White Folder

IN THE SUPREME COURT OF NEW SOUTH WALES, COURT OF APPEAL

No 250144 of 2025

DARACON ENGINEERING PTY LTD
Applicant

DAVID JOHN KELSALL & ORS
Respondents

FIRST RESPONDENT'S WRITTEN SUBMISSIONS

A. Introduction and overview

1. On 3 June 2025, the Dust Diseases Tribunal (**DDT**) granted leave, *nunc pro tunc*, to the First Respondent (**Mr Kelsall**) to amend his pleadings below to expand his existing claim against the Applicant so as to include an occupier's liability claim. Leave *nunc pro tunc* was granted in circumstances where the Applicant had moved the DDT to strike out or dismiss Mr Kelsall's occupier's liability claim against the Applicant on the ground that that claim fell outside of a previous grant of leave to amend.

2. The DDT's decision to grant leave to amend involved an archetypical exercise of a trial court's discretion on a matter of practice and procedure. It did not involve an issue of principle, question of general public importance or an injustice to the Applicant (reasonably clear or otherwise). In those circumstances, leave to appeal should be refused.

3. The Applicant's case to the contrary is misconceived. It is not, as it should be, focused on any injustice alleged to have been caused by the orders from which leave to appeal is sought. Rather, the Applicant's case for leave is focused on case management decisions that the Applicant fears might be made **in the future**. According to the Applicant, it is "*pessimistic*" about the "*attitude*" that the DDT may take towards future case management decisions regarding when the trial of the proceedings below should take place.[1]

4. Such "*pessimis[m]*" about the future does not provide an occasion for a grant of leave to appeal in relation to orders made in the past or demonstrate error in those orders. That is particularly so in circumstances where the primary judge made clear (at [29]) that the DDT would case manage the proceedings below "*including **giving** consideration to any indulgence to be granted to [the solicitor for the present Applicant] so that he can properly represent his client*".

5. If leave to appeal is granted, the appeal should be dismissed. None of the three proposed grounds of appeal have any merit. Even if any of them did, this Court would re-exercise the primary judge's discretion in the same way that the primary judge did.

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[1] Applicant's Summary of Argument filed 11 July 2025 (**AS**) at [48] (White tab 24, 524).

I Sean Ryan solicitor for the Respondent Certify this document is suitable for publication.

B. Background

6. Mr Kelsall is a 70-year-old man who is dying from silicosis and metastatic lung cancer.

7. On 13 December 2023, Mr Kelsall commenced proceedings in the DDT by statement of claim alleging that he contracted silicosis and certain other diseases as a consequence of his employment by the Applicant including at mines occupied, managed and operated by the two other defendants. In its original and first amended form, Mr Kelsall's claim against the Applicant pertained to the Applicant's alleged liability to Mr Kelsall as an employer. No claim was then advanced against the Applicant in relation to any liability as an occupier.

8. That state of affairs changed on 24 April 2025, when Mr Kelsall amended his statement of claim to advance what the Applicant described as an "*occupier's liability*" claim against the Applicant (**Occupier's Liability Claim**). Some further minor amendments were made to Mr Kelsall's statement of claim (by leave) on 29 April 2025.

9. By notice of motion filed 20 May 2025, the Applicant moved the DDT for orders striking out or dismissing the Occupier's Liability Claim on the ground that that claim was added without leave.

10. On 3 June 2025, the primary judge accepted the Applicant's submission that the amendments that Mr Kelsall made to his statement of claim was "*outside the bounds*" of a previous order made granting leave to amend[2] but held that Mr Kelsall should have leave, *nunc pro tunc*, to amend in accordance with the pleading already filed on 29 April 2025.[3]

11. In so holding, the DDT noted[4] that it:

> will monitor preparation for the hearing, including giving consideration to any indulgence to be granted to [the Applicant's solicitor] so that he can properly represent his client.

