HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA**

**SYDNEY REGISTRY** **No. S47 of 2023**

**BETWEEN**

**Michael Thomas Potts**
First Appellant

**Nicholas Abboud**
Second Appellant

and

**DSHE Holdings Ltd ACN 166 237 841 (Receivers and Managers Appointed) (In Liquidation)**
First Respondent

**Robert Murray**
Second Respondent

**Lorna Kathleen Raine**
Third Respondent

**Robert Ishak**
Fourth Respondent

**Jamie Clifford Tomlinson**
Fifth Respondent

**SUBMISSIONS OF THE FIRST RESPONDENT (DSH)**

**Part I: Internet publication**

1. This submission is in a form suitable for publication on the internet.

**Part II: Concise statement of issues**

2. These proceedings concern the proper construction and application of s 1317H(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**). The issues arising are:
    a. Whether the language "the damage resulted from the contravention" in s 1317H(1)(b) imposes, *in addition* to a test of factual causation, "normative constraints", which confine the scope of the defendant's responsibility to pay compensation to damage arising from the "particular feature" of the contravening conduct that made it wrongful (see AS[30]) – or, put another way, damage resulting from the reasons why the contravention was a contravention. The answer is "no". See [21]-[42] below.
    b. Whether DSH's asserted loss (payment out of the Final Dividend) in fact "result[ed] from a risk which the duty imposed by s 180(1) required [the appellants] to take reasonable steps to avoid" (AS[3]). The answer is "yes". See [16]-[20] below.
    c. Whether a company's payment out of a dividend, as a result of directors' contravention of their duties under s 180(1), can constitute "damage suffered" by the company within s 1317H(1). The answer is "yes". See [43]-[69] below.
3. In summary, DSH's case on this appeal is as follows.
    a. In s 1317H and its surrounding statutory context, Parliament has framed a compensation entitlement that carefully delineates the metes and bounds of defendants' responsibility to account for loss.
    b. There is no justification for reading additional "normative constraints" into s 1317H(1).
    c. Section 1317H identifies the nature of compensable loss in very general terms, extending beyond what would be recoverable in negligence at common law.
    d. There is no warrant for excluding the wrongful payment out of money from the bounds of a company's recoverable damage under s 1317H just because the money was paid to the company's shareholders, or just because a court has not found that the payment contravened a separate provision of the Corporations Act. Where the result of directors' breach of their duties is the loss of company funds that would not otherwise have been lost, the Court may require the

directors to pay compensation for that loss under s 1317H. The identity of the recipient of the funds does not change the analysis.

e. The appellants' construction of s 1317H is unsupported by the provision's text, context or purpose, and would work incoherence in the application of the broader civil penalty regime.

**Part III: Section 78B of the *Judiciary Act 1903* (Cth)**

4. No notices under s 78B of the *Judiciary Act 1903* (Cth) are required.

**Part IV: Material facts in dispute**

5. Much of the critical background is omitted from or obscured by the appellants' account.

6. ***The factual context for the dividend payment:*** DSH was a large retailer of consumer electronics (TJ[1]). To sell electronics to the public, it needed to purchase the stock from suppliers, who became its trade creditors. Some 50% of those suppliers were on trading terms requiring payment at month end (CA[22], [54], [223]).

CAB 12

CAB 309, 319, 371

7. During FY15, DSH "began increasingly to delay paying some suppliers, pushing out in the order of $20m to $30m at any one time … because [it] could not pay the creditors on the day their debts fell due" (CA[21]). Some suppliers agreed to extensions, but some did not. In various instances, suppliers were paid weeks later than the contractual terms required (CA[21]). DSH's practice caused some suppliers to withhold supply of future products until invoices were paid (CA[153]). Mr Abboud accepted that the company's payment of a dividend in April 2015 had required the deferral of payments to creditors; that payment of the Final Dividend would necessitate the same result; and that the company's practice was causing ongoing prejudice to creditors, including at the times the decisions to pay the dividends were made (CA[191]-[195]).

CAB 309

CAB 309

CAB 350

CAB 360-362

8. As at 17 August 2015, the company's daily cash flow forecast showed that, from the week starting 31 August 2015, DSH "would exceed its facilities limit of $154m on multiple occasions up until mid-December 2016, and that cash at the end of FY16 would be negative $85.2m" (CA[54]). It also showed that, on 30 September 2015 (the date the dividend was to be paid), the cash demands on DSH would exceed available funds by $31m (CA[135], [170], [284]).

CAB 319

CAB 344, 355, 387

9. Nevertheless, on 17 August 2015, DSH's directors (including the appellants) voted to declare the Final Dividend of $11.826m, which was in fact paid on 30 September 2015 (CA[56], [131]).

CAB 319-320, 343

10. What happened next? The financial situation the Board faced from October to December 2015 was ultimately "more dire than the projected situation in August 2015" (CA[294]). "[I]n September and October 2015, restrictions were placed on DSH's ability to buy stock that it needed because of its deteriorating financial position", and "DSH was seeking to delay payment of as many creditors as possible" (CA[60]). DSH received a $20m temporary increase in its overdraft facility with HSBC, but not until 16 November 2015 (CA[57], [65]).

CAB 390

CAB 320-321

CAB 320, 322

11. True it is that the courts below did not expressly find that the payment of the Final Dividend contravened s 254T of the Corporations Act in the circumstances just described. But the Court of Appeal's conclusions on the state of play in August 2015 establish that prejudice to DSH's ability to pay creditors – in other words, the need to "rob[]Peter to pay Paul" (CA[196]) – was a logical inevitability generated by the dividend payment. In their Honours' words (at CA[198]):

CAB 362

CAB 363

> Payment of the final dividend <u>inevitably</u> prejudiced the ability of DSH to pay trade creditors on time, because there was some $12m less cash to do so, and there was no reason to think that the company's cash reserves in September would be materially better than they had been over the previous months, necessitating the practice of pushing out payments.

12. Their Honours emphasised that this was "not a case … where there is no causal link between prejudice being caused to creditors and payment of the dividend" (CA[208]).

CAB 366

13. ***DSH's case at trial:*** DSH's liability claim against the appellants relied on, but was not coextensive with the elements of, s 254T of the Corporations Act (cf AS[8]). The company's case was not simply that the appellants failed to guard against the company's breach of the civil penalty provision in s 254T (cf AS[34]). DSH's claim focused on the types of financial jeopardy to the company captured by s 254T, particularly[1] through s 254T(1)(c), and the appellants' failure to give attention to these matters. Whilst that jeopardy included within it the regulatory risks associated with contravening the law, the substance of the claimed breach of duty was also the spectre of financial strife raised by the potent combination of cash flow position, debt limit, creditor liabilities and dividend payment. As the Court of Appeal explained (at CA[129][2]):

CAB 342

[1] See the relevant extract from DSH's pleading at CA[128].

