IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S315 of 2019

BETWEEN:

BENOY BERRY
First Appellant

GLOBAL SECURE CURRENCY LTD (Company Number 05127761)
Second Appellant

and

CCL SECURE PTY LTD ACN 072 353 452
Respondent

APPELLANTS' REPLY

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PART I: CERTIFICATION

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

PART II: REPLY

2. ***Methodological issues - pleading and the legal onus:*** The Appellants accept that proving their loss was an "essential element"[1] of their claim. The pleaded loss, by reason of signing the Termination Letter on 24 February 2008 effective from 31 December 2007 in reliance upon the misleading and deceptive Renewal Representation, was that the Agreement was not automatically renewed for two years from 30 June 2008; resulting in the Appellants not being paid commissions on orders for polymer notes placed between 31 December 2007 and at least 30 June 2010.[2]

3. The Appellants' legal burden on loss carried with it an evidential burden to prove the Agreement would have automatically renewed on 1 July 2008. It discharged the burden by pointing to clause 3.1 of the Agreement, together with the definition of "Expiry Date" in Schedule 2 Item 1.[3] Undoubtedly that very same Agreement included within it contractual powers which, if lawfully exercised by the Respondent, would have brought the Agreement to an end either before or after that automatic renewal date.[4]

4. It was no part of the Appellants' legal burden (cf RS[19]-[23]) to plead and prove a series of negatives; namely that the Respondent would not have exercised its contractual powers to terminate at any time within the period of the Appellants' asserted loss.

5. Once the Respondent chose to put such defences in play, it was duty bound to specify with precision: *when* it says it would have so acted; *who* on its behalf would have caused it to so act; and *why* it would have so acted.

6. The Respondent's pleading correctly observed the legal onus upon it by identifying the *when* as "shortly after February 2008 and by no later than 30 June 2008"; the *who* as Mr Brown; and *why* as first Dr Berry's supposed ill-health and second the supposed significant damage to Dr Berry's close working relationship with members of the Government of Nigeria by reason of his suit against them in the Contec arbitration.[5]

7. This plea in the defence was quite unlike the surplusage plea in *Heydon v Perpetual Executors* (1930) 45 CLR 111 of gift (cf RS[21]). As a positive defence necessary for the

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[1] *Currie v Dempsey* (1967) 69 SR (NSW) 116, 125 (Walsh JA) (NSWSC FC).
[2] 2FASOC [32] and [40]: ABFM 16, 18.
[3] ABFM 64, 69, 91.
[4] See clauses 2.6(a) and 3.2: ABFM 69.
[5] AS[13(d)] and Amended Defence [32(b)], incorporating [26AA(a) and (b)]: ABFM 40-41, 36.

"avoidance" of the Appellants' claimed loss, the Respondent was required to plead and take on the legal burden of proof of the necessary facts.[6]

8. Had the Respondent not pleaded the defence, there would have been no occasion for the court to enquire into possible hypothetical exercises of contractual powers by the Respondent. Once pleaded, the court's task was confined to resolving the controversy over the possible exercises of contractual powers *as pleaded* and not at large.

9. ***Evidential burden?*** Let it be supposed that the Respondent bore only an evidential burden on its pleaded defences (cf RS[24]). The Respondent correctly identifies[7] that the evidence advanced by the Respondent in discharge of such burden was that of Mr Brown. As recited at FFC [175] CAB 204 that evidence was largely consistent with the pleaded defence, although somewhat straying outside it in asserting that one of three reasons for the exercise of contractual power (but not the "most compelling one") was that Dr Berry was not travelling to Nigeria and therefore not carrying out his functions as agent.

10. As noted by the Full Court, the primary judge thoroughly disbelieved Brown,[8] comprehensively rejecting his evidence amidst numerous other adverse credit findings.[9]

11. Grounds 32 and 33 of the Notice of Appeal to the Full Court (CAB 145) put in issue the correctness of PJ [314] and [322]. The Respondent's oral submissions on the appeal are recorded at FFC [204]-[205] CAB 210-211. The submission recorded at FFC [204] CAB 210 is significantly unmoored from the defence as pleaded and run below. It assumes the same time frame for *when* the contractual power would have been exercised; but omits two of Brown's three supposed *reasons* for exercise of the contractual power (the ill-health lie and the inability to perform the agency though inability to travel to Nigeria), leaving only the plea that the Contec arbitration precluded performance of the agency.

