



HIGH COURT OF AUSTRALIA

18 December 2013

CLARK v MACCOURT

[2013] HCA 56

Today the High Court, by majority, allowed an appeal from a decision of the Court of Appeal of the Supreme Court of New South Wales concerning the measure of damages that the purchaser of assets of a business was entitled to recover from the vendor who broke its contractual promise to deliver stock complying with a warranty.

The appellant and respondent were registered medical practitioners who each specialised in providing assisted reproductive technology services. The appellant agreed to buy assets of St George Fertility Centre Pty Limited, a company which was controlled by the respondent and which provided medical and assisted reproductive technology services to patients. The company ("the vendor") agreed to sell certain assets of the practice, including a stock of frozen donated sperm. The respondent guaranteed the vendor's obligations under the contract.

The vendor warranted that the identification of donors of the sperm complied with specified guidelines. Of the stock of sperm delivered, 1,996 straws of sperm which the appellant would have expected to be able to use were not as warranted and were unusable.

The appellant could not buy suitable replacement sperm in Australia but could in the United States of America. The primary judge found that buying 1,996 straws of replacement sperm from the American supplier ("Xytex") would have cost about \$1 million at the time the contract was breached. The purchase price for the assets (including the stock of frozen donated sperm) was less than \$400,000. The appellant accepted that ethically she could not charge, and in fact had not charged, any patient a fee for using donated sperm greater than the amount the appellant had outlaid to acquire it.

The Supreme Court of New South Wales entered judgment for the appellant against the vendor for breach of warranty, and against the respondent as guarantor of the vendor's obligations. The primary judge assessed the damages for breach of warranty as the amount that the appellant would have had to pay Xytex (at the time the contract was breached) to buy 1,996 straws of sperm. On appeal against the assessment of damages, the Court of Appeal held that the appellant should have no damages for the vendor's breach of warranty. The appellant had bought straws of sperm from Xytex to use in treating patients and had charged each patient a fee which covered the costs the appellant had incurred in buying the straws that were used in treating that patient. The Court of Appeal held that the appellant had thus avoided any loss she would otherwise have sustained.

By special leave, the appellant appealed to the High Court seeking orders reinstating the award of damages made by the primary judge. The Court allowed the appeal by majority. It held that the appellant should recover the amount it would have cost (at the date of the breach of warranty) to acquire 1,996 straws of sperm from Xytex.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*