IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S95 of 2013

BETWEEN:

ANNE CLARK
Appellant

and

10 **DAVID MACOURT**
Respondent

RESPONDENT'S SUBMISSIONS

Part I:

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

Part II:

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

(a) Whether the damages claimed by the appellant are recoverable against the respondent, having regard to the principles in *Hadley v Baxendale* (1854) 9 Ex
20 341: 156 ER 145 (at ER 151).

(b) Whether the Court of Appeal was in error when it concluded that the true measure of the appellant's loss was the reasonable costs and expenses associated with the procurement of replacement sperm that she did not recoup from patients, rather than the loss of the value that the discarded St George sperm would have had if it were RTAC-compliant.

(c) Whether the Court of Appeal was in error when it concluded that the appellant had fully mitigated her loss.

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(d) If the appellant were entitled to damages for "the value of the worthless sperm delivered to her", whether the cost of replacement Xytex sperm was evidence of that value.

Part III:

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

Part IV:

4. The following facts contained in the appellant's narrative are contested:

   (a) Paragraph 8 - the Deed did not specify any number of straws that were to be transferred and the first time that any party was aware that 3513 had been transferred was when a stocktake by the appellant was completed on 29 November 2005, almost four years after the transfer; and

   (b) Paragraph 16 – the concession referred to in this paragraph is a reference to an exchange with Tobias AJA during the hearing of the appeal, which was to the effect that if the appellant were able to prove what she paid for the sperm, she may have been entitled to claim the loss of that amount.

5. Whilst there are no other facts in the narrative that are contested, there are significant facts that have not been included, as set out below.

The regulatory framework within which the parties were contracting

6. The parties were contracting within a regulatory framework which governed the practice of all aspects of assisted reproductive technology medical practice ("**ART**").

7. The primary source of regulation was the "Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research" (**"the NHMRC Guidelines"**) which are issued in accordance with the *National Health and Medical Research Council Act* 1992 (Cth). In 2002 at the time of the Deed the 1996 edition of the NHMRC Guidelines were in force.[1]

[1] Copies will be provided at the hearing.

8. Clause 2.1 of the 1996 NHMRC Guidelines stipulated that, to be entitled to practice in ART medicine, reproductive medicine units had to obtain accreditation from a recognised accreditation body. The Guidelines also stipulated that the recognised accreditation body was the Reproductive Technology Accreditation Committee of the Fertility Society of Australia (**"RTAC"**), and that accreditation was to include consideration of compliance with the NHMRC Guidelines and with the RTAC Code (see below).

9. RTAC promulgated a Code of Practice (**"the RTAC Code"**) and expressly required all ART units to comply with it in order to receive accreditation to practice. Clauses 9.1 and 9.2 of the Code provided that accreditation would be reviewed periodically, and would normally be for a period of 3 years.

10. The RTAC Code was amended from time to time and the version applicable when the Deed was entered into was the 1997 RTAC Code.[2] Clause 7.1 incorporated the NHMRC Guidelines and made compliance with them mandatory.

11. Accordingly, if an ART practice did not comply with the NHMRC Guidelines and the RTAC Code, it would not be accredited by RTAC and, if it were not accredited, then it could not operate as an ART unit in Australia.

12. Two specific requirements of the NHMRC Guidelines/RTAC Code are relevant.

13. The first is that clauses 11.9 and 11.10 of the NHMRC Guidelines have at all relevant times provided that commercial trading in human sperm was prohibited, although the recovery of reasonable expenses was not precluded (**"the NHMRC/RTAC restriction"**).[3] The appellant confirmed in evidence that because

[2] Copies will be provided at the hearing.

[3] Indeed, from 4 July 2007, the sale or purchase of sperm for an amount which exceeded the cost of the reasonable expenses involved in its collection, storage or transport illegal by virtue of s.16 of the *Human Cloning for Reproduction and Other Prohibited Practices Act 2003* (NSW).

of these restrictions, she did not, and had not, made a profit from supplying sperm: T32, lines 16-26, T:34, line 4 – T:35, line 2, T:73, line 43 and T:94, line 21.

