



HIGH COURT OF AUSTRALIA

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Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

No. S48 of 2023

BETWEEN

Michael Thomas Potts
Appellant

and

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

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OUTLINE OF ORAL SUBMISSIONS OF THE RESPONDENT (NAB)

Part I: Certification

These submissions are in a form suitable for publication on the internet.

Part II: Outline of Propositions

1. The only issue in this appeal is whether the primary judge and the Court of Appeal correctly disposed of Mr Potts' pleaded case that DSH was a concurrent wrongdoer.

Issue 1: Misleading conduct through the giving of the cl 21.1(t) warranty (NAB [31]-[39])

2. Mr Potts' case that DSH is a concurrent wrongdoer required him to prove wrongdoing that produced a breach of SFA cl 21.1(t). A breach of cl 21.1(t) requires the identification of specific information provided by DSH to NAB which was **(1)** not "accurate in all material respects" as at 22 June 2015 or **(2)** "misleading in any material respect" on the date it was provided.
3. Mr Potts contends that, in making the representation in SFA cl 21.1(t), DSH engaged in conduct "independently" of Mr Potts which caused NAB's loss (AS [31]-[32]). Thus, in contrast with the usual approach in misleading conduct cases (cf *Parkdale* (1982) 149 CLR 191 (3 JBA 12 p458) at 199), the Court must focus on DSH's alleged wrongful conduct as quarantined from any conduct of Mr Potts.
4. Clause 21.1(t) is not a warranty of "full disclosure" (cf Reply [15], citing *Lam* (1989) 97 FLR 458 at 475); cf cl 21.1(s). It does not apply to financial projections, estimates and forecasts (cf cl 21.1(u)).
5. The only conduct of DSH that might be considered as its wrongdoing was giving the warranty. And that could not constitute a failure to provide "important qualifying facts", or give rise to a duty to "correct" earlier information by revealing "the true position" (AS [19], [30], [36], Reply [15]). The mere giving of the warranty was not such an act.

Issues 2 and 3: The pleaded case (NAB [40]-[54])

6. Mr Potts' pleaded case that DSH was a concurrent wrongdoer was entirely reflective of NAB's case. He did not plead any additional information provided by DSH or any person acting on its behalf to NAB other than what NAB pleaded was provided to it by Messrs Potts and Abboud: Potts ACLR [132]-[135] (ABFM 162-164).
7. NAB's case against Mr Potts only partly succeeded. At the 6 May 2015 meeting and in a subsequent telephone conversation, NAB's employees directly asked Mr Potts why DSH's inventory had peaked in January 2015, and Mr Potts gave a misleading response. NAB's case against Mr Abboud failed entirely, including re: the 28 April 2015 meeting.

8. This meant that **(1)** the only pleaded “information” provided to NAB found to be misleading was that which Mr Potts had provided and **(2)** only Mr Potts’ conduct was found by the primary judge to have caused NAB’s loss.
9. That NAB accepted in its Reply that, if it established its pleaded case against Mr Potts then DSH necessarily breached cl 21.1(t), does not assist Mr Potts. There is no issue that the information Mr Potts provided on 6 May 2015 and in the subsequent telephone conversation was provided on DSH’s behalf and was “misleading in [a] material respect”. But the attribution of Mr Potts’ conduct to DSH is insufficient for it to be a concurrent wrongdoer, as Mr Potts accepts: CA [442].
- 10 10. Proportionate liability does not operate in this case, because: **(1)** the company has not “caused, independently of [the director] or jointly” the damage or loss (CCA s 87CB(3)), but rather has had the conduct attributed to it as if it were the director; **(2)** the company has no “comparative responsibility” (see s 87CD(3)(b)) for the loss, which means that there is no basis to apportion responsibility between the company and the director, and limit the liability of either (CCA s 87CD(1)); and **(3)** other legal principles of vicarious liability and several liability are preserved (CCA s 87CI).
11. What was missing from Mr Potts’ case was the identification of facts which constituted breaches by “DSH as an entity” of, relevantly, cl 21.1(t) of the SFA: CA [445].
- Issue 4: Three pieces of “information” relied upon for breach of cl 21.1(t) (NAB [55]-[71])*
- 20 12. Mr Potts now relies on three pieces of “information” to make out his case before this Court: **(1)** information provided by Messrs Abboud and Potts at the 28 April 2015 meeting, **(2)** the provision by Mr Potts of DSH’s management accounts on 5 May 2015; and **(3)** a response by Ms Puja on 20 May 2015. But none of that information was sufficiently connected with the topic of DSH’s overstocking in January 2015, and the reasons for it, to induce NAB into erroneously assuming that DSH had comprehensively disclosed anything and everything about that topic. See *Miller* (2010) 241 CLR 357 (3 JBA 11 p425) at [22]-[23], [26], [95]-[96].
13. As to **(1)**, the primary judge rejected NAB’s case that what Messrs Abboud and Potts had and had not said at the 28 April 2015 meeting was misleading both then and up to 22 June 2015 (PJ [566]). Mr Potts accepts that what was said was not misleading as at 28 April 2015 (AS [47]), and therefore the second component of cl 21.1(t) is not engaged. He has failed to identify how what was said was not “accurate in all material respects” as at 22 June 2015 so as to engage the first component of cl 21.1(t).
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14. As to (2), nothing in the management accounts has been found to be misleading. To the extent such a case was mounted, it was abandoned (PJ [344]). Those accounts accurately stated stock movements and were not framed to be giving “reasons” for those things. To the extent these contain financial projections, estimates and forecasts, they are outside cl 21.1(t) in any event (and subject to cl 21.1(u)).
15. As to (3), nothing in what Ms Puja said was inaccurate, as Mr Potts accepts: AS [53]. How then could the information Ms Puja provided, later effect a breach cl 21.1(t)?
16. As to CA [445]: Mr Potts eschewed any claim that any other officer of DSH failed in their duty (including by providing misleading information to NAB in breach of clause 21.1(t) of the SFA): CA [446]. For this reason, the contention that the Court of Appeal erred in CA [445] by stating that no other director was aware of the provision of misleading information other than Mr Potts, and misapplied *Crowley v Worley* [2022] FCAFC 33 (4 JBA 15) by focusing only on the directors, goes nowhere.

Issue 5: Whether DSH is a concurrent wrongdoer (NAB [72]-[83])

17. The question whether a breach of cl 21.1(t) of the SFA arising from the three pieces of information caused the *same* loss as Mr Potts’ misleading conduct is not straightforward. NAB relied on the representation and warranty in cl 21.1(t) (see cl 21.4, RBFM 154), but the relevant question is whether it relied upon the three *pieces of information* provided. It is not explored, let alone established, that the “no transaction” case is the correct analysis.

Issue 6: Whether Mr Potts should bear only 50% of the loss he caused (NAB [84]-[85])

18. Even if this Court were to find breach of cl 21.1(t) through the provision of the three pieces of information identified, the causal potency of Mr Potts’ conduct substantially outweighs the impact of any of this material on NAB’s lending decision-makers.



Bret Walker

9 October 2023