HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **MICHAEL THOMAS POTTS**
First Appellant
NICHOLAS ABBOUD
Second Appellant

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and

DSHE HOLDINGS LTD ACN 166 237 841 (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)
First Respondent

ROBERT MURRAY
Second Respondent

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LORNA KATHLEEN RAINE
Third Respondent

ROBERT ISHAK
Fourth Respondent

JAMIE CLIFFORD TOMLINSON
Fifth Respondent

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APPELLANTS' SUBMISSIONS

Part I: Certification

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

Part II: Statement of issues

2. This appeal raises two inter-related issues.

3. ***First***, whether, when assessing compensation under s 1317H of the *Corporations Act 2001* (Cth) (the ***Act***) for damage which a company has suffered by a contravention of s 180(1) of the Act, the Court must have regard to normative considerations in addition to considering "but for" causation. In particular, must the Court consider whether a director should be held responsible for the damage claimed (payment of the dividend) where it was not established that the damage resulted from a risk, which the duty imposed by s 180(1) required the director to take reasonable steps to avoid?

4. ***Secondly***, whether, when assessing compensation under s 1317H of the Act for damage which a company has suffered by a contravention of s 180(1) of the Act, a dividend paid to shareholders, which is not shown to contravene s 254T of the Act, is "damage" suffered by the company within the meaning of s 1317H?

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Part III: Section 78B notices

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

Part IV: Reasons for judgment below

6. The reasons of the Court of Appeal are reported as *DSHE Holdings Ltd (Receivers and Managers) (In Liq) v Potts & Ors* (2022) 405 ALR 70; [2022] NSWCA 165 (**CA**) (CAB 289). The reasons of the primary judge are reported as *DSHE Holdings Ltd (Receivers and Managers) (In Liq) v Abboud & Ors* (2021) 55 ACSR 1; [2021] NSWSC 673 (**PJ**) (CAB 6).

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Part V: Facts

7. At trial, the respondent (**DSH**) relevantly brought claims against the appellants on the basis of alleged breaches of s 180 of the Act by voting in favour of a resolution on 17 August 2015 to declare a final dividend of 5 cents per share with a total value of $11.826m, to be paid on 30 September 2015 (**Final Dividend**). The first appellant (**Potts**) was DSH's Chief Financial Officer. The second appellant (**Abboud**) was DSH's Chief Executive Officer.

8. DSH's case, as put in closing oral submissions, rested principally upon s 254T(1) of the Act (PJ[444]-[445], CAB 180-181). That is, as finally put, DSH's case was that the appellants could not resolve to pay the Final Dividend consistently with their duties under s 180 because they could not be satisfied, based on what they knew or ought to

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have known, that the payment of the dividend would not materially prejudice DSH's ability to pay its creditors (PJ [466], CAB 190; [488], CAB 198). It was not alleged that by paying the dividends DSH breached s 254T (PJ [451], CAB 183).

9. ***Findings of the primary judge*:** The primary judge found that Potts (PJ [503], CAB 202), but not Abboud (PJ [496], CAB 200), contravened his s 180 duty by voting in favour of the Final Dividend resolution. The basis for the finding that Potts had failed to meet the required standard of care was, in short, that it was not apparent how he "could have concluded that the interests of creditors would not be materially prejudiced by the payment of the dividend" when the cash flow forecast which was
10 available around the date of the Board meeting, and which Potts reviewed, indicated that DSH would not be able to meet all of its projected liabilities whether or not the Final Dividend was paid (PJ [502], CAB 202). In particular, the cash flow forecast indicated that "DSH would exceed its facility limit on multiple occasions", including on the date that the Final Dividend was to be paid (PJ [498], CAB 201).

10. However, as the primary judge noted, "DSH did not in fact exceed its facility limit with NAB and HSBC on a single occasion from the time of entry into them through to the end of December 2015" (PJ [499], CAB 202). His Honour did not consider this was relevant to the way in which DSH put its case on liability (PJ [502], CAB 202), which focussed on how Mr Potts could, exercising due care, have concluded that the
20 Final Dividend would not have materially prejudiced DSH's ability to pay its creditors, having regard to the cash flow position forecast at the time of the Board meeting. Nonetheless, his Honour considered that the fact that DSH never in fact exceeded its facility limit was "very relevant to the question of damages" (PJ [502], CAB 202).

11. On the issue of damage, the primary judge held that Potts' contravention did not cause DSH loss. *First*, DSH had not established that, but for the contravention, the Final Dividend would not have been paid (PJ [508], CAB 204). *Secondly*, in circumstances where DSH's case was that Potts' contravention exposed DSH to the risk that paying the Final Dividend would breach s 254T, DSH did not suffer damage as a result of that contravention unless it was shown that s 254T was in fact breached (PJ [507], CAB
30 204; [444], CAB 180; [451], CAB 183). His Honour observed that s 1317H required proof of the harm that resulted from payment of the dividend, and the relevant harm here would be any material prejudice to DSH's ability to pay its creditors (PJ [509],

CAB 204). However, there was no evidence of any such material prejudice, or any damage to supplier relationships as a result of the payment (PJ [509]-[510], CAB 204-205). Although DSH went into receivership several months after the dividend was paid, this was "not because of the payment of the dividend" (PJ [509], CAB 204), but rather was "brought about by what appears to have been an unintentional breach by DSH of the agreement extending the terms of the overdraft facility and the Banks' decision not to waive that breach" (PJ [433], CAB 177).

