

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 3/02/2022 10:04:37 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged: Reply - Form 34 - Rule 16.33  
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



*Sia Lagos*

Dated: 3/02/2022 10:10:49 PM 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 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.



## Reply

No. 1100 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

1. The Applicant joins issue with the allegations in the Defence to the Statement of Claim (**SOC**) filed 22 December 2021 (**Defence**), save insofar as the same consists of admissions, or are the subject of specific comment in this Reply. Unless otherwise indicated, defined terms used in this Reply have the meaning given in the SOC and Defence.
2. In answer to paragraphs 1(b) and (c) of the Defence, the Applicant:
  - (a) denies that Remediated Group Members (as defined in paragraph 1(b) of the Defence) are not Group Members;
  - (b) says that, to the extent that Remediated Group Members have entered into a settlement agreement with Tyro purportedly releasing Tyro from any liability in relation to the Connectivity Issue, the terms of any such settlement agreement may, subject to the matters pleaded in sub-paragraph (d) below, only operate as a defence by Tyro to those Group Members' claims in these proceedings;
  - (c) by reason of the matters pleaded in sub-paragraphs (a) and (b) above, denies that the Applicant cannot bring these proceedings on behalf of the Remediated Group Members pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth); and
  - (d) otherwise does not know and cannot admit that the terms of the settlement agreements into which Remediated Group Members entered with Tyro:

---

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		
<b>Address for service</b> (include state and postcode)	Bannister Law Class Actions, Level 9, 60 Park Street, Sydney NSW 2000		

- (i) had the purported effect of releasing Tyro from any liability in relation to the Connectivity Issue or preventing Remediated Group Members from bringing any claims against Tyro in relation to the Connectivity Issue; and/or
- (ii) are valid and enforceable releases of Tyro's liability capable of supplying a defence to Remediated Group Members' claims against Tyro in these proceedings.

**PARTICULARS**

- A. *The Applicant does not know whether the circumstances in which unrepresented Remediated Group Members entered into settlement agreements with Tyro involved misleading conduct by Tyro or were otherwise unfair.*
  - B. *At least since these proceedings were commenced, Tyro was required to disclose to unrepresented Group Members taking part in its remediation program that these proceedings were on foot, that Group Members may have been entitled to participate in the proceedings and that Group Members' entry into a settlement agreement may have implications for their participation in the proceedings.*
  - C. *The Applicant's solicitors notified Tyro of the matters in particular B above and requested confirmation from Tyro that such disclosures would be made to Group Members by:*
    - i. *the Letter from Bannister Law Class Actions to King & Wood Mallesons dated 5 November 2021;*
    - ii. *the Letter from Bannister Law Class Actions to King & Wood Mallesons dated 11 November 2021; and*
    - iii. *the Letter from Bannister Law Class Actions to King & Wood Mallesons dated 2 December 2021.*
  - D. *To the best of the Applicant's knowledge, Tyro has not acceded to the request referred to in particular C above.*
3. In answer to paragraph 22(a) of the Defence, the Applicant denies that cl 21.0 of the Tyro EFTPOS Terms and Conditions/Merchant Service Agreement – General Terms and Part A, cl 8 of the Tyro EFTPOS Banking Terms and Conditions relieve Tyro of its liability to the Applicant and Group Members, whether in respect of the Applicant's and Group Members' claim for a refund of all monies paid under the Tyro Agreement (as pleaded at paragraph 59(c)(i) of the SOC) or otherwise.

4. In answer to paragraph 23 of the Defence, the Applicant:
  - (a) admits sub-paragraphs (a)(i) to (iv);
  - (b) as to sub-paragraph (a)(v):
    - (i) admits that Tyro purported, by a term of the Tyro Agreement, to exclude liability, to the maximum extent permitted by law, for any loss (except for a loss due to Tyro's fraud, negligence or wilful misconduct), which arises from or in relation to or is caused by the Equipment not working or the customer being unable to process Transactions because of an act or omission of a third party; and
    - (ii) denies that the purported exclusion of Tyro's liability pleaded at paragraph 23(a)(v) of the Defence operated to exclude Tyro's liability for the loss and damage incurred by the Applicant and/or Group Members and claimed in the SOC.
5. The Applicant admits paragraph 34(b) of the Defence.
6. In answer to paragraph 35(e) of the Defence, the Applicant refers to and repeats paragraph 36 of the SOC.
7. In answer to paragraph 41(b) of the Defence, the Applicant:
  - (a) denies that it was under an obligation or duty to mitigate loss arising from the Connectivity Issue for the purpose of its claim pursuant to the ACL;
  - (b) in the alternative to sub-paragraph (a), and insofar as the Applicant was expected to mitigate its loss for the purpose of its claim for breach of the Tyro Agreement pleaded at Section D.2 of the SOC, the Applicant:
    - (i) denies that the Applicant and/or Group Members failed to mitigate the loss incurred by reason of the Connectivity Issue;

***PARTICULARS***

*The Applicant refers to and repeats paragraphs 39, 40 and 42(a) of the SOC.*

- (ii) denies that "any" loss could have been partly or wholly mitigated by accepting alternative forms of payment from customers; and
- (iii) says that, to the extent that the Applicant and/or Group Member did not accept one or more of the alternative forms of payment pleaded by Tyro at paragraph 41(b) of the Defence, the Applicant and/or Group Members did not act unreasonably in not accepting, or not taking steps to implement the systems or

capabilities which would have enabled them to accept, those forms of payment.

