing with major projects under Part 3A to dealing with transitional Part 3A projects. The transitional provisions in cl 8J, originally serving to effect the transition to projects under Part 3A, now served to effect the transition from projects under Part 3A. Clause 8J(8), however, continued to allow proponents to request the Minister under s 75W of the EPA Act to modify a development consent, including a development consent granted by the Minister under Part 4 of the EPA Act. As at 1 October 2011, the date on which Part 3A of the EPA

Act was repealed and the amended Part 1A of the EPA Regulation commenced, clause 8J(8) provided:

> "For the purposes only of modification, the following development consents are taken to be approvals under Part 3A of the Act and section 75W of the Act applies to any modification of such a consent:
>
> (a) a development consent granted by the Minister under section 100A or 101 of the Act,
>
> (b) a development consent granted by the Minister under State Environmental Planning Policy No 34 – Major Employment Generating Industrial Development,
>
> (c) a development consent granted by the Minister under Part 4 of the Act (relating to State significant development) before 1 August 2005 or under cl 89 of Schedule 6 to the Act,
>
> (d) a development consent granted by the Land and Environment Court, if the original consent authority was the Minister and the consent was of a kind referred to in paragraph (c).
>
> The development consent, if so modified, does not become an approval under Part 3A of the Act."

78 The development consent granted by the Minister on 28 August 2001 under Part 4 of the EPA Act was a development consent of a kind described in cl 8J(8) and was therefore amenable to being modified under s 75W of the EPA Act, notwithstanding the repeal of Part 3A (which included s 75W of the EPA Act).

79 These transitional arrangements permitted Part 3A to live on long after its repeal in 2011, as its provisions allowing modification of approvals under Part 3A and development consents under Part 4 still continued in force. Eventually, however, the government brought these transitional arrangements to an end, by the *Environmental Planning and Assessment Amendment Act 2017.* Schedule 13 to that Amendment Act, which was the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017, was taken to be and had effect as a regulation made under the Act (Schedule 10, cl 10.1, [2]). Schedule 10 to that Amendment Act also omitted Schedule 6A from the EPA Act and transferred it to the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 as Schedule 2 (Schedule 10, cl 10.2 [7]). The Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017

commenced on the date of commencement of Schedule 13, which was 1 March 2018.

80 Schedule 2 to this Regulation contained the transferred transitional arrangements on repeal of Part 3A (the former Schedule 6A to the EPA Act). Schedule 4 to this Regulation contained transferred transitional provisions from the EPA Regulation, including cl 8J. Clause 8J(8) remained in the same terms as earlier quoted.

81 Also on 1 March 2018, the Environmental Planning and Assessment Amendment Regulation 2018 commenced. Schedule 1 amended the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017, including importantly inserting cl 3BA which introduced the cut-off date of 1 March 2018 for making a request to modify an approval project under s 75W of the EPA Act (Schedule 1 [9]) and amending cl 12 to make it subject to cl 3BA (Schedule 1 [15]). Schedule 1 also amended Sch 4 of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 to insert a new Part 1A, providing that the interpretation of the transferred transitional provisions of the EPA Regulation (which included cl 8J) was not affected by the transfer and renumbering the part containing the transferred provisions to be Part 1B (Sch 1 [16]).

82 Clause 12 of Schedule 2 of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 allows for the continuing application of Part 3A to modifications of certain development consents:

> "Section 75W of Part 3A continues to apply (subject to clause 3BA) to modifications of the development consents referred to in clause 8J (8) of the Environmental Planning and Assessment Regulation 2000, and so applies whether an application for modification is made before or after the commencement of this clause."

83 As this clause states, this is subject to cl 3BA of Schedule 2. Clause 3BA provides for the winding up of the transitional Part 3A modification provisions on a cut-off date of 1 March 2018. Clause 3BA(2) provides that an approved project cannot be modified under s 75W on or after the cut-off date (which is

defined in cl 3BA(1) to be 1 March 2018) except as provided by the clause. To avoid doubt, clause 3BA(7)(b) provides that subcl (2):

> "extends to a modification under s 75W in relation to a development consent that is taken to be an approved project pursuant to cl 8J of the Environmental Planning and Assessment Regulation 2000".

84 Clause 3BA(3) provides, however, that subcl (2) does not apply if the request to modify the approved project under s 75W was lodged before the cut-off date.

85 Clause 3BA(4) also sets a date by which a request to modify an approved project under s 75W needs to be dealt with:

> "A request to modify an approved project or concept plan under section 75W that may be dealt with because of subclause (3) cannot be dealt with under section 75W if—
>
> (a) the request has not been determined by 1 September 2018, and
>
> (b) the Secretary is of the opinion that insufficient information has been provided to deal with the request and notifies the person who made the request that it will not be dealt with under section 75W."

86 Dartbrook sought to avail itself of the mechanism in s 75W to request the Minister to modify the development consent for the Dartbrook Mine before the cut-off date. Dartbrook lodged its request for modification with the Director-General of the Department of Planning, as required by s 75W(3), on 28 February 2018, just before the cut-off date of 1 March 2018. This was the seventh request for modification of the development consent that Dartbrook had made (the Mod 7 Application).

87 The Mod 7 Application described the original development that the development consent allows as follows:

> "DA231-7-2000 allows for underground mining operation to be undertaking until 5 December 2022. The approved mining activities include longwall mining of the Kayuga, Mr Arthur, Wynn and Piercefield coal seams. DA231-7-2000 allows for coal to be extracted at a rate of up to 6.0 million tonnes per year of Run of Mine (ROM) coal. The approval also authorises the processing and transportation of coal extracted from the underground mine."

88 The Mod 7 Application requested the Minister to modify the development consent in three respects:

> "Undertake mining of the Kayuga Seam using the first workings bord and pillar method as an alternative to the approved longwall mining within the Kayuga seam.

> In addition to the approved operations, ROM coal will also be hauled using road registered trucks on existing private roads to a new shaft facility located between the existing private Western Access Road and New England Highway. The new, enclosed shaft will be used to deliver coal via the existing Hunter Tunnel under the New England Highway to an existing stockpile. Crushed, unbeneficiated raw coal will be delivered to train loadout facility.
>
> Extend the period of DA231-7-2000 [the development consent] by 5 years to 5 December 2027."

89 The Minister had delegated his function under s 75W to modify approvals to the IPC.

90 On 9 August 2019, the IPC approved in part and refused in part the Mod 7 Application. The IPC modified the development consent on conditions to allow coal mining operations to the original date of 5 December 2022 but refused to grant a further extension of 5 years to 5 December 2027.

91 The date of the IPC's determination of the Mod 7 Application of 9 August 2019 is nearly one year after the date of 1 September 2018 in cl 3BA(4)(a) of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 by which a request to modify an approved project may be dealt with. However, cl 3BA(4) operates to prevent a request to modify an approved project under s 75W that may be dealt with because of cl 3BA(3) if not only the request was not determined by 1 September 2018 but also if the Secretary of the Department of Planning is of the opinion that "insufficient information has been provided to deal with the request and notifies the person who made the request that it will not be dealt with under s 75W". In the case of Dartbrook's Mod 7 Application, the Secretary did not notify Dartbrook under cl 3BA(4)(b) that the request will not be dealt with under s 75W. Hence, cl 3BA(4) did not operate to prevent Dartbrook's request from being dealt with under s 75W, notwithstanding that the request was not determined by 1 September 2018.

92 The Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 dealt specifically (in cl 20 of Schedule 2) with modifications of certain approved projects and development consents relating to mining or petroleum development on strategic agricultural land. Clause 20(1) provides:

> "This clause applies to the following requests and applications—

> (a) a request to modify an approved project,
>
> (b) an application for the modification of a development consent referred to in clause 8J(8) of the Environmental Planning and Assessment Regulation 2000,
>
> but only if the request or application relates to mining or petroleum development on the following land—
>
> (c) land shown on the Strategic Agricultural Land Map,
>
> (d) any other land that is the subject of a site verification certificate."

93 If cl 20 does apply, the request or application must be accompanied by a current gateway certificate in respect of the proposed development to be carried out under the modified approval or consent or a site verification certificate that certifies that the land is not biophysical strategic agriculture land: cl 20(4).

94 As earlier noted, Dartbrook's Mod 7 Application is an application for the modification of a development consent referred to in cl 8J(8) of the EPA Regulation (which was transferred to Sch 4 of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017), so that paragraph (b) is satisfied, and the land on which the Dartbrook Mine is carried out is shown on the Strategic Agricultural Land Map, so that paragraph (c) is satisfied. The Mod 7 Application does not, however, relate to "mining or petroleum development", as defined in cl 20(2)(a) of Schedule 2. "Mining or petroleum development" is defined to include:

> "(a) development specified in clause 5 of Schedule 1 to State Environmental Planning Policy (Major Development) 2005 (as in force immediately before the repeal of that Schedule), but only if—
>
> > (i) a mining lease under the Mining Act 1992 is required to be issued to enable the development to be carried out under the modified approval or consent because—
> >
> > > (A) the development is proposed to be carried out outside the mining area of an existing mining lease, or
> > >
> > > (B) there is no current mining lease in relation to the proposed development, …".

95 Whilst the Dartbrook Mine is development specified in cl 5 of Schedule 1 to the Major Development SEPP, the development is not proposed to be carried out outside the mining area of the existing mining leases, CL386, ML1381, ML1456 and ML1497. Accordingly, a mining lease under the *Mining Act 1992* is not required to be issued to enable the development to be carried out on the

modified consent. Clause 20, does not, therefore apply to Dartbrook's Mod 7 Application.

The appeal to the Court against the IPC's decision to refuse the modification

96 Dartbrook appealed against the IPC's decision to refuse in part the Mod 7 Application to modify the development consent. Section 75W(5) provides:

> "The proponent of a project to which section 75K applies who is dissatisfied with the determination of a request under this section with respect to the project (or with the failure of the Minister to determine the request within 40 days after it is made) may, within the time prescribed by the regulations, appeal to the Court. The Court may determine any such appeal."

97 Three of these criteria are satisfied: the development of the Dartbrook Mine is not a critical infrastructure project; Dartbrook is not a public authority; and, but for Part 3A, the provisions of Part 4 would apply to the development. The question is whether the development has or has not "been the subject of a review by the Planning Assessment Commission" within paragraph (c).

98 The IPC is the successor to the Planning Assessment Commission. The IPC, as delegate of the Minister, determined Dartbrook's Mod 7 Application. However, that determination did not constitute "a review" of the development within paragraph (c). The former Planning Assessment Commission not only had the function "to determine applications for the approval of projects and concept plans under Part 3A if those matters are delegated to it by the Minister" (s 23D(1)(a) of the EPA Act as then in force) but also had the function "to review any aspect of the project, or a concept plan, under Part 3A" (under s 23D(1)(b)(ii) of the EPA Act as then in force). The IPC, by the time it determined Dartbrook's Mod 7 Application, did not have any function to review any aspect of a project or a concept plan under Part 3A. The IPC did have the "functions of the consent authority under Part 4 for State significant development that are (subject to this Act) conferred on it under this Act" (s 2.9(1)(a) of the EPA Act) and "any functions under this Act that are delegated to the Commission" (s 2.19(1)(b)), amongst other functions, but it no longer had any function to review any aspect of any project under Part 3A.

99 As Dartbrook's Mod 7 Application was a request for modification of a development consent under s 75W under the repealed Part 3A and not an application for modification of a development consent under Part 4 of the EPA

Act, the IPC was not exercising the function of the consent authority under Part 4 of the EPA Act. Rather, the IPC was exercising the function of the Minister under s 75W to modify the development consent that had been delegated by the Minister to the IPC. The result is that the IPC did not conduct a "review" of the development of the Dartbrook Mine when determining the Mod 7 Application.

100 As a consequence, the development of the Dartbrook Mine was a project to which s 75K applies, so to engage the right of appeal under s 75W(5).

101 Clause 8E(4) of the EPA Regulation (which was transferred to Schedule 4 of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017) prescribed the time within which an appeal may be made under s 75W(5) as being three months after the date on which the proponent received or is taken to have received notice of the determination of the request for a modification of the approval for a project in accordance with s 153 of the EPA Act (as the section was then numbered). The IPC's determination was on 9 August 2019, so that the three month period would not expire earlier than 9 November 2019. Dartbrook lodged its appeal to the Court on 4 November 2019, before the expiry of this three month period.

102 As I will explain further below when dealing with proposed ground 1A, Dartbrook's appeal was made under s 75W(5) of the EPA Act, which was originally within Part 3A. The transitional arrangements preserve not only the mechanism for a proponent to request the Minister under s 75W to modify a development consent but also the right of a proponent who is dissatisfied with the determination of such a request to appeal to the Court. The appeal so permitted remained an appeal under the repealed but saved s 75W(5). The Court has jurisdiction to hear and dispose of an appeal under s 75W(5) in Class 1 of its jurisdiction (s 17(d) of the Court Act before amendment).

The conduct of the appeal in the Court

103 After Dartbrook filed its appeal on 4 November 2019, the Minister filed a statement of facts and contentions on 16 January 2020. The Minister maintained the IPC's decision to refuse the 5 year extension of the development consent sought in the Mod 7 Application for four sets of reasons:

(a) The cumulative impact of the mining operations, which includes the previously approved longwall method as well as the newly approved bord and pillar method, was not adequately considered in the Mod 7 Application (paragraph 32);

(b) In the absence of appropriate consideration of assessment of the air quality, noise, subsidence, groundwater and greenhouse gas emissions, social and environmental costs of the project, and the costs associated with the potential reopening and operation of the washery and reinstatement of the Hunter Tunnel, the modification cannot be considered to be in the public interest (paragraph 33);

(c) The social impacts resulting from a 5 year extension of mining operations under the approval have not been appropriately considered or assessed (paragraph 46); and

(d) The applicant has not established that the proposed extension of the approval for 5 years under the Mod 7 Application is consistent with the facilitation of ecologically sustainable development (paragraph 42).

104 On 19 March 2020, Dartbrook and the Minister participated in a conciliation conference arranged by the Court under s 34 of the Court Act. The conciliation conference was adjourned until 6 July 2020 for the purpose of allowing Dartbrook to provide further material responsive to the Minister’s contention.

105 On 23 July 2020, Dartbrook’s solicitor responded to these contentions, amongst other things, indicating that it would no longer seek to modify the coal clearance system approved under the development consent.

106 On 13 August 2020, the IPC placed Dartbrook’s response to contentions on public exhibition. The IPC received many submissions in response, including one from HTBA.

107 On 7 and 9 October 2020, Dartbrook’s solicitor sent a response and a supplementary response to the submissions received by the IPC.

108 On 12 October 2020, the conciliation conference resumed and an agreement in principle was reached between Dartbrook and the Minister about the terms of a decision that would be acceptable to them. The Minister’s representative indicated that notice of the proposed agreement should be given to the objectors.

109 By 30 October 2020, the terms of the proposed agreement under s 34(3) of the Court Act had been agreed between Dartbrook and the Minister. The conciliation conference resumed on that afternoon, at which time the parties provided the Commissioner with a signed copy of the agreement that they had reached. The terms of the agreement were fivefold:

> "1. The parties have reached agreement as to terms of a decision in the proceedings that would be acceptable to the parties (being a decision that the Court could have made in the proper exercise of its functions).
>
> 2. The terms of the decision are as follows:
>
> > (a) The Appeal is upheld.
> >
> > (b) Leave is granted to the Applicant to make the minor amendments to the application to modify DA231-7-2000 reflected in the Dartbrook Mine Modification Response to Contentions (Hansen Bailey July 2020).
> >
> > (c) The Court notes the Applicant has made an offer to enter into a planning agreement on the terms required by condition 11.4 of Schedule 2 and Appendix 5 of annexure A.
> >
> > (d) The application to modify DA231-7-2000 (MOD7) is approved, subject to the conditions in annexure A.
> >
> > (e) No order as to costs.
>
> 3. A copy of the document referred to in clause 2(b) of this agreement is attached as annexure "B".
>
> 4. Pursuant to sections 34(3)(a) and (b) of the *Land and Environment Court Act 1979* (NSW) there is a requirement for the Court to dispose of the proceedings in accordance with the parties' decision, if the parties' decision is a decision that the Court could have made in the proper exercise of its functions. The parties have identified the jurisdictional pre-requisites of relevance in these proceedings, a copy of which is Annexure "C" to this agreement. The parties are in agreement that the jurisdictional pre-requisites have been satisfied.
>
> 5. The Respondent proposes to give notice for seven days of this agreement and annexures A, B and C on the Independent Planning Commission website on 2 November 2020. The parties request that the Commissioner dispose of these proceedings in accordance with the terms of the decision set out in clause 2 above following the expiry of that notice period and not before 10 November 2020."

