HIGH COURT OF AUSTRALIA

BELL, GAGELER, KEANE, NETTLE AND EDELMAN JJ

BENOY BERRY & ANOR APPELLANTS

AND

CCL SECURE PTY LTD RESPONDENT

Berry v CCL Secure Pty Ltd
[2020] HCA 27
Date of Hearing: 3 June 2020
Date of Judgment: 5 August 2020
S315/2019

ORDER

1. *Appeal allowed.*

2. *Set aside orders 1 and 2 made by the Full Court of the Federal Court of Australia on 4 June 2019 and, in lieu thereof, order that, in place of order 2 made by Rares J on 17 August 2018, there be judgment for the appellants in the sum of $27,078,507, plus interest pursuant to statute.*

3. *The respondent pay the appellants' costs of the appeal to the Full Court of the Federal Court of Australia and to this Court.*

On appeal from the Federal Court of Australia

Representation

J T Gleeson SC with C S Ward SC and P F Santucci for the appellants (instructed by Marque Lawyers)

G K J Rich SC with J L Roy and J E Taylor for the respondent (instructed by Arnold Bloch Leibler)

CATCHWORDS

Berry v CCL Secure Pty Ltd

Damages – Misleading or deceptive conduct – Where first appellant induced to give up agreement by respondent's misleading or deceptive conduct in contravention of s 52 of *Trade Practices Act 1974* (Cth) – Where appellants sought damages pursuant to s 82 of *Trade Practices Act* referable to amounts payable had agreement not been terminated – Whether respondent entitled to contend that but for its misleading or deceptive conduct it would have lawfully terminated agreement – Whether presumption against wrongdoers applied – Whether evidence established real (not negligible) possibility that respondent would have terminated agreement by lawful means.

Words and phrases – "balance of probabilities", "counterfactual lawful termination", "deliberate contravention", "evidential burden", "lawful means alternative", "legal burden", "misleading or deceptive conduct", "notice of termination", "presumption against wrongdoers", "real (not negligible) possibility", "recovery of damages for lost commercial opportunities", "reversal of onus of proof".

Trade Practices Act 1974 (Cth), ss 52, 82.

1 BELL, KEANE AND NETTLE JJ. This is an appeal from a judgment of the Full Court of the Federal Court of Australia (McKerracher, Robertson and Lee JJ)[1] allowing in part an appeal from judgments of the Federal Court (Rares J)[2]. The question is whether the Full Court erred in their assessment of the amount recoverable by the appellants under s 82 of the *Trade Practices Act 1974* (Cth) ("the TPA") for the loss or damage they suffered by the respondent's misleading or deceptive conduct contrary to s 52 of the TPA, where such conduct caused the appellants to give up an agreement beneficial to them yet where, but for the misleading or deceptive conduct, the respondent would have been entitled lawfully to terminate the agreement. For the reasons which follow, the Full Court erred in their assessment of the damages payable, and the appeal should be allowed.

The facts

2 The facts of the matter were found by the primary judge in very considerable detail, but, for present purposes, they may be stated compendiously.

3 Up until about 2013, the Reserve Bank of Australia and Innovia Films Ltd (a United Kingdom company and a subsidiary of Union Chimique Belge) ("Innovia Films") conducted a 50-50 joint venture through the respondent (then named Securency Pty Ltd) ("Securency"). Together, they had succeeded in commercialising the production and printing of polymer banknotes using production facilities at Securency's premises in Craigieburn, which was then an outer suburb of Melbourne. The polymer printing process consisted of three stages. The first involved Innovia Films producing a large bubble or film of polymer to be cut into many sheets. Innovia Films had two production plants, one of which was at Craigieburn. The second stage involved the conversion of the polymer film sheets into opacified polymer or polymer substrate, a process known as "opacification". Innovia Films had two opacification plants, one of which was also at Craigieburn. The third stage involved a mint or commercial banknote printer using suitable equipment to print banknotes or other specialised documents on the opacified polymer.

4 Although more expensive to produce, opacified polymer banknotes have distinct technical and economic advantages over paper banknotes, including the principal advantage that they last in circulation at least four or five times longer than their paper equivalents, resulting in a cost saving for the central bank or mint of the issuing government. In 1992, the Commonwealth of Australia began

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1 *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81.

2 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546; *Berry v CCL Secure Pty Ltd [No 2]* [2018] FCA 1351.

printing Australian banknotes on polymer. Thereafter, throughout the 1990s, Securency set about marketing polymer banknotes and opacified polymer to other nations' central banks, governments and mints. By 2004, a total of 17 countries had switched to printing one or more denominations of their banknotes on opacified polymer.

5 The Federal Republic of Nigeria ("Nigeria") was one of the countries to which Securency directed its marketing efforts, but, initially, to no avail. It was only later, when the first appellant ("Dr Berry") became involved in the marketing effort, that the then president of Nigeria, President Obasanjo, and the then Governor of the Central Bank of Nigeria ("the CBN"), Governor Soludo, agreed to place an order.

6 Dr Berry is a successful entrepreneur who resides primarily in the United Kingdom. Since 1978, he has controlled several companies which, under contract or by participation in public-private partnerships, have provided substantial services to Nigeria and other countries. In or around 2004, Dr Berry became involved in Securency's efforts to market polymer banknotes to Nigeria. While Dr Berry was valuable to Securency as a person who held influence with senior officials within the Nigerian government, Dr Berry's aim, from the outset, was to be commercially involved in constructing and operating an opacification plant in Nigeria. With Securency's encouragement, between 2004 and 2006 Dr Berry negotiated Nigeria's possible adoption of polymer banknotes with Nigerian government officials on the basis that, in the long term, an opacification plant would be built in Nigeria in which Dr Berry, Securency (if it wished) and the CBN or Nigerian Security Printing and Minting Plc (the mint for the Nigerian government) ("the Nigerian Mint") would hold interests. To this end, by early June 2006, Dr Berry had procured, on Securency's behalf, the sale of 20,000 reams of opacified polymer to the Nigerian Mint for use in the printing of polymer banknotes.

7 At around the time that this order was placed, Dr Berry met with Securency's director of sales and marketing, Mr Hugh Brown, to negotiate the final terms of an agency agreement ("the Agency Agreement") under which Dr Berry and the second appellant (a company controlled by Dr Berry and incorporated in the United Kingdom in 2004 for the purposes of negotiating with the Nigerian government on Securency's behalf) ("GSC") would act as the sole agent of Securency in Nigeria. They agreed that the Agency Agreement should provide for Dr Berry and GSC to receive a commission of 15% on the net invoiced sale value of opacified polymer sold to the Nigerian government. The Agency Agreement was subsequently executed and backdated to take effect from 2 February 2006 to accommodate Dr Berry's earlier success in procuring the sale of 20,000 reams of opacified polymer and the considerable expense incurred in doing so.

8 Clause 3.1 of the Agency Agreement provided that the Agency Agreement would continue "until the Expiry Date unless terminated earlier in accordance with this Agreement". The "Expiry Date" was defined in Sch 1 to the Agency Agreement as follows:

> "This agreement remains valid until 30th June, 2008 and will be automatically renewed for further terms every two years unless terminated as per the Termination clauses contained in the contract."

Clause 3.2 provided that the Agency Agreement would continue until terminated by 30 days' written notice given by either party to the other party at any time on or after the date 30 days before the Expiry Date. Clause 2.6 provided that the agreement was also terminable at any time upon Securency giving 60 days' written notice.

9 During the latter part of 2006 and in 2007, one of the companies controlled by Dr Berry, Continental Transfert Technique Ltd ("Contec"), became involved in an unrelated commercial dispute with agencies of the Nigerian government. On 20 November 2007, Contec commenced an international arbitration proceeding in London against the Nigerian government, its Attorney-General and its Minister for the Interior.

10 In the latter part of November 2007, Dr Berry met with Governor Soludo, the Nigerian Minister for Finance and the Nigerian High Commissioner at the Nigerian High Commissioner's residence in London to discuss means of increasing the value of the naira. Shortly afterwards, on around 20 or 21 November 2007, Dr Berry met with Governor Soludo and Mr Brown at the Metropole Hotel in London. During the latter meeting, Governor Soludo made clear that a written commitment by Securency to move towards establishing an opacification plant in Nigeria was integral to the conversion of all of Nigeria's denominations of banknotes to polymer. Mr Brown allowed Governor Soludo to believe that Securency would be willing to establish such a plant if Nigeria converted all its denominations to polymer and met numerous conditions, including the use of sufficient polymer notes to satisfy Securency. Mr Brown also sought to persuade Governor Soludo to proceed with a further order for five and ten naira notes to be printed on polymer, by assuring Governor Soludo that Securency would send him a letter within the next few weeks dealing with Securency's proposals for the construction of an opacification plant in Nigeria. Those assurances were false. Mr Brown well knew that Securency had no wish to build an opacification plant in Nigeria. Nonetheless, he gave the false assurances because he believed that Securency would not gain further contracts to supply printed polymer banknotes or opacified polymer to Nigeria unless Governor Soludo, the other Nigerian authorities, and Dr Berry were persuaded that an opacification plant would be built.

11 Soon afterwards, on 23 January 2008, the Nigerian Mint placed an order with Securency for a further 10,000 reams of opacified polymer, and, between 23 and 28 January 2008, the managing director of the Nigerian Mint informed Securency that the Mint would be placing orders for a further 20,000 reams in 2008. These were very valuable orders which would result in invoiced sales worth tens of millions of euros. But Securency did not tell Dr Berry or GSC about them. Instead, as the primary judge found[3], Securency hatched a surreptitious plan to replace Dr Berry and GSC as Securency's agent in Nigeria, and to do so retrospectively in order to deprive Dr Berry and GSC of the 15% commission to which they would otherwise be entitled under the Agency Agreement on the sales to Nigeria.

