HIGH COURT OF AUSTRALIA

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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

SUBMISSIONS OF THE RESPONDENT (NAB)

Part I: Internet publication

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

Part II: Concise statement of issues

2. These proceedings concern whether Mr Potts, having been found to have misled representatives of NAB during a meeting on 6 May 2015 and in a subsequent telephone call, has established his pleaded case that DSH was a concurrent wrongdoer because it breached the contractual warranty and representation in clause 21.1(t) of the SFA by an act or omission other than Mr Potts' own misleading conduct. The following issues arise.
3. *First,* whether, on the proper construction of clause 21.1(t) of the SFA, it applies only to information (excluding financial projections, estimates and forecasts) provided by DSH or on its behalf to, relevantly, NAB, with any non-disclosure of information dealt with by clause 21.1(s) and financial projections, estimates and forecasts by clause 21.1(u). The answer is "yes": [31]-[39] below.
4. *Second,* whether, on Mr Potts' pleaded case, the only information provided to NAB (misleading or otherwise) was the information that he himself had provided, such that his case at trial was limited to reliance upon DSH being a concurrent wrongdoer because of the attribution to it of his own misleading conduct. The answer is "yes": [40]-[52] below.
5. *Third,* whether Mr Potts may depart from his pleaded case to rely upon other information provided by DSH or on its behalf to NAB. The answer is "no": [53]-[54] below.
6. *Fourth,* if the answer to the third question is "yes", whether Mr Potts can establish that any of the other information he identifies at AS [44] was not accurate on 22 June 2015 or was materially misleading when it was provided such that he can prove a breach by DSH of clause 21.1(t) of the SFA. The answer is "no": [55]-[71] below.
7. *Fifth,* if the answer to the fourth question is "yes", whether Mr Potts established that any such breach caused the same loss that his wrongdoing caused and that DSH is therefore a concurrent wrongdoer. The answer is "no": [72]-[83] below.
8. *Sixth,* if the answer to the fifth question is "yes", whether it is just that Mr Potts bear only 50% of the loss that he caused. The answer is "no": [84]-[85] below.
9. In summary, NAB's case on this appeal is as follows.
10. Mr Potts, as the person seeking to avail himself of a proportionate liability defence, carried the burden of pleading and proving that DSH was a concurrent wrongdoer. As the Court of Appeal noted at CA [446], he chose for sound forensic reasons to do so by the technique of pleading reflectively particular parts of NAB's case against him, such that it was only CAB 442

if and to the extent NAB established those parts of its case that his defence would arise.

11. Through this reflective pleading, Mr Potts only identified information he himself provided to NAB as being misleading. Mr Potts should not be entitled to depart from his pleaded case. But even if he could, Mr Potts has not shown that any of the information he identifies as having been provided to NAB was inaccurate or materially misleading (whether by omission or otherwise) at the relevant times.

12. Even if Mr Potts could demonstrate a breach of clause 21.1(t) of the SFA, he is still missing a necessary integer of his claim, because he cannot show this breach caused the damage or loss that was the subject of NAB's claim against him. And even if that could be shown, the causal significance of the other information relied upon to falsify clause 21.1(t), when compared to the potency of his own wrongdoing (which arose from giving misleading answers directly to NAB representatives when no one else from DSH was present), means it would not be just that he only bear 50% of the loss his misconduct caused.

13. Finally, it is necessary to draw attention to a threshold issue. If not clear already, it will shortly become evident from the balance of these submissions that Mr Potts' appeal depends on challenges to findings of fact, seeks to enlarge his pleaded case, and ultimately asks this Court to make findings on Mr Potts' degree of contribution to NAB's loss. The new parts of the case Mr Potts now runs might have been met with evidence below. This is not a satisfactory position for either NAB, or this Court, to face. It would be open for this Court to revoke the grant of special leave in this matter.[1]

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

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

Part IV: Material facts in dispute

15. The resolution of Mr Potts' appeal turns principally, if not solely, on his challenge to the factual findings made below, and on the proper construction of the parties' pleadings. That does not sit well with Mr Potts' contentions on the special leave application that the special leave question was of "general importance" because it "concerns what is the relevant knowledge … of a company in a misleading and deceptive conduct case", and that "absolutely no factual enquiry" would be necessary on the appeal.[2]

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[1] See *Fergusson v Latham* [2008] HCATrans 194, p23 ln 1001 – p25 ln 1054; *Talacko v Talacko* (2021) 389 ALR 178 at [62]; *New South Wales v DC* (2017) 344 ALR 415 at [17], [23]-[24]; *Water Board v Moustakas* (1988) 180 CLR 491 at 497-498.

[2] [2023] HCATrans 048, p7 lns 214-218, p7 ln 226 – p8 ln 230 (RBFM 320 to 321). See also appellant's special leave application at [3], [47] (RBFM 295 and 305).

16. Close attention is required to how Mr Potts pleaded and sought to prove his case on proportionate liability in relation to DSH at trial, so as to ascertain whether the primary judge erred in concluding that apportionment did not arise on the way in which his Honour had decided the case (PJ [586]) or whether the Court of Appeal erred in concluding that Mr Potts failed to establish his case (CA [445]). Much of this procedural history is not included in the appellant's statement of the facts and is set out below. CAB 236 CAB 442

How Mr Potts put his case below

17. ***NAB's case against Mr Potts:*** On 16 June 2017, NAB (together with HSBC Bank Australia Limited (**HSBC**)) commenced proceedings against Mr Abboud, Mr Potts and the insurers that provided the primary and various excess layers of insurance cover to them.
18. As against Mr Abboud, NAB alleged that he had engaged in misleading or deceptive conduct at a meeting on 28 April 2015 attended by Mr Abboud, Mr Potts and representatives of NAB (the **28 April 2015 meeting**).[3] As against Mr Potts, NAB alleged that he had engaged in misleading or deceptive conduct at the 28 April 2015 meeting, at a meeting that Mr Potts and with NAB's representatives on 6 May 2015 (the **6 May 2015 meeting**) and a subsequent telephone call,[4] and by providing 2015 and 2016 DSH's management accounts.[5] Relevantly to the present appeal, the only information provided to NAB on which it relied in its case was information provided by Mr Abboud and Mr Potts. As against their insurers, leave was sought to proceed against them directly under s 6(4) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).[6] Early on, the Court refused leave because there existed no extant dispute about indemnity or priority,[7] and the proceedings against the insurers were discontinued.[8]
19. ***Mr Potts' defence:*** In response to NAB's claim, Mr Potts relied on several positive