[2] See also: CA[153] (threatened "detriment to the interests of the company", including suppliers' withholding of stock); [170] ("gap between payment of creditors and receipt of cash"), [180] (inability to pay debts "in full and on time at the date the dividend was to be paid"); [202] ("potential detriment to the company's cash flow from paying the dividend"); [207] ("cash flow difficulties"); [218] ("cash flow problem"); and [221], extracting DSH's written submissions at trial concerning (relevantly) DSH's cash flow problems.

CAB 342
CAB 350
CAB 355, 358
CAB 364, 366, 369

the heart of the company's complaints was that DSH was having cash flow difficulties, and that payment of the final dividend exacerbated these, with the result that the ability of the company to pay creditors in full and on time was materially prejudiced. Messrs Potts and Abboud were said to have breached their directors' duties by voting in favour of the dividend[] without having properly considered this issue.

14. As to the company's claim for compensation under s 1317H, DSH sought only "the amount of the dividend[] … There was no claim for consequential loss. It was not argued, for example, that the payment of the dividend[] had tipped the company into insolvency such that there was some much greater liability" (CA[260]). Rather, it was submitted that "[d]eclaring and paying the dividend caused prejudice or disadvantage to the company in that it had diminished its assets; it had less money" (CA[262]). "DSH suffered damage by paying out money that would not otherwise have been paid out" (CA[270]).[3] CAB 380 CAB 380 CAB 383

15. ***Contraventions found below:*** It is important to distinguish between the *contraventions* of s 180(1) found by the courts below, and the attendant circumstances or *reasons why* the appellants' conduct breached their duties to the company. DSH alleged, and the Court of Appeal found, that Messrs Abboud and Potts contravened s 180(1) by "voting in favour of the resolution to pay the dividend[]" (CA[131]; [117]; [181]; [223]; [281]; cf AS[17]).[4] That conduct fell short of the requisite standard of care and diligence because the appellants failed to address whether payment of the dividend would comply with s 254T and, in particular, whether that payment would materially prejudice DSH's ability to pay its creditors (CA[128]). But this does not change the fact that the impugned conduct is not properly characterised as breach by omission, in the sense of (eg) a mere failure to intervene in the company's management. The *contraventions* consisted of the appellants' positive acts in approving the dividend payment. The *reasons why* those acts amounted to contraventions were that they were done without accompanying consideration of matters that diligent directors ought to have considered. CAB 343, 339, 358, 371, 386 CAB 342

**Part V: Argument**

**Issue 1: "Normative Causation"**

*A short answer: the facts*

16. To succeed on Issue 1, the appellants must do more than establish that s 1317H is imbued with the "normative causation" constraints proffered at AS[3]. They must show that those

[3] See 3ACLS [123]-[125] (RBFM 89 to 90).
[4] See 3ACLS [94], [98] (RBFM 76 and 78 to 79).

constraints were not satisfied *in this case* – specifically, that the damage (payment out of the dividend) did not "result[] from a risk which the duty imposed by s 180(1) required the director[s] to take reasonable steps to avoid" (AS[3]). If such constraints were satisfied in any event, then the legal error the appellants assert could have made no difference below.

17. Even assuming the appellants are right on the law (which is denied), the first answer to this aspect of the appeal is that the same type of harm lying at the core of the directors' wrongful conduct was ultimately "realised" (cf AS[31]).

18. As already explained, on DSH's case, the risk of harm that the appellants failed to guard against was not just breach of the legal norm in s 254T per se. It was the exacerbation of DSH's cash flow difficulties in all the circumstances, manifesting in (inter alia) a detrimental effect on DSH's ability to pay creditors in full and on time. That risk came home. Payment of the Final Dividend in September 2015 diminished DSH's assets (CA [262]) by almost $12m, which necessarily reduced the amount available to pay creditors (TJ [503]) at a time when DSH was "seeking to delay payment of as many creditors as possible" (CA [60]) and was also unable to purchase all the stock it needed (CA [60]). The harm that inevitably occurred (see [11] above) was of the same character as the risks against which the directors failed to guard.

CAB 380

CAB 202

CAB 320-321

19. The fact that the courts below did not make findings that s 254T was breached does not alter this analysis (cf AS[54]). There was no need for a formal finding that DSH contravened s 254T to be able to conclude that the appellants caused DSH the very kind of prejudice or disadvantage that they had wrongfully ignored when they contravened s 180(1). After all, the task before the Court of Appeal was *not* to adjudicate on the question of whether DSH, a claimant for relief rather than a defendant to an action founded on s 254T, contravened a separate civil penalty provision. The issue their Honours were confronting was different, and broader: did DSH suffer loss in all the circumstances?[5]

20. If the Court rejects this short answer, DSH's alternative answer to Issue 1 follows below.

*The prism through which Issue 1 should be viewed*

21. Four contextual matters, taken in combination, illustrate the magnitude of the appellants' task in persuading this Court to accept their "normative causation" thesis of s 1317H.

22. *First*, the appellants do not impugn the Court of Appeal's findings concerning factual causation (see AS[18]). They accept that the language "the damage resulted from the contravention" in s 1317H(1)(b) imposes a test of whether the damage "as a matter of fact

[5] See, by broad analogy, *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at [89]-[90].

was caused by the contravention" (CA[259]; AS[18]). They accept that, but for the appellants' breach of their duties in voting for the resolution to pay the Final Dividend, DSH would not have paid that dividend (see CA[281]-[295]; AS[13]). They accept that the payment out of money in the form of the Final Dividend was a result in fact of the appellants' breach of the statutory norm in s 180 (CA[262]). And, for the purposes of Issue 1, they also appear to accept that payment of the dividend constituted *damage* to the company within s 1317H (see CA[262] and AS[3], [18]); their argument is that this damage did not "flow[] from the right thing" (AS[27]).

CAB 380

CAB 386-390

CAB 381

CAB 380-381

23. *Second*, in contending that the statute imposes "some further, or normative, causal constraint" (AS[18]) that takes account of "the statutory purpose and policy of the provision contravened, and the type of contravention in question" (AS[24]), the appellants are silent on the express limiting mechanisms already found within s 1317H ("may order") and in the provision's surrounding context (ss 1317S, 1318): see [32]-[36] below. They submit that a further, mandatory, limitation on the scope of a defendant's liability lurks within the same statutory phrase in s 1317H(1)(b) that already imposes a test of factual causation (AS[15]).