12. ***Findings of the Court of Appeal*:** The Court of Appeal upheld the finding of liability against Potts and also held that the primary judge ought to have found that Abboud contravened his duties under s 180 of the Act by voting in favour of the Final Dividend resolution, in particular, by failing adequately to consider whether payment of the final dividend would contravene s 254T of the Act (CA [181], CAB 358; [212], CAB 367). The Court also held that the primary judge erred in finding that DSH suffered no damage for the purpose of s 1317H (CA [252]-[297], CAB 378-391).

13. *First*, the Court found that 'but for' causation was established (CA [281]-[295], CAB 386-390). *Secondly*, the Court considered the question of whether a dividend which was paid to DSH's shareholders and which was not shown to contravene s 254T was "damage" suffered by DSH within the meaning of s 1317H, and held that it was (CA [255]-[262], CAB 379-381). *Thirdly*, the Court held that it was not necessary to prove a breach of s 254T in order to establish that loss was caused by payment of the dividend, finding that payment of the dividend itself – whether or not paid in contravention of s 254T – constituted damage that resulted from the contravention of s 180 (CA [270]-[272], CAB 383-384). The Court considered that the primary judge had erroneously proceeded on the basis that the contravention said to give rise to the right to compensation was of s 254T, as opposed to a contravention of s 180 by reference to a failure properly to consider s 254T (CA [272], CAB 384).

Part VI: Summary of argument

First issue: Normative Causation

14. Section 1317H is contained in Part 9.4B of the Act, entitled "Civil Consequences of contravening civil penalty provisions". The prescribed civil penalty provisions relevantly include s 180(1) of the Act (the provision found to have been contravened

in this case): s 1317E(3). Section 1317H(1) confers power on the Court to order compensation for "damage suffered" in these terms:

> **Compensation for damage suffered**
>
> (1) A Court may order a person to compensate a corporation, registered scheme or notified foreign passport fund for damage suffered by the corporation, scheme or fund if:
>
> (a) the person has contravened a corporation/scheme civil penalty provision in relation to the corporation, scheme or fund; and
>
> 10 (b) the damage resulted from the contravention.
>
> The order must specify the amount of the compensation.

15. The central proposition which underpins the appellants' appeal is that, in considering whether "damage suffered by the corporation" relevantly "resulted from the contravention" of s 180(1) within the meaning of s 1317H(1), the law limits a defendant's liability to such prejudice or disadvantage as has "resulted from" the failure by the defendant to exercise their powers and discharge their duties "with the degree of care and diligence" required by s 180(1), this being the relevant "contravention". In the circumstances of this case, the Court of Appeal erred in adopting a pure "but for" approach to causation. The Court ought to have found that 20 no damage was shown to have "resulted from" the appellants' failure to exercise "the degree of care and diligence" which constituted a "contravention" of s 180(1) – being a failure to adequately consider whether the payment of the Final Dividend would breach s 254T of the Act – since none of the risks of harm to which the appellants' negligence exposed DSH was shown to have been realised. Further, in circumstances where no contravention of s 254T or DSH's constitution was established, the payment of the Final Dividend to DSH's shareholders did not expose DSH's economic interests to harm, and therefore did not constitute "damage suffered" by DSH within the meaning of s 180(1).

Contravention of s 180 alleged and found

30 16. As pressed at trial, DSH's case on breach of s 180 was confined to an allegation that the appellants did not give proper or adequate consideration as to whether payment of the Final Dividend would contravene s 254T. The Court of Appeal recorded at CA [126] (CAB 341) that, as pleaded, the case had two limbs: namely, that there was no

proper or adequate basis for the appellants to approve the Final Dividend (1) because there was no proper or adequate basis to approve the FY15 accounts; and/or (2) because there was no proper or adequate basis to form the view that payment of the Final Dividend would not contravene s 254T. The first limb fell away in the course of the hearing below: CA [127] (CAB 341). As for the case based on s 254T, the contravention of s 180(1) alleged against the appellants was participating in the resolution to pay the Final Dividend in circumstances where they failed "to consider, with reasonable care and diligence or at all, whether the payment … would comply with s 254T of the [Act] and, in particular whether the payment … would materially prejudice DSH's ability to pay its creditors": CA [128] (CAB 342).

17. On appeal, the Court of Appeal found that each of Potts and Abboud had breached s 180(1) of the Act. The finding of contravention was based solely on the failure of each properly to consider the risk of contravention of s 254T: as recorded at CA [211]-[212] (CAB 367), [268] (CAB 382). There was no allegation that s 254T was in fact breached when the Final Dividend was paid: as recorded at CA[270] (CAB 383).

