

FILED

09 SEP 2018



# FOURTH CROSS-CLAIM

## THIRD CROSS-DEFENDANT'S COMMERCIAL LIST CROSS-CLAIM RESPONSE TO THE COMMERCIAL LIST CROSS-CLAIM STATEMENT

### COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity Division
List	Commercial List
Registry	Sydney
Case number	<del>2017/294069</del> & 2018/52431

### TITLE OF PROCEEDINGS

#### Proceedings 2017/00294069

First plaintiff	Haliburton Charles David Findlay
Second plaintiff	Marian Jennifer Denny Findlay
First defendant	DSHE Holdings Ltd (receivers and managers appointed) (in liquidation)
Number of defendants	457

#### Proceedings 2018/00052431

First plaintiff	Epaminondas Mastoris
Second plaintiff	Lena Mastoris
First defendant	DSHE Holdings Ltd (receivers and managers appointed) (in liquidation)
Number of defendants	457

### TITLE OF THIS CROSS-CLAIM

First cross-claimant	David Robert White t/as Deloitte Touche Tohmatsu
Number of cross-claimants	455
First cross-defendant	DSHE Holdings Ltd (receivers and managers appointed) (in liquidation)
Number of cross-defendants	3

### FILING DETAILS

Filed for	Michael Thomas Potts, Third cross-defendant
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Legal representative	Tobin Meagher, Clayton Utz
Legal representative reference	135/11250/80173502
Contact name and telephone	Andrew Moore, (02) 9353 4299
Contact email	amoore@claytonutz.com

#### **A. NATURE OF DISPUTE**

1. The Third Cross-Defendant (**Potts**) agrees that the Cross-Claimants' summary of the nature of the dispute reflects the Cross-Claimants' contentions in this proceeding.

#### **B. ISSUES LIKELY TO ARISE**

2. Potts agrees that the issues identified by the Cross-Claimants are likely to arise in this proceeding.
3. Potts says that further issues likely to arise are whether, if he engaged in misleading or deceptive conduct and/or made false and misleading representations (which is denied):
  - (a) he ought fairly to be excused for the contravention and/or relieved wholly or partly from any liability to which he would otherwise be subject; and/or
  - (b) any liability which he may have to the Cross-Claimants for an apportionable claim should be reduced to reflect the proportion of the Cross-Claimants' loss that the Court considers just, having regard to the extent of his responsibility for that loss, and the extent of any concurrent wrongdoer and/or Cross-Claimants for that same loss.

#### **C. THIRD CROSS-DEFENDANT'S RESPONSES TO CONTENTIONS**

The Third Cross-Defendant, Michael Thomas Potts, responds as follows to the allegations in the Commercial List Cross-Claim Statement filed 3 July 2019. (Unless otherwise indicated, defined terms in the Commercial List Cross-Claim Statement have the same meaning where used below.)

##### **Introduction and parties**

1. Potts admits paragraph 1 of the Commercial List Cross-Claim Statement.
2. Potts admits paragraph 2 of the Commercial List Cross-Claim Statement.
3. Potts admits paragraph 3 of the Commercial List Cross-Claim Statement.
4. In response to paragraph 4 of the Commercial List Cross Claim Statement, Potts:
  - (a) admits subparagraphs 4(a) and 4(c)-(e); and

- (b) denies subparagraph 4(b) and says that DSSH was the ultimate holding company of the DSE Group at all relevant times until 9 December 2013.

5. In response to paragraph 5 of the Commercial List Cross Claim Statement, Potts:

- (a) denies subparagraph 5(a) and says that Abboud was the CEO of DSSH from 26 November 2012 until 4 January 2016; and
- (b) admits subparagraphs 5(b)-5(d).

6. Potts admits paragraph 6 of the Commercial List Cross-Claim Statement.

7. Potts does not plead to paragraph 7 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.

8. Potts does not admit paragraph 8 of the Commercial List Cross-Claim Statement.

9. Potts does not plead to paragraph 9 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.

10. Potts does not admit paragraph 10 of the Commercial List Cross-Claim Statement.

### **Retainers & responsibilities**

#### DCF Retainer

11. Potts admits paragraph 11 of the Commercial List Cross-Claim Statement.

12. Potts admits paragraph 12 of the Commercial List Cross-Claim Statement.

13. In response to paragraph 13 of the Commercial List Cross-Claim Statement, Potts:

- (a) as to subparagraph 13(a), admits that the DCF Retainer was expressed to be on the basis that the DSSH Directors were solely responsible for the matters pleaded in subparagraphs 13(a)(i)-(vi);
- (b) admits subparagraphs 13(b) and (c);
- (c) relies on the DCF Retainer for its full terms and effect; and
- (d) otherwise does not admit the allegations in paragraph 13 of the Commercial List Cross-Claim Statement.

#### Deloitte Retainers

14. Potts admits paragraph 14 of the Commercial List Cross-Claim Statement.

15. Potts admits paragraph 15 of the Commercial List Cross-Claim Statement.
16. Potts admits paragraph 16 of the Commercial List Cross-Claim Statement.
17. Potts admits paragraph 17 of the Commercial List Cross-Claim Statement, and further says that it was a term of the FY13 Retainer that Deloitte would:
  - (a) conduct its audit pursuant to the *Corporations Act 2001* (Cth) (the **Corporations Act**);
  - (b) conduct its audit in accordance with the Auditing Standards;
  - (c) perform procedures to obtain audit evidence about the amounts and disclosures in the financial report;
  - (d) evaluate the appropriateness of DSSH's accounting policies;
  - (e) evaluate the reasonableness of accounting estimates made by DSSH's management;
  - (f) evaluate the overall presentation of the financial report;
  - (g) communicate with DSSH in writing concerning any significant deficiencies in internal control relevant to the audit of the financial report that Deloitte identified during the audit; and
  - (h) exercise reasonable skill, care and diligence in the performance of services as auditor, including in performing the FY13 Audit.

#### Particulars

As to subparagraphs (a)-(g) above, see pages 1-2 of the FY13 Engagement Letter.

As to subparagraph (h) above, see clause 3.1 of Deloitte's Standard Terms and Conditions.

18. Potts admits paragraph 18 of the Commercial List Cross-Claim Statement, and further says that it was a term of each of the FY14 Retainer and the FY15 Retainer that Deloitte would:
  - (a) conduct its audit pursuant to the Corporations Act;
  - (b) conduct its audit in accordance with the Auditing Standards;
  - (c) perform procedures to obtain audit evidence about the amounts and disclosures in the Financial Report;
  - (d) evaluate the appropriateness of DSH's accounting policies;

- (e) evaluate the reasonableness of accounting estimates made by DSH's management;
- (f) evaluate the overall presentation of the Financial Report;
- (g) communicate with DSH in writing concerning any significant deficiencies in internal control relevant to the audit of the Financial Report that Deloitte identified during the audit;
- (h) express an opinion on the Financial Report in the format outlined in the example Independent Auditor's Report as per Appendix A to the retainer; and
- (i) exercise reasonable skill, care and diligence in the performance of services as auditor, including in performing, respectively, the FY14 Audit and the FY15 Audit.

