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Clark v Macourt

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Clark v Macourt[1] was an appeal before the High Court of Australia of the decision of the NSW Court of Appeal in *Macourt v Clark*.[2] The Court of Appeal decision and the decision at first instance have previously been reported in the *Australian Health Law Bulletin*.[3] The case concerned the assessment of damages for breach of contractual warranties relating to frozen donor sperm. The sperm was acquired as part of the purchase of the assets of a fertility clinic business by a medical practitioner, Dr Clark.

The High Court allowed the appeal of Dr Clark and reaffirmed that the principle that applies for assessing damages for breach of contract is that the damages awarded should put the promisee in the same position, so far as money can do it, as it would have been in had the broken promise been performed.

Background

In 2002, Dr Clark, a medical practitioner who operated a fertility clinic, entered into a deed (Deed) with another fertility clinic, St George Fertility Centre Pty Ltd (St George), in which Dr Clark agreed to purchase the assets of St George. The assets included 3513 straws of frozen donor sperm. The total amount payable by Dr Clark to St George for purchase of the assets was $386,950.91.[4] No portion of the purchase price could be attributed to the sperm and no attempt was made to do so at trial.[5]

St George provided warranties in relation to the sperm under the Deed, including warranting that the sperm would comply with the donor identification requirements of the Reproductive Technology Accreditation Committee Code of Practice, and that St George would notify its former patients that Dr Clark had purchased the sperm. St George's sole director, Dr Macourt, was St George's guarantor under the Deed.

The majority of the sperm supplied by St George (1996 straws) did not comply with the warranties under the Deed and was therefore unusable by Dr Clark. Dr Clark purchased replacement sperm from an American company, Xytex, at a cost of $1,246,025.01.[6] Dr Clark recovered her expenditure on the replacement sperm from her patients in the course of providing fertility treatments.[7]

In April 2005, the balance amount owed by Dr Clark to St George under the Deed was $219,950.91. St George sued Dr Clark for the outstanding amount. Dr Clark made a cross-claim for damages against St George and Dr Macourt for breach of warranty under the Deed in relation to the sperm.[8]

The decision at first instance

At first instance, the NSW Supreme Court found in favour of Dr Clark. The primary judge, Gzell J, held that the measure of damages for breach of warranty should be the amount that Dr Clark would have had to pay in a hypothetical purchase of 1996 straws of replacement sperm at the time the warranty was breached (at the time of the asset purchase in 2002).[9] Justice Gzell found that the best evidence of that amount was the first purchase by Dr Clark of replacement sperm from Xytex in 2005 at US$350 a straw, which, when extrapolated, provided a total damages award of A$1,020,252.70.[10]

Dr Macourt appealed the decision of the primary judge (St George was in liquidation at the time of the appeal).

The decision of the Court of Appeal

The NSW Court of Appeal held that Dr Clark should not be awarded damages for breach of warranty in relation to the sperm. The Court of Appeal disagreed with the primary judge's characterisation of the Deed as a contract for the sale of goods.[11] The Court of Appeal noted that the primary judge had applied the principle that, in breach of contract cases for sale of goods, damages should be assessed at the date of breach.[12] The Court of Appeal held that as the Deed related to a sale of business, it was inappropriate to assess damages at the date of breach, and proceeded to assess damages at the date of the hearing.[13]

The Court of Appeal found that in passing on the cost of the Xytex replacement sperm to her patients (between the date of the breach of the Deed by St George and the date of the hearing), Dr Clark had avoided any loss that she otherwise would have sustained from the breach, and set aside the award of damages made at first instance.[14]

Dr Clark appealed to the High Court and sought reinstatement of the primary judge's award of damages.

