IN THE HIGH COURT OF AUSTRALIA **No A32 of 2018**
ADELAIDE REGISTRY

BETWEEN: **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**
Appellant

and

LINDSAY KOBELT
Respondent

10 **FORM 27F – RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS**

Part I: Certification

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

Part II: Argument

T J North QC – Addressing statutory unconscionability

Preliminary observations

2. ASIC's SoA, especially [22], contains an incorrect characterisation of reasoning of Court below: Considered whole of circumstances: AB305[257]; Thirteen (13) advantages with cumulative effect considered, and conclusions drawn based on seven (7) matters: AB306-309[257], [260-269]; See also AB327[343] *et seq*; Evaluative judgment, AB339-340[382], [384-387]; No issue
20 of "trumping": ASIC's SoA[31].
3. Simplicity of transactions; Transactions explained: AB315[291].
4. Significance of some contentions not made by ASIC; Identifying undisputed contentions.
5. Anungu supported bookup continuing: AB321[314]; FBM68[189]; FBM63[172-173].

ASIC's Grounds 1 and 2 – RS [38-52]

6. Artificial to separate out Ground 1 (construing s 12CC (or antecedents)), and Ground 2 (facts relevant characterising system). A consideration of *"all the circumstances"* (s 12CB(1) in JB110) entails that different s 12CC factors properly get different weights depending upon the particular circumstances of the case in the evaluative process.
7. Why *"commercial certainty"* (Allsop CJ in *Paciocco* JB602[296]; RS[62]) is important:
30 7.1 Generally voluntary contracts benefit contracting parties (cp Keane J in *Paciocco* JB696[220]); seller values money more than goods; buyer values goods more than money; thus both benefit from voluntary transaction;
7.2 Lack of certainty entails traders' apprehension of risk of penalty, which will undermine value enhancing commerce;
7.3 Freedom of voluntary commercial action needs *"breathing space to survive"*;

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7.4 Hence, high level of bar to establish statutory unconscionability; not *"careless and partisan"*; *"high degree of moral obloquy"*: JB720[290] (Keane J); JB689[188] (Gageler J); RS[62-63];

7.5 Courts should not lightly second guess commercial participants by becoming *de facto* regulators of price or terms.

8. A further reason why unconscionability only applies *"in circumstances which are so far outside of the ordinary course,* [and of] *so much an enormity and a departure from ordinary standards of conduct"* is that fixing the bar low makes it unduly difficult for customers to enter into transactions: *Burt v. ANZ Bank* (1994) ATPR (Digest) 46-123, 53,597-53,598 (copies to be supplied under practice direction).

9. ASIC's argument (SoA[29]) that voluntary transactions should be impinged by reason of factors at AB150-151[619-620], <u>because</u> (SoA[33]) of an asserted inability of customer to <u>judge their own interests</u>, overlooks evidence and findings that they are able to make such judgments or that the contrary was not proved: FBM48[122] (relevant instruction to expert re: understanding advantages/disadvantages); FBM52[138]; FBM54[141-142]; AB62[221] (a relevant consideration only); AB109[425]; AB144[588-589] (finding falling short); AB325[332] (implicit rejection in finding of paternalism). No finding of special disadvantage was made.

10. Could not establish, as part of a <u>systems</u> case that customers as generally conceived could not judge their own interests. Repeated use contradicts such a finding: RS[41].

11. Similarly, it is erroneous simply to weigh what the Court considers detriments against benefits like with a beam balance (for the reasons above [7.5]).

12. There was no system or pattern of abuse established in the manner in which redrawing of credit was effected (which overcame the "Withdrawal conduct" issue). Kobelt sought particulars of SoC[19.1] before trial of such a pattern, and this was refused: *ASIC v. Kobelt* [2014] FCA 737, [27] (copies to be supplied under practice direction). ASIC's case went forward on the mere existence of a discretion, and not how it was exercised; the evidence as to the practice of its exercise is identified in RS[33-34], and was favourable to Kobelt.

13. If there was, unknown to Kobelt, a hidden credit charge, the overall transaction was fair. But it was not possible to infer a charge: RS[70]; cp AB334[364-365].

14. Applying statements from this Court in *Paciocco* (JB688-690, [184], [186] ("take it or leave it"), [188-191]; JB719 *et seq*, [288], [290] (cp RS[57] – relief of symptoms), [293], [302-303]), the system was not unconscionable.

<u>ASIC's Ground 3 – RS[55-61]</u>

15. This case has always been litigated on the footing that cultural and historical norms were part of *"all the circumstances"* in s 12CB(1): AB149[611]; AB308[262]; AB339[383]; RS[55].

16. SoA[52] appears to accept these are relevant considerations, but only for certain circumstances.

17. A reformulation of the case should not now be permitted.

18. A consideration of *"all the circumstances"* is devoid of reality absent engaging with the *"intersection"*, *"incommensurability"* and matters favourable to Kobelt that flow from same, as identified by ASIC's expert, Dr Martin: FBM31-32[69-71]; FBM37-38[86], [89-90].

19. The considerations adverted to by Wigney J, AB325[331-332], were additional reasons for finding against unconscionability. The system was defined by a narrow group of customers.

ASIC's Reply

20. The contentions in Reply[2] are not correct; Grounds 4 and 9 (AB235-240) were broadly successful in challenging facts; the issue of *"flexibility"* was dealt with in Kobelt's favour at AB329[348]-331[354]; The distinction between motive and effect, in relation to avoiding demand sharing, was founded in objective evidence: AB330-331[353]; FBM93 (*"convenient.. when they are available"*); FBM99 (*"There may be ... it is a way to protect resources from demands from kin."*).

21. Kobelt's evidence was generally accepted by the primary judge, and where it was rejected detailed reasons for the rejection were given (AB295[204]). Accordingly, it is not appropriate simply to go back to findings of the primary judge, and put to one side other findings in the Court below and the evidence – especially the evidence sourced from ASIC itself.

H M Heuzenroeder – Addressing cross appeal

22. Special leave to cross appeal should be grant for the reasons in Kobelt's Reply[2].

23. Adopt submissions regarding no hidden charge ([13] above).

24. As to the meaning of *"instalments"* the question is one of finding a bright line test, that does not take the operation of the NCC beyond its mischief, especially in relation to a deeming provision. Arbitrary results flow from the interpretation given in the Courts below. The appropriate bright line is to define instalment by notions of a breach of contract.

25. On that basis the cross appeal should be allowed.

Dated 4 December 2018:

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