12 Pursuant to that plan, on 24 February 2008, Securency's director of business development for Africa and the Middle East, Mr Peter Chapman, had a meeting and lunch with Dr Berry at Dr Berry's home in London. During the two or so hours that the occasion lasted, Mr Chapman told Dr Berry that he had brought some documents with him which had been drafted by lawyers in Australia and which Dr Berry was required to sign as a matter of "routine" administration. One of the documents was a letter of termination dated 14 February 2008, addressed to Dr Berry, in the following terms ("the termination letter"):

> "**Securency Agency Agreement – Nigeria**
>
> I refer to our recent discussions and confirm that the Agency Agreement with Securency dated 2nd February 2006 was terminated in accordance with the terms of the Agreement as from 31 December 2007.
>
> Kindly acknowledge the formal termination of the Agency Agreement by signing and returning the duplicate copy of the letter attached.
>
> Yours faithfully
>
> John Ellery
> Chief Financial Officer
> Securency International Pty Ltd"

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3 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [12], [166], [170].

The other document was a draft memorandum of understanding, which Mr Chapman identified as a partnership agreement that laid the foundations for the development of the opacification plant in Nigeria.

13 Mr Chapman told Dr Berry, falsely, that the Agency Agreement had to be terminated before the partnership agreement could be put into place. Mr Chapman also said that all Dr Berry needed to do in relation to the memorandum of understanding was sign it and that it would then be taken back to Australia, put through the normal routine of being endorsed, and sent back to Dr Berry. Mr Chapman said that, in the meantime, the existing financial terms of the Agency Agreement would continue. Believing what Mr Chapman told him to be true, Dr Berry signed an acknowledgement at the foot of a copy of the termination letter, which read as follows:

> "I hereby acknowledge that the Agency Agreement with Securency dated 2nd February 2006 was terminated on 31 December 2007 in accordance with the terms of the Agreement.
>
> Benoy Berry
> Global Secure Currency Limited"

14 The memorandum of understanding was not endorsed or sent back to Dr Berry or even retained by Securency. But, as the primary judge found[4], Dr Berry continued to act as agent believing that he and GSC remained the agent. There was some evidence that, unbeknownst to Dr Berry and GSC, on 5 or 6 February 2008 JH Marketing (Africa 2000) Ltd (a company incorporated in the United Kingdom) ("JH Marketing") executed an agreement to act as Securency's agent in the territory of Nigeria and the Economic Community of West African States ("the ECOWAS") which was countersigned by Securency shortly afterwards and that, on or about 6 August 2008, Securency terminated the agency agreement with JH Marketing and entered into a replacement agency agreement with JHM Global (FZC) (a company incorporated in the United Arab Emirates) ("JHM Global"). But, as will be seen[5], both of those events were contrived retrospectively to make it appear that there was a legitimate basis for diverting the commissions that would otherwise have been payable to Dr Berry and GSC to JH Marketing, JHM Global and another company, SPT Ltd ("SPT"). It was not until well into 2009 that Dr Berry learned the truth of what had occurred, after the media

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4 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [236].

5 See [52] below.

had publicised allegations that officers of Securency, including Mr Chapman, had paid bribes or been party to corrupt payments to government officials to procure contracts or orders of opacified polymer or polymer banknotes for Securency.

Proceedings at first instance

15 Before the primary judge, each party proceeded on the basis that, if Securency were found to have engaged in misleading or deceptive conduct contrary to s 52 of the TPA, the amount recoverable by Dr Berry and GSC under s 82 of the TPA depended on the commissions that would have been payable had the termination letter not been signed in reliance on Securency's wrongful conduct. Dr Berry and GSC based their claim on the provisions of the Agency Agreement that provided for its automatic renewal every two years, and contended that damages should be assessed as if, but for Dr Berry being tricked into signing the termination letter, the Agency Agreement would have continued indefinitely or at least until June 2010, when Securency terminated all of its other agency agreements (as the result of public disclosure in or about May 2009 of the bribery allegations). Securency countered that it should be concluded that, if Dr Berry had not signed the termination letter, Securency would have terminated the Agency Agreement lawfully on 60 days' notice under cl 2.6 or on 30 days' notice, expiring on 30 June 2008, under cl 3.2. Securency relied on evidence given by Mr Brown, who, with Mr Chapman, had recommended to Messrs Curtis, Ellery and Mamo of "the senior management" that the Agency Agreement should be terminated because:

> "[Dr Berry was] not travelling into Nigeria, as far as we were concerned, and therefore he was not carrying out his functions as agent … He was uncontactable and also we believed that he was ill and was hospitalised in India … and most compelling of all, was that he had started proceedings against the Nigerian government … we felt that would have denigrated his ability to perform for Securency."

16 The primary judge rejected Mr Brown's evidence and concluded[6] that Securency would not have been prepared to terminate the Agency Agreement lawfully because:

(1) unilateral termination of the Agency Agreement would have converted Dr Berry from a person who was using his influence with the Governor and other senior Nigerian officials to advance Securency's interests into a person who would be likely to impede those interests;

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6 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [314]-[319].

(2) after 15 May 2007, Securency, through Mr Chapman, had, by his handwriting on the second version of the signed Agency Agreement, recently extended its territory to include the ECOWAS following Dr Berry's consistent urging of Securency to develop a proposal for the opacification plant, which the Governor also wanted;

(3) there was no evidence to support Mr Brown's assertion that Dr Berry's and Contec's legal issues or the arbitration had any effect on Dr Berry's other relationships with the Nigerian government or his capacity to do business with it;

(4) there was no evidence that Dr Berry was inhibited, and no contemporaneous evidence that Securency perceived him in 2007 or 2008 to be inhibited, in performing the agency whether by reason of his inability, unwillingness or failure to travel to Nigeria, or at all;

(5) Mr Brown's suggestion that Dr Berry was in ill health or hospitalised had no evidentiary basis and was belied by Mr Brown's request for, and use of, Dr Berry in the November 2007 meeting at the Metropole Hotel, which was an important step in procuring the January 2008 order from the Nigerian Mint; and

(6) Securency's action in tricking Dr Berry into signing the termination letter at the February 2008 meeting implied that it was not prepared at the time to use its contractual right to terminate.

17 The primary judge thus concluded[7] that, having committed the fraud which his Honour found the misleading or deceptive conduct to have been, Securency could not be heard to complain that it had a lawful alternative path which it chose not to take. His Honour's preliminary view[8], which apparently formed the basis for the judgment ultimately awarded[9], was that damages should be assessed by reference to the presumed continuation of the Agency Agreement, as automatically renewed, based on actual sales to Nigeria by Securency, less just allowances for expenses that Dr Berry and GSC did not have to incur, up to the date of trial.

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7 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [322].

8 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [327].

9 *Berry v CCL Secure Pty Ltd [No 2]* [2018] FCA 1351 at [19], [21], [24].

Proceedings before the Full Court

18 Before the Full Court, Securency contended that, as no attack had been made on the evidence (given by Innovia Films' chief executive officer, Mr Beeby) that Securency decided to terminate all agency agreements in 2010, there was no proper basis for damages to exceed what could have been earned under the Agency Agreement up until, at the latest, 29 November 2010. The Full Court accepted that contention[10], and it is not now suggested that their Honours were wrong to do so.

19 Before the Full Court, Securency further contended that the primary judge had erred in not accepting Mr Brown's evidence that Securency had considered Dr Berry to be unable to fulfil his obligations under the Agency Agreement due to his ongoing dispute with the Nigerian government. Securency argued that, if that were accepted, and given that Securency had in fact moved to terminate the Agency Agreement by procuring Dr Berry's signature to the termination letter and further appointing other entities to act as its agents in the region, the overwhelming likelihood was that, if Dr Berry had not signed the termination letter, Securency would have exercised its unhindered right to terminate the Agency Agreement either immediately on 60 days' notice, or, at the latest, by giving 30 days' notice expiring on 30 June 2008.

20 By and large, the Full Court accepted that argument. Their Honours held[11] that the primary judge erred in reasoning that, because the termination letter was "ineffective" as a result of the "fraud", it was to be presumed that the Agency Agreement would have continued to operate according to its terms, including in respect of the rate of commission and provision for automatic renewal, for the purpose of assessing damages. The Full Court stated[12] that such an approach gave insufficient weight to the counterfactual possibility of lawful termination and its inherent probabilities. Their Honours observed[13] that, while the "fraud" sufficed to "invalidate" the termination letter, it did not obviate the need in assessing statutory compensation under s 82 of the TPA to consider on the balance of probabilities what Securency would otherwise have done if the wrongful conduct had not occurred.

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10 *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 at [195].

11 *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 at [209].

12 *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 at [209].

13 *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 at [218].

21 The Full Court did not accept that it was more probable than not that, if Dr Berry had not signed the termination letter, Securency would have given a lawful termination notice on 24 February 2008, or, therefore, that the Agency Agreement would have been terminated by 25 April 2008. Their Honours said[14] that they agreed with the primary judge's reasoning to the extent that, if Securency had at that time been prepared to give lawful notice of termination, there would have been no point in Securency engaging in the fraudulently misleading or deceptive conduct at the 24 February 2008 meeting. For much the same reason, the Full Court said[15] that they also did not accept that Securency would have given a notice of termination on 26 March 2008 expiring on 26 May 2008. Their Honours appear to have reasoned that a period of just four weeks was too short to make a relevant difference. The Full Court applied the same reasoning to conclude that Securency would not have issued a notice of termination on 22 April 2008, just eight weeks after the February 2008 meeting.

22 The Full Court acknowledged the primary judge's finding that text messages between Dr Berry and Mr Chapman and Dr Berry's requests for information and meetings in the period after 24 February 2008 demonstrated, first, that Dr Berry was unaware that his agency had been terminated, and secondly, that Mr Chapman was treating Dr Berry as if he and GSC continued to be Securency's agent. Their Honours found[16], however, that such messages recorded no more than "logistical details of setting up a meeting, and pleasantries", that any involvement of Dr Berry after the February meeting was limited and that, although Securency procured that involvement by inducing Dr Berry to believe that he remained the agent, absent the misleading or deceptive conduct the factors that motivated the replacement of Dr Berry would have ensured that his agency would have been lawfully terminated. Ultimately, their Honours concluded[17] that, in the absence of evidence of positive and substantive involvement of Dr Berry in Securency's business after February 2008, it was to be inferred that, but for the misleading or deceptive conduct, Securency would lawfully have terminated the agreement on 30 June 2008 by 30 days' notice given on 1 June 2008. Thus, damages were to be computed accordingly.