#### **Particulars**

As to subparagraphs (a)-(h) above, see page 2 of each of the FY14 Retainer and the FY15 Retainer.

As to subparagraph (i) above, see clause 3.1 of Deloitte's Standard Terms and Conditions.

#### **FY13: DSSH's/DSSH Directors' Obligations**

- 19. Potts does not plead to paragraph 19 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
- 20. Potts does not plead to paragraph 20 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
- 21. Potts does not plead to paragraph 21 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
- 22. Potts does not plead to paragraph 22 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
- 23. Potts does not plead to paragraph 23 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
- 24. Potts does not plead to paragraph 24 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.

Prospectus: DSH's/DSH Directors' Obligations

25. Potts does not admit paragraph 25 of the Commercial List Cross-Claim Statement, and relies on Part 6D.2 Division 4, and ss 718-720, 728(1) and 728(2) of the Corporations Act for their full terms and effect.

FY14/FY15: DSH's/DSH Directors' Obligations

26. Potts does not admit paragraph 26 of the Commercial List Cross-Claim Statement, and relies upon the terms of Chapter 2M, Part 2M.3 of the Corporations Act for its full terms and effect.
27. Potts admits paragraph 27 of the Commercial List Cross-Claim Statement.
28. In response to paragraph 28 of the Commercial List Cross-Claim Statement, Potts:
- (a) admits subparagraph 28(a); and
  - (b) does not admit subparagraph 28(b).
29. In response to paragraph 29 of the Commercial List Cross-Claim Statement, Potts:
- (a) admits subparagraph 29(a) and relies upon s 295A of the Corporations Act for its full terms and effect; and
  - (b) does not admit subparagraph 29(b).
30. Potts does not admit paragraph 30 of the Commercial List Cross-Claim Statement, and relies on ss 298-300A of the Corporations Act for their full terms and effect.
31. In response to paragraph 31 of the Commercial List Cross-Claim Statement, Potts:
- (a) as to subparagraph 31(a):
    - (i) admits that at all material times DSH was required pursuant to s 314(1) of the Corporations Act to provide to the members of DSH the reports pleaded in subparagraph 31(a), and denies that the section imposed any obligation on the DSH Directors to do so; and
    - (ii) further says that Deloitte was required to make the auditor's report to the members of DSH, pursuant to s 308 of the Corporations Act;
  - (b) as to subparagraph 31(b), admits that DSH issued the reports pleaded in that subparagraph to the ASX on about 18 August 2014, and denies that the DSH Directors did so;

- (c) admits subparagraph 31(c) so far as concerns the knowledge of DSH and Potts;
  - (d) denies subparagraph 31(d) so far as concerns Potts, and repeats subparagraphs (a)-(c) above; and
  - (e) admits that on about 17 August 2015 DSH issued the reports pleaded in subparagraph 31(e), and denies that the DSH Directors did so;
  - (f) admits subparagraph 31(f) so far as concerns the knowledge of DSH and Potts;
  - (g) denies subparagraph 31(g) so far as concerns Potts, and repeats subparagraphs 31(a), (e) and (f) above; and
  - (h) otherwise does not admit the allegations in paragraph 31 of the Commercial List Cross-Claim Statement.
32. In response to paragraph 32 of the Commercial List Cross-Claim Statement, Potts repeats paragraphs 111 to 114 of Potts' Defence to the Plaintiffs' Claim (**Potts' Defence**), and otherwise does not admit the allegations in paragraph 32 of the Commercial List Cross-Claim Statement.

#### **Declarations and representation letters given by Cross-Defendants**

##### Alleged Prospectus Representations

33. Potts admits paragraph 33 of the Commercial List Cross-Claim Statement.
34. In response to paragraph 34 of the Commercial List Cross-Claim Statement, Potts:
- (a) admits that on or about 14 November 2013, on behalf of the directors and management of DSH, Potts provided a representation letter to DCF dated 14 November 2013;
  - (b) relies on the letter for its full terms and effect; and
  - (c) otherwise denies the paragraph.
35. In response to paragraph 35 of the Commercial List Cross-Claim Statement, Potts:
- (a) admits that the Prospectus Management Certificate provided by Potts contained statements to the effect of those pleaded in subparagraph 35(a) and subparagraphs 35(c) - (d) of the Commercial List Cross-Claim Statement;
  - (b) as to subparagraph 35(b):

- (i) denies that the Prospectus Management Certificate provided by Potts contained statements to the effect of those pleaded in subparagraph 35(b) of the Commercial List Cross-Claim; and
- (ii) says that the Prospectus Management Certificate provided by Potts contained statements that, in each case having regard to his particular area of responsibility, to the best of his knowledge and after due enquiry, each of the matters pleaded in subparagraphs 35(b)(i)-(iv) was the case;
- (c) further says that the Prospectus Management Certificate provided by Potts contained a statement to the effect that he was the appropriate person to provide the certificate for matters in respect of his area of responsibility;
- (d) relies on the Prospectus Management Certificate provided by Potts for its full terms and effect; and
- (e) further says that, in making the statements pleaded in the Prospectus Management Certificate provided by Potts, Potts was aware of and relying on the fact that:
  - (i) the historical financial information in the Prospectus included information from the FY13 Report, and the pro forma historical financial information in the Prospectus included information that was based on the information in the FY13 Report;
  - (ii) so far as the historical financial information was concerned, the FY13 Report had been audited by Deloitte, and at the conclusion of the audit, Deloitte had issued the FY13 Audit Report, which made the statements pleaded in paragraph 54(a) of the Commercial List Cross-Claim Statement; and
  - (iii) so far as the pro forma historical financial information was concerned, DCF had reviewed that information and had reached the views stated in the IAR.

