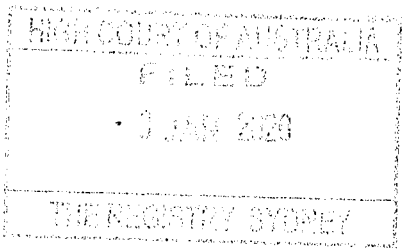
IN THE HIGH COURT OF AUSTRALIA

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

RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. The Respondent (**Securency**) agrees that the Appeal raises the two issues identified in the Appellants' Submissions (**AS**) at [2]-[3].
3. It also raises an issue as to whether the three "principles" identified at AS [50] exist or apply to the present case.
4. The Notice of Contention raises an issue as to whether there are additional bases upon which the Full Court's conclusion that the Agency Agreement would have been lawfully terminated on 30 June 2008 should be upheld.

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Part III: Section 78B Notice

5. Securency considers that no notice is required to be given under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Facts

6. The parties first executed an Agency Agreement between June and August 2006: *cf.* AS [12].[1] A replacement Agency Agreement was executed in March 2007: FFC [10].[2]

7. The pertinent terms of the Agency Agreement may be found at FFC [11], [168]-[173] CAB 158, 202-203: *cf.* AS [13]. As the Full Court held, "By virtue of the terms of cl 3.2, the agreement did not provide security for either party on a rollover": FFC [223] CAB 214. Further, as their Honours said at FFC [109] CAB 188:

> It is critical to appreciate that the Agency Agreement permitted Securency to terminate the agency appointment at any time, for any reason, or for no particular reason at all, on 60 days' written notice. Properly analysed, Dr Berry and GSC had no "entitlement" to continue as agents, or to receive new commissions, for more than 60 days after any decision by Securency to terminate the agency.

8. Mr Chapman did not admit that JHM "did not have a presence in Nigeria": *cf.* AS [15]. He accepted that JHM and Ms Whatley were not "based in Nigeria" but went on to say they were in Nigeria quite frequently: PJ [115] CAB 44. There was documentary evidence that JHM and Ms Whatley had represented large firms in Nigeria (and other parts of Africa) for some years.[3]

9. The submission at AS [15], as well as the finding at PJ [108] CAB 41, to the effect that Mr Chapman "did not identify who were the 'principal operators' of JHM nor explain to Mr Ellery that Mr Harding was already holding a 40% share in GSC" pertains to one email, dated 9 July 2007.[4] Five days later, Mr Chapman sent Mr Ellery another email, which attached "a personal profile of Amanda Whatley, the MD of JHM. She is Mike Harding's daughter."[5] Evidently, Mr Ellery was already aware of Mike Harding.

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[1] *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 (**FFC**) at [10] CAB 158; Respondent's Book of Further
[2] See also: RBFM at 67 [31] (Statement of Agreed Facts); *Berry v CCL Secure Pty Ltd* [2017] FCA 1546 (**PJ**) at [94], [97] CAB 38, 39.
[3] RBFM at 9-10 (JHM Company Profile); 23 (Energizer letter); 25-27 (Personal Profile, Ms Whatley).
[4] That email and the attached Company Profile are to be found in RBFM 8-10.
[5] That email and the attached Personal Profile are to be found in RBFM 12, 25-27.

10. Although, in the documents mentioned at AS [16]-[17], Mr Chapman gave a false explanation for *why* Dr Berry was unable to travel to Nigeria – i.e. that Dr Berry was ill – it was true that Dr Berry was unable to travel to Nigeria.[6] Dr Berry "was reluctant or, more probably, *not able safely* to travel to Nigeria" for 4 years, between about mid-2006 and mid-2010: PJ [23] CAB 16 (our emphasis).

11. The cause of that threat to Dr Berry's personal safety was his "evolving commercial and legal dispute with the Nigerian Government" relating to a separate venture, known as "Contec".[7] That dispute led to arbitration proceedings commenced by Contec in November 2007, against the Federal Government of Nigeria and two Ministers, including the Attorney-General (**Contec Arbitration**).[8] Contec obtained an award of US$252 million in damages on 14 August 2008, but despite various attempts to enforce it, the award had still not been paid some 9 years later.[9]

12. AS [22], [23], [24] and [26] refer to the development of an opacification plant in Nigeria. The Appellants' interest in constructing and taking an ownership stake in such a plant should not be conflated with the performance of their obligations under the Agency Agreement. The Agency Agreement required the Appellants to promote and obtain orders for Securency's product, which was a form of opacified polymer.[10] That product was the *output* of an opacification plant owned by Securency in Australia. The Appellants' commercial interests differed from Securency's, so far as they concerned a plant that was to be wholly or partly owned by the Appellants and the Nigerian Government, and produce its own opacified polymer.[11]

13. The Courts below did not find that the Appellants were "essential to Securency's plans in Nigeria": *cf.* AS [23]. The fact that Securency sold hundreds of millions of dollars of opacified polymer in Nigeria from 2008 to 2018,[12] shows otherwise.

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[6] PJ [20], [23] CAB 15, 16.
[7] PJ [20] CAB 15.
[8] PJ [9] CAB 11-12; PJ [135] CAB 49; RBFM at 61 (Contec Arbitration Facts).
[9] PJ [258] CAB 83; RBFM at 61-62 (Contec Arbitration Facts).
[10] PJ [2], [5] CAB 10-11; Appellants' Book of Further Materials (**ABFM**) at 68 (cll 2.2 & 2.3), 91 (Item 3).
[11] See: PJ [7] CAB 11; PJ [237]-[239] CAB 79 (As the trial judge there noted, Securency did not manufacture polymer film, being the *input* to an opacification plant).
[12] See: FFC [231] CAB 216-217 (the figures immediately to the right of the dates represent 15% of Invoiced Sales).