**PARTICULARS**

- A. *With respect to cash and other physical currency payment options, the Applicant refers to and repeats paragraph 7 of the SOC.*
  - B. *With respect to alternative non-cash payment options, the Applicant refers to and repeats paragraphs 35, 36, 41 and 42(b) of the SOC and says that, by reason of those matters, it was not unreasonable for the Applicant and/or Group Members not to implement alternative non-cash payment options in circumstances where Tyro had represented that the Connectivity Issue would be rectified in a short period of time.*
  - C. *With respect to alternative non-cash payment options, including Tyro eCommerce, online stores provided by other providers, buy-now pay-later services and online apps, it was not unreasonable for the Applicant and/or Group Members not to implement such alternatives having regard to the nature of the goods or services sold, their knowledge and familiarity with such alternatives, the terms and conditions applicable to such alternatives, and the additional technical infrastructure or requirements necessary to implement such alternative forms of payment.*
8. In answer to paragraph 54 of the Defence, the Applicant:
- (a) with respect to sub-paragraph (e), denies the allegation and refers to and repeats paragraph 7 above; and
  - (b) with respect to sub-paragraph (g):
    - (i) admits that the Applicant spoke to a customer support representative of Tyro on one or more occasions between 5 January 2021 and 20 January 2021;
    - (ii) refers to and repeats paragraphs 35 to 40 of the SOC; and
    - (iii) otherwise denies the allegation.
9. In answer to paragraph 59(c) of the Defence, the Applicant:

- (a) admits that its claim for damages pursuant to s 236 of the ACL by reason of Tyro's contravention of s 18 of the ACL is an apportionable claim within the meaning of s 87CB of the *Competition and Consumer Act 2010* (Cth) (**CCA**);
  - (b) does not know and therefore cannot admit nor deny whether Banksys and, or alternatively, Worldline, is a concurrent wrongdoer within the meaning of s 87CB of the CCA;
  - (c) says that its claim for damages for breach by Tyro of the Tyro Agreement pleaded at Section D.2 of the SOC is not an apportionable claim within the meaning of s 87CB of the CCA or otherwise; and
  - (d) says further that its claim for orders under ss 237(1) and 243 of the ACL directing Tyro to:
    - (i) refund all monies paid under the Tyro Agreement by the Applicant and Group Members; and
    - (ii) directing Tyro to pay to the Applicant and Group Members the amount of loss or damage sustained,
 by reason of Tyro's contraventions of ss 29, 33 and/or 34 of the ACL, as pleaded at paragraph 59(c) of the SOC, is not an apportionable claim within the meaning of s 87CB of the CCA.
10. In answer to paragraph 59(d) of the Defence, the Applicant denies the allegation and refers to and repeats paragraph 7 above.
11. In answer to paragraphs 62(b)(ii) and (iii) of the Defence, the Applicant denies the allegation and refers to and repeats paragraph 4(b) above.
12. In answer to paragraph 71 of the Defence, the Applicant:
- (a) denies sub-paragraph (b) and refers to and repeats paragraph 7 above; and
  - (b) denies sub-paragraph (c).
13. In answer to paragraph 91(c) of the Defence, the Applicant denies the allegation and refers to and repeats paragraph 7 above.
14. In answer to paragraph 92 of the Defence, the Applicant:
- (a) with respect to sub-paragraph (b):
    - (i) admits the sub-paragraph; and
    - (ii) relies upon s 267 with respect to the Applicant's and Group Members' damages claim pleaded in paragraph 92 of the SOC insofar as those damages were incurred by reason of Tyro's failure to comply with its obligation to supply

services and any goods resulting from those services in conformity with the guarantees under ss 60 and 61 of the ACL and will amend the SOC accordingly;

- (b) with respect to sub-paragraph (c):
- (i) admits that the Applicant and Group Member cannot take action under s 267(1) of the ACL with respect to Tyro's failure to comply with its obligation to supply services and any goods resulting from those services in conformity with the guarantee under s 61 of the ACL where the failure to comply with the guarantee occurred only because of an act, default or omission of, or a representation made by, any person other than Tyro or an agent or employee of Tyro;
  - (ii) denies that Tyro's failure to comply with its obligation to supply services and any goods resulting from those services in conformity with the guarantee under s 61 of the ACL was attributable only to an act, default or omission of Banksys and/or Worldline; and
  - (iii) refers to and repeats paragraphs 32, 33 and 54 of the SOC; and
- (c) with respect to paragraph (d):
- (i) admits that s 275 of the ACL applies to the Applicant's claim for contravention by Tyro of s 60 of the ACL;
  - (ii) admits that, by application of s 34 of the *Civil Liability Act 2002 (NSW) (CLA)*, the Applicant's claim for contravention by Tyro of s 60 of the ACL is an apportionable claim within the meaning of s 34 of the CLA;
  - (iii) admits that Part 4 of the CLA may apply to limit Tyro's responsibility to an amount reflecting the proportion of the damage or loss claimed that the Court considers just having regard to the extent of Tyro's responsibility for the damage or loss; and
  - (iv) says that Part 4 of the CLA does not apply to the Applicant's claims for:
    - A. breach by Tyro of the Tyro Agreement pleaded at Section D.2 of the SOC; and
    - B. contravention by Tyro of ss 54, 55, 58, 59 and 61 of the ACL pleaded at paragraphs 70 to 81 and 84 to 86 of the SOC,
 and that those claims are not otherwise apportionable claims within the meaning of s 34 of the CLA and/or s 87CB of the CCA.

15. In answer to paragraph 95(b) of the Defence, the Applicant denies the allegation and refers to and repeats paragraph 14(b)(ii) above.

Date: 3 February 2022



---

Signed by Charles Bannister  
Lawyer for the Applicant

This pleading was prepared by Bannister, Bannister Law Class Actions, and settled by Christopher Withers SC and Robert Pietriche of counsel.

### **Certificate of lawyer**

I Charles Bannister certify to the Court that, in relation to the reply filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 3 February 2022



---

Signed by Charles Bannister  
Lawyer for the Applicant