

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 19/10/2021 4:56:40 PM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Originating Application Starting a Representative Proceeding under Part IVA Federal Court of Australia Act 1976 - Form 19 - Rule 9.32
File Number:	NSD1100/2021
File Title:	SPOZAC PTY LIMITED (ACN 112 100 231) AS TRUSTEE FOR THE LDB FAMILY TRUST T/AS NOT JUST CAKES v TYRO PAYMENTS LTD (ACN 103 575 042)
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



Sia Lagos

Dated: 20/10/2021 10:17:44 AM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



**Originating application starting a representative proceeding under
Part IVA of the Federal Court of Australia Act 1976**

No. NSD of 2021

Federal Court of Australia
District Registry: New South Wales
Division: General

**SPOZAC PTY LIMITED (ACN 112 100 231) AS TRUSTEE FOR THE LDB FAMILY TRUST
T/AS NOT JUST CAKES**

Applicant

TYRO PAYMENTS LTD (ACN 103 575 042)

Respondent

To the Respondent

The Applicant applies for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place: Law Courts Building, 184 Phillip Street, Sydney NSW 2000

The Court ordered that the time for serving this application be abridged to

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party) Spozac Pty Ltd (ACN 112 100 231) as trustee for the LDB Family Trust
t/as Not Just Cakes, Applicant
Prepared by (name of person/lawyer) Charles Bannister
Law firm (if applicable) Bannister Law Class Actions
Tel (02) 8999 2888 Fax (02) 8088 0731
Email charles@bl.com.au
Address for service Bannister Law Class Actions, Level 9, 60 Park Street, Sydney NSW 2000
(include state and postcode)



Details of claim

On the grounds stated in the accompanying Statement of Claim or other document prescribed by the Rules, the Applicant claims:

1. with respect to the Respondent's contraventions of ss 18, 29, 33 and 34 of the *Australian Consumer Law (ACL)*:
 - (a) damages or compensation pursuant to ss 236 and/or 237 of the ACL; and
 - (b) an order that the Respondent refund all monies paid under the Tyro Agreement (as defined in the Statement of Claim) by Group Members pursuant to ss 237(1) and 243 of the ACL;
2. with respect to the Respondent's breach of the Tyro Agreement (as defined in the Statement of Claim), common law damages;
3. with respect to the Respondent's breach of the statutory guarantees under ss 54, 55, 60 and/or 61 of the ACL:
 - (a) an order that the Respondent compensate the Applicant for all reasonable costs incurred in remedying the failures of the Tyro EFTPOS Terminals (as defined in the Statement of Claim) to comply with ss 54, 55, 60 and/or 61 of the ACL; and/or
 - (b) damages pursuant to s 259(4) of the ACL;
4. further and in the alternative to the relief sought at paragraph 3 above, and with respect to the Respondent's breach of the statutory guarantees under ss 58 and/or 59 of the ACL, damages pursuant to s 272(1) of the ACL;
5. interest pursuant to s 51A of the *Federal Court of Australia Act 1976 (Cth)*;
6. costs; and
7. such further or other orders as the Court determines are appropriate.

Questions common to claims of group members

The questions of law or fact common to the claims of the group members are:

The representations

1. Did Tyro make the Reliability Representations and/or the Support Representation in the manner pleaded at paragraphs 9 to 10 and 15 to 16 of the Statement of Claim?
2. Were the Reliability Representations representations as to:
 - (a) the standard, quality, value or grade of the Tyro EFTPOS Terminals, the Tyro EFTPOS Facility and/or the Tyro Services;



- (b) the nature, characteristics and/or suitability for purpose of the Tyro EFTPOS Terminals, the Tyro EFTPOS Facility and/or the Tyro Services; and/or
 - (c) the performance characteristics, uses or benefits of the Tyro EFTPOS Terminals, the Tyro EFTPOS Facility and/or the Tyro Services?
3. Was the Support Representation a representation as to:
 - (a) the availability of benefits of, or accessories to, the Tyro EFTPOS Terminals, the Tyro EFTPOS Facility and/or the Tyro Services; and/or
 - (b) the nature, characteristics and/or suitability for purpose of the Tyro EFTPOS Terminals, the Tyro EFTPOS Facility and/or the Tyro Services?

