HIGH COURT OF AUSTRALIA

HAYNE, CRENNAN, BELL, GAGELER AND KEANE JJ

ANNE CLARK APPELLANT

AND

DAVID MACOURT RESPONDENT

Clark v Macourt
[2013] HCA 56
18 December 2013
S95/2013

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 9 November 2012, 13 December 2012 and 24 December 2012 and, in their place, order that:*

   (a) the appeal to that Court be dismissed with costs;

   (b) the cross-appeal to that Court be allowed in part with costs; and

   (c) paragraph 3 of the order of the Supreme Court of New South Wales made on 8 November 2011 be set aside and, in its place, order that, subject to paragraph 5 of that order and subject to all costs orders already made in the proceedings, David Macourt pay Anne Clark's costs of the proceedings in that Court on and after 30 May 2009 on an indemnity basis and otherwise on the ordinary basis.

On appeal from the Supreme Court of New South Wales

Representation

D F Jackson QC with A R R Vincent and L M Jackson for the appellant (instructed by Norton Rose Fulbright Australia)

C M Harris SC with H Altan for the respondent (instructed by Redmond Hale Simpson)

CATCHWORDS

Clark v Macourt

Contract – Damages – Vendor of business failed to deliver assets compliant with warranty – Purchaser bought compliant assets from alternative supplier – Purchaser used compliant assets in business and charged fee covering costs of buying them – Whether damages measured by reference to amount purchaser was unable to recoup in using assets in business or by reference to cost of buying compliant assets at date of breach – Whether purchaser mitigated loss by charging fee covering costs of buying compliant assets.

Words and phrases – "expectation interest", "same situation ... as if the contract had been performed".

1 HAYNE J. The appellant and respondent were registered medical practitioners who each specialised in providing assisted reproductive technology services. In 2002, 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.

2 The vendor warranted that the identification of donors of the sperm complied with specified guidelines. There is now no dispute that, of the stock of sperm delivered, 1,996 straws which the appellant would have expected to be able to use were not as warranted and were unusable.

3 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.

4 How should the appellant's damages for breach of warranty be fixed?

The proceedings

5 In the Supreme Court of New South Wales, Macready AsJ entered judgment for the appellant against the vendor for breach of warranty, and against the respondent as guarantor of the vendor's obligations, for damages to be assessed. Those orders were not the subject of appeal. On the assessment of damages, the primary judge (Gzell J) assessed[1] 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, the Court of Appeal (Beazley and Barrett JJA and Tobias AJA) held[2] 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.

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1 *St George Fertility Centre Pty Ltd v Clark* [2011] NSWSC 1276.

2 *Macourt v Clark* [2012] NSWCA 367.

6 By special leave, the appellant appealed to this Court seeking orders reinstating the award of damages made by the primary judge. The appeal should be allowed.

Principles

7 At no stage of this litigation has either party submitted that the assessment of the damages due for the vendor's breach of contractual warranty called for the modification of any principle, let alone the application of some new principle. There was, therefore, no dispute in this Court, or in the courts below, that a plaintiff who sues for breach of contract is to be awarded as damages "that sum of money which will put the party who has been injured ... in the same position as he [or she] would have been in if he [or she] had not sustained the wrong for which he [or she] is now getting his [or her] compensation or reparation"[3]. Nor was there, or could there have been, any dispute that when a contract has been breached, the position in which the plaintiff is to be put, by an award of damages, is the position in which the plaintiff would have been *if the contract had been performed*[4].

8 The only dispute between the parties was about how these principles were to be applied in this case. Any difficulty encountered in applying these principles stems ultimately from the failure, when speaking of "compensation" for "loss", to identify what "loss" is being compensated. Identification of the relevant loss does not depend (as much of the respondent's argument assumed) on whether the contract can be classified as a contract for the sale of goods.

9 Three different forms of "loss" might be identified. First, there might be a loss constituted by the amount by which the *promisee* is *worse off* because the promisor did not perform the contract. That amount would include the value of whatever the promisee outlaid in reliance on the promise being fulfilled. Second, the loss might be assessed by looking not at the promisee's position but at what the defaulting *promisor gained* by making the promise but not performing it. Third, there is the loss of the value of what the *promisee would have received* if the promise had been performed.