12. Most strikingly of all, the *who* is not addressed in the submission. One does not know if Mr Brown has been cast loose from the hypothetical exercise of contractual power; and if not Brown, then who within the Respondent?

13. As the submission ran (and the FFC later seems to have found[10]), the hypothetical exercise of power was something hypothetically done by the amorphous agglomerate "Securency". The basis from which an inference was sought to be drawn that unidentified person(s) within the agglomerate were minded to get rid of the Appellants by 30 June

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[6] *Currie v Dempsey* (1967) 69 SR (NSW) 116, 125 (Walsh JA) (NSWSC FC).
[7] RS [24(b)] footnote 23.
[8] FFC [176]-[177] CAB 204 noting PJ [314]-[319] CAB 99-101.
[9] As referenced at AS footnote 22.
[10] FFC [225]-[227] CAB 215.

2008, was the two facts drawn from the actual world – the Respondent's "attempts" to terminate the Agency and its appointment of other agents.

14. As to these two facts from the actual world, both were bound up with the wrong perpetrated upon the Appellants: (a) "its attempts" is a reference to Mr Chapman fraudulently deceiving Dr Berry on 24 February 2008 and in doing so spinning the "ill-health" lie to his superior Mr Ellery; and (b) the "appointment of other agents" must encompass the findings that the central reason that Chapman drove the removal of the Appellants was to make way for the agent SPT, an entity in which he had an interest and through which funds were channelled to pay bribes; while at the same time deceiving Dr Berry into believing that he was still an agent so as not to alienate him or the Governor.[11]

15. ***The Full Court's rehearing function:*** Against that background, the Respondent urges this Court to show "appellate restraint in reversing evaluative judgments" concerning an "hypothetical scenario" involving a "large body of evidence" (RS[52]). However the real focus should be: by what legal principle, and with what approach to onus, evidence and its rehearing function, did the Full Court consider itself entitled to interfere with the factual conclusions of the primary judge, when it (correctly) was not prepared to overturn his credit findings against Brown as the witness put up by the Respondent to support its pleaded defence: FFC [230] CAB 216?

16. This appeal can be allowed on the short basis that, once Brown's evidence was rejected in both courts below, then wherever the legal or evidential burden lay on the pleaded hypothetical, the evidence "*by no means established with any reasonable degree of precision*"[12] that the nature and extent of the Appellants' loss of commission would have ended at any time before the 2010 Policy Decision took effect.

17. ***Pitcher Partners:*** If this Court needs to go further, the significance of *Pitcher Partners* (consistently with the cases from the NSWCA cited at RS[27]-[28]) is this: on any view of the evidence and of onus, large doubts were left on whether, or why, the Respondent would have exercised a contractual power to end the Agency by 30 June: (a) the witness put forward to prove the case (Brown) was disbelieved; (b) the person who in the actual world recommended the termination (Chapman) was found to be thoroughly discreditable in his dealings with the Appellants and in his evidence to the Court[13]; and the actual

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[11] PJ [270] CAB 86; [312] CAB 98; FFC [110] CAB 189, [126] CAB 192, [130] CAB 193, [149] CAB 197.
[12] Cf *Purkess v Crittenden* (1965) 114 CLR 164 at 169; authority cited at RS[24].
[13] See references at AS [114] footnote 23.

decision makers (Mr Ellery and Mr Curtis[14]) did not give evidence.

18. RS[56] asserts "contemporaneous documents" proving that Securency wanted to terminate. Those documents cannot be separated from the effect of the ill-health lie. No contemporaneous document supports any asserted impediment to Dr Berry continuing his work (PJ [272] CAB 87) less still a desire to terminate independent of the ill health lie.

19. No document proved, nor did any witness from the Respondent testify to, the hypothetical that the FFC ultimately found - that the Respondent would *not* have exercised the contractual power for 8 weeks after the date of the wrong but *would* have done so 5 weeks later.[15] The evidentiary gap was of the Respondent's making. Its unlawful termination cast the matter into the realm of the hypothetical.