36. In response to paragraph 36 of the Commercial List Cross-Claim Statement, Potts:

- (a) admits that the Prospectus Representation Letter contained statements to the effect of those pleaded in subparagraphs 36(a) and (c)-(f) of the Commercial List Cross-Claim Statement;
- (b) as to subparagraph 36(b):
  - (i) admits that the Prospectus Representation Letter contained statements to the effect of those pleaded in subparagraphs 36(b)(iii), (iv) and (vi) of the Commercial List Cross-Claim Statement;

- (ii) denies that the Prospectus Representation Letter contained statements to the effect of those pleaded in subparagraphs 36(b)(i), (ii) and (v), and says that it contained confirmations from each of DSH's directors that, to the best of their knowledge and belief (having made such enquiries as they considered necessary for the purposes of appropriately informing themselves):
  - A. all material financial information, financial records, related data and other information relevant to the Financial Information within the possession of DSH and access to those persons within DSH or DSH's experts had been provided to DCF prior to the finalisation of the IAR;
  - B. in the performance of the assurance engagement, DCF had been entitled to rely on the information provided by DSH and to assume that the information provided was, to the best knowledge and belief of management and the directors of DSH, accurate and, except where otherwise indicated, complete; and
  - C. all material risks that may impact on DSH's business had been adequately disclosed in the Prospectus and considered in relation to their impact on the Financial Information.
- (c) relies on the Prospectus Representation Letter for its full terms and effect; and
- (d) further says that, in signing the Prospectus Representation Letter, Potts was aware of, and relying on, the matters in paragraph 35(e)(i)-(iii) above.

37. Potts does not plead to paragraph 37 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.

#### CEO/CFO Declarations

- 38. Potts admits paragraph 38 of the Commercial List Cross-Claim Statement.
- 39. Potts admits paragraph 39 of the Commercial List Cross-Claim Statement.
- 40. Potts does not plead to paragraph 40 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
- 41. In response to paragraph 41 of the Commercial List Cross-Claim Statement, Potts:
  - (a) as to subparagraphs 41(a)-(d):
    - (i) denies that each of the CEO/CFO Declarations included statements to the effect that, to the best of each of Abboud's and Potts' knowledge, each of the matters in

subparagraphs 41(a)-(d) of the Commercial List Cross-Claim Statement was the case; and

- (ii) says that each of the CEO/CFO Declarations included statements to the effect that each of Abboud and Potts held opinions to the effect of those pleaded in subparagraphs 41(a)-(d) of the Commercial List Cross-Claim Statement;
- (b) denies that each of the CEO/CFO Declarations included statements to the effect of those pleaded in subparagraphs 41(e)-(f) of the Commercial List Cross-Claim Statement, and says that each of the CEO/CFO Declarations included statements to the effect that:
  - (i) the CEO/CFO Declaration was founded on there being a sound system of risk management and internal control which implements policies adopted by the Board; and
  - (ii) as far as each of Abboud and Potts was aware, DSH's risk management and internal compliance control system was operating efficiently and effectively in all material respects in relation to business and financial reporting risks;
- (c) further says that:
  - (i) in making the CEO/CFO Declaration for FY14, Potts was aware of and relied on:
    - A. the contents of report by Deloitte headed "*Report to the Finance and Audit Committee for the year ended 29 June 2014*" and dated 6 August 2014 (**FY14 FAC Report**);
    - B. the matters reported by Deloitte to the Finance and Audit Committee (**FAC**) at the meeting on 12 August 2014;

#### Particulars

Minutes of meeting of FAC on 12 August 2014.

- C. the statements made by Deloitte to Potts, the FAC and/or the Board in the period up to and including 18 August 2014, regarding the procedures performed by Deloitte in the course of the FY14 Audit and the conclusions reached by Deloitte based on those procedures; and

#### Particulars

Affidavit of Potts sworn 21 August 2019 (**Potts Affidavit**), paragraphs 170, 258-259, 269-277, 281, and 501-557.

- D. the fact that Deloitte were of the opinion, based on their audit of the FY14 Report, that the FY14 Report complied with Australian Accounting Standards and gave a true and fair view of the financial position and performance of DSH for the year ended 29 June 2014;

**Particulars**

Potts repeats the particulars to subparagraphs 41(c)(i)(A)-(C) above.

- (ii) in making the CEO/CFO Declaration for FY15, Potts was aware of and relied on:

- A. the contents of the report by Deloitte headed "*Report to the Finance and Audit Committee for the year ended 28 June 2015*" and dated 6 August 2015 (**FY15 FAC Report**);
- B. the matters reported by Deloitte to the FAC at the meeting on 11 August 2015;

**Particulars**

Minutes of meeting of FAC on 11 August 2015.

- C. the statements made by Deloitte to Potts, the FAC and/or the Board in the period up to and including 17 August 2015, regarding the procedures performed by Deloitte in the course of the FY15 Audit and the conclusions reached by Deloitte based on those procedures; and

**Particulars**

Potts Affidavit, paragraphs 180 and 625-679

- D. the fact that Deloitte were of the opinion, based on their audit of the FY15 Report, that the FY15 Report complied with Australian Accounting Standards and gave a true and fair view of the financial position and performance of DSH for the year ended 28 June 2015.

**Particulars**

Potts repeats the particulars to subparagraphs 41(c)(ii)(A)-(C) above.

### Audit Management Representation Letters

42. Potts does not plead to paragraph 42 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
43. Potts admits paragraph 43 of the Commercial List Cross-Claim Statement.
44. Potts admits paragraph 44 of the Commercial List Cross-Claim Statement.
45. Potts does not plead to paragraph 45 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
46. In response to paragraph 46 of the Commercial List Cross-Claim Statement, Potts:
  - (a) denies subparagraph 46(a) so far as concerns Potts, and says that:
    - (i) the FY14 Management Representation Letter states that it was provided in connection with Deloitte's audit of the FY14 Report, and that such audit work was undertaken by Deloitte for the purpose of Deloitte expressing an opinion as to whether the FY14 Report gave a true and fair view in accordance with the Australian Accounting Standards and the Corporations Act;
    - (ii) the FY15 Management Representation Letter states that it was provided in connection with Deloitte's audit of the FY15 Report, and that such audit work was undertaken by Deloitte for the purpose of Deloitte expressing an opinion as to whether the FY15 Report gave a true and fair view in accordance with the Australian Accounting Standards and the Corporations Act;
  - (b) denies that subparagraph 46(b) fully and accurately summarises the effect of the statements made in the FY14 Management Representation Letter and the FY15 Management Representation Letter, and relies on those letters for their full terms and effect; and
  - (c) does not plead to subparagraph 46(c) of the Commercial List Cross-Claim Statement, as it contains no allegations against him.

### Audit Directors' Declarations

47. Potts does not plead to paragraph 47 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
48. Potts admits paragraph 48 of the Commercial List Cross-Claim Statement.
49. Potts admits paragraph 49 of the Commercial List Cross-Claim Statement.

50. Potts does not plead to paragraph 50 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
51. Potts admits paragraph 51 of the Commercial List Cross-Claim Statement, and relies upon the Directors' Declarations for their full terms and effect.

