FEDERAL COURT OF AUSTRALIA

Inspector-General in Bankruptcy v Sam Pos Pty Ltd [2023] FCA 1621

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| File number: | QUD 287 of 2023 |
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| Judgment of: | **RANGIAH J** |
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| Date of judgment: | 6 December 2023 |
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| Date of publication of reasons: | 19 December 2023 |
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| Catchwords: | **PRACTICE AND PROCEDURE**  – application for default judgment under r 5.23 of the *Federal Court Rules 2011* (Cth) – where respondents have not complied with an order of the Court – where respondents have not attended a hearing in the proceeding – where respondents have not defended the proceeding with due diligence – application granted |
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| Legislation: | *Bankruptcy Act 1966* (Cth) ss 185LD, 185Y, 185ZB, 185ZCA and 186L  *Federal Court Rules 2011* (Cth) rr 1.32, 5.22 and 5.23 |
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| Cases cited: | *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* (2007) 161 FCR 513  *Chamberlain Group, Inc v Giant Alarm System Co, Ltd (No 2)* [2019] FCA 1606  *CNIP Pty Ltd v Chan & Naylor Norwest Pty Ltd (No 2)* [2011] FCA 1170  *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89  *Macquarie Bank Ltd v Seagle* (2005) 146 FCR 400  *Pittmore Pty Ltd v Chan; Chan v Tan* (2020) 104 NSWLR 62  *Ross v Cotter* [2015] FCA 310  *Speedo Holdings BV v Evans (No 2)* [2011] FCA 1227  *Welsh v Digilin Pty Ltd* (2008) 250 ALR 13  *Zibara v Ultra Management (Sports) Pty Ltd* (2021) 283 FCR 18 |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | General and Personal Insolvency |
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| Number of paragraphs: | 39 |
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| Date of interlocutory hearing: | 6 December 2023 |
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| Counsel for the Applicants: | Mr PP McQuade KC with Mr NJ Derrington |
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| Solicitor for the Applicants: | Australian Government Solicitor |
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| Counsel for the Respondents: | The Respondents did not appear |

ORDERS

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|  | | QUD 287 of 2023 |
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| BETWEEN: | INSPECTOR-GENERAL IN BANKRUPTCY  First Applicant  OFFICIAL TRUSTEE IN BANKRUPTCY  Second Applicant | |
| AND: | SAM POS PTY LTD ACN 106 138 103 (TRADING AS DEBT CUTTER), A DEREGISTERED DEBT AGREEMENT ADMINISTRATOR  First Respondent  SIMONE MAZANETZ HILDEBRAND  Second Respondent  GEEKSEAT AUSTRALIA PTY LTD  Third Respondent | |

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| order made by: | RANGIAH J |
| DATE OF ORDER: | 6 DECEMBER 2023 |

THE COURT ORDERS THAT:

1. The first respondent pay to the second applicant the sum of $1,130,877.63 together with interest pursuant to s 51A of the *Federal Court of Australia Act 1976* (Cth) in the sum of $40,311.91.

2. The first respondent pay the applicants’ costs of the proceeding against it.

3. It is declared that the second respondent was knowingly concerned in a breach of trust by the first respondent paying the sum of $1,130,877.63 out of the first respondent’s trust account other than for the purposes of discharging its duties as a debt agreement administrator.

4. The second respondent pay to the second applicant the sum of $1,130,877.63 together with interest pursuant to s 51A of the *Federal Court of Australia Act 1976* (Cth) in the sum of $40,311.91.

5. The second respondent pay the applicants’ costs of the proceeding against her.

6. A copy of these sealed orders be served on the second respondent in accordance with paragraph 2 of the Orders of 12 September 2023 as soon as practicable.

7. The interlocutory application filed 9 October 2023 against the third respondent is adjourned to 9.30 am on 14 March 2024.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

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RANGIAH J:

1 The first respondent (**Sam Pos**), in its capacity as a debt agreement administrator under Part IX of the *Bankruptcy Act 1966* (Cth) (the **Act**), held funds in its trust account for the benefit of debtors and creditors. The applicants allege that the second respondent, Simone Hildebrand, who was a director of Sam Pos, unlawfully caused amounts in excess of $1 million to be paid out of the trust account to the third respondent (**Geekseat Australia**).

