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Sector: Financial Services

ASIC v Kobelt [2019] HCA 18 – Supplying "book-up" credit to an Indigenous community

In a seminal judgment, the High Court of Australia has found the provision of "book-up" credit system to a vulnerable Indigenous community is not unconscionable.

ASIC has had a further significant loss – the High Court dismissed ASIC's appeal and determined that a "book up" credit service was not unconscionable.

Background

In Mintabie, South Australia Mr Lindsay Gordon Kobelt operates "Nobby's Mintabie General Store" (**Nobby's Store**) where most of his customers are the Anangu people who are the residents of remote communities in the Anangu Pitjantjatjara Yankunytjatjara Lands (**the APY Lands**).[1] Mr Kobelt operates Nobby's store by utilising a book-up credit system which allows customers to purchase food and second-hand cars and 'pay' it later.[2] The book-up credit system operates by Mr Kobelt being authorised to access his customer's wages or Centrelink payments and PIN for their bank cards.[3] Hence, this case concerned whether the supply of credit to the residents of the APY Lands under the book-up system contravened the proscription of unconscionable conduct fixed by s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).[4]

First instance

At first instance in the Federal Court, ASIC alleged that Mr Kobelt contravened s 29(1) of the *National Consumer Credit Protect Act 2009* (Cth) (**NCCP Act**) and s 12CB of the *ASIC Act* due to his supply of credit under the book-up system.[5] ASIC referred to 117 instances of Mr Kobelt supplying book-up credit and in particular, four nominated Anangu customers who were subject to the unconscionable conduct.[6] White J, the primary judge found that Mr Kobelt did not possess the necessary licence to provide credit to purchasers of second-hand motor vehicles from 1 July 2011 until at least April 2014.[7] Furthermore, the primary judge found in favour of ASIC as Mr Kobelt's supply of credit under the book-up system had contravened s 12CB of the *ASIC Act* and was hence, unconscionable.[8] White J also found that Mr Kobelt did not need to take the full amount out of his customers accounts and hence was doing it for his own benefit.[9] Therefore, unnecessarily tying customers to their dependence on Nobby's Store when they could have been shopping elsewhere on the APY Lands or in the nearby town of Marla.[10] As a result, Mr Kobelt was ordered to pay a pecuniary penalty of $167,500.[11]

The Full Court

Mr Kobelt appealed the decision made by the primary judge and the matter was heard on appeal at the Full Court of the Federal Court of Australia. On appeal, their Honours found that the supply of book-up credit was not unconscionable as the customers had a basic understanding of the system and voluntarily entered into it with Mr Kobelt.[12] It was found that the customers knew that they could frustrate the agreement by either cancelling their bank card or directing future payments to be credited to a different bank account, connoting that the customers had knowingly chosen to enter into the book-up credit system. They also found that Mr Kobelt did not act with dishonesty but rather with a degree of good faith as he did not exert undue influence on his Anangu customers to enter into his book-up system.[13] Wigney J found that Mr Kobelt was fulfilling a demand rather than acting in an unconscionable manner.[14] Furthermore, it was held that there was an absence of unconscientious advantage and hence, he did not contravene s 12CB(1) of the *ASIC Act* and the appeal was upheld.

ASIC's grounds of appeal

ASIC had three grounds of appeal in response to the appeal being held, being that the Full Court:

1. did not consider the special disadvantage or vulnerability of Mr Kobelt's Anangu customers and gave "undue or disproportionate weight" to the customers' basic understanding of the book-up system, voluntary entry into the book-up contracts, ability to terminate and 'agency' or freedom of contract;
2. erred in overturning the primary judge's findings that Mr Kobelt engaged in predation or exploitation to finding that he acted with degree of good faith and not dishonestly or fraudulently; and
3. gave "undue or disproportionate weight" to the benefits and advantages of book-up system arising from historical and cultural norms of Anangu community and none to the primary judge's findings that these practices contributed to or demonstrated the special disadvantage of Mr Kobelt's customers.[15]