12. On 1 July 2025, the Applicant applied for leave to appeal from the primary judge's orders of 3 June 2025. Leave to appeal is required because the Applicant seeks to appeal from an interlocutory decision.[5] The Applicant's application to this Court has been expedited and listed for a concurrent hearing. The extent of the available appeal if leave to appeal is granted is an appeal "*in point of law or on a question as to the admission or rejection of evidence*".[6]

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[2] *Kelsall v Downer EDI Mining Pty Ltd* [2025] NSWDDT 2 (J) at [22] (White tab 2, 15).

[3] J at [28] (White tab 2, 17).

[4] J at [29] (White tab 2, 17).

[5] *Dust Diseases Tribunal Act 1989* (NSW) s 32(4)(a).

[6] *Dust Diseases Tribunal Act 1989* (NSW) s 32(1).

C. Leave to amend should be refused

13. It is well-established that leave to appeal will ordinarily only be granted where there is an issue of principle, a question of general public importance, or an injustice which is reasonably clear, in the sense of going beyond what is merely arguable.[7]

14. The Applicant (correctly) does not appear to suggest that its proposed appeal raises an issue of principle or question of public importance. Instead, it asserts that it has suffered a "*reasonably clear injustice*" because of an alleged failure to take certain mandatory considerations into account and an alleged failure "*properly*" to consider the Applicant's submissions and evidence below.[8]

15. But "*injustice*" of that kind (even if established) is not the kind of injustice that could warrant a grant of leave to appeal from a question of practice and procedure that does not determine or effectively determine substantive rights.

16. As the predecessor to this Court explained as early as the 1940s, "*there is a material difference between an exercise of discretion on a point of practice and procedure and an exercise of discretion which determines substantive rights*".[9] In the former case, a "*tight rein*" is kept upon appellate intervention in the interests of the proper administration of justice.[10]

17. In the present case, the only substantive injustice alleged by the Applicant is what it says is its exposure to "*the real risk of being unable to defend itself adequately in the context of a hearing that was going to be set down on an expedited basis*".[11] But that is not a risk caused by the orders from which leave to appeal is sought. Rather, it is a risk that the Applicant fears may arise from a case management decision yet to be made (ie, a decision as to when the proceedings below should be listed for trial). Nothing in the orders from which leave to appeal is sought prevents the Applicant from arguing that the proceedings below should not promptly be listed for hearing because it will not be able adequately to defend itself or that any prompt hearing should not extend to the Occupier's Liability Claim for the same reason.

18. In other words, the substantive injustice that the Applicant alleges to support a grant of leave to appeal is not (alleged) injustice that has been caused by the orders from which leave to appeal is sought. Rather, it is injustice that the Applicant fears it will suffer by reason of a

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[7] See, eg, *Secretary v Smith* (2017) 95 NSWLR 597 (NSWCA) at [28].

[8] AS at [51].

[9] *In re the Will of FB Gilbert* (1946) 46 SR(NSW) 318 (NSWSCFC) at 323.

[10] Ibid.

[11] AS at [52] referring to AS at [40].

case management decision that might be made in the future. Such a fear of future injustice (apparently based only on the Applicant's "*pessimism*" of the "*attitude*" that the court might take to submissions it might make in the future) does not provide a basis for a grant of leave to appeal.

19. In considering the question of injustice, it is important to recognise that there is no impediment on Mr Kelsall commencing fresh proceedings to agitate the Occupier's Liability Claim at any time. In this regard, it should be recalled no statute of limitations applies to dust-related claims of the kind that Mr Kelsall has brought against the Applicant.[12] That being so, the decision below was not "*critical*" for the Applicant in any meaningful sense.[13] If the Applicant succeeded below and the Occupier's Liability Claim was struck out or dismissed, Mr Kelsall would have been at liberty to agitate the Occupier's Liability Claim the next day by way of fresh proceedings and then apply for those proceedings to be consolidated or heard together with the proceedings originally commenced.

