HIGH COURT OF AUSTRALIA

## NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 28 Jul 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

### Details of Filing

| | |
|---|---|
| File Number: | S47/2023 |
| File Title: | Potts & Anor v. DSHE Holdings Ltd ACN 166 237 841 (receiv |
| Registry: | Sydney |
| Document filed: | Form 27E - Reply |
| Filing party: | Appellants |
| Date filed: | 28 Jul 2023 |

### Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **MICHAEL THOMAS POTTS**

First Appellant

**NICHOLAS ABBOUD**

Second Appellant

10

and

**DSHE HOLDINGS LTD ACN 166 237 841**

**(RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)**

First Respondent

**ROBERT MURRAY**

Second Respondent

20 **LORNA KATHLEEN RAINE**

Third Respondent

**ROBERT ISHAK**

Fourth Respondent

**JAMIE CLIFFORD TOMLINSON**

Fifth Respondent

30 **APPELLANTS' REPLY**

## PART I: CERTIFICATION

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

## PART II: REPLY TO THE ARGUMENT OF THE RESPONDENT

### Factual background: no contravention of s 254T (cf RS [5]-[20], [56], [61], [67])

2. In its submissions (**RS**), DSH acknowledges that *"the courts below did not expressly find that the payment of the Final Dividend contravened s 254T of the Corporations Act"* (RS [11]). Nevertheless, DSH seeks to rely upon a range of factual findings made at trial and on appeal with respect to the financial position of the company, which culminates in a submission that "*the same type of harm lying at the core of the directors' wrongful conduct was ultimately realised*" (RS [17]).

3. **No allegation or finding of contravention of s 254T**: That contention is not open to DSH to advance in this appeal. No breach of s 254T was found at first instance, and that finding was not challenged in the Court of Appeal. Although DSH pleaded that the payment of the Final Dividend did contravene s 254T, that allegation was not pressed. The primary judge expressly noted (at PJ [451], CAB 183) that no allegation to that effect was advanced. DSH did not contend on appeal that the primary judge erred in this regard, and the Court of Appeal dealt with the issue of causation on the basis that "*DSH had not alleged that s 254T was in fact breached when the dividends were paid*" (CA [270], CAB 383).

4. **Section 254T is not a civil penalty provision**: Contrary to RS [13], s 254T is not a civil penalty provision: see the table of civil penalty provisions in s 1317E of the Act. This may be contrasted with, for example, a contravention of s 256D of the Act which prescribes the consequences of failing to comply with s 256B (which concerns the circumstances in which a company may reduce its share capital). Subsection 256D(1) provides that a company must not make the reduction unless it complies with s 256B(1) and s 256D(3) (which is a civil penalty provision) provides that any person who is involved in a company's contravention of s 256D(1) contravenes this subsection. There is no analogous provision to s 256D in respect of s 254T, although a dividend may be a debt for the purposes of a director's liability for insolvent trading under s 588G (which is a civil penalty provision): see ss 588G(1A), 588G(3) and 1317E of the Act.

5. **No consideration of material prejudice to ability to pay creditors at time of Final Dividend payment**: Whilst the cash flow difficulties of DSH were analysed by the Court

of Appeal, those difficulties were considered in determining the issue of the appellants' breach of duty as at 17 August 2015 (which is not in issue in this appeal) (at CA [134]-[224], CAB 343). Insofar as the Court of Appeal referred at CA [198] (CAB 363) to the cash flow position as at 30 September 2015, being the date the dividend was paid, it was referring to the *forecast* (as at 17 August 2015) of the 30 September 2015 position (see also at CA [211], CAB 367). There was no finding that the payment of the dividend in fact materially prejudiced its ability to pay creditors. The Court of Appeal did not, and did not need to, consider the actual cash flow position as at 30 September, because, as outlined above, DSH did not press any contention at trial or on appeal that the payment of the dividend on 30 September did in fact materially prejudice its ability to pay its creditors and thereby contravene s 254T. If such an issue had been raised, it would have been necessary to have regard to the *actual* position as at the time of payment of the dividend (CA [271], CAB 383), not only as regards DSH's cash flow, but also as regards its current holdings of inventory and the extent to which, and speed with which, this could be readily converted into cash (CA [106], CAB 335).