24. *Third*, although the appellants put their interpretive argument as a proposition governing whether damage within s 1317H resulted from *a contravention of s 180(1)* (AS[3], [15]), orders under s 1317H are available in respect of all 46 of the corporation/ scheme civil penalty provisions set out in s 1317E. Any construction of this generally applicable compensation section must be capable of uniform and coherent application to those underlying provisions. The appellants do not address any broader implications of this kind (see [40]-[41] below).

25. *Fourth*, judicial support for the appellants' position is thin on the ground. The authorities from which the appellants draw the proposition that s 1317H contains within it "normative constraints on causation" (AS[20]-[24]) are three single judge decisions, which make general statements about causation and do not endorse the appellants' ultimate construction. The high point of *Trilogy Funds Management v Sullivan (No 2)* (2015) 331 ALR 185 (***Trilogy***) for the appellants is Wigney J's remark that causation is relevantly informed by "the purpose of the statutory cause of action" (at [665]). His Honour did not suggest that s1317H requires the Court to limit a defendant's liability to loss flowing only from the particular reasons why the defendant's conduct was wrongful (cf AS[15], [34]). Indeed, as the appellants note, Wigney J held that the words "resulted from" in s 1317H must be "given their ordinary meaning", and that damage will have "resulted from" a

contravention if there was a causal connection in fact between the damage and the contravening conduct (at [662]). In *Agricultural Land Management Ltd v Jackson (No 2)* (2014) 48 WAR 1 (***ALM***), Edelman J found that it was unnecessary to determine whether the causal enquiry in s 1317H is limited to one of factual causation (at [462]). As to *TPT Patrol Pty Ltd v Myer Holdings Ltd* (2019) 140 ACSR 38 (***TPT***), Beach J's discussion, in obiter dicta,[6] of "normative causation" does not go much further than the general proposition that, in assessing what any statutory provision "requires to impose legal responsibility for loss and damage", the "type of contravention in question is highly relevant" (at [1641]). Again, this falls far short of the appellants' argument in this appeal.

26. Messrs Potts and Abboud's separate invocation of limiting principles from the common law of negligence,[7] from British jurisprudence arising from the negligent valuation of property,[8] and from this Court's interpretation of a differently worded provision in a NSW fair trading statute,[9] provides little assistance in shedding light on what s 1317H means. As the Court recognised in each of *Trilogy*, *ALM* and *TPT*, "notions of 'cause' as involved in a particular statutory regime are to be understood by reference to the statutory subject, scope and purpose".[10]

27. In effect, then: the appellants accept the Court of Appeal's identification of a factual causation test within s 1317H(1)(b)'s "resulted from …" formulation, but ask this Court to read that statutory language as imposing an *additional* limitation on the scope of defendants' responsibility to pay compensation – notwithstanding the existence of express statutory limitations of that kind elsewhere in Parts 9.4B and 9.5 of the Corporations Act, the possible implications for other civil penalty provisions within the statute, and the lack of relevant authority supporting that course. Whilst novelty and boldness are no barrier in this Court, they do suggest the need for careful interrogation of whether there is a compelling basis for this Court to take the interpretive step urged by the appellants. As will be shown, there is not.

*The proper construction of s 1317H*

28. The appellants' "normative causation" thesis is ultimately an argument for finding within s 1317H certain limits that Hart and Honoré contend are best described in non-causal

[6] See his Honour's reasons at [1672], [1716]-[1720].
[7] *Wallace v Kam* (2013) 250 CLR 375 (AS[26]).
[8] *Hughes-Holland v BPE Solicitors* [2018] AC 599 (AS[27]) at 617-622, addressing the "*SAAMCO* principle".
[9] *Travel Compensation Fund v Robert Tambree* (2005) 224 CLR 627 (AS[28]).
[10] *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at [99].

terms: legal policy principles hinging on "the scope or purpose of the statute, or the nature of the interests it was designed to protect".[11] As Stapleton explains, these "scope rules" are directed towards "whether, as a matter of policy, the law ought in the particular case to enlarge or restrict liability independently of causal connection".[12] Where the asserted scope rule defines the terrain of a legislative rather than common law protection, its existence and nature must be ascertained by construing the provisions in question[13] – not by pointing to scope rules that exist in other fields of law (cf AS[25]-[28]).

29. Here, there is nothing in the text, context or purpose of s 1317H, when read with s 180(1) or otherwise, that justifies the scope rule for which the appellants contend.

30. *First*, there is no textual basis to read the words "resulted from …" as requiring anything other than what they naturally convey: connection in fact between the contravening conduct and the damage[14] (cf AS[19]). The precise nature and quality of the factual connection that s 1317H requires[15] is not in issue; the appellants challenge no part of the Court of Appeal's reasoning concerning causation in fact (AS[18], [35]).

31. *Second*, textual pointers within ss 1317H and 1317J indicate that the former erects *sui generis* boundaries on the scope of liability, rather than seeking merely to replicate common law principles (see CA[257], cf AS[26]). Unlike compensatory relief in tort, "compensation" under s 1317H (which "includes" profits made by the defendant) extends beyond "any damage, loss or effect on the plaintiff".[16] In *ALM*, Edelman J concluded that the provision reflected concepts of both "substitutive" and "reparative" compensation.[17] In addition, s 1317J relevantly restricts the persons who may apply for a compensation order under s 1317H to ASIC and the corporation (ss 1317J(1), (2), (4)).