14. Further, the Full Court found that any post February 2008 involvement of Dr Berry "was limited" and there was no evidence of "positive and substantive involvement" of Dr Berry in Securency's business: FFC [227] CAB 215; *cf.* AS [26].

15. It is not correct to say that Securency "chose not to" exercise its contractual rights of termination "until March 2018": *cf.* AS [32(d)]. As the Full Court said, "the fact that Securency did not issue another written notice until 2018 suggests that it regarded the wrongful termination [in 2008] as effective": FFC [230] CAB 216.

Part V: Argument

General principles and premises (AS [39]-[50])

16. Where a representation has been made in contravention of s 52 of the *Trade Practices Act 1974* (Cth) (**TPA**), a plaintiff is ordinarily entitled to recover as damages "a sum representing the prejudice or disadvantage he has suffered in consequence of his altering his position under the inducement of the fraudulent misrepresentation".[13] This is so because it is ordinarily the acts done or omitted by the plaintiff in reliance upon the representation that satisfy the requirement of causation expressed within s 82.[14]

17. The proper approach to assessing damages in this case was therefore accurately stated at FFC [166], as follows, "to determine how much worse off the respondents [now appellants] are than they would have been had they not relied on the alleged misrepresentation and entered into the transaction": CAB 201.

18. Here, the "transaction" induced by the misrepresentation comprised the Appellants' execution of the Termination Letter, whereby the Agency Agreement was terminated with effect from 31 December 2007 and without notice.[15] That transaction is correctly characterised at AS [42] as a "surrender" of "legal rights".

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[13] *Toteff v Antonas* (1952) 87 CLR 647 at 650 per Dixon J, cited with approval in *Wardley Australia Limited v Western Australia* (1992) 175 CLR 514 (***Wardley***) at 526.5, 534.7-535.5. See also: *Gould v Vaggelas* (1985) 157 CLR 215 (***Gould***) at 220-221; *Marks v GIO Australia Holdings* (1998) 196 CLR 494 (***Marks***) at [46]; *Henville v Walker* (2001) 206 CLR 459 (***Henville***) at [132]-[133], [162].

[14] *Wardley* at 525; *Henville* at [158]-[159]. In some cases (but not this one), it is the acts or omissions of third parties taken in reliance upon the representation that will satisfy the requirement of causation: e.g. *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526 at 530-532.

[15] See: Second Further Amended Statement of Claim (**2FASOC**) in the Appellants' Book of Further Materials (**ABFM**) at 14 [26], 15 [27A] & [28(a)], 16 [32], 17 [35], 18 [40], 19 [41A]; FFC [16] CAB 154, FFC [131] CAB 193, FFC [136]-[137] CAB 194-195; PJ [13]-[14] CAB 13, PJ [309] CAB 97.

19. The legal burden of proving the extent of any loss caused by that "surrender" has always rested with the Appellants.[16] The "amount of the loss or damage" suffered "by" contravening conduct is an element of the cause of action created by s 82.[17] It was therefore the Appellants who were required to prove how much worse off they were than they would have been had they not executed the Termination Letter.

20. Discharging that legal burden necessarily required the Appellants to establish what the "legal rights" which they "surrendered" would have been worth in the counterfactual; that is, had they not executed the Termination Letter. And regardless of whether that exercise were undertaken by seeking to value the Agency Agreement itself, or the revenue which would have been earned under that agreement – a distinction without a difference – the Appellants were required to make assumptions, justified by evidence, as to how long the Agency Agreement would have subsisted: *cf.* AS [45]-[46].[18] In particular that is so because the Appellants had no entitlement to the legal rights "surrendered" beyond 60 days: see [7] above.

21. To start, as the Appellants do, from the premise that "the Agency Agreement *would have* automatically renewed every 2 years until its lawful termination in fact in May 2018" (AS [47], our emphasis) is to assume what must be demonstrated. Likewise, to assert, as the Appellants do, that they surrendered a "valuable asset" consisting of rights that "were *ongoing*" (AS [44]-[45], original emphasis) begs the question, what was the asset actually worth, and presumes it is legitimate to value that asset on the footing that it conferred "ongoing" rights when, indubitably, the continuance of those rights depended upon the unrestricted volition of Securency.

22. The Appellants presume that their lost contractual rights ought to be valued as if the Agency Agreement would have been performed in the manner *most* burdensome to Securency: AS [47]. Yet, to the extent the law makes a presumption either way, it leans in the opposite direction, lest defendants be liable in damages for not doing that

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[16] *Gates v City Mutual Life Assurance Society Limited* (1986) 160 CLR 1 at 13.5-15.7; *Marks* at [19], [22], [111]; *Gould* at 238; *Commonwealth v Amann Aviation* (1991) 174 CLR 64 (***Amann Aviation***) at 80, 137; *Purkess v Crittenden* (1965) 114 CLR 164 (***Purkess***) at 167-169, 170-171.

[17] *Wardley* at 525.4, 536.5-537.3, 538.4-5, 539.6, 551.6, 555.2-7.