[3] The relevant court documents at the time of the trial were the second amended commercial list summons filed 16 June 2017 (**2AS**) (RBFM 254 to 266) and the third amended commercial list statement (**3ACLS**) (ABFM 72 to 116). The 28 April 2015 Meeting is addressed at paragraphs 86 to 88 of the 3ACLS (ABFM 92).
[4] Paragraphs 90 and 91 of the 3ACLS (ABFM 93).
[5] Paragraphs 89 and 92 of the 3ACLS (ABFM 93 and 94).
[6] Section 6(4) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), and the part in which it resided (Part 4), were repealed by the Schedule of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* and replaced by provisions for third parties to make claims against insurers as set out in the 2017 Act.
[7] *DSHE Holdings Limited (receivers and managers appointed) (in liquidation) v Abboud; National Australia Bank Ltd v Abboud* [2017] NSWSC 579. See, in particular, at paragraphs 41 and 50 to 52.
[8] There remains no dispute about indemnity, and issues of costs and the stay of NAB's judgment was determined on the basis that there will be sufficient funds available from the tower of insurers to indemnify the defendants in respect of any residual liability they have: see *DSHE Holdings Limited (receivers and managers appointed) (in liquidation) v Abboud (No 4); National Australia Bank Ltd v Abboud (No 5)* [2022] NSWSC 91 at [97].

defences,[9] including that he should be excused from liability by reason of s 1318 of the *Corporations Act 2001* (Cth) (the **Corporations Act**),[10] NAB's alleged contributory negligence and four proportionate liability defences. In relation to proportionate liability, Mr Potts contended that if he were liable as alleged by NAB, then each of **(1)** Mr Abboud, **(2)** DSH, **(3)** the partners of Deloitte Touche Tohmatsu (**Deloitte**) (who were DSH's auditors) and **(4)** the receivers and managers appointed by NAB and HSBC after DSH entered administration (the **Receivers**) were concurrent wrongdoers within the meaning of s 87CB of the *Competition and Consumer Act 2010* (Cth) (the **CCA**), s 12GP of the *Australian Securities and Investment Commission Act 2001* (Cth) (the **ASIC Act**) and s 1041L of the Corporations Act.[11]

20. By the conclusion of the hearing, Mr Potts had abandoned any contention that Deloitte or the Receivers were concurrent wrongdoers. Mr Potts only pressed his pleaded cases in relation to Mr Abboud and DSH.[12] His cases in relation to Mr Abboud and DSH were entirely reflective of the case brought by NAB. Whereas a host of new facts and allegations were pleaded by Mr Potts in relation to Deloitte[13] and the Receivers[14] (and ultimately not pressed), Mr Potts' cases with respect to Mr Abboud and DSH were confined to the facts and allegations pleaded by NAB in its case.

21. In relation to Mr Abboud, Mr Potts' contention that he was a concurrent wrongdoer depended on NAB establishing the misleading or deceptive conduct of Mr Abboud that it had alleged in paragraphs 94 to 96 and 112 to 114 of the third amended commercial list statement (**3ACLS**), being the relevant version at the time of the trial.[15] The primary judge found that Mr Abboud had not engaged in misleading or deceptive conduct, and this finding was not appealed (by either NAB or Mr Potts).

22. In relation to DSH, the relevant[16] proportionate liability defence was conditional on NAB establishing the allegations in paragraphs 17(d)-(f), 28-42, 46-47, 50, 54, 98(g)-(s), 102

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[9] See Section VI "Defences" commencing at paragraph 126 of Mr Potts' amended commercial list response (**PCLR**) (ABFM 154).
[10] Paragraph 128 of the PCLR (ABFM 161). This defence was not pressed by Mr Potts in closing submissions at the trial.
[11] Paragraph 129 of the PCLR (ABFM 161).
[12] See paragraphs 750 to 757 of Messrs Abboud and Potts' closing submissions (RBFM 271 to 272).
[13] See paragraphs 139 to 159 of the PCLR (ABFM 165 to 175).
[14] See paragraphs 160 to 164 of the PCLR (ABFM 175 and 176).
[15] Paragraph 130(b) of the PCLR (ABFM 161).
[16] There was also a proportionate liability defence in relation to DSH (at paragraph 132 of the PCLR (ABFM 162)) that related to misstatements in the financial statements as at 28 December 2014, which was ultimately not pressed by Mr Potts at trial: see paragraphs 753 and 754 of the closing submissions of Messrs Abboud and Potts, page 164 (RBFM 271).

and 123 of the 3ACLS.[17] Mr Potts did not plead any facts to establish his DSH proportionate liability defence other than relying on the proof by NAB of the facts it pleaded in its cases against Mr Abboud and Mr Potts. In particular, Mr Potts did not plead any facts arising from any of the additional documents 1 or 4 to 11 which Mr Potts has included in his book of further material.[18] Instead, Mr Potts relied in paragraph 133 upon NAB establishing the facts it had pleaded and then, if those facts were established, said that certain of the warranties contained in clauses 21.1(s), 21.1(t) and 21.1(u) of the SFA were breached by DSH. Of these, the only warranty that Mr Potts has been given leave to rely upon in this Court is that contained in clause 21.1(t) of the SFA.

23. ***NAB's reply:*** In its reply to Mr Potts' commercial list response (**PCLR**),[19] NAB admitted that, if NAB established its own pleaded case, then Mr Potts (in the case against Mr Abboud) and Mr Abboud (in the case against Mr Potts) would be concurrent wrongdoers.[20] However, NAB denied that, even if NAB established its pleaded cases against Messrs Abboud and Potts, DSH, Deloitte or the Receivers would be concurrent wrongdoers.[21]

24. In paragraph 10 of its reply, NAB set out why it denied DSH was a concurrent wrongdoer. The basis for NAB's denial was that, to the extent DSH engaged in misleading conduct as alleged by Mr Potts in, relevantly, paragraph 133 of the PCLR (by reflecting back NAB's own allegations), then DSH was not a concurrent wrongdoer because DSH engaged in that conduct only by the attribution to it of the pleaded acts or omissions of Mr Abboud and Mr Potts and therefore "DSH's conduct is relevantly the same conduct as that of its officers, [Messrs] Abboud and Potts".[22] As noted already, Mr Potts did not plead any further or additional conduct in the PCLR. The parties therefore joined issue on the pleadings on the basis that the only conduct relied upon by Mr Potts to establish his proportionate liability defence in relation to DSH was his misleading conduct if and to the extent NAB established such conduct against him.