14. Secondly, donors of sperm were free to withdraw their consent for the use of the sperm they donated at any time and Attachment E clause 6.7 of the RTAC Code required that donors be specifically notified of this when donating sperm. Donated sperm could not be used in ART procedures unless donors had been notified of that right. If consent were withdrawn, the sperm could not be used in any ART procedure. This meant that, while possession and the right to utilise the sperm could be transferred to another party, title to, or property in the sperm, could not: CA [67]

Relevant facts after 2002

15. The appellant took over possession of the practice in early 2002 including the straws of donated sperm, and commenced to utilise the sperm in patient treatments. Her gross fee income increased in the 2002, 2003 and 2004 financial years and she became liable to pay amounts to St George under the Deed which totaled $386,950. Neither party had taken a stocktake of the donor sperm and the Deed did not identify any quantity of sperm that was being transferred. A stocktake was completed by the appellant's staff on 29 November 2005 which concluded that 3,513 straws had been transferred at the time of the sale: Gzell J [26].

16. By that time the appellant had used 504 straws of SGFC sperm but, in September 2005, she purchased 30 straws of donor sperm from Xytex Corporation in the United States ("Xytex") (Gzell J [109]) and at about that time she ceased to use St George sperm because the donor records relating to that sperm had not been maintained as required by RTAC, in breach of the warranty in clause 5.1(a) of the Deed. From that time the appellant essentially obtained all new donor sperm from Xytex.

17. On 20 October 2008 the appellant was ordered to serve a proposed Reply to the then-current Defence to Cross Claim, which had asserted inter alia that she charged

patients amounts which were equal to, or exceeded, her costs of acquiring replacement Xytex sperm. In compliance with that order she served a "draft Reply" on 11 November 2008 in which she admitted that:

"... she charges and has charged a fee to patients for the use of the sperm acquired by her from Xytex for an amount equal to the cost and expense involved in the acquisition of that sperm, but denies that that charge exceeds the cost and expense involved in the acquisition of that sperm."

Part V:

18. Not applicable.

Part VI:

Introduction

19. In this case the appellant's pleaded claim was for damages assessed as the cost of replacement sperm, and she tendered evidence of payments she had made to Xytex for replacement sperm, and of the payments to Xytex which she expected to make in the future for replacement sperm, to quantify that loss.

20. However at the hearing she submitted that she was entitled to damages assessed instead as the value that the St George sperm would have had if she had been able to use it, and she asserted that the evidence of past and future payments to Xytex was evidence of that value. Gzell J awarded her damages assessed as the value that usable St George sperm would have had as at the date of the breach of contract.

21. The Court of Appeal overturned that decision, concluding that her claim had been only for replacement costs, and finding that she had fully mitigated those costs when she charged patients, to whom she supplied the replacement Xytex sperm, an amount to recoup the amount she had paid to Xytex to obtain it.

22. Indeed, in circumstances where she recouped the replacement costs from patients, to order the respondent to pay damages to her based on her outlay for replacement costs would be to compensate her twice for one loss.

23. The Court of Appeal was correct but, even if the appellant had been entitled to damages assessed as the value of usable St George sperm as Gzell J found, her claim should have failed. The evidence showed that, as a result of the NHMRC/RTAC restriction, she could not have made a charge for supplying St George sperm - still less a charge equivalent to the cost of buying replacement Xytex sperm - and indeed she did not assert that she had charged patients for the supply of St George sperm. Usable St George sperm therefore had no inherent value and the claim for damages ought to have been dismissed.

24. Paragraphs 18 and 19 of the appellant's submissions do not take into account the NHMRC/RTAC restriction. Moreover the charges she makes to patients for the supply of sperm are important if, as here, the breach results in her being able to increase those charges significantly.

25. Because of the restriction the contract sperm could not be supplied by the appellant for payment: there was no way to identify any cost to her of the sperm. However because of the breach, and her decision to replace the contract sperm with Xytex sperm, she became able to, and did, charge patients the replacement cost when supplying sperm i.e. $511 per straw initially rising to $980 per straw at the time of the hearing. She could not have supplied sperm for these amounts – or any amount – if there had been no breach.

