SHORT PARTICULARS OF CASES
APPEALS

OCTOBER 2023

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POTTS & ANOR v DSHE HOLDINGS LTD ACN 166 237 841 (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) & ORS (S47/2023); POTTS v NATIONAL AUSTRALIA BANK LIMITED (ABN 12004044937) (S48/2023)

Court appealed from: Court of Appeal of the Supreme Court of New South Wales
[2022] NSWCA 165

Date of judgment: 26 August 2022

Special leave granted: 21 April 2023

DSHE Holdings Pty Ltd ("DSH") was incorporated in 2013 (when it was known as Dick Smith Holdings Ltd), for the floating of the Dick Smith electronics business on the Australian Securities Exchange. Mr Nicholas Abboud became DSH's managing director and chief executive officer. Another director, Mr Michael Potts, was the company secretary and chief financial officer. DSH went into voluntary administration in January 2016, and into liquidation six months later.

Receivers were appointed in January 2016 by two secured creditors, National Australia Bank Limited ("NAB") and HSBC Bank Australia Limited ("HSBC"). The receivers commenced Supreme Court proceedings in DSH's name ("the company case") against Mr Abboud, Mr Potts, and other directors, alleging breaches of the duty of care owed under section 180(1) of the *Corporations Act 2001* (Cth) ("the Act") and under the general law in the directors' decision to declare a final dividend of $11.826 million ("the Dividend") in August 2015.

NAB and HSBC also sued Mr Abboud and Mr Potts in a separate proceeding ("the bank case"), alleging that the men had engaged in misleading or deceptive conduct (contrary to s 1041H of the Act, s 18 of the *Australian Consumer Law* and s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth)) in inducing the banks to enter into an agreement for the provision of finance, known as the Syndicated Facility Agreement ("the SFA"), in June 2015. One of the warranties given by DSH in the SFA, at clause 21.1(t), was to the effect that information given by the company to either bank was accurate and not materially misleading ("the Warranty").

Ball J dismissed the company case. His Honour held that Mr Potts, but not Mr Abboud, had contravened s 180 of the Act by voting in favour of the resolution for payment of the Dividend, in view of DSH's cash flow forecast having indicated that the company would be unable to meet all of its projected liabilities. Ball J held however that Mr Potts' contravention did not cause DSH loss so as to support an order for compensation, under s 1317H of the Act, as the company had failed to establish that, but for the contravention, the Dividend would not have been paid.

In the bank case, Ball J gave judgment for NAB against Mr Potts in the sum of $57.278 million, but otherwise dismissed the case. His Honour held that Mr Potts had engaged in misleading conduct by withholding from NAB information (relating to DSH's inventory levels) which was of such significance that, had it been disclosed, the bank would have decided not to enter into the SFA.

DSH appealed from Ball J's findings as to contravention of s 180 of the Act and the lack of damage for the purposes of s 1317H.

Mr Potts appealed from Ball J's judgment insofar as it determined the bank case in NAB's favour, Mr Potts seeking that his liability to NAB be reduced to no more than 50%. This was on the basis that DSH was a concurrent wrongdoer, within the meaning of the Act and cognate legislation, whose misleading conduct in breach of the Warranty had been a cause of NAB's entry into the SFA, and that a defence of proportionate liability raised by Mr Potts should have been upheld.

The Court of Appeal (Leeming and Kirk JJA and Basten AJA) unanimously allowed DSH's appeal in part and dismissed Mr Potts' appeal. In DSH's appeal, their Honours held that Ball J ought to have found that Mr Abboud too, had contravened s 180 of the Act by voting in favour of the resolution for payment of the Dividend, and "but for" causation had been established such that DSH had suffered damage for the purpose of s 1317H of the Act. The damage suffered was the paying out of money which would not otherwise have been paid out. The Court of Appeal considered that Ball J had erred by proceeding on the basis that a contravention of s 254T of the Act (which prohibits the payment of dividends unless, relevantly, the payment does not materially prejudice a company's ability to pay its creditors) was necessary for a finding that Messrs Potts and Abboud had contravened their s 180 duty on account of having exposed DSH to a *risk* of contravening s 254T. The Court of Appeal set aside certain orders made by Ball J, and in lieu gave judgment against Mr Potts and Mr Abboud in the sum of $11.826 million.