The Court's failure to consider "normative causal constraints"

18. The Court noted that s 1317H requires that the damage "resulted from" the contravention, and that the parties accepted that it was necessary to establish factual causation (CA [259], CAB 380). The Court referred to the statement in ***Adler*** *v Australian Securities and Investments* Commission (2003) 46 ACSR 504 at [709] that "only the damage which as a matter of fact was caused by the contravention can be the subject of an order for compensation". However, the Court did not address whether, for the purposes of s 1317H, it was *sufficient*, as well as necessary, to establish factual causation, and in particular, whether there was some further, or normative, causal constraint in addition to "but for" causation. The Court stated, without elaboration, that it was "not necessary to consider here what normative causal constraints may also apply" (CA [259], CAB 380).

The requirement of normative causation in the context of s 1317H

19. As a matter of statutory construction, s 1317H, which permits compensation to be awarded for damage that "resulted from the contravention", requires the Court to identify the consequences which "resulted" or flowed, relevantly, from the particular

"contravention" of the relevant civil penalty provision that has been established, and that gives rise to the operation of s 1317H. In the present context, this requires consideration of whether the damage claimed "resulted from" the appellants' failure, when participating in the resolution for the Final Dividend, to exercise "the degree of care and diligence" required by s 180(1) of the Act. There is no feature of the language of s 1317H, or the statutory context, which would suggest that the causation inquiry is limited to "but for" causation (as was the Court of Appeal's approach).

20. There have been a number of views expressed in decisions at first instance regarding the meaning and operation of s 1317H, and in particular the existence of normative
10 constraints on causation in the provision.

21. In *Trilogy Funds Management Ltd v Sullivan (No 2)* (2015) 331 ALR 184, Wigney J (at [661]-[662]) referred to the decision in *Adler* and appeared to suggest that factual ("but for") causation was sufficient to satisfy the language of the provision. However, in the same passage, his Honour observed (at [664]) that issues of causation "involve normative considerations" and the "question of causation cannot be divorced from the legal framework that gave rise to the cause of action". His Honour added (at [665]) that where "questions of causation arise in a statutory context, the statutory purpose is the primary source of the relevant legal norms"; and in "considering causation in a statutory context, therefore, it is relevant to have regard to the purpose of the statutory
20 cause of action or statutory provision that has been contravened".

22. In *Agricultural Land Management Ltd v Jackson (No 2)* (2014) 48 WAR 1 (***ALM***), Edelman J considered the meaning of the words "the damage resulted from the contravention" in s 1317H, in the context of a contravention of s 180 of the Act. His Honour noted (at [440]) that the legislative history of the provision (at [441]-[448]) does not shed light on the appropriate approach to the phrase "resulted from". At [451], Edelman J regarded the decision in *Adler* as applying a "but for" approach as a negative criterion. His Honour noted that "the meaning of causation is intimately connected with the character of the duty breached" (at [452]). However, his Honour declined (at [462]) to "attempt to explicate further the meaning of the causal concept (or concepts)
30 which the New South Wales Court of Appeal recognised in *Adler* to be included in the statutory words 'resulted from' … because the claim fails even on the widest view of compensation resulting from the breaches in this case". The observations in *ALM* have

been cited in a number of subsequent cases, some of which have contrasted what was said in *Adler* and the reasoning in *ALM*.[1]

23. In *TPT Patrol Pty Ltd v Myer Holdings Ltd* (2019) 140 ACSR 38, Beach J commented (at [1590]) that a phrase such as "resulted from" must be construed, and applied, "in the context of the primary statutory provision said to be contravened. The relevant factual and normative causation are to be considered in connection with the underlying normative standard said to be contravened". His Honour noted (at [1641]) that the words "resulted from" (in s 1317HA) are part of a composite phrase "damage resulted from the contravention" (being the same phrase as used in s 1317H). His Honour
10 observed: "In other words, in considering any notion of normative causation, that is, in terms of what the statute requires to impose legal responsibility for loss and damage, the type of contravention in question is highly relevant".

24. The proposition which emerges from these authorities is that in undertaking the causal enquiry required by s 1317H(1), it is relevant and appropriate to take into account normative considerations, in particular having regard to the statutory purpose and policy of the provision contravened, and the type of contravention in question.

25. In other contexts, this Court has recognised that normative judgments of causation cannot be divorced from the legal framework giving rise to the cause of action;[2] and that the "but for" test which is inherent in counterfactual analysis, whilst often useful,
20 is not the entire inquiry as to causation.[3]

26. In *Wallace v Kam* (2013) 250 CLR 375 at [24], this Court observed that: "A limiting principle of the common law is that the scope of liability in negligence normally does not extend beyond liability for the occurrence of such harm the risk of which it was the duty of the negligent party to exercise reasonable care and skill to avoid". As a matter of coherence, the same general "limiting principle" should apply equally in the context of a claim for damage under s 1317H of the Act resulting from a contravention of s 180, particularly because it has been recognised that s 180 overlaps with principles

