



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: S48/2023  
File Title: Potts v. National Australia Bank Limited  
Registry: Sydney  
Document filed: Form 27E - Reply  
Filing party: Appellant  
Date filed: 27 Jul 2023

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IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

BETWEEN:

**Michael Thomas Potts**  
Appellant

and

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**National Australia Bank Limited**  
**(ABN 12 004 044 937)**  
Respondent

**APPELLANT'S REPLY**

**Part I: CERTIFICATION**

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

**Part II: REPLY TO THE ARGUMENT OF THE RESPONDENT**

2. NAB's submissions (**RS**)<sup>1</sup> do not defend the Court of Appeal's reasoning at CA[445] (CAB 442), or engage with the errors identified by Mr Potts (all of which raise issues of general principle). Instead, NAB seeks to distract from the issues on this appeal by mischaracterising Mr Potts' concurrent wrongdoer defence, and by raising arguments which were not debated below, are inconsistent with its admission of Mr Potts' concurrent wrongdoer defence, are not the subject of a Notice of Contention (**NOC**), and cannot be raised for the first time in this Court.  
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3. NAB must be taken to accept the errors identified by Mr Potts in the Court of Appeal's judgment regarding attribution of knowledge to DSH (upon which the special leave question squarely arises) and whether cl 21.1(t) of the SFA was misleading (at AS[39] and [54]-[65]). Those issues of principle are not contested. Instead, NAB incorrectly frames the case against DSH as a breach of warranty case, rather than a misleading conduct case. As a result, NAB's approach to cl 21.1(t) and its contentions regarding pleading deficiencies and fact findings are also misconceived.
4. Special leave should not be be revoked (cf RS[13]): *first*, it should not be revoked based on points that NAB cannot raise without a NOC and *secondly*, contrary to NAB's contentions, this appeal raises issues of general principle, does not depart from Mr Potts' pleading (see [9]-[13] below) and does not challenge any factual findings (see [16] below). NAB fails to engage with Mr Potts' arguments and relies on that very non-engagement to deny that this appeal raises issues of general principle.  
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5. **Issue 1:** NAB's construction argument was not put below and cannot be raised now without a NOC. It is also wrong. The basis of DSH's liability to NAB is that it engaged in misleading conduct, not breach of warranty. The correct enquiry is what DSH conveyed by its representation, and not what the "proper construction" is.
6. Even approached as a matter of contract, the Court should reject NAB's contention that each of sub-cll (s), (t) and (u) are to be construed as mutually exclusive and dealing with  
30 "different categories of information" (RS[35]). *First*, the text of cl 21.1(t) does not expressly exclude information captured by cl 21.1(s). In contrast, it *does* expressly

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<sup>1</sup> Mr Potts adopts NAB's abbreviations of the relevant pleadings, being 3ACLS, PCLR and the Reply.

exclude information caught by cl 21.1(u). **Secondly**, there is no principled reason to construe cl 21.1(t) that way. Warranties are given for the benefit of the recipient. In a commercial contract, overlap between different clauses does not require them to be construed to eliminate that overlap with refined precision: *Star Entertainment Group Limited v Chubb Insurance Australia Ltd* (2021) 396 ALR 590 at [166]. As observed in *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266 at 274, legal documents often contain “superfluous words” to ensure “every conceivable point has been covered”. **Thirdly**, NAB’s contention that each warranty has a mutually exclusive operation cannot be reconciled with the warranty given by DSH in cl 21.1(r) (RBFM 152), which warranted that, inter alia, financial statements provided by DSH are “a true and fair statement of (if audited) or fairly represent (if unaudited) the matters with which they deal.” It is not in contest that cl 21.1(t) captures historical financial information (see RS[38]). This means that cll 21.1(r) and (t) are not mutually exclusive as both will be breached if DSH provides materially inaccurate financial statements.

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7. The proper enquiry is whether DSH engaged in misleading conduct in representing in cl 21.1(t) that “all information” (subject to the exclusion) provided by DSH was “not by omission or otherwise misleading”. The representation as to “all information” concerned the totality of what DSH provided to NAB, and is not limited to each piece of information considered in isolation (see AS[35]-[37]). NAB’s construction ignores the word “all”, which it tellingly omits at RS[33] and [36]. It should be rejected.

