IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S315 of 2019

BETWEEN:

BENOY BERRY
First Appellant

GLOBAL SECURE CURRENCY LTD (Company Number 05127761)
Second Appellant

and

CCL SECURE PTY LTD ACN 072 353 452
Respondent

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FIRST AND SECOND APPELLANTS' SUBMISSIONS

PART I: CERTIFICATION

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

PART II: STATEMENT OF ISSUES ON THE APPEAL

2. The Appeal raises two issues. First, in the assessment of damages under section 82 of the Trade Practices Act (**TPA**), where an applicant establishes it altered its position to its detriment in reliance on a misrepresentation under s 52 by the respondent and the respondent contends that there was an alternative lawful means by which it would have brought about the same detriment to the applicant *being a means which it chose not to take at the time of the wrong* (**lawful means argument**), what principles govern the onus, use of presumptions and the broader assessment of evidence?

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3. Second, did the Full Court, in finding appellable error in the primary judge's rejection of the Respondent's lawful means argument, instruct itself in accordance with the correct principles so as to identify, in the undisturbed findings of the primary judge or in additional findings made by it, a proper factual basis for upholding such argument?

4. The Notice of Contention raises whether there was some basis in the evidence or findings, albeit one not identified by the primary judge or Full Court, by which the Respondent's lawful means argument should have succeeded?

PART III: SECTION 78B NOTICE

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5. The first and second Appellants (**Dr Berry** and **GSC**, respectively) consider that no notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV: CITATION OF RELEVANT DECISIONS BELOW

6. Citations: *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 (**PJ**), and *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 (**FFC**); and [2019] FCAFC 92 (costs).

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PART V: RELEVANT FACTS

7. ***Events 2003-2006:*** In 2003, Dr Berry began working with the Respondent CCL Secure Pty Ltd (**Securency**) with the common goal of introducing polymer banknotes into Nigeria (FFC[8] CAB 157). Securency was a joint venture owned by the Reserve Bank of Australia and Innovia Films Ltd (UK) (PJ[4] CAB 10).

8. Dr Berry undertook significant preliminary works on behalf of Securency between 2003 and 2007, without remuneration (FFC[8]-[9] CAB 157). Dr Berry was valuable to Securency for his high-level relationship with the Nigerian Presidents (PJ[39] CAB 21) and Governors of the Central Bank. In Securency's own words, Dr Berry would operate *"from the top down to the Governor"* (PJ[44] CAB 22).

9. Dr Berry incorporated GSC as a special purpose vehicle (PJ[48] CAB 23), initially in connection with a proposal to privatise the Nigerian Mint in 2003 (PJ[41] CAB 21).

10. Mr Chapman of Securency introduced Dr Berry to a Mr Harding. Mr Chapman told Dr Berry that the Securency Board wanted Mr Harding to hold 40% of the issued shares in GSC until such time as the RBA, through Securency, decided whether to participate in the ownership of a Nigerian opacification plant (PJ[87]-[88] CAB 34).

11. The possibility that the Nigerian Government would move from paper bank notes to polymer banknotes was a matter of high-level government interest in both Australia and Nigeria (PJ[8] CAB 11). The Nigerian Government's decision in 2006 to convert the first banknote to polymer proved to be an immensely profitable one for Securency. The work of Dr Berry (and GSC) secured this outcome (PJ[98] CAB 39).

12. ***Agency Agreement:*** Dr Berry (through GSC) was formally appointed as Securency's agent in Nigeria through an agreement (**Agency Agreement**[1]) executed in March 2007 (FFC[10] CAB 158), effective 2 February 2006.

13. The Agency Agreement (FFC[168]-[173] CAB 202-203) included terms that:
    (a) obliged Securency to pay commissions on a monthly basis as 15% of the revenue which Securency earned from the Nigerian Government: clause 8, and definition of "Commission Rate" in item 4 of Schedule 1;
    (b) contained a provision that it "automatically renewed" every 2 years (see definition of "Expiry Date" item 2 of Schedule 1) – thus it was of perpetual duration absent some lawful step taken to bring it to an early end;

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[1] Appellants' Book of Further Materials (**ABFM**) pp 57-95 as amended by letter dated 1 August 2007, see PJ[113] CAB 42-43 ABFM pp 96-98.

(c) conferred on Securency two separate rights to bring it to an early end: one on 60 days' notice (cl 2.6), and the other, to be exercised only in the last 30 days of a 2 year term, on 30 days' notice (cl 3.2); and

(d) obliged Securency to forward to the Agent "*as soon as practicable*" a copy of any order received from a customer in the Territory (cl 5.1(c)).

14. ***Mr Chapman's secret plans:*** Unbeknown to Dr Berry, from the middle of 2007 Mr Chapman was taking internal steps to replace the Appellants: (PJ[219] CAB 74).

15. On 9 July 2007 Mr Chapman wrote to his superior Mr Ellery suggesting that JHM was an agent "*we are considering to provide wider coverage in Nigeria and for the region*" (PJ[106] CAB 41). No explanation was given of how JHM would provide that wider coverage. Mr Chapman later admitted in cross-examination that JHM did not have a presence in Nigeria (PJ[115] CAB 44). Mr Chapman did not identify who were the "principal operators" of JHM nor explain to Mr Ellery that Mr Harding was already holding a 40% share in GSC at Mr Chapman's suggestion (PJ[108] CAB 41).

16. On 15 August 2007, Mr Chapman communicated to Mr Ellery (PJ[114] CAB 43, FFC[221] CAB 214[2]) the false proposition that Dr Berry had "*ongoing health issues*" which "*might impact* [Dr Berry's] *travel*", and "*we* [Securency] *should therefore*" – ie because of the falsely imputed ill health– "*have a succession plan for this eventuality*". Mr Chapman proposed that the Appellants be replaced by JHM and SPT.

