



HIGH COURT OF AUSTRALIA

5 August 2020

BENOY BERRY & ANOR v CCL SECURE PTY LTD
[2020] HCA 27

Today the High Court unanimously allowed an appeal from part of a judgment of the Full Court of the Federal Court of Australia. The appeal concerned the assessment of damages under s 82 of the *Trade Practices Act 1974* (Cth) ("the TPA") in a case of misleading or deceptive conduct in contravention of s 52 of the TPA where the contravener contended that, but for its misleading or deceptive conduct, it would otherwise have used lawful means to bring about the same result.

The appellants entered into an agency agreement with the respondent, a producer of polymer banknotes, pursuant to which the appellants were to act as the respondent's agent in Nigeria in relation to the sale of opacified polymer to the Nigerian government. Under the agreement, the appellants were to receive commissions of 15% on the net invoiced sale value of opacified polymer sold to the Nigerian government. The agreement provided for its automatic renewal every two years unless terminated in accordance with its termination clauses, which provided that the agreement was terminable upon either party giving 30 days' written notice on or after the date 30 days before the contract was due to renew or upon the respondent giving 60 days' written notice at any time.

In early 2008, the respondent conceived of a plan to deprive the appellants of the commissions to which they would otherwise be entitled under the agreement. Pursuant to that plan, on 24 February 2008 a representative of the respondent induced the first appellant to sign a letter terminating the agreement by falsely representing that the execution of the letter was a matter of routine administration and that the existing financial terms of the agreement would continue.

The appellants commenced proceedings in the Federal Court seeking damages under s 82 of the TPA referable to the amount of the commissions that would have been payable had the termination letter not been signed in reliance on the respondent's misleading or deceptive conduct. The primary judge found that damages should be assessed by reference to the presumed continuation of the agency agreement as automatically renewed every two years up to the date of trial and held that, having deliberately engaged in misleading or deceptive conduct in contravention of s 52 of the TPA, the respondent could not be heard to complain that it had a lawful alternative means of termination which it elected not to take. On appeal, the Full Court considered that the primary judge's approach gave insufficient weight to the counterfactual possibility of lawful termination and concluded that it was to be inferred that, but for the misleading or deceptive conduct, the respondent would lawfully have terminated the agreement on 30 June 2008. By grant of special leave, the appellants appealed to the High Court.

Unanimously allowing the appeal, the High Court held that, since it was established on the balance of probabilities that the respondent terminated the agency agreement by deliberately deceiving the first appellant, the natural inference was that the respondent was not and would not have been prepared to terminate the agreement by lawful means. The evidential burden thereupon shifted to the respondent to adduce evidence sufficient to establish that there was a real (not negligible) possibility that it would have been prepared to terminate the agreement by lawful means at some

date before June 2010. The respondent adduced no such evidence. To the contrary, the available evidence established was that it was highly improbable that the respondent would have exercised its right to terminate the agreement lawfully prior to June 2010. It followed that the appellants were entitled to damages representing the commissions to which they would have been entitled under the agency agreement up to June 2010.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*