110 The document referred to in paragraph 2(b) and attached as annexure B, the Dartbrook Mine Modification Response to Contentions (Hansen Bailey, July 2020), identified the "minor amendments" to the Mod 7 Application in section 1.3 Revised Scope of the Modification. The first amendment was to not proceed with the alternative coal clearance system that was originally proposed in the Mod 7 Application:

> “AQC no longer proposes to proceed with the alternative coal clearance system that was proposed by the Original Modification. The alternative coal clearance system involved truck haulage of ROM coal from the Kayuga Entry and the construction of a new shaft facility. The purpose of the alternative coal clearance system was to bypass a section of the Hunter Tunnel, which is the currently approved method of transporting ROM coal from the underground mine workings to the East Site. Foregoing of the alternative coal clearance system will have the following benefits:
>
> - Avoidance of amenity impacts associated with road transportation of ROM coal; and
>
> - No additional surface infrastructure (i.e. no construction impacts).”

111 The second amendment was to give up the right to mine the Piercefield Seam:

> “DA231-7-2000 permits longwall mining activities in the Piercefield Seam. In order to reduce subsidence and groundwater impacts, the proponent will not mine in the Piercefield Seam unless further approval is obtained. The proponent would continue to be entitled to undertake all other approved activities authorised under DA231-7-2000.”

112 By paragraph 2(b) of the terms of the decision, the parties sought the Court’s leave to allow Dartbrook to amend the Mod 7 Application in these two respects.

113 The revised modification application would therefore continue to seek the first modification sought in the original modification application of undertaking mining of the Kayuga Seam using the first workings bord and pillar method as an alternative to the approval longwall mining within the Kayuga Seam, and the third modification sought in the original modification application of extending the period of the development consent by 5 years to 5 December 2027, but not the second modification sought in the original modification regarding the alternative coal clearance system. In addition, the revised modification application sought a new modification of surrendering the right afforded by the development consent of mining the Piercefield Seam.

114 By paragraph 2(d), the parties sought for the Court to approve the Mod 7 Application (as so amended) on conditions, with the result that the development consent as modified would be in the form of the development consent attached as annexure A. Amongst the conditions that would be imposed by the approval of the Mod 7 Application were conditions that implemented the revised scope of modification of the development, being first not to proceeding with the alternative coal clearance system that had been

sought in the original Mod 7 Application (the second requested modification) and, secondly, not to mine the Piercefield Seam.

115 Condition 1.1 of the consent would require the development to be carried out generally in accordance with the original development application and environmental impact statement in 2000, as well as other documentation, including the Dartbrook Mine Modification Response to Contentions (Hansen Bailey July 2020) referred to in revised condition 1.1(a)(xi).

116 Condition 1.2 implemented the extension of mining operations until 5 December 2027, which had been sought in the original application to modify the development consent.

117 Condition 2.3(c) locked in the surrender of the right to mine the Piercefield Seam:

> "The Applicant must not extract coal from the Piercefield Seam."

118 Revised condition 2.4 locked in the abandonment of the proposed alternative coal clearance system:

> "The Applicant must not construct a new shaft site or deep delivery shaft connecting to the Hunter Tunnel and associated infra-structure during the currency of this approval (ie until 2027)."

119 On 2 November 2020, the IPC published the s 34(3) agreement on its website.

The application for joinder to the appeal

120 On 9 November 2020, HTBA applied by notice of motion to be "joined as the Second Respondent to these proceedings under section 8.15 of the *Environmental Planning and Assessment Act 1979* and/or r 6.24 of the Uniform Civil Procedure Rules 2005" (UCPR).

121 HTBA filed a draft Statement of Facts and Contentions that it would raise if it were to be joined as a party. HTBA raised four contentions:

(1) There is no power to approve the amended Modification Request: "The Court has no jurisdiction to determine the amended 28 February 2018 modification request if leave is granted on the terms in Prayer 2(b) of the s 34 agreement (Amended Modification Request) because the amended Modification Request is so different from the original 28 February 2018 Modification Request (28 February 2018 Modification Application Request) that it constitutes an original request under

repealed s 75W of the *Environmental Planning and Assessment Act 1979.*"

(2) Proposal lacks economic benefits: "The proposal ought be refused because the operation of the mine proposed does not establish the economic benefits of the extension of the approval for five years."

(3) Unacceptable environmental impact from the storage, handling and disposal of rejects and operation of the washery: "The proposal ought be refused because it causes unacceptable environmental impacts, comprising visual, acoustic and air quality impacts, associated with the storage, handling and disposal of rejects on the East Site and operation of the washery over the five year extension and in respect of the Kayuga Seam if it is longwall mined."

(4) Mine water balance and environmental impacts: "The proposal ought be refused because the environmental impacts to surface water and groundwater water quality associated with the use of water for dust suppression, the wash plant, storage in sediment dams, and mine water dams, and the use or disposal of water contained within the Hunter Tunnel and Wynn Seam, are unacceptable over the five year extension and in respect of the Kayuga Seam if it is longwall mine."

The primary judge's decision for joinder

122 HTBA's motion was heard by the primary judge on 12 November 2020. Judgment was reserved and delivered on 20 November 2020. The primary judge ordered that HTBA be joined as a party to the proceedings. The primary judge's decision relied solely on the power to join a party under s 8.15(2) of the EPA Act. Although HTBA did raise the alternative source of power for joinder under r 6.24 of the UCPR, the primary judge did not address that source of power.

123 Section 8.15(2) of the EPA Act provides:

> "On an appeal under this Division, the Court may, at any time on the application of a person or of its own motion, order the joinder of a person as a party to the appeal if the Court is of the opinion—
>
> (a) that the person is able to raise an issue that should be considered in relation to the appeal but would not be likely to be sufficiently addressed if the person were not joined as a party, or
>
> (b) that—
>
> (i) it is in the interests of justice, or
>
> (ii) it is in the public interest,
>
> that the person be joined as a party to the appeal."

124 The primary judge's main basis for joinder was to allow HTBA to raise contention 1, which is that the decision, the terms of which the parties had agreed under s 34(3) of the Court Act, was not a decision that the Court could have made in the proper exercise of its functions. The reason HTBA so contended was that the amended modification request is so different from the original 28 February 2018 modification request, that it constitutes an original request under s 75W of the EPA Act. HTBA particularised six respects in which the amended modification request differed from the 28 February 2018 modification request.

125 The primary judge found that only two of these six respects were maintainable. These two respects were the second and third respects:

> "(2) There would be no mining of the Piercefield seam (being 78.2Mt of coal reserves).
>
> (3) The coal clearance system, which would have included road transport and additional construction, would be abandoned."

126 The primary judge noted that each of these two respects "relies upon a 'reduction' in the scope of the Modification Request to found an argument that the Varied Modification Request is a new application and, therefore, beyond power" (at [50]). The primary judge held that HTBA's contention on these two respects was reasonably arguable:

> "Whilst in most circumstances a reduction in the scope of an application is seen to beneficial and to be endorsed, it does not follow that such a reduction could not arguably change the character of a Modification Request such that it could comprise a new request rather than a variation to such request. These questions will turn on mixed questions of fact and law and have the potential to affect the Commissioner's capacity to make the s 34 Agreement as proposed by the parties. There are presently, on the evidence tendered to me, no particular submissions or consideration of this particular issue such that the Commissioner could be assisted in determining these particulars of Contention 1. The issue is one that is reasonably arguable in the context of the legislative regime and will turn to an extent upon an understanding of the facts. Accordingly, Contention 1(ii) and (iii) are relevantly matters that the Intervenor is able to raise as an issue that should be considered in relation to the appeal but would not be likely to be sufficiently addressed if the person were not joined as a party for the purposes of s 8.15(2) of the EP&A Act. Therefore, the Intervenor should be joined as a party on the terms outlined below." (at [50]).

127 The primary judge noted (at [51]) that the parties could have agreed on a different approach. Rather than Dartbrook seeking the Court's leave to amend its modification application and the Court approving the modification application

so amended, the parties could have agreed for the Court to have approved the original modification application under s 75W on conditions that would exclude mining of the Piercefield Seam and abandon the proposed coal clearance system. However, that is not the approach agreed between the parties. They seek for the Court to grant leave to amend the modification application prior to the grant of approval, thereby raising for consideration the issue of the power of the Court to approve the amended modification application (at [51]).

128 The primary judge therefore found that HTBA is able to raise an issue that should be considered in relation to the appeal but would not be likely to be sufficiently addressed if HTBA were not joined as a party. This is the ground for joinder under s 8.15(2)(a) of the EPA Act.

129 A secondary basis for the primary judge deciding to join HTBA as a party was to allow HTBA to raise contentions 2 to 4, which are merit considerations. The primary judge considered that the consequence of her allowing the joinder of HTBA to the appeal in order to raise the jurisdictional question in contention 1 would be that all three of the parties would not be able to reach agreement under s 34(3) of the Court Act. HTBA would not agree to the terms of the decision that Dartbrook and the Minister had already agreed to. The result would be that there would be no agreement under s 34(3) and the Commissioner would be required to terminate the conciliation conference under s 34(4). The appeal would then need to proceed to a hearing. The Commissioner or Judge hearing the appeal would be required to determine the whole of the matter on its merits (at [52]). The merits will include the issues raised by HTBA in contentions 2 to 4. As neither Dartbrook nor the Minister is likely to raise these issues, the primary judge considered that HTBA should be joined so as to raise the issues in contentions 2 to 4 (at [55]).

Proposed ground 1A: No jurisdiction to join under s 8.15(2)

Dartbrook's argument that the power of joinder under s 8.15(2) is not applicable

130 Dartbrook's first proposed ground of appeal is framed as jurisdictional, but it really is one of power. The primary judge had jurisdiction to determine HTBA's application for joinder to the proceedings, the question was what source or sources of power were available to join HTBA to the proceedings. Dartbrook's

argument is that its appeal against the IPC's decision under s 75W(5) of the EPA Act is not "an appeal under this Division", being Division 8.3 of the EPA Act, so that the power of joinder under s 8.15(2) of the EPA Act was not available to be exercised by the Court.

131 Dartbrook contends that the transitional arrangements on the repeal of Part 3A saved not only the entitlement under s 75W(2) of Dartbrook as a proponent to request the Minister to modify certain approvals and consents but also the right to appeal to the Court under s 75W(5) against a determination of any such request under s 75W(4).

132 Clause 12 of Schedule 2 of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 expressly provided that "Section 75W of Part 3A continues to apply (subject to clause 3BA) to modifications of the development consents referred to in clause 8J(8) of the Environmental Planning and Assessment Regulation 2000…". On its face, this makes the whole of s 75W to continue to apply, including s 75W(2) allowing a proponent to request the Minister to modify an approval, s 75W(4) empowering the Minister to determine the request by modifying the approval or disapproving of the modification, and s 75W(5) entitling a proponent who is dissatisfied with the determination of a request to appeal to the Court.

133 Clause 3BA of Sch 2 of this transitional regulation did set a cut-off date of 1 March 2018 for making a request to modify an approved project under s 75W (cl 3BA(2)). Subclause (2), setting the cut-off date, extended to a modification under s 75W in relation to a development consent that is taken to be an approved project pursuant to cl 8J of the EPA Regulation (which was transferred to become Sch 4 of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017)) (cl 3BA(7)(b)). However, a request to modify an approved project under s 75W continued to be dealt with under s 75W provided the request was lodged before the cut-off date (cl 3BA(3)). An "approved project" in cl 3BA includes a development consent that is taken to be an approved project pursuant to cl 8J(8) of the EPA Regulation.

134 Clause 8J(8) of the EPA Regulation provides that: “For the purposes only of modification, the following development consents are taken to be approvals under Part 3A of the Act and section s 75W of the Act applies to any modification of such a consent…”. One of the consents identified in paragraph (c) is a development consent granted by the Minister under Part 4 of the Act (relating to State significant development) before 1 August 2005. The development consent for the Dartbrook mine is such a consent and is taken to be an approved project pursuant to cl 8J(8)(c) of the EPA Regulation. By operation of cl 8J(8) of the EPA Regulation, s 75W of the Act applies to any modification of this consent. Again, cl 8J(8) applied the whole of s 75W, including the entitlement of a proponent to appeal under s 75W(5) against the determination of a request for modification under s 75W.

135 Dartbrook contends that these transitional provisions continue the right of appeal afforded under s 75W(5) of the EPA Act against a decision of the Minister under s 75W(4) of the EPA Act to disapprove a request to modify a development consent made under s 75W(2) of the EPA Act. Dartbrook’s request for modification, made on 28 February 2018 before the cut-off date, was a request for modification under s 75W(2). The IPC’s determination of Dartbrook’s request was under s 75W(4). Dartbrook, therefore, had a right to appeal under s 75W(5) against this determination to the Court, which it did within time. This appeal under s 75W(5) is distinct from the appeal under s 8.9 of the EPA Act against an application made under ss 4.55 or 4.56 of the EPA Act to modify a development consent. Whilst the latter appeal is an appeal under Division 8.3 of the EPA Act, the former appeal is not an appeal under this Division. Accordingly, the appeal under s 75W(5) of the EPA Act is not an appeal to which the power of joinder in s 8.15(2) of the EPA Act applies.

HTBA’s argument that the power of joinder under s 8.15(2) is applicable

136 HTBA accepted that the transitional provisions operated so as to allow Dartbrook to make the request to modify the development consent under s 75W(2) of the EPA Act, and the Minister, by his delegate the IPC, to determine that request under s 75W(4) of the EPA Act. HTBA disputed, however, that the transitional provisions saved the right of appeal under s 75W(5).

137 First, as a part of the same package of law reform as the transitional provisions, the provisions for appeals against decisions of a consent authority under Part 4 in relation to an application for development consent and for modification of a development consent were collected and re-enacted in Division 8.3 of the EPA Act. Those provisions included an express right of appeal from a determination of an application for the modification of a development consent (s 8.9), formerly located in Part 4 (s 97AA of the EPA Act). An appeal against a determination of a request for modification of a development consent made under s 75W comes within the terms of the appeal provided for by s 8.9. The development consent, if modified under s 75W, does not become an approval under Part 3A, but instead remains a development consent under Part 4 (see cl 8J(8)).

138 Another contextual indicator to which HTBA referred was the removal of the right of appeal by s 8.6(3) in certain circumstances, which would not apply to an appeal under s 75W(5) unless Division 8.3 has application to this type of appeal.

139 Secondly, the right of appeal under s 75W(5) is afforded to "the proponent of a project to which section 75K applies". HTBA notes that s 75K was repealed and, having nothing to do with "modification", is not part of the body of law continued in force by cl 8J(8).

140 For these two reasons, HTBA submits that it is unlikely that cl 8J(8) was intended to pick up the right of appeal in s 75W(5), but instead an appeal from a decision made under s 75W now lies under s 8.9 in Division 8.3.