20. That fact exposes the lack of utility of the Applicant's proposed appeal. Mr Kelsall will remain entitled to advance his Occupier's Liability Claim through fresh proceedings even if this Court were to hold that the primary judge erred in ordering that that claim could be added to the existing proceedings. While there may be a contestable question as to whether Mr Kelsall's Occupier's Liability Claim should be permitted to be advanced at the same trial as that to be convened to deal with his remaining claims, that question will not be determined by the Applicant's proposed appeal to this Court, regardless of its result.

21. It follows from the above that, to the extent that the Applicant claims injustice of a kind that is said to warrant a grant of leave to appeal, that claim rings hollow. The Applicant's application for leave to appeal thereby fails at the first hurdle. Leave to appeal should be refused and the DDT should be left to case manage its proceedings in the ordinary way.

D. If leave to appeal is granted, the appeal should be dismissed

22. The Applicant's draft notice of appeal[14] identifies three proposed grounds of appeal.

23. None of them have merit.

24. If leave to appeal is granted, the appeal should be dismissed.

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[12] *Dust Diseases Act Tribunal Act 1989* (NSW) s 12A.

[13] Cf AS at [40].

[14] White tab 3, 34.

The DDT did not fail to seek to act in accordance with the dictates of justice (cf proposed ground 1)

25. Proposed ground 1 as pleaded and (lightly) argued appears to have at its heart an allegation that the primary judge failed to take into account one or more mandatory considerations in the exercise of his Honour's discretion – the duty imposed on a court by s 58(1) of the *Civil Procedure Act 2005* (NSW) (**CPA**) to "*seek to act in accordance with the dictates of justice*" and/or the related duty imposed by s 58(2)(a) of the CPA to have regard to the provisions of ss 56 (overriding purpose) and 57 (objects of case management) "*[f]or the purpose of determining what are the dictates of justice in a particular case*".

26. It is difficult to see how that allegation has been made in the face of the primary judge's reasons, which refer specifically to s 58 of the CPA[15] and analyse the question of whether leave *nunc pro tunc* should be granted in an entirely conventional way.[16]

27. To succeed on an allegation that a decision-maker has failed to take into account a mandatory consideration, it is (of course) necessary to demonstrate that the decision-maker did not, in fact, do so.

28. It is absurd, with respect, to suggest that the primary judge overlooked the overriding purpose in s 56 and/or the objectives of case management in s 57(1) of the CPA in exercising his Honour's discretion to grant leave to amend. The whole of the primary judge's reasons on the question of whether leave to amend should be granted were directed to those basal matters.

29. The gist of the primary judge's reasoning was that, although Mr Kelsall did not have leave to advance the Occupier's Liability Claim when he did so by amendment, the dictates of justice supported him being granted leave to do so *nunc pro tunc*. In coming to that view, his Honour took into account the Applicant's concerns about being ready for trial but found that those concerns could and should be dealt with through case management including "*giving consideration to any indulgence to be granted to [the Applicant's solicitor] so that he can properly represent his client*".

30. In other words, the primary judge took into account the factors that his Honour considered fed into an assessment as to what procedural course would facilitate the just, quick and cheap resolution of the real issues in the proceedings and the objects of case management and decided that a grant of leave to amend *nunc pro tunc* with later case management was the

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[15] See J at [28] (White tab 2, 17)

[16] J at [26]-[31] (White tab 2, 16-18).

appropriate procedural course. That was an entirely conventional approach that discharged the duty imposed by s 58 of the CPA.

31. In its two paragraphs of substantive written submissions directed to proposed ground 1, the Applicant complains that the DDT's reasons do not "*identify*" the matters that were "*required to be considered by the dictates of justice*",[17] "*do[] not explain*" why it considered that a grant of leave to amend would facilitate the just, quick and cheap resolution of the real issues in the proceedings.[18] The Applicant also complains that the DDT's reasons also do not do what is said to be "*required by s 57(1) CPA*": to "*explain*" "*why granting leave would be consistent with the principles in that subsection*".[19] Those submissions wrongly proceed on a premise that ss 56 and 57 impose a duty on courts specifically to refer to ss 56 and 57 of the CPA and explain, in the language of those sections, why the court is of the view that a particular procedural course should be taken. That premise is contrary to principle and authority. As this Court explained in *Choy v Tiaro Coal* [2018] NSWCA 205 at [64] per Leeming JA (with whom Gleeson and Payne JJA agreed):

> There [is] no requirement upon [a] primary judge expressly to mention either the purpose or the sections of the *Civil Procedure Act* which mandate giving effect to it.

