

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD AND GLEESON JJ

MICHAEL THOMAS POTTS

APPELLANT

AND

NATIONAL AUSTRALIA BANK LIMITED

RESPONDENT

Potts v National Australia Bank Limited

[2023] HCA 41

Date of Hearing: 10 October 2023

Date of Judgment: 6 December 2023

S48/2023

ORDER

- 1. Revoke the grant of special leave to appeal to this Court given on 21 April 2023.*
- 2. The appellant pay the respondent's costs.*

On appeal from the Supreme Court of New South Wales

Representation

N C Hutley SC with M E Ellicott and A Zheng for the appellant (instructed by Hall & Wilcox)

B W Walker SC with J A Arnott SC, C G Winnett and M Mellos for the respondent (instructed by Norton Rose Fulbright)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Potts v National Australia Bank Limited

High Court of Australia – Special leave to appeal – Where questions of legal principle not in issue at appeal hearing – Whether single ground of appeal concerning factual issues met criteria for special leave to appeal – Whether special leave to appeal should be revoked.

Words and phrases – "question of law of public importance", "revocation of special leave", "special leave to appeal".

Judiciary Act 1903 (Cth), s 35A.

1 GAGELER CJ, GORDON, EDELMAN, STEWARD AND GLEESON JJ. The appellant, Mr Potts, former company secretary, chief financial officer and director of Dick Smith Holdings Ltd, now known as DSHE Holdings Ltd (receivers and managers appointed) (in liquidation) ("DSHE"), was granted special leave to appeal to this Court from the judgment and order of the Court of Appeal of the Supreme Court of New South Wales¹ which dismissed his appeal from the decision of the primary judge.² The primary judge ordered judgment for the respondent ("NAB") against Mr Potts in the sum of \$57,278,091.44, as damages caused by Mr Potts' misleading and deceptive conduct which induced NAB to enter into a syndicated facility agreement ("SFA") and associated agreements to loan funds to Dick Smith Holdings Ltd (as DSHE was then known).

2 The single ground of appeal was that the Court of Appeal erred in finding that Mr Potts had failed to establish that DSHE was a concurrent wrongdoer for the purposes of proportionate liability defences relied upon by Mr Potts to reduce his liability to NAB.³ The grant of special leave was limited to Mr Potts' case concerning a representation made by DSHE to NAB in cl 21.1(t) of the SFA that all information provided by DSHE to NAB was accurate in all material respects and not misleading by omission.

3 Mr Potts' special leave application contended that the proposed appeal raised a question of general importance concerning the correct principles to apply when attributing knowledge to a corporate entity and, specifically, when determining if a corporation engaged in misleading conduct by making representations authorised by its board. In response to a question from the Bench, senior counsel for Mr Potts submitted that the question of general importance involved no factual inquiry.

4 However, at the hearing of the appeal, principles concerning the attribution of knowledge for the purpose of finding a corporate entity to be a concurrent wrongdoer were not in issue. Instead, Mr Potts contended that the cl 21.1(t)

1 *DSHE Holdings Ltd (receivers & managers appointed) (in liq) v Potts* (2022) 405 ALR 70.

2 *DSHE Holdings (receivers & managers appointed) (in liq) v Abboud [No 3]* (2021) 359 FLR 331.

3 The defences were based upon *Australian Securities and Investments Commission Act 2001* (Cth), ss 12GP(3), 12GR; *Competition and Consumer Act 2010* (Cth), ss 87CB(3), 87CD; *Corporations Act 2001* (Cth), ss 1041L(3), 1041N.

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representation was falsified by three pieces of information provided by DSHE to NAB because each was "misleading by omission in [a] material respect as at the date provided", within the meaning of cl 21.1(t). Neither the primary judge nor the Court of Appeal had made findings to this effect.

5 Senior counsel for Mr Potts acknowledged this deficiency in the factual basis for the appeal, but sought to overcome it by arguing, variously, that: the falsity of the cl 21.1(t) representation had been admitted by NAB on the pleadings; the falsity was an obvious inference from the facts as found; and the primary judge and the Court of Appeal had failed to deal with Mr Potts' case by omitting to find those facts. Contending that the Court of Appeal erred by identifying DSHE's knowledge of the falsity of the cl 21.1(t) representation as a relevant issue when the representation was one of historical fact, Mr Potts submitted that his liability for NAB's loss should be limited to no more than 50 per cent, taking into account DSHE's comparative culpability.

6 Special leave to appeal would not have been granted to address the arguments made by Mr Potts at the hearing of the appeal. None of those arguments raised a question of law of public importance or met any of the other criteria for a grant of special leave to appeal.⁴

7 Moreover, none of Mr Potts' contentions concerning the deficient factual basis for the appeal were made out. The Court of Appeal was correct to say that Mr Potts' proportionate liability defences omitted an identification of the facts which constituted breaches of the cl 21.1(t) representation by DSHE as an entity independently of Mr Potts.⁵ It is sufficient to observe that Mr Potts' defences did not allege that any of the three pieces of information relied upon in this Court was misleading in a material respect at the date provided, so as to render the cl 21.1(t) representation misleading or deceptive. Consequently, NAB's admission, that the cl 21.1(t) representation was misleading or deceptive by reason of DSHE's failure to disclose to NAB various pleaded matters prior to entry into the agreements that included the SFA, did not encompass an admission that the cl 21.1(t) representation was misleading or deceptive by reason of omissions from any of those pieces of information.

4 *Judiciary Act 1903* (Cth), s 35A.

5 *DSHE Holdings Ltd (receivers & managers appointed) (in liq) v Potts* (2022) 405 ALR 70 at 164 [445].

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8 If DSHE had been found to have engaged in misleading or deceptive conduct by any of these omissions, questions of public importance may have arisen as to the extent of culpability of DSHE and whether DSHE was a concurrent wrongdoer in relation to NAB's claim against Mr Potts, as a person "whose acts or omissions ... caused, independently of [Mr Potts] or jointly", the loss that was the subject of the claim.⁶ In the absence of an adequate factual basis for considering that issue, the case was not an appropriate vehicle to consider that question.

9 Accordingly, the proper course is for the grant of special leave to be revoked. Mr Potts must pay the costs of the proceeding in this Court.

6 *Australian Securities and Investments Commission Act 2001* (Cth), s 12GP(3); *Competition and Consumer Act 2010* (Cth), s 87CB(3); *Corporations Act 2001* (Cth), s 1041L(3).