26. If she were supplying Xytex sperm for the amount for which she had been supplying St George sperm, then her loss might be the replacement cost as claimed. But here the breach " *...which caused the damage also caused the profit ...* " (per Mustill LJ in *Hussey v Eels* (1990) 2 QB 227 at 241) and any loss was thus fully mitigated.

Submissions

27. The appellant's pleaded claim was for damages assessed as the costs and expenses of replacing the non RTAC-compliant St George sperm. Her Cross Claim did not plead that the Deed was a contract for the sale of goods, but the Trial Judge, accepting her submissions at the Trial, nevertheless awarded her damages assessed on the alternative basis usually available in sale of goods cases; being the loss of the value that the St George sperm would have had if it had been RTAC-compliant.

28. The appellant now submits in paragraph 23 of her submissions in this Court that the focus ought not be on whether or not the Deed was a contract for the sale of goods, but whether the loss claimed by the appellant came within the principles in *Hadley v Baxendale* (1854) 9 Ex 341: 156 ER 145 (at ER 151). The reason for the Court of Appeal's detailed analysis as to whether the Deed was a contract for the sale of goods, and as to whether any part of the agreement between the parties involved a sale of sperm, was to address the approach and findings that were the basis of the decision at first instance, in accordance with the submissions that the appellant had made to Gzell J: CA [75].

29. Furthermore, the question of whether or not the Deed was a contract was for the sale of goods, or whether it included a sale of sperm, is nevertheless important because it informs the question of whether the damages claimed come within the rule in *Hadley v Baxendale*; what was within the reasonable contemplation of the parties as being the probable result of a breach of the contract will depend in part on the nature and subject matter of the contract itself, and the "reasonable contemplation" of the parties *"depends on a consideration of the terms of the contract in the light of the matrix of circumstances in which it was made"*: *The Commonwealth v Amann Aviation Pty Limited* [1991] HCA 54; (1991) 174 CLR 64 at 92. See also *European Bank Limited v Evans* [2010] HCA 6; (2010) 240 CLR 432 at [13].

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30. The Court of Appeal correctly concluded that the Deed was not a contract for the sale of goods, and that insofar as donor sperm was concerned, it did not include a relevant sale of goods. It did so for the following reasons:

(i) as the Appellant conceded at trial,[4] under the RTAC Code, donors of sperm could always withdraw their consent to its use in insemination procedures, in which event the sperm could not be used by fertility practitioners. As such, St George did not have ownership of the sperm to pass on to the appellant: CA [67];[5]

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(ii) no part of the (potentially zero) purchase price was apportioned to donor sperm: CA [8], [49];

(iii) there was no evidence that the appellant had paid anything for the donor sperm and indeed it was "extremely difficult, if not impossible" to calculate any price for the donor sperm: CA [66];

(iv) the price for the "Assets" was wholly deferred: CA [8]; and

20 (v) the purchase price for the whole of the "Assets" depended on the increase in gross fee income of the appellant and was in no way related or dependent on the quantity of donor sperm transferred; the "Assets" the subject of the sale were defined by reference to the "business" or medical practice carried on by St George; and the Deed incorporated a restraint of trade by both St George and the respondent: CA [49].

31. Other factors not mentioned by the Court of Appeal, but which are also consistent with the Deed not being a contract for the sale of goods, or not containing a sale of the donor sperm, are:

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[4] T:32, line 29, T:34 line 49 – T:35, line 26.

[5] This is also recognised in clauses 1b and 9.1(a)(i) in the Deed which refers to the transfer of the "Assets", "to the extent that title in them can pass" to the purchaser.