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[1] *Oliana Foods Pty Ltd v Culinary Co Pty Ltd (In Liq)* [2020] VSC 693 at [409]-[419]; *Steadfast ICT Security Pty Ltd v Peak (No 2)* [2021] ACTSC 319 at [15]; *Asden Developments Pty Ltd (In Liq) v Dinoris (No 3)* [2016] FCA 788; (2016) 114 ACSR 347 at [152].
[2] *Henville v Walker* (2001) 206 CLR 459 at [92]-[109].
[3] See, eg, *Marks v GIO Australia Holdings* (1998) 196 CLR 494 at 512-513 in relation to s 82 of the *Trade Practices Act 1974* (Cth); *Anchorage Capital Master Offshore Ltd v Sparkes* [2023] NSWCA 88 at [381] re s 236 of the Australian Consumer Law.

of negligence at common law: *Vines v Australian Securities and Investments Commission* (2007) 73 NSWLR 451 at [137]-[151] (as referred to at CA [119] (CAB 339)). Such an approach is within the terms of s 1317H which requires any damage flow from the particular contravention (or breach) of the statutory duty of care and diligence imposed by s 180(1) that has been established.

27. In *ALM*, Edelman J stated (at [409]) that, where compensation is sought either at common law or in equity, "it is important to identify precisely the scope of the duty which is owed by a defendant", quoting observations (extra-judicially) by Lord Hoffmann that there "is a close link between the nature of the duty and the extent of liability for the breach of duty". In *Hughes-Holland v BPE Solicitors* [2018] AC 599 at 622, Lord Sumption JSC, having referred to Lord Hoffmann's comments, observed that questions of causation "are normally concerned with identifying the consequences which flow from the breach": an aspect of this inquiry is "whether the loss flowed from the right thing, ie, from the particular feature of the defendant's conduct which made it wrongful", which "turns on an analysis of what did make it wrongful".

28. Similarly, in the case of other statutory provisions conferring a remedy with respect to (for example) misleading or deceptive conduct, normative considerations have been held to be relevant. For example, in *Travel Compensation Fund v Robert Tambree* (2005) 224 CLR 627 (which concerned a claim in respect of loss and damage recoverable under s 68 of the *Fair Trading Act 1987* (NSW)), Gleeson CJ observed at [28] that "it is not in doubt that issues of causation commonly involve normative considerations, sometimes referred to by reference to 'values' or 'policy'." His Honour then observed at [29] that "to acknowledge that, in appropriate circumstances, normative considerations have a role to play in judgments about issues of causation is not to invite judges to engage in value judgments at large. The relevant norms must be derived from legal principle." His Honour further stated at [35] that (on the facts of that case): "The answer to the problem of causation in the present case is to be found, not in a value judgment, but in an accurate identification of the nature of the risk against which the appellant sought protection and of the loss it suffered, considered in the light of the kind of wrongful conduct in which the first and second respondents engaged". Relatedly, Gummow and Hayne JJ observed at [45] that "it is doubtful whether there is any 'common sense' notion of causation which can provide a useful, still less universal, legal norm. There are, therefore, cases in which the answer to the

question of causation will require examination of the purpose of a particular cause of action, **or the nature and scope of the defendant's obligation in the particular circumstances**" (emphasis added).

What damage "resulted from" the "contravention", being the appellants' failure to exercise "the degree of care and diligence" required by s 180(1)?

29. In principle, as the Court of Appeal explained at CA [152] (CAB 349), s 180 requires directors to take account of the interests of the corporation including any threats to those interests. In particular, a corporation's interests may be threatened by its "failure to comply with legal obligations", which "may give rise to a range of risks: reputational; litigious; regulatory; and the potential for undermining relationships with creditors or others" (ibid).

30. In this case, the particular feature of the appellants' conduct in voting in favour of the Final Dividend resolution which constituted a failure to exercise the "the degree of care and diligence" required by s 180(1) of the Act was their failure to take reasonable steps to ensure that the payment of the Final Dividend would not contravene s 254T. The Court of Appeal observed at CA [154] (CAB 350) that "payment of a dividend in contravention of [s 254T] gave rise to distinct regulatory risks, together with the risks to relationships with current and future suppliers".

31. However, none of those risks was found to be realised.

32. Significantly, it was no part of the Court's reasoning that there were any adverse consequences to DSH from the payment of the Final Dividend (other than loss of the amount of the dividend itself). In the absence of any contravention of s 254T, there were no adverse regulatory consequences for DSH from payment of the Final Dividend. Nor were DSH's relationships with current and future suppliers shown to have been harmed as a result of its payment (PJ [509]-[510], CAB 204-205). The Court of Appeal accepted that "[e]very supplier" throughout the relevant period seems to have been paid and that, while "some" were paid later than their contractual terms, "some" agreed to extensions, and it was not clear to what extent suppliers did not agree or acquiesce in any such delay (CA [21], CAB 309). Further, although DSH subsequently went into receivership, administration and liquidation, it was no part of the Court's reasoning that the payment of the dividend caused, or hastened, those events. Instead, there were unchallenged findings made by the primary judge that

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DSH's insolvency was causally unrelated to the payment (PJ [509], CAB 204-205; and PJ [433], CAB 177).