[18] The distinction between the capital and revenue accounts discussed in *Murphy v Overton Investments* (2004) 216 CLR 388 was drawn for the "limited purposes of explanation and illustration": 408 [48]. The TPA "draws no such distinction": 408 [48]. Further, it is wrong to assume that loss is incurred *either* as a loss on capital account, *or* as a loss on revenue account: 408 [49]-[50].

which they were never obliged to do.[19] The true position is that although a contractual right of termination does not automatically restrict the damages which can be awarded, the Court must "have regard to the facts and evaluate the possible exercise of the right in all the circumstances of the case."[20]

23. Nothing turns on the fact that Securency "pleaded and sought to prove" that it could and would lawfully have brought the Agency Agreement to an end prior to May 2018: *cf.* AS [48]. The legal burden of proof is not assigned according to who pleads or seeks to prove a given fact.[21]

24. If it is argued that Securency nonetheless bore an evidential burden, then:

(a) *First*, the argument should be rejected. The point of an evidential burden is that, unless it is discharged, the relevant issue *does not arise* for determination by the tribunal of fact.[22] But here, the issue of whether and when the Agency Agreement would otherwise have been terminated necessarily arose for determination on the Appellants' own case: it was essential for the Court to determine that issue in order to calculate the "amount of the loss or damage" the Appellants suffered "by" Securency's contravening conduct.

(b) *Second*, even if Securency did bear an evidential burden, it discharged *that* burden by adducing evidence that the Agency Agreement would have been terminated in the first half of 2008 or (at the latest) by 30 October 2010.[23] An evidential burden "does no more than oblige a party to show that there is sufficient evidence to raise an issue as to the existence (or non-existence) of a fact."[24] That having been shown, it was for the Appellants "upon the whole of the evidence to satisfy the

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[19] *Mardenlanto Compania Naviera SA v Bergbau-Handel GmbH "The Mihalis Angelos"* (***Mihalis Angelos***) at 196G-197A, 202H-203A; *TCN Channel 9 v Hayden Enterprises* (1989) 16 NSWLR 130 (***Hayden Enterprises***) at 156B; *Amann Aviation* at 92.9-93.1, 152.1; *Martinez (atf Martinez Martinez HLW Practice Trust) v Griffiths* (***Martinez***) [2019] NSWCA 310 at [30]-[35], per Meagher JA (Bell ACJ and Barrett AJA agreeing); J D Heydon, *Heydon on Contract* (2019, Lawbook Co) at [26.200].

[20] *Amann Aviation* at 93.6, per Mason CJ & Dawson J. See also: *Mihalis Angelos* at 196G, per Lord Denning MR; *Hayden Enterprises* at 154F-156E; *Amann Aviation* at 93.4-8, 101.5-9, 114.9, 133.3, 143.3-144.2, 145.3, 149.8-150.2, 152.1-2, 177.2.

[21] See, e.g., *Heydon v Perpetual Executors* (1930) 45 CLR 111; *Coshott v Sakic* (1998) 44 NSWLR 667.

[22] See: *Braysich v The Queen* (2011) 234 CLR 434 at [32]-[33]; *Momcilovic v The Queen* (2011) 245 CLR 1 (***Momcilovic***) at [665].

[23] See: FFC [175]-[176] CAB 203-204; FFC [183]-[184] CAB 205-206.

[24] *Momcilovic* at [665], per Bell J.

> tribunal of fact of the extent of the injury [or loss] caused by the defendant's negligence [or contravention]."[25]

"Principle one": Onus on the wrongdoer & Pitcher Partners (AS [51]-[59])

25. AS [50(a)] urges a "principle" which the Appellants formulate as, "the onus lies on the wrongdoer to establish the facts necessary to justify the inference of a counterfactual lawful termination...". There is no such principle.

26. As we have already submitted, both the legal and evidential burdens of proof rested with the Appellants, not "the wrongdoer". Further, the Appellants have misapplied the principle derived from *Armory v Delamirie* (1722) 1 Stra 505; 93 ER 664 and relied upon in *Pitcher Partners Consulting v Neville's Bus Service* (2019) 371 ALR 480 (***Pitcher Partners***), to which reference is made at AS [51]-[59].

27. The principle derived from *Armory v Delamirie* does not reverse the onus of proof. Rather, it concerns the resolution of doubts which remain once the Court has assessed all of the evidence. As Bathurst CJ observed in *Dr Shanahan v Jatese Pty Ltd* [2019] NSWCA 113 at [55] (Bell P and Emmett AJA agreeing), the principle:

> ... cannot be taken too far. It does not permit findings to be made which are contrary to the evidence before the court. Nor does it, in my view, entitle the court to engage in speculation. What it can do is to enable the court, where there is a doubt as to what can be concluded from the evidence before it, and where that doubt is a consequence of the conduct of the defaulting party, to be robust in resolving the doubt in favour of the non-defaulting party. I do not think that the principle extends any further.

28. Moreover, it is an approach to resolving factual uncertainty which "need not be taken, but may be," and indeed, "is generally not taken."[26] It does not "require inferences to be drawn favourably to a plaintiff in all cases, or even in all cases where there is uncertainty which may be expressed as a range of possible outcomes."[27] That being so, any "failure" to draw the inferences urged by the Appellants was not an error of law.

29. *Pitcher Partners* did not decide to the contrary. In that case, the plaintiff proved that had it known the true position it would have increased its price by $600,000 per annum: at [41]. The plaintiff also proved that, even with such an increase, its price was

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[25] *Purkess* at 168.9, per Barwick CJ, Kitto & Taylor JJ.
[26] *McCartney v Orica Investments* [2011] NSWCA 337at [158], per Giles JA (Macfarlan & Young JJA relevantly agreeing).
[27] *Oneflare Pty Ltd v Chernih* [2017] NSWCA 195 at [89], per Meagher JA (Gleeson and Leeming JJA agreeing).

still below the incumbent operator's price; that the increase would have been "insignificant" in the scheme of things to its counterparty, TfNSW; and that TfNSW would have been in a "difficult bargaining position" if the plaintiff had requested the increase: at [43]-[51]. On appeal, the defendant countered that it was nonetheless fatal to the plaintiff's case that it had not called a witness from TfNSW to prove what TfNSW would have done if asked to accept an increased price: at [64], [66], [69], [72].