(i) under the NHMRC/RTAC restriction, compliance with which was necessary for accreditation to carry on an ART medical practice, commercial trading in sperm was unethical and prohibited, and the appellant confirmed in evidence that this was her understanding and that she did not and had never bought or sold sperm for valuable consideration: T:32, lines 16-26, T:73, line 43 and T:94, line 21;

(ii) the Deed did not identify any quantity of sperm being transferred;

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(iii) "Sperm" within the definition of "Assets" was itself a defined term which was defined to mean "*all frozen sperm whether from donors, stored for patients or reserved for patients with the vendor in the Business*". It is not and has never been suggested by the appellant that there was a sale of the sperm stored or reserved for patients, and in circumstances were the definition of "Assets" did not differentiate between that type of sperm and donor sperm, the Deed could not be construed as involving a sale of the donor sperm;

20 (iv) the respondent had conducted no stocktake before entering into the Deed to ascertain the quantity of the "Sperm" or what proportion of the sperm was donor sperm as opposed to patient sperm; and

(v) the appellant undertook no stocktake before entering into the Deed; she conceded in evidence that she could not have known how many straws were useable until after an "audit" was conducted;[6] but she did not conduct a stocktake after entering into the Deed and did not know how many straws had been transferred by St George until 29 November 2005, almost 4 years later.

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[6] T:49 at line 10.

32. Having regard to the matters set out in paragraphs 30 and 31 above, at the time of the entry into the Deed it would have been within the "reasonable contemplation" of the parties that:

(i) because she had paid no money to St George at the time of completion of the Deed (i.e. when taking possession of the sperm) and because there was no way of knowing from the terms of the Deed what amount, if any, she would pay for donor sperm (CA [126]), the appellant could not ethically make any charge to the patients to whom she supplied it;

(ii) after the end of the first year, when the first installment of the purchase price was due, it would be in an amount which was totally independent of the amount of sperm that had been transferred to her, or the amount of sperm she had used, and the problem in (i) above would remain;

(iii) even after the end of the third year, when payment of the whole of the purchase price was identifiable, she would still not have been able to identify the amount she had paid for the St George sperm;

(iv) a stocktake was not important: the cost to the appellant of acquiring the St George practice was a proportion of any increase in her gross fee income after acquiring the practice. Because she could not sell, and on her evidence would not have sold, the sperm for a profit, the benefit to her in having the sperm was the professional fees she could earn from medical procedures and patient treatments (this much is acknowledged in paragraphs 26, 33 and 36 of the appellant's submissions). If she were unable to use some or all of it, then she would not be able to utilise it in medical procedures and patient treatments, which would reduce the increase in fees she might otherwise have received from performing those procedures and treatments, with a corresponding reduction in the purchase price she would be obliged to pay St George. Any consequence for breach

of any warranty in respect of the donor sperm was therefore, in effect, built in to the contract by virtue of the method which the parties chose to calculate the purchase price;

(v) therefore, if the St George sperm were not usable she would not lose money she had paid for it, she would instead lose the fees she might otherwise have earned from carrying out medical procedures and patient treatments with that sperm; and

(vi) if she were unable to use St George sperm, but could obtain donor sperm from another source then, because of the NHMRC/RTAC restriction, she would not be required to pay for that sperm any more than its cost, and she would then be able to pass that cost – together with any acquisition costs of her own – on to her patients.

33. Thus, having regard to the terms of the Deed and the *"matrix of circumstances in which it was made"* as set out above the respondent submits that it was not within the "reasonable contemplation" of the parties at the time they entered into the Deed that the probable result of some or all of the St George sperm not being RTAC-compliant would be the loss of sperm which had some inherent value or the acquisition by the appellant of sperm from another source the costs of which she would not pass on to patients. In those circumstances, the loss she has claimed in the proceedings, no matter how it is framed, did not fall within the principles in *Hadley v Baxendale* (1854) 9 Ex 341: 156 ER 145 (at ER 151): CA [6]-[10].

Replacement costs and expenses

34. The Court of Appeal correctly noted that the appellant's claim for "replacement costs":

(i) was confined to the reasonable costs and expenses associated with the procurement of replacement sperm: CA [27]

(ii) was supported by evidence of only the supply and transportation costs of the replacement sperm: CA [41], [87]; and

(iii) could not have included other costs involved in the supply of sperm to patients – being storage, treatment costs etc. – since those costs would have been incurred with St George sperm if it had been RTAC-compliant, and were therefore a constant (indeed she would have made a saving on these because, having acquired the Xytex sperm only as and when it was needed, she was not required to store large numbers of sperm): CA [41], [98].

35. As set out in the narrative above, in her draft Reply served pursuant to court orders on 11 November 2010, she conceded that she charged a fee to patients which was equal to her cost to acquire Xytex sperm.

