

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S315 of 2019

BETWEEN:

BENOY BERRY

First Appellant

GLOBAL SECURE CURRENCY LTD (Company Number 05127761)

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Second Appellant

and

CCL SECURE PTY LTD ACN 072 353 452

Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANTS

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Part I: Certification

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

Part II: Outline of Propositions

Key legal issues on the Appeal

2. A contravenor argues that the assessment of damages under s 82 of the TPA requires an examination of an alleged counterfactual in which the contravenor would have used lawful means to bring about some or all of the damage otherwise shown to be caused by the contravening conduct. Who bears the onus? On what standard of proof? What is the role for presumptions or inferences? How are facts bound up in the contravening conduct in the actual world to be considered in the alleged counterfactual?

Factual findings on liability and causation

3. Concurrent factual findings:
 - (a) 2 February 2006 Agency Agreement: PJ[93]; FFC[11]; **AS[12]-[13]**.
 - (b) 15 August 2007 Memo with ill-health lie: PJ[114]-[123]; FFC[121]-[126], **AS[16]**.
 - (c) November 2007 Meeting at Metropole London between Berry, Brown and Governor Soludo: PJ [137]-[151]; FFC[13], [110]; **AS[22]**.
 - (d) January 2008 Order: PJ[161]-[163]; FFC[177]; **Rep[23]**.
 - (e) January 2008 handwritten note with ill-health lie: PJ[164]-[171]; FFC[121]; **AS[17]**.
 - (f) 24 February 2008: Respondent, via Chapman, makes the misleading Renewal Representation to Berry, inducing him to sign the Termination Letter: FFC[16], [17(1)], [136]-[138], [163]; **AS[18]-[20]**.
 - (g) March 2008 onwards: Berry continues to act as agent, including meeting Chapman and the Governor in London: PJ[237]-[240]; FFC[110]; **AS[24]**.
 - (h) Mid 2009: bribery scandal erupts and Berry first learns that he may have been duped: PJ [275], [287]-[298]; FFC[167]; **AS[28]**.
4. The credit findings against Chapman/Brown: PJ [19]-[23], [35]; [114] were unsuccessfully challenged on appeal: Grounds 1-29 of Appeal (CAB[125]-[144]); FFC[19]-[163]; **AS[94], [114]**.

Pleadings and onus on damages

5. The Appellants pleaded loss, relying upon the analytical tool of the revenue account: ABFM pages 16-18; *Murphy v Overton* (2004) 216 CLR 388 at [47]-[52]; **AS[45]**.
6. The Respondent accepted that damages should be assessed on the revenue account. It pleaded a counterfactual in which it would have used lawful means to terminate the agreement by no later than 30 June 2008 alleging: (a) Berry's alleged ill health; and (b)

Berry having damaged his close working relationship with the Nigerian government. Brown was identified as the key witness: ABFM pages 40-44; **AS[33], [48]; Rep[6]**.

7. The defence recognised, correctly, an onus (legal, alternatively evidential) on the Respondent to make out a counterfactual dependent upon its own conduct: **Rep[5]-[7]**.

The Primary Judge was correct on damages

8. The primary judge: (a) rejected the credit of Brown generally; and (b) gave six compelling reasons for rejecting his hypothetical evidence: PJ[302], [314]-[318]); **AS[93]-[94]**.
9. The primary judge also relied upon authorities establishing a general policy of the law as the effect of fraud: PJ[319]-[321]. On grounds of fact and law he rejected the pleaded counterfactual, up until, relevantly, the 2010 Policy Decision: PJ[322]; **AS[60]-[71]**.

The Full Court was in error on damages

10. On Grounds 32 and 33, the Full Court did not overturn the primary judge on the credit of Brown: FFC[230]; **AS[95]**. Nor did the Court find that either of Brown's supposed reasons for a lawful termination was made out: FFC[125], [126], [130], [132], [149]. The appeal should have been dismissed at that point: **Rep[16]**.
11. The Full Court at FFC[219]-[221] correctly rejected the lawful means argument up until 22 April 2008, albeit with incomplete reasoning.
12. The Full Court at FFC[224]-[230] wrongly accepted the lawful means argument as at 1 June 2008 based upon a counterfactual which:
- 20 (a) was neither pleaded nor based on the evidence of the identified witness (Brown);
- (b) if based on the discredited fraudster Chapman, did not identify any specific evidence from him, or about his conduct, which would have led him to recommend it;
- (c) if based on the decision makers, Ellery or Curtis, did not explain how inferences favourable to the Respondent could be drawn in the absence of either of them giving evidence;
- (d) never identified what changed between 22 April and 1 June 2008 such that the Respondent would have run the risks of lawful termination on the latter date which it not have been prepared to on the former: **AS[78]-[105]; Rep[13]-[14]**.
13. More generally, the Full Court's analysis failed to have regard to: (a) the onus; (b) the
- 30 presumptions to be drawn against an intentional wrongdoer who resorts to fraud in preference to lawful means; and (c) the principle that the intentional wrongdoer should bear the risk of uncertainties in assessing damages created by its wrong: *Murphy* at [74]; *Pitcher Partners v Neville's Bus Service* (2019) 371 ALR 480 at [94]-[124]; *Commonwealth v Amann Aviation* (1991) 174 CLR 64 at 82-90, 106-108; cf 126-128, 138-143, 155-158; *L.*

Albert & Son v Armstrong Rubber Co (1949) 178 F 2d 182 at 189; *Story Parchment Co. v Patterson* (1931) 282 US 555 at 562, 563: **AS[55]-[71], [88]-[89], [96]-[98]**.

14. The Respondent suggests (**RS 61**) that the Full Court at FFC[226], [227] should be read as inferring that by 1 June 2008 Chapman's desire to install replacement agents for corrupt purposes would have become so intense that the Respondent would by now have run the risks of a lawful termination. So read would be to attribute to the discredited fraudster Chapman a hypothetical state of mind as to how he would have advanced his fraud, in circumstances other than its particular manifestation in February 2008, to which he never deposed. It would run contrary to every policy of the law in respect to fraud to give Chapman, and the Respondent, the benefit of such an hypothesis: **AS[98]-[105]**.
15. It would also fail to apply the rigour which *Amann Aviation* at 97, 114-115 and 150 indicates must be applied to the factual assessment where a wrongdoer (in that case a contract breaker) says it could have used lawful means to bring about the same consequences for the innocent party as did by its wrong: **AS[50(b)], [68]-[71]**.

Notice of Contention must fail

16. The notice of contention must fail on the facts (**Rep[23]-[24]**):
- (a) Chapman and Brown had no more than an authority to recommend a termination;
 - (b) The highly partial attempt to resuscitate the credit of Brown and Chapman does not grapple with the full concurrent findings against their credit;
 - (c) No evidence was led from Ellery or Curtis, the only persons authorized to terminate;
 - (d) There is no other basis, in contemporaneous business records or otherwise, to suggest that a termination would have occurred for the reasons asserted in the Notice: PJ[272].
17. Ground 2 of the Notice is premised on the Respondent appointing JHM *alone* to replace the Appellants. No basis is shown to interfere with the concurrent findings that: (a) JHM was only ever considered as part of joint package with SPT to replace the Appellants after they were gone; (b) that package was always premised on the ill-health lie requiring new agents; and (c) it was Chapman's corrupt desire to replace the Appellants with SPT, rather than any view of the superior qualities of JHM as an agent, that drove the recommendation to terminate the Appellants: PJ[312], FFC[124]-[126], [130]; **Rep[24]**.

30 Dated: 3 June 2020

Justin Gleeson SC Christopher Ward SC Philip Santucci