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8. RS[37] asserts that the proposition in AS[37] is incorrect, because cl 21.1(t) cannot provide any assurance regarding the accuracy or completeness of financial projections (since they are excluded). That the representation conveyed by cl 21.1(t) is qualified by an express exclusion does not assist NAB. The matters that Mr Potts contends that DSH did not disclose to NAB concern DSH’s pursuit of O&A rebates and whether it had taken real steps to address that. Those matters do not fall within the express exclusion, and were subject to the assurance conveyed by DSH to NAB.

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9. **Issues 2 and 3:** NAB’s contentions regarding the pleading also cannot be raised without a NOC. The argument NAB makes (that Mr Potts’ concurrent wrongdoer defence naming DSH was confined to conduct pleaded by NAB against Mr Potts) was not dealt with by the primary judge (since his Honour failed to deal with the defence entirely: CA[450]; CAB 443). Although the argument was also raised on appeal (at T226.20-228.32 (RBFM 291-2 and SuppBFM 8)), it formed no part of the Court of Appeal’s reasons.

10. In any event, the contention that Mr Potts' appeal departs from his pleaded case is a strawman. The pleading is at PCLR [133] (ABFM 162-163). It pleads conduct by DSH to establish DSH's liability to NAB: that DSH made the representation in cl 21.1(t) of the SFA at [133(a)] and that this conduct was misleading because of DSH's failure to disclose certain matters to NAB at [133(c)]. Mr Potts argued this case at trial (see written opening submissions at [12] and [27]-[28] (SuppBFM 5-7), written closing submissions at [753]-[754] (RBFM 271) and oral closing at T4270.10-22 and 4270.40-4271.12 (RBFM 281-2)). He maintains it now.
- 10 11. NAB asserts that PCLR [133] is a "reflective case" (RS[43]), pleaded no further facts to establish DSH's liability (RS[22] and [24]), and that "the only matter relied upon by Mr Potts to falsify [the representation] was the attribution to DSH of his own conduct in dealing with NAB" (RS[49]). Those assertions are incorrect. Although the defence is conditional upon certain allegations made in NAB's case being established, it does not mirror the misleading conduct alleged by NAB against Mr Potts. As pleaded in [133], the basis of DSH's liability to NAB is independent of Mr Potts' liability to NAB, being the non-disclosure by DSH pleaded at [133(c)]. PCLR [133(c)] is a plenary pleading of misleading conduct.
- 20 12. Insofar as NAB contends at RS[40]-[48] that (a) Mr Potts had to plead, as part of the concurrent wrongdoer defence, particular items of information provided by DSH to NAB; (b) the only reference in PCLR [133] to such information is the reference to 3ACLS [102] (which refers to Mr Potts' contraventions) in the chapeau; and (c) as a result Mr Potts pleaded a "reflective" case, none of that follows. What Mr Potts had to plead was the relevant misleading conduct and he did so at PCLR [133(c)] (a pleading which expressly picked up identified paragraphs of 3ACLS relied upon to establish DSH's liability for non-disclosure). In any event, 3ACLS [102] (ABFM 102) pleads loss suffered by NAB as a result of Mr Potts' alleged contraventions, not provision of information, and it is not referred to in [133(c)].
- 30 13. Further, PCLR [133] was admitted without qualification in Reply [9] (ABFM 49). It is therefore not open to NAB to now contend that the pleading is deficient. While NAB seeks to qualify its admission by reference to its denial in Reply [10], and argue that it only admitted DSH's liability "by attribution to it of the pleaded acts or omissions of...Mr Potts" (at RS[24] and [42]), that argument is hopeless. What NAB denied in Reply [10] was PCLR [134] (ABFM 164), which pleaded that DSH was also a concurrent wrongdoer as a consequence of its misleading conduct as pleaded,

relevantly, in [133]. It was not an answer to PCLR [133] and cannot qualify or traverse the admission given in Reply [9] of DSH's liability to NAB for misleading conduct.


