SHORT PARTICULARS OF CASES
APPEALS

DECEMBER 2018

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AUSTRALIAN SECURITIES AND INVESTMENT COMMISSION v. KOBELT (A32/2018)

Court appealed from: Full Court of the Federal Court of Australia [2018] FCAFC 18

Date of judgment: 20 February 2018

Special leave granted: 17 August 2018

From the mid-1980s Mr Kobelt ("the respondent") ran a general store in Mintabie South Australia known as "Nobby's Mintabie General Store" ("Nobby's"). Mintabie is in the far north of the State, approximately 1100 kms from Adelaide, in land excised by lease to the State Government from the Anangu Pitjantjatjara Yankunytjatjara ("APY") Lands. Nobby's sold a range of goods including food, groceries and fuel but a significant part of Nobby's business came from the sale of second-hand cars. The average sale price of the cars was $5600, and they generally fell outside the State's statutory duty to repair, having been driven in excess of 200,000 kms.

Almost all of Nobby's customers were indigenous persons (specifically Anangu), who resided mainly in two remote communities northwest of Mintabie, Mimili and Indulkana. These customers shared the following characteristics: they were impoverished, they had low levels of financial literacy, most could not read nor add up, and at least half were financially dependent on social security payments as their main income. The respondent was aware of his customers' vulnerable circumstances.

Since at least mid-2008, the respondent offered customers at Nobby's credit via a system called "bookup". Bookup was interest-free and operated in the same way to all purchases at Nobby's other than with respect to second-hand cars which attracted an undisclosed and "very expensive" credit charge (as cars were sold at higher prices on credit than if purchased for cash). Bookup customers had to give the respondent a debit card ("key card") to their bank account into which their wages or Centrelink payments were received and their PIN, both of which were retained by him.

The respondent used the key cards and PINs to withdraw most if not all of the funds in the customers' bank accounts, usually on Centrelink payday. Withdrawals were often made early or late in the day so that customers had very little opportunity to withdraw funds by other means such as internet or phone banking. In most cases the respondent took all of a customer's bank balance and applied it in reduction of the customer's debt. He claimed that half of the amount withdrawn was notionally available for the customer to spend, though "their half" remained in the respondent's account at all times and was not held in trust for the customer. With limited exceptions, customers got access to "their half" of the money only by returning to Nobby's to purchase goods (referred to by ASIC as the "tying effect"). Even then, the respondent exercised a high degree of control over how much and for what items a customer was able to withdraw funds. Nobby's kept rudimentary hand-written records which were inadequate and often illegible. The 50:50 arrangement was not recorded in writing and no record was maintained showing the balance said to be available to each customer.

There was no suggestion of dishonest record-keeping, nor of pressure or undue influence exerted over customers. There was evidence that the Anangu found the bookup system to be attractive and that it was in demand, with a low level of complaints. The two other stores in Mintabie offered bookup that was not materially different, including the handing over of key cards and PINs. The respondent argues that he acted in good faith and provided a service to the Anangu which suited them for cultural and other reasons

The respondent withdrew substantial amounts via bookup: in the period between 1 July 2010 and 30 November 2012, he withdrew total of just under $1M from the accounts of 85 customers to whom book-up had been provided for the purchase of second-hand cars.

The appellant ("ASIC") brought proceedings against the respondent alleging that his system of conduct contravened s 29(1) of the *National Consumer Credit Protection Act (2009)* (Cth) ("*NCCPA*") and s 12CB of the *Australian Securities and Investment Commission Act 2001* (Cth) (the "*ASIC Act*"). Section 12CB prohibits conduct which "is, in all the circumstances, unconscionable" in connection with the supply of financial services in trade and commerce.

ASIC was successful before the Primary judge. In ruling that the respondent had breached the relevant statutory provisions, the Primary judge made findings that the respondent engaged in conduct which involved forms of predation and exploitation of his customers. He imposed a penalty of $100,000 for the breach of the *ASIC Act* and a total of $67,500 in penalties for 55 contraventions of the *NCCPA* and ordered that the respondent pay the bulk of the appellant's costs.

The respondent appealed to the Full Court of the Federal Court ('the Full Court"), which allowed the appeal in relation to s12CB of the *ASIC Act,* but dismissed the appeal insofar as it concerned the *NCCPA.* The Full Court essentially found that the respondent's bookup system was not unconscionable in light of the historical and cultural norms and practices of the APY community and the customers' voluntary usage of the system.

ASIC appealed to the High Court of Australia Court from that part of the Full Court's judgment which relates to the contraventions of the unconscionability provisions of the *ASIC Act.* ASIC argues that the consequence of the Full Federal Court's reasoning is that there has been a lower standard of consumer protection set for remote indigenous consumers than for others in Australian society, notwithstanding that such consumers are a group who fall squarely within those the *ASIC Act* is designed to protect.

The grounds of appeal include:

1. That the Full Court erred its construction of sections 12CB and 12CC of the *ASIC Act* by failing to give due weight to the special disadvantage or vulnerability of the respondent's customers and by giving undue weight to the customers' voluntary entry into the bookup arrangement.