10 Subject to some limitations, none of which was said to be engaged in this case, damages for breach of contract must be measured[5] by reference to the third

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3 *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39.

4 *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at 286 [13]; [2009] HCA 8. See also *Robinson v Harman* (1848) 1 Exch 850 at 855 [154 ER 363 at 365].

5 *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at 286 [13].

kind of loss: the loss of the value of what the *promisee would have received* if the promise had been performed.

11 As Professor Fuller and Mr Perdue wrote[6], many years ago:

> "This seems on the face of things a queer kind of 'compensation'. ... In actuality the loss which the plaintiff suffers (deprivation of the expectancy) is not a datum of nature but the reflection of a normative order. It appears as a 'loss' only by reference to an unstated *ought*. Consequently, when the law gauges damages by the value of the promised performance it is not merely measuring a quantum, but is seeking an end, however vaguely conceived this end may be."

As those authors demonstrated[7], the protection which the law thus gives to the expectation that a contract will be performed can be seen as resting on, first, "the need for curing and preventing the harms occasioned by reliance" upon the expectation of performance, and second, "on the need for facilitating reliance on business agreements". The loss which is compensated reflects a normative order in which contracts must be performed.

Valuing what should have been received

12 Under the contract which the appellant made, she should have received 1,996 more straws of sperm having the warranted qualities than she did receive. The relevant question in the litigation was: what was the value of what the appellant did *not* receive? The answer she proffered in this Court was that it was the amount it would have cost (at the date of the breach of warranty) to acquire 1,996 straws of sperm from Xytex. That answer should be accepted.

13 The answer depends upon determining the content of the unperformed promise. The answer does not depend upon whether the contract can be described as one for the sale of goods or for the sale of a business. How much the appellant paid for the benefit of the promise is not relevant. It does not matter whether the value of what she did not receive was more than the price she had agreed to pay under the contract or (if it could have been determined) the price she had agreed to pay for the stock of sperm. The extent to which the appellant could have turned the performance of the promise to profit would be relevant only if the appellant had claimed for loss of profit. She did not. She

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6 Fuller and Perdue, "The Reliance Interest in Contract Damages: 1", (1936) 46 *Yale Law Journal* 52 at 53.

7 Fuller and Perdue, "The Reliance Interest in Contract Damages: 1", (1936) 46 *Yale Law Journal* 52 at 62.

sought, and was rightly allowed by the primary judge, the value of what should have been, but was not, delivered under the contract.

Mitigation?

14 As already noted, however, the Court of Appeal concluded[8] that the appellant had *mitigated* her loss by buying replacement sperm from Xytex. In respect of "the loss of each straw of replacement sperm actually sourced from Xytex" before the date of assessment of damages, Tobias AJA concluded[9] that the chief component of the appellant's "loss" would be "the sum (if any) representing that part of the overall cost of acquisition of that straw not recouped from a patient". And in respect of "the residue of the 'lost' 1996 straws over and above those in fact replaced by Xytex sperm up to the date of trial", Tobias AJA concluded[10] that "the appropriate course would have been to assume that [the appellant] would continue to source straws of donor sperm from Xytex at a cost consistent with that which had prevailed since August 2005, and that she would continue to recoup from patients the same proportion of that cost as she had done in the past". On this footing, Tobias AJA concluded[11] that the appellant's damages in respect of straws not "replaced" would be "the aggregate of the discounted present value of the *un-recouped* balances (if any) of that cost as at the date of their assessment" (emphasis added).

15 Two points must be made about this analysis. First, the calculations described would reveal whether, and to what extent, the appellant was, or would be, worse off as a result of the breach of warranty. That is, the calculations of the net amount which the appellant had outlaid, and would thereafter have to outlay, would reveal the amount needed to put the appellant in the position she would have been in *if the contract had not been made*. The calculations would not, and did not, identify the value of what the appellant would have received *if the contract had been performed*.

16 Second, the reference to mitigation of damage was apt to mislead. In order to explain why, it is necessary to say something about what is meant by "mitigation" of damage.

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8 [2012] NSWCA 367 at [127] per Tobias AJA (Beazley and Barrett JJA agreeing).

9 [2012] NSWCA 367 at [129].

10 [2012] NSWCA 367 at [130].

11 [2012] NSWCA 367 at [130].