33. Accordingly, it would follow, on the Court's reasoning, that precisely the same result would have occurred – that is, the appellants would be liable to compensate DSH for the amount of the Final Dividend – even if DSH had continued to trade, and thrive, up until the present day. It is difficult to see why, in that scenario, a director should have to compensate the company for payment of a dividend, simply because the director failed adequately to consider, when voting in favour, whether there was a risk that it would contravene s 254T, in circumstances where it was not established that the payment of the dividend did contravene that section, or prejudice the company's ability to pay creditors, let alone that those matters resulted in any adverse consequences for the company. Further, in such a case (where the company remained solvent), if the company were entitled to recover the amount of the dividend from its directors, the company could then declare another dividend in the amount of the recovery, with the result that the shareholders received the same dividend twice. This leads into the section question on this appeal, considered below: namely, whether the payment of a dividend in accordance with s 254T and the company's constitution can constitute "damage suffered" by the company for the purposes of s 1317H(1) of the Act.

Conclusion on first issue (normative causation)

34. The nature and scope of the appellants' obligation under s 180 of the Act in the particular circumstances of this case involved an obligation to take reasonable care to ensure that the company did not contravene s 254T of the Act. The appellants were held to have failed to exercise the degree of care and diligence required by s 180(1) by failing adequately to consider the *risk* that DSH would, by paying the Final Dividend, contravene s 254T, and the *risk* that it would suffer adverse consequences as a result of such contravention. However, the primary judge was correct to conclude at PJ [507] (CAB 204) that, unless that risk came to fruition, DSH suffered no loss as a result of the appellants' failure to exercise the degree of care and diligence required by s 180(1).

35. In summary, the Court of Appeal erred, *first* in failing to consider whether the terms of s 1317H were satisfied merely by "but for" causation, and whether there were, in addition, normative restraints on causation; and *secondly*, in failing to consider whether such normative constraints were satisfied in circumstances where the

appellants' "contravention" consisted of a failure, when participating in the resolution to approve the Final Dividend, to take reasonable steps to prevent DSH being exposed to the risk of contravening s 254T, and the risk of the adverse consequences of such contravention, but no such contravention and no such adverse consequences were shown to have resulted from their participation in that resolution.

Second issue: The dividend was not "damage suffered" by the company

36. The Court of Appeal erred in holding at CA [264]-[269] (CAB 381-383) that the payment of the Final Dividend constituted "damage suffered" by DSH within the meaning of s 1317H(1) of the Act in circumstances where it was not shown to have been paid otherwise than in accordance with s 254T and DSH's constitution. By the payment of the Final Dividend, DSH did not wrongfully pay away any assets which it was required to hold for the benefit of creditors. DSH "suffered" no "damage" because it was not shown to have been exposed to any of the consequences which might flow from an unlawful dividend payment.

The character of a dividend

37. The payment of dividends in accordance with the law is contemplated by statute (s 254T) and, in virtually all modern trading corporations, including in this case (as recorded at CA [130] (CAB 342)), by express provision in the statutory contract between the company and its members.

38. The characterisation of a dividend which is paid consistently with the provisions of s 254T and a company's constitution as "damage suffered" by the company is difficult to reconcile with the proposition that, as observed by A.H. Slater, it is central to the commercial rationale for the existence of companies that the company – the legal entity distinct from the persons who are its members – will at some stage distribute part of its assets to its members, with such distribution representing the "gain" for the purpose of which the members became associated.[4] Ordinarily, as Slater observes, "distributions to members take the form of dividends – some part of the assets of the company is set aside to be divided and distributed among the members while the company continues on its way with its capital thereby unchanged". [5]

[4] A.H. Slater, *The Law and Taxation of Company Distributions* (CCH Australia, 1980), at [10,101].
[5] Ibid.

39. As Lord Millett observed in *Inland Revenue Commissioners v Laird* [2003] UKHL 54 at [35] (the other Lords of Appeal agreeing), a share confers not only personal rights on a shareholder but "proprietary rights in the company though not in its property". By declaring a dividend, "the directors effectively release funds due to the shareholders from their power to retain them in the business" (at [41]). The "distribution of the undistributed profits of a company to the shareholders entitled thereto merely gives effect to the rights attached to the shares" (at [42]).

40. Consistently with that principle, in a taxation context, a dividend has been characterised as the "fruit" or "produce" of a shareholder's property in a share and it has been posited that the "right to a dividend, or more accurately the expectation of a dividend, is part of the rights which make up a share" and that "a dividend once declared is clearly produce".[6] In *Commissioner of Taxation (New South Wales) v Stevenson* (1937) 59 CLR 80 at 99, Rich, Dixon and McTiernan JJ noted that "a distribution of profit" by way of a dividend "is described by expressions like 'detachment', 'release' and liberation'. The title to them is treated, it may be said, as a *jus re fruendi salva rei substantia.* The share is the substance of the property which remains, and the distribution the *fructus*." When a dividend is declared, the profits of the company are "detached, released or liberated, leaving the share intact as a piece of property" (ibid).[7]

41. Having regard to those principles, while the payment of a dividend involves a payment of money away by the company, the position of a shareholder who receives a dividend cannot simply be equated to that of any third party who receives a payment from the company. The payment made is the fruit of the member's share in the company itself, and the payment of such fruit provides the very rationale for the creation of the company limited by shares and for the holding of shares in that company.

