Moral obloquy or commercial autonomy? Debating statutory unconscionability

>> COMPETITION & CONSUMER

Notes from a Level Twenty Seven Chambers Seminar

June 2020

On 14 February 2018, when the New South Wales Court of Appeal handed down its decision in *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd*,[1] commentators (including at Level Twenty Seven Chambers) began speculating as to whether the decision would lower the bar of statutory unconscionable conduct. In particular, it appeared that the doctrine would be applied even to relations between experienced commercial parties.

The High Court's decision in *Australian Securities and Investments Commission v Kobelt*[2] (***Kobelt***), however, appears in a different context – a remote community in the APY lands of central Australia, involving a credit relationship between a store owner and financially illiterate, impoverished Aboriginal Australians. Despite that context, the reasons hinge on individual autonomy and freedom to contract – even if the contracts appear to be a bad deal.

Importantly, the decision re-affirms the High Court's view that mere "unreasonableness" or "unfairness" in trade or commerce, even in transactions involving particularly vulnerable individuals, is not sufficient to establish unconscionable conduct.

Background Facts

Mr Kobelt operated a general store in Mintabie, South Australia. Most of Mr Kobelt's customers were Anangu people from communities in the APY lands. Mr Kobelt sold food, groceries, second-hand cars and fuel. If customers wished to buy from Mr Kobelt, but did not have the cash to do so, they could enter into a "book up" arrangement with him. The key features of the book up arrangement were that:[3]

1. the customer was required to give Mr Kobelt their bank keycard, and the PIN for the bank account in which their wages and Centrelink payments were deposited;

2. Mr Kobelt would withdraw all funds deposited into the customer's bank account as soon as they were deposited; and

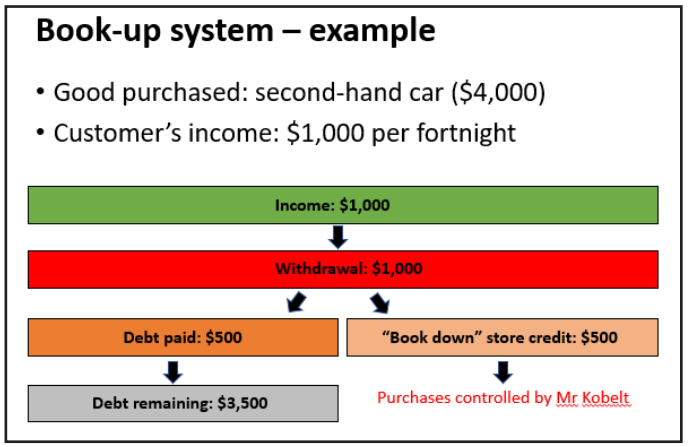
3. Mr Kobelt would split the customer's funds into two categories:
   a. approximately 50% of the customer's funds would be used to pay down the customer's debt; and
   b. the remaining 50% was applied to a system of "book down", where the customer could use that money as credit in his store.

ASIC commenced proceedings against Mr Kobelt, alleging that the conduct was unconscionable in contravention of s 12CB of the ASIC Act.

The trial judge found in ASIC's favour, primarily on the basis that the withdrawal of the entirety of the customers' accounts went beyond what was necessary to protect Mr Kobelt's interests, and created a cycle of dependency upon Mr Kobelt and his store.

The Full Court of the Federal Court overturned the decision, finding that Mr Kobelt had not acted unconscionably because his customers had a basic understanding of the credit system and entered it voluntarily and Mr Kobelt had not acted with dishonesty, but was fulfilling a demand.

[1] [2018] NSWCA 15; 329 FLR 149.
[2] (2019) 368 ALR 1; [2019] HCA 18.
[3] Refer to attached diagram.