36. At [127] CA, Tobias AJA stated that the appellant's prima facie loss was the cost of replacement sperm, but that she had been able to fully mitigate that loss. His Honour was not there saying that the cost of replacement sperm "could only be understood as the market cost or value of donor sperm", as submitted by the appellant in paragraph 24 of her submissions. His Honour was saying nothing about "market cost" or "value", expressions which are associated with a sale of goods and are therefore (given the CA's finding that there was no sale of goods) apt to mislead in the context of this case. His Honour was there referring to the actual amounts paid to Xytex by the appellant. The approach taken by Gzell J was not to compensate her for the cost of replacement sperm, but to compensate her for the loss of the value of the St George sperm.

Loss of value

37. Gzell J erred in assessing the loss claimed by the appellant as the value, as at the date of the breach (being the date of the contract) of 1,996 straws of replacement sperm because this was not the claim pleaded by the appellant in her Cross-Claim, and relief not founded on the pleadings should not be granted: see *Gould v Mount Oxide Mines* (1916) 22 CLR 490 at 517 and *Banque Commerciale SA v Akhil Holdings Ltd* (1990) 169 CLR 279 per Mason CJ and Gaudron J at 286-7, per Dawson J at 296-7, per Toohey J at 302-3 and per Brennan J at 287-8.

38. The appellant's failure to make such a claim in her Cross-Claim was not cured by what she pleaded in the Reply filed on 14 January 2011 and in the subsequent amended replies that she filed. Part 14.18 of the *Uniform Procedure Rules 2005 (NSW)* provides that a party "must not in any pleading ... raise any ground or claim, inconsistent with any of his or her previous pleadings". Inconsistent for this purpose means "new or different": *Herbert v Vaughan* [1972] 1 W.L.R. 1128. A claim for "the reasonable costs and expenses associated with the procurement of replacement sperm" is different to one for the "value of the worthless Sperm delivered to her". If the appellant wished to seek damages for loss of the value of the contract sperm, she ought to have sought leave to amend her Cross-Claim to seek such damages. It was not sufficient to seek to re-cast her claim in the Reply without amending her Cross-Claim, avoiding the requirement to obtain leave to amend.

39. However, if the appellant's claim were accepted as a claim for the loss of the value that the St George sperm would have had if it had been RTAC compliant, then she bore the onus of proving that value and she did not do so. That loss (if any) having occurred at the date of breach, i.e. the date of the Deed when possession of the sperm was delivered (Clause 9.2), the appellant was obliged to prove the value in early 2002 of RTAC-compliant sperm acquired from St George.

40. The appellant sought to prove that value by tendering evidence of the cost of Xytex sperm at various times from August 2005 when she first acquired it. However, this provided no evidence of RTAC-compliant St George sperm in early 2002 or at all because:

(i) the NHMRC/RTAC restriction prevented the sale of compliant St George sperm for more than its cost: in early 2002 the appellant had obtained possession of the sperm without payment; without being obligated to pay any identifiable amount for it in the future; and in circumstances where, even after all of the purchase price had been paid, she would not be able to identify the amount paid for the donor sperm, and therefore could make no charge for it;

(ii) even after the appellant had paid one or more of the installments of purchase price she would not be able to identify the amount (if any) paid for sperm, and would not therefore know its cost (if any) and thus be unable to charge for it without contravening the restriction: CA [85], [86], [126];

(iii) the appellant's own evidence showed that Xytex charges included payment for several expenses that would not be incurred for compliant St George sperm, and which therefore made Xytex costs inappropriate as a proxy for, or evidence of, St George value. Examples in this category included:

(a) cryogenic transport of sperm from the USA and the return of specialised transport containers;

(b) airfares and accommodation for trips by the appellant and members of her staff to the USA to inspect Xytex facilities and confer with Xytex staff;

(c) engagement of locums to operate her fertility practice while she was in the USA;

(d) a 3% American Express charge on the amounts paid by her for Xytex sperm;

(e) the administrative costs involved in ordering sperm from Xytex; and

(f) the administrative costs involved in reporting to Xytex on treatment outcomes;