In dismissing Mr Potts' appeal, the Court of Appeal held that the findings made by Ball J as to Mr Potts' liability for misleading conduct must be upheld, despite his Honour having not carried out an assessment of the defence of proportionate liability raised by Mr Potts. This was in view of the absence of any finding that officers of DSH other than Mr Potts had breached their duties and had failed to disclose material information to NAB such that DSH could be held liable as a concurrent wrongdoer by having breached the Warranty. NAB had sought to go behind public statements made by DSH, but it was Mr Potts who had then failed to disclose material information to NAB's representatives.

The ground of appeal of Mr Potts and Mr Abboud in S47/2023 is:

- The Court of Appeal erred in finding that the payment by DSH of a dividend of $11.826 million on 30 September 2015 was, within the meaning of s 1317H of the Act, "damage suffered by the corporation … [which] resulted from the contravention" of s 180 which the Court found to be established.

Mr Potts' ground of appeal in S48/2023 is:

- The Court of Appeal erred in finding that Mr Potts failed to establish that DSH was a concurrent wrongdoer for the purposes of the proportionate liability provisions relied upon by Mr Potts.

THE KING v ROHAN (A PSEUDONYM) (M33/2023)

Court appealed from: Supreme Court of Victoria Court of Appeal [2022] VSCA 215

Date of judgment: 4 October 2022

Special leave granted: 19 May 2023

In April 2021, after a trial by jury, the Respondent and two co-accused were all convicted of 11 offences: the supply of drugs to a child (charges 1 and 2); sexual assault of a child under 16 (charges 5 and 14); and sexual penetration of a child under 12 (charges 3, 4, 6, 7, 8, 9 and 13). The Respondent was then sentenced to imprisonment for 11 years and 4 months, with a non-parole period of 6 years and 9 months.

The prosecution case against the Respondent and his co-accused, was that the three men had reached an agreement or understanding that they would supply cannabis to the complainants, two girls aged 11 and 12 (respectively, "Daisy" and "Katie"), and then engage in sexual activity with them.

In respect of charges 1, 2, 3, 7, 8 and 9, the case against the Respondent was that he was complicit and was not the principal offender. Statutory provisions applicable to complicity included section 323(1)(c) of the *Crimes Act 1958* (Vic) ("the Act"), which provided that a person was involved in the commission of an offence "if the person enters into an agreement, arrangement or understanding with another person to commit the offence", and s 324(1) of the Act, which provided that a person involved in the commission of an offence was taken to have committed the offence and was liable to the maximum penalty for the offence.

None of the charged offences included an element of the alleged offender's knowledge of the victim's age, and the trial judge, Judge Carlin, did not direct the jury that the prosecution was required to prove that the Respondent knew that the girls were underage.

On an appeal against his conviction on charges 1, 2, 3, 7, 8 and 9, the Respondent argued that a miscarriage of justice had occurred because, since his alleged guilt was as a secondary offender, it was necessary for the prosecution to establish that the Respondent knew that the girls were underage and that the trial judge should have directed the jury accordingly.

The Court of Appeal (Emerton P, Kyrou and Forrest JJA) unanimously allowed the Respondent's appeal, setting aside the convictions and ordering a new trial on charges 1, 2, 3, 7, 8 and 9 (and resentencing the Respondent to imprisonment for 8 years and 6 months, with a non-parole period of 6 years). Their Honours considered that the terms of s 323(1)(c) indicated that the substance of an agreement must be intended. For guilt based on an intention to commit an offence, the accused's knowledge of those facts which make the proposed conduct an offence must be proved. The Court of Appeal held that, although knowledge of a victim's age was not an element of the relevant offences, the age factor became an essential fact and the prosecution bore the onus of proving that the Respondent had knowledge of the complainants' ages.

The grounds of appeal are:

- The Court of Appeal erred by holding that the Respondent suffered a substantial miscarriage of justice on charges 1 and 2, because the jury was not directed that it had to be satisfied to the criminal standard, that the Respondent knew both “Daisy” and “Katie” were aged under 18, when he agreed with his co-offenders to supply them with drugs, where such knowledge is not an element of the offence.