32. A moment's reflection confirms the correctness of that statement. If it were otherwise, directions lists around the State would slow to a crawl as judicial officers rehearsed, in the language of ss 56 to 59 of the CPA, why they have decided that the dictates of justice and the just, cheap and quick determination of the real issues in dispute warranted (for example) a party having four weeks to serve her evidence rather than the six weeks that she sought or the two weeks that her opposing party proposed. In other words, the Applicant's approach to the overriding purpose in the CPA would be apt to defeat that very purpose by hindering the efficient and proportionate resolution of the real issues in proceedings. That demonstrates the error in the Applicant's approach.

33. In the result, the error alleged by proposed ground 1 has not been demonstrated to have occurred (and did not occur). Proposed ground 1 should be dismissed if entertained.

No *Dranichnikov* error has been demonstrated (cf proposed ground 2)

34. Proposed ground 2 as explained by the Applicant's summary of argument appears to be directed to asserting what could be called a "*Dranichnikov error*".

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[17] AS at [29].

[18] AS at [30].

[19] AS at [30].

35. In ***Dranichnikov*** *v Minister* (2003) 77 ALJR 1088 at [24]-[25], Gummow and Callinan JJ found that, in the circumstances of the particular case before their Honours, the failure of an administrative decision-maker "*[t]o fail to respond to a substantial, clearly articulated argument* ***relying*** *upon established facts*" constituted a "*constructive failure to exercise jurisdiction*" and a failure to accord natural justice.

36. As this Court has since explained, an error of that kind will only have occurred where there has been a failure to address an issue "*of such significance as to warrant a conclusion that the decision-maker has failed to complete the exercise of its power by reason of having failed to engage with an issue of importance to the matter being resolved*".[20]

37. That is not this case.

38. The nub of the Applicant's complaint seems to be that the DDT's reasons did not expressly engage with the Applicant's submissions as to the permissible (but not mandatory) considerations in s 58(2)(b) of the CPA. But that does not demonstrate a *Dranichnikov* error.

39. It is plain from the primary judge's reasons that his Honour understood that there was a discretion to be exercised and took into account the factors that his Honour regarded as relevant. The absence of express reference to permissible but not mandatory considerations does not demonstrate that the primary judge failed to understand his statutory function or failed to complete it.

40. In its summary of argument (at [36]), the Applicant goes so far as to say that:

> Given that [the Applicant] addressed all of the criteria in s 58 of the CPA [by which the Applicant appears to mean the mandatory and non-mandatory considerations in s 58], the [DDT] was obliged to consider and deal with those submissions or at least explain why it considered that the factors in s 58(2)(b) CPA were not relevant to the case before it.

41. No authority is cited in support of that proposition. That is unsurprising. It is wrong. As the High Court explained, for example, in *Whisprun v Dixon* (2003) 77 ALJR 1598 at [62]:

> A judge's reasons are not required to mention every fact or argument relied on by the losing party as relevant to an issue. Judgments of trial judges would soon become longer than they already are if a judge's failure to mention such facts and arguments would be evidence that he or she had not properly considered the losing party's case.

42. That observation has particular force, with respect, in relation to decisions on matters of practice and procedure in respect of which brevity in reasons promotes the interests of justice by facilitating the efficient disposition of the business of the court.

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[20] *Ming v DPP(NSW)* (2022) 109 NSWLR 605 (NSWCA) at 609 [15]

43. One further point should be made in relation to proposed ground 2: both the Applicant's draft notice of appeal and summary of argument make the error of complaining that the DDT failed "*properly*" to engage with certain submissions made by the Applicant. Submissions of that kind risk directing attention away from the critical question – whether there was an appealable error in point of law in the primary judge's decision.[21] Absent appealable error being demonstrated, it is unnecessary and inappropriate to inquire into whether this Court considers that the primary judge ought to have engaged with the Applicant's submissions below in a particular way.