17. In January 2008 Mr Chapman, in a handwritten note, requested that Mr Ellery issue the Appellants a "letter of release" in respect to the Agency Agreement, falsely stating "*[t]his is due to his continuing ill-health which is necessitating extended hospital stays in India and is preventing him from travelling to Nigeria*" (PJ[164] CAB 58[3]). Mr Ellery made a notation that Mr Chapman's immediate superior, Mr Brown, "*confirmed above to be correct*" (PJ[165] CAB 58). Mr Ellery then generated the critical letter (the **Termination Letter**) for signature by Dr Berry.

18. ***Misleading and deceptive conduct:*** Dr Berry signed the Termination Letter on 24 February 2008, effective from 31 December 2007, which purported to deprive the Appellants of commissions on sales of polymer bank notes from 1 January 2008 onwards.

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[2] Mr Chapman's memorandum dated 15 August 2007 ABFM pp 99-100.
[3] Mr Chapman's January 2008 handwritten note to Mr Ellery ABFM pp 101-102.

19. Dr Berry was induced to do so by the misleading and deceptive (and fraudulent) conduct of Securency's Mr Chapman. The relevant misrepresentation (**Renewal Representation**) was that, by signing the Termination Letter, Dr Berry and GSC would continue to be protected by the existing terms of the Agency Agreement and the parties would make a new agreement on those terms (PJ[303] CAB 95, first bullet point and PJ[309] CAB 97; affirmed FFC[61] CAB 174, [136]-[138] CAB 194-195).

20. Dr Berry believed Mr Chapman's explanation that signing the letter was merely "routine" (PJ[220]–[223] CAB 74-75; FFC[136] CAB 194). Up until that time, Securency had made no suggestion to Dr Berry that it might terminate him (FFC[110] CAB 188).

21. The central reason that Mr Chapman wanted the Appellants terminated had nothing to do with Dr Berry's falsely imputed ill-health. Rather, it was to make way for SPT (PJ[270] CAB 86; FFC[125] CAB 192). Mr Chapman was *"intimately involved"* in the establishment of SPT and later engaged in "*personal transactions*" with it, which included "*receiving funds from SPT which he or a company associated with him used to pay bribes*" (FFC[124] CAB 191).

22. ***Continuing utility of Appellants to Securency:*** Unaware of the fraud, Dr Berry continued to represent Securency to Governor Soludo both *before* and *after* signing the Termination Letter (FFC[110] CAB 188-189). As to the *before*, in November 2007, Dr Berry attended an important private meeting in London with the Nigerian Minister of Finance, the Governor and the Nigerian High Commissioner; and subsequently attended a meeting with Mr Brown of Securency and the Governor at the Metropole Hotel in London at which the Governor had reiterated the importance of Securency's commitment to the development of an opacification plant in Nigeria (PJ[137]-[140] CAB 50-51; FFC[110] CAB 188-189).

23. The Appellants were essential to Securency's plans in Nigeria because Dr Berry was a substantial businessman with a successful public-private partnership in Nigeria, and the capital necessary to fund the opacification project (PJ[144] CAB 52) that was being held out as a carrot to the Nigerian Government in an effort by Securency to lead to the conversion of lower denomination notes to polymer (PJ[147] CAB 53).

24. As to the *after*, on 16 March 2008, after discussion with Mr Ellery, Mr Chapman provided the Appellants with two letters concerning the construction of the opacification plant and Securency's supply of polymer substrate (PJ[237] and [297]

CAB 79 and 93); and on 24 March 2008 Dr Berry met with Governor Soludo and Mr Chapman in London, where Mr Chapman stated that Dr Berry and Securency *"were well on course"* on the partnership to construct the opacification plant in Nigeria (PJ[240] CAB 80; FFC[110] CAB 189).

25. The primary judge found (PJ[314]-[319] CAB 99-100) and the Full Court confirmed that "*one of the practical consequences of the contravening conduct was to bring Dr Berry's agency to an end without unnecessarily alienating him*" (FFC[226] CAB 215, see also FFC[110] CAB 188-189).

26. In mid-July 2008 Dr Berry made contact by text with Mr Chapman with the words "*long time no see (or hear)*" (PJ[242] CAB 80). In September 2008 Dr Berry texted Mr Chapman asking him to touch base before Dr Berry's upcoming meeting with Governor Soludo (PJ[268] CAB 86). In November 2008 Dr Berry was trying to arrange a meeting in the UK with Mr Chapman. The primary judge concluded that Dr Berry's texts and requests for information from Mr Chapman demonstrated that he was not acting as if he was terminated; nor was Mr Chapman treating Dr Berry as if he had (PJ[271] CAB 86); and that in Dr Berry advancing his plans for the opacification plant he was necessarily still pushing Securency's case for conversion of banknotes to polymer (PJ[272] CAB 87). The Full Court did not disturb these findings but returned to the texts at FFC[227] CAB 215, discussed below.

27. As to the agents who had been appointed following the removal of the Appellants, the primary judge concluded there was no evidence that any of Mr Harding, JHM or SPT did any work to bring about any order (PJ[272] CAB 87).

28. ***The scandal erupts:*** In May 2009, a scandal publicly erupted over Securency's bribery of foreign government officials in many countries to secure polymer orders (PJ[275] CAB 87). That was the first time at which Dr Berry learned that other agents had been appointed for Nigeria (PJ[291] CAB 92).

29. On 29 September 2009, Dr Berry and GSC wrote to Securency demanding an account and payment of his fees and commissions (PJ[287] CAB 91).

30. Mr Chapman and Mr Brown provided various internal explanations to Mr Ellery (PJ[293]-[297] CAB 92-93). Securency chose to ignore Dr Berry's letter, leading to a further demand in April 2010 (PJ[298] CAB 93).

31. In July/August 2010, the Securency board made a decision (**2010 Policy Decision**) to terminate all agency agreements (FFC[174(2)] CAB 203 and [183] CAB 206).

