Determination of damages for a deliberate contravention of s 52 of the TPA

Hayden Fielder reports on *Berry v CCL Secure Pty Limited* [2020] HCA 27

The High Court of Australia has clarified the correct approach to the determination of damages in a case of deliberate contravention of s 52 of the *Trade Practices Act 1974* (Cth) (TPA, now s 18 of the *Australian Consumer Law* (ACL)). The Court held, unanimously, that while ordinarily a claimant bears the onus of proof of its loss, where the contravener contends it would otherwise have used lawful means to bring about the same end, the evidential burden shifts to the contravener 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.

Background

Securency Pty Limited (respondent) manufactures polymer banknotes. In the early 1990s Securency began printing Australian banknotes on polymer and, thereafter, set about marketing polymer banknotes to other countries, including Nigeria.

Dr Berry and his company (the appellants) assisted Securency with the marketing efforts in Nigeria pursuant to an Agency Agreement which entitled Dr Berry to receive commissions on any sales of the banknotes to the Nigerian government. The agreement took effect from February 2006 until June 2008 (after which time it was to be automatically renewed on two-year cycles unless terminated earlier).

In February 2008, Securency no longer wanted Dr Berry to act as its agent. It persuaded Dr Berry to sign a document which terminated the Agency Agreement. However, Securency said that this was on the basis that the termination was necessary to facilitate the next stage of its banknote business in Nigeria and that Dr Berry would continue to act as agent and receive commissions in accordance with the Agency Agreement.

Subsequently, during 2009, Dr Berry learned that Securency had arranged matters to make it appear that there was a legitimate basis for diverting the commissions that would otherwise have been payable to Dr Berry to other entities. This was around the time that the media publicised allegations that officers of Securency had paid bribes or been party

to corrupt payments to government officials. It was then that Dr Berry discovered the true effect of the termination and that Securency refused to pay any more commissions to him. Dr Berry commenced proceedings against Securency alleging that it had engaged in misleading or deceptive conduct in contravention of section 52 of the TPA (now section 18 of the ACL).

Key issue

The primary issue on appeal concerned the correct approach to the calculation of damages. In particular, how to assess damages by reference to what would have occurred under the Agency Agreement 'but for' the misleading or deceptive conduct.

Dr Berry contended that damages should be assessed by reference to the commissions he would have received on the assumption that the Agency Agreement remained on foot up to the date of the trial.

Securency contended that, had Dr Berry not terminated the Agency Agreement, it would have terminated the agreement lawfully shortly after February 2008 conformably with its terms. Accordingly, Securency contended that damages should only accrue up to that termination date.

Findings below

The primary judge found that Securency's conduct in bringing about Dr Berry's termination of the Agency Agreement was misleading or deceptive. Dr Berry was awarded approximately $65 million in damages on the assumption that the Agency Agreement would have continued up to the date of trial.

On appeal, the Full Federal Court overturned the primary judge's decision, finding that, in the absence of evidence of substantive involvement of Dr Berry in Securency's business after February 2008, it was to be inferred that Securency would have lawfully terminated the agreement by around 30 June 2008. As such, damages were limited to $1.8 million.

High Court

Dr Berry's appeal to the High Court proceeded on 3 grounds ([2020] HCA 27 at [23]):

1. Damages should be assessed in a robust manner with a presumption against wrongdoers and resolving doubtful questions against the party whose actions made an accurate determination so problematic, relying on *Pitcher Partners Consulting v Neville's Bus Service* (2019) 271 FCR 392;

2. A wrongdoer should not be heard to set up a lawful means alternative to reduce its liability in damages so as to retain the benefit of its wrong unless the alternative is truly independent of the wrong (relying on *Potts v Miller* (1940) 64 CLR 282, *Gould v Vaggelas* (1984) 157 CLR 215 and *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64); and

3. A wrongdoer alleging that, 'but for' its contravening conduct, it would have deployed lawful means to cause the same outcome, must at least prove that there was a substantial prospect that it would have acted in that way (relying on *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 and *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332).

In a unanimous decision, the High Court allowed Dr Berry's appeal on the basis of Ground 3 above.

The principal judgment was that of Bell, Keane and Nettle JJ. In relation to Ground 1, their Honours High Court left open the question as to whether the above principle

from *Pitcher Partners* correctly stated the law relating to damages for deceit, with their Honours noting that the 'established authority of this Court' governing the assessment of damages under s 82 of the TPA (now s 236 of the ACL) for the loss of a commercial opportunity caused by misleading or deceptive conduct contrary to s 52 of the TPA is as laid down in *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332. The present case, however, was capable of resolution without resort to that principle ([2020] HCA 27 at [36]).

In relation to Ground 2, Bell, Keane and Nettle JJ held that there was nothing in the decisions referred to above in relation to this Ground which suggested that a wrongdoer will not be heard to set up a lawful means alternative while retaining the benefits of its wrong or if considerations that justified the wrong at all 'feature in the calculus that the wrongdoer would otherwise have undertaken'. Their Honours noted, further, that in Amann Aviation it was recognised that ordinarily, the purpose of 'compensatory damages' at the common law was fair and adequate compensation' and not punishment ([2020] HCA 27 at [31]).

Thus, their Honours said that allowing a 'fraudster' to plead and prove a lawful counterfactual which, but for its fraud, the fraudster would have pursued, 'is not in any sense to permit the fraudster to take advantage of its fraud' ([2020] HCA 27 at [27]). Rather, it merely limits the amount recoverable by reason of the contravening conduct.

In relation to Ground 3, Bell, Keane and Nettle JJ noted, in a discussion about the onus of proof, that, as claimants under s 82 of the TPA, Dr Berry generally bore the burden of establishing the existence and amount of the loss or damage that they suffered by Securency's misleading or deceptive conduct in contravention of s 52 of the TPA. However, their Honours continued that 'the nature and circumstances of the wrongdoer's conduct may support an inference or presumption that shifts the evidentiary burden' ([2020] HCA 27 at [29]).

Thus, in relation to the present case, Bell, Keane and Nettle JJ continued that 'where, as here, it is established on the balance of probabilities that a wrongdoer purposely chose to achieve a certain result by means of a calculated deceit, the natural inference is that the wrongdoer was not and would not have been prepared to bring about that result by lawful means' ([2020] HCA 27 at [39].

Accordingly, the evidential burden shifted to Securency to establish that, if it had not acted as it did, it would have terminated by lawful means and, in the absence of that evidence, it was 'fair to infer that there was not a realistic possibility of that occurring' ([2020] HCA 27 at [39].

In the present case, there was an absence of any such evidence from Securency. Accordingly, Bell, Keane and Nettle JJ concluded that, on the balance of probabilities, the agreement would have continued until 30 June 2010 but for Securency's misleading and deceptive conduct (being the date on which Securency terminated all of its other agency agreements following the bribery allegations) ([2020] HCA 27 at [33]). On that basis, Dr Berry was awarded a little over $27 million in damages.

In separate reasons, Gageler and Edelman JJ agreed with the orders proposed by Bell, Keane and Nettle JJ. Gageler and Edelman JJ also declined to consider the correctness of *Pitcher Partners*, preferring to wait for 'a case in which adoption or rejection of a 'robust' approach to fact-finding against the interests of a party found to have engaged in dishonest misleading or deceptive conduct is determinative' ([2020] HCA 27 at [74]). **BN**