



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

Michael Thomas Potts
Appellant

and

National Australia Bank Ltd
(ABN 12 004 044 937)
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: CERTIFICATION

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

Part II: OUTLINE OF PROPOSITIONS

2. Whether DSH engaged in misleading or deceptive conduct is to be assessed against the following uncontested findings made by the trial judge.
3. *First*, that from early 2014, DSH pursued a strategy to obtain “O&A” rebates from suppliers in order to improve its reported profits (PJ[25]-[26], [31], [79], [82], [113]-[114]; CAB 19, 20, 22, 39, 41, 53-54), and Mr Abboud was the main driver of that strategy (PJ[384]-[385], [390]; CAB 154, 156). Mr Potts and Mr Abboud, along with senior management, were aware that this was a substantial cause of DSH’s overstocked position in January 2015 (PJ[127]-[130], [411]-[415], [570]; CB 60-61, 164-166, 229). The emphasis on O&A rebates did not change in 2015 (PJ[570], [572]; CAB 229-230).
4. *Second*, on 6 and 11/12 May 2015, Mr Potts answered questions asked by NAB officers about why DSH was overstocked in January 2015 and what steps it had taken to prevent a recurrence (PJ[218]-[227]; CAB 95-98). He engaged in misleading conduct by failing to disclose what the trial judge found to be the “true position”, which was that (a) the overstocking was caused by the O&A strategy and (b) no real steps had been taken to address this (PJ[571]-[573]; CAB 229-231).
5. *Third*, DSH employees also provided information to NAB on, relevantly, the following three occasions prior to execution of the SFA:
 - a. on 28 April 2015, when Mr Potts and Mr Abboud met with NAB and Mr Abboud gave a presentation about DSH using a presentation slide pack prepared by DSH (PJ[205]-[210], [545]-[547], [566]; CAB 91-93, 221, 227-228);
 - b. on 5 May 2015, when Mr Potts (in a ministerial capacity: PJ[549]; CAB 222) provided DSH’s management accounts to NAB (PJ[215]-[216], CAB 94); and
 - c. on 20 May 2015, when Ms Puja answered questions posed by a NAB officer regarding DSH’s trade and working capital requirements (PJ[242]; CAB 102-103).

The basis for DSH’s liability to NAB.

6. On 22 June 2015, DSH made the representation in the form of cl 21.1(t) of the SFA (RBFM 152). The representation was about “all information” provided by DSH to NAB in connection with the SFA. It had two aspects. The first was that all information, relevantly, provided prior to that date was “accurate in all material respects” as at 22

June 2015. The second was that all information was also not misleading by omission in any material respect as at the date provided. The representation made by cl 21.1(t) was a straightforward representation of fact, not opinion. It focussed on the objective quality of all information provided.

7. It was falsified by each of the three pieces of information provided by DSH to NAB referred to in paragraph 5 above:
 - a. the information provided on 28 April 2015 was misleading by omission because none of it disclosed the true position with DSH. That the case against Mr Abboud for engaging in misleading conduct at this meeting was dismissed (PJ[566]; CAB 227-228) is irrelevant. The trial judge did not deal with the case against DSH based on its independent act in making the cl 21.1(t) representation on 22 June 2015;
 - b. the management accounts were also misleading by omission because they did not explain the inventory position reflected in the monthly figures, or the relationship between the reported profit and the January 2015 inventory figure; and
 - c. Ms Puja's information was also misleading by omission as she was asked a direct question about DSH's management of excess stock, and her answer did not disclose the O&A strategy which had contributed to the excess stock position, or that no real steps take been taken to address this problem.

The pleadings and how Mr Potts' concurrent wrongdoer defence was dealt with below

8. Mr Potts' concurrent wrongdoer defence as pleaded in his Amended List Response (**Potts List Response**) (ABFM 117ff) to NAB's Third Amended Commercial List Statement (**NAB List Statement**) (ABFM 72) did not plead a "reflective case". Rather, Mr Potts pleaded at paragraph 133 (ABFM 162-163) that DSH was liable to NAB for misleading conduct based on the independent act of NAB making the cl 21.1(t) representation on 22 June 2015. DSH is not vicariously liable for any act of Mr Potts; it was DSH that made the representation which was misleading because information provided by DSH to NAB was, at the date of provision, materially misleading by omission. This was admitted by NAB at [9] of its Reply (AFBM 49). Insofar as NAB relies on [10] of the Reply (ABFM 49) to qualify this admission, that is misconceived since it presumes that DSH's liability to NAB is vicarious.
9. Further, Mr Potts never put a case below that DSH was a concurrent wrongdoer due to vicarious liability for his conduct. At both trial and on appeal, Mr Potts' case identified

independent conduct by DSH (trial: Supp BFM 6-7 and RBFM 271 and 281-282; appeal: Further Supp BFM 9, 18, 25-28).

Errors by the Court of Appeal

10. The Court of Appeal erred in its consideration of whether the cl 21.1(t) representation was falsified in two critical ways at CA[445] (CAB 442):
 - a. to consider that the “state of mind” of DSH was relevant, when the representation was one of historical fact (the objective quality of the information provided by DSH to NAB); and
 - b. in considering that “state of mind”, then excluding the knowledge of Mr Abboud, who was DSH’s CEO and focussing on the non-executive directors of DSH, rather than senior management. Applying the principles stated in *Krakowski v Eurolynx* (1995) 183 CLR 563 at 582 and *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421 at [96]-[100], the centrality of Mr Abboud’s role within DSH meant he was a person so “closely and relevantly connected” with DSH to attribute his knowledge to it. Further, applying the approach in *Crowley v Worley Limited* [2022] FCAFC 33 at [118] and [122], the Court of Appeal should have had regard to the unchallenged findings of what senior management, in particular Mr Borg, knew about the undisclosed “true position” found by the trial judge (AS[63]-[64]).

Apportionment

11. Mr Potts’ responsibility for NAB’s loss should be limited to no more than 50 percent, taking into account the comparative culpability of Mr Potts and DSH.

Special leave should not be revoked

12. Special leave should not be revoked as this appeal raises issues of general principle, does not depart from Mr Potts’ pleading and does not involve any challenge of factual findings below. Further, the Court of Appeal’s reasons demonstrate clear error which should be corrected. This is an appropriate case for this Court’s visitation jurisdiction.

Dated: 10 October 2023



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