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14 *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 at [219].

15 *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 at [220].

16 *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 at [227].

17 *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 at [228].

The appellants' contentions

23 In their written submissions before this Court, Dr Berry and GSC contended that three principles govern the correct approach to the determination of damages in a case of deliberate contravention of s 52 of the TPA where the contravener contends it would otherwise have used lawful means to bring about the same end, and that the Full Court failed to observe them. The first, which was said to derive from *Armory v Delamirie*[18] and has been recently recognised by the Full Court of the Federal Court in *Pitcher Partners Consulting Pty Ltd v Neville's Bus Service Pty Ltd*[19], is that the court should assess damages 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'". The second principle, which was said to be evident in this Court's decisions in *Potts v Miller*[20], *Gould v Vaggelas*[21] and *The Commonwealth v Amann Aviation Pty Ltd*[22], is that a wrongdoer will not be heard to set up a lawful means alternative to escape or reduce its liability in damages while at the same time retaining the benefit of its wrong, and, moreover, that the court will not allow the wrongdoer to set up hypothetically innocent intentions and consequences unless they are truly independent of the wrong. It was contended that it follows from these two constraints that a wrongdoer must be able to point to some matter wholly independent of its wrongdoing which would have justified the wrongdoer lawfully achieving the result achieved by the wrong. The third principle, which was put in the alternative and supported by reference to *Malec v J C Hutton Pty Ltd*[23] and *Sellars v Adelaide Petroleum NL*[24], is that a wrongdoer alleging that, but for its

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18 (1722) 1 Strange 505 [93 ER 664].

19 (2019) 271 FCR 392 at 417 [109] per Allsop CJ, Yates and O'Bryan JJ, quoting *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46 at 59 per Handley JA (Mason P and Beazley JA agreeing at 48, 60), in turn quoting *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1990) 24 NSWLR 499 at 508 per Hodgson J.

20 (1940) 64 CLR 282 at 298 per Dixon J.

21 (1984) 157 CLR 215 at 220 per Gibbs CJ.

22 (1991) 174 CLR 64 at 114 per Brennan J.

23 (1990) 169 CLR 638.

24 (1994) 179 CLR 332 at 355 per Mason CJ, Dawson, Toohey and Gaudron JJ.

contravening conduct, it would have deployed lawful means to bring about the same detriment to the victim, must at least prove on the balance of probabilities that there was a "substantial prospect" or "prospect of value" that it would have so acted.

24 In oral argument, Dr Berry and GSC principally submitted that the Full Court erred in finding that "it [was] clear that Securency wanted to end its agency with Dr Berry"[25], and erred in law – in effect, reversing an onus of proof – in holding that, in the absence of evidence of positive and substantive involvement of Dr Berry in Securency's business after February 2008, "there [was] no reason to assume in the counterfactual that Securency would not have acted to terminate the Agency Agreement"[26].

The respondent's contentions

25 Securency submitted to the contrary that there is no principle that the onus lies on a wrongdoer to establish the facts necessary to justify the inference of a counterfactual lawful termination, or, if there is, that Securency discharged the onus by adducing evidence sufficient to establish on the balance of probabilities that the Agency Agreement would have been terminated, at latest, by the end of the first half of 2008. Securency further contended that there is no principle that a wrongdoer must be able to point to a matter wholly independent of its wrongdoing in order to advance a counterfactual argument supported by evidence and relevant causal inquiry as to the proper assessment of damages. And Securency argued that, if and insofar as the appellants' invocation of the principles of assessment identified in *Sellars* and *Malec* was for the purpose of impugning the Full Court's approach to the assessment of damages, it was misplaced, because the parties agreed before the Full Court that the method followed by the Full Court (of determining on the balance of probabilities the date on which, but for the termination letter, the Agency Agreement would have been terminated) was the way that damages were properly to be assessed.

The effect of the termination letter

26 Before turning in detail to the three principles for which Dr Berry and GSC contended, it is to be observed that, if the termination letter had been "ineffective"

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25 *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 at [224].

26 *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 at [225].

in law, as the primary judge at one point in his Honour's reasons said it was[27], and the Full Court, at least in terms, accepted it was[28], then Dr Berry and GSC could not have suffered any loss or damage by reason of Securency's misleading or deceptive conduct. If the termination letter had been "ineffective", the Agency Agreement would have continued, and, in that event, Dr Berry's and GSC's only claim would have been for commissions accrued due under the Agency Agreement up until that contract was lawfully terminated[29]. But, contrary to the reasoning of the courts below, the termination letter was *not* "unravelled"[30] or "invalidate[d]"[31] by Securency's "fraud". As was observed in *SZFDE v Minister for Immigration and Citizenship*[32], "[t]he vitiating effect of fraud is not universal throughout the law". A transaction induced by misrepresentation is not void, but merely voidable[33], and, if the misrepresentee brings proceedings like the subject proceedings claiming loss and damage dependent on the efficacy of the "transaction" (*scil* dependent upon the termination letter having deprived Dr Berry and GSC of the benefit of the Agency Agreement), the misrepresentee is taken to affirm the transaction[34]. Given, therefore, that the termination letter was effective, the loss and damage suffered by Dr Berry and GSC by reason of Dr Berry being tricked into signing the termination letter was and is properly cognisable as the loss of their legal rights under the Agency Agreement.

27 It is also to be observed that it is not entirely clear what the primary judge intended to convey by his Honour's observation that Securency, having committed

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27 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [320], [333].

28 *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 at [209].

29 See *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd* (1936) 54 CLR 361 at 379 per Dixon and Evatt JJ.

30 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [334].

31 *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 at [218].

32 (2007) 232 CLR 189 at 196 [16] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ.

33 See, eg, *Larratt v Bankers and Traders Insurance Co Ltd* (1941) 41 SR (NSW) 215 at 225 per Jordan CJ.

34 See, eg, *McAllister v Richmond Brewing Co (NSW) Pty Ltd* (1942) 42 SR (NSW) 187 at 191-192 per Jordan CJ.

the fraud of deceiving Dr Berry into signing the termination letter, could not be heard to assert in mitigation of damages that it had a lawful alternative path to termination, albeit which it chose not to take, of terminating the Agency Agreement under cl 3.2 or cl 2.6[35]. Some of his Honour's reasoning suggests that he was of the opinion that reliance on such an hypothetical counterfactual was precluded as a matter of law because to allow it to be advanced would be to allow Securency to take advantage of its fraud. But on another reading of his Honour's reasoning, it appears that his Honour may have meant no more than that the fact of the fraud demonstrated, as a matter of forensic proof, that Securency was not prepared to use its contractual rights to terminate the Agency Agreement, and, hence, it was to be inferred that, in the absence of the fraud, Securency would not have been prepared to do so. If his Honour intended to convey the former, it would have been an error. Permitting a fraudster to plead and prove a lawful counterfactual which, but for its fraud, the fraudster would have pursued, is not in any sense to permit the fraudster to take advantage of its fraud. As will be explained[36], it is to do no more than to limit the amount recoverable by the victim to the amount of loss or damage which the victim is shown to have suffered "by" the contravening conduct within the meaning of s 82 of the TPA. That accords with the general principle at common law that a wrongdoer is not required to compensate a victim for loss which the wrongdoer does not cause, even where the cause of action is the tort of deceit[37]. By contrast, if his Honour meant to convey that, in circumstances where a party has resorted to fraud to achieve an objective which it was open to achieve by lawful means, it becomes more difficult, if not impossible, to draw an inference that, but for the fraud, that party would have chosen to proceed by lawful means, then, as will be explained, his Honour's process of reasoning was entirely consistent with established principle and authority. Ultimately, however, it makes no difference to the result in this matter because, as will be seen, it was not established that there was a real (not negligible)

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35 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [322].

36 See fn 39 below. See also *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525 per Mason CJ, Dawson, Gaudron and McHugh JJ; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 116 [16] per Gleeson CJ; *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at 643-644 [49] per Gummow and Hayne JJ.

37 See fnn 47-49 below. See also *The National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569 at 597 per Windeyer J; *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506 at 509, 514 per Mason CJ; *Chappel v Hart* (1998) 195 CLR 232 at 242 [23] per McHugh J.

possibility that Securency would have terminated the Agency Agreement by lawful means at any time before June 2010.

First principle: onus of proof

28 As claimants under s 82 of the TPA, Dr Berry and GSC generally bore the legal burden of establishing the existence and amount of the loss or damage that they suffered by Securency's misleading or deceptive conduct in contravention of s 52 of the TPA[38]. That entailed establishing the net "value or worth of the rights and benefits" that they surrendered upon Dr Berry signing the termination letter[39]. Since that value inhered in the commissions that would have been payable under the Agency Agreement if not so terminated, it depended on both the period for which the Agency Agreement would have continued and the commissions that would have been payable under it for as long as it did. For example, assuming counterfactually that, if Securency had not tricked Dr Berry into signing the termination letter, it appeared certain that Securency would have given notice lawfully terminating the Agency Agreement on 24 February 2008, one would have to conclude that Dr Berry and GSC did not suffer any loss or damage by reason of signing the termination letter: for, on that hypothesis, they would have been no worse off by signing the letter than they would have been if they had not signed it. By contrast, if it appeared certain that Securency would *not* have lawfully terminated the Agency Agreement until sometime after 24 February 2008 when commissions would have become payable, one would have to conclude that Dr Berry and GSC had suffered loss or damage in an amount dependent on the time for which the Agency Agreement would have thus continued before lawful

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38 *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 7 per Gibbs CJ, 15 per Mason, Wilson and Dawson JJ; *Sellars* (1994) 179 CLR 332 at 353 per Mason CJ, Dawson, Toohey and Gaudron JJ, 359, 367 per Brennan J; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 513 [43] per McHugh, Hayne and Callinan JJ, 533 [111] per Gummow J; *Henville v Walker* (2001) 206 CLR 459 at 482 [68] per Gaudron J. See generally *Watts v Rake* (1960) 108 CLR 158 at 159 per Dixon CJ; *Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA) Pty Ltd* (1984) 157 CLR 149 at 160 per Gibbs CJ, Mason, Wilson and Dawson JJ, 172-173 per Brennan J; *Amann Aviation* (1991) 174 CLR 64 at 80, 88 per Mason CJ and Dawson J, 99 per Brennan J, 118 per Deane J, 137 per Toohey J; *Chappel v Hart* (1998) 195 CLR 232 at 270 [93(4)] per Kirby J.