CAB 379-380

32. *Third*, the contention that the causal language "resulted from" in s 1317H(1)(b) incorporates "normative constraints" is belied by three express limitations contained in the surrounding statutory context. Section 1317H(1) provides that a Court "may" make a compensation order. That has been construed as conferring a discretion on the Court.[18]

33. More significantly, within the same Part that contains s 1317H (Part 9.4B, entitled "Civil consequences of contravening civil penalty provisions"), s 1317S relevantly provides that,

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[11] Hart and Honoré, *Causation in the Law* (2nd ed, 1985) (**Hart and Honoré**) at 102; see also at 93, 304-307.
[12] Stapleton, 'Law, Causation and Common Sense' (1988) 8 *Oxford Journal of Legal Studies* 111 (**Stapleton**) at 115.
[13] Hart and Honoré at 306.
[14] *Adler v ASIC* (2003) 46 ACSR 504 (***Adler***) at [709].
[15] See, eg, Stapleton at pp113-114.
[16] *ALM* at [434].
[17] *ALM* at [437]-[438].
[18] *Adler* at [696]; see also *ASIC v Loiterton* [2004] NSWSC 897 at [87], [106], [110], [112].

in proceedings under s 1317H (s 1317S(1)(a)), if it appears to the court that the person has contravened a civil penalty provision but that the person has acted honestly and "*having regard to all the circumstances of the case* (including, where applicable, those connected with the person's appointment as an officer … of a corporation[])… *the person ought fairly to be excused for the contravention*", the court "may relieve the person either wholly or partly from a liability … that might otherwise be imposed on the person, because of the contravention" (s 1317S(2), emphasis added). Similarly, s 1318(1), which applies to a person who is an officer of a corporation (s 1318(4)(a)), is in the following terms:

> If, in any civil proceedings against a person to whom this section applies for negligence, default, breach of trust or breach of duty in a capacity as such a person, it appears to the court before which the proceedings are taken that the person is or may be liable in respect of the negligence, default or breach but that the person has acted honestly and that, *having regard to all the circumstances of the case*, including those connected with the person's appointment, the person *ought fairly to be excused for the negligence, default or breach, the court may relieve the person either wholly or partly from liability on such terms as the court thinks fit.* (emphasis added)

34. These two "substantially similar" provisions "operate as … dispensing power[s]" to ensure that the relevant provisions giving rise to the liability do not operate unfairly or harshly.[19] Relevantly, they may excuse a liability arising from directors' contraventions of the Corporations Act, including of s 180(1).[20] "Liability" in this context extends to an order to pay compensation.[21]

35. Sections 1317S and 1318 provide exactly the kind of statutory escape valve that the appellants envisage when they suggest that they should not fairly be held accountable for damage that, in their view, caused no "adverse consequences" to DSH (AS[32]). So much must have been apparent to Messrs Potts and Abboud, as they invoked the provisions at trial (see TJ[512]). In exercising its broad power under s 1317S(2) or s 1318(1), the Court is expressly required to take into account "all of the circumstances of the case" – which circumstances extend to "the seriousness of the contravention *and its potential or actual consequences*".[22] Within ss 1317S and 1318, the expression "the case" "directs attention

CAB 205

[19] *ASIC v Healey (No 2)* (2011) 196 FCR 430 (***Healey (No 2)***) at [85]-[86]; *DCT v Dick* (2007) 242 ALR 152 at [78]; *Daniels v Anderson* (1995) 37 NSWLR 438 at 525.
[20] See, eg, *Commissioner of Taxation v Dick* (2007) 67 ATR 762 (***Dick***) at [15], [28]-[29]; *Hall v Poolman* (2007) 65 ACSR 123 at [313]; and, more recently, the approach taken in *Healy (No 2)* at [3], [8], [81], [97] (noting that the declarations made included declarations of contravention of s 180(1): see the unreported judgment at [2011] FCA 1003) and in *ASIC v Vocation Ltd (in liq) (No 2)* (2019) 140 ACSR 382 at [1], [4], [11], [22], [41].
[21] See Explanatory Memorandum to the Corporate Law Reform Bill 1992 (**1992 EM**) at p44 [189]; *Asden Developments Pty Ltd (in liq) v Dinoris* [2017] FCAFC 117 at [105]-[106]; *Healey (No 2)* at [94]-[96].
[22] *Healey (No 2)* at [89] (emphasis added); *Morley v ASIC (No 2)* (2011) 83 ACSR 620 at [50]; *Trilogy* at [890].

to the way in which the default or breach has occurred".[23]

36. These provisions are "scope rules" in the sense described at [28] above. Adopting the appellants' parlance, they reflect "normative constraints" on the application of s 1317H. Given the presence of ss 1317S and 1318 in the statutory scheme governing the consequences of civil penalty contraventions, there is no justification for reading s 1317H to contain a further scope rule that would do the same work. That proposition is supported by the legislative history. The civil penalty regime was inserted into the then *Corporations Law* by the Corporate Law Reform Bill 1992, the same Bill which created Part 9.4B. That Bill relevantly introduced ss 1317HA and 1317HD, the antecedents to what is now s 1317H,[24] which used materially the same language as present s 1317H(1)(b) to define the circumstances in which a corporation could recover compensation. It also contained s 1317JA, "a provision in virtually identical terms to s 1318" which is "now found in s 1317S".[25] The Explanatory Memorandum stated that new Part 9.4B Div 5 would "enable[] the Court to order a person who has contravened a civil penalty provision to compensate the company for any … loss to the company", but tempered that in the very next paragraph with the explanation that proposed sections ss 1317JA and following include "provisions based on section 1318 enabling the Court to relieve a person from liability arising out of certain contraventions".[26] Thus, it is clear that Parliament viewed the compensation power and the power to relieve from liability as complementary planks of the broader civil penalty architecture, each performing a different function. Treating s 1317H(1)(b) as a separate source of "normative constraints" jars with that design.

37. *Fourth*, the "purpose of the … statutory provision that has been contravened" (AS[21]) in the appellants' case – s 180(1) – provides no support for their analysis. Section 180(1) binds a company's directors and officers to exercise their powers and discharge their duties with a minimum degree of care and diligence. As Edelman J recognised in *ASIC v Cassimatis (No 8)*,[27] the Corporations Act treats a contravention of this provision as "both a public and a private wrong". As a private wrong, it is a breach of a duty owed to the corporation, and is thus "shaped by the private interests of the corporation". Its "private character" is "evident in the liability of the corporation to compensate the corporation for

[23] See *Advance Bank Australia Ltd v FAI Insurances Ltd* (1987) 9 NSWLR 464 at 490-491.
[24] The legislative history is explained in more detail by Edelman J in *ALM* at [441]-[447].
[25] *Dick* at [44].
[26] 1992 EM at [120]-[121].
[27] (2016) 336 ALR 209 (***Cassimatis FC***) at [455] (affirmed on appeal: (2020) 275 FCR 533).

loss".[28] Further, the private duty in s 180(1), like that in s 181(1), is not imposed "to secure compliance with the various requirements of the Corporations Act". [29]

