IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S95 of 2013

BETWEEN:

ANNE CLARK
Appellant

and

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DAVID MACOURT
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

20 **Part II: Issues in the Appeal**

2. The appellant contends that the following issues arise in the appeal:

(a) Whether the Court of Appeal erred in holding that the appellant had not demonstrated loss by reason of the fact that 1,996 of the donor semen straws forming part of the Assets were unusable.

(b) Whether the Court of Appeal erred in finding that because the Deed between St George Fertility Centre Pty Limited (**St George**), the appellant and the respondent entered into in early 2002 did not apportion to particular Assets
30 the consideration payable by the appellant thereunder, the appellant had failed to demonstrate any loss sustained by her by reason of the fact that 1,996 of the donor semen straws forming part of such Assets were unusable.

(c) Whether the Court of Appeal erred in finding that the principles applicable to the assessment of damages where defective goods are supplied in a contract for the sale of a business differ from the principles applicable to the assessment of damages where defective goods are supplied in a contract for the sale of goods.

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(d) Whether the Court of Appeal erred in finding that different principles apply to the mitigation of damages resulting from a breach of contract under which wholly unusable goods were supplied depending on whether the contract was characterised as a contract for the sale of goods or a contract for the sale of business.

Part III: Judiciary Act 1903

3. The appellant does not consider that notice in compliance with s.78B of the *Judiciary Act 1903* is required.

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Part IV: Primary and intermediate decisions

4. The reasons for judgment of the primary and intermediate courts in the case are as follows:

   a. *St George Fertility Centre Pty Ltd v Clark* [2011] NSWSC 1276

   b. *Macourt v Clark* [2012] NSWCA 367

Part V: Material Facts

5. In early 2002 the appellant and St George each conducted assisted reproductive technology (**ART**) practices in Sydney: Gzell J. [2]. At that time the appellant and St
20 George entered into a Deed whereby the appellant purchased and St George sold various assets of the business carried on by St George. The respondent was a party to the Deed as a guarantor of the obligations of St George under it: Gzell J. [1].

6. By cl.1a of the Deed the appellant agreed to purchase the "*Assets for the purchase price and on the terms and conditions of this Contract*": CA [43]. The term "*Assets*" was defined in the Deed as "*the following assets of the vendor used in or attached to the Business, being the goodwill of the vendor in respect of the Business, Records, Embryos (to the extent title in them can at law pass to the Purchaser) and Sperm*". The term "Sperm" was in turn defined to mean "*all frozen sperm whether from*
30 *donors, stored for patients or reserved for patients with the vendor in the Business*" known as "*St George Fertility Centre*" conducted by St George.

7. The purchase price of the Assets was calculated in accordance with the formula set out in cl.2a of the Deed.[1]

8. As required by the Deed, in early 2002 St George provided the appellant with 3,513 straws of donor sperm. Of those straws, the appellant had been able to use only 504. The remaining 3,009 straws were found to be unusable. This was in breach of the contract contained in the Deed: Gzell J. [33], CA[28].

9. The proceedings arose because, by virtue of the appellant's inability to use the majority of the donor sperm supplied by St George, she ceased making payment of the purchase price to St George. St George then initiated proceedings on 8 March 2006 to recover from her the outstanding amount of the purchase price for the Assets.

10. The appellant cross-claimed for damages against St George (and the respondent as guarantor) for the breach of contract relating to, *inter alia*, the suitability of the donor sperm sold by St George as part of the Assets.

11. On 9 June 2010 Macready AsJ, as recited by Gzell J. at [4], made findings that St George had breached warranties in the Deed and ordered, *inter alia*, that the appellant should have, on her Further Amended Statement of Cross-Claim, summary judgment against St George and the respondent with damages to be assessed. The judgment of Macready AsJ was founded primarily on the admissions made by the respondent that "*sperm donor records were not maintained in each case as required*" and was entered by consent as against St George and, following argument, against the respondent: CA [18].