42. Further, the general features of a dividend outlined above are difficult to reconcile with the notion that a dividend which is paid consistently with s 254T and the company's constitution could constitute "damage suffered" by the company. That is so

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[6] See, eg, R.W. Parsons, *Income Taxation in Australia: Principles of Income, Deductibility and Tax Accounting* (Law Book Company, 1985) at p 90.

[7] See also, eg, *Webb v Federal Commissioner of Taxation* (1922) 30 CLR 450 at 461; *Federal Commissioner of Taxation v Blakely* (1951) 82 CLR 388 at 407; *Commissioner of Taxation of the Commonwealth of Australia v Uther* (1965) 112 CLR 630 at 634.

notwithstanding that the inevitable consequence of any dividend is that the company will have less assets following payment of the dividend than it had prior to payment. If it were otherwise, and if (as DSH contended below) the payment of a dividend necessarily represented "damage suffered" by a company by reason of cash being paid away with nothing received in return, it is difficult to see how a director could reasonably vote in favour of any dividend at all.

43. As to the meaning of "damage suffered", in *Marks v GIO Australia Holdings* (1996) 196 CLR 494, at [46] McHugh, Hayne and Callinan JJ stated that in misleading conduct claims the central notion is that "the plaintiff has sustained (or is likely to
10 sustain) a prejudice or disadvantage as a result of altering his or her position under the inducement of the misleading conduct". The Court of Appeal noted in this case that "there is no reason to doubt that similar principles apply as regards s 1317H" (CA [258], CAB 380).

44. In circumstances where a dividend has been paid out of capital in breach of the capital maintenance rule, the unauthorised distribution of capital deprives the company of assets which ought to be available to meet creditors' and lower ranking shareholders' claims. In such a case, the company plainly "suffers" a "prejudice or disadvantage".

45. In contrast, it is difficult to see what prejudice or disadvantage is "suffered" by a company from a dividend being lawfully paid to shareholders out of profits (where the
20 payment of dividends is subject to the profits test), or in accordance with the requirements of s 254T, let alone why the "damage suffered" would be the entire amount of the dividend paid.

46. On the contrary, one may readily identify prejudice or disadvantage that may be sustained by a company arising from a decision *not* to pay a dividend. These include, for example, that "it would be unwise to disappoint a 'clientele' of investors seeking a particular type of income which has been associated with a quoted company because of its past dividend policy" and "listed companies may well use the time trend of dividends as a signal of future likely prospects (for instance, a cut in dividend may reflect the directors' pessimism, whereas an increase may reflect their optimism)".[8]
30 Such considerations arise squarely in the present case: in July 2014 the DSH Board

[8] As discussed in Palmer's Company Law (Sweet & Maxwell, 2022) at [9.701] "The economic rationale for dividend distributions".

had resolved a dividend payment policy based on a dividend payout ratio of 60-70% of normalised net profit after tax (see PJ [163], CAB 75). Failure to pay dividends in accordance with such an expectation is apt to discourage investment in the company's shares (as noted at CA [283], CAB 387) and does not advance the economic interests of the company.

47. In *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20, divergent views were expressed on the issue of whether a dividend, paid in accordance with the relevant statutory provisions governing such payment, could constitute "damage" to the company. At [130]-[131], Lord Leggatt JSC held that a dividend lawfully paid from distributable profits reduced the company's assets in the same amount as a dividend unlawfully paid out of capital, but (in contrast to a dividend unlawfully paid) did not cause any actionable loss (that is, a loss which the law regards as an injury). Lord Hodge DPSC and Lord Sales JSC (with whom Lord Reed PSC, Lady Black JSC and Lord Kitchin JSC agreed) expressed reservations (at [3]) about this aspect of Lord Leggatt JSC's reasoning although it was not considered necessary to determine that issue. For the reasons addressed in these submissions, the analysis of Lord Leggatt JSC should be preferred.

48. Although it has been established since at least *Salomon v A Salomon & Co Ltd* [1897] AC 22 that a corporation is a distinct legal person from its corporators, that does not mean that the interests of the corporators are to be disregarded when considering whether the corporation has "suffered damage" by the payment of a dividend. As Owen J observed in *Bell Group (in liq) v Westpac Banking Corporation* (2008) 39 WAR 1 at [4393]: "the interests of shareholders and the interests of the company may be seen as correlative not because the shareholders *are* the company but, rather, because the interests of the company and the interests of the shareholders intersect". So, for example, a director is able to obtain for himself a profit by means of a transaction in which he is concerned on behalf of the company provided that there has been full disclosure and this is ratified by the shareholders in general meeting, or all the shareholders acquiesce: *Furs Ltd v Tomkies* (1936) 54 CLR 583 at 592 per Rich, Dixon and Evatt JJ. In *Angas Law Services Pty Ltd (in liq) v Carabelas* (2005) 226 CLR 507 at [67], Gummow and Hayne JJ cited with approval the statement by Street CJ in *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLE 722 at 730 that; "In a solvent company the proprietary interests of the shareholders entitle them as a

general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done."