32. ***The remaining live issues:*** After the Full Court judgment, it is no longer in dispute that:

(a) Securency engaged in misleading and deceptive conduct in breach of s 52 TPA;

(b) Securency's conduct was intentional and fraudulent;

(c) Securency's conduct induced the Appellants to act to their detriment on 24 February 2008 by signing the Termination Letter, thereby terminating, effective 31 December 2007, their rights to commissions under the Agency Agreement;

(d) While Securency had contractual rights under the Agency Agreement to terminate it on appropriate notice, it chose not to exercise such rights in fact until March 2018, effective 20 May 2018 (FFC[181] CAB 205).

33. Securency's remaining pleaded defence was that the assessment of damages under s 82 of the TPA was to be conducted on the basis that, had Securency not brought the Agency Agreement to an end in February 2008 in breach of s 52, it would have done so by the issue of a 60 day notice under cl 2.6, or a 30 day notice under cl 3.2, such that the Agency Agreement would have ended no later than 30 June 2008 (FFC[174] CAB 203[4]).

34. The pleaded defence was supplemented by an alternative defence through the evidence of Mr Beeby, a member of the board of Securency, that Securency would have issued a 60 day notice under cl 2.6, after the Securency board made the 2010 Policy Decision (FFC[183] CAB 206).

35. The primary judge rejected both theses defences for reasons of fact and law and proceeded to award damages up until 2018 (PJ[314]-[329] CAB 99-103[5]).

36. The Full Court, in addressing ground 34 of the appeal to that Court (CAB 145) found that Dr Berry did not have *"a chance of survival"* in respect to *"the 2010 purge"* or *"worldwide agency terminations"*. Securency would have issued a 60 day notice on 31 August 2010, leading to a termination date of 30 October 2010 (FFC[195]-[201] CAB 209-210). The Appellants do not challenge this finding.

37. The Full Court turned to the possibility of a hypothetical termination earlier in 2008. It rejected Securency's case that a 60 day cl 2.6 notice would have been issued on any of 24 February, 26 March or 22 April 2008. Had this been Securency's intention, there

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[4] Paragraphs [26AA], [32(b)] and [33] ABFM pp 36, 40 and 43.

[5] And see *Berry v CCL Secure Pty Ltd (No 2)* [2018] FCA 1351 [4], CAB 112.

would have been no need for it to have engaged in the misleading and deceptive conduct on 24 February 2008 (FFC[219]-[221] CAB 214). Securency does not challenge those findings.

38. The Appeal and Notice of Contention concern the Full Court's ultimate finding that Securency would have issued a 30 day cl 3.2 notice on 1 June 2008, bringing the Agency Agreement to an end on 30 June 2008 (FFC[222]-[228] CAB 214-216).

PART VI: ARGUMENT

A. STATUTORY COMPENSATION IN A CASE LIKE THE PRESENT

General principles in respect of s 82 damages for contravention of s52 of the TPA

39. Section 82 provides:

> (1) A person who suffers loss or damage by an act of another person that was done in contravention of a provision of Part IV or V may recover the amount of the loss or damage by action against that other person.

40. It is well settled that: (a) section 82 requires the court to identify and then measure the loss suffered by the applicant "by" the misleading and deceptive conduct; (b) analogies with the assessment of damages at common law, particularly in deceit or negligence can be helpful but do not substitute for the statutory enquiry; and (c) overriding attention must be given to the purpose of the statute. As Gleeson CJ explained in *Travel Compensation Fund v Robert Tambree t/as R Tambree and Associates* (2005) 224 CLR 627 at 639 [30]:

> In recent cases, this Court has pointed out that, in deciding whether loss or damage is "by" misleading or deceptive conduct, and assessing the amount of the loss that is to be so characterised, it is in the purpose of the statute, as related to the circumstances of a particular case, that the answer to the question of causation is to be found.

41. Three circumstances of the Appellants' case are critical to shaping the answer to the question of causation and measurement of loss and damage in the present case.

42. *First*, the wrongful conduct of the Respondent induced the Appellants to surrender legal rights rather than to incur an obligation.

43. In many cases, misleading and deceptive conduct leads the victim to purchase an asset, or to pay away money, or sometimes to incur an obligation, on the faith of the conduct. In such cases, the damages task conventionally requires the court to identify the position that the victim was in before the conduct and compare that with the position that the victim is in after, and brought about by, the conduct: *Henville v Walker* (2001) 206 CLR 459 (***Henville***) at 509 [162], per Hayne J. It thus resembles, although it should not be assimilated to the approach in deceit: *Henville* at 502-503 [133]-[135],

per McHugh J. In many cases of a falsely induced asset purchase, the loss may be (or include) the difference between the true value of the asset at the time the victim was induced to buy it and the higher sum that the victim paid for it (conventionally known as *Potts v Miller* (1940) 64 CLR 284 damages).

44. By contrast, the present case is one where the misleading and deceptive conduct induced the Appellants to surrender a valuable asset – being their rights to commission under the Agency Agreement – in exchange for a legally worthless promise that they had equivalent protection from Securency (FFC[136] CAB 194). Being tricked into parting with a valuable asset is a type of loss identified in a seminal deceit case, *Gould v Vaggelas* (1984) 157 CLR 215, 223 and 228 per Gibbs CJ, at 232 per Murphy J.

45. *Second*, the rights lost were *ongoing* (automatically renewing, but potentially defeasible) rights to earn income. To assess damages in such a case, one could view the loss as occurring on the capital account or the revenue account (see the distinction in *Murphy v Overton Investments* (2004) 216 CLR 388 (***Murphy***) at 408 [49]). On the capital account, the loss is the true value of the Agency Agreement which the Appellants were tricked into parting with for no consideration, assessed at the date of the wrong (24 February 2008). Such a valuation would necessarily build in assumptions, looking forward from 24 February 2008, as to how long the Agency Agreement lawfully would have remained on foot but for the misleading conduct; and regard could be had to events post-dating of the wrong to confirm the value inherent in the Agency Agreement at the date of the wrong, as a hindsight confirming a foresight: *HTW Valuers v Astonland* (2004) 217 CLR 640 (***HTW Valuers***) at 658 [39].