12. The assessment of damages was conducted by Gzell J. He held that the appellant should be compensated for the failure of St George to deliver 1,996 warranty compliant straws in early 2002. Gzell J. arrived at the figure of 1,996 in the following way:

    (a) Of the 3,513 straws delivered to her, the appellant only expected to be able to use 2,500 of the 3,513 straws of donor sperm delivered to her, due to the operation of a 10 Family Limit which the appellant observed in her practice

[1] Ultimately the total amount that the appellant was obliged to pay St George for all of the Assets, including the donor sperm, was $386,950.91: CA [16].

from 2002 and which limit was incorporated in an RTAC Code of Practice revised in February 2005 (Gzell J. [34]-[36]).

(b) From the 2,500 figure there should be deducted the number of straws of donor sperm actually used by the appellant (504): Gzell J. [47]-[48], CA [29]-[30], [148].

(c) The resulting figure was 1,996.

13. Gzell J. held that the appellant's damages were to be assessed as at the date of breach, i.e. in early 2002: Gzell J. [12]-[18]. He held that in quantifying such damages, it was appropriate to determine what it would have cost the appellant, at the time of breach, to purchase the equivalent quantity of straws in the market: Gzell J. [19], [108].

14. To arrive at that figure Gzell J. adopted the actual cost of sperm purchased from Xytex Corporation in September 2005: Gzell J. [109], [110]. He noted, at [111], that the cost of replacement sperm in early 2002 was likely to be less than was the case three and a half years later in 2005 but accounted for that by not allowing interest in that three and a half year period.

15. While there was a market for donor sperm (Gzell J. [40]) the cheapest donor sperm that complied with the necessary regulatory and legislative requirements was donor sperm from Xytex Corporation in the United States of America: Gzell J. [9], [42] and [82]. [2]

16. Gzell J. correctly found that the appellant paid the respondent for the donor sperm obtained from St George, evidently on the basis that some part of the purchase price payable by the appellant under the Deed for the Assets was attributable to the donor sperm: Gzell J. [21]. The respondent conceded before the CA that some part of the total purchase price payable under the Deed of $386,950.51 for the Assets related to the acquisition of the St George donor sperm: CA [77].

17. The appellant has paid the total payable under the Deed.

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[2] At an interlocutory hearing before Windeyer AJ on 8 October 2010 the respondent's Counsel stated that *"we don't say that either the St George sperm, which has all been discarded as I understand in any event could have been used nor do we say there is cheaper sperm available"*

Part VI: Appellant's argument

General

18. This was a simple case where the appellant purchased a number of assets from a similar practice. She agreed to pay a "global" price in respect of the items being purchased. The Sperm she was purchasing would be added to existing stocks. Whether she would charge patients for it, and how much she might charge them was immaterial.

19. Because of the breach of contract in supply of the Sperm the appellant did not have the stock which she might otherwise have had. She was entitled to be compensated for what it would have cost her to replace the unusable Sperm at the time when it was to be supplied under the Deed. It was immaterial that she later acquired sperm from Xytex and received the cost, or part of it, from patients.

Applicable principles to the assessment of damages

20. The CA approached the case on the basis that the principles applicable to the assessment of damages in sale of goods cases did not apply because the Deed did not include a relevant sale of goods: CA [1], [8]-[10], [49]-[50], [66]-[67], [89].

21. This approach was based on the view that:

(a) the price provided for by the Deed was deferred (CA [8]);

(b) no part of the price was allocated or apportioned to any separate part of the Assets including the donor sperm (CA [8], [49]);

(c) there was no evidence that the appellant paid anything for the donor sperm under the terms of the Deed (CA [66]-[67]).

22. The CA erred in this reasoning. It erred also in its conclusion that the principles applicable to the assessment of damages in sale of goods cases were not apposite to the assessment of damages arising from the supply of unusable donor sperm under the Deed. The true position is as follows:

23. *First*, there is no relevant difference between the principles applicable to the assessment of damages where defective goods are supplied in a contract for the sale of a business as compared to the principles applicable to the assessment of damages

where defective goods are supplied in a contract for the sale of goods. As stated at CA [7], the damages are not assessed by reference to "*some a priori characterisation of the contract but according to the actual circumstances of the case*". The relevant focus ought to have been on the loss arising from the breaches of the Deed by St George in selling wholly unusable goods to the appellant and not on the nature of the transaction under which the goods were sold.