**The FY13 Audit**

52. Potts does not plead to paragraph 52 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
53. Potts does not plead to paragraph 53 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
54. Potts admits paragraph 54(a) and otherwise does not plead to paragraph 54 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
55. Potts does not plead to paragraph 55 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.

**The Prospectus**

56. Potts does not plead to paragraph 56 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
57. In response to paragraph 57 of the Commercial List Cross-Claim Statement, Potts:
- (a) admits that Steve Shirtliff signed the Due Diligence Sign-Off on behalf of DCF in his capacity as a director of DCF;
  - (b) admits that the Due Diligence Sign-Off contained statements to the effect of those pleaded in subparagraphs 57(a) - (f);
  - (c) relies on the Due Diligence Sign-Off for its full terms and effect; and
  - (d) otherwise does not admit the allegations in that paragraph.
58. Potts does not plead to paragraph 58 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
59. In response to paragraph 59 of the Commercial List Cross-Claim Statement, Potts admits that Deloitte gave the DTT Prospectus Consent, and otherwise does not admit the allegations in that paragraph.

60. Potts does not plead to paragraph 60 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
61. In response to paragraph 61 of the Commercial List Cross-Claim Statement, Potts admits that DCF gave the DCF Prospectus Consent, and otherwise does not admit the allegations in that paragraph.
62. Potts does not plead to paragraph 62 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
63. In response to paragraph 63 of the Commercial List Cross-Claim Statement, Potts:
- (a) admits that Steve Shirliff signed the IAR (and attached FSG) on behalf of DCF in his capacity as director of DCF;
  - (b) relies on the IAR for its full terms and effect; and
  - (c) otherwise does not admit the paragraph.
64. Potts does not plead to paragraph 64 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
65. Potts does not plead to paragraph 65 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.

#### **The FY14 Audit**

66. In response to paragraph 66 of the Commercial List Cross-Claim Statement, Potts:
- (a) admits that he and the other directors of DSH resolved, at a meeting of the Board on 18 August 2014, to adopt the FY14 Report;
  - (b) says that the resolution in subparagraph (a) was passed for the purpose of DSH complying with its reporting obligations under the Corporations Act;
  - (c) says that, prior to the Board passing this resolution, Mr White of Deloitte reported to the Board that Deloitte had concluded their audit of the FY14 Report, and were of the opinion, based on their audit, that the FY14 Report complied with Australian Accounting Standards and gave a true and fair view of the financial position and performance of DSH for the year ended 29 June 2014 (the **FY14 Unqualified Audit Statements**);

#### **Particulars**

The FY14 Unqualified Audit Statements were partly express and partly implied.

To the extent they were express (1), see Minutes of the meeting of the board of directors of DSH held on 18 August 2014, "*Adoption of full year accounts*", (2) the signed FY14 Audit Report provided in "*escrow*" on 15 August 2014 (pleaded in paragraph 67 below), and (3) Potts Affidavit, paragraph 552.

To the extent they were implied, they were implied from those express statements and from the terms of the FY14 Retainer.

- (d) further says that, following the making of and in reliance on the FY14 Unqualified Audit Statements, Potts and the other directors of DSH passed the resolution referred to in subparagraph (a) above; and
  - (e) otherwise does not admit paragraph 66 of the Commercial List Cross-Claim Statement.
67. Potts denies paragraph 67 of the Commercial List Cross-Claim Statement, and says that:
- (a) on or before 15 August 2014, Mr White, in his capacity as lead auditor, signed the FY14 Audit Report in his own name and in the name of Deloitte, pursuant to s324AB(3) of the Corporations Act;
  - (b) Mr White signed the FY14 Audit Report prior to:
    - (i) the giving of the FY14 Management Representation Letter;
    - (ii) the making of the FY14 CEO/CFO Declaration;
    - (iii) the making of the FY14 Directors' Declaration; and
    - (iv) the passing of the resolution by the directors of DSH to adopt the FY14 Report; and
  - (c) on 15 August 2014, Deloitte provided the signed FY14 Audit Report to Potts in "*escrow*", subject to various matters including the signing of the FY14 Management Representation Letter, the giving of the FY14 Directors' Declaration and the Directors' Adoption of the FY14 Report.

#### Particulars

Email sent from Mr Cork of Deloitte to Potts on 15 August 2014  
 [POT.010.011.6618] and attachments [POT.010.011.6619], [POT.010.011.6621]  
 and [POT.010.011.6622].

68. In response to paragraph 68 of the Commercial List Cross-Claim Statement, Potts:

- (a) admits subparagraph 68(a); and
- (b) does not plead to subparagraph 68(b), as it contains no allegations against him.

69. In response to paragraph 69 of the Commercial List Cross-Claim Statement, Potts:

- (a) admits that he and each of the other directors of DSH joined in the resolution of the Board to adopt the FY14 Report;
- (b) says that DSH issued and published the FY14 Report following the passing of that resolution; and
- (c) otherwise denies the allegations in that paragraph.

#### **The FY15 Audit**

70. In response to paragraph 70 of the Commercial List Cross-Claim Statement, Potts:

- (a) admits that he and the other directors of DSH resolved, at a meeting of the Board on 17 August 2015, to adopt the FY15 Report;
- (b) says that the resolution in subparagraph (a) was passed for the purpose of DSH complying with its reporting obligations under the Corporations Act;
- (c) says that, prior to the Board passing this resolution, Mr White of Deloitte reported to the Board that Deloitte had concluded their audit of the FY15 Report, and were of the opinion, based on their audit, that the FY15 Report complied with Australian Accounting Standards and gave a true and fair view of the financial position and performance of DSH for the year ended 28 June 2015 (the **FY15 Unqualified Audit Statements**);

#### **Particulars**

The FY15 Unqualified Audit Statements were partly express and partly implied.

To the extent they were express, see (1) Minutes of the meeting of the board of directors of DSH held on 17 August 2015, (2) the signed FY15 Audit Report which was provided to Potts on 13 August 2015 (pleaded in paragraph 71 below), and (3) Potts Affidavit, paragraph 675.

To the extent they were implied, they were implied from those express statements and from the terms of the FY15 Retainer.

- (d) further says that, following the making of and in reliance on the FY15 Unqualified Audit Statements, Potts and the other directors of DSH passed the resolution referred to in subparagraph (a) above; and

(e) otherwise does not admit paragraph 70 of the Commercial List Cross-Claim Statement.