141 Thirdly, if s 75W(5) is picked up by cl 8J(8), HTBA submits it does not apply to the IPC's determination of Dartbrook's request to modify the development consent for the Dartbrook mine. The right of appeal under s 75W(5) only arises if the project is one "to which section 75K applies". Section 75K applied only if "the project has not been the subject of a review by the Planning Assessment Commission": s 75K(1)(c). The IPC is taken to be a continuation of, and the same legal entity, as the Planning Assessment Commission: cl 7 of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017. HTBA submits that the process of determination

of Dartbrook's request to modify the development constituted a "review" within the meaning of s 75K(1)(c), so that the project was not a project to which s 75K applies. No right of appeal under s 75W(5) therefore arose in this case.

142 Fourthly, HTBA submits that even if Dartbrook had a right of appeal under s 75W(5), s 8.9 can be regarded as bringing all appeals that come within its language, including an appeal under s 75W(5), within the regime of Division 8.3. That is to say, an appeal under s 75W(5) is also an appeal under s 8.9 and hence an appeal under Division 8.3.

The power of joinder under s 8.15(2) is not applicable

143 I find that the right of appeal provided for by s 75W(5) was continued in force by the transitional provisions and this constituted a distinct right of appeal to the right of appeal provided for by s 8.9 of the EPA Act. The consequence is that Dartbrook's appeal against the IPC's determination of the request to modify the development consent was an appeal under s 75W(5), which is not an appeal under Division 8.3.

144 Clause 12 of Sch 2 of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 expressly provided that s 75W continues to apply to modifications of the development consents referred to in cl 8J(8). Clause 8J(8) expressly provided that s 75W applies to any modification of the development consents referred to in the clause. The development consent for the Dartbrook mine was one such consent referred to in cl 8J(8). The upshot is that, by operation of both cl 12 of Sch 2 and cl 8J(8), the whole of s 75W continues to apply to Dartbrook's request to modify the development consent (under s 75W(2)), the IPC's determination of this request (under s 75(4)) and Dartbrook's appeal to the Court against the IPC's determination of the request (under s 75(5)).

145 There is no justification in the text of these transitional provisions to construe s 75W as applying only to a request to modify a development consent and the determination of this request, but not to an appeal against the determination of the request.

146 Part 3A of the EPA Act was established as a distinct regime for obtaining approval, and modifying any approval, for projects to which Part 3A applied,

and operated separately from the regime in Part 4 of the EPA Act for obtaining development consent, and modifying development consent, for developments to which Part 4 applied. For this reason, separate rights of appeal were established against determinations of applications and requests under Part 3A and applications under Part 4. An example is the right of appeal under s 75W(5) of a proponent of a project who is dissatisfied with a determination under s 75W(4) of a request under s 75W(2) to modify an approval for a project under Part 3A. This right of appeal is distinct from the separate right of appeal under the former s 97AA and the current s 8.9 by an applicant who is dissatisfied with a determination of a consent authority with respect to the applicant's application under the former ss 96 or 96AA and the current ss 4.55 and 4.56 to modify a development consent under Part 4.

147 As the saved provisions in s 75W to request modification of an approval for a project and to appeal a determination of such a request were in the repealed Part 3A, the appeal provided for in s 75W(5) will also be under Part 3A. Section 8.15(2), however, is expressly stated to apply to "an appeal under this Division", which is Division 8.3 in Part 8 of the EPA Act. There are three kinds of appeal under Division 8.3. Section 8.6(1) provides:

> "A decision of a consent authority under Part 4 in relation to an application for development consent or a development consent is (if this Division so provides) subject to appeal to the Court under this Division."

148 The first two kinds of appeal are "in relation to an application for development consent". An appeal may be brought by an applicant for development consent who is dissatisfied with the determination of an application by a consent authority, under s 8.7, or a person who duly made a submission by way of objection during the public exhibition of an application for development consent for designated development (an objector), who is dissatisfied with the determination of the consent authority to grant consent.

149 The third kind of appeal is "in relation to a development consent". An applicant for the modification of a development consent who is dissatisfied with the determination of an application by the consent authority may appeal against the determination, under s 8.9. As I have noted, this right of appeal under s 8.9 is separate to the saved right of appeal under s 75W(5) and is only with respect

to a determination of a consent authority of an application to modify a development consent under ss 4.55 or 4.56 of the EPA Act.

150 Contrary to HTBA's submissions, there is no justification in the context for an interpretation that the appeal right under s 75W(5) was not saved but instead became s 8.9. The collation and transfer of rights of appeal against determinations of applications for development consent or to modify development consents from Part 4 to Part 8 (in Division 8.3) was unrelated to the bringing to an end the entitlement to request the modification of development consents under s 75W. In particular, the transfer of the former s 97AA in Part 4 to be s 8.9 in Division 8.3 of Part 8 did not effect any change in the rights of appeal against determinations of applications to modify development consents under Part 4. The former s 97AA applied to appeals against applications to modify development consents made under the former s 96 and s 96AA, whilst s 8.9 applies to appeals against determinations of applications to modify consents made under the equivalent provisions of ss 4.55 and 4.56. Section 8.9 did not pick up and incorporate the appeal provided for by s 75W(5).

151 The inclusion of the restraint on a right of appeal under Division 8.3 in s 8.6(3) is of no interpretive assistance. As that restriction only applies to a "right of appeal under this Division", it cannot assist in identifying the rights of appeal under the Division; that task necessitates examination of other provisions in the Division to identify the rights of appeal under the Division. One of these provisions is in s 8.9, giving a right of appeal against a determination of an application for modification of development consent. The scope of that right of appeal is to be determined by interpretation of the section; no assistance is to be gained from s 8.6(3) restricting that right of appeal in the circumstances referred to in the subsection.

152 No assistance is also to be derived from the fact that s 75K, the provision referred to in s 75W(5), was repealed and not expressly saved. The transitional provisions continued the application of s 75W for the purpose of enabling modification of development consents referred to in cl 8J(8). The whole of s 75W, including the right of appeal provided for in s 75W(5), continued to apply

under these transitional provisions. The right of appeal under s 75W(5) is framed as only applying to a project "to which section 75K applies". By this language, s 75K continues to apply for the purpose of ascertaining whether the project is one "to which section 75K applies". Section 75K(1) specifies the projects to which the section applies. This subsection is capable of being applied for the limited purpose of ascertaining whether an applicant who made a request under s 75W(2) to modify a development consent is a proponent of a project to which section 75K applies, so as to have a right of appeal under s75W(5) of the EPA Act.

153 As a matter of fact, Dartbrook is a proponent of a project to which s 75K applies. The IPC determined Dartbrook's request to modify the development consent under delegation from the Minister. The IPC was not exercising any function of review. As I have earlier explained, the function of review by the Planning Assessment Commission was a distinct function to the functions of determination of an application for development consent or for modification of a development consent and, by the time the IPC determined Dartbrook's request to modify the development consent, could not be and was not exercised by the IPC.

154 The result is that Dartbrook's appeal against the IPC's determination of the request to modify the development consent was under s 75W(5) and not s 8.9, and that appeal was under Part 3A, not Division 8.3 of Part 8. As the power of joinder in s 8.15(2) can only be exercised in relation to appeals under Division 8.3, the power was not available to the primary judge to join HTBA as a party to Dartbrook's appeal under s 75W(5), which was not an appeal under Division 8.3.

HTBA's argument that joinder is supported by an alternative source of power

155 The validity of the primary judge's decision to join HTBA as a party to the appeal is not necessarily affected by the primary judge mistaking the source of power to make the decision: *Brown v West* (1990) 169 CLR 195 at 203; [1990] HCA 7; *Attorney General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1; [2013] HCA 3 at [175]. Validity depends simply on whether a relevant power existed to support the decision: *Johns v Australian Securities*

Commission (1993) 178 CLR 408 at 426; [1993] HCA 56. As was held in *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1; [2012] HCA 3 at [34]:

> "A mistake by an administrative decision-maker as to the source of his or her power to make a decision does not necessarily invalidate the decision if it is able to be supported by another source of power. Whether it can be supported by the other source of power will depend upon whether that power is subject to requirements which the decision-maker has failed to meet because of his or her belief as to the source of the power or for some other reason. As Heydon J said in *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318 at 362 [124]:
>
> > 'If the maker of an administrative decision purports to act under one head of power which does not exist, but there is another head of power available and all conditions antecedent to its valid exercise have been satisfied, the decision is valid despite purported reliance on the unavailable head of power.'"

156 The latter point is important. As Meagher JA observed in *Bondi Beach Astra Retirement Village Pty Ltd v Assem* [2020] NSWSC 1814 at [76]:

> "A mistake as to the source of a power will ordinarily be relevant to the validity of an exercise of power only if it leads to the disregard of requirements which condition the power, such as the formation of a particular opinion or state of satisfaction."

157 In this case, HTBA contends, there was an alternative source of power capable of sustaining the judge's decision to join HTBA to Dartbrook's appeal under s 75W(5). This was UCPR r 6.24. HTBA referred to this rule as a source of power in the alternative to s 8.15(2) of the EPA Act in its notice of motion applying to be joined as a party to the proceedings. That rule applies to all civil proceedings in the Land and Environment Court: UCPR r 1.5. Rule 6.24(1) provides:

> "If the court considers that a person ought to have been joined as a party, or is a person whose joinder as a party is necessary to the determination of all matters in dispute in any proceedings, the court may order that the person be joined as a party."

158 The Court may exercise the power in r 6.24(1) to order the joinder of a person as a party in two circumstances: first, if the Court considers that the person ought to have been joined as a party and, second, if the Court considers that the person is one whose joinder as a party is necessary to the determination of all matters in dispute in the proceedings.

159 In the present case, the first circumstance in r 6.24(1) is not applicable, but HTBA contends the second circumstance in r 6.24(1) is applicable. The second circumstance is similar to, although not the same as, the circumstance in s 8.15(2)(a) of the EPA Act that the person "is able to raise any issue that should be considered in relation to the appeal that would not be likely to be sufficiently addressed if the person were not joined as a party."

160 HTBA contends the primary judge did consider and form the opinion that HTBA is able to raise the jurisdictional issue in contention 1 that should be considered in relation to the appeal but would not be likely to be sufficiently addressed if HTBA were not joined as a party (in [50] of the judgment). That consideration and the formation of that opinion by the primary judge is sufficiently similar to the consideration and opinion required by r 6.24(1) that the joinder of HTBA as a party "is necessary to the determination of all matters in dispute." The matters relied on by the primary judge for finding that HTBA was proposing to raise issues that "should be considered in the appeal", but were not otherwise "likely to be sufficiently addressed", constitute strong reasons why HTBA is a person whose joinder is "necessary" for the determination of all issues in dispute.

161 The issue as to whether the Court had jurisdiction to make orders in terms of the decision agreed between the parties under s 34(3) of the Court Act necessarily needed to be decided by the Court in order to dispose of the proceedings in accordance with the decision agreed between the parties. This is a matter in dispute in the proceedings, regardless of whether the parties raised the issue, because it goes to the jurisdiction of the Court to determine and dispose of the proceedings. In this sense, joinder of HTBA as the person raising the jurisdictional issue is "necessary" to the determination of all matters in dispute in the proceedings.

162 In these circumstances, "all conditions antecedent" to the valid exercise of the alternative source of power under UCPR r 6.24 were satisfied, so that the primary judge's decision to join HTBA as a party to the appeal is valid despite the primary judge's purported reliance on the unavailable source of power under s 8.15(2) of the EPA Act.

163 HTBA further submitted that its joinder as a party is necessary to ensure that the rules of procedural fairness are observed. The Minister did not give public notice of its intention to enter an agreement under s 34(3) of the Court Act until after the agreement was made. Had the specific terms of the decision agreed between the Minister and Dartbrook been made public before the agreement under s 34(3) was made, and had the Minister made its change in attitude to defence of the proceedings apparent before that time, HTBA would have had the opportunity to at least put full submissions on the jurisdictional question before the Commissioner as part of the opportunity to make submissions in the initial phase of the conciliation conference under s 34 of the Court Act (this being the Court's usual practice in the conduct of conciliation conferences). As a non-party, this would have been HTBA's last opportunity to put submissions before the Court before the parties moved into closed negotiations in the conciliation conference. HTBA submits that procedural fairness required that HTBA be given an opportunity to persuade the Commissioner, who would decide whether there is power to dispose of the proceedings in accordance with the decision agreed between the parties, that there was no jurisdiction to do so: *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326; [2015] HCA 40 at [42], [45], [46], [52], [53], [60] and [69].

164 HTBA submits that, although its rights and interests are not directly affected, it nevertheless is a representative body of an industry that operates in close proximity to the Dartbrook mine, whose operations would be modified and extended in time by the modification application that was the subject of the proceedings. This is a sufficient interest upon which the primary judge could find that joinder was necessary.

165 HTBA notes that UCPR r 6.24(1) has been used by the Land and Environment Court to join objectors to proceedings in Class 1 of the Court's jurisdiction, including in *Leimroth v Wingecarribee Shire Council* [2012] NSWLEC 256 and *Toplace Pty Ltd v The Council of the City of Sydney* [2020] NSWLEC 121.

Dartbrook's argument that no alternative source of power is applicable

166 Dartbrook contests that UCPR r 6.24 could support the primary judge's decision to join HTBA as a party to the appeal.

167 First, the criteria under r 6.24(1) are different to the criteria under s 8.15(2), so that the primary judge's decision that the criteria under s 8.15(2) are satisfied cannot suffice to establish that the criteria under r 6.24(1) are satisfied: *Eastman v Director of Public Prosecutions (ACT)* at [124].

168 Secondly, r 6.24 does not support a wide ranging discretion to join disaffected parties to civil proceedings. As noted in *Burton v Babb* [2020] NSWCA 331 at [42]:

> "Although joinder under r 6.24 is discretionary, no occasion for the exercise of discretion arises unless and until the court is satisfied of the existence of one of the two pre-conditions already discussed [in r 6.24]."

169 Dartbrook contends that neither of the pre-conditions in r 6.24(1) were satisfied, so that no occasion for the exercise of the discretion arose.

170 Thirdly, Dartbrook contests that the second precondition, that joinder "is necessary to the determination of all matters in dispute", was established. Dartbrook submits that at the time of HTBA's application for joinder, there were no matters in dispute between the Dartbrook and the Minister in relation to which HTBA's joinder could be necessary. Indeed, Dartbrook submits, it was because the question of jurisdiction of the Court to dispose of the proceedings in accordance with the decision agreed between the parties and all merit issues were not in dispute by reason of the parties having reached agreement under s 34(3) of the Court Act that the primary judge considered that the discretion to order joinder under s 8.15(2)(a) was enlivened.

171 Fourthly, Dartbrook further submitted that regardless of whether there were any matters in dispute, the joinder of HTBA was not "necessary" to the determination of any matter in dispute. Dartbrook contends that in order for the joinder of a person to be "necessary", the party's rights against or liabilities to any person need to be directly affected by a decision or order in the proceedings, citing *Pegang Mining Co Ltd v Choong Sam* [1969] 2 MLJ 52 at 55-56; *State of Victoria v Sutton* (1998) 195 CLR 291 at 316; [1998] HCA 56; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [131]; [2010] HCA 19; *Ross v Lane Cove Council* (2014) 86 NSWLR 34; [2014] NSWCA 50 at [51]-[53]; and *Burton v Babb* at [23]-[26].

172 Here, no right or liability of HTBA will be directly affected by any decision or order that might be made by the Commissioner disposing of the proceedings in accordance with the decision agreed between the parties under s 34(3) of the Court Act. The fact that HTBA might be a representative body of an industry that operates in close proximity to the Dartbrook mine is insufficient; no rights or liabilities of HTBA are directly affected by that circumstance.

173 Dartbrook submits that the decisions of the Land and Environment Court joining a person as a party to proceedings in Class 1 of the Court's jurisdiction under UCPR r 6.24 do not establish otherwise. Another decision in *Positive Change for Marine Life Inc v Byron Shire Council* [2015] NSWLEC 147 at [19] found that the joinder of the Byron Preservation Association was not necessary to the determination of all matters in dispute in the proceedings, amongst other reasons because "[t]he Association, as a legal entity, cannot claim to be directly affected by any order made in the proceedings."