(iv) since the total price she had become liable to pay for the practice in February 2005 was $386,950 and there were 3,513 straws transferred, even if the whole of the purchase price for all of the "Assets" were taken to be only for donor sperm, her cost to "purchase" it would only have been approximately $110 per straw, and as a result of the NHMRC/RTAC restriction, she would only have been able to charge that amount when supplying sperm to her patients. That amount was therefore the maximum theoretical value of each straw of St George sperm at the time of the contract. The cost of Xytex sperm, however, was approximately $511 per straw (Gzell J [109] – [110]), more than four times the maximum theoretical value of each straw of St George sperm. Thus, the cost of replacement Xytex sperm was irrelevant and not an appropriate proxy for the value of RTAC compliant St George sperm; and

(v) in any event, the Xytex evidence related to its cost from August 2005 onwards: there was no evidence given of its cost in early 2002, and no evidence that evidence of such cost could not be obtained, or that it was otherwise appropriate to assume that the cost in early 2002 would be equivalent top the cost in August 2005 less interest

41. Additionally, the appellant did not give evidence that she had charged patients for the supply of St George sperm. In the absence of such evidence, the Court of Appeal correctly inferred that, being unable to identify the amount she had paid St George for that sperm, it should be assumed that she had made no charge for it: [85], [86], [126].

42. In these circumstances, even if the claim were treated as a claim for loss of value, it should have been rejected on the basis that either the evidence showed that the value to the appellant of RTAC- compliant St George sperm in early 2002 was nil; or alternatively that the appellant had not proved that such sperm had any particular value at that time.

Mitigation

43. The Court of Appeal considered the relevant authorities on mitigation at [100] – [111] and correctly concluded at [112] – [116] that the charges made by the appellant to patients for the supply of Xytex sperm constituted full mitigation of the costs she had incurred to acquire that replacement sperm.

44. The appellant's submissions at paragraph 34 of the written submissions, which were also made to the Court of Appeal, should not be accepted. For the reasons set out in paragraphs 30-31 above the Court of Appeal was correct to conclude that the Deed was not a contract for the sale of goods, that it did not contain a sale of goods, and that the loss claimed by the appellant had been fully mitigated.

45. However, even if the Deed had been or contained a contract for the sale of goods, the respondent would still have discharged the onus to show that the appellant had fully mitigated her loss.

46. To constitute mitigation, a benefit must be obtained which arises *"out of the consequences of the breach and in the ordinary course of business"*: *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Company of London Ltd* [1912] AC 673 at 690. As with the decision of the innocent party in that case, the charging of costs to patients receiving Xytex sperm in amounts intended to recoup the appellant's costs of acquiring that sperm was not a res inter alios acta, but *"a prudent course quite naturally arising out of the circumstances in which* [the appellant] *was placed by the breach"*: *British*

Westinghouse at 691.

47. The onus on the respondent to prove mitigation was limited to proving mitigation of the loss claimed by the appellant. The loss for which she was seeking compensation was the costs of replacement Xytex sperm. She could have sought compensation for the value the St George sperm would have had if RTAC-compliant but did not do so. The appellant now argues in paragraph 34(c) of her written submissions that, to successfully establish a defence of mitigation, the respondent must prove not only that she mitigated the loss constituted by "the reasonable costs and expenses associated with the procurement of replacement sperm", but also the loss of the value that the St George sperm would have had if it had been RTAC compliant; i.e. the appellant argues that the respondent must prove not only that the appellant mitigated the loss that she did claim, but also that she mitigated other possible losses that she did not claim. The respondent submits that there is no no authority for such a proposition.

48. If the appellant's submissions in paragraph 34(c) were correct then, while she had claimed replacement costs, which were $511 per straw, because the respondent had only proved that that loss had been fully mitigated, and had not also proved that she had mitigated an alternative, lesser claim of $110 per straw which she could have, but did not, make, the appellant would be entitled to recover her claimed loss of $511 per straw.

