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 CAN 072 353 452
Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I: Publication

1. This Outline of Oral Argument is in a form suitable for publication on the internet.

Part II: Outline of propositions to be advanced in oral argument

2. The stipulation in s 82, that a person may recover damage suffered "by conduct … that was done in contravention" of the TPA, signifies that the requisite connection between recoverable damages and the contravention is one of causation: RS [16]*ff*.

3. Ascertaining whether that causal connection exists requires consideration of what has happened and of what would have happened if there had been no misleading conduct. It is only by comparing these two sets of facts (one actual and one hypothetical) that the effect of the misleading conduct can be evaluated: RS [20]*ff*.; *Marks v GIO* at [38], [42]; *Chappel v Hart* at [113].

4. The trial judge did not undertake this comparison: CAB 102 PJ [322]; CAB 104 PJ [333]; CAB 116 PJ2 [19]. This led the causation inquiry to miscarry to the extent that his Honour awarded damages on the footing that the Agency Agreement would have subsisted for a further 10 years, until after the trial.

5. The Full Court was correct in finding error within the trial judge's approach: CAB 209 FFC [196], [199]; CAB 211 FFC [209]; CAB 212 FFC [211]; CAB 214 FFC [218]; *cf.* CAB 276 Notice of Appeal [2]; AS [36].

6. The "three related principles" relied upon by the Appellants to show error in the Full Court's reasoning do not exist or do not apply: RS [25]-[51]; *cf.* AS [50]-[76].

7. "Principle one" (AS [50(a)]) is at odds with the basal principle that a plaintiff must make out its case for relief. In particular, this "principle":

   (a) would reverse the onus of proving causation under s 82: (i) in every case (all contraveners are "wrongdoers"); or (ii) only in cases of "deliberate contravention" (AS [51]), an unstable category which seems to depend upon the degree of moral

obloquy attending the contravention: RS [25]-[26], [37].

(b) is the opposite of the approach at common law, when a question arises as to whether a defendant in breach of contract would otherwise have exercised a right of termination: RS [22]; *Hayden Enterprises* at 156B; *Amann Aviation* at 92-93; *Martinez* at [31]-[35].

(c) goes further than *Pitcher Partners* and the principle derived from *Armory v Delamirie*: RS [26]-[32].

8. As for "Principle two" (AS [50(b)]; RS [33]-[47]):

(a) it would exclude the actual facts from the counterfactual. The only change in the counterfactual should be an assumption that the misleading conduct did not occur: RS [47]; *Martinez* at [36].

(b) it does not emerge from the Appellants' authorities: *cf.* AS [50(b)], [65], [66]-[71]; RS [38]-[46]; *Amann Aviation* at 73, 96, 129; *Bunge* at [19], [20], [23].

9. "Principle three" (AS [50(c)]) does not apply:

(a) *first*, before the Full Court, the parties agreed that the sum ultimately awarded was the sum that should be awarded, if the Full Court concluded that the Agency Agreement would have been terminated with effect from 30 June 2008: CAB 216-217 FFC [231]; CAB 230 at [1]; RS [49]-[51].

(b) *second*, the purpose of the counterfactual is to ascertain whether there is a causal connection between damage and misleading conduct; and causation must be proved on the balance of probabilities: RS [21].

10. The Full Court highlighted the relatively unfettered rights of termination conferred by the Agency Agreement: CAB 214 FFC [222]-[223]. It correctly found that Securency would have exercised those rights: CAB 215-216 FFC [225]-[230]; RS [52]*ff*.

11. A number of the trial judge's findings as to *why* Securency chose to mislead Dr Berry make it more, not less likely that the Agency Agreement would have been terminated on 30 June 2008: *cf.* AS [49], [80], [86]. In this regard:

(a) the advantage of the Termination Letter, as compared with a lawful termination, was that it could operate retrospectively: CAB 13 PJ [13].

(b) the trial judge's findings directly link the retrospective operation of the Termination Letter to Securency's "plan" to deprive the Appellants of commissions on large orders that were made or anticipated in January 2008: CAB 12 PJ [12]; CAB 58-59 PJ [162]-[168]; CAB 60 PJ [170]-[171]; CAB 85 PJ [263]-[265]. And see: CAB 191-192 FFC [121], [125]-[126].

(c) the only other means by which to "make way for SPT" (AS [21]) or prevent the Appellants from becoming entitled to further commissions, was to terminate the Agency Agreement lawfully: RS [66]-[69].

12. Securency was not afraid of risking the "golden goose" (*cf.* AS [23], [25], [85], [98]):

    (a) *first*, if it were, "the Agency Agreement would not have been terminated, fraudulently or otherwise": CAB 216 FFC [230]; RS [55].

    (b) *second*, Securency had long planned to appoint JHM in the Appellants' place: RM 8, 12, 14, 15, 19, 21, 31, 33, 37, 39, 41-59; RS [56]; CAB 215 FFC [226].

    (c) *third*, the risk of alienating Dr Berry was "a neutral consideration" in the counterfactual: CAB 215 FFC [226]; CAB 216 FFC [230]; RS [65].

    (d) *fourth*, the "limited" post February involvement of Dr Berry and the substantial Nigerian sales made over the next decade indicate that he was not essential to success: CAB 215 FFC [227]; CAB 216-217 FFC [231]; RS [13], [14], [71].

13. No real difficulty arises as to "who on behalf of Securency" would have exercised lawful means to terminate (*cf.* AS [80], [96], [109]; AR [12], [13]). All 4 individuals within Securency who were involved in decisions to appoint or terminate agents (RM 81-83) approved the Appellants' termination and the appointment JHM in February 2008: RM 8, 12, 14-15, 21, 31, 33, 35, 37, 41, 59. On the findings below, it is probable that each would have supported a lawful termination in June 2008.

14. The Notice of Contention is directed at findings that the Full Court should have made, each of which increases the probability of a lawful termination (RS [75]-[84]):

    (a) NOC [1] – Dr Berry's dispute with the Nigerian Government did have a negative impact on his ability to perform his contractual obligations: CAB 11 PJ [9]; CAB 83 PJ [258]; CAB 15-16 PJ [20], [23]; G.12 CAB 131; CAB 197 FFC [147], [149]; FFC [130]-[131] CAB 193. What Chapman and Brown said on this matter was plausible and consistent with Dr Berry's belief that it was harmful to his case: RM 71.3-71.15, 78.3-79.6, 85.21-87.5. That Dr Berry could meet in London does not mean an inability to travel had no negative impact: *cf.* AR [23].

    (b) NOC [2] – Additional reasons why it is probable that the Agency Agreement would have been terminated lawfully from 30 June 2008 are:

        (i) Dr Berry had been unable to travel to Nigeria since mid-2006;

        (ii) Dr Berry was suing the Nigerian Government for US$252M;

        (iii) Mr Harding of JHM was already known to the Governor, and JHM had already been involved with the Appellants in the provision of services in Nigeria: FFC [103] CAB 40.

        (iv) All four individuals who could have been involved in a decision to terminate the Agency Agreement from 30 June, had shown a preparedness to do so.

3 June 2020 Garry Rich Julia Roy Jane Taylor