71. Potts denies paragraph 71 of the Commercial List Cross-Claim Statement, and says that:

- (a) on or before 13 August 2015, Mr White, in his capacity as lead auditor, signed the FY15 Audit Report in his own name and in the name of Deloitte, pursuant to s 324AB(3) of the Corporations Act;
- (b) Mr White signed the FY15 Report prior to:
  - (i) the making of the FY15 CEO/CFO Declaration;
  - (ii) the making of the FY15 Directors' Declaration; and
  - (iii) the passing of the resolution by the directors of DSH to adopt the FY15 Report; and
- (c) on 13 August 2015, Deloitte provided the signed FY15 Audit Report to Potts.

#### **Particulars**

Email sent from Mr Cork of Deloitte to Potts on 13 August 2015  
[POT.010.022.0841] and attachments [POT.010.020.0843] and  
[POT.010.020.0844].

72. In response to paragraph 72 of the Commercial List Cross-Claim Statement, Potts:

- (a) admits subparagraph 72(a); and
- (b) does not plead to subparagraph 72(b), as it contains no allegations against him.

73. In response to paragraph 73 of the Commercial List Cross-Claim Statement, Potts:

- (a) admits that he and each of the other directors of DSH joined in the resolution of the Board to adopt the FY15 Report;
- (b) says that DSH issued and published the FY15 Report following the passing of that resolution; and
- (c) otherwise does not admit the allegations in that paragraph.

#### **Factual allegations repeated**

74. In response to paragraph 74 of the Commercial List Cross-Claim Statement, Potts repeats:

- (a) Parts A to E of Potts' Defence;

(b) his Commercial List Response to the Company Claim; and

(c) his Commercial List Response to the Bank Claim.

75. Potts does not admit paragraph 75 of the Commercial List Cross-Claim Statement insofar as it contains allegations against him, and otherwise does not plead to the allegations in that paragraph.

76. Potts does not admit paragraph 76 of the Commercial List Cross-Claim Statement insofar as it contains allegations against him, and otherwise does not plead to the allegations in that paragraph.

#### Alleged Representations

##### *Alleged FY13 Representations*

77. Potts does not plead to paragraph 77 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.

##### *Alleged Prospectus Representations*

78. In response to paragraph 78 of the Commercial List Cross-Claim Statement, Potts:

(a) as to subparagraphs 78(a) and (b):

(i) repeats paragraphs 33 and 35 above;

(ii) says that the Prospectus Management Certificate contained statements by Potts which were made to the best of his knowledge, as pleaded in subparagraphs 35(a) to (d) of the Commercial List Cross-Claim Statement;

(iii) says that Potts believed those statements to be correct, to the best of his knowledge;

(iv) in forming that view, Potts was aware of and relied on the matters pleaded in subparagraph 35(e) above, the Due Diligence Sign-Off and the contents of the IAR Report; and

(v) otherwise denies subparagraphs 78(a) and (b) of the Commercial List Cross-Claim Statement;

(b) as to subparagraphs 78(c) and (d):

(i) repeats paragraphs 34 and 36 above;

- (ii) says that, in signing the Prospectus Representation Letter, Potts was aware of and relying on the matters pleaded in subparagraph 35(e) above, the Due Diligence Sign-Off and the contents of the IAR Report; and
- (iii) otherwise denies subparagraphs 78(c) and (d) of the Commercial List Cross-Claim Statement; and
- (c) denies subparagraphs 78(e)-(f), and repeats paragraphs 33-36, 56, 65 and 78(a)-(b) above.

*Alleged FY14 Representations*

79. In response to paragraph 79 of the Commercial List Cross-Claim Statement, Potts:

- (a) as to subparagraphs 79(a) and (b):
  - (i) repeats paragraph 41 above;
  - (ii) says that the FY14 CEO/CFO Declaration contained statements of opinion by Potts to the effect of those pleaded in paragraph 41(a)(ii) above;
  - (iii) says that it was true that Potts held those opinions as at the date of the FY14 CEO/CFO Declaration; and
  - (iv) says that, in forming those opinions, Potts was aware of and relied on the matters pleaded in subparagraphs 41(c)(i)(A)-(D) above;
  - (v) otherwise denies subparagraphs 79(a) and (b) of the Commercial List Cross-Claim Statement; and
- (b) as to subparagraphs 79(c) and (d):
  - (i) repeats paragraph 46 above;
  - (ii) says that Potts was of the opinion, as at the date of the FY14 Management Representation Letter, that the statements made by that letter were correct;
  - (iii) in forming that opinion, Potts was aware of and relied on the matters pleaded in subparagraphs 41(c)(i)(A)-(D) above; and
  - (iv) otherwise denies subparagraphs 79(c) and (d) of the Commercial List Cross-Claim Statement; and
- (c) as to subparagraphs 79(e) and 79(f):

- (i) says that the statements in the Directors' Declarations which are pleaded in paragraph 51 of the Commercial List Cross-Claim Statement were, and were expressed to be, statements of opinion,
  - (ii) says that it was true, as at the date that the FY14 Directors' Declaration was made, that Potts held the opinions in respect of the FY14 Report which are pleaded in paragraph 51 of the Commercial List Cross-Claim Statement and which were made by the FY14 Directors' Declaration;
  - (iii) says that in forming those opinions, Potts was aware of and relied on the matters pleaded in subparagraphs 41(c)(i)(A)-(D) above; and
  - (iv) otherwise denies subparagraphs 79(e) and (f) of the Commercial List Cross-Claim Statement; and
- (d) denies subparagraph 79(g)-(h), and repeats paragraphs 41, 46, 66, 69 and 79(a)-(c) above.

*Alleged FY15 Representations*

80. In response to paragraph 80 of the Commercial List Cross-Claim Statement, Potts:

- (a) as to subparagraphs 80(a) and (b):
  - (i) repeats paragraph 41 above;
  - (ii) says that the FY15 CEO/CFO Declaration contained statements of opinion by Potts to the effect of those pleaded in paragraph 41(a)(ii) above;
  - (iii) says that it was true that Potts held those opinions as at the date of the FY15 CEO/CFO Declaration;
  - (iv) says that, in forming those opinions, Potts was aware of and relied on the matters pleaded in subparagraphs 41(c)(ii)(A)-(D) above; and
  - (v) otherwise denies subparagraphs 80(a) and (b) of the Commercial List Cross-Claim Statement;
- (b) as to subparagraphs 80(c) and (d):
  - (i) repeats paragraph 46 above;
  - (ii) says that Potts was of the opinion, as at the date of the FY15 Management Representation Letter, that the statements made in that letter were correct;

- (iii) in forming that opinion, Potts was aware of and relied on the matters pleaded in subparagraphs 41(c)(ii)(A)-(D) above; and
  - (iv) otherwise denies subparagraphs 80(c) and (d) of the Commercial List Cross-Claim Statement;
- (c) as to subparagraphs 80(e) and 80(f):
- (i) says that the statements in the Directors' Declarations which are pleaded in paragraph 51 of the Commercial List Cross-Claim Statement were, and were expressed to be, statements of opinion,
  - (ii) says that it was true, as at the date that the FY15 Directors' Declaration was made, that Potts held the opinions in respect of the FY15 Report which are pleaded in paragraph 51 of the Commercial List Cross-Claim Statement and which were made by the FY15 Directors' Declaration;
  - (iii) says that in forming those opinions, Potts was aware of and relied on the matters pleaded in subparagraphs 41(c)(ii)(A)-(D) above; and
  - (iv) otherwise denies subparagraphs 80(e) and (f) of the Commercial List Cross-Claim Statement;
- (d) denies subparagraphs 80(g)-(h), and repeats paragraphs 41, 46, 70, 73 and 80(a)-(c) above.