30. It was in that context that the Full Court in *Pitcher Partners* referred to the principle derived from *Armory v Delamirie*: at [109]-[118]. Two features of that context should be specifically noted. First, the relevant "uncertainty" concerned how a third party would have behaved in hypothetical circumstances. Second, neither party called a witness to give direct evidence on that issue. Ultimately, their Honours decided that the plaintiff had "proved enough" to leave it "open to" the trial judge, looking at the matter "robustly", to conclude that the loss flowing from the defendant's deceit was $600,000 per annum: at [122]-[124].

31. That decision affirmed no more than that, given the evidence already before the Court in support of the plaintiff's damages claim, *if* there was any remaining uncertainty as to what TfNSW would have done, then it was permissible for the trial judge to take a "robust" approach to that issue and resolve it in the plaintiff's favour: at [124].

32. Nothing more radical should be drawn from what the Full Court said about the "onus" of proving damages being "qualified" at [116] of *Pitcher Partners*: *cf.* AS [50(a)] & footnote 6. The Full Court did not there distinguish between a legal and an evidential onus. It is doubtful they were using "onus" in the former sense, and if they were using it in the latter sense, then to say that a plaintiff's evidential onus of proving its loss is "qualified" is consistent with the authorities mentioned in [27] and [28] above. In other words, where there is doubt as to what can be concluded from the evidence, the "qualification" enables – but does not require – a court to resolve that doubt in the plaintiff's favour.

"Principle two": The lawful means must be independent from the wrong (AS [60]-[71])

33. AS [50(b)] posits a "principle" whereby the "lawful means of termination must be wholly independent of the wrong".

34. The Appellants' argument for that "principle" starts from the proposition that "a court is disinclined to allow a party to a contract to take advantage of its own wrongdoing": AS [60]. That proposition has no bearing on the issues presented by this appeal.

35. Securency's "wrongdoing" was comprised of a misrepresentation, which induced the Appellants to execute the Termination Letter. To conclude that the Agency Agreement would have been terminated by 30 June 2008, if that misrepresentation had *never been made* and the Termination Letter had *never been signed*, is not to allow Securency to take advantage of its wrong. To the contrary, it is to determine what would have happened "absent the offending conduct".[28]

36. AS [61] takes the matter no further. It is fallacious to start from the premise that the wrongdoer's "liability in damages", or the "benefits of its wrong", *include* amounts which the wrongdoer would not have been obliged to pay had the contract been lawfully terminated. If the contract would have been lawfully terminated in the absence of the wrong, there is no "liability in damages" to "escape". Nor are any "benefits of the wrong" being retained.

37. Despite the tenor of AS [61]-[65], s 82 has "no punitive aspect".[29] Although it "may be said, as a matter of abstract or intuitive assessment, that it is 'wrong' if a party that has been found to have engaged in misleading or deceptive conduct does not 'pay a price' for its misleading or deceptive conduct," that is not what the TPA provides.[30] Instead, the remedy given by s 82 is "available only to those who are worse off as a result of a contravention of the relevant parts of the Act."[31] Issues which arise in the determination of contravention of s 52 are to be distinguished from the administration of a remedy under s 82;[32] and the character of the respondent's contravention, e.g. whether it was calculated and fraudulent, is not relevant to the statutory inquiry as to what loss the contravention caused: *cf.* AS [63].[33] Nor is there a basis in the TPA upon which the Court "will not allow" the respondent to advance a factual argument that is supported by evidence and relevant to that causal inquiry: *cf.* AS [61]-[62].

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[28] FFC [203] CAB 210. See also: FFC [166] CAB 201; FFC [211] CAB 212; FFC [218] CAB 214.
[29] *Marks* at 501 [9] per Gaudron J.
[30] *Marks* at 515 [56]-516 [57] per McHugh, Hayne and Callinan JJ.
[31] *Marks* at 516 [57], per McHugh, Hayne and Callinan JJ.
[32] *I&L Securities v HTW Valuers* (2002) 210 CLR 109 at [48]-[49], per Gaudron, Gummow & Hayne JJ.
[33] *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at [46]-[50].

38. As for the cases cited in AS [66]-[71], they do not support the independence "principle" contended for at AS [50(b)].

39. It is convenient to start with *Amann Aviation*, which is relied upon at AS [68]-[69]. No "independent" lawful termination was posited in that case. To the contrary, the FCAFC had found (and each member of this Court accepted) that there was a 20% chance the Commonwealth would have lawfully terminated the contract anyway, for the same reasons as it had relied upon when it wrongfully terminated the contract and precipitated the litigation.[34] The reason four members of the Court did not reduce the damages award on account of that 20% chance was *not* due to any "principle" which mandates that the posited lawful termination must be "wholly independent" of the wrong, but because, on the facts as found, such a termination was "an event which was unlikely to occur."[35] The balance of the Court thought the damages ought to be reduced, even though the posited lawful termination was unlikely to occur.[36] It did not matter that any hypothetical, lawful termination, would be founded on the same facts as led the Commonwealth to terminate unlawfully.