25. ***The evidence at the trial:*** At the trial, NAB led evidence from five of its employees. Mr Cameron Clarke, a Senior Associate in NAB's client relationship team gave evidence about the 28 April 2015 meeting: PJ [204]. Mr Paul Taylor, an Associate Director within CAB 90-91

[17] See paragraphs 133 to 135 of the PCLR (ABFM 162 to 164).
[18] Documents 2 and 3 are the provision by Mr Potts of the 2015 management accounts, which was a part of NAB's pleaded case that it did not establish at trial.
[19] The relevant version of NAB's reply at the time of the trial is at ABFM 31 to 58 and was filed on 25 August 2017. The reply was not amended in response to Mr Potts's amended commercial list response filed 16 July 2019 (ABFM 117 to 177), and Mr Potts made no changes to his pleading of DSH as a concurrent wrongdoer.
[20] Paragraph 5(b)(i) of NAB's reply (ABFM 48).
[21] Paragraph 5(b)(ii) of NAB's reply (ABFM 48).
[22] Paragraph 10 of NAB's reply (ABFM 49 to 50), in particular, paragraphs 10(b)(iv) and (c)(i).

the client fulfilment team of NAB's corporate banking division and Mr Alan Menzies, a Senior Associate within the same team gave evidence of the 6 May 2015 meeting with Mr Potts in which they asked him why it was that DSH had so much excess at the end of January 2015, when the inventory of a retailer would normally have fallen substantially after the Christmas trading period: PJ [212], [218]-[227]. Ms Karen Peter, Head of Credit – Property, Consumer, Telecommunications and Mr Graeme Johnson, Director, Credit Risk gave evidence as the NAB employees whose approval was required for any proposed loan to DSH: PJ [212]. Mr Potts did not give evidence at the trial (PJ[550]), and he did not call any other lay witnesses in his case. Mr Abboud gave evidence and was cross-examined.

CAB 93, 95-98

CAB 93, 222

26. ***Closing submissions at the trial:*** As noted already, in closing submissions, Mr Potts only pressed his case that Mr Abboud and DSH were concurrent wrongdoers.[23]

27. In oral closing submissions in response to the case about DSH, NAB relied upon the response it had set out in its reply; that is, that DSH could not be a concurrent wrongdoer for the conduct of Messrs Abboud and Potts because "it's the same conduct".[24]

28. In his oral closing submissions, Mr Potts contended, incorrectly, that he was not "relying solely on [his] conduct or Mr Abboud's conduct as constituting the company's conduct".[25] Relevantly to how the case was ultimately decided by the primary judge, Mr Potts made the following oral submission:[26]

> If your Honour finds against the executive directors for express statements, **such as the 6 May meeting**, I don't say that the company's liable simply because it's vicariously liable for Mr Potts. I say that if the NAB was misled about the reasons for the December 2014 stock, then the company contributed to that by its announcements about the causes of the stock build-up, which the bank read and relied on. If it is misled about the stock position because matters weren't disclosed, the company likewise failed to disclose them when referring to the same subject matter in the ASX documents, so it's at least 50 per cent responsible. (emphasis added)

29. In reply, NAB identified that Mr Potts was impermissibly seeking to depart from his pleaded case:[27]

> Finally, our learned friends identified the proportionate liability defence today. A lot has been said in this case about the pleadings but [Mr Potts'] submissions bear no resemblance to the proportionate liability pleading which has been advanced. For

[23] See footnote 23 above.
[24] Trial transcript, page 3645, lns 15-23 (RBFM 274)
[25] Trial transcript, page 4270, lns 1-3 (RBFM 281). The oral submissions of Mr Potts on proportionate liability are at trial transcript, pages 4266 to 4272 (RBFM 277 to 283).
[26] Trial transcript, page 4270, ln 40 to page 4271, line 4 (RBFM 281 to 282).
[27] Trial transcript, page 4287, lns 18 to 36 (RBFM 284). The oral submissions of NAB in reply on proportionate liability are at trial transcript, page 4287, lns 18 to 46 (RBFM 284).

> example, if one were to take up Mr Potts' list response at pages 45 and 46, paragraph 132 pleads an independent case based on the company's audited accounts, but that's not the banks' case, it never has been. Then in paragraph 133, if the matter is pleaded in – and it picks up my case.
>
> So what there is not is a proportionate liability defence of the company doing things independently of Messrs Potts and Abboud. So this speculation about what happened when there was a meeting about transactional banking[28] is not a matter that's within the case, whether on our causation case, nor notified as part of a proportionate liability defence.

30. Accordingly, the trial concluded on the basis that NAB was holding Mr Potts to his pleaded case in relation to whether DSH was a concurrent wrongdoer. This case was one which was reflective of NAB's own case which, relevantly, only pleaded misleading conduct by Mr Potts. Mr Potts thus depended on NAB establishing its allegations against him in order to provide the foundation for Mr Potts' positive defence that DSH was a concurrent wrongdoer. No application was made by Mr Potts at any time to amend the PCLR to expand his case beyond that set out in it.

Part V: Argument

Issue 1: The proper construction of clause 21.1(t)

31. An appropriate starting point is the proper construction of clause 21.1(t) of the SFA, given its significance for Mr Potts' appeal. The relevant clause is set out at CA [443].[29] It is contained in the SFA, a document drafted by DSH's legal advisors for review and approval by NAB and HSBC[30] and then executed by Mr Abboud and Mr Potts on behalf of DSH on 22 June 2015, pursuant to the approval of the board given on 16 June 2015. CAB 441

32. Clause 21.1(t) is one of several contractual warranties and representations in clause 21.1, together with clauses 21.1(s) and (u). Each of these clauses is directed at different types of disclosures and contains an agreed standard for the quality of information in each class. *Clause 21.1(s)* was a contractual warranty and representation that provided that DSH had "fully disclosed in writing" to NAB all documents and information known to DSH relating to DSH, its assets, "the Finance Documents" and anything in connection with them "which is reasonably considered by [DSH] to be material to the assessment of the nature and amount of risk" undertaken by NAB or HSBC in entering and performing "the Finance

[28] The phrase "meeting about transaction banking" refers to the meeting Mr Potts now seeks to rely upon in this Court and is the subject of the documents at pages 14 to 17 of ABFM, which is outside his pleaded case.
[29] The SFA appears in full at RBFM 94 to 253.
[30] See Mr Potts' board paper for the 16 June 2015 board meeting (DSE.600.003.0724 at [.0827] to [.0828]) (RBFM 92 to 93).