24. Tobias JA observed at [127] that the appellant's prima facie loss was the cost of acquiring sperm from an alternative source – which could only be understood as the market cost or value of donor sperm. That, it is submitted, was precisely the approach that Gzell J. had taken.

25. Whilst these statements were correct the CA then failed to apply them to this case.

26. *Secondly*, it was in the contemplation of the parties to the Deed that the donor sperm sold to the appellant was to be used in medical procedures with patients in an "ART business". Accordingly, adopting the terminology of Alderson B in *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 145 (at ER 151) (see CA [6]), it can reasonably be supposed that the parties contemplated that the probable result, if the donor sperm transferred by St George could not be used by the appellant, would be that the appellant would have to procure replacement donor sperm.

27. *Thirdly*, the fact that the time for payment of the purchase price was deferred (CA [8]) cannot mean of itself that there was no price for the donor sperm.

28. Further the fact that there was a mechanism for the calculation of the price of the Assets whereby it was possible that the price could be nil (CA [8]) does not mean that there was no monetary consideration or price for the donor sperm under the Deed. The parties agreed upon this mechanism for the calculation of the price of the Assets and the agreed mechanism provided for monetary consideration.

29. Lastly, simply because there was no express allocation of price to the donor sperm in the Deed does not mean that:

    (a) there was no price payable for donor sperm under the Deed; and/or

(b) upon payment of the purchase price under the Deed, no payment had been made for the donor sperm.

30. The CA (at [66]-[67]) rejected the finding of Gzell J. (at [21]) that the appellant paid twice for the use of donor sperm being on the one hand the amount paid under the Deed and on the other hand payment of the cost of acquisition and storage of sperm from Xytex. The CA rejected this finding on the basis that there was no evidence that the appellant paid anything for donor sperm under the Deed. It may be noted, however, that the respondent conceded before the CA that some part of the total purchase price payable under the Deed of $386,950.51 for the Assets related to the acquisition of the St George donor sperm: CA [77].

31. Importantly, it was not incumbent on the appellant to prove the quantum of the price payable for the donor sperm under the Deed in order to prove damage. The appropriate measure of damages was not the contract price of the donor sperm but rather the market price of replacement of that quantity of sperm and it was common ground between the parties that the cheapest replacement donor sperm was donor sperm from Xytex.

32. Further, simply because the donor sperm was part of a larger class of Assets being sold under a single purchase price does not mean that no payment was made for the donor sperm. The payment of a global purchase price does not mean that no monetary consideration has been provided for the purchase of each of the component parts of the group of Assets.

33. The finding of Gzell J. (at [21]) that the appellant did in fact suffer loss as a result of paying twice for the donor sperm was correct and it was immaterial (subject to principles of mitigation of damage) that the appellant may have recovered 'most', but not all, of the costs that she incurred in the acquisition and resupply of donor sperm obtained from Xytex from patients when utilising *that* donor sperm in medical procedures: CA [5] and [11]. The appellant was entitled to recover the market cost of the replacement donor sperm from the respondent and the CA erred in setting aside the judgment of Gzell J.

Mitigation

34. The proper approach to the analysis of mitigation of damage in the present case was as set out by the CA in the submissions of the appellant to that Court: CA [115]-[118] and [124]-[127], namely:

    (a) the respondent had the onus to prove that the appellant had mitigated her loss to the extent of suffering no loss (CA [115]);

    (b) the respondent had to do more than simply point to the receipt of money from patients in order to show that the appellant had mitigated her loss and that its breach of the Deed conferred on the appellant a benefit which the appellant could not have gained if the Deed had been performed (CA [116]);

    (c) the onus was on St George and the respondent to establish that the appellant would have been unable to charge her patients in respect of hypothetically compliant St George donor sperm a sum of a similar order to that actually charged to her patients in respect of the Xytex sperm (CA [117]).

