



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

Productivity Partners Pty Ltd (trading as Captain Cook College) ACN 085 570 547
First Appellant

10 **Site Group International Ltd ACN 003 201 910**
Second Appellant

And

Australian Competition and Consumer Commission
First Respondent

Blake Wills
Second Respondent

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

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Part I: CERTIFICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: PROPOSITIONS TO BE ADVANCED

Grounds 2 and 3

2. Section 21 of the Australian Consumer Law (ACL) establishes a norm of conduct in connection with the actual or possible supply, or acquisition, of good and services. The use of the term 'unconscionable' gives content to that norm. The norm is not limited to the equitable conception; the concepts are discrete albeit overlapping. The requisite gravity or departure from acceptable conduct is identified by the chosen language: *Kobelt* at [89]-[92].
- 30 3. Section 22 of the ACL gives further content to the norm by non-exhaustively identifying the types of conduct or matters to which s 21 is directed. The matters and conduct are substantially directed to the supplier's conduct in obtaining the customer's consent to the transaction (or acquirer's consent: s 22(2)); demonstrating the type of conduct to which the norm is directed. The presence or absence of each inform the judgement required as to whether conduct is unconscionable in the statutory sense. Without attention to the identified and relevant matters or types of conduct, the assessment would be an instinctive reaction that the legislation sought to avoid: *Kobelt* at [83], [87], [120], [154]-[155] and [302].

4. The trial judge and Full Court held Productivity Partners (**PP**) engaged in unconscionable conduct by removing two controls over misconduct in circumstances in which PP knew of the identified risks of agent misconduct and enrolment of unsuitable students, knew the controls which were removed were important mitigants of those risks, and did so for a profit making purpose: FJ[121] CAB 270. Protection of potential customers from risk is not the type of conception to which ss 21 and s 22 are directed.
5. The courts below erroneously held that the identified system was unconscionable, a conclusion untethered to the equitable concept or the matters or conduct identified in s 22. The courts found shortcomings in PP's controls over identified risks and evaluated the conduct by comparison with PP's previous controls, instead of those controls which were required by specific regulation directed to those risks or common in the market (cf s 22(1)(e) and, by analogy, s 22(1)(g)). The latter provide a reference for assessing whether conduct involves a sufficient departure from acceptable commercial conduct to be unconscionable. The error was not cured by the Full Court's analysis of some factors identified in s 22(1).
6. The error of approach led the trial judge and Full Court to characterise a system as unconscionable which:
- (a) did not involve any dishonesty: TJ[512] CAB137; FJ[492] CAB 394. PP did not intend that misconduct eventuate, and deployed resources to provide the services promised: FJ[176], [180] CAB 292, 295 (s 22(1)(j)(iii),(iv), (l));
 - (b) reduced controls over the risk of wrongful behaviour by third parties, controls neither required by regulation (s 22(1)(g)), nor shown to be comparable with the broader industry (s 22(1)(e)); controlling risk is a concept to which s 21 and s 22 are not directed;
 - (c) involved customers being informed by PP that a debt would be incurred if they failed to withdraw by an identified date: TJ[290], [294], [296], [301] CAB 84-86; FJ [449-450] CAB 384 (s 22(1)(i)); there is no finding that consumers were unable to understand the information provided by PP (s 22(1)(c)) or of undue pressure by PP (s 22(1)(b));
 - (d) involved informing customers of the withdrawal process: TJ[301] CAB 86 (s 22(1)(c));
 - (e) included other controls directed to agent misconduct consistent with the requirements of the legislative scheme: FJ[174], [190] CAB 291, 302 (s 22(1)(g) by analogy); and
 - (f) had known as opposed to foreseeable consequences after those consequences occurred: TJ[333], CAB93; FJ[496] CAB 395; and where PP responded by taking measures to

contact and provide services to disengaged students: TJ[408], [409] CAB 111-12; FJ[182(f)] CAB 299.

7. The findings at trial were to the effect that a high number of enrolled students were disengaged or uncontactable; and that “unwitting or unsuitable students were being enrolled and incurring debts in increasing numbers and proportions”: see FJ[91], [173], [181], [184] - [186], [201], [208], [227], [245], [249], [250], [256] CAB 261, 291, 297, 300, 301, 322-25. However, as the Full Court recognized, suitability for enrolment is directed to characteristics of the student: FJ[17], [58] and [221] CAB 234, 247, 315. The case was advanced without reference to any characteristic of the students; and PP sought to provide training consistently with the object of the VET-FEE HELP scheme: cf TJ[41], [496] CAB 23, 133.
8. While the lack of student engagement raises queries: TJ [521] CAB 139-40; FJ [226], [227] CAB 317, factors which vitiate consumers’ autonomy were not alleged or established: cf ss 22(1)(a), 22(1)(b), 22(1)(c) and s 22(1)(d) (save for increased *risk* of its occurrence). An alteration to a system which increases risk that misconduct will not be detected, does not contravene s 21 of the ACL: FJ[452]-[468] CAB 385-90 (Downes J), at least absent an intention that the misconduct occur.
9. As to the enforcement of contracts with unwitting students, the effect of findings by the trial judge was that PP did not do so where misconduct was identified. On those occasions, PP reversed the enrolments of affected students: FJ[119], CAB 270. Although the ambit of the investigations was criticised, that was not in the sense of deliberate shortcomings or part of the design of the system and is not the type of conduct to which s 22(1) is directed.

Ground 4 (to be addressed with Mr Wills’ appeal)

10. Site Group’s liability depends on Mr Wills being knowingly concerned in the contravention. He was not as there is no finding that he knew the essential facts, relevantly the conduct has a character, however he conceptualised it, that the statute describes as unconscionable.

Dated: 6 February 2024



30 Jeremy Giles
Seventh Floor Wentworth Selbourne
Tel: 02 9231 4121
Email: jcg@7thfloor.com.au



Rob Davies
Omnia Chambers
Tel: 02 8915 2634
Email: rob.davies@omniachambers.com