

Berry v CCL Secure: new High Court guidance on counterfactual analysis



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The High Court has provided guidance on how damages for misleading or deceptive conduct may be assessed by reference to counterfactual analysis. The decision in *Berry v CCL Secure Pty Ltd* [2020] HCA 27, handed down on 5 August 2020, resolves that a claim for damages under the Australian Consumer Law (ACL) may be reduced where a person who engaged in contravening conduct would otherwise have taken lawful alternative means to bring about the same result. The decision emphasises the importance of precise pleading of counterfactuals.

Use of counterfactuals in relation to damages claims

Defendants may rely on counterfactual analysis as a mechanism to reduce or eliminate their damages exposure. Specifically, the Court may find that causation has not been proved between a defendant's unlawful conduct and a plaintiff's damage, if the defendant had lawful alternative means available to it at the time to bring about the same result.

Where a counterfactual is raised by a defendant, the Court must determine what would have happened by postulating a hypothetical situation in which all the facts remained as they occurred save for the defendant's unlawful conduct (see, e.g. *Bartlett v Australia & New Zealand Banking Group Ltd* (2016) 92 NSWLR 639; [2016] NSWCA 30 at [83]-[85]).

Factual background

The Respondent, formerly known as Securrency Pty Ltd (*Securrency*), marketed Australian polymer banknote technology globally. Unfortunately, Securrency became embroiled in bribing foreign government officials to win lucrative contracts – somewhat ironic for a company whose business involved printing banknotes. Prior to the scandal, Securrency had contracted the Appellant, Dr Berry, to act as Securrency's agent in Nigeria. Dr Berry was an interesting choice of agent – one of his companies was suing the Nigerian government for US\$252 million, which made it unsafe for him to travel to Nigeria. Nonetheless, Dr Berry maintained valuable connections with the Nigerian president and the central bank gov-

Snapshot

- Defendants may rely on counterfactuals to reduce or eliminate their damages exposure.
- Damages will be reduced to the extent that, had the defendant not engaged in the unlawful conduct, the defendant would have taken lawful means to effect the same result.
- Counterfactuals must be pleaded carefully and proved by evidence.

ernor which were integral to Securrency's success in accessing that market.

In early 2008, one of Securrency's directors, Mr Chapman, implemented a surreptitious plan to replace Dr Berry as agent with Mr Chapman's own company and then divert the commissions payable to that company. Mr Chapman would later be found guilty of various bribery offences. Mr Chapman induced Dr Berry to sign a letter bringing about an early termination of Dr Berry's agency agreement and lied by telling him that the entitlements to commissions would continue whilst Securrency prepared a replacement partnership agreement. This deceit amounted to Securrency engaging

in misleading or deceptive conduct under s 52 of the *Trade Practices Act 1974* (Cth) (*TPA*), the predecessor of ACL, s 18.

In a proceeding in the Federal Court of Australia under ss 52 and 82 of the *TPA*, Dr Berry claimed damages and sought the value of commissions that he would otherwise have been paid on sales of polymer had his agency agreement been automatically renewed pursuant to its terms. Securrency contended that it had unfettered contractual rights to terminate the agency agreement upon written notice and, had Mr Chapman not induced Dr Berry to sign the early termination letter, Securrency would have instead availed itself of those rights anyway.

Earlier decisions

At first instance, Rares J did not accept Securrency's counterfactual (at [322]) and awarded Dr Berry damages in respect of commissions he would otherwise have been paid under the agency agreement up to the date of trial, amounting to approximately \$50 million, plus interest.

On appeal, the Full Court found that it was clear that Securrency wanted to end its agency agreement with Dr Berry and had a contractual entitlement 'to do so for good reason or for no reason'. As such, the Full Court found that: 'there is no reason to assume in the counterfactual that Securrency would not have acted to terminate the Agency Agreement at the time when that agreement would otherwise have been automatically renewed for a further term of two years' (*CCL Secure Pty Ltd*

v Berry [2019] FCAFC 81 at [224]-[225]).

The Full Court reduced Dr Berry's damages to approximately \$1.2 million, plus interest, being the value of commissions payable up to the renewal or expiry date of the agreement.

The High Court's decision

In the High Court, it was common ground that Securrency could rely on counterfactual analysis to seek to reduce its damages payable under s 82 for contravention of s 52 of the *TPA*.