46. An alternative way to assess the damages, one agreed upon by the parties here, was to treat the loss as occurring on the revenue account. The value of the Agency Agreement rested in the future income streams which it would have generated while on foot (less any future expenses which would have been incurred in performing the obligations of an agent under the contract).

47. The working out of the Agency Agreement, but for the misleading conduct, is a *past hypothetical event*. The prima facie measure of damages starts with the contractual baseline that the Agency Agreement would have automatically renewed every 2 years until its lawful termination in fact in May 2018.

48. *Third*, it was Securency that pleaded and sought to prove a past hypothetical in which there was a means available to it by which it could have lawfully brought the Agency

Agreement to an end prior to May 2018.

49. Such a plea has to confront the stark fact that using lawful means to bring the Agency Agreement to an end, as of 24 February 2008, was the very thing that the Respondent chose *not* to do; instead it preferred the benefits of fraud, namely terminating the contractual rights of the Appellants so as to put in replacement agents such as SPT for Mr Chapman's private purposes, while at the same time "keeping the Appellants onside" by inducing them to believe they were still protected by an adequate promise of their ongoing commissions.

50. The Appellants urge three related principles by which the Court approaches such a contention by the wrongdoer:

(a) *Principle one:* the onus lies on the wrongdoer to establish the facts necessary to justify the inference of a counterfactual lawful termination;[6] and a robust approach must be taken to the fact-finding on the wrongdoer's case, including resolving doubtful questions against the wrongdoer;[7]

(b) *Principle two:* The putative lawful means of termination must be wholly independent of the wrong;[8]

(c) *Principle three*: The *Sellars/Malec*[9] standard of proof governs the working out of the past hypothetical event.

Principle One: Onus on the wrongdoer, with a "robust" approach to fact finding

51. The correct approach to fact-finding in cases involving deliberate contravention of s 52 of the TPA was recently explained by a differently constituted Full Court in *Pitcher Partners v Neville's Bus Service* (2019) 371 ALR 480.

52. In 2013, Neville's Bus (**Neville's**) engaged Pitcher Partners (**PP**) to prepare financial data for the purposes of submitting a tender bid to Transport of New South Wales (**TfNSW**) for a privatised bus route. As part of the tender, the government would fund the full finance cost of the buses the operator was required to take on to operate the

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[6] *Pitcher Partners v Neville's Bus Service* [2019] FCAFC 119; 371 ALR 480 (***Pitcher Partners***) at 505 [116]; *Commonwealth v Amann Aviation (**Amann Aviation**)* (1991) 174 CLR 64 at 94 (Mason CJ and Dawson J), 114 (Brennan J).

[7] *Pitcher Partners* at 503 [109]; *Murphy* at 416 [74].

[8] *Amann Aviation* at 114 (Brennan J), see also 97 (Mason CJ and Dawson J), 149-150 (Gaudron J); *Maredelanto Campania Naviera SA v Bergbau-Handel GmbH (the **Mihalis Angelos**)* [1971] 1 QB 164 (CA) at 209-210 (Megaw LJ); *Chappel v Hart* (1998) 195 CLR 232 at 263 [83] (Gummow J); *HTW Valuers* at 659 [40].

[9] *Sellars v Adelaide Petroleum NL* (***Sellars***) (1994) 179 CLR 332 at 355; *Malec v JC Hutton Pty Ltd (**Malec**)* (1990) 169 CLR 638; *Badenach v Calvert* (2016) 257 CLR 440 at 454 [40]; *Amann Aviation* at 120-121 (Deane J).

route. [10] PP's work contained an error in calculating that amount, as a result of which Neville's tender was $660,000 less profitable per year than expected. In August 2013 TfNSW informed Neville's that it was successful, and wrote to it asking it to double check its figures for the transfer-in buses.[11]

53. In February and March 2014 (after the date of the contract but before completion), Neville's obtained further modelling from PP which was necessary to demonstrate to its financier it was capable of meeting its financing obligations based on cash-flow from the tender.

54. In preparing that subsequent model, in about March 2014 Mr Stewart of PP discovered the original error in the tender. Rather than inform Neville's, Mr Stewart set about making irregular changes to the model, amounting to fraudulent concealment.[12]

55. A core point taken by PP on appeal was that Neville's had failed to call evidence from the third party TfNSW to explain what would have happened if Neville's had submitted a revised tender.

56. The Full Court identified the proper approach in principle at 503 [109]:

> Relevant to these considerations are the proper considerations of proof when fraud is involved. In *Houghton v Immer (No 155) Pty Ltd* [1997] NSWSC 608; 44 NSWLR 46, at 59, Handley JA (with the agreement of Mason P and Beazley JA) expressed the principle derived from *Armory v Delamirie* (1722) 1 Stra 505; 93 ER 664, as follows:
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> > ... the Court should assess the compensation in a robust manner, relying on the presumption against wrongdoers, the onus of proof, and resolving doubtful questions against the party "whose actions have made an accurate determination so problematic".

57. The Full Court explained further at 505 [116]:

> These passages reveal that the general proposition that the claimant has the onus to prove its damages is qualified in circumstances where the (deliberate) wrong has caused the position of uncertainty or difficulty of proof. Even in cases of breach of contract where it has become difficult or impossible for the plaintiff to prove it would have recovered its expenses from the performance of the contract, the onus shifts to the defendant to prove that the plaintiff would not have done so, or that the contract was worthless [citations omitted].