38. The interests of the corporation advanced by s 180(1) read with s 1317H include the need both to make it whole for past wrongs and to protect it from future wrongs. In the Senate Committee report precipitating the 1992 reforms of the directors' duty provisions and the introduction of the civil penalty regime,[30] the Committee relevantly stated that "[r]egulation of directors … must aim to secure adherence to what the community considers are reasonable standards in business practice" (at [2.22]); that, "[w]here people suffer loss through a director's breach of duty, they should be able to recover compensation from him or her" (at [2.37]); and that "laws governing the corporate sector" needed to carry sanctions to "gain obedience" (at [10.12]). Similarly, the extrinsic material for a progenitor of s 229 of the uniform Companies Codes (now reflected in ss 180-184 of the Corporations Act) stated that the provisions were designed to "be an effective deterrent to misconduct"[31] and "encourage good corporate governance by provision of deterrents".[32]

39. Against this backdrop, why should the "private interests of the corporation" not extend to an entitlement under s 1317H to make the corporation's directors accountable in damages for all losses in fact flowing to it from the private wrong committed in contravention of s 180(1)? To adapt Stapleton's query from the negligence context, the appellants' argument raises the "simple and obvious question of why, merely because [the statutory norm in s 180(1)] presupposes the likelihood of certain harm, it should follow that the responsibility of the defendant must be limited to harm of that sort".[33] The answer is that the policy underpinning s 180(1) indicates that no narrow view should be taken of the prejudice or disadvantage that is compensable under s 1317H.

40. *Fifth*, the appellants' construction of s 1317H as applied to a contravention of s 180(1) would create incoherence in the application of s 1317H to other civil penalty provisions. The difficulty lies in the fact that the "normative constraints" they read into s 1317H(1)(b) are mandatory rather than discretionary (AS[15]). Adjusting their thesis to accommodate other civil penalty provisions, the appellants must say that the defendant's liability to pay

[28] *Cassimatis FC* at [456].
[29] *ASIC v Maxwell* (2006) 59 ACSR 373 (***Maxwell***) at [106].
[30] Senate Standing Committee on Constitutional and Legal Affairs, 'The Social and Fiduciary Duties and Obligations of Company Directors' (November 1989); see also the 1992 EM at [2]-[4].
[31] Victoria, Legislative Assembly, Parliamentary Debates (Hansard), 9 September 1958 at 331, concerning what became s 107 of the *Companies Act 1958* (Vic); discussed in *Angas Law Services Pty Ltd (in liq) v Carabelas* (2005) 226 CLR 507 (***Angas Law***) at [60].
[32] *Angas Law* at [62].
[33] Stapleton at p121, fn 36.

compensation *is limited* to such prejudice or disadvantage as has "resulted from" the feature of the defendant's conduct which made it wrongful. But various civil penalty provisions already reflect a conclusion reached by Parliament on the scope of a defendant's responsibility for the proscribed conduct. For example, by s 1317E(4), a person who attempts to contravene, or is involved in a contravention of, a civil penalty provision is taken to have contravened the provision. Similarly, in respect of creditor-defeating dispositions of property, an officer of a company is liable to a civil penalty both for engaging in certain conduct that results in the company making such a disposition (s 588GAB(2)) and for "procuring, inciting, inducing or encouraging" the making of such a disposition (s 588GAC(2)).

41. Suppose that a director attempts to arrange for a company to make a large investment in one of his or her personal business ventures, contrary to s 182(1)(a) read with s 1317E(4), and one consequence of the director's conduct is that another entity pulls out of a profitable proposed joint venture due to concerns about the company's perceived mismanagement. On the appellants' analysis, the harm to the company against which s 182(1) guards would seem to be the *execution* of a transaction that abuses the director's position – meaning that, if the director's hypothetical transaction did not ultimately proceed, the company could have suffered no compensable loss under s 1317H. But again, why should that follow? Parliament's extension of these corporate governance norms to encompass inchoate contraventions by company officers reflects a strong deterrence objective (see, eg, s 588GAA). Imposition of the appellants' narrowing "normative constraints" at the s 1317H(1)(b) stage would undercut the broader normative framework that Parliament appears to have contemplated at the anterior stage of applying, eg, s 1317E(4).

42. For the foregoing reasons, the appellants' arguments on Issue 1 should be rejected.

**Issue 2: Damage**

43. Messrs Potts and Abboud also contend that the payment of the Final Dividend did not constitute "damage suffered" by DSH for the purposes of s 1317H(1) (AS[36]). However, their submissions on that score are not supported by the language of s 1317H(1), the legal character of a dividend, relevant authorities concerning the wrongful payment out of dividends, or the policy of s 254T.

*The statutory text*

44. The starting point is, again, the statutory text (cf AS[37]-[42]). Relevantly, under s 1317H(1), a Court may order a person to "compensate" a corporation for "damage" it

has "suffered". This language is perfectly general. As already explained, ss 1317H(2)-(3) demonstrate that the "damage" to which a compensation order may attach is a broad spectrum of economic consequences that includes profits and diminution in property value. A liberal construction is also supported by the width of the term "damage",[34] read in the context that s 1317H is a remedy by which a corporation may hold its officers to account for contraventions of the Corporations Act affecting that entity (see [37]-[39] above). The Court of Appeal was right to conclude that "damage" in this statutory setting should be given no confined meaning, and entails an enquiry into whether the corporation has "sustained … a prejudice or disadvantage".[35] The appellants' examples at AS[46] of what counts as sufficient "prejudice or disadvantage" for these purposes – a loss of public confidence in the company's prospects, and discouragement of investment in the company's shares – bolster that conclusion.

45. Messrs Potts and Abboud do not identify anything in the statutory text, context or purpose that would warrant a narrow reading of the expression "damage" in s 1317H. Instead, they proffer two reasons why payment out of a dividend (or, at least, a "lawfully paid" dividend) cannot constitute a prejudice or disadvantage to the company (AS[45]). Each is misconceived.

*The special position of shareholders?*

46. Messrs Potts and Abboud contend that the "intersection between the interests of a corporation and its corporators" means that, where a corporation is solvent and pays a dividend to those corporators, it is "difficult to see" how the corporation could have suffered damage (AS[49]). Their argument proceeds from an assumption that the corporation's interests and the shareholders' interests are, in substance, the same, at least when the corporation is not insolvent. However, that assumption is not consistent with the authorities.

47. *First*, it is wrong to treat the effect of the dividend payment on shareholders cf its effect on DSH as "indistinguishable", because "to do so would be to deny that the company is a separate legal entity".[36]

48. *Second*, any historical support for treating the company's best interests as exclusively those of its members has yielded to more modern jurisprudential developments recognising that

[34] See *Macquarie Dictionary Online* (2021), definition 1: "injury or harm that impairs value or usefulness".
[35] CA[258], quoting from *Marks v GIO Australia Holdings* (1996) 196 CLR 494 at [46].
[36] *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 (***Pilmer***) at [49].