39 cf *Wardley* (1992) 175 CLR 514 at 527 per Mason CJ, Dawson, Gaudron and McHugh JJ.

termination and the commissions payable under the Agency Agreement during that period.

29 While a claimant bears the legal burden of establishing the amount of its loss or damage, the nature and circumstances of the wrongdoer's conduct may support an inference or presumption[40] that shifts the evidentiary burden[41]. That accords with the principle encapsulated in *Armory v Delamirie*[42] that, where a wrongdoer has destroyed or failed to produce evidence which the innocent party requires to show how much he or she has lost, it is just that the wrongdoer should suffer the resulting uncertainty. Hence, in that case, since the defendant by his wrongful conversion of the plaintiff's stones, and failure to produce them at trial, had made it impossible for the plaintiff to prove the quality of them, the stones were presumed to be of the highest quality and value[43]. One relevant modern application of that principle is reflected in this Court's decision in *Amann Aviation*, in which it was held[44] that where, upon acceptance of the Commonwealth's repudiation of a contract, Amann claimed damages for loss of the contract, Amann was entitled to recover "reliance damages" assessed on the basis of a rebuttable presumption that the net benefits to which Amann would have been entitled under the contract (if the contract had not been rescinded) would have been sufficient to cover the expenditure which Amann incurred pursuant to the contract. As

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40 See *Masson v Parsons* (2019) 93 ALJR 848 at 858-859 [32] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ; 368 ALR 583 at 594.

41 See, eg, *Morison v Walton* (unreported, House of Lords, 10 May 1909), as explained in *Coldman v Hill* [1919] 1 KB 443 at 458 per Scrutton LJ; *H West & Son Ltd v Shephard* [1964] AC 326 at 363 per Lord Devlin, cited in *Skelton v Collins* (1966) 115 CLR 94 at 99 per Kitto J.

42 (1772) 1 Strange 505 at 505 per Pratt CJ [93 ER 664 at 664]. See also *Lupton v White* (1808) 15 Ves Jun 432 at 440 per Lord Eldon LC [33 ER 817 at 820]; *The Ophelia* [1916] 2 AC 206 at 229-230 per Sir Arthur Channell for the Privy Council; *Allen v Tobias* (1958) 98 CLR 367 at 375 per Dixon CJ, McTiernan and Williams JJ; cf *Rosebanner Pty Ltd v EnergyAustralia* (2009) 223 FLR 406 at 473-474 [456]-[457] per Ward J.

43 See Chitty, Denning and Harvey, *Smith's Leading Cases*, 13th ed (1929), vol 1 at 393, 404-405.

44 (1991) 174 CLR 64 at 86-89 per Mason CJ and Dawson J, 105-107 per Brennan J, 126-127 per Deane J, 142-143 per Toohey J, 155-156 per Gaudron J.

Brennan J explained[45], because the Commonwealth had repudiated the contract and thereby deprived Amann of the ability to establish that the contract would have returned sufficient to recoup Amann's contractual expenses, it was to be presumed that Amann would not have incurred its expenditure in reliance on the contract without a reasonable expectation that its performance of the contract would have returned it sufficient to recoup its expenses, and thus it was just that the Commonwealth should bear the ultimate onus of proving at least a prospect that Amann's returns under the contract would not have been sufficient to recoup that expenditure. By contrast, as Brennan J observed[46], if a claimant seeks "expectation damages" for the loss of a chance that, had an agreement run to term, it may have been renewed or extended, the onus is on the claimant to establish those facts, although, even then, since the existence and degree of such an hypothetical possibility is, by reason of the wrongful termination of the contract, incapable of proof on the balance of probabilities, it is considered just that the wrongdoer should suffer the resulting uncertainty to the extent that proof to the level of a real (more than negligible) possibility is regarded as enough. The worth of the chance is then valued by a process of informed estimation.

30 For reasons to be explained, in this case it is unnecessary to invoke either of the presumptions considered in *Amann Aviation*, and for that reason it is convenient to delay consideration of *Pitcher Partners* until later in these reasons.

Second principle: innocent hypotheses

31 *Potts v Miller*[47] and *Gould v Vaggelas*[48] relevantly stand as authority that, where a claimant is induced by deceit to enter into a transaction, the claimant is entitled to recover by way of damages the actual damage "directly" flowing from the fraudulent inducement – including losses flowing from causes "inherent" in the transaction – but is not entitled to recover losses of which the cause is "independent", "extrinsic", "supervening" or "accidental" such that those losses cannot rationally be regarded as caused by the deceit[49]. There is nothing, however,

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45 *Amann Aviation* (1991) 174 CLR 64 at 105-106, 113.

46 *Amann Aviation* (1991) 174 CLR 64 at 108.

47 (1940) 64 CLR 282 at 298 per Dixon J.

48 (1984) 157 CLR 215 at 220-222 per Gibbs CJ.

49 See also *Twycross v Grant* (1877) 2 CPD 469 at 544-545 per Cockburn CJ; *Toteff v Antonas* (1952) 87 CLR 647 at 650 per Dixon J; *Doyle v Olby (Ironmongers) Ltd*

in or about those decisions which suggests that a wrongdoer will not be heard to set up a lawful means alternative while retaining the benefits of its wrong or if considerations that justified the wrong at all feature in the calculus that the wrongdoer would otherwise have undertaken. Nor is there anything in or about *Amann Aviation* which lends any weight to that notion. Rather to the contrary, it was expressly recognised in *Amann Aviation*[50] that, ordinarily, the purpose of "compensatory damages" in the common law is "fair and adequate compensation", not punishment, and that "artificial forms of reasoning", including in assessing such compensation, are increasingly rejected "in favour of allowing tribunals of fact to give such probative force to evidentiary materials as they think fit having regard to all the circumstances of the case".

Third principle: *Sellars*

32 By parity of reasoning with *Malec*[51] and *Amann Aviation*[52], in *Sellars*[53] it was held that, where a claimant established on the balance of probabilities that misleading or deceptive conduct contrary to s 52 of the TPA caused the claimant the loss of a commercial opportunity of *some* value (not being a negligible value), the value of that lost opportunity was to be ascertained by reference to hypotheses and possibilities which, though they were speculative and therefore not capable of proof on the balance of probabilities, could be evaluated as a matter of informed estimation.

33 Similarly, in this matter, if the state of the evidence were that, although it did not establish on the balance of probabilities that, but for Securency's misleading or deceptive conduct, the Agency Agreement would have continued beyond 30 June 2008, it nevertheless established that there was a more than negligible chance that, but for Securency's misleading or deceptive conduct, the Agency Agreement would have continued beyond that date, Dr Berry and GSC

[1969] 2 QB 158 at 167 per Lord Denning MR; *South Australia v Johnson* (1982) 42 ALR 161 at 170 per Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ.

50 (1991) 174 CLR 64 at 116 per Deane J, 166 per McHugh J.

51 (1990) 169 CLR 638 at 639-640 per Brennan and Dawson JJ, 642-643 per Deane, Gaudron and McHugh JJ. See also *Badenach v Calvert* (2016) 257 CLR 440 at 454 [39]-[40] per French CJ, Kiefel and Keane JJ.

52 (1991) 174 CLR 64 at 92 per Mason CJ and Dawson J, 102-104 per Brennan J, 118-119 per Deane J.

53 (1994) 179 CLR 332 at 355 per Mason CJ, Dawson, Toohey and Gaudron JJ, 368 per Brennan J.

would have been entitled to claim that the measure of their damages fell to be determined by reference to the hypothetical possibility that, but for Securency's misleading or deceptive conduct, Securency would have waited a substantial time after 24 February 2008 before terminating the Agency Agreement. In that event, and subject to questions of the way in which the matter was conducted below, it would have been necessary to undertake an assessment of the likelihood of the various hypothetical possibilities and to compute an award based on that assessment. But, as will be explained, in fact the state of the evidence was and is that it establishes on the balance of probabilities that, but for Securency's misleading or deceptive conduct, the Agency Agreement would have continued until 30 June 2010; and so, therefore, the assessment of damages is properly to be undertaken on the basis of the commissions which would have been payable under the Agency Agreement up to that point.

The appellants' reliance on *Pitcher Partners*

34 In *Pitcher Partners*, the Full Court of the Federal Court (Allsop CJ, Yates and O'Bryan JJ) discerned[54] the existence of a qualification to the general proposition that a claimant bears the onus of proving damages, to the effect that, in cases where damage is claimed to have been suffered by reason of a deliberate wrong, the court should assess the damages in a robust manner relying on the presumption against wrongdoers whose actions have made an accurate determination problematic. As appears from the Full Court's reasons, their Honours considered[55] that the existence of such a qualification was supported by three lines of authority. The first, of which *Armory v Delamirie* is representative and *Amann Aviation* is a specific exemplar, consists of cases where a wrongdoer is made to suffer the uncertainty resulting from its own conduct[56]. In *Indian Oil Corporation Ltd v Greenstone Shipping SA (Panama)*[57], Staughton J characterised such cases as those where the court does "the only justice that [can] be done". The second consists of cases supporting the notion approved by Gummow J in *Palmer*

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54 (2019) 271 FCR 392 at 418 [116].

55 *Pitcher Partners* (2019) 271 FCR 392 at 413-418 [94]-[117].