2 The first applicant (the **Inspector-General**) brings claims under s 185ZCA of the Act to recover losses suffered by creditors. The second applicant (the **Official Trustee**), as the replacement debt agreement administrator and trustee of the remaining funds, sues to recover the funds from Sam Pos, Mrs Hildebrand and Geekseat Australia.

3 On 9 October 2023, the applicants applied for default judgment:

(a) against Sam Pos, on the statutory and equitable claims pleaded; and

(b) against Mrs Hildebrand, only on the Official Trustee’s equitable claim.

4 On 6 December 2023, I made orders granting the relief sought by the applicants against Sam Pos and Mrs Hildebrand.

5 These are my reasons for making those orders.

## Background

6 On 28 June 2023, the applicants filed an originating application and concise statement.

7 On 29 June 2023, the applicants served the originating documents on Sam Pos by post. The applicants also emailed copies of the originating documents to the directors. On the same day, the applicants arranged for a process server to serve the originating documents on Mrs Hildebrand and emailed her a copy of the documents.

8 On 20 July 2023, Registrar Schmidt ordered that Mrs Hildebrand file and serve a concise statement in response.

9 On 30 June 2023, Sam Pos was ordered by the Court to be wound up in insolvency. The applicants sent copies of the originating documents to the liquidator of Sam Pos. The liquidator of Sam Pos indicated that she did not oppose the applicants having leave to proceed against the company in liquidation, subject to an order that no steps be taken to enforce any judgment without leave of the Court first being obtained.

10 On 28 August 2023, I made orders granting that leave, and ordered Sam Posto file a concise statement in response to the concise statement on or before 25 September 2023.

11 No concise statement in response has been filed. Sam Pos has not otherwise participated in the proceeding or attended any hearing.

12 On 4 July 2023, the process server engaged to serve Mrs Hildebrand attended the address registered with ASIC by Mrs Hildebrand in her capacity as director of Geekseat Australia.

13 On 5 July 2023, Mrs Hildebrand called the applicants’ solicitor and left a voicemail message. On the next day, the applicants’ solicitor called Mrs Hildebrand who said that she was overseas but was aware that someone has attended her residence to give her documents and had received the email with the documents.

14 On 6 July 2023, the applicants’ solicitor sent a copy of the Court’s listing notification to Mrs Hildebrand. Mrs Hildebrand sent an email to the Court requesting the Court to reschedule the hearing.

15 On 12 September 2023, I made orders deeming service of the originating documents on Mrs Hildebrand and ordering substituted service through email. I also made orders extending the time required for Mrs Hildebrand to file a concise statement in response to the applicants’ concise statement.

16 Mrs Hildebrand has not since filed a concise statement in response or otherwise participated in the proceeding or attended any hearing.

17 On 9 October 2023, the applicants filed an interlocutory application for default judgment. The application was listed for 8 November 2023 but was adjourned to 6 December 2023.

18 On 6 December 2023, I made orders granting default judgment against Sam Pos and Mrs Hildebrand.

19 The application for default judgment against Geekseat Australia was adjourned to 14 March 2024.

## The principles

20 Rule 5.23(2) of *Federal Court Rules 2011* (Cth) (the **Rules**) provides:

(2) If a respondent is in default, an applicant may apply to the Court for:

(a)  an order that a step in the proceeding be taken within a specified time; or

(b)  if the claim against the respondent is for a debt or liquidated damages—an order giving judgment against the respondent for:

(i)  the debt or liquidated damages; and

(ii)  if appropriate, interest and costs in a sum fixed by the Court or to be taxed; or

(c)  if the proceeding was started by an originating application supported by a statement of claim or an alternative accompanying document referred to in rule 8.05, or if the Court has ordered that the proceeding continue on pleadings—an order giving judgment against the respondent for the relief claimed in the statement of claim or alternative accompanying document to which the Court is satisfied that the applicant is entitled; or

(d)  an order giving judgment against the respondent for damages to be assessed, or any other order; or

(e)  an order mentioned in paragraph (b), (c) or (d) to take effect if the respondent does not take a step ordered by the Court in the proceeding in the time specified in the order.

21 Under r 1.32, the Court may make any order that the Court considers appropriate in the interests of justice.

22 A party will be in default if, relevantly, that party fails to do an act required to be done by the Rules, comply with an order of the Court, attend a hearing in the proceeding, or defend the proceeding with due diligence: r 5.22.