174 Fifthly, the joinder of HTBA was not necessary to avoid procedural unfairness. HTBA did not have any right to make full submissions to the Commissioner presiding over the conciliation conference on either the jurisdictional question or any merit issues before the parties went into closed negotiations in the conciliation conference. HTBA cannot have been denied an opportunity to be heard arising from a right it did not have.

Alternative source of power not capable of supporting decision for joinder

175 I find that UCPR r 6.24(1) is not an available source of power capable of supporting the primary judge's decision to join HTBA to the proceedings. The reason is that the primary judge did not consider and form an opinion of satisfaction regarding all of the requirements upon which a valid exercise of the power in r 6.24(1) depends. I will explain my reasons for so finding.

176 A court can exercise the discretionary power under r 6.24(1) to join a person as a party to proceedings in two circumstances: first, where the court considers that the person "ought to have been joined as a party" and, secondly, where the court considers that the person is "a person whose joinder is necessary to the matters in dispute" in the proceedings. In the present case, the first

circumstance is not applicable; the question is whether the second circumstance is applicable.

177 In both circumstances, the outcome of the exercise of the discretionary power is the joinder of the person as a party to the proceedings. There are number of different ways in which a person may be present before the court, of which being joined as a party to the proceedings is one. Joinder as a party, however, is the particular mode of presence before the court that r 6.24(1) requires to be necessary to the determination of all matters in dispute in the proceedings. Under the second circumstance, this outcome of joinder as a party needs to be "necessary" in order to achieve "the determination of all matters in dispute" in the proceedings.

178 The court's consideration of this second circumstance in r 6.24(1) involves, first, identifying what are "all matters in dispute" in the proceedings; secondly, ascertaining that those matters need "determination" by the court in the proceedings; and thirdly, evaluating that the joinder of the person as a party is "necessary" to achieve "the determination of all matters in dispute".

179 As to the first consideration, what will constitute a matter in dispute in the proceedings will depend on the nature of the proceedings. The proceedings in the decisions on joinder as a party to which Dartbrook referred involved private, inter-parties disputes. In such proceedings, the matters in dispute are mostly defined and delineated by the parties in the pleadings. However, the phrase "all matters in dispute in the proceedings" is not limited to matters arising on the existing pleadings and "may also include those disputed issues of fact which are subjacent to the pleadings": *Qantas Airways Ltd v AF Little Pty Ltd* [1981] 2 NSWLR 34 at 38. In contrast, the proceedings involved in the present case are an administrative or merits review appeal against the decision of a public authority to determine an application for a form of statutory approval. The matters in dispute in such proceedings are not limited to the issues joined between the parties to the appeal, in the statement of facts and contentions that serve the purpose of pleadings in an administrative appeal in the Court, but necessarily must also involve issues going to the power of the Court,

exercising the administrative functions of the public authority on the appeal, to determine the application for approval.

180 Where the parties reach agreement under s 34(3) of the Court Act as to the terms of a decision that would be acceptable to them for the disposal of the proceedings, the issue of whether the Court has jurisdiction to dispose of the proceedings in accordance with the decision agreed between the parties is a matter that is necessary to be decided. Section 34(3) of the Court Act is clear – the Court only has jurisdiction to dispose of the proceedings in accordance with the decision agreed between the parties if it is "a decision that the Court could have made in the proper exercise of its functions". This is a matter in dispute in the proceedings regardless of whether the parties raise the issue or reach agreement on the issue, because it goes to the jurisdiction of the Court to determine and dispose of the proceedings. It is well settled that the Court cannot gain jurisdiction by the consent of the parties: *Al Maha Pty Ltd v Huajun Investments Pty Ltd* at [29], [30], [191], [200] and [206].

181 In this case, the issue raised by HTBA in contention 1 went to the jurisdiction of the Court: the decision agreed between the parties for the Court to grant leave to Dartbrook to amend its application to modify the development consent was not a decision the Court could have made in the proper exercise of its functions. If that contention be correct, the Court would have no jurisdiction to dispose of the proceedings in accordance with the decision agreed between the parties, by reason of s 34(3) of the Court Act. The jurisdictional question raised by HTBA was, therefore, a matter in dispute in the proceedings, regardless of whether it was a matter in dispute between the parties.

182 The second consideration in deciding whether to exercise the power to join a person as a party is ascertaining that the matter in dispute requires "determination" by the Court. This depends on the stage at which application for joinder is made. In the present case, HTBA applied to be joined after the parties had reached agreement on the terms of a decision that was acceptable to them at a conciliation conference under s 34(3) of the Court Act. That agreement resolved all but one of the matters in dispute in the proceedings. All of the merit considerations concerning the acceptability of the proposed

modification of the development consent raised by the Minister in the statement of facts and contentions and joined between the parties, were resolved. Hence, although those merit considerations were once matters in dispute in the proceedings, they ceased to be on the parties reaching agreement under s 34(3) of the Court Act and the Court no longer was called upon to make a "determination" of these matters. The only matter in dispute in the proceedings remaining to be determined by the Court was that required by s 34(3) of whether the decision agreed between the parties was a decision the Court could have made in the proper exercise of its functions.

183 It is the determination of this matter in dispute in the proceedings in respect of which the Court needed to consider whether the joinder of HTBA as a party was necessary. Rule 6.24(1) simply refers to "the determination" of all matters in dispute in the proceedings. The predecessor of r 6.24(1), Pt 8 r 8 of the Supreme Court Rules 1970, and the English rules of court on which that rule was based, expanded on the determination required. Those earlier rules stated the Court may add a person as a party if the person is "a person whose joinder as a party is necessary to ensure that all matters in dispute in the proceedings may be effectually and completely determined and adjudicated upon." Although the current rule now speaks simply of "determination", it still embodies the notion of its predecessor of effectual and complete determination. The determination is of course by the Court. The inquiry is to ascertain whether and how the joinder of the person as a party will enable the effectual, that is to say, effective and successful, and complete determination of all the matters in dispute.

184 The third consideration requires the Court to find that the joinder of the person as a party is "necessary" to the Court's determination of all matters in dispute in the proceedings. On this requirement, previous decisions differ in preferring a narrower or a wider construction of the rule: see, for example, the narrower view of Devlin J in *Amon v Raphael Tuck & Sons Ltd* [1956] 1 QB 357 at 380 and the wider view of Denning MR in *Gurtner v Circuit* [1968] 2 QB 587 at 595. However, as Lord Morris of Borth-y-Gest observed in *Vandervell Trustees Ltd v White* [1971] AC 912 at 920, "I do not think that any process of giving a wide or liberal interpretation to the rule can be employed to alter it or to give it an

enlarged meaning which, on a fair and reasonable interpretation, it does not bear." Viscount Dilhorne in the same case equally observed: "However wide an interpretation is given, it must be an interpretation of the language used. The rule does not give power to add a party whenever it is just or convenient to do so": at 935-936.

185 Rule 6.24(1) gives power to join a person as a party to proceedings if the "joinder as a party", being the particular mode of presence before the court allowed by the rule, is "necessary" to the determination of all matters in dispute in the proceedings. Courts have identified some circumstances where joinder is and is not necessary, but such identification does not exhaust the circumstances in which joinder as a party may or may not be considered to be necessary. As Diplock LJ pointed out in *Gurtner v Circuit* at 602, tests such as that formulated by Devlin J in *Amon v Raphael Tuck & Sons Ltd* at 380, should not be treated as comprehensive, indeed, they "illustrate the undesirability of propounding general propositions wider than are strictly necessary for the determination of the particular case": at 602.

186 Similar caution was expressed by Needham J in *Re Great Eastern Cleaning Services Pty Ltd and the Companies Act* [1978] 2 NSWLR 278 at 281 about propounding tests as to the application of the rule:

> "Although it is not possible to find a principle unanimously adopted in the decisions, and although the conclusion I have suggested might be inconsistent with the principles put forward in some of the cases, it seems to me that the rule must be construed in accordance with the ordinary meaning of its words, unless there is an authority binding on me which decides to the contrary. I think the House of Lords, in *Vandervell Trustees Ltd v White*, construed the words of the equivalent English rule without placing on them any such gloss as, for example, was placed upon them by Wilmer J in *The Result* and by Devlin J in *Amon v Raphael Tuck & Sons Ltd.* The English Court of Appeal decision in *Gurtner v Circuit* is inconsistent with there being any such gloss."

187 Circumstances in which courts have held joinder of a person as a party is "necessary" fall into two main categories: first where the determination of the matters in dispute in the proceedings will affect the person to be joined in some material respect, such as directly affecting their rights or interests, and secondly, where the person to be joined can assist the Court in the determination of the matters in dispute. Cases in the first category include:

(a) where the person seeking to be joined is “able to show that some legal right enforceable by him against one of the parties to the action or some legal duty enforceable against him by one of the parties to the action will be affected by the result of the action”: *Fire Auto and Marine Insurance Ltd v Greene* [1964] 2 QB 687 at 697;

(b) where the person’s “rights against or liabilities to any party to the action in respect of the subject matter of the action [will] be directly affected by any order which may be made in the action”: *Pegang Mining Co Ltd v Choong Sam* at [55]-[56]; *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 524; [1996] FCA 870; *John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd* at [131];

(c) where the person to be joined “should be bound by the result of the action and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party”: *Amon v Raphael Tuck & Sons Ltd* at 380;

(d) where the determination of a dispute between two parties “will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill”: *Gurtner v Circuit* at 595; and

(e) where “the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff upon the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained”: *Gurtner v Circuit* at 602-603; *The State of Victoria v Sutton* at [77].

188 Cases in the second category include where the person seeking joinder “is in a position to put before the Court matters which could be relevant to the exercise of discretion”, being the matter in dispute, and “there is no one else who has been shown to have any interest in putting forward such matter”: *Re Great Eastern Cleaning Services Pty Ltd and The Companies Act* at 281.

189 The reason for joinder as a party being necessary differs between these categories of circumstances. For the first category, it is necessary to join the person as a party in order to allow the person to protect the person’s rights or liabilities, to make any judgment or order binding on the person, or to accord the person procedural fairness. For the second category, it is necessary to join the person as a party in order to assist the court to determine, effectually and completely, all matters in dispute in the proceedings.

190 Conversely, courts have held that the joinder of a person as a party is not necessary where the matters in dispute "can be effectively and completely determined and adjudicated upon in the absence of" the person seeking to be joined to the proceedings: *Vandervell Trustees Ltd v White* at 930, 936. This of course, is merely a statement of the non-satisfaction of the required criterion of the rule. Nevertheless, by so expressing the criterion, it focuses attention on the requirement that the mode of presence of being joined as a party to the proceedings is "necessary" to the determination of the matters in dispute in the proceedings.

191 In the present case, the joinder of HTBA as a party to the proceedings is not necessary because the determination of the proceedings would not affect HTBA's rights against or liabilities to any party to the action, or so that HTBA should be bound by the decision or orders made by the Court, or for any reason of procedural fairness. Those circumstances, applicable to private, inter-partes litigation, are not applicable to this administrative or merits review appeal.

192 In relation to rights and liabilities, no right or interest of HTBA will be directly affected by the determination of the proceedings. The facts that HTBA is a representative body of an industry, thoroughbred horse breeders, and that some of its members operate their business in proximity to the Dartbrook mine, are insufficient to establish a direct effect on HTBA's rights and interests.

193 In relation to procedural fairness, HTBA has not advanced a sound basis for being owed any duty to be afforded procedural fairness. HTBA had no legal right to be afforded an opportunity to make a submission on the jurisdictional question, stemming from either s 34 of the Court Act or the particular conduct of the conciliation conference in this case.

194 Rather, HTBA contends that its joinder as a party is necessary to enable it to put before the Court evidence and argument as to the Court's determination of the matter in dispute of the jurisdiction of the Court to dispose of the proceedings in accordance with the decision agreed between the parties, in circumstances where neither of the current parties, Dartbrook and the Minister, will put forward such material to assist the Court to determine the matter. This

was held to be sufficient in *Re Great Eastern Cleaning Services Pty Ltd and the Companies Act* at 281.

195 But the critical question is whether it is "necessary" to join HTBA "as a party" to the proceedings in order for it to assist the Court in its determination of this matter in dispute or whether it could provide such assistance by some other mode of presence than being joined as a party.

196 There are two potential other modes of presence of a person in an administrative or merits review appeal in the Court. The first is by being allowed to appear to inform the Court on any matter and in such manner as the Court thinks appropriate. Under s 38(2) of the Court's jurisdiction, the Court "may inform itself on any matter in such manner as it think appropriate and as the proper consideration of the matters before the Court permits." This power has been used by the Court to grant leave to persons to appear at a hearing of proceedings in Class 1 of the Court's jurisdiction to inform the Court on matters in dispute in the proceedings, including by calling evidence, cross-examining other parties' witnesses and making submissions. This has been referred to as a Double Bay Marina order, after the case in which such an order was first made, *Double Bay Marina Pty Ltd v Woollahra Municipal Council* (1985) 54 LGRA 313 at 314-315.

197 The second mode of presence is by the Court appointing a person as an amicus curiae. The justification for allowing a person to appear as an amicus curiae is the willingness of the person to assist the Court in its determination of the matters in dispute. As Brennan J in *Levy v State of Victoria* (1997) 189 CLR 579 at 604; [1997] HCA 31 explained:

> "The footing on which an *amicus curiae* is heard is that that person is willing to offer the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would not otherwise have been assisted. In *Kruger v The Commonwealth*, speaking for the Court, I said in refusing counsel's application to appear for a person as *amicus curiae*:
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> > 'As to his application to be heard as amicus curiae, he fails to show that the parties whose cause he would support are unable or unwilling adequately to protect their own interests or to assist the Court in arriving at the correct determination of the case. The Court must be cautious in considering applications to be heard by persons who would be amicus curiae lest the efficient operation of the Court be prejudiced. Where the Court has parties before it who are willing and able to

> provide adequate assistance to the Court it is inappropriate to grant the application.'"

198 The question that arises is whether the Court has power to allow a person to appear by either of these modes in a conciliation conference arranged under s 34(1) of the Court Act. On the face of the powers, there would appear to be no reason why the Court could not allow a person to appear either to inform the Court on a particular matter in dispute that it needs to determine at the conciliation conference or as an amicus curiae to assist the Court in its determination of such matter. The Court's making of either order provides the authority for the person to be present at the conciliation conference, notwithstanding that the person is not a party.

199 The availability of these powers to allow a person to be present by either of these modes at the conciliation conference in order to assist the Court in the determination of the matters in dispute in the proceedings has the consequence that the joinder of a person as a party, the particular mode of presence allowed by r 6.24(1), may not be necessary to the determination of the matters in dispute in these proceedings.

200 I have examined the application of r 6.24(1) to the circumstances of the present case. I have found that two of the three considerations required by r 6.24(1) may be capable of being met: there is a matter in dispute in the proceedings concerning the jurisdiction of the Court to dispose of the proceedings in accordance with the decision agreed between the parties and the Court is obliged by s 34B(3) of the Court Act to make a determination of this matter.

201 The third consideration, however, might not be capable of being met: it may not be "necessary" to join HTBA as a party in order for the Court to determine the matter as other modes of presence may be sufficient to allow HTBA to assist the Court in its determination of the matter.

