Australian Securities and Investments Commission v Kobelt [2019] HCA 18

By Shipra Chordia

In *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18, the High Court held by a majority of 4-3 that the provision of credit to residents of remote Aboriginal communities in the Anangu Pitjantjatjara Yankunytjatjara (**APY lands**) in far north South Australia pursuant to a particular form of the 'book-up' method was not unconscionable within the meaning of s 12CB(1) of the *Australian Securities and Investment Commissions Act 2001* (Cth) (**ASIC Act**).

Background

From the mid-1980s until 2018, the respondent – Lindsay Kobelt – ran a general store called Nobbys in the community of Mintabie, which is located on a leasehold excised from APY lands. Nobbys sold food, groceries, general goods, fuel and second-hand cars primarily to Indigenous residents of the APY lands (the **Anangu people**). Mr Kobelt also offered to his customers a system of credit known as 'book-up'. Under the system, in return for credit, Mr Kobelt's customers would hand over to him the debit card (**keycard**) and personal identification number (**PIN**) linked to their bank account. Mr Kobelt would use the keycard and PIN to withdraw money directly from those accounts on the day that payments were credited to them. The withdrawals continued until the debt was repaid.

The 'book-up' system was mainly used by Mr Kobelt's Anangu customers to finance purchases of second-hand cars. Mr Kobelt sold cars under the book-up system for approximately $1,000 more than the price he charged to cash-paying customers for similar cars. At his discretion, Mr Kobelt would also allow certain customers to buy a restricted set of grocery items from his store with the funds he had withdrawn from their bank accounts (known as 'book-down'), and would at times issue purchase orders and cash advances, for a fee of $5 or $10, to enable his customers to buy goods from a limited number of other stores in the region.

The Australian Securities and Investments Commission (**ASIC**) commenced proceedings in the Federal Court, alleging, inter alia, that the book-up system maintained by Mr Kobelt contravened s 12CB(1) of the ASIC Act. Section 12CB(1) proscribes conduct that is, in all the circumstances, unconscionable in trade and commerce in connection with the supply or acquisition, or possible supply or acquisition, of financial services. Section 12CC sets out, non-exhaustively, matters that a Court may have regard to in determining whether conduct is unconscionable under s 12CB(1).

What some might consider the denial of autonomy via the paternalistic intrusion of alien legal standards others may view as the necessary protection of vulnerable sections of the community by the force of law.

The primary judge (White J) considered that ASIC had established unconscionability under s 12CB(1). This aspect of the first instance decision was, however, overturned on appeal to the Full Federal Court (Besanko, Gilmour and Wigney JJ). Justices Besanko and Gilmour in their joint judgment emphasised that those who had entered into book-up arrangements with Mr Kobelt had some understanding of the system, did so voluntarily and understood that they could end the arrangement by, for example, cancelling their keycard. Their Honours also considered it relevant that no allegation had been made that Mr Kobelt had acted dishonestly. Justice Wigney, in a concurring but separate judgment, added that the primary judge had given insufficient consideration to anthropological evidence of cultural practices of the Anangu people which might explain their disposition towards entering into book-up arrangements with Mr Kobelt.

Reasoning of the majority

Chief Justice Kiefel and Bell, Gageler and Keane JJ held that Mr Kobelt's conduct was not unconscionable. In their joint judgment, Kiefel CJ and Bell J observed that the word 'unconscionable' in s 12CB(1) is not statutorily defined and is to be given its ordinary meaning of 'being against conscience'. The values that might inform the standard of conscience include 'certainty in commercial transactions, honesty, the absence of trickery or sharp practice, fairness when dealing with customers, the faithful performance of bargains and promises freely made' as well as the protection of those with a vulnerability that precludes them from protecting their own interests. Their Honours accepted that a supplier of financial services might engage in conduct that is unconscionable even where a recipient has voluntarily entered into a contract for the supply of such services. They did not, however, accept that the absence of undue influence was irrelevant to a finding that there had not been unconscionable conduct. Similarly, Kiefel CJ and Bell J held that the absence of dishonesty, or other moral taint, is relevant to determining whether there has been a departure from accepted community standards, even if unconscionability is capable of being found in the absence of dishonesty.

Chief Justice Kiefel and Bell J emphasised that book-up credit provided Mr Kobelt's customers with the opportunity to purchase goods notwithstanding their low incomes and lack of assets with which to secure a loan. It was also relevant that Mr Kobelt's book-up system suited his Anangu customers 'for reasons that stemmed from cultural practices and norms and not from their position of special disadvantage' (at [66]). Their Honours held that it was open to the Full Court to have placed reliance on the system's capacity to assist Anangu people in avoiding the cultural practice of 'demand sharing' or 'humbugging' under which there was an expectation that resources, including financial resources, would be shared with relations upon their becoming available. By contrast, the only advantage that Mr Kobelt obtained from the system of book-up was to encourage his customers

to become dependent on Nobbys. Kiefel CJ and Bell J did not consider this sufficient to establish unconscionability.

