

Article Information

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Judgment in default and Accessorial Liability: Commissioner for Consumer Protection v Unleash Solar

the Western Australian Commissioner for Consumer Protection issued proceedings against Unleash Solar Pty Ltd (Unleash Solar) and its sole director alleging misleading and deceptive conduct by Unleash Solar

The Western Australian Commissioner for Consumer Protection issued proceedings against Unleash Solar Pty Ltd (**Unleash Solar**) and its sole director alleging misleading and deceptive conduct by Unleash Solar (amongst other things) and that the sole director was knowingly concerned in, or a party to the contraventions alleged. The proceedings were not defended by the respondents and the Federal Court ultimately entered judgment in default. The case serves as a reminder of the matters to be taken into account when seeking a default judgment, particularly in circumstances where the orders sought relate to matters of contention, and the use of accessorial liability provisions. **Partner, Ian Nathaniel, Senior Associate, Ben Hartley, and Law Graduate, John Evans**, discuss further.

The Federal Court Rules provide that the Court may give judgment against a respondent for the relief claimed in the statement of claim to which the Court is satisfied the applicant is entitled. The difficulty here is that the Court has to grapple with mere allegations before being satisfied that the applicant is entitled to judgment. An application for default judgment does not require proof by way of evidence of the applicant's claim, but instead requires that on the face of the statement of claim there is a claim for relief and the Court has the jurisdiction to grant that relief. In addition, an applicant will be entitled to the relief sought if each element of the relevant civil wrong is properly and discretely pleaded. While these matters should be relatively uncontroversial, it does stress the importance of having a properly pleaded statement of claim setting out all material facts (and relevant particulars) in support of the relief claimed.

In this particular case, the Federal Court carefully considered the allegations pleaded against Unleash Solar, namely the representations alleged to have been made and what customers of Unleash Solar experienced, contrary to those representations. The Court then considered the applicable law and determined that Unleash Solar did in fact engage in misleading and deceptive conduct. Critical to this finding was the fact that a customer of Unleash Solar would not have been able to offset the cost of electricity production by the amount of solar energy produced on a one to one basis as promised. As the Court noted, *"These misleading and deceptive representations would have led consumers into error and were thus in contravention of s18(1) ACL"*. Unleash Solar was also found to have breached other sections of the Australian Consumer Law including the non-supply of goods or services in a specified period or reasonable time.

The Commissioner for Consumer Protection also alleged that Unleash Solar's sole director was knowingly concerned in, party to or aided or abetted Unleash Solar's contraventions of the Australian Consumer Law. Accessorial liability provisions are found in various Commonwealth statutes and are a useful means of casting the net to capture other parties who were knowingly involved in the primary contravener's conduct. However, the bar to a successful prosecution of such a claim is high. As the High Court stated more than 30 years ago, *"There can be no question that a person cannot be knowingly concerned in a contravention unless he has knowledge of the essential facts constituting the contravention.... [A] person could only be properly said to be a "party to" a "contravention" if his participation was in the context of knowledge of the essential facts constituting the particular contravention in question."* And further, *"...a party to a contravention be an intentional participant, the necessary intent being based upon knowledge of the essential elements of the contravention."* While the proceeding was not defended, the fact that the accessory was the sole director of Unleash Solar and the letter containing the misrepresentations was in his name and signed by him was (amongst other things) sufficient to satisfy the Court that the sole director was knowingly concerned in Unleash Solar's breaches of the Australian Consumer Law.

The Federal Court ultimately entered orders restraining the sole director for a period of three years from managing or being otherwise concerned in carrying on a business of promoting or supplying photovoltaic solar panel systems in Australia and ordered both Unleash Solar and its sole director to pay a combined pecuniary penalty in-excess of \$500,000. To the extent that the Commissioner for Consumer Protection was successful underlines the importance of a properly pleaded statement of claim setting out all elements of the cause of action and the particulars in support. This is perhaps more so in circumstances where accessory liability is alleged as the bar is high and the Court must be satisfied that that a party to a contravention was an intentional participant. Accessory liability provisions such as those found in consumer protection legislation provide additional scope to add parties to a proceeding in circumstances where a party has been intimately involved with the conduct alleged and can be a useful means of piercing the corporate veil.

Ian Nathaniel and Ben Hartley have experience in prosecuting and defending consumer protection claims and should you have any queries relating to these matters, including accessory liability, please do not hesitate to contact us.