23 The following principles apply to an application for orders under r 5.23 of the Rules:

(a) The discretion to grant default judgment is broad and unconfined: *Welsh v Digilin Pty Ltd* (2008) 250 ALR 13 at [12]-[14]; *Ross v Cotter* [2015] FCA 310 at [20].

(b) The discretion is to be exercised with caution: *Speedo Holdings BV v Evans (No 2)* [2011] FCA 1227 at [20]-[21].

(c) In respect of r 5.23(2)(c), the question is not whether the relief is proved by element, but whether the Court is satisfied that each element of the wrong is properly and discretely pleaded: *Macquarie Bank Ltd v Seagle* (2005) 146 FCR 400 at [24]; *Speedo* at [24].

(d) It is not a requirement that the applicant prove its claim by way of evidence. Put another way, the facts alleged in the statement of claim are taken to have been admitted: *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* (2007) 161 FCR 513 at [42].

(e) If, on inspection of the statement of claim, the Court is satisfied that the applicant would be entitled to the relief sought then this requirement of r 5.23(2)(c) will be met: *CNIP Pty Ltd v Chan & Naylor Norwest Pty Ltd (No 2)* [2011] FCA 1170 at [18]-[19]; *Speedo* at [23]; *Chamberlain Group, Inc v Giant Alarm System Co, Ltd (No 2)* [2019] FCA 1606 at [14].

(f) Further evidence may be adduced, provided that it is not evidence that would alter the pleaded case: *Chamberlain* at [14].

## Consideration

24 I am satisfied that Sam Pos and Mrs Hildebrand are in default and that the preconditions for the making of an application for default judgment have been made out.

25 Neither has complied with the orders of the Court requiring a concise statement in response to the concise statement, filed an address for service, attended a hearing in the proceeding, nor are they defending the claim with due diligence.

26 I will briefly describe the case against Sam Pos and Mrs Hildebrand.

### Sam Pos

27 The Inspector-General seeks relief under s 185ZCA of the Act, which provides:

**185ZCA Court may order administrator to make good loss caused by breach of duty**

(1) This section applies if, on application by:

(a)  the Inspector‑General; or

(b)  a creditor who is or has been a party to a debt agreement;

the Court is satisfied that a person who is or has been an administrator of the debt agreement has committed a breach of duty in relation to the debt agreement.

(2)  The Court may make any one or more of the following orders:

(a)  an order directing the person to make good any loss that a creditor has sustained because of the person’s breach of duty;

(b)  if the person is a registered debt agreement administrator—an order directing the Inspector‑General to cancel the person’s registration as a debt agreement administrator;

(c)  any other order that the Court considers just and equitable in the circumstances.

28 The Inspector-General is seeking an order that Sam Pos pay to the Official Trustee the sum of $1,130,877.63.

29 As to this claim, the applicants’ concise statement alleges that:

(a) Sam Pos was a registered debt agreement administrator pursuant to Part IX of the Act;

(b) in its capacity as a debt agreement administrator, Sam Pos received funds from debtors, primarily for the purpose of paying that money to each debtor’s creditors, in accordance with the terms of the relevant debt agreement;

(c) pursuant to s 185LD of the Act, Sam Pos:

(i) was required to pay all money received by it from debtors under debt agreements to the credit of a single interest-bearing bank account that was in its name and contained the words “—Debt Agreement Administration Trust Account”. Sam Pos maintained two bank accounts with Westpac, one described as its Debt Agreement Administration Trust Account (the **Trust Account**) and one described as its Clearing Account (the **Clearing Account**); and

(ii) had a duty not to pay any money out of the Trust Account, or money which ought to have been paid into the Trust Account but which had been paid into the Clearing Account, other than for purposes related to the administration of debt agreements, in accordance with the Act, or in accordance with a direction of the Court;

(d) between 1 July 2021 and 31 January 2023, $1,159,127.63 which was either held in the Trust Account or which ought to have been held in the Trust Account, was paid by Sam Pos to third parties for purposes which were not permitted by s 185LD(2A). The bank accounts to which the funds were paid included a bank account held by GMD Investments Pty Ltd (**GMD Investments**) and two bank accounts described as being held by “Gemada”;

(e) none of GMD Investments, the entity or person referred to as “Gemada”, or Geekseat Australia, had any lawful basis to receive the funds which were paid to each or any of them; and

(f) $1,130,877.63 of the $1,159,127.63 has not been repaid by Sam Pos or any of the recipients of the funds. As a consequence, none of the creditors, for whom the money was due to be paid, have been paid the amounts which they were due in accordance with the debt agreements pursuant to which the sums of money totalling $1,130,877.63 was paid.