44. The correct approach to proposed ground of appeal 2 as pleaded is to focus on whether the primary judge failed to afford procedural fairness or constructively failed to exercise his Honour's jurisdiction as demonstrated by a failure to respond to a substantial, clearly articulated argument relying upon established facts in the sense described above. No such failure has been demonstrated (or occurred).

45. Proposed ground 2 of appeal should be dismissed if entertained.

The primary judge's reasons were not inadequate (cf proposed ground 3)

46. The Applicant's complaint about the adequacy of the primary judge's reasons should also be rejected if entertained.

47. Mr Kelsall accepts that the giving of reasons is a normal (albeit not universal) incident of the judicial process.[22] It follows that a failure to give reasons where reasons are required constitutes an error conveniently described as a failure to discharge the duty to give reasons. Such an error is characterised as an error of law.[23]

48. But there was no such error in the present case.

49. As French CJ and Kiefel J explained in *Wainohu v New South Wales* (2011) 243 CLR 181 at 215 [56]:[24]

> The duty [to give reasons] does not apply to every interlocutory decision, however minor. Its content – that is, the content and detail of the reasons to be provided – will vary according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision.

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[21] See, eg, *Plaintiff M1/2021 v Minister* (2022) 96 ALJR 497 at [26] regarding labels such as "*proper, genuine and realistic consideration*" in the context of an application for judicial review.

[22] *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 667 per Gibbs CJ (with whom Wilson, Brennan and Dawson JJ agreed).

[23] See, eg, *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 388; *Soulemezis v Dudley* (1987) 10 NSWLR 247.

[24] Quoted with approval in *Resource Pacific v Wilkinson* [2013] NSWCA 33 at [54].

50. At least in the case of a decision which is not subject to appeal for errors of fact (like the decision in respect of which leave to appeal is sought), the duty to give reasons will ordinarily be discharged if "*by his [or her] reasons the judge apprises the parties of the broad outline and constituent facts of the reasoning on which he [or she] has acted*".[25] As Mahoney JA put it in *Soulemezis v Dudley* (1987) 10 NSWLR 247 at 271:

> the law does not require that a judge make an express finding in respect of every fact leading to, or relevant to, his final conclusion of fact; nor is it necessary that he reason, and be seen to reason, from one fact to the next along the chain of reasoning to that conclusion.

51. As has already been explained,[26] the gist of the primary judge's reasons was that the dictates of justice supported a grant of leave to amend *nunc pro tunc* including in circumstances where the Applicant's concerns regarding its ability to be ready for the hearing were most appropriately dealt with as a matter of case management. That reasoning was sufficiently explained by the primary judge's written reasons as to discharge his Honour's obligation to give reasons.

52. In light of the primary judge's approach (and in any event) it was unnecessary for the primary judge to engage in detail with the Applicant's submission that it would not be in a position to be ready for trial within what the Applicant then thought to be Mr Kelsall's life expectancy. On the primary judge's approach, the Applicant is entitled to have its solicitor in a position in which he can "*properly represent his client*" but that issue is most appropriately dealt with as a matter of case management.

53. It was well within the primary judge's discretion to come to that view. In any event, coming to that view did not involve a failure to give adequate reasons as the Applicant alleges.

54. Proposed ground 3 should be dismissed if entertained.

If an occasion arises for the re-exercise of the primary judge's discretion, this Court should re-exercise that discretion in the same way that the primary judge did

55. In the event that the Court grants leave to appeal and detects appealable error, the Court should re-exercise the primary judge's discretion in the same way that his Honour did and, on that basis, dismiss the appeal.