202 I have expressed these findings in terms of the considerations required by r 6.24(1) being capable or not capable of being met. This is because the primary judge did not in fact consider r 6.24(1) and form any opinion about whether the considerations required by r 6.24(1) were or were not met. The question I have been examining is whether r 6.24(1) is capable of sustaining the decision the primary judge did make to join HTBA exercising the different

source of power under s 8.15(2) of the EPA Act. The source of power in r 6.24(1) will only be capable of sustaining the primary judge's decision if all requirements which condition the exercise of the power under r 6.24(1) are met. As the exercise of the power under r 6.24(1) is dependent on the Court's consideration and satisfaction of the requirements in r 6.24(1), the availability of r 6.24(1) as a source of power is dependent on the primary judge considering and being satisfied of the substance of the requirements even though the primary judge did not identify r 6.24(1) as the source of power for her decision to join HTBA.

203 The primary judge, by her consideration of the requirements of s 8.15(2) of the EPA Act, could be seen to have considered the first two requirements of r 6.24(1), but not the third requirement that the joinder of HTBA was necessary to the determination of the matters in dispute in the proceedings. This is because this requirement of r 6.24(1) is not a requirement that needed to be considered in exercising the power in s 8.15(2) of the EPA Act.

204 In this circumstance, the primary judge failed to consider and be satisfied of this requirement of r 6.24(1) with the consequence that r 6.24(1) cannot support the primary judge's decision to join HTBA as a party to the proceedings.

The primary judge's joinder decision is invalid

205 The primary judge purported to join HTBA as a party to the proceedings exercising the power in 8.15(2) of the EPA Act, but that power was unavailable in the proceedings brought by Dartbrook. The primary judge's decision is not capable of being supported by the other source of power in r 6.24(1) as the primary judge failed to meet all of the requirements upon which that power is subject.

206 Proposed ground 1A should be upheld.

Proposed ground 1: Error in joining on the basis of the jurisdictional question

Dartbrook's arguments that the primary judge erred

207 The jurisdictional question raised by HTBA in contention 1 was that the Court had no jurisdiction to dispose of the appeal in accordance with the decision

agreed between the parties because the terms of that decision require the Court, first, to grant leave to Dartbrook to amend the application it had made under s 75W(2) requesting the Minister to modify the development consent and, secondly, to approve the application to modify the consent as so amended. HTBA contends that the amended modification application would be so different from the original modification application as to amount to a new modification application that the Court could not entertain. Dartbrook identifies three errors of the primary judge in dealing with HTBA's contention:

> "The first was in reasoning that the changes between the original Mod 7 Application and the varied modification request in the s 34 agreement could arguably comprise a new s 75W request such as the Commissioner lacked power to dispose of the proceedings. The second was in finding that there was no evidence before her Honour of particular submissions or consideration of this particular issue. The third was in determining the question posed by s 8.15(2) of the EPA Act on the basis that the proposed intervenor need only show a contention not liable to be struck out as a pleading." (at [25] of applicant's submissions).

208 As to the first error, Dartbrook contends that the decision, in the terms agreed between the parties, was a decision that the Court "could have made in the proper exercise of its functions". Dartbrook argues that this requirement in s 34(3) of the Court Act refers to the power of the Court to allow an applicant to amend an application to modify an approval under Part 3A or a development consent under Part 4, not whether the power ought to be exercised in any particular instance.

209 Dartbrook accepted that there is no express power in the EPA Act for an applicant to amend an application to modify an approval under Part 3A or a development consent under Part 4 or for the Minister or a consent authority respectively to agree to any such amendment, such as there is for an amendment of a development application under cl 55 of the EPA Regulation. Dartbrook contended, however, that there was an implied power to do both.

210 Dartbrook firstly contended, relying on *Mirvac Projects Pty Ltd v Ku-ring-gai Council* (2007) 159 LGERA 151; [2007] NSWLEC 540 at [29], that "a power to apply must ordinarily include a power to amend". Hence, an applicant who made an application to modify a development consent is allowed to amend that application: see also *Jaimee Pty Ltd v Council of the City of Sydney* [2010] NSWLEC 245 at [30]-[32].

211 Secondly, Dartbrook contends that the consent authority has an implied power to accept an amendment made by an applicant of the application to modify a development consent, prior to the determination of the application: *Jaimee Pty Ltd v Council of the City of Sydney* at [33]. Dartbrook argues that that power is implied by, in the sense of being incidental to or consequential upon, the statutory power to determine the application to modify a development consent: *Jaimee Pty Ltd v Council of the City of Sydney* at [36], citing *Johns v Australian Securities Commission* at [428]-[429]. In *Jaimee Pty Ltd v Council of the City of Sydney,* Craig J held:

> "Given the discretion that a consent authority has, when determining an application made to it in accordance with s 96 of the Act, I would have thought that the power to determine the application extends to allowing that application to be amended prior to determination. Provided the amendment sought does not convert the original application into a new application, I do not perceive that allowing an amendment would be inconsistent with the purpose of the Act as it addresses the modification of development consent." (at [38]).

212 Thirdly, Dartbrook contends that, if the consent authority had an implied power to allow an applicant to amend the application to modify development consent, the Court on an appeal from the consent authority's determination of an application to modify a development consent also can exercise that implied power by operation of s 39(2) of the Court Act: *Jaimee Pty Ltd v Council of the City of Sydney* at [44]-[46].

213 Fourthly, Dartbrook accepts there is a limit to the power to allow an amendment of an application to modify a development consent, being that "the amendment sought does not convert the original application into a new application": *Jaimee Pty Ltd v Council of the City of Sydney* at [38].

214 Fifthly, an amendment of the application to modify a development consent cannot result in an application that falls outside the scope of the section giving the power to modify a development consent. In the case of s 75W(2) of the EPA Act, the request for modification must still fall within the scope of the section. The question of whether the request for modification falls within or without the scope of the section is one for the Minister to decide. Judicial review is limited to determining whether acceptance by the Minister that a particular request falls within the terms of s 75W is an opinion reasonably open

in the circumstances: *Barrick Australia Ltd v Williams* (2009) 74 NSWLR 733; [2009] NSWCA 275 at [21], [38].

215 Based on these propositions, Dartbrook submits that the question the Commissioner was being asked to decide, in determining whether the decision in the terms agreed between the parties under s 34(3) of the Court Act was a decision the Court could have made in the proper exercise of its functions, was whether the amendment of the application sought converted the original modification application into a new modification application or caused it to be outside the scope of s 75W(2). This accepts that there is power for the applicant to amend and for the Court to accept an amendment of the application to modify the development consent, but recognises that the Court has a discretion as to whether or not to accept the applicant's amendment. So put, the decision of the Court to allow the amendment of the application to modify the development consent, the subject of the terms of the decision agreed between the parties, was a decision that the Court "could have made" in the proper exercise of the Court's functions.

216 As a consequence, Dartbrook contends, HTBA's contention that the Court lacked jurisdiction to dispose of the proceedings in terms of the decision agreed between the parties was not "reasonably arguable", and the primary judge erred in finding otherwise.

217 As to the second error, Dartbrook contends that the primary judge erred in concluding that there was no "particular submissions or consideration" of the issue of whether the amendment of the original modification application would convert it into a new application. The issue had been raised in submissions in response to the proposed s 34 agreement and Dartbrook responded to those submissions, explaining why the Court did have jurisdiction to make a decision in accordance with the s 34 agreement. Those submissions and Dartbrook's responses were before the Commissioner presiding over the conciliation conference.

218 As to the third error, Dartbrook contends that the primary judge misdirected herself as to the statutory test under s 8.15(2) of the EPA Act and asked the wrong question. Section 8.15(2) requires the Court to engage in a two-step

process: first, to determine whether the requirements of s 8.15(2)(a) or (b) are engaged, and secondly, to determine whether an order for joinder is justified in the exercise of the Court's discretion: *Flaherty v Hawkesbury City Council* (2020) 244 LGERA 51; [2020] NSWLEC 29 at [28].

219 Dartbrook contends that the primary judge failed to engage in this two-step process. Instead, the primary judge adopted a test "most favourable" to HTBA of whether the contentions sought to be raised by HTBA "disclose an arguable case". The primary judge then applied the test adopted in strike out applications to the contentions sought to be raised by HTBA. In doing so, the primary judge failed to apply the statutory test under s 8.15(2)(a). This test required the primary judge to be positively satisfied – "of the opinion" – that HTBA could raise an issue that "should be considered" and "would not be likely to be sufficiently addressed", but the primary judge did not do so.

HTBA's arguments that the primary judge did not err

220 HTBA contested that the primary judge erred in applying the statutory test in s 8.15(2)(a) of the EPA Act. The question of whether HTBA is able to raise one or more issues that should be considered in relation to the appeal but would not be likely to be sufficiently addressed if HTBA were not joined as a party, was a matter of opinion for the primary judge. The opinion the primary judge formed, that the contentions raised by HTBA were ones that should be considered but were not likely to be considered if HTBA were not joined as a party, was not an unreasonable one.

221 HTBA addressed each of the three alleged errors raised by Dartbrook. As to the first error, the question of whether the amendments to the application for modification of the development consent were so great as to cause the application to be a new modification application and outside the scope of s 75W was still an issue even if it was a matter of opinion for the Commissioner to decide. HTBA sought to raise, by contention 1, that the amendments did have this effect, so that the decision agreed between the parties to allow the amendments and to approve the amended modification application was not one that the Court could have made in the proper exercise of its functions.

222 As to the second error, the primary judge was not wrong to conclude at [50] that there were "no particular submissions or consideration of this particular issue such that the Commissioner could be assisted in determining these particulars of contention 1." Even if this finding did involve a mistake of fact, it is not one properly the subject of an appeal under s 57 of the Court Act, let alone an appeal from an interlocutory decision of practice and procedure.

223 As to the third error, the primary judge did not determine, contrary to Dartbrook's argument, that "the mere existence of an arguable or 'reasonably arguable' contention about the Commissioner's" jurisdiction to grant the approval was sufficient to warrant joinder, nor that joinder is warranted merely if a contention can be identified that would not be struck out if it were a pleading. In considering whether there was a reasonably arguable case, the primary judge was addressing HTBA's concession (see at [39] of the judgment) that the joinder application should fail if HTBA was not raising a reasonably arguable case. As the terms of the judgment at [50] make clear, the primary judge was also separately addressing whether it was considered that the issue would be likely to be sufficiently addressed without joinder and the primary judge's opinion was that contention 1(ii) and (iii) were matters that should be considered in relation to the appeal but would not be likely to be sufficiently addressed if HTBA were not joined as a party for the purposes of s 8.15(2) of the EPA Act. This also followed the primary judge's addressing of the broader principles and arguments in [19]-[37] of the judgment. This was a conclusion reasonably open to the primary judge.

The primary judge not shown to have erred on a question of law

224 I do not accept that Dartbrook has established that the primary judge made the three errors alleged in deciding to join HTBA to raise contention 1, that the Court lacked jurisdiction to allow the amendment of the request to modify the development consent. I will start with the first error alleged, that the primary judge erred in finding that the jurisdictional issue raised by HTBA in contention 1 was reasonably arguable. I find that the primary judge did not err, on a question of law, in deciding that it was reasonably arguable that the Court lacked jurisdiction to allow the amendment of the request to modify the development consent sought by the parties in their agreement.

225 Dartbrook’s argument joins issue with HTBA’s argument. HTBA’s argument, raised in contention 1, is that the amendments of the request for modification of the development consent for which leave of the Court was sought by paragraph 2(b) of the terms of the decision agreed between Dartbrook and the Minister, are outside the power of Dartbrook as a proponent or the Minister and on appeal the Court as consent authority to make. HTBA contends that the scope of the power to amend or allow amendment of a request for modification of a development consent or approval is limited. The amendments of the request for modification of the development consent agreed between Dartbrook and the Minister are so great as to cause the request to be a new request which the Court has no jurisdiction to accept. Dartbrook’s argument is that the particular amendments agreed between Dartbrook and the Minister, for which the Court’s leave was sought, clearly did not exceed the scope of the power to amend the request for modification of the development consent, so that it could not be said that HTBA’s contention that they did was reasonably arguable.

226 Both HTBA’s argument and Dartbrook’s argument assume that there is power to amend a request for modification of a development consent or an approval, but join issue on what is the scope of the power of amendment. In order to resolve this dispute as to the scope of any power to amend a request or application to modify a development consent or an approval, it is first necessary to identify whether there is power and, if so, what are the terms of the power to amend a request or application to modify a development consent or an approval.

227 I find that, contrary to the assumption of the parties, there is no power to amend a request or an application to modify a development consent or an approval, so that no question arises as to the scope of the power to allow the amendment of the request to modify the development consent sought by Dartbrook and the Minister. There are four reasons.

228 First, there is no express or implied authority in the EPA Act allowing a proponent to amend its application to modify a development consent or an approval. A development consent granted under Part 4 of the EPA Act and an approval granted under Part 3A of the EPA Act are the final determinations of

the applications seeking the consent or approval. In a sense, the entitlement to make the application seeking development consent or approval merges with the determination of that application by the consent authority in granting or refusing the application. The power to determine the application does not include a power to reconsider or redetermine the application.

229 If a proponent wishes to carry out a development or project different to or differently to the development or project approved by the development consent or approval, the proponent has two options: either make a fresh application for another development consent or approval or apply to modify the already granted development consent or approval. The second option of modification of a development consent was introduced by the EPA Act on its enactment to overcome the inconvenience of the first option of having to make successive applications for development consent to modify the development that has been approved to be carried out.

230 Prior to the enactment of the EPA Act, planning legislation did not provide express power for modification of a development consent on the application of an applicant or person having the benefit of the development consent. Where a modification of the development consent was sought, it was necessary for the applicant to make a further development application to obtain the required development consent: *Progress and Securities Pty Ltd v North Sydney Municipal Council* (1988) 66 LGRA 236 at 241.

231 The EPA Act, originally by s 109 and later by s 96, created the statutory entitlement to apply to modify a development consent granted under Part 4 of the EPA Act or, when Part 3A was introduced, by s 75W, an approval under Part 3A of the EPA Act. The mischief that these provisions were intended to remedy was "the necessity for the making of further and successive development applications and for the granting of further development consents to vary the terms of a development consent": *Progress and Securities Pty Ltd v North Sydney Municipal Council* at 242. These provisions allowing for modification of development consents are "beneficial and facultative" (*Houlton v Woollahra Municipal Council* (1997) 95 LGERA 201 at 203), in that they avoid the necessity for the obtaining of a further development consent to secure a

variation of an existing development consent. However, the provisions do not "abrogate the right to seek to obtain successive development consents in respect of the same land": *Progress and Securities Pty Ltd v North Sydney Municipal Council* at 242. An applicant has the option of either applying to modify an existing development consent, provided the modification sought falls within the scope of the provisions allowing for modification of a development consent, or applying for a further development consent.

232 A development application cannot be made to vary the terms of a development consent directly; a development application can only be made seeking consent for the carrying out of development: *Gordon & Valich Pty Ltd v City of Sydney Council* [2007] NSWLEC 780 at [15], [16]. Nevertheless, the grant of another development consent may have the consequence of effecting a modification of the original development consent in two ways. First, the second development consent may be granted subject to a condition requiring the modification or surrender of the original development consent (under originally s 91(7) and later s 80(1)(b) and (5) and currently s 4.17(5) of the EPA Act). Second, even without a condition requiring modification, the terms in which the second development consent is granted and the carrying out of development in accordance with the second development consent may have the consequence of effecting a variation of the original consent: *Gordon & Valich Pty Ltd v City of Sydney Council* at [17]; *Auburn Municipal Council v Szabo* (1971) 67 LGRA 427 at 432-433.

233 There is nothing to prevent a person having two development consents to carry out development on the same land: *Liverpool City Council v Home Units Australia Pty Ltd* [1973] 2 NSWLR 61 at 70; *Auburn Municipal Council v Szabo* at 433; *Waverley Council v Hairis Architects* (2002) 123 LGERA 100; [2002] NSWLEC 180 at [30]. A development application can be made, and development consent can be granted, to erect or use a distinct part of a building or land that is already the subject of another development consent: *Waverley Council v Hairis Architects* at [32]. The two development consents applying to development on the same land need to be read together to ascertain the development that is authorised to be carried out on the land:

Pilkington v Secretary of State for the Environment (1973) 26 P&CR 508 at 512-513; [1974] 1 All ER 283 at 287.