The Connectivity Issue

4. Was the Connectivity Issue caused by the matters pleaded at paragraph 26 of the Statement of Claim?
5. Did Tyro fail to take one or more of the steps pleaded at paragraph 32 of the Statement of Claim?
6. Had one or more of the steps pleaded at paragraph 32 of the Statement of Claim been taken, would Tyro have prevented, or substantially reduced the impact upon merchants of, the Connectivity Issue?

Contraventions

7. Did Tyro engage in misleading or deceptive conduct or conduct that was likely to mislead or deceive in contravention of s 18 of the ACL?
8. Did Tyro engage in conduct that was liable to mislead the public as to the nature, characteristics and the suitability for their purpose of goods or services in contravention of ss 33 and/or 34 of the ACL?
9. Did Tyro contravene s 29(1) of the ACL?
10. Did the Tyro EFTPOS Terminals, the Tyro EFTPOS Facility and/or the Tyro Services fail to comply with the statutory warranties and guarantees under ss 55, 56, 58, 59, 60 and/or 61 of the ACL?

Breach of the Tyro Agreement

11. Did Tyro breach the Tyro Fitness Warranty in the Tyro Agreement?
12. Did Tyro breach the Tyro Reasonable Care Warranty in the Tyro Agreement?



Loss and damage

13. Are the Applicant and Group Members entitled to recover the following losses by reason of Tyro's contraventions of ss 18, 29, 33 and/or 34 of the ACL:
 - (a) Loss of profits;
 - (b) Loss of goodwill;
 - (c) Costs of mitigating losses, including of obtaining temporary replacement EFTPOS terminals and payment processing services; and/or
 - (d) Increased costs arising from obtaining permanent replacement EFTPOS terminals and payment processing services.
14. Are the Applicant and Group Members entitled to a refund of all or some monies paid under the Tyro Agreement pursuant to ss 237 and 243 of the ACL?
15. What are the principles governing the quantification of loss or damage suffered by the Applicant and Group Members by reason of any of the contraventions of the ACL and/or breaches of the Tyro Agreement alleged in the Statement of Claim which have been established?
16. Was it reasonably foreseeable that, should the Tyro EFTPOS Terminals not comply with the statutory warranties and guarantees in the ACL pleaded in the Statement of Claim, the Applicant and Group Members would:
 - (a) experience inoperability of their Tyro EFTPOS Terminals by reason of the Connectivity Issue;
 - (b) be unable to process payments from customers for so long as the Connectivity Issue remained unresolved;
 - (c) incur a loss of business by reason of the inability to process payments;
 - (d) be required to acquire alternative EFTPOS terminals from other providers; and
 - (e) incur the additional cost of acquiring and installing alternative EFTPOS terminals?

Representative action

The Applicant brings this application as a representative party under Part IVA of the *Federal Court of Australia Act 1976* (Cth).

The Group Members to whom this proceeding relates are persons who:

1. entered into a written agreement (the **Tyro Agreement**) with the Respondent comprising:
 - (a) the Tyro EFTPOS Banking Application Form;



- (b) the Privacy Statement and Consent; and
 - (c) for Group Members who entered into the Tyro Agreement before 29 October 2015, the Tyro EFTPOS Terms and Conditions / Merchant Service Agreement – General Terms; or
 - (d) for Group Members who entered into the Tyro Agreement on or after 29 October 2015, the Tyro EFTPOS Banking Terms and Conditions;
2. pursuant to the Tyro Agreement, used the Tyro EFTPOS Terminals, Tyro EFTPOS Facility and Tyro Services (as defined in the Statement of Claim) to accept non-cash payments from their customers;
 3. as at 5 January 2021, were customers of the Respondent;
 4. were not, and are not:
 - (a) a director, officer or close associate (as defined in section 9 of the *Corporations Act 2001* (Cth)) of the Respondent; or
 - (b) a judge or judicial registrar of the Federal Court of Australia; and
 5. have suffered loss or damage by reason of the contravening conduct of the Respondent as pleaded in the Statement of Claim.

Applicant's address

The Applicant's address for service is:

Place: Bannister Law Class Actions, Level 9, 60 Park Street, Sydney NSW 2000

Email: charles@bl.com.au

The Applicant's address is 18 Warnervale Road, Warnervale NSW 2259.



Service on the Respondent

It is intended to serve this application on all Respondents.

Date: 19 Oct 2021

A handwritten signature in black ink, appearing to read "Charles Bannister".

Signed by Charles Bannister
Lawyer for the Applicant