58. The Full Court addressed PP's argument that Neville's had failed to call evidence from TfNSW to explain what *would* have happened if on the counterfactual the error had been disclosed, concluding at 506 [124]:

> If the question of what TfNSW would have done was uncertain, that uncertainty was brought about, not insignificantly, by the conduct of the appellants as wrongdoers and by them (as much as NBS) in not calling third parties, years after the event to speculate on entirely hypothetical questions on matters that would not have materially concerned them. In such circumstances, it was appropriate to rely on the presumption against the wrongdoer, the onus

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[10] *Pitcher Partners* at 489 [35].
[11] *Pitcher Partners* at 487 [22].
[12] *Pitcher Partners* at 488 [27]-[28].

of proof and resolving doubtful questions against the appellants whose actions have made an accurate determination problematic.

59. The Full Court acknowledged that the approach taken was based heavily in the deceit cases but explained its applicability to statutory damages under s 82.[13]

Principle two: the posited lawful means must be independent from the wrong

60. The primary judge was correct to identify a general policy of the law that a court is disinclined to allow a party to a contract to take advantage of its own wrongdoing (PJ[319]-[321] CAB 100-101). Such a policy of the law does not sit in the ether. It must be made specific to the legal rule in question. In the present case, this general policy of the law becomes relevant in the Court's assessment of the wrongdoer's attempt to set up a lawful means argument in two related ways.

61. The first is that the wrongdoer cannot be heard to set up a lawful means argument where that would allow it to escape or reduce its liability in damages while at the same time retaining the benefits of its wrong.

62. The second is that the Court will not allow the wrongdoer to set up hypothetically innocent intentions and consequences unless they are truly independent of the wrong.

63. The wrongdoer of whom we are speaking has made a known calculus in the *actual* world: that the benefits of achieving the ultimate goal by fraud justify the resort to fraud over the pursuit of lawful means which carry adverse commercial consequences.

64. That wrongdoer then asked the Court to reduce its damages on account of a *hypothetical* calculus: had it pursued the path of rectitude, it would have calculated that the benefits which only fraud could produce did not justify accepting the adverse commercial consequences which would flow from use of lawful means.

65. Taking both these points together, for practical purposes, for the wrongdoer to set up a lawful means argument, it needs to point to some matter, wholly independent of its wrong, which would have justified it bringing about the same detriment to the victim.

66. Support for this "independence" constraint can be discerned from the following cases. In *HTW Valuers* this Court considered the scope of matters that ought to be taken into account under s 82 of the TPA in circumstances where the plaintiff acquires something of lesser value than it was led to believe. The Court observed that a defendant can be liable for the loss arising from factors inherent in the object, land, or shares acquired.

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[13] *Pitcher Partners* at 507 [129]-[132].

However, the Court explained (citing *Potts v Miller* and *Gould v Vaggelas*) that "[i]f the cause be 'independent', 'extrinsic', 'supervening' or 'accidental', then the additional loss is not the consequence of the inducement.[14] Put another way, a defendant can escape liability for the whole of the diminution in value if it can point to a reason for the diminution in value which was *independent* from its deceit.

67. This Court has also insisted upon the independence principle for which the Appellants contend in cases of tort. In *Chappel v Hart* (1998) 195 CLR 232 Gummow J explained the application of the principles in *Malec* to the calculation of damages in respect of a negligent doctor who had failed to warn his patient of the risks associated with surgery, stating at 263 [83]:

> In the present case it would have been for Dr Chappel to show that Mrs Hart's damages were to be reduced to reflect the possibility being more than a speculation, that independently of his negligence Mrs Hart would have sustained at some later date the injuries of which she complained [emphasis added].

68. A similar approach is apparent with contractual damages, albeit in such cases the task for the contract breaker may be easier than the tortious or statutory wrongdoer. Damages under s 82 of the TPA or in deceit compensate for an act that is always wrongful, whereas terminating a contract is not an act prohibited per se by the law. It is sometimes justified by the contract and sometimes not. A party who terminates a contract without lawful justification, when there was another means available to it then, or later, by which the termination would have been justified, may be permitted to set up that alternative lawful means. But even here the lawful means must be independent of the wrongful termination and the court will not readily assume that a party who had lawful means available to it but chose not to take them at the time should be permitted to escape liability in damages on such ground.

69. In *Amann Aviation* the Commonwealth could potentially have lawfully terminated Amann through a show cause procedure involving the Secretary. The Commonwealth chose not to go through such procedure because it risked delay by which time the intended replacement provider might no longer be available. Each of the majority judges refused to allow a discount on the damages on this lawful means argument.[15]

70. That reasoning was consistent with the *Mihalis Angelos* where the defendant was

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[14] *HTW Valuers* at 659 [40], citing *Potts v Miller* (1940) 64 CLR 282 at 298 (Dixon J); and *Gould v Vaggelas* (1985) 157 CLR 215 at 220 (Gibbs CJ).

[15] *Amann Aviation* at 114 (Brennan J), see also 97 (Mason CJ and Dawson J), 149-150 (Gaudron J); cf the minority at 132-133 (Deane J), 146-148 (Toohey J), 176-177 (McHugh J).

permitted to rely upon the *plaintiff's* own failure (manifest at the time of the defendant's breach) to have the ship ready to load at its next port to reduce the damages that would otherwise have been payable upon its repudiation.[16] The plaintiff's failure was independent of the defendant's own repudiation.

71. That approach is also consistent with the subsequent line of English contract cases that have considered the *Mihalis Angelos*. In each case the Court looked at facts known in the real world (by the date of the trial) to assess damages by reference to a past hypothetical. In the *Golden Victory*[17] damages could be reduced because the outbreak of war meant the contract would (some years after the defendant's breach) have been cancellable under an express term of the contract. Similarly in *Bunge SA*[18] the imposition of an export ban was anticipated by the defendant; albeit too early at the time of repudiation. By the time of the trial the ban was manifest and it would have rendered the contract cancellable sometime after repudiation; damages were reduced accordingly.