234 The nature and extent of the entitlement to apply to modify a development consent or an approval and the constraints on the exercise of the power to modify a development consent or an approval are delineated by the terms in which the statutory provisions create the entitlement and the power: *Valhalla Cinemas Pty Ltd v Leichhardt Municipal Council* (1986) 60 LGRA 240 at 246 and *Valiant Timber and Hardware Co Pty Ltd v Blacktown City Council* (2005) 144 LGERA 33; [2005] NSWLEC 747 at [29]. The statutory provisions were originally s 109, then ss 96 and 96AA of the EPA Act for modification of a development consent granted under Part 4 of the EPA Act and s 75W of the EPA Act for modification of an approval granted under Part 3A and certain development consents granted under Part 4, and are currently ss 4.55 and 4.56 of the EPA Act for development consents granted under Part 4 of the EPA Act.

235 The terms of these statutory provisions entitle a proponent to make any number of applications or requests to modify a development consent or an approval, but confer no entitlement to amend any application or request for modification that has been made before it is determined. If a proponent wishes to modify a development consent or an approval in a manner or respect different to that which the proponent has requested in the application to modify the development consent or approval, the proponent needs to withdraw the application and make a new application requesting the different modification now sought. The terms of the statutory provisions conferring the entitlement to make an application or a request for modification do not allow the proponent to amend the application or request for modification that has already been made.

236 There is no statutory provision allowing a proponent to amend an application or a request to modify a consent or an approval equivalent to cl 55 of the EPA Regulation that expressly allows an applicant to amend or vary a development application at any time before the application is determined, but only with the agreement of the consent authority. Detailed regulations have been made in the EPA Regulation on the form and content of the application for modification

of development consent (cl 115); the fee payable (cl 115); the notification or advertising of the application (cll 117-119); notification of concurrence authorities and approval bodies (cl 120); keeping applications available for public inspection (cl 121); and giving notice of the determination of the application (cl 122). Yet, no provision is made allowing an applicant to amend or vary the application to modify the development consent. This should be seen to be a deliberate choice. The legislature has expressly allowed an applicant to amend an application for development consent but not an application or a request to modify a development consent.

237 There is also no warrant to imply an entitlement of a proponent to amend an application or a request to modify a development consent or an approval from the terms in which the entitlement to make an application or a request to modify a development consent or an approval is granted.

238 The statutory provisions allow a proponent to make an application to (in the case of the former ss 96 and 96AA and now ss 4.55 and 4.56) or to request (in the case of s 75W) the relevant decision maker (the consent authority or the Minister respectively) to modify the development consent or approval. The making of the application or request triggers the power of the decision maker to modify the consent or the approval. That power is relational – it is dependent on and linked to the application or request.

239 The power to modify a development consent or an approval must be exercised in relation to the particular modification sought in the particular application or request that has been made to the relevant decision maker. An exercise of the power will not be valid unless it constitutes a determination of that application or request: see similarly, as to the need for a consent to be given to the application that has been made: *Hunter Industrial Rental Equipment Pty Ltd v Dungog Shire Council* (2019) 101 NSWLR 1; [2019] NSWCA 147 at [296], [297] and [57].

240 This proposition is underscored by the terms in which the appeal provisions are framed. For a request to modify an approval under Pt 3A, a proponent who is dissatisfied with “the determination of a request made under this section [s 75W] with respect to the project” may appeal to the Court under s 75W(5). It is

the determination of the request to modify the approval that founds the right to appeal. Similarly, for an application to modify a development consent under Pt 4, an applicant who is dissatisfied with “the determination of the application” may appeal to the Court under the current s 8.9. The application referred to is the application for modification of development consent made under the current s 4.55 of the EPA Act. Again, it is the determination of the application that founds the right of appeal.

241 The exercise of the power to modify a development consent or an approval is subject to satisfaction of certain preconditions, which differ depending on the power that is exercised. In the case of the powers under the former ss 96 and 96AA and the current ss 4.55 and 4.56, there are three types of powers to modify a development consent: one for modifications involving minor error, misdescription or miscalculation, a second for modifications involving minimal environmental impact, and a third for other modifications. The preconditions that must be satisfied before the consent authority can exercise any of these powers to modify a consent differ between the powers: see *King v Bathurst Shire Council* (2006) 150 LGERA 362; [2006] NSWLEC 505 at [50]-[86]. For the first, the proposed modification must be to correct a minor error, misdescription or miscalculation (s 96(1) now s 4.55(1)). For the second, the proposed modification must be of minimal environmental impact and the consent authority must be satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted before that consent as originally granted was modified (s 96(1A) now s 4.55(1A)). For the third, the consent authority must be satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (s 96(2) and s 96AA(2) and now s 4.55(2) and s 4.56(1)).

242 In the case of the power under s 75W, the section confers on the Minister an implicit obligation to be satisfied that the request falls within the scope of the section: *Barrick Australia Ltd v Williams* at [38].

243 These conditions to the exercise of the power all turn around the particular application or request for modification of the consent or approval that has been made. The exercise of the power to modify the consent or approval or disapprove of the modification involves the determination of the particular application or request that has been made.

244 These elements of the statutory scheme for the modification of a consent or an approval speak against any implication of an entitlement of a proponent to amend the application or request that has been made to modify a consent or an approval. It is the application or request that has been made that triggers the power to modify a consent or an approval and that is the focus of the conditions governing the exercise of that power.

245 In *Jaimee Pty Ltd v Council of the City of Sydney*, Craig J came to a different conclusion. He considered that "extraordinary administrative fragility would be imposed if, upon examination of an application for modification, some apparent error or omission was discovered that was easily rectifiable but, nonetheless could not be rectified by amendment, necessitating the lodgment of an entirely new application. Unless the interpretation of the Act or regulation mandates such a result, I do not believe that it should be so interpreted": at [28].

246 With respect, that analysis inverts the statutory interpretive task. The starting point is not that an entitlement to amend an application for modification should be implied unless the statutory provisions allowing for modification of a consent "mandate" a contrary interpretation. Rather, the starting point is the statutory provisions, which expressly do not allow an applicant to amend an application or a request for modification, and the question of statutory interpretation that arises is whether such an entitlement can be implied from these statutory provisions. I do not consider it can be.

247 No assistance is gained, in this interpretive task, by reference to different planning legislation and judicial decisions interpreting different planning legislation. Craig J, for example, in *Jaimee Pty Ltd v Council of the City of Sydney* referred to the decision of the Full Court of South Australia in *Independent Holdings Ltd v City of Adelaide Planning Commission* (1994) 85 LGERA 339, where the Court held that, although there was no express

provision authorising an applicant to amend an application for development approval, such authority could be implied from the statutory scheme (at 346). The factors that the Court found supported an implication of authority to amend an application for development approval under the South Australian planning legislation are not, however, as cogent to the different type of application to modify a development consent under the different planning legislation in New South Wales. No assistance is to be gained from the South Australian court's decision on a different type of application under different planning legislation.

248 In the earlier decision of *Mirvac Projects Pty Ltd v Ku-ring-gai Council*, Talbot J also held that an applicant is allowed to amend an application to modify development consent made under the former s 96 of the EPA Act. Talbot J noted that there was no equivalent provision to cl 55 of the EPA Regulation expressly allowing an applicant to amend an application to modify a development consent, but he viewed that provision as a "constraint" on the ability of an applicant to amend an application. Presumably, this was because cl 55 allows an applicant to amend or vary an application for development consent only with the agreement of the consent authority. Talbot J held that "in the absence of a similar constraint on the amendment of a s 96 application, it can be accepted that an applicant is allowed to amend." (at [29]).

249 This conclusion suffers from at least two drawbacks. First, no authority was cited for accepting that an applicant is allowed to amend an application to modify a development consent. Secondly, the interpretive task has been inverted. Whilst cl 55 might be seen to impose a constraint on an applicant's entitlement to amend a development application, by requiring the consent authority to agree to the amendment, cl 55 is the express source of the entitlement of an applicant to amend the development application: see *Ervin Mahrer and Partners v Strathfield Council (No 2)* (2001) 115 LGERA 259; [2001] NSWLEC 140 at [100]-[101]. There is no equivalent statutory provision entitling an applicant to amend an application to modify a development consent.

250 It is illogical to infer from an absence of a "similar constraint" to that in cl 55 on the amendment of an application to modify a development consent, an

entitlement of an applicant to amend such an application. Rather, there must first be found a statutory source of an entitlement of an applicant to amend an application to modify a development consent before one can sensibly speak about there being an absence of a constraint on the amendment of an application to modify a development consent.

251 The decisions of *Jaimee Pty Ltd v Council of the City of Sydney* and *Mirvac Projects Pty Ltd v Ku-ring-gai Council,* to the extent that they hold that an applicant is allowed to amend an application to amend an application to modify a development consent, are wrongly decided.

252 Secondly, there is no express or implied power in the EPA Act for a consent authority to allow a proponent to amend an application to modify a development consent or an approval prior to determining the application.

253 In *Jaimee Pty Ltd v Council of the City of Sydney*, Craig J considered "the power to determine the application extends to allowing that application to be amended prior to determination" (at [38]). Craig J referred to the dicta of Mason P in *North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468 at 475-476 and McClellan CJ of LEC in *1643 Pittwater Road Pty Ltd v Pittwater Council* [2004] NSWLEC 685 that an application for modification of a development consent could be determined by the grant of conditional consent or approval, notwithstanding the absence of an express power in the EPA Act or EPA Regulation to do so (at [34]-[35]). Craig J also referred to the statement of Brennan J in *Johns v Australian Securities Commission* (1993) 178 CLR 408; [1993] HCA 56 at 428-429 that: "An authority conferred by statute is construed as authorising everything which can fairly be regarded as incidental to or consequential upon the authority itself." (at [36]).

254 Whilst these dicta can be accepted for the propositions they state, it does not logically follow from these dicta that the consent authority has the authority to allow an applicant to amend the application prior to the consent authority determining the application. The statements of principle that a power to determine an application for some form of approval includes the power to determine the application on conditions say nothing about whether an applicant is or is not entitled to amend the application prior to the consent authority

determining the application. The former concern the determination of the application, the latter concerns the action before determination of the application.

255 In this respect too, *Jaimee Pty Ltd v Council of the City of Sydney* is wrongly decided.

256 Thirdly, the Court, on an appeal against the determination of a consent authority of an application or request to modify a development consent or an approval, has no power to allow an applicant to amend the application to modify the development consent or approval. Such an appeal involves merits review; the Court metaphorically stands in the shoes of the consent authority and reexercises the power of the consent authority to determine the application or request to modify the development consent or approval. On the appeal, the Court has, for the purposes of hearing and disposing of the appeal, "all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal": s 39(2) of the Court Act. This provision, however, does not give the Court any function or discretion to allow an applicant to amend the application or request to modify the consent or approval.

257 As I have explained, neither does the applicant have the authority to amend the application or request to modify the development consent or approval nor does the consent authority have the power to allow an applicant to amend the application or request to modify the development consent or approval. There is, therefore, no relevant function or discretion of the consent authority that s 39(2) of the Court Act picks up and which the Court can exercise in hearing and disposing of the appeal.

258 In this respect, the position in relation to an application to modify a development consent or an approval is different to the position in relation to an application for development consent. With respect to the latter, cl 55 of the EPA Regulation expressly gives the consent authority the function or discretion to agree to an applicant amending the development application. That function or discretion can be exercised on appeal by the Court, by operation of s 39(2) of the Court Act: *Ku-ring-gai Council v Bunnings Properties Pty Ltd* (2019) 236

LGERA 35; [2019] NSWCA 28 at [151] in my judgment, with whom Beazley P agreed at [9], although Basten JA disagreed at [50], [57], [63] and [64]. That result can only occur, however, because the consent authority is expressly given the function or discretion to agree to an applicant amending the development application. There is no equivalent provision expressly giving the consent authority the function or discretion to agree to an applicant amending an application or a request to modify a development consent or an approval. The Court, therefore, cannot have any function or discretion that the consent authority does not have.

259 A contrary decision was made in *Jaimee Pty Ltd v Council of the City of Sydney,* holding that it was "open to the Court to allow an amendment to be made to the application [for modification] in reliance upon s 39(2)" of the Court Act (at [45]-[46]). In this respect too, this decision is wrongly decided.

260 Fourthly, the Court has no power under s 64 of the *Civil Procedure Act 2005* or Part 19 of the UCPR to amend, or to allow the amendment of, the application or request for modification of a development consent or an approval. Both s 64 of the *Civil Procedure Act* and Part 19 of the UCPR apply to civil proceedings in the Land and Environment Court, including an appeal in Class 1 of the Court's jurisdiction. However, these provisions do not authorise amendment of documents that are not documents of the kind to which the provisions apply.

261 For s 64 of the *Civil Procedure Act*, "any document in the proceedings" refers to documents created for the purpose of the proceedings, including the originating process, pleadings, notices of motion, subpoenas, notices to produce, affidavits and other statements of evidence filed in the proceedings. A document brought into existence before the proceedings are commenced and for a purpose other than the purpose of the proceedings is not a "document in the proceedings".

262 In the case of proceedings in Class 1 of the Court's jurisdiction, including appeals against the determination of a development application or an application to modify a development consent, the application the subject of the determination is not a "document in the proceedings". The application is brought into existence for the purpose of seeking the approval of the consent

authority, either a development consent in the case of a development application or the modification of a development consent or an approval in the case of an application or a request to modify a development consent or an approval. Although the determination of either such application founds the right of appeal to the Court, and hence the proceedings, the application is not a document in the proceedings. The application for approval is not the originating process commencing the proceedings – that is a separate document, called an Application Class 1, 2 or 3. The prescribed form for this type of application requires identification of the decision appealed against, being the determination of the application for development consent or the application or request for modification of the development consent. But such identification of the application for development consent or for modification of a development consent does not cause the application so identified to become a document in the proceedings.

263 The result is that the power of amendment of any document in the proceedings in s 64 of the *Civil Procedure Act* does not extend to allow amendment of an application for development consent or an application to modify a development consent.

264 The same conclusion was reached by Bignold J in *Ervin Mahrer and Partners v Strathfield Council (No 2)* with respect to the similar power that existed in s 68 of the Court Act, prior to its repeal upon the application of the *Civil Procedure Act* and UCPR to civil proceedings in the Court. Bignold J held that the amendment power conferred by s 68 of the Court Act was "confined to an amendment of the relevant proceedings (including of course, steps taken in, or documents filed in, those proceedings…)", and did not allow amendment of the development application, the existence of which provides (in conjunction with the consent authority's actual or deemed refusal of the development application) "the very foundation of, and for, the proceedings". Amendment of the development application does not involve amendment of the proceedings: at [53].

265 Part 19 of the UCPR also does not allow for amendment of the application for development consent or the application or request for modification of a

development consent or an approval that is the foundation for the proceedings. None of the types of amendments authorised by Part 19 apply to such applications. Rule 19.1 allows a plaintiff to amend a statement of claim and r 19.2 allows amendments to add or remove parties. Rules 19.3 and 19.4 regulate amendments, the first dealing with the time within which an amendment must be made and the second dealing with disallowance of amendments. An amendment of an application for development consent or an application or a request to modify a development consent or an approval are not amendments authorised by rr 19.1 or 19.2.

266 For these reasons, the Court has no power to allow a proponent to amend the application or request to modify a development consent or an approval. The consequence in this case is that one of the terms of the decision that the parties had agreed and sought for the Court to make, being the grant of leave to Dartbrook "to make the minor amendments to the application to modify" the development consent (in paragraph 2(b) of the agreement between the parties), was outside the power of the Court. Neither was Dartbrook, as the applicant, entitled to amend its request under s 75W to modify the development consent, nor was the Court, exercising the function of the Minister to determine that request, entitled to allow any amendment of the request to modify the development consent.