"how the company's interests [are] understood might depend on the circumstances".[37] In 1976, this Court observed that "the directors of a company in discharging their duty to the company must take account of the interest of its shareholders and its creditors", explaining that "[a]ny failure by the directors to take into account the interests of creditors will have adverse consequences for the company".[38] In *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722, Street CJ qualified his statement excerpted at AS[48] with the remark that shareholders cannot absolve directors from a breach of duty to the company in circumstances where "the interests at risk are those of creditors" (at 732). In *Vrisakis v ASIC* (1993) 9 WAR 395, Ipp J held that, "[i]n determining what is in the 'interests of the company, the company means the corporate entity itself, the shareholders, and, *where the financial position of the company is precarious*, the creditors of the company" (at 450).[39] And in *Sequana*, a recent UK Supreme Court decision, all of their Lordships agreed that a company's directors are obliged to consider the interests of creditors *before* the point of insolvency (cf AS[49]).[40] As Lord Reed stated, to "treat the company's interests as equivalent to the shareholders' interests" when the company is nearing insolvency "encourages the taking of commercial risks which are borne primarily not by shareholders but by the creditors" (at [59]). On the facts found below, DSH was financially distressed at the time the dividend was paid (CA[60], [294]).

CAB 320-321, 390

49. *Third*, the proposition that the assessment of whether the company has lost anything (at least while it is solvent) must take account of what its *shareholders* have received is in tension with this Court's reasoning in *Pilmer* (see CA[264]-[265]). There, as part of a successful takeover bid for another entity (Western United Ltd), a company (Kia Ora) had purchased Western United shares using a combination of cash and its own shares obtained through a new share issue. "As a result of the acceptances of its offers, it paid $25.696 million and issued and allocated 67.9 million $1 shares in Kia Ora" (at [2]). Relevantly, the courts below held that the accountants who had prepared the independent report leading to Kia Ora's takeover offer had breached common law and contractual duties of care to

CAB 381-382

[37] *BTI 2014 LLC v Sequana SA* [2022] UKSC 25 (***Sequana***) at [29].
[38] *Walker v Wimborne* (1986) 137 CLR 1 at 7.
[39] Emphasis added; approved by Thawley J in *Cassimatis v ASIC* (2020) 275 FCR 533 at [453]. See also *Nicholson v Permakraft (NZ) Ltd* (1985) 1 NZLR 242 at 249 ("creditors are entitled to consideration … if the company is insolvent, or near-insolvent, or of doubtful solvency, or if a contemplated payment or course of action would jeopardise its solvency"), approved by Street CJ in *Kinsela* at 731-733.
[40] *Sequana* at [45] (Lord Reed: "insolvent or nearing insolvency"), [207] (Lord Hodge: "insolvent or bordering on insolvency"), [176] (before insolvency, although the point at which the obligation arises is "fact sensitive" and depends to some extent on "the brightness or otherwise of the light at the end of the tunnel"), [250] (Lady Arden: "financially distressed companies").

that company. The question in this Court was "whether Kia Ora suffered any loss by the issue and allotment of its shares to those who accepted its takeover offer" (at [4]).

50. If the correct prism for assessing loss had been that of Kia Ora's existing shareholders, the effect of the "very disadvantageous" share issue on those members would have been "very large" (at [48]). However, the Court emphasised that the question was "*not* whether shareholders in Kia Ora were adversely affected" (at [18], emphasis in original). When attention was properly confined to what Kia Ora lost, the answer was that it lost the cash it had outlaid, less the value of the shares it obtained from Western Union, plus the administrative costs of issuing the shares (at [64], [88]).

*Segenhoe Ltd v Akins* (1990) 29 NSWLR 569

51. Useful guidance on the correct approach in analysing whether payment of the Final Dividend caused "damage" emerges from the reasoning of Giles J in *Segenhoe Ltd v Akins* (1990) 29 NSWLR 569 (***Segenhoe***). In that case, a company sued its auditors in negligence, and claimed that the negligent audit of its accounts caused it to pay shareholders an amount by way of dividend that it would not otherwise have paid ($494,111 of the $2 million dividend) (at 571, 574). The Court accepted that this was the amount of Segenhoe's loss, and awarded damages accordingly (at 581, 588). His Honour rejected the auditors' argument that the payment of dividends out of capital only caused damage to the company when the company was insolvent (at 574, 580). Justice Giles canvassed numerous English cases and textbooks in support of the proposition that the measure of damages recoverable by a company from negligent auditors where a dividend has been paid out of capital is the amount wrongly paid out (at 574-580), and continued (at 580-581, emphasis added):

> As a matter of principle, it does not seem to me that it matters for present purposes that the company paying a dividend is solvent rather than insolvent. *In either case the company as a separate entity is out of pocket to the extent of the money paid away.* The effect of the company being out of pocket may be different: those who ultimately suffer may be the shareholders rather than the creditors. But the effect in the case of a solvent company may vary according to whether or not the company is trading profitably; not having the money paid away may be what takes a solvent company into insolvency; or an insolvent company may nonetheless trade out of its difficulties. *To investigate and forecast these effects would be to embark upon a neverending process. It is a process which is not undertaken when, for example, the loss to the company is not payment of a dividend but a payment to a third party (not a shareholder) in reliance upon a negligent mis-statement. A line is drawn: the claimable loss is the amount of the money paid away.*

52. His Honour also rejected as "untenable in principle" the contention that the payment of a dividend does not cause loss to a company because it is "a payment to, and for the benefit of, shareholders" (at 574). In Giles J's words, that reasoning "would negate the company's status as a legal entity separate from its shareholders"; in effect, it would "disregard … the corporate veil" (at 581). His Honour also explained that, in any event, a dividend paid without adequate care on the directors' part *can* cause losses to shareholders, because (i) a diminishment in the value of the shareholding may not match the dividend amount; and (ii) an incoming shareholder who did not receive the dividend "will not necessarily pay a price for his shares discounted so as to reflect the company being out of pocket" (at 581).

53. Justice Giles' reasoning on these points was not challenged and appears to have been accepted by the Court of Appeal in *Carr v Resource Equities Ltd* (2010) 80 ACSR 247 (at [40]), a case relevantly involving a company's claims against its former directors under ss 180-182 of the Corporations Act. It also coheres with the English courts' recognition that, "[i]f a dividend was paid in reliance on the findings of [a] negligent audit, it would be within the type of loss recoverable for breach of the auditor's duties".[41] There is no reason in principle or authority to proceed differently where the defendant is a director.