Findings in the High Court

The majority considered that the difficulty with ASIC's case was identifying any advantage Mr Kobelt obtained from the book-up credit system which could fairly be said to be against conscience, particularly in circumstances where there was an apparent lack of bad faith or dishonesty. Although Mr Kobelt's system was open to abuse, he did not abuse it, and there was no feature of his conduct that exploited or otherwise took advantage of his customers' lack of education and financial acumen.[4]

In particular, significant emphasis was placed on the cultural norms and socio-economic context of the Anangu people and the finding below that, informed by these circumstances, the Anangu people chose to engage in the book-up system of credit because it suited their interests. That evidence included that:

• the book-up system was seen by many Anangu people as enabling their access to the necessities of life, in circumstances where a "boom and bust" cycle of household expenditure would otherwise result in periods where no funds were available to meet those expenses;

• this cycle was exacerbated by the widespread cultural practice of demand sharing which resulted in significant cultural pressure to share funds and resources with other members of the community when they were available;

• the Anangu people were unable to access banks, credit unions or other institutions to secure credit and in any event, their socio-economic circumstances would render them unlikely to be able to secure commercial loans in order to obtain the necessitates of life or to purchase a second-hand car which was a significant asset for members of the community; and

• the Anangu people considered that the book-up system allowed them to exercise "agency" in the sense of the capacity to act and to exercise choice in what was perceived to be the individual's own interests.

The majority considered it inappropriate to assess the book-

[4] *Kobelt* at [79] (per Kiefel CJ and Bell J, with Keane J agreeing).

up system by the standards applied elsewhere in modern Australian society. In the words of Gageler J, that approach "fails…to afford to the Anangu people the respect that is due to them within contemporary Australian society. Those of the Anangu people who chose to maintain their relationship with Mr Kobelt and to continue to participate in his book-up system evidently considered that continued participation in the book-up system suited the interests of them and their families having regard to their own preferences and distinctive cultural practices."[5]

The majority emphasised that there is no requirement to deal with customers, even those in situations of special disadvantage in an altruistic or disinterested way.[6]

Dissenting judgments

Justices Nettle and Gordon took a different view. Their Honours observed that the system "deprived customers of independent means of obtaining the necessities of life" and created prolonged dependence on Mr Kobelt. As Mr Kobelt limited the types of products that could be bought with book-down credit, Nettle and Gordon JJ found that customers became dependent upon a favourable exercise of Mr Kobelt's goodwill. This made the customers vulnerable in a way that was totally separate from, and in addition too, the vulnerability they faced due to their illiteracy, poverty and remoteness.

While the transactions had been entered into voluntarily, their Honours noted that voluntariness must be assessed in light of all of the circumstances – including the power imbalance between the parties; the relative lack of choice available to Mr Kobelt's customers; the fact that customers had a limited understanding of the terms of the arrangement; the lack of transparency of the terms and conditions of the arrangement; and Mr Kobelt's exploitative conduct.

[5] *Kobelt* at [110].
[6] *Kobelt* at [44] (per Kiefel CJ and Bell J, with Keane J agreeing).

Edelman J agreed with Nettle and Gordon JJ's reasons, and added that Parliament had made "repeated attempts to liberalise the application by the courts of statutory proscriptions against unconscionable conduct", so as to encourage a "broad" application of the concept of unconscionability.

Implications

Kobelt was handed down in June 2019. Since that time, some courts have suggested that the case should be confined to its own unique facts[7] and have limited future application.

What of the future of moral obloquy? Gageler J, noting his adoption of the phrase in *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 now describes it as "arcane terminology", stating "[m]y adoption of it has been criticised judicially and academically. The criticism is justified. I regret having mentioned it."[8] In their joint judgment in dissent, Nettle J and Gordon J state that the phrase "reveals little of the requisite character of unconscionability".[9] Only Keane J adopts the phrase in his reasons.[10]

One implication of Kobelt though is clear. The case illustrates that the Court will not always conclude that an apparently bad bargain is an unconscientious one. A Hobson's choice[11] (that is, a choice between taking something as it is, or taking nothing at all) nonetheless involves a free exercise of agency, and in the absence of trickery or dishonesty, it appears courts will respect that agency and autonomy.

[7] See eg. *Lloyd v Belconnen Lakeview Pty Ltd* [2019] FCA 2177.
[8] *Kobelt* at [91].
[9] *Kobelt* at [152].
[10] *Kobelt* at [118]-[120].
[11] *Kobelt* at [266] (per Edelman J).

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