56 See [29] above.

57 [1988] QB 345 at 362, 368, quoting *Lupton v White* (1808) 15 Ves Jun 432 at 440 per Lord Eldon LC [33 ER 817 at 820].

Bruyn & Parker Pty Ltd v Parsons[58] that, whereas the exclusion of heads of loss in the law of negligence reflects considerations of legal policy, in cases of deliberate wrongdoing the object of damages is to compensate the claimant for all the loss it has suffered so far as money can do. *Gould v Vaggelas* demonstrates the point[59]. The third, and seemingly most influential, line of authority in the Full Court's reasoning consists of decisions of the Court of Appeal of the Supreme Court of New South Wales in *Houghton v Immer (No 155) Pty Ltd*[60], *McCartney v Orica Investments Pty Ltd*[61] and *Tyco Australia Pty Ltd v Optus Networks Pty Ltd*[62], to the effect that the *Armory v Delamirie* presumption against a wrongdoer goes beyond cases where the nature of wrongdoing makes it impossible for the claimant to prove the precise amount of damage suffered to cases in which the wrongdoing thrusts a claimant into a difficult task of proving a past hypothetical. On those bases, the Full Court in *Pitcher Partners* concluded[63] that, where a claimant had entered into a contract on the faith of the company's accountants' negligently erroneous advice (to the effect that amounts payable under the contract would be sufficient to cover the cost of finance leases which the claimant was required to enter into as part of the contract) and the claimant subsequently took over the finance leases at a time when the accountants, although having since become aware of the error, deliberately concealed it from the claimant, the claimant was entitled to recover damages for the accountants' misleading or deceptive conduct computed on the basis that, if not so deceived, the claimant could *and would* have renegotiated the amounts payable under the contract to cover the costs of the finance leases. Moreover, and more significantly, the Full Court

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58 (2001) 208 CLR 388 at 413 [78], citing *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 at 279 per Lord Steyn. See also *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39 per Lord Blackburn.

59 See [31] above. See also *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483 per Bowen LJ, cited in *Standard Chartered Bank v Pakistan National Shipping Corpn [Nos 2 and 4]* [2003] 1 AC 959 at 967 [16] per Lord Hoffmann.

60 (1997) 44 NSWLR 46 at 59 per Handley JA (Mason P and Beazley JA agreeing at 48, 60), quoting *LJP Investments Pty Ltd* (1990) 24 NSWLR 499 at 508 per Hodgson J.

61 [2011] NSWCA 337 at [149]-[154] per Giles JA (Macfarlan and Young JJA agreeing at [192], [193]).

62 [2004] NSWCA 333 at [246] per Giles JA.

63 (2019) 271 FCR 392 at 419-420 [124] per Allsop CJ, Yates and O'Bryan JJ.

held[64] that it was not necessary for the claimant to prove on the balance of probabilities that it *would* have been successful in so renegotiating the contract. According to the Full Court, it was enough that there was a "sufficient likelihood" of that occurring to permit the court, using the "robust approach" warranted by the contribution of the wrongdoer to the claimant's difficulties of proof, to award damages equal to the full costs of the finance leases.

35 *Prima facie*, the conclusion that the claimant was entitled to damages equal to the full costs of the finance leases presents as questionable. Although the primary judge in *Pitcher Partners* found[65] it to be proved on the balance of probabilities that the claimant would have been successful in negotiating full recoupment of the finance lease costs, the Full Court stated[66] that such a finding was unnecessary to justify full recovery. As has been seen, their Honours considered[67] that it was enough that there was a "sufficiently real possibility" or "sufficient likelihood" – expressions which, used as they were in contradistinction to proof "on the balance of probabilities", imply that their Honours conceived of "sufficient likelihood" as being something less than proof on the balance of probabilities. Of course, there was no doubt that the accountants' deceit deprived the claimant of a commercial opportunity of negotiating for recoupment of the finance lease costs. But, as has been seen[68], previous decisions of this Court concerning the recovery of damages for lost commercial opportunities – regardless of whether they are commercial opportunities to earn an extension or renewal of a contract, as in *Amann Aviation*, or to negotiate a new contract, as in *Sellars*, or even to institute proceedings for the recovery of damages, as in *Malec* – have held that, once it is established on the balance of probabilities that the defendant's wrong caused the loss of opportunity, the value of the loss falls to be determined (and discounted) according to the assessed degree of likelihood that, assuming the claimant had been able to exploit the opportunity, it might not have resulted in all of the gain that was hoped for. On that basis, but for the primary judge's finding in *Pitcher Partners* that it was proved on the balance of probabilities that the claimant would have been successful in negotiating total recoupment of the finance lease

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64 *Pitcher Partners* (2019) 271 FCR 392 at 420 [125] per Allsop CJ, Yates and O'Bryan JJ.

65 *Neville's Bus Service Pty Ltd v Pitcher Partners Consulting Pty Ltd* [2018] FCA 2098 at [243] per O'Callaghan J.

66 *Pitcher Partners* (2019) 271 FCR 392 at 420 [125].

67 *Pitcher Partners* (2019) 271 FCR 392 at 419 [123], 420 [125].

68 See [29], [32] above.

costs, it might be thought that the amount of damages awarded for the lost opportunity to negotiate should have been no more than the proportion of the finance costs assessed according to the degree of likelihood that, if the claimant had been able to renegotiate the contract, the negotiation would have proved entirely successful.

36 For present purposes, however, it is unnecessary finally to determine whether the decision of the Full Court in *Pitcher Partners* correctly states the law relating to damages for deceit. The established authority of this Court governing the assessment of damages under s 82 of the TPA for the loss of a commercial opportunity caused by misleading or deceptive conduct contrary to s 52 of the TPA is relevantly as laid down in *Sellars*. Where a claimant establishes on the balance of probabilities that misleading or deceptive conduct contrary to s 52 has caused the loss of a commercial opportunity of some value (not being a negligible value), the value of the lost opportunity is to be ascertained by reference to hypotheses and possibilities which, though they may not be capable of proof on the balance of probabilities, are to be evaluated as a matter of informed estimation. But, to repeat, this matter is capable of resolution without resort to that principle.

Error in the Full Court's approach

Onus of proof

37 In accordance with general principle[69], where a contract is terminated for anticipatory breach, or, as in this matter, terminated as a result of misleading or deceptive conduct, a claimant claiming damages for loss of the contract bears the onus of establishing on the balance of probabilities what would have been the value of the contract to the claimant had it not been so terminated. The value is to be determined objectively, and thus, where the lost contractual rights were by their terms capable of being rendered less valuable in certain events, the assessment must take account of the possibility that those events might have eventuated[70]. More generally, if there are two or more ways in which a wrongdoer could lawfully

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69 See fn 38 above.

70 *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 QB 164 at 196-197 per Lord Denning MR, 202-203 per Edmund Davies LJ, 209-210 per Megaw LJ; *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha* [2007] 2 AC 353 at 382 [36] per Lord Scott of Foscote; *Bunge SA v Nidera BV* [2015] 3 All ER 1082 at 1092 [23] per Lord Sumption JSC (Lord Neuberger PSC, Lord Mance and Lord Clarke JJSC agreeing).

have performed a contract which is rescinded for anticipatory breach, it is to be assumed that, but for rescission, the wrongdoer would have adopted the mode of performance most beneficial to the wrongdoer[71]. And so, if the contract was lawfully terminable at the instance of the wrongdoer, it must be valued accordingly and, subject to the evidence, not as if it were bound to continue.

38 So to say, however, does not mean that the mere existence of the wrongdoer's right to terminate the contract operates automatically to restrict the damages that can be awarded[72]. The question is whether, absent rescission, the wrongdoer would have terminated the contract. And to decide that requires the court to have regard to all the facts and circumstances of the case, including events extraneous to the contract that were within the control of the wrongdoer, such as the need to retain third party custom. As Diplock LJ observed in *Lavarack v Woods of Colchester Ltd*[73], one must not assume that a wrongdoer would cut off its nose to spite its face by controlling such events so as to reduce its legal obligations to the claimant and incurring greater loss in other respects. By parity of reasoning, in this matter, it would be wrong to assume, without proof, that Securency would have been prepared to give a lawful notice of termination to Dr Berry and GSC before June 2010.

39 Furthermore, although a claimant bears the burden of proof in the sense of the ultimate burden of establishing its case on the balance of probabilities, the burden of proof in the sense of introducing evidence is liable to shift constantly "according as one scale of evidence or the other preponderates"[74]. Consequently, where, as here, it is established on the balance of probabilities that a wrongdoer purposely chose to achieve a certain result by means of a calculated deceit, the natural inference is that the wrongdoer was not and would not have been prepared

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71 See, eg, *Cockburn v Alexander* (1848) 6 CB 791 at 814 per Maule J [136 ER 1459 at 1468-1469]; *Withers v General Theatre Corporation Ltd* [1933] 2 KB 536 at 551 per Scrutton LJ.

72 See *Amann Aviation* (1991) 174 CLR 64 at 91-93 per Mason CJ and Dawson J, 113-115 per Brennan J, 132-133 per Deane J, 143-144 per Toohey J, 149-150 per Gaudron J; *TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd* (1989) 16 NSWLR 130 at 154 per Hope JA (Priestley and Meagher JJA agreeing at 161, 163).

73 [1967] 1 QB 278 at 295-296.

74 *Purkess v Crittenden* (1965) 114 CLR 164 at 168 per Barwick CJ, Kitto and Taylor JJ, quoting Argyle, Havers and Benady, *Phipson on Evidence*, 10th ed (1963) at 95 [95].

to bring about that result by lawful means. As the majority observed in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*[75], the conventional perception is that members of our society do not ordinarily engage in fraudulent conduct. That perception, which underpins the need for clear evidence of fraud[76], implies that a person would not intentionally mislead another without sufficient cause to do so. So, in the absence of contrary evidence, it may be inferred that the reason for engaging in the fraud was sufficient to dissuade the fraudster from proceeding by lawful means. The evidential burden thereupon shifts to the fraudster to adduce evidence sufficient to establish that, if it had not acted as it did, it would have been prepared to bring about the same result by lawful means. And in the absence of such evidence, it is fair to infer that there was not a realistic possibility of that occurring.