6. There was no consideration of those matters because there was no issue as to whether s 254T was in fact breached by the payment. The cash flow position of DSH as at the date of payment formed no part of the reasoning of the Court of Appeal on the challenge to the primary judge's findings on causation at PJ [507] and [509]: see CA [270]-[272] (CAB 383-384).

7. **No finding of insolvency:** Whilst DSH's submissions refer to *"DSH's descent towards insolvency"* (RS [68]), there was no finding in this case that DSH was insolvent or nearing insolvency prior to January 2016, nor that receivers were appointed because of any issue related to payment of trade creditors. Rather, the factual findings reflect that in circumstances where NAB had written to DSH on 31 December 2015 notifying a breach of the facility and requiring the breach to be remedied within 10 business days, the board resolved to appoint administrators, following which the banks then elected to appoint receivers, who attempted to sell the business and then decided to close it: see PJ [333]-[336] (CAB 133-134). Further, this was causally unrelated to the payment of the dividend: as noted at PJ [509] (CAB 204): *"The fact that DSH ultimately went into receivership and could not repay the Banks in full arose from a complicated series of events that occurred after the dividend was paid, and not because of the payment of the dividend"*.

8. **Value of delayed payments as at September 2015:** Finally, at RS [67], DSH submits that although the facility limit was not reached *"the value of DSH's delayed payments in September 2015 was $43.349,275.38"*. However, the table referenced at PJ [135] (CAB 63) shows that by December 2015 this figure had dropped significantly – to $3.242 million. Further, in any event, the analysis in this table must be read in light of the primary judge's findings at PJ [484] (CAB 197) that the analysis did not take account of cases where a creditor agreed or acquiesced in an extension or where there was a valid reason for a delay (because, for example, there was a dispute concerning supply), and that *"it is not possible to determine accurately the length of the delays"*. As such, DSH's submission at RS [67] with respect to the Final Dividend payment that *"one problem was solved by the creation, or exacerbation, of another"* is incorrect. This is reinforced by the primary judge's unchallenged factual finding at PJ [510] (CAB 205) that "*The likelihood is that the payment of the final dividend caused DSH to delay paying some trade creditors whose debts were due at the time of the payment. However, there is no evidence that those delays caused damage. The creditors were paid, and there is no suggestion that the delay caused DSH some other form of harm*".
9. For all of the reasons outlined above, DSH's submission in relation to the risk of harm posed by a contravention of s 254T that this *"risk came home"* (RS [18]) is not correct, nor is it open to DSH to advance that case having regard to how the proceeding was conducted below.

**Normative considerations arise in this case (cf RS [28]-[41])**

10. Properly analysed, the textual and contextual features upon which DSH relies do not weigh against the construction for which the appellants contend. Whilst issue is largely joined, the appellants emphasise the following matters in reply.
11. ***First***, the fact that the power in s 1317H(1) is expressed in discretionary terms does not preclude the existence of normative constraints in s 1317H (cf RS [32]). Indeed, it is a factor which points in the other direction: it makes it clear that the court is not required to order compensation even if factual causation alone is established.
12. ***Second***, the existence of exculpatory provisions in ss 1317S and 1318 of the Corporations Act do not bear upon the issue of whether there are normative constraints on s 1317H(1) (cf RS [33]-[36]). They are directed to a different issue entirely. Namely, the purpose of those provisions is to *"excuse company officers from liability in situations where it would be unjust and oppressive not to do so, recognising that such officers are*