Documents". "Finance Documents" was defined to mean the SFA and other documents created to record the overall transaction.[31] Accordingly, it was this clause that dealt with disclosure generally by DSH, and was confined to material that DSH "reasonably considered" materially bore on the assessment of the risk of NAB and HSBC.

33. *Clause 21.1(t)* had a different scope. It was limited to "information … provided by [DSH] or on its behalf" to either NAB or HSBC "in connection with" the Finance Documents. It excluded from its operation "financial projections, estimates and forecasts", which were dealt with by clause 21.1(u). In relation to the "information provided by [DSH]", DSH made two representations. First, it warranted that this information was "accurate in all material respects" as at "the date of this document" (ie. 22 June 2015) or, if provided later, when provided. Secondly, it warranted that this information "at the date provided" was "not, by omission or otherwise, misleading in any material respect at the date provided (whether by its inclusion or by omission of other information".

34. *Clause 21.1(u)* dealt with the financial information carved out of clause 21.1(t). It provided that "financial projections, estimates and forecasts" provided by DSH or on its behalf to NAB or HSBC "in connection with" the Finance Documents had been prepared "in good faith with due care and skill", "based on information known to it" and subject only to reasonable assumptions and qualifications.

35. Thus, these three clauses created specific contractual representations and warranties which were made through the SFA and which dealt with different categories of information.

36. Relevantly to the present appeal, clause 21.1(t) applies only to "information provided by DSH or on its behalf". Proof of a breach of the clause requires identification of the information provided and then establishing why this information was not accurate or was materially misleading at the times provided for (including because material was omitted from it that was required to be included in the information so that it was not misleading).

37. In this regard, AS [37] does not correctly capture the effect of clause 21.1(t). Contrary to what is put there, it cannot be construed as an assurance that NAB "could comfortably enter the SFA without making any further enquiries regarding whether material information had been withheld by DSH". Construed in its context, clause 21.1(t) was a warranty about the accuracy of information actually provided (including by omission), and was not addressed to information that was not provided. The non-disclosure of information was the province of clause 21.1(s), which, by agreement, was limited to the disclosure of

[31] RBFM 112.

information which DSH "reasonably considered" was material to the assessment of risk by NAB and HSBC.

38. Tested another way, NAB could and did ask Mr Potts to provide the 2015 and 2016 management accounts, which he provided. The 2015 management accounts in part (for the period April to June 2015) and the 2016 management account in whole contained financial projections, estimates and forecasts, and therefore fell within clause 21.1(u). To the extent that the 2015 management accounts contained historical information (that is, stated the past financial results of DSH) they fell within clause 21.1(t). Assuming this was all of the information that NAB asked for and was provided, clause 21.1(t) did not permit NAB to conclude that it could "comfortably enter the SFA without making any further enquiries" on the basis that no material information had been withheld from it. Seen thus, the contention at AS [37] cannot correctly represent the proper construction of the clause.

39. Accordingly, the contention at AS [38], that it is not necessary to analyse "each piece of information provided to NAB" to consider whether clause 21.1(t) was breached by something other than Mr Potts' own misconduct, is wrong. In order to prove a breach of clause 21.1(t), it is necessary first to identify information provided to NAB by DSH or on its behalf, and, having identified that information, then to consider whether that information was not accurate or was materially misleading in breach of the clause.

Issue 2: Mr Potts' pleaded case

40. It follows from the above that, to establish a breach of clause 21.1(t) of the SFA by DSH, it was necessary for Mr Potts to plead particular "information … provided by [DSH] or on its behalf to any Finance Party" and then to establish that there was a breach of that clause because that information was not accurate or was materially misleading.

41. Noting how Mr Potts pleaded this part of his case, it is clear that, having identified at PJ [515] that Mr Potts' only remaining positive defences were that DSH and Mr Abboud were concurrent wrongdoers, there was no error in the primary judge's conclusion that "the question of apportionment does not arise": PJ [586]. The Court of Appeal was also correct to hold that "[w]hat was missing for [Mr Potts'] case was identification of facts which constituted breaches of the relevant representations": CA [445]. CAB 206-207 CAB 236 CAB 442

42. As identified above, the relevant pleading by Mr Potts was in paragraphs 133 to 135 of the PCLR. While Mr Potts seeks to make much in this Court of the fact that paragraph 133 of the PCLR was admitted by NAB (see AS [29]), that submissions fails to grapple with **(1)** the reality that what was pleaded in paragraph 133 was a reflection of NAB's own case

against Mr Potts and **(2)** the reasons why NAB stated in its reply in response to paragraphs 134 and 135 and its closing submissions that DSH was not a concurrent wrongdoer on the basis of this pleading. Put simply, the admission made in relation to paragraph 133 does not assist Mr Potts to establish the unpleaded case he now wants to make in this Court.

43. As noted already, paragraph 133 was a conditional pleading which applied "if" particular paragraphs "are established" by NAB. That is, Mr Potts only mounted a reflective case which depended on NAB proving particular paragraphs of the 3ACLS. These were paragraphs 17(d)-(f), 28-42, 46-47, 50, 54, 98(g)-(s), 102 and 123 of the 3ACLS.

44. None of these paragraphs pleaded any "information … provided by [DSH] or on its behalf to any Finance Party" except for the information provided by Mr Potts. Paragraphs 17(d) to (f) are the three clauses of the SFA (clauses 21.1(s), (t) and (u)), of which only the second is in play on this appeal. Paragraphs 28 to 37 pleaded business practices of DSH at particular times in relation to rebates, their impact on buying practices and how they were accounted for. Paragraph 38 pleaded that DSH should have made provisions for excess inventory in its 2015 half-year financial statements. Paragraphs 39 to 42 set out DSH's cash flow difficulties as at 12 February 2015. Paragraphs 46 and 47 allege that Mr Potts and Mr Abboud did not have a proper or adequate basis to approve the 2015 half-year financial statements. Paragraph 50 sets out DSH's cash flow difficulties as at 30 April 2015. Paragraph 54 set out DSH's cash flow difficulties as at 22 June 2015. Paragraphs 98(g) to (s) repeated in propositional form allegations from these paragraphs, and did not refer to the provision of any information to NAB.