40 Ultimately, the Full Court reasoned to their conclusion that the Agency Agreement would have been lawfully terminated by no later than 30 June 2008 as follows[77]:

> "As we have said, if Securency wanted to engage another agent it was free to do so and it is clear that in the first half of 2008, it did want to do so. We note, for example, that, on the findings of the primary judge[78], on 5 or 6 February 2008, JH Marketing ... executed an agency agreement for the territory of Nigeria and the [ECOWAS] which was, by 14 February 2008, countersigned by Securency. As recorded[79], on about 6 August 2008, Securency terminated the agency agreement with JH Marketing ... and entered into a replacement agency agreement with JHM Global ... We do not see it as significant whether or not Dr Berry was in any relationship with JHM whereby he would be doing work for them. As we noted[80] above, one

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75 (1992) 67 ALJR 170 at 171 per Mason CJ, Brennan, Deane and Gaudron JJ; 110 ALR 449 at 450.

76 See *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 per Dixon J. See also *Helton v Allen* (1940) 63 CLR 691 at 701 per Starke J; *Hocking v Bell* (1944) 44 SR (NSW) 468 at 475 per Davidson J.

77 *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 at [226]-[228].

78 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [174]-[178].

79 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [222], [255].

80 *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 at [110].

> of the practical consequences of the contravening conduct was to bring Dr Berry's agency to an end without unnecessarily alienating him, which allowed Securency to continue to make some limited use of Dr Berry possibly including a meeting between Mr Chapman and Dr Berry as late as November 2008 (although, as the primary judge noted[81], there was no evidence of what transpired at that meeting).
>
> Although the primary judge said that Dr Berry's texts with Mr Chapman and his requests for information and meetings was a demonstration that he was not acting as if his agency had been terminated and Mr Chapman was not treating Dr Berry as if it had, in our opinion the text messages themselves record no more than logistical details of setting up a meeting, and pleasantries. What is evident is that any post February Meeting involvement of Dr Berry was limited and although the misleading conduct of Securency made that limited involvement possible, in the counterfactual, absent the misleading conduct, the factors that motivated the replacement of Dr Berry would have ensured that his agency would have been brought to an end. 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.
>
> We therefore find, for the purpose of assessing quantum that, absent the contravening conduct, the Agency Agreement would have terminated on 30 June 2008."

41 Hence, as it appears, although their Honours were satisfied on the balance of probabilities that Securency was sufficiently concerned about alienating Dr Berry and Nigeria to refrain from serving a lawful notice of termination on 24 February 2008, 26 March 2008, and 22 April 2008, their Honours concluded[82] that there was "*no reason to assume* in the counterfactual" that "*the factors that motivated the replacement of Dr Berry*" would not have ensured that his agency would have been brought to an end at the first expiry date. More specifically, despite accepting that, until 22 April 2008, Securency was so concerned about the potential ramifications of lawful termination as to eschew the option of lawful termination, the Full Court considered that it was probable that, just over a month later, on 1 June 2008, Securency would have become sufficiently unconcerned

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81 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [271].

82 *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 at [225], [227] (emphasis added).

about the ramifications of lawful termination as to embrace that option, and that Dr Berry and GSC had failed to negative that possibility.

Reversal of onus of proof

42 There are two problems with that process of reasoning. The first is that it appears to proceed upon an assumption that "the factors that motivated the replacement of Dr Berry" would have been sufficient to overcome Securency's reticence about giving a lawful notice of termination, thereby suggesting that the evidential burden lay on Dr Berry and GSC to adduce evidence to dispel the assumption. If so, the reasoning is unsound. As has been explained[83], since Dr Berry and GSC had established on the balance of probabilities that Securency terminated the Agency Agreement by deliberately deceiving Dr Berry, the natural inference was that Securency was not and would not have been prepared to terminate the Agency Agreement by lawful means. The evidential burden thereupon shifted to Securency to adduce evidence sufficient to establish that there was a real (not negligible) possibility that circumstances so changed by 1 June 2008 (or some later date before June 2010) that Securency would then have been prepared to terminate the Agency Agreement by lawful means. Securency adduced no such evidence.

Facts not proved

43 The second problem is that, even if the Full Court intended to convey that their Honours were of opinion that "the factors that motivated the replacement of Dr Berry" were sufficient to establish that there was a real (not negligible) possibility that Securency would have terminated the Agency Agreement by notice given on 1 June 2008, it is clear that was not the case. The Full Court identified these "factors" as being: (1) that Securency "patently wished to terminate the Agency Agreement (in particular having regard to its attempts to do so)"; (2) that "Dr Berry was unable to fulfil his obligations as a result of his ongoing dispute with the Nigerian Government"; and (3) that "Securency had in fact appointed other entities to act as its agents"[84]. The difficulty with that, as counsel for Dr Berry and GSC submitted, is that none of those "facts" was established.

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83 See [39] above.

84 *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 at [204].

44 There was no evidence that Securency patently wished to terminate the Agency Agreement. As the primary judge found[85], there were no contemporary documents that could or did provide any explanation for replacing Dr Berry and GSC as Securency's agent for Nigeria. The evidence included a memorandum from Mr Chapman to Mr Ellery and Mr Brown purportedly dated 15 August 2007 which proposed that SPT and JH Marketing be appointed to replace Dr Berry and GSC on the basis that Mr Chapman was "very conscious of [Dr Berry's] ongoing health issues which might impact on his travelling and therefore his capacity to fulfil his duties under the agreement". But, as the primary judge found[86], the document was created by Mr Chapman well after 15 August 2007 and its contents were fabricated. And, as has been seen[87], there was no evidence that Dr Berry's and Contec's legal issues or arbitration proceeding had any effect on Dr Berry's other relationships with the Nigerian government. To the contrary, Governor Soludo's determination in the November 2007 meeting, and in another meeting in March 2008[88], was that Dr Berry should be involved in the construction of the opacification plant, and Securency was conscious of the importance of that objective to the Nigerian government. Further, such evidence as there was in support of the notion that, "on 5 or 6 February 2008, JH Marketing ... executed an agency agreement for the territory of Nigeria and the [ECOWAS] which was, by 14 February 2008, countersigned by Securency"[89] was highly problematic. None of Securency's records covering the period between 15 August 2007 (being the date of the backdated memorandum) and 1 January 2008 (being the date of a further backdated document entitled "REQUEST FOR APPOINTMENT OF AN AGENT") made any reference to SPT or JH Marketing, and, as the primary judge found[90], the latter document was created much later in 2008 (certainly after late May 2008) and backdated in order to provide a false audit trail. The primary judge similarly found[91] that a handwritten note from Mr Chapman to Mr Ellery dated 21 or 26 January 2008 purportedly requesting Dr Berry's release from the Agency

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85 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [123].

86 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [114].

87 See [16(3)] above.

88 See [46] below.

89 See [40] above.

90 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [156].

91 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [169]-[170].

Agreement and referring to his "continuing ill health" was backdated for the purposes of creating a false audit trail. His Honour concluded[92] that Securency's creation of a false audit trail was motivated by a desire "to explain why, despite the contemporaneous commercial success of Dr Berry's agency in securing orders for 30,000 reams of opacified polymer or polymer substrate, Securency had 'released' Dr Berry and GSC from the agency agreement as from 31 December 2007 and so would not be liable to pay them all the commission that they would otherwise have been entitled to receive".

45 The capacity of SPT and JH Marketing to act as Securency's agent was also, to say the least, highly suspect. On 9 July 2007, Mr Chapman emailed Mr Ellery a company profile of JH Marketing, which, as the primary judge observed[93], described JH Marketing's clients as "supermarkets, food, beverage, diaper and battery suppliers". The backdated memorandum of 15 August 2007 proposed that Securency conduct formal due diligence on SPT and JH Marketing with a view to both companies being appointed to operate "within the same scope and commission parameters as the entities they are replacing". There was no evidence of any such due diligence having been conducted. Furthermore, Mr Chapman accepted in cross-examination that, as at August 2007, neither JH Marketing nor SPT was based in Nigeria, and he accepted unequivocally that neither of them could supply the service of providing security and transport in Nigeria. Mr Chapman testified that, as at 15 August 2007, a company called "SPT Limited" had offices in or near Pretoria in South Africa (although he did not know whether it was incorporated or not and there was no document in evidence that referred to any company named "SPT Limited" or "SPT" that was based in South Africa). He claimed that a Don McArthur and a Dave Marais, with whom he and Messrs Brown and Curtis of Securency had worked previously, as well as one John McKay, were the principals of "SPT Limited". But, as the primary judge found[94], "[i]n comparison to the ability of Dr Berry to meet directly with the President of Nigeria, Ministers in its Government and other senior officials, Mr Brown's perception of what Mr McArthur might be able to achieve in Nigeria through his contacts with a mobile telephone company [made] no apparent commercial sense". Mr Brown sought to explain the incongruity of appointing SPT by saying that "SPT was intended to be a hub for Africa, and we were setting up hubs in three different parts of the world", namely, Africa (based in South Africa), Latin America, and "the Far

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92 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [170].

93 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [107].

94 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [122].

East, Asia and the Pacific" (to be dealt with from the head office in Australia). But the primary judge rejected that evidence on the basis[95] that it was "not supported by any document" and "in the teeth of the documents and agreements [Mr Brown] or Securency wrote to and made with SPT and JH Marketing that confined their activities to Nigeria". His Honour concluded[96] that Mr Brown gave that evidence falsely "because he realised that no contemporary documents existed that could or did provide any explanation for replacing Dr Berry and GSC as Securency's agent for Nigeria".