30 The Official Trustee is also seeking equitable compensation from Sam Pos to repay the money to recover trust property improperly paid out by Sam Pos and thereby restore the trust estate.

31 The claim by the Official Trustee for equitable compensation relies on the same allegations, together with the following:

(a) on 8 March 2023:

(i) the Inspector-General cancelled Sam Pos’ registration as a debt agreement administrator and issued a notice of cancellation to Sam Pos pursuant to s 186L(5) of the Act; and

(ii) as a consequence, pursuant to s 185ZB(2) of the Act, the Official Trustee became the debt agreement administrator of the debt agreements for which Sam Pos was administrator;

(b) pursuant to s 185Y of the Act, the money that was received by Sam Pos from debtors under each debt agreement was taken to have been received by Sam Pos on trust to be dealt with in the way specified in the debt agreement; and

(c) in the premises, Sam Pos breached its duties as trustee in respect of each debt agreement by paying money out of its Trust Account, or which ought to have been held in its Trust Account but which was not so held, for a purpose which was not permitted by the terms of the trust.

32 The application has been on foot for some time and the liquidator of Sam Pos is clearly aware of the claim against the company and is on notice of this application. It can be inferred that the company’s choice to not defend or oppose the application is a deliberate choice.

### Mrs Hildebrand

33 Although there are multiple claims against Mrs Hildebrand, the applicants only press for judgment in default in respect of the following relief:

(a) an order that Mrs Hildebrand pay to the Official Trustee the sum of $1,130,877.63 by way of equitable compensation; and

(b) a declaration that Mrs Hildebrand was knowingly concerned in a breach of trust by Sam Pos paying the sum of $1,130,877.63 out of Sam Pos’ trust account other than for the purposes of discharging its duties as a debt agreement administrator.

34 It is alleged that Mrs Hildebrand procured the breaches of trust by Sam Pos, or alternatively, knowingly assisted in those breaches of trust.

35 A third party’s liability for inducing or procuring a breach of trust or fiduciary duty has two elements. The first is the intentional conduct which causes, and is intended to cause, the breach of trust or fiduciary duty. The second is that the third party knew that he or she was bringing about a breach of trust or fiduciary duty: *Pittmore Pty Ltd v Chan; Chan v Tan* (2020) 104 NSWLR 62 at [186]. Similarly, as conventionally understood in Australia, the second limb of *Barnes v Addy* liability makes a defendant liable if that defendant assists a trustee or fiduciary with knowledge of a dishonest and fraudulent design on the part of the trustee or fiduciary: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [160]. Dishonesty in this sense means a transgression of ordinary standards of honest behaviour: *Zibara v Ultra Management (Sports) Pty Ltd* (2021) 283 FCR 18 at [105]-[107]. It is not necessary to plead that the design was dishonest or fraudulent if the contention is otherwise raised: *Zibara* at [115]-[117].

36 The applicants’ concise statement alleges that:

(a) Mrs Hildebrand was the director and secretary of Sam Pos between 17 January 2020 and 29 April 2020;

(b) funds paid out were then paid to Geekseat Australia;

(c) Mrs Hildebrand was, at the time of the payments, a director of both Geekseat Australia and GMD Investments;

(d) Mrs Hildebrand, who was aware that Sam Pos was a registered debt agreement administrator, caused this money to be paid out for the purposes of funding the business of Geekseat Australia and knew that the payments to Geekseat Australia were not payments made for the purposes of Sam Pos discharging its duties under the debt agreements; and

(e) Mrs Hildebrand has admitted the money was paid out for the purposes of funding the business of Geekseat Australia.

37 Mrs Hildebrand has also been on notice of the proceeding for a substantial period of time and has chosen not to participate.

## Conclusion

38 I was satisfied that judgment should be entered by an order that Sam Pos pay to the Official Trustee the sum of $1,130,877.63.

39 I was also satisfied that judgment should be entered by an order that Mrs Hildebrand pay to the Official Trustee the sum of $1,130,877.63 together with a declaration that Mrs Hildebrand was knowingly concerned in a breach of trust by Sam Pos.

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| I certify that the preceding thirty-nine (39) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rangiah. |

Associate:

Dated: 19 December 2023