267 In short, the term of the decision in paragraph 2(b) of the agreement between the parties is not one that the Court could have made in the proper exercise of its functions. This is the jurisdictional precondition in s 34(3) of the Court Act to the Court having power to dispose of the proceedings in accordance with the decision agreed between the parties.

268 This conclusion directly rebuts Dartbrook's argument concerning the first error the primary judge is alleged to have made. Dartbrook argued that the primary judge erred in finding that HTBA's contention that the Court lacked jurisdiction to dispose of the proceedings in terms of the decision agreed between the parties was reasonably arguable. Dartbrook contended that this contention was not reasonably arguable because the decision of the Court to allow the amendment of the application to modify the development consent, referred to

in paragraph 2(b) of the agreement, was a decision that the Court “could have made” in the proper exercise of the Court’s functions.

269 For the reasons I have advanced, however, this decision to allow the “minor amendments” of the application to modify the development consent is not a decision that the Court could have made in the proper exercise of its functions. The primary judge, therefore, committed no error in holding that HTBA’s contention that the Court lacked jurisdiction to allow the amendment of the application to modify the development consent sought in paragraph 2(b) of the agreement was reasonably arguable.

270 Indeed, it was more than reasonably arguable, it was correct. True it is that the reason advanced by HTBA in its contention 1 for the Court not having jurisdiction was incorrect. The lack of jurisdiction flows not from the extent of the amendment of the application to modify the development consent being so great so as to convert it into a fresh modification application, but rather from there being no power in the first place to allow any amendment of the modification application. But the result is the same, regardless of the reason for the result. The Court has no power to allow the amendment to the application to modify the development consent sought in paragraph 2(b) of the agreement reached between the parties.

271 This conclusion that the Court would have no power to make a decision in accordance with paragraph 2(b) of the parties’ agreement to allow Dartbrook to amend the application to modify the development consent, does not mean, however, that the Court would not have power to make a decision in accordance with the other terms of the decision agreed between the parties, including paragraph 2(a) that the appeal be upheld and paragraph 2(d) that the application to modify the consent be approved on the conditions agreed. The Court lacks power only to make a decision allowing the amendment of the application to modify the consent, not to approve the application and uphold the appeal.

272 The condition in s 34(3) of the Court Act that the terms of a decision in the proceedings, on which agreement is reached between the parties, “be a decision that the Court could have made in the proper exercise of its functions”,

operates distributively with respect to each of the terms of the decision. Each term of the decision must be one that the Court could have made in the proper exercise of its functions before the Court will be obliged to dispose of the proceedings in accordance with that term of the decision. If it is, the Court is obliged to dispose of the proceedings in accordance with that term of the decision, but if not, the Court cannot dispose of the proceedings in accordance with that term of the decision.

273 Of course, this operation of s 34(3) only applies with respect to terms of a decision in the proceedings that relate to the disposal of the proceedings. This follows from the language of s 34(3)(a), that the Commissioner must "dispose of the proceedings in accordance with the decision". If the term of the decision is not relevant to the disposal of the proceedings, this requirement cannot be satisfied, as the proceedings could not be disposed of in accordance with that term of the decision.

274 In the present case, the terms of the decision in paragraphs 2(a) and (d) of the parties' agreement do relate to the disposal of the proceedings. The Court has power to dispose of proceedings in accordance with these terms of the decision. The term in paragraph 2(a) is unproblematic, the Court has power to uphold the appeal. The term in paragraph 2(d) involves the determination of the request to modify the development consent by approving the request on conditions. The power to approve an application or a request to modify a development consent or an approval includes the power to impose conditions on the approval.

275 The power to condition an approval is express in the case of the power under s 75W of the EPA Act. Section 75W(4) provides that the Minister may modify the approval "with or without conditions". Moreover, the "modification of approval" is defined in s 75W(1) to mean:

> "changing the terms of a Minister's approval, including:
>
> (a) revoking or varying a condition of the approval or imposing an additional condition of the approval, and
>
> (b) changing the terms of any determination made by the Minister under Division 3 in connection with the approval."

276 The power to condition an approval is implied in the case of the power under ss 4.55 and 4.56 of the EPA Act to modify a development consent: *North Sydney Council v Michael Standley & Associates Pty Ltd* at 475-476 and *1643 Pittwater Road Pty Ltd v Pittwater Council* at [41].

277 In the present case, the decision agreed between the parties referred to in paragraph 2(d) of the parties' agreement, is for the approval of the request to modify the development consent on conditions, an exercise of the power in s 75W(4) that is authorised. The conditions include conditions implementing the amendments to the request to modify the development consent that had been agreed between the parties, being the abandonment of the proposal for the alternative coal clearance system and the surrender of the right to mine the Piercefield Seam granted by the development consent. On their face, such conditions are within the scope of the power to condition the approval of the request to modify the development consent.

278 In the language of the parenthetical phase in s 34(3), therefore, the decision to uphold the appeal and to approve the application to modify the development consent on conditions is "a decision that the Court could have made in the proper exercise of its functions."

279 The Court has power to dispose of the proceedings in accordance with the terms of the decision, notwithstanding that it does not have power to allow the amendment of the application to modify the development consent in accordance with the term of the decision in paragraph 2(b) of the agreement. The obligation of the Court imposed by s 34(3)(a) operates only to require it to dispose of the proceedings in accordance with the terms of the decision that the Court could have made in the proper exercise of its functions and not to dispose of the proceedings in accordance with the term of the decision that the Court could not have made in the proper exercise of its functions.

280 HTBA foreshadowed that if the primary judge's decision to join HTBA to the appeal is undisturbed, it would wish to raise before the Commissioner presiding at the conciliation conference an issue that the decision to approve the application to modify the development consent subject to the conditions agreed in annexure A to the parties' agreement is in law not a decision that the Court

could have made in the proper exercise of its functions. HTBA has not yet raised this issue because the focus of its application for joinder and the primary judge's decision to join HTBA has been only on the term of the decision in paragraph 2(b) of the parties' agreement. The assumption had been that if this term of the decision could be shown to be one that the Court could not have made in the proper exercise of its functions, the Court could not dispose of the proceedings at all. If this assumption is incorrect, and the Court could dispose of the proceedings, not in accordance with the term of the decision in paragraph 2(b), but nevertheless in accordance with the terms of the decision in paragraphs 2(a) and (d), then HTBA foreshadows its wish to raise the new issue that the Court could not have made a decision in accordance with paragraph 2(d) in the proper exercise of its functions.

281 This is not an issue that arises in these proceedings seeking leave to appeal against the primary judge's decision to join HTBA to the proceedings and therefore does not call for determination by this Court.

282 I turn now to the second and third errors that Dartbrook contends the primary judge made in deciding that HTBA's contention 1 was an issue that would not be likely to be sufficiently addressed if HTBA were not joined as a party.

283 The alleged second error arose from the primary judge's conclusion that there were no "particular submissions or consideration of this particular issue such that the Commissioner could be assisted in determining these particulars of contention 1" (at [50] of the judgment). Dartbrook submits that this conclusion was factually incorrect. The parties had provided to the Commissioner presiding over the conciliation conference, as part of the agreement reached between the parties, a document identifying and demonstrating compliance with the "jurisdictional prerequisites" to the Court having power to dispose of the proceedings in accordance with the decision agreed between the parties. This document was annexure C to the agreement. This document addresses, among other matters, the contention raised by HTBA and two local councils who made a submission, that there is no power to amend the Mod 7 Application. The document stated:

> "The parties agree there is power to amend the Mod 7 Application in the scheme of the EPA Act because:

> (a) An authority conferred by statute is construed as authorising everything which can fairly be regarded as incidental to or consequential upon the authority itself (citing *Johns v Australian Securities Commission* (1993) 178 CLR 408 (***Johns***));
>
> (b) The scope of a statutory power is ascertained by the character of the statute and the nature of the provisions it contains. When the exercise of power is left to the discretion of some person, the scope for implementing the power is fettered only by the necessity to maintain consistency with the purpose or purposes of the legislation (citing *Johns*);
>
> (c) It would be inconsistent with the sensible application of provisions that required the consent authority to notify an application for modification and to consider the submissions received as a result of the notification to be unable to seek a meaningful response from the applicant *(Jaimee Pty Ltd v Council of the City of Sydney* [2010] NSWLEC 245 (***Jaimee***) at [28]); and
>
> (d) Even where there is no express power to amend an application it is 'manifestly convenient that such a power exist' (*Jaimee* at [29] - [30])
>
> The parties agree that the amendment brought about by the Response to Contentions is within the amendment power. Comparing the request as originally made to that which is reflected in the Response to Contentions, there is nothing that is substantially different to the application made nor anything that changes the nature of the application. The Response to Contentions provides additional material to support the request as made, or addresses how the application might be determined in response to the contentions raised. For that reason, there is no substantial change to the underlying Mod 7 Application brought about by the Response to Contentions such that it could be said that it falls outside the concept of modification under s75W and it is within the Court's power to consider the application as amended by the Response to Contentions."

284 Dartbrook noted that the Commissioner was also provided with the responses to the submissions that had been made. One of these responses was prepared by Hansen Bailey dated October 2020, entitled "Response to submissions received following notification of the proponent's response to contentions." Annexure B to this response was the legal advice provided by Dartbrook's solicitors dated 7 October 2020. The legal advice responded to the "jurisdictional issues raised in submissions". One of the issues was framed as: "Do the adjustments made to the Mod 7 by the Response to the Contentions constitute a fresh application?". This issue was raised by both Muswellbrook Shire Council and Upper Hunter Shire Council in their submissions. It is also the issue raised by HTBA in its contention 1. The legal advice responded to this issue in similar terms to what was said in the document addressing the jurisdictional prerequisites.

285 Dartbrook submits that these documents do constitute “particular submissions or consideration” of the jurisdictional issue and the primary judge was incorrect to find otherwise.

286 I find Dartbrook has not established that the primary judge made an error of law of a kind sufficient to found an appeal under s 57(1) of the Court Act. The primary judge’s decision to join HTBA was an interlocutory decision on a matter of practice and procedure in proceedings in Class 1 of the Court’s jurisdiction. An appeal against an order or a decision of the Court (including an interlocutory order or decision) under s 57(1) is “on a question of law.” Dartbrook’s alleged second error is framed as an error of fact – the primary judge made an incorrect factual finding concerning the existence of particular submissions or consideration on the jurisdictional issue. That error, even if established, is not an error on a question of law.

287 In any event, the primary judge’s finding, in the terms she expressed, does not necessarily reveal any error of fact. The primary judge’s finding regarding the sufficiency of the submissions or consideration of the issue of the Court’s jurisdiction to allow the amendment of the application to modify the development consent sought in paragraph 2(b) of the parties’ agreement was expressed in qualified and preliminary terms, reflecting the fact that the primary judge was not herself determining the jurisdictional issue but only the question of whether the jurisdictional issue “would not be likely to be sufficiently addressed” if HTBA were not joined as a party, as required by s 8.15(2)(a) of the EPA Act. For this reason, the primary judge did not need to identify and consider all of the submissions and consideration of the jurisdictional issue that had been made – that would need to be done by the Commissioner determining the jurisdictional issue but not the primary judge in deciding whether the jurisdictional issue is likely to be sufficiently addressed. This sets the context for the primary judge’s statement:

> “There are presently, on the evidence tendered to me, no particular submissions or consideration of this particular issue such that the Commissioner could be assisted in determining these particulars of Contention 1.”

288 That finding may indeed be correct on the evidence that was tendered on the motion for joinder and was before the primary judge. The question of whether

the jurisdictional issue “would not be likely to be sufficiently addressed” if HTBA were not to be joined was an evaluative one for the primary judge. No material error of fact is revealed by pointing out that minds may differ on what should be the answer to that question.

289 There is a further reason for declining appellate intervention to correct this alleged error of the primary judge. The primary judge’s finding that there are no particular submissions or consideration of the issue, although made by reference to the way HTBA had put its contention that the extent of amendment of the modification application converted it to be a fresh modification application, would also be sustainable by reference to the legal position that the Commissioner had no power to allow any amendment of the modification application. The document addressing the jurisdictional prerequisites and the legal advice did not sufficiently address this lack of power of the Court to allow any amendment of the modification application, but rather was focused on the extent of the amendment of the modification application that was permissible.

290 The alleged third error was that the primary judge asked the wrong question in applying s 8.15(2)(a) of the EPA Act. Dartbrook contends that rather than engage in the two step process required by s 8.15(2)(a), the primary judge adopted a test “most favourable” to HTBA of whether the contentions sought to be raised by HTBA “disclose an arguable case”.

291 It may be accepted that the primary judge said that she “will adopt a formulation that is most favourable to the intervenor, namely a similar test to that applied on a strike out application” (at [39]). The primary judge said she did this in the absence of submissions from the parties as to the test to be applied.

292 The primary judge had nevertheless earlier identified the two limbs for joinder under s 8.15(2) of the EPA Act, including the first limb in paragraph (a) that the person is “able to raise an issue that should be considered in relation to the appeal but would not be likely to be sufficiently addressed if the person were not joined as a party” (at [36]). The primary judge was addressing the question raised by this first limb of whether the intervenor “is able to raise an issue that should be considered in relation to the appeal” when she adopted the similar test that applied on a strike out application. The primary judge applied this

similar test “for determining whether in the circumstances of this case the intervenor has disclosed a reasonable cause of action as formulated in contention 1” (at [41]). The primary judge found that HTBA had not demonstrated that the particulars (i), (iv), (v) and (vi) to contention 1 give rise to a reasonable cause of action (at [48], [49]). The primary judge did find, however, that particulars (ii) and (iii) of contention 1 raise an issue “that is reasonably arguable in the context of the legislative regime” and “that should be considered in relation to the appeal” (at [50]). Dartbrook, of course, only seeks to challenge the primary judge’s finding on particulars (ii) and (iii) of contention 1.

293 I consider that the primary judge did misdirect herself by adopting a similar test to that used in a strike out application in determining whether the issue HTBA sought to raise by contention 1 is an issue that should be considered in relation to the appeal, but that error on a question of law was not material or vitiating. The reason is that the primary judge started her inquiry by asking the correct question, being the question raised by paragraph (a) of s 8.15(2), and finished her inquiry by answering that correct question. The primary judge’s diversion, in between asking and answering the correct question, to consider the similar test to that applied in a strike out application, was not material. This was evident from the primary judge’s reasoning in [50]. The primary judge did find that the issue raised by particulars (ii) and (iii) of contention 1 “is one that is reasonably arguable”, which echoes the test for a strike out application, but then found that that reasonably arguable issue was “an issue that should be considered in relation to the appeal”, which is the test in s 8.15(2)(a). Reading these two findings together, the primary judge can be seen to have concluded that the jurisdictional issue raised by particulars (ii) and (iii) of contention 1 should be considered in relation to the appeal because it is reasonably arguable in the context of the legislative regime. If the issue had not been reasonably arguable, as was the case with the matters raised by the other particulars to contention 1, the issue would not be one that “should be considered in relation to the appeal.”

294 For these reasons, Dartbrook has not established the three errors raised by ground 1 of its proposed appeal. Proposed ground 1 should be rejected.

Proposed ground 2: Error in concluding that merit considerations warranted joinder

Dartbrook's argument that the primary judge erred

295 By proposed ground 2, Dartbrook challenges the primary judge's decision "that the Intervenor should be joined to address the issues identified in Contentions 2-4 of its Statement of Contentions" (at [55]). Dartbrook contends that the primary judge erred in deciding in two respects. First, once the parties had reached agreement on the terms of a decision in the proceedings that would be acceptable to the parties, there were no merit issues remaining to be considered or determined by the Court. Section 34(3)(a) of the Court Act provides that where agreement is reached between the parties as to the terms of a decision in the proceedings that is acceptable to the parties, the Commissioner must dispose of the proceedings in accordance with the decision. The provision leaves no room for a consideration of "merit considerations". Such merit considerations are subsumed by the agreement reached between the parties: *Al Maha Pty Ltd v Huajun Investments Pty Ltd* at [71]-[79].