Justice Gageler considered that the words of s 12CB 'make clear that the statutory conception of unconscionable conduct is unconfined to conduct that is remediable on that basis by a Court exercising jurisdiction in equity' (at [83]), and the function of a Court is to 'recognise and administer [the] normative standard of conduct' set out in s 12CB including by taking into account the considerations identified in s 12CC. His Honour noted that the appropriation of equitable terminology in s 12CB did not, however, authorise a Court to produce 'equity-lite', by adopting 'a process of reasoning which starts with the equitable conception of unconscionable conduct, involving exploitation of a special advantage, and then uses considerations in s 12CC to water down the Court's assessment of what amounts to a special disadvantage or to allow the Court to arrive more easily at an assessment that conduct amounts to exploitation' (at [89]). Justice Gageler retreated from his observation in *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 at 587 that s 12CB requires 'a high level of moral obloquy' on the part of the person said to be acting unconscionably. His Honour clarified that that reference was meant only to convey that the conduct ought to be 'so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct offensive to conscience' (at [92]). Justice Gageler acknowledged that there were factors in both directions on the question of statutory unconscionability. Pointing towards unconscionability were Mr Kobelt's relative strength of bargaining power, his differential treatment of Anangu customers from non-Indigenous customers, that his credit could have been provided by means less restrictive of his Anangu customers' freedom of action, that he had no particular reason to withdraw all, or almost all, of the funds paid into his Anangu customers' accounts, that his bookkeeping did not allow his Anangu customers to keep track of their indebtedness, and that the credit charge on car purchases had been found to be 'very expensive' (at [98] – [99]). On the other hand, Mr Kobelt did not exert undue influence or pressure and also did not act in bad faith. Beyond that balancing of competing considerations, Gageler J observed that the continuing relationship between Mr Kobelt and his Anangu customers was not the involuntary consequence of the book-up system, but 'a matter of choice on the part of those customers'. ASIC's contention that the customers' choice was evidence of their vulnerability failed, in Gageler J's opinion, 'to afford to the Anangu people the respect that is due to them within contemporary Australian society' (at [110]).Unlike Gageler J, Keane J continued to find utility in the concept of 'moral obloquy', holding that 's 12CB calls for a judgment as to whether the impugned conduct exhibits the level of moral obloquy associated with predatory conduct' (at [120]). For Keane J, ASIC had failed to establish that Mr Kobelt had exploited his Anangu customers' vulnerability with a view to securing pecuniary advantage. His Honour considered that ASIC's contention regarding the Anangu people's vulnerability did not consider that they exercised market power 'inherent in their numbers and social solidarity' as well as by virtue of the existence of competing suppliers (at [129]).

The dissenting judgments

A critical distinction between judges in the majority and those dissenting was that the latter accepted ASIC's assertion that the Anangu people's choice in entering into book-up arrangements with Mr Kobelt was evidence of their special disadvantage or vulnerability rather than of their agency. Thus, for Nettle and Gordon JJ, the central question in the case was whether Mr Kobelt's book-up system 'took advantage of an inability on the part of some of his customers to make worthwhile decisions in their own interests, which inability was sufficiently evident to Mr Kobelt, or should have been, to render his system exploitative' (at [151]). Their Honours considered that it was not paternalistic to look at a transaction and the position of the parties 'objectively'. Justices Nettle and Gordon considered that Mr Kobelt had taken advantage of his Anangu customers by failing to assess their financial situation before offering them credit, by charging undisclosed credit fees on the sale of the second-hand cars, by withdrawing extra amounts without authority, by arbitrarily exercising discretion in relation to the 'book-down' system, by maintaining poor records, and by encouraging a dependence on Nobbys. Their Honours considered that the anthropological evidence disclosed little support for the purported advantage of avoiding demand-sharing. Justices Nettle and Gordon also considered it relevant that Mr Kobelt's particular book-up system could have been offered in such a way as to avoid its unconscionable aspects. Their Honours observed that the 'ready willingness of Mr Kobelt's customers to hand over their key cards and their PINs seems to reflect a lack of understanding as to the precautions which they should take in their own self-interest' (at [236]).

Justice Edelman's reasons were broadly consistent with those of Nettle and Gordon JJ, albeit that his Honour also emphasised that it was relevant that Mr Kobelt's system of credit was the only form of credit available to 'remote communities of highly vulnerable persons in need of credit' (at [313]).

Conclusion

ASIC v Kobelt is an example of a 'hard case' the unusual facts of which may curtail its wider application. The differences between the majority and the minority underscore the difficulties which can arise in characterising human decision-making as 'free' or otherwise. What some might consider the denial of autonomy via the paternalistic intrusion of alien legal standards others may view as the necessary protection of vulnerable sections of the community by the force of law. Such considerations undoubtedly take on further layers of complexity and the need for sensitivity when they are decided at what Gageler J described as 'the "intersection" between the distinctive culture of indigenous peoples in remote communities and "mainstream" Australian society' (at [94]). BN