#### Statutory provisions engaged

- 81. Potts denies paragraph 81 of the Commercial List Cross-Claim Statement.
- 82. Potts denies paragraph 82 of the Commercial List Cross-Claim Statement.

#### FY13 Conduct

- 83. Potts does not plead to paragraph 83 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
- 84. Potts does not plead to paragraph 84 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
- 85. Potts does not plead to paragraph 85 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.

86. Potts does not plead to paragraph 86 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.

87. Potts does not plead to paragraph 87 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.

Prospectus Conduct

88. In response to paragraph 88 of the Commercial List Cross-Claim Statement, Potts repeats paragraphs 74-76 above.

89. Potts denies paragraph 89 of the Commercial List Cross-Claim Statement.

90. Potts denies paragraph 90 of the Commercial List Cross-Claim Statement.

91. Potts denies paragraph 91 of the Commercial List Cross-Claim Statement.

92. Potts denies paragraph 92 of the Commercial List Cross-Claim Statement.

FY14 Conduct

93. In response to paragraph 93 of the Commercial List Cross-Claim Statement, Potts repeats paragraphs 74-76 above.

94. Potts denies paragraph 94 of the Commercial List Cross-Claim Statement.

95. Potts denies paragraph 95 of the Commercial List Cross-Claim Statement.

96. Potts denies paragraph 96 of the Commercial List Cross-Claim Statement.

97. Potts denies paragraph 97 of the Commercial List Cross-Claim Statement.

FY15 Conduct

98. In response to paragraph 98 of the Commercial List Cross-Claim Statement, Potts repeats paragraphs 74-76 above.

99. Potts denies paragraph 99 of the Commercial List Cross-Claim Statement.

100. Potts denies paragraph 100 of the Commercial List Cross-Claim Statement.

101. Potts denies paragraph 101 of the Commercial List Cross-Claim Statement.

102. Potts denies paragraph 102 of the Commercial List Cross-Claim Statement.

Alleged Abboud and Potts Misleading Conduct Contraventions

- 103. Potts does not plead to paragraph 103 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
- 104. Potts denies paragraph 104 of the Commercial List Cross-Claim Statement.
- 105. In response to paragraph 105 of the Commercial List Cross-Claim Statement, Potts denies the alleged Potts Misleading Conduct Contraventions and otherwise does not plead to paragraph 105 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.

**ALLEGED BREACH OF S 728**

- 106. Potts denies paragraph 106 of the Commercial List Cross-Claim Statement so far as concerns Potts, repeats paragraphs 88-91 above, further says that he was not a director of DSH at the time of the issue of the Prospectus, and otherwise does not plead to the allegations in that paragraph.
- 107. Potts does not plead to paragraph 107 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
- 108. In response to paragraph 108 of the Commercial List Cross-Claim Statement, Potts:
  - (a) as to Section J.1 of the First Cross-Claim:
    - (i) admits paragraphs 140 and 141 of the First Cross-Claim;
    - (ii) does not admit paragraph 142 of the First Cross-Claim;
  - (b) as to Section R of the First Cross-Claim:
    - (i) admits paragraphs 197 to 200 of the First Cross-Claim;
    - (ii) does not admit paragraphs 201 to 204 of the First Cross-Claim.
- 109. Potts denies paragraph 109 of the Commercial List Cross-Claim Statement so far as concerns Potts, repeats paragraph 106 and 108 above, and otherwise does not plead to the allegations in paragraph 109.

**ALLEGED BREACH OF S 1041E**

- 110. Potts denies paragraph 110 of the Commercial List Cross-Claim Statement, and repeats paragraphs 58 and 65 above.

111. Potts denies paragraph 111 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
112. Potts denies paragraph 112 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
113. Potts denies paragraph 113 of the Commercial List Cross-Claim Statement so far as concerns Potts, repeats paragraphs 110-112 above, and otherwise does not plead to the allegations in paragraph 113.
114. In response to paragraph 114 of the Commercial List Cross-Claim Statement, Potts denies the allegations of conduct and knowledge pleaded against him, and otherwise does not plead to the allegations in paragraph 114.
115. Potts denies paragraph 115 of the Commercial List Cross-Claim Statement and repeats paragraphs 69 and 73 above.
116. Potts denies paragraph 116 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
117. Potts denies paragraph 117 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
118. Potts denies paragraph 118 of the Commercial List Cross-Claim Statement so far as concerns Potts, repeats paragraphs 115-117 above, and otherwise does not plead to the allegations in paragraph 118.
119. In response to paragraph 119 of the Commercial List Cross-Claim Statement, Potts denies the allegations of conduct and knowledge pleaded against Potts in paragraph 118 of the Commercial List Cross-Claim Statement, and otherwise does not plead to the allegations in paragraph 119.
120. Potts denies paragraph 120 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.

#### **DSH's ALLEGED BREACH OF CONTRACT**

121. In response to paragraph 121 of the Commercial List Cross-Claim Statement, Potts:
  - (a) repeats paragraphs 74-76 above;
  - (b) denies the allegations in paragraph 121 so far as concerns Potts; and
  - (c) otherwise does not plead to the allegations in that paragraph.