40. None of the judges who decided *Amann Aviation* expressed the view that the defendant was "not allowed" and "cannot be heard" to "set up a lawful means argument" unless it can "point to some matter, wholly independent of its wrong, which would have justified it bringing about the same detriment to its victim": *cf.* AS [50(b)], [61], [62], [65]. The case is not authority for that proposition.

41. Nor is *HTW Valuers v Astonland* (2004) 217 CLR 640 at [40]. The passage relied upon at AS [66] addresses the need, in some cases, to take account of events that have occurred since the date of acquisition, but in doing so, to "distinguish among possible causes of the decline in value of what has been bought." It says nothing about how the Court should approach the very different task of determining whether an event that *never* occurred, would have occurred in the absence of a contravention.

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[34] *Amann Aviation* at 73.10-74.5, 75.1-9, 78.4-9, 96.6-9, 97.4-10 (Mason CJ & Dawson J); 114.2-9 (Brennan J); 129.7-130.1, 131.4-132.5 (Deane J); 146.2-5 (Toohey J); 149.6-8, 150.7-151.2, 158.2 (Gaudron J); 176.8-9 (McHugh J).

[35] *Amann Aviation* at 97.6-98.1, per Mason CJ & Dawson J. See also: at 114.2-115.3 (Brennan J); 158.2 (Gaudron J).

[36] *Amann Aviation* at 131.6-132.5 (Deane J); 146.5-10, 147.5-148.2 (Toohey J); 176.10-176.3 (McHugh J).

42. In *Chappel v Hart* (1998) 195 CLR 232 at [83], Gummow J was likewise addressing a different issue: *cf.* AS [67]. Moreover, the reason why Dr Chappel had to posit an "independent" mechanism for the plaintiff's injuries is that, otherwise, the only possibility was that those injuries resulted from his negligence. The same cannot be said for the economic loss now claimed by the Appellants. If the Agency Agreement would have been lawfully terminated by 30 June 2008 in any event, then the Appellants would have lost their rights to income under that agreement, regardless of Securency's contravention of the TPA. There is no logical necessity to posit a termination for reasons or by persons "wholly independent" of the contravention.

10 43. It is correct that, in the *Mihalis Angelos*, the defendants relied upon facts that were "independent" of their own wrong: AS [70]. But none of the judgments identifies this "independence" as essential to the result. Lord Denning MR said:[37]

> You must take into account all contingencies which might have reduced or extinguished the loss. ... It follows that if the defendant has under the contract an option which would reduce or extinguish the loss, it will be assumed that he would exercise it. ... In short, the plaintiff must be compensated for such loss as he would have suffered if there had been no renunciation: but not if he would have lost nothing.

44. Likewise, it does not follow from the facts in the *Golden Victory* that the House of Lords endorsed an "independence principle": *cf.* AS [71].[38] The plurality expressed the
20 principle being applied in broad terms and did not advert to any qualification of the kind contended for by the Appellants.[39]

45. The final decision on which the Appellants rely in this context is *Bunge SA v Nidera BV* [2015] 3 All ER 1082 (UKSC) (***Bunge SA***). It is difficult to discern anything "independent" about the lawful means relied upon by the successful defendants in that case. The hypothetical lawful termination was founded on precisely the same export embargo as had prompted the wrongful termination.[40] The difference was in the timing of the hypothetical termination – after the embargo had prevented shipping, rather than in anticipation of that eventuality – but that hardly makes the hypothetical termination "wholly independent of [the] wrong": *cf.* AS [65].

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[37] *Mihalis Angelos* at 196G-197A. See also: at 202H-203A (Edmund Davies LJ); 210A-B (Megaw LJ).
[38] *Golden Strait Corporation v Nippon Yusen Kubushika Kaisha* [2007] 2 AC 353 (***Golden Victory***).
[39] *Golden Victory* at [30], [36] (Lord Scott of Foscote); [60], [63], [64], [66] (Lord Carswell); [74], [76], [78], [85] (Lord Brown of Eaton-Under-Heywood).
[40] *Bunge SA* at [3]-[6], [35].

46. Further, their Lordships rested their decision on "the fundamental compensatory principle."[41] As Lord Sumption (Lords Neuberger P, Mance and Clark agreeing) went on to explain at [23] (our emphasis):

> If the contract had not been repudiated, it would have been lawfully cancellable. If it was lawfully cancellable, the charterer would have been entitled to avail himself of that right *regardless of his motive.* The only question is whether he would in fact have done so, a question which in practice would probably have been determined by his financial interest.

This reasoning does not admit of a qualification, whereby the charterer is "not allowed" to rely on the fact that the contract was "lawfully cancellable" unless he identifies some "wholly independent" matter which would have justified a lawful termination. The "only question" is one of fact: would it have cancelled the contract lawfully?

47. In answering that question in the present case, no fact or circumstance should be assumed to be changed other than that Securency did not make the Renewal Representation and thereby induce the Appellants to sign the Termination Letter.[42] There is no warrant for ignoring other facts or for making additional assumptions that are contrary to them. To do so is to assess damages upon an improbable hypothesis, in disregard of the actual facts.[43]

"Principle Three": Use of the Sellars/Malec approach (AS [72]-[76])

48. It is unclear what, if anything, is said to flow from the Appellants' submission that the *Sellars/Malec* [44] principle was "in play": *cf.* AS [72].

49. Insofar as that submission seeks to impugn the approach taken by the Full Court, the criticism is misplaced. Before the Full Court, the parties agreed "on the sums yielded by the various permutations" and it was "not in issue that the quantum of loss suffered" by the Appellants was the very amount ultimately awarded, if "absent the misleading and deceptive conduct, the Agency Agreement would have terminated on 30 June 2008": FFC [231]-[232] CAB 216-217.