2. That the Full Court erred in overturning the Primary judge's findings about the respondent's engaging in predation or exploitation.

3. That the Full Court erred by giving undue weight to the incidental 'benefits' or 'advantages' of the bookup system arising from relying upon historical and cultural norms and practices of the APY community so as to excuse what would otherwise be unconscionable conduct.

By way of proposed cross-appeal and Notice of Contention, the respondent has disputed the application of the NCCPA to his conduct in providing credit to his second-hand car customers.

ASIC has undertaken not to seek its costs of the High Court of Australia proceedings against the respondent, in the event it is successful.

UNIONS NSW & ORS v STATE OF NEW SOUTH WALES (S204/2018)

Date writ of summons filed: 10 August 2018

Date special case referred to Full Court: 23 October 2018

On 1 July 2018 the *Electoral Funding Act 2018* (NSW) ("the EF Act") came into operation. The EF Act makes provision for the disclosure, capping and prohibition of certain donations and expenditure in relation to electoral campaigns for State and local government elections in New South Wales.

Section 29 of the EF Act imposes various caps on electoral expenditure for State election campaigns. Section 29(10) provides as follows:

> *For a State general election, the applicable cap for a third-party campaigner is:*
> *(a) $500,000 if the third-party campaigner was registered under this Act before the commencement of the capped State expenditure period for the election, or*
> *(b) $250,000 in any other case.*

Section 35 of the EF Act is in the following terms:

> *(1) It is unlawful for a third-party campaigner to act in concert with another person or other persons to incur electoral expenditure in relation to an election campaign during the capped expenditure period for the election that exceeds the applicable cap for the third-party campaigner for the election.*
> *(2) In this section, a person* acts in concert *with another person if the person acts under an agreement (whether formal or informal) with the other person to campaign with the object, or principal object, of:*
> *(a) having a particular party, elected member or candidate elected, or*
> *(b) opposing the election of a particular party, elected member or candidate.*

Each of the plaintiffs is an employee organisation which either is, or intends to become, registered as a "third-party campaigner" under the EF Act for the New South Wales State general election to be held on 23 March 2019. The first plaintiff is also the "State peak council for employees" prescribed by s 215 of the *Industrial Relations Act 1996* (NSW). On 10 August 2018 the plaintiffs commenced proceedings in this Court, seeking declarations that sections 29(10) and 35 of the EF Act are both invalid.

The parties filed a special case, which Justice Bell referred to the Full Court for hearing. The special case states the following questions:

1. Is section 29(10) of the *Electoral Funding Act 2018* (NSW) invalid because it impermissibly burdens the implied freedom of communication on

governmental and political matters, contrary to the Commonwealth Constitution?

2. Is section 35 of the *Electoral Funding Act 2018* (NSW) invalid (in whole or in part and, if in part, to what extent) because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?

3. Who should pay the costs of the special case?

The plaintiffs have filed a Notice of a Constitutional Matter, as has the Attorney-General of the Commonwealth, who is intervening in the proceeding. The Attorneys-General of South Australia, Queensland and Western Australia are also intervening.

The Liberal Party of Australia (NSW Division) has applied for leave to intervene in the proceeding, and the University of New South Wales Grand Challenge on Inequality has applied for leave to be heard as amicus curiae.

McKELL v THE QUEEN (S223/2018)

Court appealed from: New South Wales Court of Criminal Appeal
[2017] NSWCCA 291

Date of judgment: 8 December 2017

Special leave granted: 17 August 2018

On 21 July 2016 the Appellant was found guilty by a jury of the following offences:

a) importing a commercial quantity of a border-controlled precursor, intending or believing it to be for the manufacture of a border-controlled drug;
b) conspiring to import a commercial quantity of a border-controlled drug; and
c) dealing with money to the value of $100,000 or more, believing it to be the proceeds of crime.

On 11 November 2016 Judge King sentenced the Appellant to 18 years and 9 months imprisonment, with a non-parole period of 11 years and 9 months. The Appellant then appealed against his convictions. The sole issue on appeal was whether the cumulative effect of a number of individual passages in Judge King's summing-up had caused a miscarriage of justice.

On 8 December 2017 a majority (Payne JA & Fagan J; Beech-Jones J dissenting) of the New South Wales Court of Criminal Appeal ("CCA") held that Judge King's summing-up was not unfairly lacking in balance, nor did it cause any miscarriage of justice. The majority held that Judge King had given the jury members clear directions that they alone were the arbiters of the facts. He had also properly directed the jury that they should disregard his comments concerning the facts if they did not accord with their own.

Justice Beech-Jones however held that Judge King's summing-up did not exhibit a "judicial balance". It had therefore deprived the jury of an adequate opportunity to understand and give effect to the Appellant's defence. Justice Beech-Jones additionally held that Judge King's further instructions to the jury did not remedy that prejudice and that this led to the conclusion that there was a miscarriage of justice. This was because the gulf was too great between what Judge King said that he was *not doing* (endeavouring to persuade the jury) and what he in fact *did do* (the opposite).

The ground of appeal is:

- The CCA erred in finding that the summing-up to the jury by Judge King did not give rise to a miscarriage of justice.