- The Court of Appeal erred by holding that the Respondent suffered a substantial miscarriage of justice on charges 3, 7, 8 and 9, because the jury was not directed that it had to be satisfied to the criminal standard, that the Respondent knew “Daisy” was under 12, when he agreed with his co-offenders that they would sexually penetrate her, where such knowledge is not an element of the offence.

CARMICHAEL RAIL NETWORK PTY LTD AS TRUSTEE FOR THE CARMICHAEL RAIL NETWORK TRUST v BBC CHARTERING CARRIERS GMBH & CO. KG & ANOR (B32/2023)

Court appealed from: Full Court of Federal Court of Australia
[2022] FCAFC 171

Date of judgment: 12 October 2022

Special leave granted: 9 June 2023

In December 2019, the appellant ("Carmichael") entered into an agreement with OneSteel Manufacturing Pty Ltd ("OneSteel") for the manufacturing and supply of steel rails in South Australia to be used in a railway construction project in Queensland. Carmichael engaged the first respondent ("BBC") to transport the rails from South Australia to Queensland by sea.

On 17 December 2020, the steel rails were loaded on to a vessel named the BBC Nile. A bill of lading was issued by BBC, naming Carmichael as the consignee for the shipment ("the BOL"). The BOL indicated that the rails were loaded at South Australia and were to be discharged in Queensland. The BBC Nile reached the Port of Mackay in Queensland on 24 December 2020. The next day, the ship's crew observed that a part of the cargo hold had collapsed and had caused extensive damage to the rails. The damage rendered the rails unusable for their intended purpose and they were eventually sold as scrap.

On 2 August 2022, BBC informed Carmichael that they had initiated arbitration proceedings in London ("the Arbitration") in accordance with an arbitration clause, clause 4 in the BOL, which provided as follows:

> *Except as provided elsewhere herein, any dispute arising under or in connection with this Bill of Lading shall be referred to arbitration in London. The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) terms. The arbitration Tribunal is to consist of three arbitrators, one arbitrator to be appointed by each party and the two so appointed to appoint a third arbitrator. English law is to apply.*

In August 2022, Carmichael commenced Federal Court proceedings against BBC and OneSteel for damages. Carmichael also applied for an injunction restraining BBC from taking any further steps in the Arbitration. Carmichael contended that it had a statutory right, under section 11(2)(b) of the *Carriage of Goods by Sea Act 1991* (Cth) ("the COGSA"), to an anti-suit injunction preventing any proceedings other than in an Australian court. BBC then applied for a stay of Carmichael's proceedings in light of the Arbitration, pursuant to s 7(2) of the *International Arbitration Act 1974* (Cth). SC Derrington J granted a temporary injunction restraining BBC from taking any further steps in the Arbitration until the determination of Carmichael's and BBC's applications. Allsop CJ directed that the proceeding be heard by the Full Court of the Federal Court exercising original jurisdiction.

The Full Court (Rares, SC Derrington and Stewart JJ) unanimously dismissed Carmichael's application for an anti-suit injunction, discharged the interim injunction and granted BBC's application for a stay of the Australian proceedings in favour of the Arbitration. Their Honours determined that s 11(2)(b) of the COGSA did not

operate to capture inter-State bills of lading. After examining the legislative history of the provision, the Full Court concluded that there was no indication that parties involved in sea carriage documents, including bills of lading, should be prohibited from choosing to resolve disputes outside the jurisdiction of Australian courts when it came to the carriage of goods inter-State. Ambiguity in the provision likely resulted from a drafting error and their Honours considered that reading the BOL broadly would create more problems than solutions. Carmichael had argued that it would be appropriate to read additional words into s 11(2)(b) of the COGSA to provide comprehensive protection for all Australian shippers except in cases of inter-State carriage. The Full Court rejected this argument, finding that the intention behind the provision was to address a different loophole related to controlling shipowner liability rather than ensuring that all sea carriage disputes automatically came within the jurisdiction of Australian courts.