ASIC relied on the primary judge's assessment that Mr Kobelt in withdrawing all the funds in his book-up customers' accounts went beyond what was reasonably necessary for the protection of his legitimate interests. However, the Full Court found that the book-up credit suited Mr Kobelt's Anangu customers for cultural practice and norm reasons rather than from a position of special disadvantage.[16] They also found that Mr Kobelt did not take advantage of the book-up credit system established and although it was "open to abuse", he did not.[17]

The High Court

On ASIC's appeal, the matter went before the High Court. In a 4:3 majority decision, the High Court dismissed ASIC's appeal and found Mr Kobelt was not guilty of unconscionable conduct by operating a book-up credit system. The majority found that the book-up system was not exploiting the customers but rather it was a system akin to the people of the ATP Lands. Keane J identified that 'unconscionable' as identified in s 12CB of the *ASIC Act* relates to a level of exploitation and "victimisation of the vulnerable".[18] Furthermore, Keane J regarded unconscionable conduct to be "calculated taking advantage of a weakness or vulnerability on the part of victims of the conduct in order to obtain for the stronger party a benefit not otherwise obtainable".[19] Mr Kobelt did not satisfy either category of 'unconscionable' as he did not take advantage of the book-up credit system but rather, was fulfilling a demand and need for such a system.

The majority's decision, in particular Gageler J's judgment, identified the faults of ASIC's pleaded case. Gageler J identified that ASIC may have won the appeal if they had pleaded the clear argument that Mr Kobelt's book-up system fosters a "cycle of perpetual indebtedness".[20] Furthermore, he identified that although they should have, ASIC did not plead that the credit charge for the purchase of motor vehicles was very expensive compared to the commercial lending rates for unsecured loans which the customers were subject to.[21] Gageler J identified that ASIC's argument diluted the significance of unconscionable conduct "fails in the application of that normative standard adequately to accommodate societal norms of acceptable commercial behaviour to the peculiar circumstances of the case".[22]

However, the minority found a different conclusion to the unconscionability question. Nettle and Gordon JJ firstly identified the difficult nature of unconscionability, as there is a tension between the customers choosing to enter into the book-up credit system and the benefits of such a transaction system for them, in contrast with the customers' vulnerability and the conduct of Mr Kobelt.[23] Edelman J however found that the book-up credit system was "Hobson's choice" to the customers likening it to a 'take it or leave it' system.[24] Furthermore, Edelman J identified that "impoverished and often illiterate and innumerate Aboriginal customers" do not voluntarily enter into the book-up system as suggested by the majority but are rather, given the "choice" to utilise the system and have credit or have none at all.[25]

Evidently, this seminal case identifies that a book-up credit system is not *prima facie* unconscionable, but can be considered as a required and desired system of credit. However, the narrow majority that came to this decision is demonstrative of the divided approach to and opinion of statutory unconscionability in the current legal landscape and poses a question as to how it may be interpreted in future cases.

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[1] Australian Securities and Investments Commission v Kobelt [2019] HCA 18 [4] ('ASIC v Kobelt').

[2] Ibid [1]-[2].

[3] Ibid.

[4] Ibid [4].

[5] Ibid [7].

[6] Ibid [9].

[7] Ibid [9].

[8] Australian Securities and Investments Commission v Kobelt [2017] FCA 387 [5].

[9] Ibid [22].

[10] Above n 1, [76].

[11] Ibid [114].

[12] Kobelt v Australian Securities and Investments Commission [2018] FCAFC 18 (15 February 2018) [266].

[13] Ibid [353].

[14] Ibid [302]-[304].

[15] Above n 1, [55].

[16] Ibid [77].

[17] Ibid [79].

[18] Ibid [118].

[19] Ibid [121].

[20] Ibid [103].

[21] Ibid [99].

[22] Ibid [107].

[23] Ibid [156].

[24] Ibid [266].

[25] Ibid.