Principle three: use of the *Sellars/Malec* approach

72. When the wrongdoer contends that, on a particular past date, it would hypothetically have used lawful means to bring about the same detriment to the victim as it actually did by the wrongful means, the *Sellars/Malec* principle[19] is in play.

73. The wrongdoer will have to prove, on the balance of probabilities, that there was a "substantial prospect" or a "prospect of value" that it would so have acted; if it passes this hurdle, the Court would then take into account the possibilities and probabilities in deciding what discount is necessary to the damages otherwise indicated.

74. The *Sellars/Malec* principle accommodates cases at both ends of the spectrum – where the past hypothetical event is so speculative or uncertain that no allowance is made for it;[20] or at the other end where it is near enough to a certainty to be treated as such.

75. In the present case, on the unchallenged findings of the Full Court the 2010 Policy Decision (FFC[200] CAB 210) falls into the latter category; whereas the possibility of

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[16] The *Mihalis Angelos* at 209-210 (Megaw LJ), as considered in *Amann Aviation* at 93-95 (Mason CJ and Dawson J), 113-114 (Brennan J), 149-152 (Gaudron J).

[17] *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (**Golden Victory**)* [2007] 2 AC 353 at 378-379 [27], 383 [37] (Lord Foscote), 392-393 [66] (Lord Carswell), 398 [82] (Lord Brown of Eaton-under Heywood).

[18] *Bunge SA v Nidera BV* [2015] 3 All ER 1082 (UKSC) at 1097 [35]-[36] (Lord Sumption).

[19] See cases cited under footnote 9 above.

[20] As, for example, in *Amann Aviation* itself, in the view of the majority regarding the speculative possibility of the Commonwealth exercising the show cause procedure in light of its actual repudiation.

a lawful termination on 24 February or within 2 months thereafter falls into the former.

76. That brings into focus the ultimate question: by what legal principle did the Full Court act, and how did it apply it to the evidence, in finding that Securency would, as a matter of virtual certainty, have behaved as at 1 June 2008 to the exact opposite of how the Full Court found it would have behaved but 5 weeks earlier?

B. APPLICATION OF PRINCIPLE TO THE PRESENT CASE

77. The Full Court recorded Securency's key submission as follows: it "*patently wished to terminate the Agency Agreement (in particular having regard to its attempts to do so), where Dr Berry was unable to fulfil his obligations as a result of his ongoing dispute with the Nigerian Government and where Securency had in fact appointed other entities to act as its agents in the region*" (FFC[204] CAB 210).

78. The Full Court proceeded to accept the first and third limbs of that submission but not the second (FFC[224]-[227] CAB 214-215).

79. It is convenient to take each paragraph of the Full Court's reasoning in turn, to identify the errors of law and fact.

80. ***Error in FFC [224]:*** The Full Court said: "*Next to be considered is that it is clear that Securency wanted to end its agency with Dr Berry*" (FFC[224] CAB 214). This statement, which appears to be a generalised finding about the intent of Securency in the actual world, begs fundamental questions:

    (a) Which person (or persons) in the decision-making tree of Securency had this intent – no specific person is identified here or later in the reasons?

    (b) On what date (or dates) did such unidentified person(s) form such intent – the finding reads as if it is speaking generally about the intent of Securency in the first half of 2008; in which event what happened during that period to change Securency from an entity which would *not* have issued such a notice up until 22 April 2008 into one which *would* have done so a mere 5 weeks later?

    (c) In discerning this generalised intent, is the Full Court relying on the person who in the actual world drove the termination, Mr Chapman; and if so how is the Full Court abstracting from his desire to terminate the Appellants *by fraud* into a willingness to recommend a termination *without fraud*?

81. ***Error in FFC [225]:*** The Full Court stated there was "*no reason to assume in the counterfactual that Securency would not have acted to terminate the Agency*

Agreement at the time when that agreement would otherwise have been automatically renewed for a further term of two years" [emphasis added].

82. Here we see the Full Court reasoning to the exact opposite of the correct approach to onus. It is as if, as soon as the wrongdoer can point to a possible hypothetical lawful means, the law will assume those means would have been taken unless the victim can point to compelling evidence to the contrary.

83. ***Error in FFC [226]:*** This paragraph is difficult to follow but might be read as a finding that a reason why Securency would have used lawful means against the Appellants on 1 June 2008 (but not earlier) was that by then the need to appoint replacement agents, specifically JHM, was so pressing that the risk of alienating Dr Berry, which would have prevailed over an earlier use of lawful means, would by now have been run.

84. As a species of reasoning, this appears to be drawing an inference in favour of Securency's argument as to what it *would* have done from these objective facts about its *actual* behaviour at the time. No doubt, in various circumstances, the law permits inferences of this kind to be drawn. But the question is: what role does this type of inferential reasoning play in a case like the present?

85. Securency was a wrongdoer. As of 24 February 2008, and for 2 months thereafter, the Full Court has concluded (correctly) that it was a virtual certainty that Securency would not have risked using lawful means for fear of alienating Dr Berry and thereby risking the "golden goose" of Nigerian polymer purchases.

86. The Full Court does not identify a witness for Securency giving evidence that the hypothetical calculus would have changed by 1 June 2008 or that it was so essential to get JHM in as an agent, *to the exclusion of the Appellants*, that risks which but 5 weeks earlier would have counted against lawful means now were worth running.

87. Why would the Court, in the absence of a Securency witness giving (reliable) testimony of the asserted hypothetical, find the hypothetical in Securency's favour, indeed, as noted, find it to be a virtual certainty?