*businessmen and women who act in an environment involving risk in commercial decision-making"*: *Daniels v Anderson* (1995) 37 NSWLR 438 at 525. The legislative policy which is reflected in those provisions is one of not inflicting liability if the contravention is the product of honest error or inadvertence: *Re Wave Capital Ltd* (2003) 47 ACSR 418 at [29]. In exercising the discretion under ss 1317S or 1318, courts are required to form a view as to whether, notwithstanding breaches of the Act, the director has acted honestly and, if so, to conduct an evaluative judgment as to whether the applicant ought fairly to be excused: *Australian Securities and Investments Commission v Healey (No 2)* (2011) 196 FCR 430 at [89]. Relevant considerations include the degree to which the person's conduct fell short of the statutory standard, the seriousness of the contravention and its potential or actual consequences, impropriety such as deceptiveness or personal gain, and contrition. In the context of a contravention of s 180 of the Act, this is not directed at the issue of whether the damage claimed resulted from the risk of harm against which a director failed to guard in contravention of s 180.

13. ***Third***, the appellants' construction of s 1317H as applied to a contravention of s 180(1) would not work incoherence in the application of s 1317H to other civil penalty provisions (cf RS [40]). There is nothing incoherent or inconsistent which arises from an obligation to take values and normative considerations into account in deciding contested questions of causation. Such a requirement is consistent with authority in a range of contexts.[1]

**Dividend not damage resulting from the contravention (cf RS [43]-[66])**

14. As to DSH's submissions on the issue of dividend as damage, again, issue is largely joined.

15. DSH seeks to rely on ***Segenhoe*** *Ltd v Akins* (1990) 29 NSWLR 569 in support of its characterisation of the Final Dividend as equating to the company's loss (RS [51]-[54]). However, in *Segenhoe*, the company's loss was not the amount of the dividend itself but only that part of the dividend which was paid out of capital rather than out of profits (see at 575). *Segenhoe* should not be read as supporting a broader proposition that, if negligent advice has been given and a dividend has been paid as a result, the loss equates to the full value of the dividend.

[1] See, eg, *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at [59]-[60].

16. DSH submits at RS [53] that Giles J's reasoning in *Segenhoe* was not challenged and was accepted by the Court of Appeal in ***Carr*** *v Resource Equities Ltd* (2010) 80 ACSR 247 (at [40]). However, *Carr* stands for a narrower principle. In *Resource Equities Ltd v Garrett* [2009] NSWSC 1385 at [259], McDougall J referred to Giles J's detailed review of the authorities in *Segenhoe* and commented that: *"those authorities provide support for 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 authorized by statute"*. In *Carr*, what the Court of Appeal referred to and approved was the reasoning of McDougall J at first instance on this issue (at [40]).

17. DSH's submissions conclude by recapitulating that the Final Dividend constituted damage because the company *"paid away a sum of money"* and *"received nothing in return"* (RS [68]). However, as the primary judge recognised, in a sense a company *always* suffers a detriment when it pays a dividend for this reason (PJ [509], CAB 204). As already addressed in the appellants' submissions in chief (**AS**), because of the special character of a dividend, it cannot simply be equated with any other payment away by the company: see AS [37]-[42].

**Conclusion**

18. In this case, the risk of harm to which the appellants' negligence exposed DSH was not shown to have been realised (and it is not open to DSH to assert that it did). Relatedly, as submitted at AS [61], the payment of the Final Dividend did not expose DSH's interests to harm in circumstances where no contravention of s 254T or DSH's constitution was established. DSH therefore suffered no damage "resulting from" the contravention of s 180 as alleged and found for the purposes of s 1317H.

Dated: 28 July 2023

**N C HUTLEY**
5th Floor St James Hall
(02) 8256 2599
nhutley@stjames.net.au

**M E ELLICOTT**
Sixth Floor Chambers
(02) 8915 2649
mellicott@sixthfloor.com.au

**A ZHENG**
Sixth Floor Chambers
(02) 8915 2619
azheng@sixthfloor.com.

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' REPLY SUBMISSIONS

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

| No. | Description | Version | Provisions |
|---|---|---|---|
| 2. | *Corporations Act 2001* (Cth) | Dated 1 July 2015 | ss 180, 254T, 256B, 256D, 588G, 1317E, 1317S and 1318 |
| 3. | *Corporations Act 2001* (Cth) | Dated 1 July 2023 | ss 1317H and 1317HA |