The ground of appeal is:

- The Full Court erred in holding that the arbitration clause contained in clause 4 of the BOL was valid, when it ought to have held that clause void by operation of Article 3(8) of the Australian Hague Rules on the basis that there existed a risk that BBC's liability would be relieved or lessened as a consequence of one or more of the following matters:

    a. the risk that the London arbitrators would, in applying the Hague-Visby Rules, apply the pro-carrier interpretation of those rules required by English law, and specifically that the arbitrators would regard themselves as bound to interpret Article 3(2) as delegable, in the manner required by the House of Lords in *Jindal Iron & Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc* [2004] UKHL 49, with Carmichael thus losing the chance of having its claims against BBC determined in accordance with the interpretation of Article 3(2) favoured by Sheller JA in *Nikolay Malakhov Shipping Co Ltd v Seas Sapfor Ltd* (1998) 44 NSWLR 371 as a matter of Australian law;

    b. the risk that the London arbitrators would construe the clause paramount in the BOL as incorporating only Articles 1-8 of the Hague Rules, rather than the Hague-Visby Rules as applicable under Australian law, thereby substantially reducing the package limitation defence; and/or

    c. the expense and practical difficulty that would result from requiring Carmichael to pursue its claims against BBC through arbitration in London.

XERRI v THE KING (S76/2023)

Court appealed from: Court of Criminal Appeal of the Supreme Court of New South Wales
[2021] NSWCCA 268

Date of judgment: 12 November 2021

Special leave granted: 16 June 2023

In August 2019, Mr Brian Xerri pleaded guilty to an offence of maintaining an unlawful sexual relationship with a child under the age of 16 years, contrary to section 66EA(1) of the *Crimes Act 1900* (NSW) ("the Crimes Act"), based on his having engaged in two or more acts of sexual intercourse between 9 November 2016 and 14 July 2018 with a girl who was aged 14 and 15 years.

In February 2020, Judge Wass sentenced Mr Xerri to imprisonment for 8 years, with a non-parole period of 4 years and 9 months. In doing so, her Honour stated that the offence carried a maximum penalty of life imprisonment.

On an appeal against his sentence, Mr Xerri made the point (for the first time) that at the time of his offending, s 66EA(1) prescribed a maximum penalty of 25 years' imprisonment ("the predecessor offence"); imprisonment for life was introduced by amendments which took effect on 1 December 2018. He contended that Judge Wass had erred by sentencing with reference to a maximum penalty which was not that prescribed in the predecessor offence. Mr Xerri relied on s 19 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the CSP Act"), which provided that if a law increased a penalty, the increased penalty applied only to offences committed after the enactment of the law. The Crown submitted that s 66EA, as amended in rewritten form by the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) ("the Amendment Act"), was a substantially different law from the predecessor offence, with distinctly different elements, such that it constituted a new offence which had retrospective effect.

Subsection (7) of s 66EA, as introduced by the Amendment Act, provided as follows:

> *(7) This section extends to a relationship that existed wholly or partly before the commencement of the relevant amendments, or the predecessor offence, if the acts engaged in by the accused were unlawful sexual acts during the period in which the relationship existed.*

The Court of Criminal Appeal ("the CCA") (Bell P and Price J; Hamill J dissenting) dismissed Mr Xerri's appeal. The majority of the CCA held that s 19 of the CSP Act did not apply, their Honours considering that s 66EA(7) of the Amendment Act clearly indicated a legislative intent that the s 66EA(1) offence in its amended form have retrospective effect. Such an interpretation was confirmed by the second reading speech and by the report of the Royal Commission into Institutional Responses to Child Sexual Abuse.

Hamill J however considered that, although s 66EA had been reformulated by the Amendment Act, the changes were not of such significance that a new offence was created, and s 19 of the CSP Act did apply. This was partly on account of s 25AA(4) of the CSP Act, which provided that s 19 was unaffected (s 25AA(1) otherwise

providing that sentencing for child sexual offences must be in accordance with sentencing practices at the time of sentencing, rather than at the time of the offence). Hamill J concluded that retrospectivity applied only to the offence, not to the prescribed maximum penalty.

The sole ground of appeal is:

- The majority of the CCA erred in upholding that it was correct for Mr Xerri to be sentenced on the basis that the maximum penalty was life imprisonment when the maximum penalty at the time of offending was twenty-five years imprisonment.

The respondent has filed a notice of contention, seeking to raise the following ground:

- Even if the Amendment Act "increase[d] the penalty" for the offence under s 66EA of the Crimes Act for the purposes of s 19(1) of the CSP Act, the maximum penalty of life imprisonment specified in s 66EA(1), following that amendment, applied to Mr Xerri by reason of s 66EA(7).