Arguments of the parties on appeal

On appeal, Dr Clark argued that the breach of warranty by St George resulted in the value of the sperm straws being less than it would have been if the breach had not occurred. Dr Clark claimed that the value she did not receive (and thus the damages she claimed) was the amount it would have cost (at the date of the breach of warranty) to purchase the 1996 straws of sperm from Xytex.[15]

Dr Macourt argued that Dr Clark's claim for damages related to the costs of procuring replacement sperm, which arose subsequent to the date of the breach of the Deed by St George and, accordingly, the damages should be assessed at the date of the hearing. The court noted that the advantage of Dr Macourt framing Dr Clark's claim this way was that it would allow Dr Macourt to argue (as accepted by the Court of Appeal) that Dr Clark had recouped the costs of the procurement of the replacement sperm through her dealings with patients subsequent to the breach, so that she had suffered no loss because of St George's breach of contract.[16]

Consideration by the High Court

The High Court, by majority,[17] allowed the appeal by Dr Clark, with Keane J delivering the leading judgment. In dissent, Gageler J found that the measure of damages adopted by the Court of Appeal was appropriate.[18] Justice Gageler stated that due to the "peculiar" nature of the asset (frozen sperm) being delivered under the Deed, the value Dr Clark would have received could not be equated with the value to a buyer of goods that could be resold at market at the time of delivery.[19] The High Court's key findings are set out below.

The principle for assessing damages for breach of contract

The High Court noted that to argue that Dr Clarke was able to recover from her patients the cost of acquiring the sperm from Xytex was not the claim that was actually being made. Rather, the loss for which compensation was claimed occurred at the completion of the deed, when the assets acquired were not as valuable as they would have been had no breach of warranty occurred. Thus, the court held that damages should be assessed at the amount it would have cost, at the date of breach of warranty, to purchase 1996 straws of sperm from Xytex.[20] This was the value Dr Clark would have received had the promise (the warranty) been performed.[21]

The High Court reaffirmed that the "ruling principle" to be applied when assessing damages for breach of contract is that "damages should put the promisee in the same situation with respect to damages, so far as money can do it, as it would have been in had the broken promise been performed".[22] The High Court held that the damages to be paid for breach of contract in accordance with the "ruling principle" should be assessed at the date of the breach.[23] Justice Keane stated that assessment of damages at the date of breach is "an integral aspect of the principle, which is concerned to give the purchaser the economic value of the performance of the contract at the time the performance was promised".[24]

The High Court further found that the fact that the Deed did not specify a particular price for the sperm was irrelevant for the purposes of calculating damages, as Dr Clark's loss was to be measured "not by reference to what she outlaid as compared to what she obtained from St George, but by reference to the value of what St George had promised to deliver to her but did not".[25]

Reference to the prohibition on receiving valuable consideration for sperm

At the time the Deed was entered into by the parties in 2002, Dr Clark and Dr Macourt were bound by the ethical guidelines on assisted reproductive technology published by the National Health and Medical Research Council. These guidelines prohibited commercial trading in sperm, save for the recovery of reasonable expenses[26] (for example, of acquiring, transporting and storing the sperm). The High Court noted that these ethical prohibitions were later overlaid by provisions in the Human Cloning for Reproduction and Other Prohibited Practices Act 2003 (NSW) which prohibited Dr Clark from receiving valuable consideration for sperm beyond reasonable expenses.[27]

Justice Keane noted, however, that Dr Clark denied that she had made a profit from supplying the sperm and "there was no reason to doubt her evidence". His Honour thus concluded that by providing assisted reproductive technology services for a fee, Dr Clark "cannot sensibly be said to be engaging in commercial trading of sperm for a profit".[28]

Furthermore, Crennan and Bell JJ held that, in relation to the calculation of damages, the measure of damages was the market price of the goods at the time the goods were to be delivered under the contract, less the contract price (if the latter has not been paid to the seller of the goods). This was the case notwithstanding the circumstance in which the buyer was constrained by regulation.[29]

Mitigation of loss

The High Court disagreed with the Court of Appeal's conclusion that Dr Clark had mitigated her losses by "passing on" the costs of the Xytex sperm to her patients. Instead, the majority found that Dr Clark had neither increased nor diminished the loss of her bargain under the Deed through St George's failure to deliver warranty compliant sperm.[30] Justice Hayne noted that if Dr Clark, in her subsequent transactions with patients, had obtained some advantage, she would then have mitigated her loss, or if she had been left worse off, she would have aggravated her loss, but in this case she had done neither and the value of her losses was revealed by what she paid to buy replacement sperm from Xytex.[31]