296 The primary judge accepted that contentions 2-4 raised by HTBA "relate to merit considerations" and "are matters that appear to be no longer contentious between the parties" (at [53]). Yet, the primary judge nevertheless joined HTBA in order "to address the issues identified in contentions 2-4" (at [55]). The primary judge thereby erred in joining HTBA to raised merit issues that were no longer in contention and hence could not be issues that "should be considered in relation to the appeal", being the first requirement in s 8.15(2)(a) of the EPA Act.

297 Secondly, there was circularity in the primary judge's reasoning. The primary judge accepted that the merit considerations raised by HTBA's contentions 2-4 were "no longer contentious between the parties". Rather than that accepted finding leading to the conclusion that HTBA should not be joined as it cannot raise an issue that should be considered in relation to the appeal, the primary judge concluded to the contrary that it justified joining HTBA because otherwise these issues will not be sufficiently addressed on the appeal. Dartbrook submits that the error in this conclusion is that it ignores the critical first

question raised by s 8.15(2)(a) of whether these merit issues "should be considered" in relation to the appeal. Only if the issue should be considered does the inquiry move to the second question raised by s 8.15(2)(a) of whether the issues are not likely to be sufficiently addressed if HTBA were not joined as a party.

298 The primary judge, having found that the issues were no longer contentious, moved straight to the second question, which she answered by finding that those issues would not be likely to be sufficiently addressed if HTBA were not to be joined as a party. In doing so, the primary judge failed to answer the first question of whether the issues should be considered in relation to the appeal. Having regard to the parties' agreement under s 34(3), the only answer open was that the merit issues were not ones that should be considered in relation to the appeal.

HTBA's argument that the primary judge did not err

299 HTBA's response was twofold. First, even if the primary judge did err in the manner alleged by Dartbrook in joining HTBA to raise contentions 2-4, such error would not vitiate the primary judge's orders from which the appeal is made, as the primary judge had already decided to join HTBA to raise contention 1. Once HTBA is joined it becomes a party for all purposes: *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391 at 396. Accordingly, any error in joining HTBA for the additional reason of being able to raise contentions 2-4, where the primary judge had already decided to join HTBA so as to be able to raise contention 1, cannot vitiate the primary judge's decision.

300 Secondly, and relatedly, the primary judge's decision to join HTBA to raise contentions 2-4 was not an independent basis for joinder, but only arose once the primary judge had found that HTBA should be joined to raise contention 1. The primary judge was being realistic in recognising that the consequence of joining HTBA to raise the jurisdictional issue in contention 1 would be that all three parties would not be prepared to dispose of the proceedings in terms of the s 34 agreement that had been reached by only two of the parties, Dartbrook and the Minister. In that circumstance, the Commissioner could not

dispose of the proceedings under s 34(3)(a) and instead would need to terminate the conciliation conference under s 34(4) of the Court Act. This is what the primary judge was saying in [55].

301 HTBA further submitted that the primary judge was not required to reapply s 8.15(2)(a) to contentions 2-4 in circumstances where the primary judge had already determined that HTBA should be joined to raise contention 1, having applied s 8.15(2)(a) to that contention.

The primary judge not shown to have erred on a question of law

302 I find that Dartbrook has not established that the primary judge has made a material error of law of the kind required for an appeal under s 57(1) of the Court Act. Although the primary judge, in the abbreviated manner in which she expressed her reasons for allowing HTBA to be joined to address the issues identified in contentions 2-4, might on one view be seen to have made the errors raised by Dartbrook, I consider that a fair reading of her reasons reveals that the primary judge's logic is that explained by HTBA, which does not reveal error.

303 The primary judge found that "the intervenor has demonstrated that it is appropriate that it be joined for the purposes of raising contention 1" at [55]. Once HTBA is joined as a party to the proceedings, the primary judge found, it is "likely that the Commissioner will have to determine the merits of the appeal" (at [55]). The unstated, but obvious, reason is that HTBA is not likely to reach agreement with the other two parties as to the terms of the decision in the proceedings that would be acceptable to all of the parties. HTBA is not likely to agree to the agreement that had already been reached between the other two parties, Dartbrook and the Minister, as that involves the Court modifying the development consent so as to allow mining for another 5 years, a result that HTBA opposed. The primary judge had earlier recognised this was the likely result: "The natural consequence of the joinder of an additional party to these proceedings is that the s 34 Agreement cannot be made unless all parties (including any joined party) agree to its terms" (at [18]).

304 The result would be that it could no longer be said that "agreement is reached between the parties… as to the terms of a decision in the proceedings that

would be acceptable to the parties", which is the necessary condition to engage the obligation of the Commissioner to dispose of the proceedings in accordance with the decision. In that circumstance, the Commissioner will have no option but to terminate the conciliation conference under s 34(3). The proceedings will then need to be fixed for a hearing before another Commissioner or judge, unless the parties consent to the Commissioner disposing of the proceedings under s 34(3)(b). Either way, however, there will be a hearing of the appeal, in which there will be a consideration and adjudication of merit considerations going to the acceptability of the proposed modifications of the development consent. This explains why the primary judge found that "it is therefore likely that the Commissioner will have to determine the merits of the appeal" (at [55]).

305 The primary judge then found that the merit considerations raised by HTBA in contentions 2-4 would be unlikely to be sufficiently addressed, as "the Minister is unlikely to advocate against an approval" (at [55]). This meant that "the Intervenor should be joined to address the issues identified in contentions 2-4 of its Statement of Contentions" (at [55]).

306 This reasoning of the primary judge has a logic and a foundation in the operation of s 34(3) and (4) of the Court Act. It does not reveal a material error of law sufficient to warrant appellate intervention in a discretionary decision on a matter of practice and procedure.

307 There is also force in HTBA's submission that, even if material error be found, it is not vitiating as the primary judge's decision to join HTBA so as to allow it to raise contention 1 is unaffected by any error in the primary judge's additional reason for joinder to allow HTBA to raise contentions 2-4.

308 Proposed ground 2 should be rejected.

Proposed ground 3: Joinder was legally unreasonable

Dartbrook's argument that the primary judge erred

309 Dartbrook's proposed third ground of appeal is that the primary judge's decision to join HTBA "in all the circumstances was unreasonable and the primary judge did not properly exercise the discretion reposed in the Court

below by s 8.15(2) of the EPA Act". Dartbrook identified two relevant considerations supporting this ground.

310 First, the primary judge did not refer to or consider the fact that HTBA would, in the absence of joinder, have no right of appeal to the Court against any decision of the Minister to approve the request to modify the development consent under s 75W of the EPA Act. That section only gives the proponent a right of appeal to the Court, under s 75W(5).

311 Second, the primary judge made a "fundamental error of fact" in [51] of the judgment. The primary judge noted that "it was open to the Minister to impose conditions on the Modification Request requiring the modification to exclude the mining of Piercefield Seam and the approval of the above ground infrastructure…". The primary judge found that this had not been done:

> "However, that is not the approach taken by the Minister or the Applicant in this case. The parties seek [for] the Court to vary the Modification Request prior to the grant of approval thereby raising for consideration the power that the Court has to approve the Varied Modification Request." (at [51]).

312 Dartbrook contends that this finding is factually incorrect. The parties not only sought for the Court to grant leave to Dartbrook to make minor amendments to the application to modify the development consent, they also sought for the Court to approve the application to modify the development consent on the conditions in annexure A to the parties' agreement. These conditions included conditions 1.1(a)(xi), 2.3(c) and 2.4, which required the modification to exclude the mining of the Piercefield Seam and the removal of the above ground infrastructure, the two things the primary judge identified the conditions could have required but did not require.

HTBA's argument that the primary judge did not err

313 HTBA disputed at the outset that this proposed third ground of appeal raises a question of law, which is necessary for an appeal under s 57(1) of the Court Act against a decision or order, including an interlocutory decision or order, in Class 1 of the Court's jurisdiction: *Ferella & Anor v Chief Commissioner of State Revenue* [2014] NSWCA 378 at [6]; *Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc* (2014) 86 NSWLR 524; [2014] NSWCA 105 at [4]. The two considerations identified by Dartbrook, which concern

incorrect factual findings, do not demonstrate what the alleged unreasonableness is or in what respect the primary judge is alleged to have not properly exercised the discretion under s 8.15(2) of the EPA Act.

314 In respect of the first consideration, HTBA submits that, on a fair reading of the primary judge's reasons as a whole, the primary judge should be taken to be aware of the fact that HTBA would, in the absence of joinder, have no right of appeal to the Court. First, HTBA's lack of a right of appeal against the Minister's determination of Dartbrook's request to modify the development consent was the very reason for HTBA applying to be joined as a party to the proceedings, either under s 8.15(2) of the EPA Act or r 6.24 of the UCPR. The primary judge cannot not have known that HTBA had no right otherwise to appeal to the Court.

315 Secondly, the primary judge extracted the statement of principle in *Morrison Design Partnership Pty Ltd v North Sydney Council* (2007) 159 LGERA 361; [2007] NSWLEC 802 at [43] that the EPA Act draws a distinction between different types of development and the different rights to be a party to an appeal to the Court for the different types of development. This evidences consideration by the primary judge of the question of who has rights of appeal.

316 Thirdly, the primary judge expressly noted in argument at the hearing of the application for joinder that "the statutory scheme doesn't give a right of appeal" to HTBA "unless they're joined as a party" (12/11/20 T60:1-2) and was informed by HTBA's counsel that "there was never any appeal right for the purposes of s 75W" and "it's not one of the cases where my client would have an appeal right" (12/11/20 T62:8-9).

317 Finally, HTBA submits that a lack of a right of appeal of the person applying for joinder is not a consideration required by s 8.15(2) of the EPA Act in any event. The significance of the principle noted in *Morrison Design Partnership Pty Ltd v North Sydney Council* at [43] was to underscore the fact that joinder is limited by the circumstances set out in the subparagraphs of s 8.15(2) and is not a de facto appeal right. The primary judge applied these terms of s 8.15(2).

318 In respect of the second consideration, HTBA submits that the primary judge, in making the observations in [51], did not overlook the fact that the parties

were seeking, by paragraph 2(d) of the terms of the decision agreed between the parties, for the Court to grant approval to the request to modify the development consent on the conditions in annexure A. The primary judge had earlier set out the terms of the decision, including paragraph 2(d) (at [15]). The primary judge noted that the parties have requested that the Court give effect to the s 34 agreement in these terms (at [16]). Two of the conditions on which the parties agreed approval should be granted constrained the proposal to what was newly proposed in the amended modification request (conditions 2.3(c) and condition 2.4). The other condition (condition 1.1(a)(xi)) merely required the proposal to be carried out consistently with, amongst other documents, the Response to Contentions document that identified the amendments to the modification request for which leave was sought in paragraph 2(b) of the parties' agreement.

The primary judge not shown to have erred on a question of law

319 I find Dartbrook has not established that the primary judge made an error of law of a kind sufficient to found an appeal under s 57(1) of the Court Act. I accept HTBA's submissions that the primary judge did not fail to consider the fact that HTBA did not have a right of appeal to the Court against the Minister's decision in relation to Dartbrook's request to modify the development consent. The primary judge was clearly aware of this fact, as HTBA has explained.

320 The primary judge also did not misunderstand that the parties sought for the Court to grant approval on conditions. The primary judge set out the terms of the decision agreed between the parties, which included paragraph 2(d) that the request to modify the development consent be approved subject to the conditions in annexure A. Those conditions implemented the amendments to the modification request for which leave was sought in paragraph 2(b).

321 The primary judge's observation in [51] of the judgment was directed to a different point. She was simply pointing out that the parties did not need to have sought the Court's leave to amend the modification request, as they had done in paragraph 2(b) of their agreement, because the modification request without amendment could have been approved on conditions that effected the amendments they sought. The primary judge observed that if this approach

had been taken, there would have been no basis for HTBA's contention that the Court has no jurisdiction to grant leave to the applicant to amend the modification request. The primary judge noted, however, that this was not the approach taken by the parties. They did seek for the Court to grant leave to the applicant to amend the modification request prior to the Court granting approval on conditions, thereby raising for consideration the power the Court has to allow the amendment of the modification request and to approve any amended modification request.

322 No error of law is revealed in the primary judge's observation. Proposed ground 3 should be rejected.

Disposition of the application for leave to appeal

323 With respect to proposed ground 1A of appeal, Dartbrook has established that the primary judge mistook the source of power to join HTBA as being 8.15(2) of the EPA Act, and that the primary judge's decision to join HTBA cannot be supported by the alternative source of power in r 6.24 of the UCPR. Proposed ground 1A should therefore be upheld. Dartbrook has otherwise not established its proposed grounds 1, 2 or 3 of appeal.

324 In these circumstances, leave to appeal should be granted with respect to proposed ground 1A, but not for the other proposed grounds. Dartbrook's appeal on proposed ground 1A should be upheld and the orders of the primary judge joining HTBA as a party to the proceedings in the court below set aside.

325 The upholding of proposed ground 1A means that neither of the bases relied on by HTBA for joinder as a party are sustainable. However, HTBA's notice of motion not only sought joinder as a party but also in paragraph 4 "such further or other orders that the Court thinks fit." This prayer for relief is ample enough for HTBA to seek an order allowing HTBA to appear either under s 38(2) of the Court Act or as an amicus curiae to inform and assist the Court in the determination of the jurisdictional question of whether the decision agreed between the parties under s 34(3) is a decision the Court could have made in the proper exercise of its functions.

326 HTBA has at the hearing of this appeal foreshadowed that if Dartbrook and the Minister no longer seek for the Court below to grant leave to Dartbrook to

amend the application to modify the consent, but instead request the Court to approve the application with conditions to achieve the same result, it would wish to submit that such a decision would also not be a decision that the Court could have made in the proper exercise of its functions. If HTBA wishes to make either application, it should amend its notice of motion in the Court below accordingly.

327 Equally, Dartbrook and the Minister may wish to alter the terms of the decision that they have agreed. As I have indicated, the term of the decision that the Court grant leave to Dartbrook to amend its application to modify the development consent is not one the Court could have made in the proper exercise of its functions. But that term of the decision is unnecessary. The Court, exercising the functions of the consent authority, can grant approval to the application to modify the development consent as made on conditions. This course is proposed in one of the terms of the decision. Dartbrook and the Minister can agree to altered terms of a decision that would be acceptable to them and then seek for the Court to dispose of the proceedings in accordance with that altered decision.

328 The orders I propose this Court should make will set aside the primary judge's orders, dismiss paragraph 3 of the notice of motion that sought an order for joinder as a party, allow HTBA if it wishes to apply to amend the notice of motion to seek an order that it appear otherwise than as a party, allow Dartbrook and the Minister if they wish to alter their agreement to propose different terms of a decision that the Court should make, and allow the Court to decide HTBA's notice of motion (if amended) and whether the decision Dartbrook and the Minister have agreed on (if altered) is a decision the Court could have made in the proper exercise of its functions.

329 I propose the Court should make the following orders:

(1) Grant leave to appeal.

(2) Direct Dartbrook to file a notice of appeal amended in accordance with its written submissions in reply and otherwise dispense with the rules as to service.

(3) Allow the appeal.

(4) Set aside the orders made by Duggan J of the Land and Environment Court on 20 November 2020.

(5) Dismiss paragraph 3 of the notice of motion filed 9 November 2020, without prejudice to HTBA's entitlement to seek to be heard as to the making of orders pursuant to s 34(3) of *the Land and Environment Court Act 1979* (NSW), with any amended notice of motion seeking to be heard to be filed and served within 7 days of today.

(6) Order HTBA to pay Dartbrook's costs of the proceedings in this Court.

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