122. Potts denies paragraph 122 of the Commercial List Cross-Claim Statement so far as concerns Potts, and repeats paragraphs 74-76 above.
123. In response to paragraph 123 of the Commercial List Cross-Claim Statement, Potts:
- (a) repeats paragraphs 74-76 above;
  - (b) denies subparagraphs 123(a) and 123(b); and
  - (c) does not plead to the allegations in subparagraphs 123(c) and 123(d), as they contain no allegations against him.
124. In response to paragraph 124 of the Commercial List Cross-Claim Statement, Potts repeats paragraphs 121 to 123 above, and otherwise does not plead to paragraph 124 as it contains no allegations against him.
125. In response to paragraph 125 of the Commercial List Cross-Claim Statement, Potts:
- (a) repeats paragraphs 74-76 above;
  - (b) denies the allegations in paragraph 125 so far as concerns Potts; and
  - (c) otherwise does not plead to the allegations in that paragraph.
126. Potts denies paragraph 126 of the Commercial List Cross-Claim Statement so far as concerns Potts, and repeats paragraphs 74-76 above.
127. In response to paragraph 127 of the Commercial List Cross-Claim Statement, Potts:
- (a) repeats paragraphs 74-76 above;
  - (b) denies subparagraphs 127(a) and 127(b); and
  - (c) does not plead to the allegations in subparagraph 127(c), as it contains no allegations against him.
128. In response to paragraph 128 of the Commercial List Cross-Claim Statement, Potts repeats paragraphs 125 to 127 above, and otherwise does not plead to paragraph 128 as it contains no allegations against him.

## **CONTRIBUTION**

129. Potts does not plead to paragraph 129 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.

**Plaintiffs' Claim**

- 130. Potts denies paragraph 130 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
- 131. Potts denies paragraph 131 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
- 132. Potts denies paragraph 132 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
- 133. Potts does not plead to paragraph 133 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
- 134. Potts denies paragraph 134 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.

**Cross-Claims against Deloitte**

- 135. Potts denies paragraph 135 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
- 136. Potts denies paragraph 136 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
- 137. Potts denies paragraph 137 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
- 138. Potts denies paragraph 138 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.

**Cross-Claim against DCF**

- 139. Potts denies paragraph 139 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
- 140. Potts denies paragraph 140 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
- 141. Potts denies paragraph 141 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
- 142. Potts does not plead to paragraph 142 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.

143. Potts denies paragraph 143 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.

## **CAUSATION**

144. Potts does not plead to paragraph 144 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
145. Potts denies paragraph 145 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
146. Potts denies paragraph 146 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
147. Potts denies paragraph 147 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
148. Potts denies paragraph 148 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
149. Potts denies paragraph 149 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
150. Potts denies paragraph 150 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
151. Potts does not plead to paragraph 151 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.
152. Potts denies paragraph 152 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
153. Potts denies paragraph 153 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
154. Potts does not plead to paragraph 154 of the Commercial List Cross-Claim Statement, as it contains no allegations against him.

## **RELIEF**

### **Damages**

155. Potts denies paragraph 155 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.

156. Potts denies paragraph 156 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.

#### **Set-Off**

157. Potts denies paragraph 157 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
158. Potts denies paragraph 158 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.

#### **Injunction**

159. Potts denies paragraph 159 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.
160. Potts denies paragraph 160 of the Commercial List Cross-Claim Statement so far as concerns Potts, and otherwise does not plead to the allegations in that paragraph.

### **DEFENCES**

#### **Relief pursuant to section 1318 of the Corporations Act**

161. In further answer to the whole of the Commercial List Cross-Claim Statement, Potts says that, if it is established that he engaged in misleading or deceptive conduct in contravention of the Corporations Act, the ASIC Act and/or the ACL NSW, as pleaded in paragraphs 104 and 120 of the Commercial List Cross-Claim Statement (which is denied), he acted honestly and, having regard to all the circumstances of the case, he ought fairly be excused for the contravening conduct pursuant to s 1318 of the Corporations Act.

#### **Proportionate Liability – Apportionable Claims**

162. In further answer to the whole of the Commercial List Cross-Claim Statement, Potts says that, if (which is denied) Potts contravened s 12DA of the ASIC Act or s 1041H of the Corporations Act and/or s 18 of the ACL NSW, and is liable to Deloitte and/or for any loss or damage which resulted from any such contravention, then each of the claims of Deloitte and DCF against Potts in respect of such loss or damage is an apportionable claim within the meaning of (respectively) s 1041L of the Corporations Act, s 12GP of the ASIC Act and s 34 of the *Civil Liability Act 2002* (NSW) (CLA).
163. In the event that Deloitte establishes that:
- (a) Abboud engaged in conduct in contravention of the Corporations Act, the ASIC Act and/or the ACL NSW (as pleaded in paragraphs 103, 106 and 120 of the Commercial List Cross-Claim Statement);

- (b) DSH engaged in conduct in contravention of the Corporations Act, the ASIC Act and/or the ACL NSW (as pleaded in paragraphs 105, 107 and 120 of the Commercial List Cross-Claim Statement), or breached the terms of its contract with Deloitte (as pleaded in paragraph 124 of the Commercial List Cross-Claim Statement); and
- (c) the conduct in subparagraphs (a) and/or (b) above caused and/or contributed to the loss pleaded by Deloitte against each of Potts, Abboud and DSH in paragraphs 144-151 of the Commercial List Cross-Claim Statement;

each of Potts, Abboud and DSH is a person whose acts or omissions caused the loss allegedly suffered by Deloitte which is the subject of their claim, and therefore, each is a concurrent wrongdoer within the meaning of s 1041L of the CA, s 12GP of the ASIC Act and s 34 of the CLA.

164. Further or alternatively, Potts:

- (a) repeats paragraphs 5-10, 54, 55(e)-(h), 56(c)-(f), 57(e)-(h), 60-75, 79, 85-88, 90(c) and 102-104 of the Sixth Cross-Claim Commercial List Cross-Claim Statement in Proceeding No. 2017/00081927; and
- (b) says that if the matters pleaded in paragraphs 106-109 of the Commercial List Cross-Claim Statement are established, and further or alternatively if the matters referred to in paragraph (a) are established, then:
  - (i) each of Robert Murray, Lorna Raine, Robert Ishak, Jamie Tomlinson, William Wavish and Phillip Cave (the **NEDs**) engaged in conduct in contravention of the Corporations Act, the ASIC Act and/or the ACL NSW;
  - (ii) but for such conduct, Deloitte would not have taken the steps pleaded in paragraphs 59, 67-68 and 71-72 of the Commercial List Cross-Claim Statement in this proceeding; and
  - (iii) in the premises, the contravening conduct referred to in subparagraph 164(b)(i) above caused and/or contributed to the same loss or damage which is claimed by Deloitte against Potts in respect of the Prospectus, the FY14 Audit and the FY15 Audit, and therefore each is a concurrent wrongdoer within the meaning of s 1041L of the CA, s 12GP of the ASIC Act and s 34 of the CLA.

165. By reason of the matters pleaded in paragraph 163 and/or 164 above, and pursuant to s 1041N of the CA, s 12GR of the ASIC Act and/or s 35 of the CLA, any liability (which is denied) of Potts to Deloitte is to be limited to an amount reflecting that proportion of the loss or damage claimed

that the Court considers just having regard to the extent of Potts' responsibility, and the extent of the responsibility of each of Abboud, DSH and the NEDs for such loss or damage.