Justice Hayne also found that the fact that Dr Clark charged her patients the amount she had paid to acquire replacement sperm was "irrelevant to deciding what was the value of what the vendor should have, but had not, supplied" under the Deed.[32] As noted by Keane J, this was in accordance with the nature of the claim made by Dr Clark.[33]

Evidence of the value of the St George sperm

Dr Macourt argued that it was "counter-intuitive" that a contract for sale of assets of a business for a total price of $386,950.91 should give rise to an award of damages of $1,246,025.01 for failure to deliver some of the assets.[34] Justice Keane found that this argument was unsupported by evidence, and the "fundamental value protected by the law of contract is that … bargains are to be kept".[35] Furthermore, the High Court found that the only source of replacement sperm was Xytex, and Dr Macourt failed to adduce any evidence to establish a more reliable proxy for the value of the sperm that St George was required to deliver under the Deed.[36]

Conclusion

The High Court allowed Dr Clark's appeal and reinstated the award of damages made by the primary judge.[37] In doing so, it reaffirmed the principle that damages awarded for breach of contract should place the promisee in the same position they would have been in had the broken promise been performed.

While the damages award of over $1 million arising out of a sale of assets of a business for $386,950.91 may appear "counter-intuitive",[38] it related to the fact that Dr Clark's claim for damages was based on the value of the sperm that should have been delivered to her by St George (which did not take into account whether she could recover the cost to her of replacement sperm)[39] and, in the absence of evidence of a more reliable proxy, the calculation of damages was based on the cost of the Xytex sperm.[40]

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Footnotes

1. *Clark v Macourt* (2013) 304 ALR 220; 88 ALJR 190; [2013] HCA 56; BC201315809.
2. *Macourt v Clark* [2012] NSWCA 367; BC2010208827.
3. See G Marino, C Sim and C Hirst "*St George Fertility Centre Pty Ltd v Clark* [2011] NSWSC 1276; BC201109683 — assessment of damages" (2012) 20(1) *Australian Health Law Bulletin* 186–88; C Hirst, C Sykes and G Marino "Commercial considerations in the supply of human eggs, sperm or embryos — Macourt v Clark revisited" (2013) 21(2) *Australian Health Law Bulletin* 197.
4. Above, n 1, at [81].
5. Above, n 1, at [94].
6. Above, n 1, at [88].
7. Above, n 1, at [5].
8. Above, n 1, at [81]–[82].
9. *St George Fertility Centre Pty Ltd v Clark* [2011] NSWSC 1276; BC201109683 at [18], [108].
10. Above, n 9, at [109]–[110].
11. Above, n 2, at [48]–[49].
12. Above, n 2, at [56]–[59], [62].
13. Above, n 2, at [49], [127]–[131].
14. Above, n 2, at [129]–[131], [174]–[175].
15. Above, n 1, at [12] (Hayne J), [98] (Keane J).
16. Above, n 1, at [101]–[102].
17. Majority of 4:1 (Hayne, Crennan, Bell, Keane JJ; Gageler J dissenting).
18. Above, n 1, at [72].
19. Above, n 1, at [72].
20. Above, n 1, at [128], [138] (Keane J).
21. Above, n 1, at [10]–[12] (Hayne J).
22. Above, n 1, at [106] (Keane J).
23. Above, n 1, at [109] (Keane J).
24. Above, n 1, at [109] (Keane J).
25. Above, n 1, at [111] (Keane J).
26. Above, n 1, at [42] (Gageler J).
27. Above, n 1, at [42]. Note that there is corresponding federal, state and territory legislation in this area.
28. Above, n 1, at [121].
29. Above, n 1, at [28], [38].
30. Above, n 1, at [21]–[22] (Hayne J), [37] (Crennan and Bell JJ), [128]–[138] (Keane J).
31. Above, n 1, at [21] (Hayne J).
32. Above, n 1, at [22].
33. Above, n 1, at [128].
34. Above, n 1, at [135].

35. Above, n 1, at [135].
36. Above, n 1, at [136], [138] (Keane J).
37. Above, n 1, at [23] (Hayne J), [24] (Crennan and Bell JJ), [146] (Keane J).
38. Above, n 1, at [135] (Keane J).
39. Above, n 1, at [100], [128] (Keane J).
40. Above, n 1, at [136], [138] (Keane J).