46 Contrary also to the Full Court's reasoning, Securency's conduct towards Dr Berry after he signed the termination letter manifestly bespoke continuation of the Agency Agreement. For example, on 16 March 2008, Mr Chapman signed two letters on Securency's letterhead addressed to GSC, the first dealing with Securency's conditions for the supply of polymer substrate and the second headed "Conditions for the consideration of a Memorandum of Understanding pertaining to the construction of an Opacification Plant in Nigeria". In late March 2008, Dr Berry and Mr Chapman met with Governor Soludo in the United Kingdom. The primary judge inferred[97] that, although neither Dr Berry nor Mr Chapman referred to Securency's letters dated 16 March 2008 in connection with this meeting, Mr Chapman had ensured Dr Berry had received them "for the purpose of his being able to assure the Governor of the then position on the progress that Securency and Dr Berry were making to progress towards the construction of the opacification plant". In mid-July 2008, Dr Berry contacted Mr Chapman by text noting that he had not heard from him, and Dr Berry followed that up with a further text in mid-August 2008. In late August 2008, Mr Chapman responded, suggesting a meeting in early September 2008, when he would be in the United Kingdom. On 29 September 2008, Dr Berry texted Mr Chapman, informing him that he was soon to meet Governor Soludo, and, in November 2008, Dr Berry and Mr Chapman had a meeting at Dr Berry's home in the United Kingdom. Admittedly, as the primary judge observed, there was "no evidence of what transpired" at the meeting[98], but, in the absence of evidence of any other reason for it, it is a fair inference that it concerned matters pertinent to the agency.

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95 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [123].

96 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [123].

97 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [240].

98 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [271].

47 On 2 June 2009, Dr Berry sent Mr Chapman a text informing him that Governor Soludo had been replaced by Governor Sanusi. On 17 June 2009, Dr Berry asked Mr Chapman for clarification on Securency's position and plans moving forward, emphasising that he was under pressure. That was followed by further texts requesting meetings. In response, on 20 July 2009, Mr Chapman sent Dr Berry a text asking if he could have "GSC position ready to discuss tomorrow afternoon". Dr Berry gave evidence, which the primary judge accepted[99], that he understood from his discussions and dealings with his lawyers and Governor Sanusi that Mr Chapman wanted to know what guarantees GSC required or could accept from Securency for the supply of polymer for an opacification plant. All of that correspondence is entirely inconsistent with the idea of any sort of transition to SPT and JH Marketing or JHM Global.

48 Mr Brown gave evidence as to why, he said, he would have supported the termination of the Agency Agreement if the termination letter had not been signed, and gave as his reasons that Dr Berry was not travelling to Nigeria, and therefore not discharging his functions as agent, that Dr Berry was unwell and was hospitalised in India, and that Dr Berry had started the Contec arbitration proceedings against the Nigerian government. But the primary judge not only rejected Mr Brown as a credible witness generally but rejected each of the three reasons as contrary to the objective evidence[100]. As his Honour observed[101], there was no evidence that Dr Berry was inhibited in his agency obligations in relation to Nigeria, and no contemporaneous evidence that in 2007 or 2008 Securency perceived him to be so inhibited by reason of his inability, unwillingness or failure to travel to Nigeria. The suggestion that he was so inhibited was inconsistent with Mr Brown's request for, and use of, Dr Berry in the meeting with Governor Soludo in late November 2007 at the Metropole Hotel in London (which was an important step in procuring the January 2008 order from the Nigerian Mint). None of the documents that Messrs Chapman, Brown, Ellery or Mamo of Securency created immediately after that meeting suggested that there was any problem with Dr Berry's performance of the agency. Mr Brown conceded that immediately before the meeting he and Dr Berry had discussed the possibility of Dr Berry's appointment as agent in India. Mr Chapman continued to use Dr Berry after 24 February 2008, including by having him meet Governor Soludo in London on 24 March 2008. There was no evidence that Dr Berry was unwell or restricted by illness in his ability to travel and, as has been seen, in fact he travelled extensively. And the suggestion that Dr Berry was in ill health or hospitalised had no

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99 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [280].

100 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [314]-[318].

101 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [317].

evidentiary basis and was also belied by Mr Brown's request for, and use of, Dr Berry in the November 2007 meeting.

49 On 6 February 2008, Ms Whatley on behalf of JH Marketing wrote to Securency enclosing two executed copies of what purported to be an agency agreement between Securency and JH Marketing for the territory of Nigeria and the ECOWAS. It was later purportedly executed by Messrs Curtis and Ellery on behalf of Securency. But, on 22 July 2008, Mr Ellery emailed Mr Chapman attaching two draft agency agreements for SPT and JHM Global, noting that "we are still awaiting completion of the due diligence for SPT". The terms of the SPT agency agreement were materially similar to those for JH Marketing and JHM Global except that the SPT agreement provided that SPT was entitled to a commission of 12% and the territory was limited to only Nigeria. Mr Chapman responded the next day that the agreement for JHM Global looked "fine" and that he had emailed the draft SPT agency agreement to SPT for review. He suggested that Mr Ellery "issue" the agreement for SPT's execution to hold pending "final due diligence". But, as the primary judge observed[102], there was "no evidence of what, if any, due diligence Securency ever performed in respect of SPT", and, "[c]learly enough, these emails show[ed] that nothing of substance had been done to appoint any entity called SPT at any time contemporaneous with the documents that Mr Ellery, Mr Brown and Mr Chapman created for the paper or audit trail". On 6 August 2008, Ms Whatley, on behalf of JH Marketing, and Messrs Curtis and Ellery, on behalf of Securency, signed a letter of that date purporting to terminate the agency agreement between Securency and JH Marketing of February 2008, and, on the same date, Ms Whatley, on behalf of JHM Global, signed a new agency agreement between JHM Global and Securency on the same terms as the agreement between Securency and JH Marketing. There was equally no evidence of any due diligence conducted in respect of JH Marketing and no reason to suppose that it was a suitable Nigerian agent.

50 On 13 August 2008, Mr Chapman emailed Mr Ellery attaching a draft letter for Securency to execute and stating as the purpose of the letter that, once the SPT agency agreement was signed, SPT "could prove their status and *bona fides* to those with whom they need to discuss on our behalf and might require proof on a confidential basis". But the reality was that, only a few days later, on 22 August 2008, Securency made its first payment of commissions to SPT, which Securency's commission statement described as being "[i]n respect of 16,000 reams of N20 substrate shipped April-July 2008", being commissions supposedly earned long before SPT was appointed as agent. Then, on 25 August 2008, Mr Ellery signed a formal letter about SPT's appointment. Based, therefore, on the payment of commission on 22 August 2008, and the fact that Mr Ellery signed the

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102 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [252], [254].

formal letter about SPT's appointment on 25 August 2008, the primary judge concluded that SPT and Securency entered into the SPT agency agreement on 22 August 2008 and that it was backdated to 1 January 2008 in an attempt to justify the payment of commissions in respect of sales going back that far[103].

51 In the result, the primary judge found[104] that, overall, SPT received five 12% commission payments totalling about €5.23 million, and that it was safe to infer that Securency paid JH Marketing and JHM Global at the least €3.3 million, being their 8% commission for the same period and shipments, and yet there was no evidence of anything that JH Marketing or JHM Global or SPT had ever done to bring about any order from Nigeria for opacified polymer.

52 The Full Court did not overturn any of those findings and it would not have been open to their Honours to do so. On the basis of the available evidence, the inference was ineluctable that the supposed agency agreements between Securency and SPT and JH Marketing, and later JHM Global, were a pretence retrospectively fabricated in an effort to provide the appearance of a lawful justification for the diversion to SPT, JH Marketing and JHM Global of commissions that, but for the fraudulently procured termination letter, Dr Berry and GSC would have received under the Agency Agreement. It is also apparent on that basis that the sole "factor" that "motivated the replacement of Dr Berry" was Securency's resolve to cheat Dr Berry and GSC of the commissions to which they were entitled under the Agency Agreement, by tricking Dr Berry into signing the termination letter, while pretending to him and to the Nigerian government that Dr Berry and GSC remained as Securency's agent in Nigeria.

53 Finally, and most significantly for present purposes, it is plain that Securency had very good reason to maintain that pretence. As the primary judge in effect found[105], Dr Berry had proved to be of critical importance in winning the sales to Nigeria, and Securency likely considered him to be critical to attracting further orders:

> "Since Dr Berry was aware that the commercial justification for constructing an opacification plant could only be that Nigeria had converted all its banknotes to polymer, it is inconceivable that, first, Dr Berry's interactions with Governor Soludo did not involve Dr Berry pushing the

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103 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [265].

104 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [272], [281].

105 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [272].

case for that conversion and, secondly, Securency, and Mr Chapman in particular, were unaware of this fact."

54 In the face of those circumstances, it is objectively highly improbable that Securency would have served a notice of termination on Dr Berry, of which the inevitable effect would have been to put Dr Berry and Nigeria on notice that Dr Berry was no longer Securency's agent and to convey to Dr Berry and Nigeria that Securency had no intention of proceeding with the opacification plant that Nigeria conceived of as integral to the switch to polymer.

55 Of course, the pretence that Dr Berry and GSC remained as agent and that Securency would honour its assurances regarding the opacification plant could not have been maintained indefinitely, since, sooner or later, Dr Berry was bound to demand payment of the commissions that were due (as he did in fact in September 2009), and Securency would then face the prospect of having to respond with the assertion (which Securency advanced at trial) that, because of the termination letter, Dr Berry and GSC had given up their rights to the commissions. But, axiomatically, it was in Securency's interests to delay that day of reckoning for as long as it could, and so any thought of Securency giving a lawful notice of termination before then must be regarded as highly improbable.

Notice of contention

56 Under cover of a notice of contention, Securency submitted that the Full Court should have found that Dr Berry's dispute with the Nigerian government had a negative impact on his ability to perform his contractual obligations under the Agency Agreement and that, but for the termination letter, the Agency Agreement would have been terminated with effect from 30 June 2008 because Dr Berry had been unable to travel to Nigeria since mid-2006, and was suing the Nigerian government for US$252 million, Mr Harding of JH Marketing was already known to the Governor of the CBN and the Nigerian Mint and involved with Securency in the provision of services in Nigeria, and all four individuals, Messrs Brown, Chapman, Ellery and Curtis, who would have been involved in any decision to terminate the Agency Agreement had shown a preparedness to do so.