14. **Issue 4:** NAB contends that none of the additional information identified at AS[44] establishes that DSH misled NAB by making the representation in cl 21.1(t). *First*, NAB has not sought to withdraw its admission of PCLR [133(c)] (i.e. that DSH misled NAB), so the issue does not arise. *Secondly*, Mr Potts' primary position on cl 21.1(t) is that it is not necessary to consider particular information in isolation, but to look at the totality of what was provided. If that is accepted, the issue also does not arise.
- 10 15. In any event, NAB's two-step approach set out in RS[55] to analysing whether particular information identified at AS[44] was misleading is wrong. NAB incorrectly seeks to evaluate whether each piece of information was misleading by omission at the time it was provided, ignoring the effect of the representation made by DSH. Let it be assumed in NAB's favour that, at the time each piece of information was provided, DSH was not required to volunteer information or to disclose all relevant qualifying facts. That was no longer the case *after* DSH represented on 22 June 2015 that "all information" provided by DSH to NAB "is at the date of this document...accurate in all material respects and not, by omission or otherwise, misleading in any respect". The cl 21.1(t) representation meant that the previous non-disclosure of important qualifying facts was misleading because NAB would be misled, absent such disclosure, into believing that the previous information was complete: cf *Miller & Anor v BMW Australia Finance Limited* (2010) 241 CLR 357 at [23]. The effect of the representation was to render earlier omissions misleading or deceptive, being "communications between [the parties that] gave rise to a duty to add to or correct earlier information": *Lam v Ausintel Investments Australia Pty Ltd* (1989) 97 FLR 458 at 475.
- 20 16. NAB also argues that *first*, Mr Potts cannot rely on information provided at the 28 April meeting without challenging the primary judge's finding that there was no misleading conduct at that meeting (RS[59]-[62]). However, Mr Potts need not challenge that finding, since the primary judge was not considering the present issue: whether the information was misleading where DSH subsequently represented that all information provided was not, by omission or otherwise, misleading (see also AS[14] and [47]-[48]).
- 30 17. *Second*, NAB also argues that there are no findings that the management accounts and Ms Puja's information were misleading (despite both being addressed in Mr Potts' submissions on the concurrent wrongdoer defence: see T4270.15-22 and 4271.6-11

RBFM 281-2). The point is that the primary judge failed to deal with the concurrent wrongdoer defence naming DSH altogether. The Court of Appeal acknowledged this failure but did not correct the error: CA[450]; CAB 443. That however should not prevent this Court from doing so. This Court can comfortably find that the information provided was misleading by omission, in light of the representation made in cl 21.1(t), for the reasons given at AS[45]-[53]. Each particular piece of information identified at AS[44] engaged on the topics of DSH’s inventory position or rebates without disclosing an important qualifying fact, which was what the primary judge found to be the “true position” regarding both those matters at PJ[571]-[572] (CAB229-230).

- 10 18. **Issue 5:** There are three problems with NAB’s contention that DSH’s misleading conduct did not cause the same loss and damage as Mr Potts’ conduct. *First*, this point formed no part of the Court of Appeal’s reasoning and cannot be raised without a NOC. *Secondly*, the issue cannot be raised in the face of NAB’s admission in Reply [9], which admitted that DSH’s conduct caused NAB to enter the SFA and advance funds, being the same loss for which Mr Potts is liable (being PCLR [133(d)]; ABFM 163). That admission was sensibly made, as NAB itself pleaded that it relied upon cl 21.1(t) in entering the SFA (3ACLS [19]; ABFM 78). Because loss and causation were not in issue, it was not necessary to explore in evidence. NAB has not sought to withdraw its admission and to do so would cause Mr Potts irreparable prejudice. *Thirdly*, as this
- 20 argument involves questions of fact that could have been the subject of evidence, NAB is precluded from raising it for the first time before this Court: *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418. Had this matter been in issue at first instance, Mr Potts could have cross-examined the decision-makers as to what NAB would have done had DSH not engaged in misleading conduct by making the cl 21.1 representation (which, contra RS[80]-[83], was not whether NAB would have exited the SFA for breach of warranty, but whether it would have entered into the SFA in the first place).
19. **Issue 6:** Mr Potts relies upon AS[66]-[72] regarding apportionment. However, Mr Potts’ position has always been that the Court may remit the issue for determination.

Dated: 27 July 2023

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