35. The CA eschewed this approach on the basis that these principles were only applicable to contracts for the sale of goods: CA [118]. There should be no difference in the applicable principles of mitigation depending on the characterisation of the contract entered into by the parties. The analysis should focus on the nature of the damage or loss that has been suffered by virtue of the breach of the contract and the conduct of the party who has suffered loss following that breach.

36. In the present case it was anticipated by the parties to the Deed that the St George donor sperm was to be utilised in patient treatments in an ART business, in fact 504 straws of donor sperm were used by the appellant. As an ART business it was to be expected that the appellant would receive payment for the patient treatments where donor sperm was used. Accordingly it was for the respondent and St George to establish that the appellant had mitigated her loss. They did not do so.

37. The suggestion that the appellant recovered all (CA [131]) or most (CA [11]) of her costs of replacement donor sperm from patients was ultimately irrelevant. As earlier submitted, there was a price payable for the donor sperm as part of the Assets under the Deed.

38. The finding of Gzell J. (at [21]) that the appellant did suffer loss by paying twice for donor sperm was correct. The respondent did not establish that the appellant was better off by utilising replacement donor sperm in patient treatments than she would have been if she had utilised contractually compliant St George donor sperm in patient treatments.

39. At CA [39]-[41] reference was made to the appellant's evidence as to the "*very significant buffer*" between the various costs associated with the acquisition, transport, storage, holding and transport of and dealing with the Xytex sperm, on the one hand, and the actual cost billed to the patient for that sperm, on the other hand.

40. There were costs associated with the acquisition of the St George sperm and the appellant would have been entitled to include other costs, such as the cost of treating and storing the St George sperm (CA [85]), in charging patients for the St George sperm.

41. To the extent, if any, to which it may be relevant, the existence of costs of collecting, storing and transporting the Xytex sperm, but not the St George sperm, does not demonstrate that the appellant would have been unable to make a substantial charge to her patients for the supply to them of hypothetically compliant St George sperm. She would have been so entitled. The respondent failed to prove otherwise and he (and St George) bore the onus.

42. There was no evidence of the quantum of the costs comprised in the "*very significant buffer*" and the matter was not investigated by the respondent beyond the evidence at CA[39]-[40]. Even though the "*very significant buffer*" was shown to exist, the respondent adduced no evidence to quantify it. The respondent failed to establish that the differential the subject of the "*very significant buffer*" was so great that the applicant had fully mitigated her loss, or mitigated it to any particular extent.

43. In the circumstances the appellant was entitled to damages in the sum of the replacement costs of the donor sperm and where Xytex sperm was the cheapest compliant donor sperm Gzell J. was correct in awarding damages by reference to the initial cost of obtaining Xytex sperm on 25 September 2005.

Part VII: Applicable Statutes, authorities etc

Hadley v Baxendale (1854) 9 Ex 341; 156 ER 145 at ER 151

Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd (1991) 33 FCR 1 at 28

Ruthol Pty Ltd v Tricon (Australia) Pty Ltd [2005] NSWCA 443; (2006) NSW ConvR 56-145 at [39]-[50]

Tabcorp Holdings Ltd v Bowen Investments Pty Ltd [2009] HCA 8; (2008-2009) 236 CLR 272 at [13]

Part VIII: Precise form of Orders

44. The appellant contends that the following orders should be made:

1. Appeal allowed with costs.
2. Orders of the New South Wales Court of Appeal be set aside and in lieu thereof order:
   (a) Appeal dismissed.
   (b) Cross-Appeal allowed in part.
   (c) Order 3 made by Gzell J. be set aside and in lieu thereof order that, subject to order 5 made by Gzell J. and subject to all costs orders already made in the proceedings, the Second Plaintiff/Second Cross-Defendant is to pay the Defendant/Cross-Claimant's costs of the proceedings on and after 30 May 2009 on an indemnity basis and otherwise on the ordinary basis.
   (d) The Appellant/Cross-Respondent to pay the Respondent/Cross-Appellant's costs of the appeal and the cross-appeal.

Part IX: Time Estimate of Oral Argument

45. The appellant estimates that approximately 2 hours are required for the presentation of the appellant's oral argument.

Dated

14 June 2013

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