45. Paragraph 102 is the first paragraph that refers to information provided to NAB in that it refers to the representations and conduct of Mr Potts in relation to NAB. It provided:

> By reason of the contraventions by [Mr] Potts of section 18 and 29(1)(a) or (b) of the ACL, section 12DA(1) and 12DB(1)(a) of the ASIC Act and section 1041H of the Corporations Act set out in paragraph 99, and in reliance on the representations pleaded in paragraphs 98(a) to 98(f) NAB entered into the [SFA] and advanced the loans to [a subsidiary of DSH] as pleaded above and has suffered loss and damage.

46. Paragraphs 98(a) to (f) plead the particular representations relied upon, and paragraph 99 sets out the conduct of Mr Potts alleged to have been misleading or deceptive, which included the statements he made or concurred in at the 28 April 2015 meeting and the statement he made during the 6 May 2015 and the subsequent telephone call or calls.

47. The final paragraph that Mr Potts relied upon was paragraph 123, which was the equivalent to paragraph 102 in HSBC's case, which HSBC failed to prove at trial and on appeal.

48. Accordingly, the case as pleaded by Mr Potts to establish that DSH was a concurrent

wrongdoer relied solely on the information that he provided to NAB and HSBC. He did not assert that there was any other information provided by DSH or by anyone on its behalf that was not provided by him.

49. Once that is seen, it is plain both why NAB admitted paragraph 133 and why the allegations that Mr Potts made in paragraph 133 of the CLR did not establish that DSH was a concurrent wrongdoer. Contrary to AS [30], the only matter relied upon by Mr Potts to falsify the three contractual representations and warranties was the attribution to DSH of his own conduct in dealing with NAB, as alleged by NAB. There were no separate acts pleaded (by reflection) by Mr Potts except for his own. As acknowledged in AS [31], NAB, from the time it filed its reply on 25 August 2017, denied that this attribution made DSH a concurrent wrongdoer[32] because Mr Potts was relying on his own conduct.

50. Mr Potts did not seek to amend his claim. As the Court of Appeal observed at CA [446]: CAB 442
"[n]o doubt that affirmative case against DSH would have been forensically difficult for Mr Potts to run, given his position as the primary contact between NAB and DSH and the person responsible for identifying what material was and was not to be disclosed".

51. At AS [31], Mr Potts repeats a significant concession, which he also made in his closing submission at trial (see [28] above) and to the Court of Appeal (CA [442]). That is, he CAB 440
accepts that, in order for him to establish that DSH was a concurrent wrongdoer, he needs to show "some relevant act attributable to DSH other than his own acts". The fundamental flaw with Mr Potts' case is that he simply never pleaded any act other than his own because he took the forensic decision to run a proportionate liability defence in relation to DSH that was entirely reflective of NAB's case against him.

52. This is a sufficient basis to dismiss Mr Potts' appeal. While it may be said the primary judge should have given more detailed reasons why "the question of apportionment does not arise" (PJ [586]), in the light of how the case was pleaded and conducted at trial, it is CAB 236
plain the primary judge reached the correct conclusion. Of the two identified concurrent wrongdoers, the primary judge explained in some detail why Mr Abboud did not engage in misleading conduct and the only misleading conduct found was that of Mr Potts. These findings did not provide a sufficient basis for DSH to be held to be a concurrent wrongdoer.

Issue 3: Whether departure from the pleaded case should be permitted

53. Whether Mr Potts should now be entitled to depart from his pleaded case can be dealt with briefly. Mr Potts should not be permitted to depart from the case set out in the PCLR and

[32] See denials at paragraphs 5(b)(ii) and 10 of NAB's reply (ABFM 48 and 49 to 50).

on which the parties joined issue. This is not a matter of mere formality but rather a matter of procedural fairness.[33] The function of the court is to determine the issues and grant relief founded on the pleadings unless the parties are allowed to alter the issues at the trial without amendment of the pleadings.[34] These principles apply equally to a case in the Commercial List, where it is intended that commercial list statements and responses ensure that each party knows the case against it and define the limits within which the trial will be conducted.[35] And they apply with special force in this Court.

54. In circumstances where Mr Potts' pleaded case did not establish a basis for DSH to be a concurrent wrongdoer other than through the information that he himself provided to NAB (and which was found to be misleading in relation to the 6 May 2015 meeting), he should not be permitted in this Court to put a different case. The trial was conducted on the basis of the issues set out in the pleadings. In fact, Mr Potts' trial counsel were adamant that the case was to be conducted solely by reference to the pleading and that the plaintiffs should be kept strictly to their pleaded case, and the primary judge made it clear that all parties were "going to be held to their pleadings".[36] Mr Potts was given fair notice from the filing of NAB's reply on 25 August 2017 of the basis upon which NAB contended that DSH was not a concurrent wrongdoer, and objected to him departing from his pleaded case in closing submissions at trial (see [29] above) and on appeal.[37] There is no reason why he should be entitled in this Court to run a different case from that which he pleaded.

Issue 4: Whether any of the additional information breached clause 21.1(t)

55. The following submissions arise in the event Mr Potts is permitted by this Court to depart from his pleaded case. It is convenient at this point to address what is put at AS [32] and [33]. As Mr Potts acknowledges there, any contention that DSH is a concurrent wrongdoer by reason of clause 21.1(t) of the SFA requires the identification of conduct independently of that of Mr Potts. However, contrary to what is advanced there, a breach of clause 21.1(t) of the SFA requires two steps: first, the identification of information provided by DSH or on its behalf that was not accurate or materially misleading at the relevant time and secondly, the making of the two representations and the giving of the two warranties by DSH through clause 21.1(t) of the SFA. Put another way, no breach of the SFA arises from

[33] *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 (***Akhil***) at 286.
[34] *Akhil* at 288.
[35] *Brambles Australia Ltd v Tatale Pty Ltd* [2006] NSWSC 204 at [9]; *Hastie Group Ltd (In Liq) v Bourne*; [2017] NSWSC 709 at [58]-[59].
[36] See, for example, T1440.44-1441.32 (RBFM 268 to 269)
[37] T222.47-227.36 (RBFM 287 to 292)

the giving of the representation and warranty without some relevant conduct (arising independently of Mr Potts) that predates the SFA. Once the two steps are complete, and the contract is formed and the representations and warranties are made, then the breach by DSH of the SFA may occur.