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[41] *Bunge SA* at [14], [18]-[20], [23] (Lord Sumption); [37], [85]-[86] (Lord Toulson).
[42] See: *Martinez* at [36], per Meagher JA (Bell ACJ and Barrett AJA agreeing); *Bartlett v Australia & New Zealand Banking Group* (2016) 92 NSWLR 639 at [83], per Macfarlan JA (Meagher and Simpson JJA agreeing), [101] per Meagher JA (Simpson JA agreeing); *Willis Australia Group Services v Mitchell-Innes* [2015] NSWCA 381 at [122]-[123], per Macfarlan JA (Ward and Leeming JJA agreeing).
[43] See: *Amann Aviation* at 93.6, per Mason CJ & Dawson J; *Hayden Enterprises* at 156B-C, per Hope JA.
[44] *Sellars v Adelaide Petroleum* (1994) 179 CLR 332; *Malec v J C Hutton P/L* (1990) 169 CLR 638.

50. The Full Court was not asked, if it came to that conclusion, to award some additional amount to account for the possibility that the Agency Agreement might have subsisted for longer. Nor was the Full Court asked to discount any damages award if it concluded, on the balance of probabilities, that the Agency Agreement would have subsisted until 31 October 2010.

51. For the same reasons, it is incorrect to attribute to the Full Court a finding of "virtual certainty": *cf.* AS [76]. Neither side submitted to the Full Court that the agreed sums which appear in FFC [231] CAB 216-217 could only be awarded if a termination on the corresponding date was a "virtual certainty", as opposed to probable.

10 ***Application of principle to the present case***

The Full Court did not err

52. For the reasons just outlined, the Full Court's decision is not attended by any of the errors of law contended for by the Appellants. What remains is an attempt to traverse factual findings concerning a hypothetical scenario, which were arrived at in light of a large body of evidence. There is a need for appellate restraint in reversing evaluative judgments of this kind.

53. Further, while the Appellants' specific criticisms of the Full Court's reasoning are canvassed below, it is worth pausing to observe that the Full Court, correctly, took as its "starting point", the terms of the Agency Agreement, and especially those which
20 permitted Securency to terminate that agreement, even "for no reason": FFC [223] CAB 208. The Full Court also found, again correctly, that it was "clear that Securency wanted to end its agency with Dr Berry": FFC [224] CAB 208. Moreover, that is what Securency actually did.

54. In those circumstances, the Full Court's conclusion that Securency would have terminated the Agency Agreement by 30 June 2008 is inherently plausible.

The supposed error in FFC [224] (AS [80])

55. There is nothing surprising or deficient about the Full Court's finding that "Securency wanted to end its agency with Dr Berry": FFC [224] CAB 214; *cf.* AS [80]. After all, that is precisely what Securency did "in the actual world". And as the Full Court said,
30 "the Agency Agreement would not have been terminated, fraudulently or otherwise, if Securency wanted Dr Berry to continue in that role": FFC [230] CAB 216.

56. Before the Renewal Representation was made, Securency had already formed an intention to terminate the Agency Agreement. So much is evident from contemporaneous documents that were in evidence.[45] Those documents showed that each of Messrs Curtis, Ellery, Brown and Chapman were aware and approved of the fact that the Appellants' agency was to be terminated, *before* Mr Chapman made the Renewal Representation on 24 February 2008. There was other evidence that those four persons had the requisite authority, within Securency, to "hire and fire" agents.[46]

57. As for the rhetorical questions at AS [80(b)] and [80(c)], the Full Court did not say that Securency's "intent", or Mr Chapman's "desire", to terminate the Agency Agreement "changed" at all between February and June 2008. At FFC [224] and [226], the Full Court accepted that Securency "wanted to end" the agreement throughout that period. What the Full Court did not accept was that it was probable, in the counterfactual, that Securency would have effected that termination by giving 60 days' notice under cl 2.6, by 22 April 2008: FFC [219]-[221]. The Full Court reasoned that Securency had not taken that option in late February, and therefore, it was unlikely it would have taken it within the following 8 weeks either.

58. That logic, however, cannot be sustained indefinitely: see FFC [225] CAB 215. It does not follow from the fact that Mr Chapman sought to trick Dr Berry in February, that he *never* would have been prepared to give Dr Berry a notice that Securency was lawfully entitled to give. If, as the Full Court correctly found, Securency (including Mr Chapman) "wanted to end" the Agency Agreement in the first half of 2008, and "was entitled to do so for good reason or for no reason", then the probabilities are that they would have done so, and that they would not have waited until October 2010.

The supposed error in FFC [225] (AS [81]-[82])

59. AS [82] misunderstands FFC [225] CAB 215. That paragraph needs to be read with what the Full Court itself described as "the immediately preceding paragraphs"; in particular, FFC [219]-[222].

60. In those paragraphs, their Honours rejected Securency's contention that a notice of termination would have been given under cl 2.6 in February, March or April of 2008.

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[45] See: RBFM at 8, 12, 17, 21, 31, 33, 37, 39, 41-59.
[46] RBFM at 81.50-82.20, 83.40-50 (Mr Beeby).

They did so on the basis that Securency's misleading conduct less than 8 weeks beforehand indicated that it was not minded to issue such a notice at that time. That is the "lack of internal logic" being referred to at FFC [225].