The High Court held that the issue to be determined is the amount of damage which the plaintiff (or applicant) suffered 'by' the contravening conduct, being the analysis called for in *TPA*, s 82 (now embodied in *ACL*, s 236, which refers to damage suffered 'because of' the conduct). This is an issue of causation, upon which a plaintiff always bears the legal onus. The evidentiary onus may, however, shift to a defendant in certain circumstances. In this case, the High Court held that Securrency had the evidentiary onus of establishing its posited counterfactual and had failed to discharge it. Securrency had purposely engaged in the contravening conduct. It did so because it wanted to keep Dr Berry in the dark about his being replaced as Securrency's agent so that Dr Berry would continue to assist Securrency in its efforts to achieve sales in Nigeria. Bell, Keane and Nettle JJ held that: '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 ([2020] HCA 27 at [39]. See also at [42] and [53]-[54].)

The error in the Full Court's judgment, apparent from the passage set out above, was to reverse the proper onus by considering whether there was any reason to assume that 'Securrency would not have acted to terminate the Agency Agreement' at or shortly after the contravening conduct occurred. That effectively required Dr Berry to disprove a hypothetical that had been posited by Securrency. The correct approach was to require Securrency to establish by evidence, on the balance of probabilities, that Securrency would in fact have terminated the agreement.

The effect of the High Court's decision was to increase the amount of damages payable to Dr Berry to \$27 million, plus interest, being based on the amount of commissions payable to 29 November 2010. It was common ground in the High Court, based on the Full Federal Court's earlier findings (at [195]-[197]), that Dr Berry's agency agreement would otherwise have been terminated during 2010 when the bribery scandal came to light and Securrency's new management resolved to terminate all agency agreements globally.

The importance of pleadings

In a separate judgment, Gageler and Edelman JJ emphasised that a counterfactual must be pleaded precisely and that the

Court's consideration of the counterfactual is to be confined by the pleadings. Securrency's pleaded defence indicated that it would seek to prove, by evidence from its director, Mr Brown, that Securrency would have terminated the agency agreement by the renewal or expiry date of the agency agreement, on the basis of Dr Berry's alleged ill-health and fraught relationship with the Nigerian government stemming from the ongoing law-suit between one of Dr Berry's companies and the Nigerian government (referred to above). Mr Brown's evidence was thoroughly disbelieved at trial (at [71]).

This is the second time this year that the High Court has emphasised the importance of precision in pleading and proving damages counterfactuals. On 17 April 2020, the High Court refused special leave to appeal a different decision of the Full Federal Court, which (contrary to its decision in Dr Berry's case) had held that counterfactual analysis is not appropriate in misleading or deceptive conduct cases (*Wyzenbeek v Australasian Marine Imports & Ors* [2019] FCAFC 167 at [90] and [118]). In so doing, the High Court indicated that, notwithstanding the point of principle, it was not persuaded that the pleadings and evidence below concerning the counterfactual were such as to render it an appropriate vehicle for the grant of special leave (*Gold Coast City Marina Pty Ltd & Ors v Wyzenbeek & Ors* [2020] HCATrans 54 (17 April 2020)).

The High Court's decision also highlights that, at the outset of a dispute, plaintiffs ought to determine the best cause of action by considering how a defendant might deploy counterfactual analysis to reduce the damages payable in respect of each cause of action. An alternative cause of action available to Dr Berry in this case was a claim in contract for the commissions payable under the agency agreement, on the basis that the early termination letter was *voidable* due to Securrency's misleading or deceptive conduct with the result that the agency agreement remained on foot. Counterfactual analysis would not have been available to reduce such a claim for damages. As a result of the way Dr Berry framed his claim in the present case, which effectively served to affirm the legal effect of the early termination letter, this alternative cause of action was not available to him ([2020] HCA 27 at [26]).

Conclusion

A defendant seeking to rely upon counterfactual analysis to reduce damages payable must plead carefully and precisely what it says it would have done absent the unlawful conduct. The counterfactual ought to find strong support in the evidence that a defendant can adduce, or otherwise rely upon, at trial. Care needs to be taken to ensure that contentions as to counterfactuals do not cut across or undermine other aspects of the defence, particularly where issues of liability and damages are heard together. Similarly, a plaintiff should frame its case carefully from the outset of the dispute, having regard to any alternative causes of action available and the ability for counterfactual analysis to be used to reduce damages payable in respect of one or more of those causes of action. **LSJ**