88. Here the *Pitcher Partners* principles are apposite. The Full Court should have observed that the onus was on Securency; that it failed to lead direct evidence of any decision maker; that it failed to identify who on its behalf would have so acted in the asserted way; that all evidentiary doubts were created by its own wrongdoing; and that all inferences reasonably available should have been drawn *against* it, rather than in its favour.

89. There is a further problem with FFC[226] CAB 215 in that it focusses on *JHM* as the posited replacement agent driving the hypothetical use of lawful means against the Appellants. From mid 2007, Mr Chapman was promoting to Mr Ellery (under the false guise of Dr Berry's ill-heath) a package of *joint* replacements agents, SPT and JHM. The Full Court had earlier found, correctly and consistently with the primary judge, that, of the two, it was *SPT* that drove the (dishonest) agenda of Mr Chapman (see [21] above).

90. The Full Court does not identify how, in the hypothetical, the role of SPT would have been dealt with in the decision making by Securency.

10 91. To the extent that Mr Chapman was relevant to the hypothetical, he gave extensive evidence on a range of topics. He was thoroughly disbelieved by the primary judge (PJ[213]-[219] CAB 72-74) and his credit was not restored in the Full Court.

92. Securency had identified by its pleading[21] that the core witness it would rely on for its hypothetical was Mr Chapman's immediate superior, Mr Brown. Mr Brown, like Mr Chapman, was a person making recommendations, not a decision-maker.

93. Mr Brown gave evidence asserting reasons why he supported the termination of the Appellants, irrespective of whether Dr Berry had signed the Termination Letter (PJ[302] CAB 94-95). Mr Brown asserted three rolled together propositions: that Dr Berry was not travelling into Nigeria and therefore was not carrying out his functions
20 as agent; that he was ill and hospitalised in India; and he had started proceedings against the Nigerian government (being the Contec arbitration).

94. The primary judge specifically rejected this evidence of Mr Brown, including each of his three asserted reasons, giving convincing reasons for so doing (PJ[314]-[317] CAB 99-100). See also the various other findings against his credit.[22]

95. The Full Court did not reinstate Mr Brown's credit or evidence (FFC[230] CAB 216).

96. Neither of the two persons with decision-making authority within Securency, Mr Ellery and Mr Curtis, gave evidence. There was no basis in such evidence as was called to find the terms of an hypothetical recommendation to them from Mr Chapman and

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[21] Paragraphs [26AA] and [32(b)] ABFM pp 40-41.

[22] See PJ[22] CAB 15, PJ[35] CAB 20 (Mr Brown was not a witness on whose uncorroborated evidence the primary judge could rely); PJ[123] CAB 46 (rejecting Mr Brown's claim SPT would be used as a hub for Africa); PJ[155]-[157] CAB 55-56 (Mr Brown was *"not candid"* in his evidence of how the Appellants were replaced by JHM and SPT); PJ[160] CAB 57; PJ[164]-[166] CAB 58; PJ[168] CAB 59 (Mr Brown's knowing participation in the deceit against Dr Berry); PJ[171] CAB 60; PJ[293]-[294] CAB 92-93; PJ[302] and PJ[314]-[317] CAB 94-95 and 99-100.

Mr Brown consistently with FFC[226] CAB 215. It is simply unknown whether, if they had put forward a recommendation to use lawful means as a prelude to appointing SPT and/or JHM, there would have been a full disclosure of the "ill health" falsehood, or of Mr Chapman's plans to use SPT to obtain funds to pay bribes or whether further lies would have been told; or what Mr Ellery and Mr Curtis would have done in response to such unknown recommendation. It is also unknown how the relative merits of the Appellants, as the incumbent and successful agent, as against the rival, unproven SPT/JHM agents would have been presented to Mr Ellery or Mr Curtis; let alone how they would have assessed any such recommendation. Those problems of proof must be resolved against Securency.

97. In summary, it was antithetical to the *Pitcher Partners* approach for the Court to speculate on these matters, let alone conclude them in favour of the wrongdoer.

98. In those circumstances, it was an error of law as well as fact for the Full Court to draw the inference at FFC[226] CAB 215 that it was a virtually certainty that such benefits (unidentified as they were) in getting JHM in as an agent would have impelled Securency, as of 1 June 2008, to run the risk of alienating Dr Berry and Nigeria which risk, but 5 weeks earlier, was too grave to run.

99. ***Error in FFC [227]:*** At the end of the paragraph just critiqued, FFC[226] CAB 215, the Full Court referred back to its earlier finding at FFC[110]: *"one of the practical consequences of the contravening conduct was to bring Dr Berry's agency to an end without unnecessarily alienating him"* and further observed that Securency's witnesses accepted that *"Dr Berry continued to represent Securency"* before and after the contravening conduct, indeed as late as November 2008. At FFC[227] CAB 215 the Full Court returned to this theme, observing that *"the misleading conduct...made that limited involvement possible"*.

100. Yet it went on to hold within FFC[227] CAB 215: *"...Ultimately, without evidence of positive and substantive involvement of Dr Berry in Securency's business, we consider no more should be made of evidence such as Dr Berry's texts and his requests for information and meetings, in terms of proving that in the counterfactual Dr Berry would have continued to act as Securency's agent."*

101. What occurred here was a radical inversion of the onus and radical departure from the approach in *Pitcher Partners*. The Full Court asked itself the wrong question in trying to find within Dr Berry's text messages evidence of whether the Appellants were doing

enough to warrant some unidentified person within Securency hypothetically allowing the continuation of the Agency Agreement. Rather, it was for *Securency* to demonstrate when, why and by whom it would have terminated, and in doing so any difficulties of proof, which were all of its making, were to be resolved against it.

102. In the *actual* world, Securency by its wrong had procured Dr Berry to sign the Termination Letter by lulling him into the continuing belief that he remained "on the books" as Securency's agent so that he would continue to present himself as "on board" with Securency's plans to get more polymer orders from Nigeria.

