ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No A32 of 2018

BETWEEN:

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Appellant

and

LINDSAY KOBELT
Respondent

10 **FORM 27E – RESPONDENT'S REPLY ON ISSUES IN CROSS APPEAL**

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Argument

2. As to Appellant's Reply (**AR**) [11], the test for special leave to cross appeal in *DPP v. United Telecasters Sydney Ltd*,[1] (*"special nature requiring the attention of* [the] *court"*) is met, because:

   2.1 The question of whether a *"charge"* existed in fact, overlaps with issues concerning statutory unconscionable conduct – if Kobelt's submissions are accepted on this issue in the appeal proper, it would undermine a line of the reasoning in the Court below, and of
20 the primary judge, on the unlicensed credit issues;

   2.2 The issues are of public importance as the legislation to be interpreted applies throughout Australia, had received no authoritative interpretation prior to this case; and if the present interpretation is not corrected, error will be perpetuated, with the inconvenient results these submissions seek to identify below also being perpetuated;

   2.3 The interpretation of deeming provisions in the Court below, and by the primary judge, gives those provisions an unduly wide meaning, going beyond the purposes of the NCCPA.

3. **As to AR[12]:** Section 13(1) of the NCC only reverses the onus of proof in relation to s 5 of the NCC, not s 11 of the NCC.

30 4. The submission on p5, line 2, (*"In effect, ... "*) attacks a straw man. How can a marked sale price explicitly <u>for the specified vehicle</u> (which might be subject to further negotiation

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[1] (1990) 168 CLR 594, 602.

Prepared by: T J North QC and H M Heuzenroeder
Filed on behalf of Lindsay Kobelt by:
Lempriere Abbott McLeod, Barristers & Solicitors
93 Carrington Street, Adelaide, SA, 5000

Date of this document: 23 November 2018
Contact: Robert Holland
File ref: 14158
Telephone: (08) 8223 3999
Lawyer's E-mail: rholland@lam.com.au
Facsimile: (08) 8224 0986

irrespective of whether there be vendor finance) contain a separate *"charge"* within it, unless there is some compelling reason to draw this inference of fact (as with a sham)? The only basis to draw that inference is by reference to market price. There was no evidentiary basis for the factual inference on any of the motor vehicle sales.

5. If it is assumed *ex hypothesi* that a mere price differential implies a credit charge, then there would be no need to call expert evidence of market price in cases such as *Walker v. Consumer, Trader and Tenancy Tribunal*,[2] and all manner of ostensibly innocent commercial arrangements would become illegal in the absence of a credit licence.

6. Take the hypothetical example of a used vehicle vendor negotiating on a Saturday with a customer to sell a vehicle, with the intention that the customer takes title and delivery that day. The vendor intends to participate in a wholesale vehicle auction later in the day, to purchase new stock, where settlement must be by cash which he/she does not have and cannot easily obtain on the weekend. The purchaser can arrange finance on the Monday for the marked price (also the market price) with a third party, and does not quite have sufficient cash at the time of negotiation to transact at the marked price. The vendor, therefore, offers to drop the price[3] if the purchaser can pay *instanter* in cash, so that it can be used later at the auction. On ASIC's argument a credit *"charge"* must be inferred. The result is arbitrary and nonsensical, and beyond the intention of the legislation. Clearly the offered differential implies a cost to the vendor, not the purchaser. The vendor is *"paying"* for the benefit of having the utility of cash, and the purchaser is only benefited. There is no cost or charge upon the purchaser, and thus no reason to require a credit licence with the burden of regulation this implies.

7. No doubt examples could be multiplied, given the extreme breadth of s 3 of the NCC in defining the provision of credit, and the multitude of reasons why there might be a differential between the cash price offered, and any other basis of deferred payment.

8. **Similarly AR[13]:** This attacks a straw man. KS[71] identifies the central meaning, not the outer boundary of the meaning of *"instalments"*. KS accepts that instalments need not be in equal amounts or at evenly spaced rests. Rather, it contends that the concept of an instalment defines the parameters of a breach of contract, which draws for its rationale both the legal history of the concept of instalments, and logic (which matters AR conspicuously does not address).

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[2] [2013] NSWSC 1432.

[3] By more than 5%, so the exception in section 6 of the NCC does not apply.

9. Take the above example of a vehicle sale. Suppose, then, there is deferred payment and the purchaser obtains finance early in the next week. They attempt to repay the credit by EFT. If the daily transaction limit imposed by the bank is above the sale price, and repayment is made in one transfer, that would not be by *"instalments"*. The vendor would not be subjected to a penalty. However, if this is not the case, and two payments are made on consecutive days, on ASIC's argument the vendor would be subject to a penalty. And this would be so, despite the fact that the purchaser has in substance born no actual cost for the provision of credit.

10. Kobelt's position is even further removed from this example, because the creditor operates the account, and it would stretch legal credulity to accept the proposition that because he, as creditor, had overlooked operating the debtor's account, the debtor was somehow in breach of contract.

Dated 23 November 2018:

T J North

Telephone: (03) 9225 7345
Facsimile: (03) 9670 7086
Email: tnorth@vicbar.com.au

H M Heuzenroeder

Telephone: (08) 8110 9100
Facsimile: (08) 8231 5439
Email: hheuz@internode.on.net