166. In the event that DCF establishes that:

- (a) Abboud engaged in conduct in contravention of the Corporations Act, the ASIC Act and/or the ACL NSW (as pleaded in paragraphs 103, 106 and 120 of the Commercial List Cross-Claim Statement);
- (b) DSH engaged in conduct in contravention of the Corporations Act, the ASIC Act and/or the ACL NSW (as pleaded in paragraphs 105, 107 and 120 of the Commercial List Cross-Claim Statement), or breached the terms of its contract with DCF (as pleaded in paragraph 128 of the Commercial List Cross-Claim Statement);
- (c) the DSH Directors engaged in conduct in contravention of the Corporations Act (as pleaded in paragraph 106 of the Commercial List Cross-Claim Statement); and
- (d) the conduct in subparagraphs (a), (b) and/or (c) above caused and/or contributed to the loss pleaded by DCF against each of Potts, Abboud and DSH in paragraphs 145, 148 and 152-154 of the Commercial List Cross-Claim Statement;

each of Potts, Abboud, DSH and the DSH Directors is a person whose acts or omissions caused the loss allegedly suffered by DCF which is the subject of its claim, and therefore, each is a concurrent wrongdoer within the meaning of s 1041L of the CA, s 12GP of the ASIC Act and s 34 of the CLA.

167. Further or alternatively, Potts:

- (a) repeats paragraphs 26A - 26D, 66 -70, 81 - 81C, 89A - 90B and 99A - 99G, of the Third Cross-Claim, Amended Statement of Cross-Claim (**Potts Cross-Claim**);
- (b) says that, by reason of the matters in paragraph (a) above:
  - (i) Deloitte engaged in misleading conduct in contravention of the Corporations Act, the ASIC Act and/or the ACL NSW in performing the FY13 Audit work;
  - (ii) but for such conduct, the Prospectus would not have been issued with the Financial Information in the form in fact issued, and DCF would not have any liability to DSH for having given the DDC Sign-Off or the IAR in relation to the Financial Information in that form; and
  - (iii) in the premises, the contravening conduct of Deloitte referred to in subparagraph 167(b)(i) above caused and/or contributed to the same loss or damage which is

claimed by DCF against Potts, and therefore Deloitte is a concurrent wrongdoer within the meaning of s.1041L of the CA, s.12GP of the ASIC Act and s.34 of the CLA.

168. By reason of the matters pleaded in paragraph 166 and/or 167 above, and pursuant to s 1041N of the CA, s 12GR of the ASIC Act and/or s 35 of the CLA, any liability (which is denied) of Potts to DCF is to be limited to an amount reflecting that proportion of the loss or damage claimed that the Court considers just having regard to the extent of Potts' responsibility, and the extent of responsibility of each of Abboud, DSH, and the DSH Directors and Deloitte for such loss or damage.

### **Contributory negligence**

169. In further answer to the whole of the Commercial List Cross-Claim Statement, Potts says that, if (which is denied) Potts contravened s 12DA of the ASIC Act and/or s 1041H of the Corporations Act, and is liable to Deloitte for any loss or damage which resulted from any such contravention, then:

- (a) such a claim is a claim for economic loss allegedly caused by the conduct of Potts, within the meaning of s 12GF(1B) of the ASIC Act and s 1041I(1B) of the Corporations Act;
- (b) any such loss or damage was suffered wholly or partly as a result of failure to take reasonable care;

### **Particulars**

Potts repeats paragraphs 26A - 34, 49 - 58, 66 - 70, 77 - 80, 89A - 98, 99A - 105, of the Potts Cross-Claim.

As pleaded in those paragraphs, Deloitte failed to take reasonable care in performing each of the FY13 Audit, FY14 Audit and the FY15 Audit; and but for Deloitte's failure to take reasonable care, Potts would not have signed the Prospectus Management Certificate or the Prospectus Representation Letter, would not have given the CEO/CFO Declarations, the Management Representation Letters or the Directors' Declarations and would not have joined in the resolutions to adopt the Financial Reports in the form in which they were issued, and Deloitte would not have given the DTT Prospectus Consent, the FY14 Audit Report or the FY15 Audit Report in respect of Financial Reports in that form.

- (c) by reason of the matters pleaded in subparagraphs 169(a)-(b) above, and pursuant to s 12GM of the ASIC Act and/or s 1041I(1B) of the Corporations Act, any liability (which is denied) of Potts to Deloitte is to be limited to an amount reflecting that proportion of the

loss or damage claimed that the Court considers just having regard to the extent of Deloitte's responsibility for such loss or damage.

170. In further answer to the whole of the Commercial List Cross-Claim Statement, Potts says that, if (which is denied) Potts contravened s 12DA of the ASIC Act and/or s 1041H of the Corporations Act, and is liable to DCF for any loss or damage which resulted from any such contravention, then:

- (a) such a claim is a claim for economic loss allegedly caused by the conduct of Potts, within the meaning of s 12GF(1B) of the ASIC Act and s 1041I(1B) of the Corporations Act;
- (b) any such loss or damage was suffered wholly or partly as a result of DCF's failure to take reasonable care;

#### **Particulars**

Potts repeats paragraphs 130 - 132 of the Potts Cross-Claim.

As pleaded in those paragraphs, DCF failed to take reasonable care in performing its work in relation to the Prospectus; and but for DCF's failure to take reasonable care, Potts would not have signed the Prospectus Management Certificate or the Prospectus Representation Letter, and DCF would not have taken the steps pleaded in 57, 61 and 63 of the Commercial List Cross-Claim Statement.

- (c) by reason of the matters pleaded in subparagraphs 170(a)-(b) above, and pursuant to s 12GM of the ASIC Act and/or s 1041I(1B) of the Corporations Act, any liability (which is denied) of Potts to DCF is to be limited to an amount reflecting that proportion of the loss or damage claimed that the Court considers just having regard to the extent of DCF's responsibility for such loss or damage.

#### **D. QUESTIONS APPROPRIATE FOR REFERRAL TO A REFEREE**

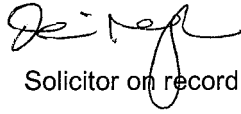
None.

#### **E. MEDIATION STATEMENT**

The parties have attempted mediation of the underlying proceeding (i.e. not including the Fourth Cross-Claim) on 26-27 February 2019 and did not succeed in resolving the dispute. The Third Cross-Defendant is willing to proceed to further mediation at an appropriate time.

**SIGNATURE OF LEGAL REPRESENTATIVE**

Signature

A handwritten signature in black ink, appearing to be "De-Neil".

Capacity

Solicitor on record

Date of signature

9 September 2019