56. As the above analysis demonstrates, it is simply wrong for Mr Potts to submit in AS [33] that the issue of whether there was any information provided by DSH or on its behalf that was not accurate or materially misleading "does not arise" given NAB's admission, as that admission is only that the attribution of Mr Potts' conduct to DSH would mean that DSH breached clause 21.1(t) of the SFA when it entered the SFA (a case that Mr Potts does not seek to rely upon). What Mr Potts needed to identify, and failed to plead, was some misleading or inaccurate information, other than information he himself provided to NAB.

57. In that regard, and for the reasons already identified, Mr Potts is wrong to contend at AS [41] that the Court of Appeal erred in finding that he had not identified the facts necessary to constitute a breach of the relevant representations. It is not sufficient for Mr Potts simply to assert that DSH did not disclose what he refers to as the "true position" or that others within DSH knew what he knew (cf AS [54]-[65])) to support his contention that clause 21.1(t) was breached. The primary judge referred to the "true position" relevantly at PJ [571] and [572] to explain why it was that what Mr Potts had said to NAB was misleading. Those findings do not establish that any information other than that provided by Mr Potts was misleading because it did not reveal the "true position". These findings arose in circumstances where Mr Potts was directly confronted by NAB representatives with the question of why DSH's inventory was higher at the end of January 2015 and he gave answers which were misleading. These findings provide no basis for a conclusion that, absent a direct question of that nature, any other person on behalf of DSH was required to disclose to NAB representatives that information. CAB 229-231

58. Mr Potts attempts to confront this difficulty in AS [44] where he identifies information provided by DSH or on its behalf on three occasions which are separate from the conduct the primary judge found to be misleading at the 6 May 2015 meeting. The three occasions he relies upon are **(1)** the 28 April 2015 meeting that Mr Abboud and Mr Potts attended, **(2)** the provision by Mr Potts of DSH's management accounts on 5 May 2015 and **(3)** answers provided by Ms Puja to NAB on 20 May 2015.

59. As to **(1)**, this contention is hopeless. The 28 April 2015 meeting was comprehensively dealt with by the primary judge and found not to give rise to any misleading conduct. As Mr Potts recognises at AS [47], the primary judge dismissed any contention that

Mr Abboud and Mr Potts engaged in any misleading conduct at this meeting. However, what Mr Potts appears to contend in AS [50] is that even though what Mr Abboud and Mr Potts said at the 28 April 2015 meeting was not misleading at the time of the meeting, their conduct became misleading as a consequence of Mr Abboud and Mr Potts executing the SFA on behalf of DSH (with clause 21.1(t) with it), when they knew that they had not told NAB everything "about inventory management and the rebate strategy" at the meeting. There are a number of flaws in this contention which mean it must be rejected.

60. First, it is premised on NAB's case against Mr Abboud being confined to "whether his conduct was misleading in the circumstances that existed as at 28 April 2015": AS [50]. This premise is incorrect. The case against Mr Abboud (and for that matter Mr Potts) was in relation to their conduct in dealing with NAB, including at the 28 April 2015 meeting, up to and including their execution and delivery of the SFA on 22 June 2015.[38] Accordingly, insofar as Mr Potts is relying upon anything Mr Abboud did or did not say at the 28 April 2015 meeting as being misleading as at 22 June 2015 , that case has been resolved against NAB (and Mr Potts) in favour of Mr Abboud. Mr Potts did not appeal the dismissal of the case against Mr Abboud to the Court of Appeal and he cannot resuscitate it now to contend that Mr Abboud's conduct, either on 28 April 2015 or 22 June 2015, was misleading. That case was run and lost.

61. Second, to the extent that Mr Potts contends that, as at 22 June 2015, what was said at the 28 April 2015 meeting was misleading, then that is not conduct that is separate from his own conduct, such that it would make DSH a concurrent wrongdoer by some separate and independent act or omission. Mr Potts attended the 28 April 2015 meeting and knew what had and had not been said at it. If Mr Potts wishes to now contend that what occurred at that meeting was misleading, then that means he must accept that the misleading conduct was his, as a participant in the meeting and as a person who signed the SFA. However, he does not appear to accept that.

62. Third, in the light of the uncontested findings below, Mr Potts cannot establish that any of the information provided at the meeting on 28 April 2015 was not accurate as at 22 June 2015 or was materially misleading when it was provided, which is the necessary test to establish that DSH breached clause 21.1(t) of the SFA. As the primary judge addressed at PJ [205]-[210] and [545]-[548], none of the information that Mr Abboud and Mr Potts conveyed to NAB at the meeting on 28 April 2015 was incorrect or misleading. For CAB 91-93, 221-222

[38] See paragraphs 96(a) to (f) of the 3ACLS (ABFM 97 to 98) in relation to Mr Abboud and paragraphs 99(a) to (g) of the 3ACLS (ABFM 100 to 101) in relation to Mr Potts.

example, while Mr Potts refers to the reference to "improved inventory management" on one of the slides (AS [45(a)], see PJ [205]), the primary judge's uncontested finding was that DSH's system did record information in relation to each stock item and a report was prepared and reviewed each week to identify un-performing or slow-moving stock (PJ [209], see also PJ [546]) and to the extent there was any reference to the use of scan rebates to protect gross profit margins at the meeting, what Mr Abboud said was true (PJ [547]). At PJ [566], the primary judge rejected any case based on non-disclosure by Mr Abboud and Mr Potts at the meeting on 28 April 2015, and Mr Potts did not appeal these findings in relation to Mr Abboud. CAB 91 CAB 93, 221 CAB 221, 227-228

63. Accordingly, Mr Potts cannot establish a breach of clause 21.1(t) of the SFA by reference to the 28 April 2015 meeting.

64. As to **(2)**, Mr Potts contends that that the monthly management accounts that Mr Potts emailed to NAB on 5 May 2015 were "misleading by reason of material omission": AS [51]. There are various difficulties with this contention. First, there were no factual findings made below that the monthly management accounts were misleading (either expressly or by reason of omission), as Mr Potts would now contend. Mr Potts made no such submission at the trial. NAB's case at trial was that Mr Potts, by providing these management accounts, represented that to the extent that the accounts contained historical information, they were prepared on a proper and adequate basis and were true and fair, and to the extent that the management accounts contained projections for April, May and June 2015, they were prepared on a proper or adequate basis. This case was rejected by the primary judge at PJ [549], and not appealed. In any event, it was no part of NAB's case that these monthly management accounts should have addressed any of the matters referred to in AS [51]. CAB 222

65. Second, what was provided by Mr Potts was simply the profit and loss statement and balance sheet for DSH.[39] These set out the actual and projected month end results for DSH. They contained no commentary or narrative. There is no basis for Mr Potts' contention that these accounts were misleading because they did not contain such information.