49. Given those principles, and the intersection between the interests of a corporation and its corporators, it is difficult to see that where a corporation is solvent, and where a dividend is paid by that corporation to its corporators, the interests of the corporation could be said to be prejudiced or disadvantaged – and the corporation could be said to have "suffered damage" - by the mere fact that some part of a corporation's profits is distributed by way of dividend to its corporators (absent some other prejudice to the
10 corporation's operations being shown to have resulted from the payment).

Comparison with "unlawful" dividends

50. For the purposes of the loss analysis, a distinction arises between dividends that are "unlawful", in the sense that they are paid inconsistently with the company's constitution or the legislative provisions governing the payment of dividends (in this case s 254T), and dividends that are paid consistently with those requirements. The following matters are relevant.

51. *First*, dividends may be paid only in accordance with the company's constitution. The declaration by the directors of a dividend that does not comply with the requirements of the constitution is *ultra vires*: ***Industrial Equity*** *Limited v Blackburn* (1977) 137
20 CLR 567 at 580 per Mason J (Stephen, Murphy and Aickin JJ agreeing). It was not alleged, or shown, in this case that payment of the Final Dividend did not comply with the requirements of DSH's constitution or was otherwise beyond power.

52. *Secondly*, the principle at general law of maintenance of capital required that paid-up capital should not be returned to shareholders before a winding-up except under strict conditions (known as the capital maintenance rule). The basis of this principle was that people who deal with a limited liability company should be entitled to assume that, subject to capital being diminished in the course of trading, the company maintains the level of capital provided for in its constitution: see *Trevor v Whitworth* (1887) 12 App Cas 409 at 423-4. From this principle, case law derived the proposition that dividends
30 can be paid only out of profits, which was subsequently enshrined in the predecessor provisions of s 254T: *Industrial Equity* at 576.

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53. It is unclear whether, following the introduction of the current form of s 254T, this principle has any continuing relevance to the declaration of dividends. In *Wambo Coal Pty Ltd v Sumiseki Materials Co Ltd* (2014) 88 NSWLR 689 at [57], Barrett JA (with whom Bathurst CJ and Beazley P agreed) observed that it "may be" the case that, following the introduction of s 254T, "there remains a general law principle that dividends may only be paid out of profits, given the essential nature of a dividend as a 'share of profits'." In contrast, in *Grant-Taylor v Babcock & Brown Ltd* (2016) 330 ALR 642 at [39], Allsop CJ, Gilmour and Beach JJ commented that it was "not in dispute" that the current version of s 254T would have permitted the payment of the
10 relevant dividends in that case (which were paid out of capital). This issue does not need to be resolved on this appeal. That is because, following the abandonment of DSH's accounting case, there is no dispute that the Final Dividend represented a proportion of the NPAT of $37.905M which was in fact earned by DSH in FY15 (as reported in the annual accounts approved at the same meeting: PJ [273], CAB 115).

54. *Thirdly*, s 254T of the Act prescribes the circumstances in which a dividend may be paid. It relevantly provides that "A company must not pay a dividend unless: …(c) the payment of the dividend does not materially prejudice the company's ability to pay its creditors". No such material prejudice was established in this case.

55. As noted by the Court of Appeal in CA [89] (CAB 329), the current version of s 254T
20 was introduced by the *Corporations Amendment (Corporate Reporting Reform) Act 2010 (Cth).* Previously, the provision had provided, simply, that "[a] dividend may only be paid out of profits of the company" (reflecting the capital maintenance rule). The explanatory memorandum for the 2010 change stated at [10.52] that the "objective is to ensure that companies have the ability to distribute dividends if they have the ability to do so without causing detriment to ongoing operation".[9] That is, the policy of the legislative regime is that a dividend may be paid so long as it does not 'cause detriment' to the company's ongoing operations. Here, no such "detriment" to DSH was alleged beyond the fact of the payment away of the amount of the Final Dividend. However, the policy of permitting dividends to be paid where such payment does not
30 cause detriment to the company's ongoing operations would lack coherence if the mere

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[9] Revised Explanatory Memorandum to the *Corporations Amendment (Corporate Reporting Reform) Act 2010* (Cth).

fact of the payment necessarily constituted such "detriment".

56. In other cases where a company has been found to have suffered "damage" in the amount of a dividend (or part thereof) which was paid as the result of the defendant's negligence or other breach of duty, it has been established that the payment of the dividend (or part thereof) was made in contravention of the provisions of the corporations legislation governing payment of dividends, with compensation being awarded to the extent of such contravention: see eg ***Segenhoe** Ltd v Akin* (1990) 29 NSWLR 569 and the English authorities cited therein.[10] So, in *Segenhoe*, liability in negligence was found not for the whole amount of the dividend that was paid, but only
10 for that portion of the dividend which had been paid out of capital rather than profits, in breach of the then requirement of the *Companies (NSW) Code*. The principle for which Segenhoe and the English authorities to which reference was made therein was described by McDougall J in *Resource Equities v Carr* [2009] NSWSC 1385 at [259] as "the proposition that a company suffers loss, when it pays a dividend out of non-existent profits, because it suffers a capital loss, or diminishes its capital in a way not authorised by statute". In that case, on the facts, McDougall J concluded that the company "suffered a loss because its capital was improperly reduced" (at [60]).