54. Further, as Giles J recognised in *Segenhoe*, this conception of the company's loss aligns the law's treatment of dividend payments with other wrongful payments made using company funds – for example, directors' fees and bonuses paid in reliance upon negligent audits,[42] loan funds dispersed for non-approved purposes in breach of ss 180-182,[43] and money paid to a third party in reliance upon a negligent misstatement.[44] Both in *Segenhoe* and in the present case, payment of the Final Dividend was "the natural and immediate consequence of [the relevant] breach of duty" (here, the resolution to pay the dividend), and the wrongdoers should be "liable for damages to the amount of the moneys so paid".[45]

*A distinction between "lawful" and "unlawful" dividend payments?*

55. The appellants contend that the principle recognised in *Segenhoe* and approved in *Carr* – that a dividend payment resulting from a breach of duty can constitute loss to the company

[41] *Assetco plc v Grant Thornton UK LLP* [2019] EWHC 150 (Comm) at [968], [1007], citing (inter alia) *Leeds Estate, Building and Investment Co v Shepherd* (1887) 36 Ch D 787 (***Leeds***); *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20 (***Manchester***) at [3]. See also *Jackson & Powell on Professional Liability* (9th ed, 2021) at [17-141] and *Accountants' Negligence and Liability* (2nd end, 2021) at [8.83]-[8.93]
[42] *Leeds* at 809, discussed in *Segenhoe* at 574-576.
[43] *Maxwell* at [144], [170] (holding, as to the application of s 1317H(1), that "the authorisation by Mr Maxwell of the post-order non-project payments was a breach of his duty as an officer of the [companies] … and that by those funds being paid away from those companies to third parties, the companies suffered loss").
[44] *Segenhoe* at 574, 581.
[45] *Leeds* at 809.

– only applies where the payment occurred "in contravention of the provisions of the corporations legislation governing payment of dividends" (AS[56]). They say that a dividend "paid consistently with s 254T and the company's constitution" falls within a different category (AS[42]).

56. Putting aside the problem that there was no finding below that the Final Dividend was paid *consistently* with s 254T and DSH's Constitution, the appellants' analysis ignores the broad rationale underpinning Giles J's reasoning: that the result of the defendants' negligence was that Segenhoe had *paid to its shareholders money which it would not otherwise have paid* (at 574, 576). The fact that the dividend payment was unlawful to the extent it breached the capital maintenance rule was not the reason why Giles J held that the company had suffered loss. It was relevant only as a circumstance that explained factual causation in that case: the directors would not have paid out that sum had they known that to do so was unlawful (at 571, 574; CA[269]). CAB 382-383

57. The appellants' distinction also jars with his Honour's explanation (at 576, 581) that the same rationale underpinned a company's ability to recover damages in respect of other payments it had made due to negligence (none of which were constrained by the capital maintenance rule), such as directors' fees, bonuses, tax and remittances to third parties.[46]

58. These matters are clear from Giles J's summary of the "simpl[e]" case advanced by Segenhoe (at 574), which his Honour ultimately upheld:

> Segenhoe was a separate legal entity, distinct from its shareholders. As a result of the negligence of DHS, it had paid to its shareholders money which it would not otherwise have paid. It suffered the loss of that money, and could recover it from DHS. The position was the same … as where it had been led to pay money to a third party (not a shareholder) in reliance upon a negligent misstatement.

59. As his Honour asked, if payments to third parties constitute compensable loss when they result from negligent conduct, why should dividend payments be treated differently? Or, on the appellants' softer version of their case, why should "lawfully paid" dividends be treated any differently? Equally, the same position should follow where the wrong is a breach of directors' duties.[47] Section 1317H contemplates that, whenever a company "part[s] with a valuable thing, whether it be goods or choses in action", due to its director's

[46] Note that *Leeds* did not only concern dividends paid out of capital (cf AS[56] fn 10). The Court held that each of "[t]he payment of the dividends, directors' fees and bonuses to the manager" resulted from the auditor's negligence and was recoverable in damages: at 809.
[47] See *Equitable Life Assurance Society v Ernst & Young* [2003] 2 BCLC 603 (***Equitable Life Assurance***), 664-666 at [91]-[96] (Brooke LJ); *Maxwell* at [170].

conduct, "[its] measure of damages is the value of the thing at the time [it] parted with it" – which, where the thing is currency, the face value of the currency.[48]

60. The suggestion that lawfully paid dividends cannot amount to damage or else directors would be duty-bound never to pay them (AS[42]) is distracting alarmism. For the purposes of s 1317H, no payment out of company funds amounts to "damage" in a vacuum. The necessary anterior step is to identify wrongful conduct from which the payment resulted. The point is that when directors have paid out a company's money in breach of their duties – by investing in unstable business ventures; by paying an inflated price for assets; or making a dividend payment –that payment can amount to loss suffered by the company even where there is no separate statutory prohibition on the underlying conduct.

61. Relatedly, the argument that the object of s 254T is to permit the making of distributions to a company's members where "such payment does not cause detriment to the company's ongoing operations" (AS[55]) does not assist Messrs Potts and Abboud. *First*, the facts found below certainly do not support the claim that the Final Dividend payment caused no detriment to DSH's operations ([10]-[11], [18] above). *Second,* the claim that it creates incoherence in the law if a dividend payment not found to have breached s 254T is the source of damage for the purposes of s 1317H is unfounded. Section 254T does not seek to immunise the company's payment of a dividend from all legal consequences – least of all, the fixing of liability on *directors* to account for their failure of due care and skill that caused the payment to be made. To treat a company's return of money to members as damage in that context creates no inconsistency with s 254T; just as it would not undermine the statutory scheme to conclude that directors' conduct in causing a company to execute a contract (s 124(1)), cancel shares (s 124(1)(a)) or grant a security interest (s 124(1)(e)) breached s 180(1) even though those corporate acts are permitted by the Corporations Act.

62. Finally, it is convenient to address some red herrings in the appellants' submissions.

63. The appellants' qualification that a dividend payment might cause damage to a company where "some other prejudice to the corporation's operations" is "shown to have resulted from the payment" (AS[49]) reflects a misplaced search for consequential loss. The $11.826 million depletion in DSH's funds was all that DSH ultimately sought (CA[260]), and needed, to plead in order to establish damage. CAB 380

64. The contention that DSH would have been "entitled to recover the amount of the dividend from its directors" (AS[33]) while it remained solvent is similarly unavailing. If Messrs

[48] *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452 at 489-490, approved in *Pilmer* at [63].