66. Third, the monthly management accounts were the origin of Mr Potts' own misconduct. When Mr Taylor and Mr Menzies reviewed these accounts, they identified that the inventory recorded at the end of January 2015 had increased from the end of December 2014, which was contrary to their expectations. They met with Mr Potts in order to ask

[39] ABFM 11 and 12.

him questions. As the primary judge recorded at PJ [568]: CAB 228

> In answering NAB's questions, Mr Potts was not acting in a purely ministerial capacity. He was answering questions that fell within his area of responsibility and about which he could be expected to have, and did have, personal knowledge. It was obviously important to NAB to understand why, contrary to its expectations, the level of stock had increased rather than decreased in January 2015. The answers to those questions were unlikely to be found, or could not easily be found, in the records of the company, but rather depended on an intimate knowledge of the company which someone in the position of Mr Potts could be expected to have. That is, no doubt, why NAB requested a meeting with Mr Potts and why Mr Menzies spoke directly to Mr Potts. Mr Potts must have understood that that was the position and that is why he agreed to the meeting and spoke to Mr Menzies himself, rather than delegating those tasks to someone else at DSH or suggesting to NAB that it would be more appropriate for its representatives to deal with someone else at DSH. Accordingly, to the extent that Mr Potts gave misleading answers to the questions he was asked or did not disclose information that left NAB with a misleading impression, he was personally liable for that conduct.

67. Importantly though, the management accounts were not themselves found to be misleading. They merely set out historical and projected financial information. The January 2015 inventory number raised questions in the minds of Mr Taylor and Mr Menzies, which they asked Mr Potts to answer. However, it does not follow simply from the fact that they had questions arising from the management accounts that those accounts were themselves misleading.

68. For these reasons, Mr Potts cannot establish a breach of clause 21.1(t) in relation to the monthly management accounts that he emailed to NAB on 5 May 2015.

69. As to **(3)**, Mr Potts seeks to rely upon an answer given by Ms Puja, a business strategy analyst at DSH, to Ronald Lin, NAB's Director Trade and Working Capital NSW/ACT (see PJ[242]), in order to establish a breach of clause 21.1(t). The answer is set out at AS [52]. There are many problems with this contention. First, Mr Potts does not suggest that any part of Ms Puja's answer was inaccurate. That is, Mr Potts accepts that, when Ms Puja said that inventory was provisioned on a monthly basis in the manner she described, this was accurate and not misleading. Second, there are no findings below that this answer was inaccurate or materially misleading, as it was no part of NAB's case. CAB 102-103

70. Third, the contention that Ms Puja's answer meant that DSH contravened clause 21.1(t) of the SFA cannot be established. It provided a direct, clear and correct answer to the question that NAB had posed (see ABFM 19). The argument that Ms Puja should have included further information not called for by the question, or that her answer became misleading because DSH did not supplement it as at 22 June 2015 cannot be sustained. That is not what clause 21.1(t) obliged DSH to do. Ms Puja's answer was not misleading, either on 20 May 2015 when it was given or on 22 June 2015 when the SFA was executed, and Mr Potts

has not established to the contrary.

71. For these reasons, Mr Potts cannot make out his unpleaded case that the information provided by Mr Abboud and Mr Potts at the 28 April 2015 meeting, in the management accounts he provided on 5 May 2015 or by Ms Puja on 20 May 2015 constitute conduct which meant that DSH breached clause 21.1(t) of the SFA.

Issue 5: Whether DSH is a concurrent wrongdoer

72. Contrary to the position he put at the hearing of the special leave application,[40] Mr Potts asks this Court to determine his degree of contribution as a concurrent wrongdoer. That task should properly be undertaken by a court with all the evidence before it.

73. Addressing Mr Potts' arguments on their terms: even if Mr Potts were able to prove that any of the information provided by Mr Abboud and Mr Potts at the 28 April 2015 meeting, in the management accounts on 5 May 2015 or by Ms Puja on 20 May 2015 meant that DSH breached clause 21.1(t) of the SFA, it would not follow from that alone that DSH would be a 'concurrent wrongdoer' in NAB's case against him.

74. Under the relevant proportionate liability regimes, for a person to be a 'concurrent wrongdoer' in relation to a claim, they must be a person who is one of two or more persons whose act or omission "caused, independently of each other or jointly, the damage or loss that is the subject of the claim". Accordingly, Mr Potts' proportionate liability defence requires focus on **(1)** what damage or loss was the subject of NAB's claim; and **(2)** whether DSH's breach of clause 21.1(t) of the SFA "caused" that same damage or loss.

75. Starting with **(1)**, the claim against Mr Potts upon which NAB succeeded was that he engaged in misleading or deceptive conduct at the 6 May 2015 meeting and in a subsequent telephone conversation with Mr Menzies a week later. At that meeting, which was held in Mr Potts' office at DSH's headquarters at Chullora, Mr Taylor and Mr Menzies confronted Mr Potts with the question why inventory went up in January 2015 and not down. Mr Potts said that the Company was overstocked after the Christmas peak period because a large private label order that had been placed before Christmas was delayed and did not arrive until late January 2015: PJ [220]. He was asked what had been done to prevent that occurring again, and he referred to the implementation of weekly buyers meetings: PJ [221]-[223]. He misled Mr Taylor and Mr Menzies by not explaining that the real reason was that the emphasis that DSH was placing on the collection of O&A rebates was causing it to buy too much stock, and that no steps had been taken to reduce DSH's reliance

[40] [2023] HCATrans 048, p20 lns 783-785 (RBFM 333).

upon those rebates to achieve its profit targets.