20. In *Pitcher Partners* it was a *third party* whose hypothetical actions were relevant to an hypothetical pleaded by the *applicant*. The "robust approach" to fact finding against a wrongdoer whose actions had made proof difficult saw the applicant's hypothetical made out. Here the case for the "robust approach" is even stronger. The critical fact is what *the wrongdoer* would have done but for the wrong, on a defence pleaded by the *wrongdoer*. The persons who were best placed to testify to that matter were its officers or former officers, all of whom either were disbelieved or did not attend.

21. The Respondent is left only with a speculative and contestable assertion: "*...with the passage of time, there ceases to be a necessary contradiction*" between the Respondent's conduct and its contention that it would have issued a notice of termination (RS[61]-[62]). One asks: why is that so? With what passage of time? Why does an extra five weeks make the difference? How could the court find that the risks of alienating the Appellants (and thereby the Governor) that in February were so feared that Chapman resorted to fraud on the Appellants would by now have become acceptable to run? And how could the court find with any degree of certainty the terms of the hypothetical recommendation by Chapman to Brown and on to Ellery and Curtis? Are we to assume Chapman told the same lie to his superiors, or different lies, or that he confessed that his true reason for his recommendation was his corrupt motivation that existed in the actual world (cf RS[68])?

22. It is difficult to think of a more appropriate case in which to say: your fraudulent conduct

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[14] PJ [27]-[32] CAB 18-19; cf RS[56] which wrongly suggests that Chapman and Brown had decision making authority. That they did not is supported by Beeby T415-6 at RBFM 81-82; Mamo T360 at Appellants' Supplementary Book of Further Materials (**SBFM**) 8; and Brown T443 at SBFM 13. See also Request for appointment of agent at SBFM 6 and PJ [152]-[154] CAB 54-55.

[15] FFC [219]-[221] CAB 214 cf FFC [222]-[228] CAB 214-216.

created these doubts; your witnesses exacerbated them rather than resolved them; and the law will not reward your fraud by a generous approach to the evidence.

23. ***Notice of Contention Ground 1:*** Ground 12 of the Notice of Appeal was dealt with and rejected by the FFC[16] (cf RS[76]). There is no basis for this Court to disturb concurrent findings of fact. The attempt to find contradiction in the primary judge's findings (RS[77]-[78]) fails. It does not grapple with the primary judge's findings on the topic, including that Brown and the Governor were perfectly comfortable with Dr Berry performing the Agency Agreement during the November 2007 meeting in London, notwithstanding their knowledge of the arbitration, which meeting was instrumental in achieving the substantial 23 January 2008 order.[17] The attempt to resuscitate parts of the evidence of Chapman and Brown (RS[79]-[81]) cannot have life in the absence of a full-blooded attempt to challenge the wholesale credit findings against each of them.

24. ***Notice of Contention Ground 2:*** This ground does not advance the Respondent's case. Each of facts (a)-(d), to the extent they are accurately stated, were in existence as of 24 February 2008. None were sufficient to cause the Respondent to exercise a contractual power at that date, nor any time up to 22 April 2008.[18] It is bare speculation that they would have produced a different outcome 5 weeks later. Specifically, in 2(c)-(d), the Respondent appears to seek a finding that a desire to appoint JHM sustains its case. That ignores: (i) the fact that the critical recommendation was founded on the ill-health lie; (ii) the recommended (and actual) appointment was for *both* SPT and JHM, not simply JHM; and (iii) the concurrent findings that it was Chapman's corrupt desire to appoint SPT which drove his recommendations at the time.[19] The "preparedness" to terminate was premised on Chapman's ill-health lie. Brown did not make inquiries in Nigeria of any effect of the arbitration on Dr Berry's business interests and did not recall discussing the topic with the decision-maker, Ellery.[20] The uncertainty as to what Ellery and Curtis might have done must be resolved against the Respondent.

Dated: 30/1/20

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[16] FFC [149] last sentence CAB 193; together with FFC [130] last sentence; FFC [131] CAB 193.
[17] PJ [10]-[12] CAB12; [137] CAB50; [161]-[166] CAB 57-58; [272] CAB 87; [316]-[317] CAB 99-100.
[18] See the unchallenged finding of the FFC [219]-[221] CAB 214.
[19] PJ [114] CAB 43; [266] CAB 85, [270] CAB 86 confirmed at FFC [124]-[126] CAB 191-192.
[20] Brown T306-308 at SBFM 10-11.