57 That contention is unpersuasive. Sufficient has already been said of the primary judge's findings to show that it was well open to his Honour to reject Messrs Chapman and Brown's evidence generally, and, specifically, in relation to their claims that the reasons for Securency wishing to end the Agency Agreement were that Securency believed Dr Berry to be unwell, and compromised in his ability to act as agent because of his arbitration proceedings with the Nigerian government.

58 The notion that Mr Harding would have been a preferred agent because Mr Harding was already known to Governor Soludo rested on evidence given by Mr Chapman that, on 20 April 2007, he received a text from Dr Berry, then in India, informing Mr Chapman of a proposed meeting to be held at Heathrow Airport that evening between Mr Harding and Governor Soludo, and that Dr Berry had brought Mr Harding in as a person who he understood held 40% of the shares in GSC on behalf of Securency. The primary judge rejected Mr Chapman's evidence that he was told by Mr Harding, Governor Soludo and Dr Berry of a discussion at a meeting at around the time of the text between Dr Berry, the Governor and Mr Harding. His Honour observed[106] that:

> "Mr Chapman gave that evidence after being shown the text, yet there is no written record of such a meeting in evidence, Mr Chapman could not recall what he had been told about the discussion at the meeting and, crucially, Dr Berry could not have been at Heathrow to attend it since his passport showed that he was in India."

Counsel for Securency did not suggest any reason why the primary judge's reasons for rejecting Mr Chapman's evidence on that issue were insufficient to sustain his Honour's conclusion. The contention that they were is unsustainable.

59 Finally, neither Mr Ellery nor Mr Curtis, who were Messrs Brown and Chapman's superiors at Securency, and, as it appeared, the ultimate Securency decision makers in relation to the engagement of Securency agents, was called to give evidence as to whether he considered that it was in Securency's best interests to terminate the Agency Agreement and appoint JH Marketing or JHM Global and SPT in place of Dr Berry and GSC. Naturally, the primary judge inferred[107] that nothing which either man might have said on those subjects would have assisted Securency's case.

Conclusion

60 It follows that the appeal should be allowed. Orders 1 and 2 of the Full Court made on 4 June 2019 should be set aside and, in their place, it should be

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106 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [103].

107 *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 at [31], applying *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345 at 412-414 [167], [169] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, *Jones v Dunkel* (1959) 101 CLR 298 at 308 per Kitto J, 312 per Menzies J, 320-321 per Windeyer J and *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at 384-385 [63]-[64] per Heydon, Crennan and Bell JJ.

Bell *J*
Keane *J*
Nettle *J*

ordered that there be judgment for the appellants in the sum of $27,078,507, plus interest pursuant to statute, and costs. The respondent should pay the costs of the appeal to the Full Court and to this Court.

61 GAGELER AND EDELMAN JJ. Together with Bell, Keane and Nettle JJ, we would allow the appeal by Dr Berry and GSC. Their Honours' detailed recitation of the facts and procedural history allows us to state our reasons shortly.

62 Though some large issues of legal principle were canvassed in written and oral submissions, the appeal can and in our opinion should be allowed on the narrow basis suggested by Dr Berry and GSC in their written reply. The narrow basis is that Securency failed at trial to discharge the evidentiary onus imposed upon it by the way it had joined issue with Dr Berry and GSC on the pleadings on the question of causation of the loss they claimed to have suffered.

63 Given that the only action on which Dr Berry and GSC succeeded against Securency was an action under s 82 of the *Trade Practices Act 1974* (Cth) to recover the amount of the loss which Dr Berry and GSC claimed to have suffered by conduct of Securency in breach of s 52 of that Act, the findings of the primary judge couched in the conclusory language of a common law action in deceit have been an unfortunate distraction.

64 A feature of the statutory action on which Dr Berry and GSC succeeded against Securency is that the statute itself requires for the action "the suffering of loss or damage", requires a connection between the loss or damage and the contravention of s 52 through the requirement that the loss or damage "must be sustained 'by' the contravention", and instructs that "the measure of compensation is 'the amount of' the loss or damage sustained"[108].

65 "Economic loss may take a variety of forms"[109] all of which involve the identification of some "prejudice or disadvantage" that has occurred[110]. Plaintiffs pursuing the statutory action are initially responsible for formulating how such loss or damage as they claim to have suffered is to be identified. The initial question must always be: "what loss or damage does the plaintiff allege"[111]? The plaintiff then bears the legal onus of proving that the identified loss or damage has been suffered by the contravention of which they complain and of establishing the amount of that loss or damage. The plaintiff bears, in other words, the ultimate burden of establishing both the required connection with the contravention and

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108 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 527 [95].

109 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 527.

110 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 513 [46].

111 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 555. See also *Henville v Walker* (2001) 206 CLR 459 at 488-489 [94], 507 [153].

quantum by inferences drawn from the whole of the evidence. That legal onus is constant.

66 The practical burden of introducing evidence – the so-called "evidentiary onus"[112] – is a different matter. In the pre-trial and trial processes that lead up to a court ultimately having to determine whether a plaintiff has discharged the legal onus of proof by inferences drawn from the whole of the evidence, the practical burden of introducing evidence can and often does shift. Whether, and if so how and to what extent, an evidentiary onus might shift from a plaintiff during the conduct of an action depends in large measure on how the plaintiff chooses to formulate the loss or damage claimed to have been suffered, and on how the parties thereafter choose to join issue on the questions of connection with the contravention and quantum that arise in respect of the chosen formulation. Much, in other words, depends on the pleadings.

67 Dr Berry and GSC did not formulate the loss they claimed to have suffered by the misleading or deceptive conduct of Securency in terms of the loss of contractual rights under the Agency Agreement. Had they formulated their loss in that way, they would have proved that the misleading or deceptive conduct of Securency was sufficiently connected with the identified loss by proving nothing more than that Dr Berry signed the termination letter in reliance on the misleading or deceptive conduct. There being no dispute that the termination letter was effective to bring the Agency Agreement to an end, the amount of their loss would have been the value of the contractual rights under the Agency Agreement that they gave up at the date of termination. The value of those contractual rights would have been assessed at the date of termination of the Agency Agreement having regard to the degree of probability that the Agency Agreement would have continued to exist into the future had it not been ended by the termination letter and having regard to the degree of probability that a future stream of commission would have been paid under it[113].

68 Dr Berry and GSC chose instead to formulate the loss they claimed to have suffered by the misleading or deceptive conduct of Securency exclusively in terms of the loss of commission they would have received under the Agency Agreement had the Agency Agreement not been brought to an end by the termination letter. It was common ground that the formulation of their loss in that way required them to prove that the misleading or deceptive conduct of Securency caused the loss by proving on the balance of probabilities the counterfactual that, but for Dr Berry having signed the termination letter in reliance on the misleading or deceptive

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112 See *Purkess v Crittenden* (1965) 114 CLR 164 at 167-168.

113 cf *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 355; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 514 [48]-[49].

conduct so as to bring the Agency Agreement to an end, the Agency Agreement would have continued in existence and commission would have been paid under it.

69 Prima facie discharge of the onus of proving that the Agency Agreement would have continued in existence required no more of Dr Berry and GSC than that they point to the provision for automatic renewal in the Agency Agreement. The "mere existence" of contractual rights to terminate the Agency Agreement was insufficient to displace the inference that the Agency Agreement would have continued in existence which arose from that provision for its automatic renewal[114]. The practical burden of introducing evidence to show on the balance of probabilities that the Agency Agreement would have been terminated through the affirmative exercise of a contractual right to terminate fell to Securency.

70 By its pleaded defence, Securency indicated that it sought to shoulder that practical burden by proving that it would have terminated the Agency Agreement no later than 30 June 2008 either by reason of Dr Berry's health or by reason of Dr Berry having significantly damaged his close working relationship with members of the Nigerian Government. To discharge the burden, Securency indicated by its defence that it relied on the evidence of Mr Brown.

71 The evidence of Mr Brown having been thoroughly disbelieved by the primary judge in findings undisturbed on appeal to the Full Court, Securency's pleaded defence on causation was left devoid of evidentiary foundation. Rejection of Securency's pleaded defence ought to have been the end of the issue.

72 "The function of pleadings is to state with sufficient clarity the case that must be met" and thereby to "ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and ... to define the issues for decision"[115]. A plaintiff should be expected to plead all material facts on which the plaintiff relies to constitute the statutory cause of action, including any counterfactual on which that plaintiff relies to establish the requisite causal link between identified loss or damage and identified misleading or deceptive conduct. In the same way, a defendant resisting the statutory action should be expected to plead any different counterfactual on which that party might rely to deny the causal link. Unless and to the extent that the parties choose to depart from the pleadings in the way they go on to conduct the trial[116], choice

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114 *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 93, citing *TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd* (1989) 16 NSWLR 130 at 154.

115 *Banque Commerciale SA (En liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286.

116 *Banque Commerciale SA (En liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 287.

between the competing pleaded counterfactuals on the balance of probabilities should then exhaust the fact-finding that is required to be undertaken by the court on the issue of causation.

73 The error of the Full Court, in an otherwise meticulous judgment, was sourced in the observation that 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"[117]. The way the issue of causation had been joined on the pleadings was reason enough to confine consideration of whether Securency would have terminated the Agency Agreement to whether Securency would have terminated the Agency Agreement for the reasons Securency sought to advance through the evidence of Mr Brown. No broader factual inquiry was warranted.

74 Our preference is to defer consideration of the correctness of the reasoning of the Full Court of the Federal Court in *Pitcher Partners Consulting Pty Ltd v Neville's Bus Service Pty Ltd*[118] to a case in which adoption or rejection of a "robust" approach to fact-finding against the interests of a party found to have engaged in dishonest misleading or deceptive conduct is determinative.

75 For these reasons, we agree with the orders proposed by Bell, Keane and Nettle JJ.

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117 *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 at [225].

118 (2019) 271 FCR 392.