76. After the meeting, Mr Menzies circulated several drafts of the credit memorandum internally within NAB: PJ [229]. The version prepared following the meeting was consistent with Mr Taylor's evidence of what Mr Potts said at the meeting about the reason for the excess stock being a delayed private label shipment: PJ [225], [227]. After receiving comments on the drafts, Mr Menzies spoke with Mr Potts by telephone on 11 or 12 May 2015: PJ [229]. In that conversation, Mr Potts provided additional information about the level of inventory projected for June and December 2015 and the additional controls that had been put in place to prevent a recurrence of the problem: PJ [229]. Mr Menzies included what Mr Potts told him in the credit memorandum: PJ [237], [238]. CAB 98 CAB 96, 98 CAB 98-99 CAB 101-102

77. On 20 May 2015, Mr Johnson and Ms Peter approved (subject to some conditions) offering a facility to DSH of the type described in, and based on, the credit memorandum: PJ [241]. CAB 102

78. NAB's case was that, if Mr Potts had answered the questions posed to him on 6 May 2015 and in the later call accurately and completely, then NAB would not have proceeded further, either because Mr Taylor and Mr Menzies would not have recommended the transaction or because Mr Johnson and Ms Peter would not have approved it, given the significance of that information. Mr Potts, at trial and on appeal, contested this causation case (see CA [401]-[433]). The Court of Appeal upheld the primary judge's conclusion that, if NAB had been told by Mr Potts that one of the reasons for the build-up in stock was the emphasis on O&A rebates and that DSH had not taken steps to change its policies and procedures to deal with the problem, it would not have agreed to participate in the syndicate with HSBC: PJ [574]; CA [431]. CAB 425-436 CAB 231, 435-436

79. Accordingly, the damages or loss that was the subject of NAB's claim was its damages or loss on a "no transaction" basis – that is, on the basis that it did not enter the SFA.

80. As to **(2)**, the question then is whether DSH's breach of clause 21.1(t) of the SFA "caused" that same damage or loss. As already dealt with, Mr Potts' contention on breach requires two steps: the provision of information and then the giving of the representation or warranty by the execution of the SFA. It can be immediately seen that a different counterfactual emerges, with different causal considerations. Whereas in the case against Mr Potts, NAB would never have executed the SFA, in the case of a hypothetical claim by NAB against DSH, the execution of the SFA by DSH, NAB and HSBC was a necessary component of the cause of action, because it was through its execution that the contractual representation and warranty was given. But this means that the damages or loss that arose are not those arising on a "no transaction" case but rather on the basis that NAB had entered

the SFA. While NAB and HSBC relied upon the contractual representations and warranties in entering the SFA (as clause 21.4 of the SFA records), the entry into the SFA is a necessary step in order for DSH's wrongdoing to be complete.

81. Because Mr Potts did not run this case at trial, this issue has never been satisfactorily explored in the evidence. Despite Mr Potts having cross-examined the relevant decision makers from NAB and HSBC, there was no exploration at trial of what they would have done had they become aware of a breach by DSH of clause 21.1(t) of the SFA or any evidence of them taking this clause into account in their decision-making.

82. It cannot be said that what would have occurred in this scenario is obvious. It required Mr Potts to lead evidence to address it. However, it is plain that the considerations that would arise when deciding to enter a loan are very different to those which would arise if one were seeking to exit a loan (either through the remedy of recission[41] or through the contractual provisions in the SFA that set out the consequences of a breach of clause 21.1(t) of the SFA).[42] One of the difficulties faced by NAB once it had entered the SFA was that it was part of a syndicate with HSBC, which required its interests to be addressed through the decision-making processes under the SFA, and the syndicate had refinanced the existing lender, Westpac Banking Corporation, such that DSH was now dependent on the SFA for its survival. It is not at all clear from the evidence whether NAB and HSBC would have sought to bring the SFA to an end if they became aware of a breach of clause 21.1(t), and if so, when and how they would have done so, and whether, if they had done so, their losses would have been materially different from those they in fact experienced in the real world after the directors of DSH appointed administrators, and they appointed the Receivers, in January 2016.

83. Put simply, Mr Potts cannot show that any breach of clause 21.1(t) by DSH caused NAB the same damage or loss for which NAB sued him.

Issue 6: Whether it is just for Mr Potts to bear only 50% of the loss he caused

84. The reasons that Mr Potts advances as to why he should not bear "a lion's share of the responsibility for NAB's loss" (AS [71]) are unconvincing. He was DSH's chief financial officer and had been charged by the board with overseeing the tender process and dealing with each of the potential financiers. He was the person who recommended that DSH enter

[41] *Alati v Kruger* (1955) 94 CLR 216 at 220 and 222; *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2022) 406 ALR 632; [2022] HCA 38 at [61].
[42] Clause 25.2 of the SFA (RBFM 167). Clause 28 of the SFA (RBFM 173 to 175) sets out how the Agent is instructed.

into the SFA with NAB and HSBC and executed it, with Mr Abboud, on its behalf. He alone bears responsibility for misleading NAB at the meeting on 6 May 2015. No one else was in the room where it happened. Not Mr Abboud, Ms Puja or Mr Mills (cf AS [71]).

85. No one else from DSH was found to have engaged in any misleading conduct. It is not to the point that other people within DSH, including Mr Abboud, knew the same things that Mr Potts did (cf AS [54]-[65]) – what is relevant is that no one else was asked the relevant questions by NAB and gave misleading responses. The three other instances of the provision of information to NAB which Mr Potts identifies at AS[44] are not alleged to have been misleading. Further, Mr Potts' misconduct had a potent causative effect on NAB's decision making process, as demonstrated by the evidence of Mr Taylor, Mr Menzies, Ms Peter and Mr Johnson. He alone bears responsibility for not revealing to NAB, in response to direct questions, the real reason why DSH's inventory was inflated at the end of January 2015 and the underlying cause had not been remedied.

Part VII: Estimate of time for oral argument

86. NAB estimates that it will require 1.5 hours for its oral argument.

Dated: 7 July 2023

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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

ANNEXURE TO THE RESPONDENT'S SUBMISSIONS

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

No.	Description	Version	Provisions
1.	*Australian Securities and Investments Commission Act 2001* (Cth)	Version in force from 14 April 2015, registered 20 April 2015	ss 12DA and 12 DB
2.	*Australian Securities and Investments Commission Act 2001* (Cth)	Compilation no 90, in force from 10 August 2022, registered 20 September 2022	s 12GP
3.	*Competition and Consumer Act 2010* (Cth)	Version in force from 1 January 2015, registered 15 January 2015	ss 18 and 29 of Schedule 2 (Australian Consumer Law)
4.	*Competition and Consumer Act 2010* (Cth)	Compilation no 140, in force from 1 July 2022, registered 21 July 2022	s 87CB
5.	*Corporations Act 2001* (Cth)	Version in force from 14 April 2015, registered 29 April 2015	s 1041H
6.	*Corporations Act 2001* (Cth)	Compilation no 118, in force from 10 August 2022, registered 30 September 2022	ss 1041L and 1318
7.	*Law Reform (Miscellaneous Provisions) Act 1946* (NSW)	Version in force from 19 May 2017	s 6