57. There has been no case identified where a defendant has been found liable for negligently causing the company to pay a dividend that complied with the relevant
20 provisions of the corporations legislation governing their payment.

58. In relation to the payment of an unlawful dividend, Rimer LJ (with whom Lords Walker and Clarke agreed on appeal[11]) noted in *Holland v Revenue & Customs Commissioners* [2009] EWCA Civ 625 at [98] with respect to the remedy of equitable compensation in such matters, that "[t]he established remedy against a director liable in respect of the payment of an unlawful dividend is to require the director to reinstate the amount of the payment. The court does not in such a case embark upon an inquiry as to the loss said to be suffered by the company as a result of such breach of duty".

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[10] *Leeds Estate, Building and Investment Co v Shepherd* (1887) 36 Ch D 787; *Re London and General Bank (No 2)* [1895] 2 Ch 673; *Re Thomas Gerrard & Son Ltd* [1968] Ch 455. See also, more recently, *Assetco plc v Grant Thornton UK LLP* [2019] EWHC 150 (Comm); *SSF Realisations Limited (in liq) v Loch Fyne Oysters Limited & Ors* [2020] EWHC 3521 at [112].
[11] *Revenue & Customs Commissioners v Holland* [2010] 1 WLR 2793 at [124] (Lord Walker), [146] (Lord Clarke).

59. The rationale underpinning this principle was explained by Justice Edelman (writing extra-curially) as follows:[12]

> The reason why causation of loss is ignored when a breach of duty by a trustee or company director is established in these cases is simple. The order that is sought is not compensation for loss. The "compensation" is an order for specific performance, or the money equivalent of specific performance (where a non-money asset was dissipated without authority). Loss is not relevant to an order that a duty should be performed. Hence causation of loss is irrelevant.

60. In contrast, the causal inquiry which was required in this case necessitates consideration of the loss (that is, the "damage") "suffered by" the company "resulting from" the appellants' contravention for the purposes of s 1317H.

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Conclusion (second issue)

61. In summary, the Court ought to have found that in circumstances where the Final Dividend was paid to DSH's shareholders, without any contravention of s 254T or DSH's constitution being established, such payment did not expose DSH's economic interests to harm. As noted above, the objective of the legislative regime for the payment of dividends is to permit such distributions to be made to a company's members where the company has "the ability to do so without causing detriment to ongoing operation" ([55] above). In the absence of such detriment being shown, there was no "damage suffered" by the mere fact of the distribution being made.

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Submissions on costs

62. The costs orders for which the appellants contend are as set out in Orders 2(b) and 3 below. Order 2(b) is, in part, a third party costs order as against National Australia Bank Limited and HSBC Limited (the **Banks**).

63. The relevant background in relation to Order 2(b) is that the primary judge made a costs order in favour of Potts and Abboud which provided that the Banks were jointly and severally liable with DSH for those costs, in circumstances where the proceedings were brought for the benefit of the Banks who effectively funded the litigation by foregoing distributions which would otherwise have been made to them and the Banks agreed to indemnify the receivers against any costs liability they might have: *DSHE*

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[12] J. Edelman "Unnecessary causation" (2015) 89 ALJ 20 at 28.

Holdings (Receivers and Managers) (in liq) (No 5) [2022] NSWSC 91 at [14]-[20].

64. In finding on appeal that Potts and Abboud were entitled to 50% of the costs of the trial, the Court of Appeal held that it was appropriate that the Banks remain jointly and severally liable with DSH for those costs in circumstances where the Banks did not appeal the orders of the primary judge in that regard: *DSHE Holdings Ltd (Receivers and Managers) (in liq) v Potts (No 2)* [2022] NSWCA 258 at [26]-[27]. Again, there was no appeal from that order. In this appeal, the same result should obtain with respect to the costs of the proceedings below if the appellants are successful.

Part VII: Orders sought

10 65. The appellants seek the following orders:

1.Appeal allowed.

2.Orders 1 to 4 of the orders made by the Court of Appeal on 26 August 2022 and Orders 1 and 2 of the orders made by the Court of Appeal on 13 December 2022 in proceeding 2021/314709 be set aside and in lieu thereof order that*:*

(a) proceeding 2017/81927 be dismissed;

(b) the first respondent, National Australia Bank Ltd and HSBC Bank Ltd pay each of the appellants' costs of (i) proceeding 2017/81927 (including their costs of the cross-claims); and (ii) the appeal to the Court of Appeal, on the ordinary basis, such liability to be joint and several.

20 3.The first respondent pay the appellants' costs of the appeal to this Court.

Part VIII: Estimate of time required

66. The appellants estimate that they will need 2 hours for oral argument.

Dated: 9 June 2023

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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

ANNEXURE TO THE APPELLANTS' SUBMISSIONS

Pursuant to Practice Direction No. 1 of 2019, the Appellants set out below a list of the
20 statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
1.	*Corporations Act 2001* (Cth)	Dated 6 May 2010	s 254T
2.	*Corporations Act 2001* (Cth)	Dated 1 July 2015	ss 180, 254T, 1317E
3.	*Corporations Act 2001* (Cth)	Dated 1 March 2023	ss 1317H, 1317HA