56. Mr Kelsall is entitled to advance the Occupier's Liability Claim. That could be done by fresh proceedings if the existing Occupier's Liability Claim were struck out or dismissed as the Applicant seeks. The dictates of justice do not support forcing Mr Kelsall to take that

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[25] *Soulemezis v Dudley* (1987) 10 NSWLR 247 per McHugh JA.

[26] See paragraph 27 above.

procedurally inefficient course. The just course is for Mr Kelsall to have leave *nunc pro tunc* to advance his Occupier's Liability Claim and to reserve to the DDT for further consideration what case management course should be taken to ensure that the Applicant has a proper opportunity to respond to that case.

57. The Applicant's submissions[27] do not support this Court re-exercising the primary judge's discretion differently if occasion to do so arises.

58. On the contingency that the primary judge's discretion falls to be re-exercised by this Court, the Applicant appears to seek a factual finding from this Court that a grant of leave to amend by this Court will **necessarily** place the Applicant "*in a position where it must seek to defend itself ...without **sufficient** time to be able to do so*".[28]

59. There is no evidential or other basis on which this Court could make such a finding.

60. Such a finding relies on this Court treating as "*illusory*" the assurance by the DDT that it would give consideration to "*any indulgence to be granted to [the Applicant's solicitor] so that he can properly represent his client*".[29]

61. In other words, the Applicant seemingly asks this Court to proceed on the assumption that the DDT will abdicate its duty to afford procedural fairness to the Applicant. There is no basis on the evidence or otherwise on which this Court would proceed on that assumption.

62. As for the Applicant's complaint about Mr Kelsall's explanation for not advancing an Occupier's Liability Claim before he did,[30] the primary judge found (in a passage not challenged by the Applicant) that Mr Kelsall's counsel was "*very frank*" as to how this occurred.[31] In short, when Mr Kelsall's proceedings were first commenced, Mr Kelsall had not given instructions that, when he was employed by entities other than the Applicant, his work was directed and supervised by the Applicant. The Applicant (appropriately) does not suggest that Mr Kelsall deliberately held back an Occupier's Liability Claim for tactical or other reasons.

63. That fact takes the sting out of the Applicant's complaint (at [49]) that the Occupier's Liability Claim was a "*last minute amendment*" and the associated implicit suggestion that Mr Kelsall should, in effect, be punished for not making that amendment sooner.

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[27] See AS at [44]-[50].

[28] AS at [46].

[29] AS at [47] referring to J at [29] (White tab 2, 17).

[30] AS at [45].

[31] J at [16] (White tab 2, 14).

64. In any event, the Applicant's submissions do not explain why it says that the dictates of justice (including the efficient use of judicial resources) support this Court setting aside the primary judge's orders and leaving Mr Kelsall to incur the time and expense of preparing and filing a fresh statement of claim and consolidation application. This is a telling omission, particularly in circumstances where this point loomed large in the argument below.

65. That point provides a significant factor in favour of this Court re-exercising any discretion that falls to be re-exercised in the same way that the primary judge did. In light of Mr Kelsall's intention to advance his Occupier's Liability Claim and in light of the Applicant's position as to whether it can be ready to meet such a claim, it is inevitable that the Occupier's Liability Claim will be before the DDT and seems inevitable that there will need to be debate as to when that claim is tried. That debate should be had before the DDT at the time that it considers appropriate having regard to the ordinary exigencies of case management and without Mr Kelsall first having to incur the time and expense of additional procedural steps such as filing a fresh statement of claim and a consolidation application.

66. That course is to be preferred to making the orders proposed by the Applicant, which would simply mean that Mr Kelsall would have to take further procedural steps (a fresh statement of claim and an application for consolidation) to reach substantially the same position as presently applies on the primary judge's orders.

D. Conclusion

67. For these reasons, leave to appeal should be refused with costs. If leave to appeal is granted, the Court should receive the additional evidence at pages 485 to 514 of the White Folder on which the Applicant seeks to rely[32] but the appeal should be dismissed with costs.

29 July 2025

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[32] See affidavit of David Andersen affirmed 10 July 2025 at [2] (White 533) identifying the additional evidence on which the Applicant seeks to rely.