61. In saying the "lack of internal logic" had been "exhausted", the Full Court was making the point that, with the passage of time, there ceases to be a *necessary* contradiction between Securency's earlier misleading conduct and its contention that it would have issued a notice of termination. And in going on to say there was "no reason to assume in the counterfactual that Securency would *not* have acted to terminate the Agency Agreement" (our emphasis), the Full Court was saying there was no longer any reason to make the same assumption *against* Securency which had led it to reject Securency's contention at FFC [219]-[221].

62. Rather than making an assumption *in favour* of Securency, or placing a particular onus on the Appellants, the Full Court was merely saying that, by June 2008, Securency's contention was no longer overwhelmed by an inherent contradiction, and accordingly, there was no longer any reason to assume, *against* Securency, that it would not have issued a notice of termination.

The supposed errors in FFC [226] (AS [83]-[98])

63. The criticisms of FFC [226] begin with attacks on straw men: AS [83]-[85].

64. The "finding" postulated in AS [83] was not made. The second and third sentences of FFC [226] are, "examples" that bear out the finding made in the first sentence. In other words, the fact that Securency had already signed an agreement with JHM before 24 February 2008, and later entered into a "replacement" agreement, was evidence that "Securency wanted to engage another agent": FFC [226] CAB 215.

65. Nor did the Full Court conclude that Securency "would not have risked using lawful means for fear of alienating Dr Berry and risking the golden goose": *cf.* AS [85], [98]. What the Full Court said was that "one of the *practical consequences* of the contravening conduct was to bring Dr Berry's agency to an end without necessarily alienating him."[47] The Full Court went on to reject this as a matter which would have prevented Securency from terminating lawfully, describing it as "a neutral

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[47] FFC [226] CAB 215 (our emphasis).

consideration since the wrongful termination would also have had that effect."[48] In other words, tricking Dr Berry carried just as much (if not more) risk of alienating him as giving him a perfectly lawful notice of termination.

66. At AS [89]-[90], it is submitted that SPT "drove the (dishonest) agenda of Mr Chapman" and the Full Court is criticised for failing to identify "how, in the hypothetical, the role of SPT would have been dealt with in the decision making by Securency." But if Mr Chapman wanted the Agency Agreement terminated "to make way for SPT" (AS [21]), that only makes it more probable that the agreement would have been terminated lawfully, had it not been terminated wrongfully. If Mr Chapman had not tried to trick Dr Berry into a consensual termination, then a lawful termination on 60 or 30 days' notice was the most probable (if not the only) alternative course for him to pursue.

67. Implicit in the AS is a notion that Mr Chapman must either be excluded from the counterfactual, or else replaced with an hypothetical executive who does not possess any of Mr Chapman's selfish or dishonest motives. At AS [96], it is even suggested that the Full Court should have considered whether "there would have been full disclosure of the 'ill health' falsehood, or of Mr Chapman's plans to use SPT to obtain funds to pay bribes," as well as whether a different process for evaluating the relative merits of the prospective agents would have been undertaken.

68. To adopt that approach would be to err. As we submitted at [47] above, in answering the question whether Securency would have terminated the Agency Agreement lawfully, no fact or circumstance should be changed other than that Securency did not engage in the contravening conduct. To ignore or alter any other facts is to award damages in disregard of the circumstances in which the parties found themselves.

69. Further, the Appellants are entitled to compensation for being induced by the Renewal Representation to surrender their rights under the Agency Agreement. The Appellants did not establish a right to compensation arising from any different wrong, or wider scheme being perpetrated by Mr Chapman.

70. AS [98] is of a piece with AS [83]. It attacks a "finding" the Full Court did not make.

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[48] FFC [230] CAB 216.

The supposed errors in FFC [227] (AS [99]-[105])

71. The summary of the Full Court's findings contained within AS [99]-[100] omits:

(a) the fact that "there was no evidence of what transpired" at any meeting between Dr Berry and Mr Chapman in November 2008: FFC [226] CAB; PJ [271] CAB 86;

(b) the Full Court took a different view of Dr Berry's post-termination text messages to Mr Chapman, finding that they "record no more than logistical details of setting up a meeting, and pleasantries": FFC [227] CAB 215; and

(c) the Full Court's finding that "any post February Meeting involvement of Dr Berry was limited": FFC [227] CAB 215.

10 72. Also missing is recognition of the fact that Dr Berry testified and therefore had every opportunity to give direct evidence of any positive and substantive role he played in promoting and obtaining orders for opacified polymer in Nigeria after June 2008. Yet the Full Court concluded that there was no evidence that he did play such a role: FFC [227] CAB 215.

73. Contrary to AS [101], the final sentence of FFC [227] did not invert the onus of proof or depart from the approach in *Pitcher Partners*. In that regard:

(a) *First*, the Full Court was expressing a conclusion about the evidence discussed earlier in the paragraph, and did so in general terms.

(b) *Second*, the relevant principles are addressed in [26] to [32] above.

20 (c) *Third*, what was being dealt with in FFC [227] was evidence as to what Dr Berry had, in fact, done, post-termination. Dr Berry was called as a witness and his text messages were tendered. In contrast, the forensic difficulty which lay at the heart of *Pitcher Partners* concerned how a third party, TfNSW, would have behaved in hypothetical circumstances, a topic on which there was no direct evidence.

(d) *Fourth*, the Full Court did not indicate that it was in doubt or uncertain as to what could be concluded from the evidence. Accordingly, the principle derived from *Armory v Delamirie* was not enlivened.

Part VI: Notice of contention

74. Securency's argument on the Notice of Contention is outlined below.

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Ground 1

75. On appeal to the Full Court, Securency challenged the trial judge's finding at PJ [23] CAB 16 to the effect that there was "no evidence" that the dispute the subject of the Contec Arbitration had a "substantive inhibitory or negative effect" on the Appellants' ability to perform the Agency Agreement. That challenge was embodied in Ground 12 of the Amended Notice of Appeal, which also set out the bases relied upon: CAB 131.

