CLARK v MACOURT (S95/2013)

Court appealed from:	New South Wales Court of Appeal [2012] NSWCA 367
Dates of judgment:	9 November 2012 & 13 December 2012
Special leave granted:	10 May 2013

Prior to 2002 Dr Anne Clark conducted an Assisted Reproductive Technology ("ART") practice, as did the St George Fertility Centre Pty Limited (In Liq) ("St George"). At all material times, Dr David Macourt was the sole director and controller of St George. An ART provides treatments aimed at procuring pregnancy other than by sexual intercourse. Donor sperm is used in those treatments.

In early 2002 Dr Clark and St George entered into a Deed ("the Deed") to which Dr Macourt was also a party (as guarantor of St George's obligations). Pursuant to that Deed, Dr Clark agreed to purchase St George's "Assets" for $386,950.91. Those "Assets" included, but were not limited to, St George's stocks of donor sperm. Dr Clark was then supplied with 3513 "straws" of donor sperm by St George, of which only 504 turned out to be useable. (In 2005 she ascertained that the remaining 3009 "straws" were not.) This forced Dr Clark to source donor sperm from an alternative supplier, the US-based Xytex Corporation ("Xytex").

In March 2006 St George (which was not then in liquidation) sued Dr Clark for the balance of the purchase price, being $219,950.91. Dr Clark then cross-claimed against St George and Dr Macourt, claiming damages for breach of various warranties relating to the sperm comprising the Assets. On 9 June 2010 Macready AsJ found for Dr Clark, with damages to be assessed at a later date. On 8 November 2011 Justice Gzell awarded Dr Clark damages of $1,246,025.01. (This amount was calculated pursuant to a formula based on the total number of usable "straws" delivered, less the number of "straws" actually used.) As St George was in liquidation by this stage, only Dr Macourt appealed against those orders. Dr Clark however filed both a Notice of Cross-Appeal and a Notice of Contention.

The Court of Appeal (Beazley & Barrett JJA, Tobias AJA) unanimously upheld Dr Macourt's appeal and set aside the lower Court's award of damages. Their Honours found that Justice Gzell had mischaracterised the Deed as one for the sale of goods, as opposed to one for the sale of the goodwill and assets of a business. The question of damages therefore could not be assessed as if there had been a simple contract for the sale of goods. The Court of Appeal also found therefore that Justice Gzell had erred in finding that Dr Clark had suffered a loss for the amount paid under the Deed for the St George sperm. Their Honours noted that Dr Clark had successfully mitigated that loss by recovering the full cost of acquiring the replacement Xytex sperm from her patients. The Court of Appeal found therefore that St George was entitled to judgment in the sum of $219,950.91, to be set-off against a small amount awarded to Dr Clark on her cross-claim.

The grounds of appeal include:

- The Court of Appeal erred in holding that because the Deed between St George, Dr Clark and Dr Macourt entered into in early 2002 did not apportion to particular Assets the consideration payable by Dr Clark thereunder, Dr Clark was unable to demonstrate the loss sustained by her by reason of the fact that 1996 of the semen “straws” forming part of the Assets were unusable.

On 19 June 2013 the Respondent filed a summons, seeking leave to file a notice of contention out of time. The ground in that notice of contention is:

- If Dr Clark were entitled to damages assessed by reference to the loss of the value of the contract sperm, then the cost of the acquisition of replacement Xytex sperm was not an approximate proxy of that value.