103. On the findings, the first Dr Berry learnt that his position might be imperilled was after the scandal broke a full year later (see [28] above). For a good year after the posited date for application of lawful means to terminate the Appellants, the Appellants were, in the *actual* world, continuing to represent Securency to Nigeria. In doing so, the fraud was continuing to do its intended work. Since at no point in this period in the *actual* world was Securency prepared to be honest with the Appellants, or with Nigeria, about their real intent - that Dr Berry was no longer on "their team" - why would the Court assume that Securency would have behaved differently in the *hypothetical* world?

104. Indeed, even after the Appellants raised complaint in September 2009, Securency still was not prepared to admit what its real intent had been when it procured Dr Berry's signature on the Termination Letter back in February 2008. It chose silence over a response (see [30] above).

105. One can thus see the good sense, as well as policy of the law, in the primary judge's approach. Securency, as the wrongdoer, in the actual world of 24 February 2008 chose *not* to take lawful means to achieve its objectives. Why should the Court contemplate it might have acted differently, whether then or in the future, absent proof of a compelling matter independent of its fraud, which would have justified such action?

106. ***Conclusions by reference to Notice of Appeal:*** The Ground numbered [2] of the Notice of Appeal is made out. Securency was seeking to set up, in diminution of the damages otherwise indicated, a lawful means to inflict on the Appellants the harm which it actually inflicted by misleading and fraudulent conduct. This lawful means it chose not to take as of 24 February 2008, the date of the wrong.

107. Having regard both to the policy of the law and to the primary judge's undisturbed findings on the evidence of Mr Brown and Mr Chapman, no error was shown in the primary judge's conclusion (PJ[319]-[322] CAB 101-102) that Securency could not

be permitted to set up the lawful means argument (prior to the 2010 Policy Decision which, after the Full Court's further findings, fell into a different category).

108. Further, the Ground numbered [3] in the Notice of Appeal should also be upheld. The Full Court ought to have adopted the principles of onus and approach to evidence as outlined in *Pitcher Partners*. Had it done so, for this reason also, the primary judge made no error on his 2008 findings. Securency failed to discharge the onus on it in setting up the lawful means argument. Specifically, it failed to call any witness who had actual decision-making authority; or prove what recommendation would hypothetically have been made to such witness or how it would have been responded to; and the witnesses it did call (Mr Chapman and Mr Brown) were thoroughly disbelieved at trial and their credit unrestored on appeal.

109. The appeal should have been concluded on the basis that across the *whole* of the contested period – 24 February 2008 to 1 June 2008 – only one answer was open: there was no sound basis to identify who on behalf of Securency would have exercised the posited lawful means or why they would have done so, when as of 24 February Securency chose to procure the termination of the Agency Agreement unlawfully and fraudulently. It was not until the 2010 Policy Decision that Securency demonstrated a sound basis for concluding the Appellants would have been terminated for reasons unconnected with the fraud perpetrated upon them.

C. THE NOTICE OF CONTENTION

110. The Appellants will respond after submissions have been developed on the Notice of Contention other than to note the following matters of context and approach.

111. The Notice of Contention seeks to set up some deficiency in the ability of Dr Berry to perform his duties under the Agency Agreement as a reason why, hypothetically, Securency would have given lawful notice of termination on 1 June 2008.

112. One immediately asks, as per the analysis above: if there were any such deficiency, why was Securency not prepared to rely upon it in the actual world to give lawful notice of termination? Why instead did it resort to fraud on 24 February 2008 to achieve a termination?

113. Further, if there were any such asserted deficiency, when did it arise? Where is the evidence that it suddenly sprung up shortly before 1 June 2008 so as to justify lawful means on that date, consistent with the Full Court's findings, Securency would not have given notice in the 2 months after 24 February 2008?

114. And how does such argument sit with the strong and repeated findings of the primary judge, including credit findings,[23] which reject the contention that the Appellants had exhibited any relevant disability?[24]

115. Such findings span at least three matters: *first*, the substance of the performance of the Appellants' obligations involved physical meetings in London, as well as telephonic and electronic communications, of which the Appellants were on any view fully capable; *second*, express findings that Dr Berry's arbitration with Nigeria was not an obstacle to performance of the Agency Agreement; and *third*, that Mr Chapman and Mr Brown never at the time (or even when questioned internally 18 months later) asserted any such disability.

116. None of these findings were overturned by the Full Court, carrying out its rehearing function. There is no basis for this Court to do so.

PART VII: ORDERS SOUGHT BY THE APPELLANTS

117. The Appellants seek the orders set out in the Notice of Appeal at CAB 277.

118. The amount of damages is not in dispute if the Appellants are otherwise correct in their arguments on this appeal (see FFC[231] CAB 216-217).

PART VIII: TIME REQUIRED FOR PRESENTATION OF ORAL ARGUMENT

119. The Appellants estimate they will require 1.5 hours for oral submissions in chief plus 0.75 hours in reply and on the Notice of Contention.

Dated December 2019

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[23] **Mr Chapman**: PJ[22] CAB 15; PJ[35] CAB 20; PJ[116]-[117] CAB 44-45; PJ[120] CAB 46; PJ[166] CAB 58; PJ[168] CAB 59; PJ[171] CAB 60; PJ[203]-[205] CAB 70; PJ[209] CAB 71; PJ[213]- [219] CAB 72-74; PJ[267] CAB 85-86; PJ[282]-[286] CAB 89-91; and **Mr Brown**: see footnote 22 above.

[24] PJ[23] CAB 15; PJ[271]-[272] CAB 86-87.

ANNEXURE

Excerpts from *Trade Practices Act 1974* (Cth)

(as in force from 5 October 2007 to 1 July 2010)

Section 52 Misleading or deceptive conduct

(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive...

Section 82 Actions for damages

(1) Subject to subsection (1AAA), a person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV, IVA, IVB or V or section 51AC may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention...