IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S95 of 2013

BETWEEN:

**ANNE CLARK**
Appellant

and

**DAVID MACOURT**
Respondent



APPELLANT'S REPLY

**Part I: Certification**

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

**Part II: Reply**

2. *Re RS [19], [20], [34(i)], [34(ii)], [37], [38], [40]-[42]:* The contentions in these paragraphs are based on the assumption that the appellant's claim in the proceedings was for the amount actually expended in obtaining replacement sperm from Xytex corporation ("Xytex").

3. This is quite incorrect. The words actually used in the appellant's claim (1 AB63, [11(3)]) are "has suffered loss and damage (being) the reasonable costs and expenses associated with the procurement of replacement sperm".

4. That is a perfectly apt way of describing the damages to which the appellant was entitled in consequence of the claims alleged in the Cross-Claim at 1 AB55 [10(6)], 1 AB60 [10(11)], [10(13)], 1 AB63[10(17A)] and [10(19)] and found in its favour (3 AB1111, [1] and [2(2)]).

5. Those damages were to be calculated on the basis referred to in *Radford v De Froberville* [1977] 1 WLR 1262 at 1270 and adopted in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 and 288, [16], namely that the appellant was entitled to be provided with the cost of obtaining that which should have been, but was not, supplied pursuant to the contract. As the passage from *Radford* makes apparent, that entitlement existed whether the party not in breach intended to use that which had not been supplied for commercial, or non-commercial, purposes. The submission at RS [41] misapplies the law; see for example, *Diamond Cutting Works Federation v Triefus* [1956] 1 Lloyd's Rep 216 at 227.

6. The respondent's submissions confuse the analysis by seeking to focus on the alleged subjective value of the St George sperm to the appellant by reference to, *inter alia*, its cost under the Deed (at RS [40]-[42]), rather than focusing on the question of the cost

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of contractually compliant donor sperm, the best proxy being the replacement cost of donor sperm in circumstances where there was no more St George donor sperm that could be acquired and there was a market for donor sperm (Gzell J at [40], 3 AB1124).

7. That was the correct approach, as set out in AS [18]-[19], as was the approach of Gzell J at [5]-[9] (3 AB1117). The price paid by the appellant for the St George sperm was immaterial to the question of the value of hypothetically contractually compliant donor sperm as was the amount charged by the appellant to patients for the supply of Xytex donor sperm and whether any, and what, amount was charged by the appellant for St George sperm that was used.

8. The contention that the form of the Cross-Claim at [11(3)] (1 AB63) means that the appellant's claimed *measure of damages* was the amount expended in acquiring Xytex straws in 2005 is an assumption based on a misreading of [11(3)].

9. The appellant's Reply immediately drew attention to the respondent's misreading of [11(3)] (1 AB102, [13]) and she continued to do so in the Outline of Submissions at trial (3 AB921, [26]; 3 AB923, [36]) and in her counsel's opening address before Gzell J (1 AB108.10 – 11, especially 109.32 – 45). The contention at RS [38] should not be accepted. At the highest for the respondent, it might be said that perhaps the Cross-Claim at [11(3)] might be read in two ways. But the Reply is not inconsistent with the Cross-Claim.

10. *Re RS [14], [30(a)], [31(iii)]:* The submission that property in the sperm could not be transferred to another person does not sit well with the terms of the Deed (1 AB404). See Recitals A and B, cll 1a, 1b, 9.1(a)(i), 9.1(b)(ii). Further, the expression "to the extent title in them can pass to the purchaser" in cl 1b and the similar expression in cl 9.1(a)(i) seems to relate to embryos rather than sperm: see the definition of Assets in cl 18.1 (1 AB410).

11. Clause 6.7 of Attachment E to the RTAC Guideline may impose a practical restriction on the use of donor sperm, in the sense that the donor may decline to consent to its use, but it does not follow that the ownership of the sperm cannot be transferred or that the sperm cannot be used pending the grant of consent. CA [67] (last sentence) – 3 AB1207 – goes too far.

12. *Re RS [6]-[14], [23]-[25], [31(i)], [40(i)]:* The arguments based on the supposed NHMRC/RTAC restrictions:

    (a) should not be permitted to be raised at this stage of the matter; and
    (b) are in any event without substance.

13. As to paragraph 12(a), above, the NHMRC restriction was pleaded by the respondent in the proceedings at first instance.[1] The appellant advanced extensive written submissions directed to the NHMRC/RTAC restriction.[2] The respondent, however, did not advance any submissions, in writing or orally, on the issue to the trial judge. It is

[1] See paragraphs 17H to 17J of the Defence: 1 AB79.
[2] See paragraphs 103 to 110 of the appellant's written closing submissions at trial: 3 AB986-988.

no doubt for that reason that Gzell J refrained from making any findings pertaining to that question.

14. There was no ground of appeal by the respondent in the Court of Appeal,[3] and no argument in that Court, directed to the NHMRC/RTAC restriction. The respondent should not be allowed to raise the point at this stage.

15. Further, the proposed Notice of Contention in this Court (3 AB1280) seeks to draw in aid the NHMRC/RTAC restriction (see for example RS [40]). Leave to file the Notice of Contention in so far as it seeks to rely on the supposed restriction should not be granted. The Court does not have the benefit of any findings by the Courts below in relation to the issue, and that is a result of the way in which the respondent has conducted the litigation.

16. The questions which might have been but which have not been dealt with in the courts below, and the appellant's responses – see paragraph 12(b) above – include the following:

    (a) Clause 1.1 of the NHMRC Guidelines provided that, where both a State law and the Guidelines "apply", then "the State law prevails". The appellant contended at trial that s 32 of the *Human Tissue Act 1983* (NSW) "applied" in that it regulated the extent to which it was either lawful or unlawful to enter into a contract for valuable consideration relating to the supply of tissue. The appellant contended that s 32 thus prevailed over the NHMRC/RTAC restriction. She further submitted that, having regard to the evidence adduced at trial, s 32 permitted the appellant to supply St George sperm to her patients for valuable consideration.[4] The trial judge did not make any findings as to the factual substratum of the submissions directed to s 32 or determine the operation or otherwise of s 32. The concession concerning s 32, referred to by Tobias JA at [67] (3 AB1207), was not made. The appellant's submission at trial was to the contrary and s 32 was not addressed in submissions before the Court of Appeal;

    (b) The chapeau to cl 11 of the Guidelines described each of the practices that followed as being "ethically unacceptable" and stated that each "should" be prohibited. The respondent did not suggest at trial or in the Court of Appeal that that heavily qualified language presented any real limitation on the entitlement or ability of the appellant to charge her patients for the supply of St George sperm;

    (c) The respondent did not suggest at trial or in the Court of Appeal, and still does not suggest, that there is any legislative or regulatory foundation for the purported requirement in cl 2.1 of the Guidelines that an assisted reproductive technology (ART) unit in a State "had to obtain accreditation from a recognised accreditation body" (see RS [8]). There is no statute or regulation that requires such accreditation. The Guidelines were issued by the Chief Executive Officer of the NHMRC pursuant to s 7(1)(a) of the *National Health and Medical*

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[3] The Amended Notice of Appeal is at 3 AB1151.

[4] See the appellant's closing submissions at trial at [94]-[102]: 3 AB984-986.

*Research Council Act 1992* (Cth) and are not legislative instruments (see s 7(2));

(d) Central to the respondent's contention in this regard – see RS [13] – are cll 11.9 and 11.10 in the Guidelines.[5] But cl 11.9 is directed to "commercial trading" in gametes or embryos. It hardly seems directed to the supply of donor sperm in medical treatments. If the drafter of cl 11.9 had had in mind the supply of sperm by an ART practitioner as part of a donor insemination treatment, the provision would surely have said so. Clause 11.10 is the provision directed to ART and it merely prevented payment to donors of gametes of anything beyond reasonable expenses;

(e) Even if the NHMRC/RTAC restriction were applicable, it would, as a matter of construction, have permitted the appellant, in supplying contract sperm to her patients, to charge all expenses incurred in connection with the supply of the sperm, together with an allowance for her own professional time incurred in connection with that supply. Such a supply could have been made for a very significant sum.

17. *Re RS [4(a)], [15], [31(iv)], [31(v)], [32(iv)]:* The respondent seeks to rely on the fact that a stocktake of the straws was not conducted until late 2005. This should be read in the context of the oral evidence of the appellant at 1 AB117.49-119.36, [36]-[47]; 338, [11]-[17] and [18]-[19]. The respondent's contentions are not ultimately relevant.

18. *Re RS [39]:* As is apparent from the appellant's evidence – 1 AB281, [36]-[37]; [72]-[73], [77]-[100]; 338-340, [12]-[19] – it would have been difficult for the appellant in early 2002 to obtain a number of straws equivalent to this number which should have been supplied under this agreement. This is no doubt why the respondent accepted, in an interlocutory hearing before Windeyer AJ that he did not assert that alternative sperm could be obtained more cheaply than from Xytex: 3 AB1096.37.

19. *Re RS [40]:* The contention that the amount which could be charged for the supply of semen to patients could not exceed the purchase price by the medical practitioner is a reading of cl 11.9[6] going beyond its terms.

20. Further, if the straws provided by St George pursuant to the agreement had complied with its terms, the amount of the consideration payable may have been higher: see 1 AB119.34; 1 AB340[18].

21. The appellant otherwise relies on the AS.

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[5] Respondent's List of Authorities
[6] Respondent's List of Authorities

Dated: 25 July 2013

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