76. The Full Court did not directly deal with the issue raised by Ground 12, namely, that there *was* evidence (indeed, the trial judge found) that the Contec dispute had prevented Dr Berry from travelling to Nigeria, and that his absence from Nigeria inhibited his ability to perform his role as Securency's agent.[49] The present significance of these matters is that they support a finding that the Agency Agreement would have been terminated lawfully, had the contravention not occurred.

77. The trial judge's finding at PJ [23] CAB 16 is not congruent with his earlier finding at PJ [20] CAB 15, that the reason Dr Berry lied about having visited Nigeria several times in the four year period from about mid-2006, "was to create a *false* impression that [the Contec dispute] ... had not created any problem for him in visiting that country [Nigeria] and dealing there with both its officials and his own business or in performing his role as Securency's agent" (our emphasis). Plainly, if the impression Dr Berry sought to create was "false", then the truth was that the dispute *had* created the very problems that Dr Berry lied to conceal.

78. The trial judge's finding at PJ [23] CAB 16 is also incompatible with his finding within the same paragraph, that Dr Berry was "not able safely to travel to Nigeria." It is quite improbable that Securency's agent for Nigeria, whose contractual obligations included marketing, promoting and obtaining orders from customers located in Nigeria,[50] experienced no "substantive inhibitory or negative effect" on his ability to perform those obligations, by reason of the fact that he did not, and could not safely, visit the country and meet there with the officials with whom he had to deal.

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[49] At FFC [130] CAB, the Full Court did say that, as a rationale for why Dr Berry would agree to sign the Termination Letter without trickery, the submission that he was prepared to do so owing to the Contec dispute and his consequent inability to travel to Nigeria "faced the hurdle" that Securency did not suggest this reason at the time of the proposed termination and was also rejected by the trial judge because Mr Chapman was motivated by SPT.

[50] See cll 2.2 & 2.3 of the Agency Agreement: ABFM at 68.

79. Mr Chapman gave evidence that Dr Berry's absence from Nigeria "became a problem" after the initial launch of the 20 Naira polymer notes in February 2007, at which point it became important to ensure the notes were "accepted" by the public, the press, and politically.[51] Despite Mr Chapman's general lack of credibility, this evidence rings true and coheres with the trial judge's finding as to why Dr Berry lied (see [77] above).

80. Mr Brown said he recommended that the Appellants' agency be terminated because (among other things) Dr Berry "was clearly not travelling into Nigeria, and therefore was not carrying out his functions as agent."[52] He later said Dr Berry "was not going in and out generally and safeguarding our business," and he was concerned Securency would lose traction in Nigeria as a result.[53]

81. The trial judge addressed that (and related) evidence from Mr Brown at PJ [314]-[318] CAB 99-100. Among other things, his Honour repeated the finding at PJ [23] CAB 16 to the effect that there was "no evidence" Dr Berry's inability to travel to Nigeria due to the Contect dispute had a negative effect on the Appellants' ability to perform the Agency Agreement: PJ [316]-[317].

82. The Full Court said it was "unnecessary to address" those reasons: FFC [230] CAB 216. Nonetheless, their Honours went on to express views that differed from those of the trial judge in important respects: FFC [230]. Their Honours ought to have gone further, and upheld Ground 12 of Securency's Appeal.

Ground 2

83. At FFC [228] CAB 216, the Full Court concluded that, absent the contravening conduct, the Agency Agreement would have terminated on 30 June 2008.

84. The following are additional bases, not (or not expressly) relied on by the Full Court, upon which the conclusion in FFC [228] should be upheld:

    (a) *First*, Dr Berry had been unable to travel to Nigeria since mid-2006. This is a sensible and legitimate reason why Securency would have lawfully terminated the Agency Agreement by 30 June 2008, whether or not the impact on the Appellants'

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[51] RBFM at 85.48-87.12.
[52] RBFM at 71.15-40.
[53] RBFM at 78.18-25.

capacity to fulfill their obligations was "substantive". Securency was entitled to have a Nigerian agent who could safely set foot in that country.

(b) *Second*, in 2008, Dr Berry was (through Contec) suing the Nigerian Government for US$252 million. The suit was not being treated as an ordinary commercial dispute within Nigeria, as is plain from the threat to Dr Berry's personal safety and the continued refusal of the defendants (even after the award) to pay what they owed. This is another sensible and legitimate reason why Securency would have lawfully terminated the Agency Agreement by 30 June 2008. No company whose only Nigerian customer was the Nigerian Government would wish to retain as their Nigerian agent, a man who was suing that Government for hundreds of millions.

(c) *Third*, in JHM, Securency had available an alternative agent with which Mr Harding was associated. Mr Harding was already known to the Governor of the Reserve Bank of Nigeria and had for some time been a 40% shareholder of the Second Appellant.

(d) *Fourth*, the likelihood of Securency lawfully terminating the Agency Agreement was increased by the fact that all four of the persons within Securency who could have been responsible for such a decision had already shown themselves willing to terminate the Appellants' appointment.

Part VII: Time estimate

85. Securency estimates that it will require approximately 2.25 hours for the presentation of its oral argument.

Dated 9 January 2020

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ANNEXURE

Excerpts from *Trade Practices Act 1974* (Cth)

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

Section 52 Misleading or deceptive conduct

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

(2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of sub-section (1).

Section 82 Actions for damage

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

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