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and Potts are postulating some action against the directors other than the claim under s 1317H, the argument could only be relevant to a mitigation defence that Giles J rejected as unsound in *Segenhoe*. There, the auditors contended that Segenhoe's diminishment of its cash resources by $494,111 generated in its place a "right of action against the shareholders to recover that sum", such that there was "no diminution in the nett assets of Segenhoe and accordingly it had suffered no loss" (at 582). His Honour considered that the question raised by this argument was "one of mitigation of loss" (at 582). Justice Giles reasoned that, "[i]n fulfilling its obligation to mitigate its loss", Segenhoe was "only required to act reasonably"; that "the standard of reasonableness [was] not high in view of the fact that [the auditor firm was] the wrongdoer"; and that Segenhoe "was not obliged to take the risk of bringing uncertain litigation against the shareholders" (at 582). No different analysis should apply in respect of DSH's compensation claim under s 1317H and its failure to bring some separate action against the appellants to recover the dividend amount.

65. If instead the appellants are suggesting that the directors or administrators could have caused DSH to recover the dividend payment from Messrs Potts and Abboud under s 1317H while DSH remained solvent, and then declared another dividend in the same amount, such that the shareholders received two dividends – it is hard to see how that curious and unlikely hypothetical answers the fundamental proposition that DSH is a legal entity separate from its shareholders. Any assertion of double recovery is unfounded.

66. As to *Manchester* (AS[47]), Lord Leggatt's statement that a dividend lawfully paid from distributable profits causes no "actionable loss" to the company (at [130]) is not persuasive and did not persuade the rest of the UK Supreme Court. In terms reminiscent of the present case, their Lordships remarked (at [3]) that it is "not obvious why recovery of damages should be limited to a payment out of capital which would not have been made but for the negligent advice" and must exclude "a payment out of retained profits which would not have been made but for that advice, where the sum paid would otherwise have been retained by the company as available working capital".

*The correct conception of DSH's damage*

67. A company's declaration of a dividend creates a debt due to its shareholders.[49] By application of cl 85(a) of DSH's Constitution[50] read with s 254V(2) of the Corporations Act, DSH immediately incurred a debt upon the Board's resolution to declare the final

[49] *State Revenue v Dick Smith Electronics* (2005) 221 CLR 496 at [13], [30]; *Fischer v Nemeske Pty Ltd* (2016) 257 CLR 615 at [32]; *Bluebottle UK Ltd v DCT* (2007) 232 CLR 598 at [20].
[50] RBFM 45.

dividend on 17 August 2015 (TJ[274]; CA[56]), which debt was discharged when DSH paid the dividend on 30 September 2015 (CA[131]). The dividend payment reduced by $11.826 million the monies available to DSH to conduct its business operations – for example, to buy the stock it needed (TJ[294]; CA[60]), to invest in profit-earning assets, and to discharge onerous liabilities.[51] It reduced DSH's value and the value of shares held by shareholders. DSH was forced to delay payments to creditors, and some of its accounts held with suppliers were suspended (TJ[294], [510]; CA[60], [186]-[187], [193]). As explained earlier, DSH's weekly forecasts showed that, on the date the dividend was due to be paid, DSH would exceed its facility limit by approximately $31 million (CA[135], [170], [284]). That latter consequence was ultimately avoided, but the value of DSH's delayed payments in September 2015 was $43,349,275.38 (TJ[135]; CA[174]). In other words, one problem was solved by the creation, or exacerbation, of another (see TJ[294], [510]; CA[60], [198], [208]).

CAB 115, 319-320
CAB 343
CAB 121-122, 320-321
CAB 122, 205, 320-321, 359-360, 361-362
CAB 344, 355, 387
CAB 36, 356
CAB 120-121, 205, 320-321, 362-363, 366

68. Ultimately, the best summary of the prejudice or disadvantage caused by the appellants' support of the resolution to pay the Final Dividend comes from the trial judgment: DSH "paid away a sum of money" and "received nothing in return" (TJ[509]). Immediately after the dividend payment was made, DSH was worse off by the amount it paid away – $11.826 million. It "suffered damage by paying out money that would not otherwise have been paid out" (CA[270]). No further evaluation of events in DSH's descent towards insolvency is necessary (cf AS[32], [61]).

CAB 204
CAB 383

69. Accordingly, this Court should also reject the appellants' submissions concerning Issue 2.

**Part VII: Estimate of time for oral argument**

70. DSH estimates that it will require 2 hours for oral argument.

**Dated: 7 July 2023**

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[51] See, similarly, *Equitable Life Assurance*, 664-666 at [92]-[93], [96] (Brooke LJ).

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. S47 of 2023

BETWEEN

**Michael Thomas Potts**
First Appellant

**Nicholas Abboud**
Second Appellant

and

**DSHE Holdings Ltd ACN 166 237 841**
**(receivers and managers appointed) (in liquidation)**
10 First Respondent

**Robert Murray**
Second Respondent

**Lorna Kathleen Raine**
Third Respondent

**Robert Ishak**
Fourth Respondent

**Jamie Clifford Tomlinson**
Fifth Respondent

20 **ANNEXURE TO THE FIRST RESPONDENT'S SUBMISSIONS**

Pursuant to Practice Direction No. 1 of 2019, the First Respondent sets out below a list of the statutes and statutory instruments referred to in these submissions.

| No. | Description | Version | Provisions |
|---|---|---|---|
| 1. | *Companies Act 1958* (Vic) | Version dated 2 December 1958 | s 107 |
| 2. | *Corporate Law Reform Act 1992* (Cth) | Version dated 24 December 1992 | s 17 (inserting, relevantly, ss 1317HA, 1317HD and 1317JA into the Corporations Law) |
| 3. | *Corporations Act 2001* (Cth) | Version in force from 1 July 2015, registered 16 July 2015 | ss 180, 254T and 254V |

| No. | Description | Version | Provisions |
|---|---|---|---|
| 4. | *Corporations Act 2001* (Cth) | Compilation no 118, in force from 10 August 2022, registered 30 September 2022 | s 1317H |
| 5. | *Corporations Act 2001* (Cth) | Compilation no 121, in force from 1 March 2023, registered 7 March 2023 | ss 124, 181, 182, 588GAA, 588GAB, 588GAC, 1317E, 1317J, 1317S and 1318 |