49. However, if the respondent did have the onus to show that the appellant could not have charged for compliant St George sperm "a sum of similar order to that actually charged" for Xytex sperm, as asserted in the appellant's submissions at [34(c)], then this onus was discharged when any one of the following three aspects of the evidence is taken into consideration:

(i) there were significant costs, set out in paragraph 40(iii) above, involved in the acquisition of Xytex sperm which would not have been incurred, and

so under the NHMRC/RTAC restriction could not have been recovered for the supply of St George sperm;

(ii) as set out in paragraph 40 (iv) above, St George sperm could not have been supplied for more than $110 per straw in circumstances where the Xytex costs were over four times that amount;

(iii) having regard to the facts that:

(a) the appellant could not make a profit from the supply of St George sperm

(b) she could not identify the amount, if any, that she paid to acquire the St George sperm

(c) her claim did not include, as an alternative to replacement costs, a claim for an amount she would have charged for the St George sperm if it had been compliant; and

(d) she tendered no evidence that she had charged patients for the supply to them of St George sperm

the Court of Appeal was correct to conclude that she was not able to make any charge for St George sperm, still less a charge "of similar order" to the charge for Xytex sperm: CA [85], [86], [126]. Indeed, for the reasons set out in 32(i)-(iii) above, the evidence showed that she would not have been able to charge any amount for St George sperm had it been RTAC compliant: CA [126].

50. Gzell J addressed the respondent's assertion of mitigation at [21] and stated that the answer to that assertion was that the applicant paid twice for usable sperm. Gzell J's conclusion in [21] would have supported a claim for damages assessed as the amount by which the appellant had been "*left ... out of pocket for the amount paid under the Deed.*" However, that amount could not be identified, the appellant made no claim for it, and this was in any event, no answer to the respondent's defence that the appellant either avoided or fully mitigated the loss she was claiming.

51. In relation to paragraphs 39 to 42 of the appellant's submissions, the transcript extracted at CA [39] and [40] shows that the *"very significant buffer"* became a *"sufficient buffer"* and finally turned out to be the *"costs involved in the holding, protecting and dealing with the sperm"*. These costs would have been incurred for St George sperm if it had been RTAC-compliant, and so were not in any way caused by a breach of the Deed. They had not been included as part of the replacement costs claimed by the appellant (CA [41], [87]) and they would not have been reflected in any "loss of value" damages to which she may have been entitled since those damages had been assessed at the date of the breach – the date when the sperm was physically transferred into the appellant's possession – and none of those costs had been incurred at that time: CA [98]

52. If the appellant's arguments were correct, then the quantum of damages to which she would be entitled would be completely independent of the amount, if any, that she received for the supply of the replacement sperm. She would be entitled to recover the same amount of damages whether she provided the sperm to patients without charge or, as was the case, provided the sperm for payment of full replacement costs i.e. she would be entitled to the same amount of damages irrespective of whether she recovered $0 or, as was the case, $1,423m (i.e. over $769,000 at the time of the hearing (Sapere Report 21 September 2011 paragraph 18) with the expectation of receiving a further $740,000 in the future (Sapere paragraph 26)).

53. Considering that the appellant recovered from patients the costs of acquiring the replacement sperm, an order that the respondent now pay to her the damages she claims would result in her being compensated twice for the loss she claimed; she would have the same quantity of usable sperm that she would have had if the St George sperm had been RTAC-compliant, thus putting her "in the same situation ... as if the contract had been performed" (per Parke B in *Robinson v Harman*) but she would also have an additional $1.473m (if her evidence of quantum in the

Sapere report were accepted) or $1.246m (if the Trial Judge's orders were reinstated). This would put the appellant *"in a superior position to that which ... she would have been in had the contract been performed"* contrary to the statement of Mason CJ and Dawson J in *The Commonwealth v Amann Aviation Pty Limited* [1991] HCA 54; (1991) 174 CLR 64 at [28].

Conclusion

54. For all those reasons, it is respectfully submitted that the Notice of Appeal ought to be dismissed with costs.

Part VII:

55. The respondent's argument on his notice of contention (subject to the granting of leave) is set out in paragraphs 39-41 above.

Part VIII:

56. The respondent estimates that approximately 2 hours will be required for the presentation of the respondent's oral argument.

Dated: 5 July 2013

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