17 For present purposes, "mitigation" can be seen as embracing two separate ideas[12]. First, a plaintiff cannot recover damages for a loss which he or she *ought to have* avoided, and second, a plaintiff cannot recover damages for a loss which he or she *did* avoid.

18 The Court of Appeal's analysis, and the respondent's argument in this Court, both depended upon engaging the second of these propositions. In this Court, the respondent submitted, correctly, that it is a proposition recognised in the speech of Viscount Haldane LC in *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd*[13]. But there remains for consideration how the proposition applied in this case.

19 The appellant's subsequent purchases and use of replacement sperm left her neither better nor worse off than she was before she undertook those transactions. In particular, unlike *British Westinghouse* and other cases referred to[14] in the speech of Viscount Haldane, the appellant obtained no relevant benefit from her subsequent purchases of sperm. The purchases replaced what the vendor had agreed to supply.

20 The purchase price paid for the replacement sperm revealed the value of what was lost when the vendor did not perform the contract. But the commercial consequences flowing from the appellant's subsequent use of those replacements would have been relevant to assessing the value of what should have been supplied under the contract *only* if she had obtained some advantage from their use, or if she had alleged that the replacement transactions had left her even worse off than she already was as a result of the vendor's breach.

21 If she had obtained some advantage, the value of the advantage would have mitigated the loss she otherwise suffered. If she had been left even worse off (for example by losing profit that otherwise would have been made), that additional loss may have aggravated her primary loss. But the appellant was not shown to have obtained any advantage from the later transactions and she did not claim that they had left her any worse off. Those transactions neither mitigated nor aggravated the loss she suffered from the vendor not supplying what it had agreed to supply. The value of that loss was revealed by what the appellant paid to buy replacement sperm from Xytex.

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12 cf *Chitty on Contracts*, 31st ed (2012), vol 1 at 1805-1806 [26-077].

13 [1912] AC 673 at 689-690.

14 *Staniforth v Lyall* (1830) 7 Bing 169 [131 ER 65]; *Erie County Natural Gas and Fuel Co v Carroll* [1911] AC 105; *Wertheim v Chicoutimi Pulp Co* [1911] AC 301.

22 Showing that the appellant had charged, or could charge, third parties (her patients) the amount she had paid to acquire replacement sperm from Xytex was irrelevant to deciding what was the value of what the vendor should have, but had not, supplied. If the contract had been performed according to its terms, the appellant would have had a stock of sperm having the warranted qualities which she could use as she chose. She could have stored it, given it away or used it in her practice. In particular, she could have used it in her practice and charged her patients nothing for its supply. But because the vendor breached the contract, the appellant could put herself in the position she should have been in (if the contract had been performed) only by buying replacement sperm from Xytex. Whatever transactions she then chose to make with her patients are irrelevant to determining the value of what should have been, but was not, provided under the contract.

Conclusion and orders

23 For these reasons, and for the reasons given by Keane J (with which I agree generally), the appeal should be allowed. Consequential orders should be made in the terms sought by the appellant.

24 CRENNAN AND BELL JJ. The factual background and the procedural history are set out in the reasons for judgment of Keane J. We agree that the appeal should be allowed and consequential orders should be made, for the reasons given by Keane J. We make additional comments in relation to the circumstance that the primary judge made an award of damages of $1,246,025.01 in respect of the vendor's breach of warranty, in the supply of frozen donor sperm ("the St George sperm"), when the total purchase price for assets of the vendor's fertility clinic business, including that sperm, was $386,950.91.

25 The issue on the appeal is the measure of damages recoverable by the appellant, as purchaser of assets of a business, when the vendor promised to deliver stock complying with a warranty, but did not do so. We agree that the assessment of damages undertaken by the primary judge required assessment of the value of what should have been delivered in accordance with the vendor's contractual promise to the appellant[15].

26 The applicable principle, confirmed in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*[16] and traceable to *Robinson v Harman*[17], is that damages for breach of contract are to put the promisee, so far as money can do it, in the same situation as if the contract had been performed as promised. Different, even cumulative, heads of damage may be pleaded by a plaintiff, depending on the type of contract involved and the kinds of breach and damage occasioned, provided there is no double recovery.

27 In *The Commonwealth v Amann Aviation Pty Ltd*[18], Mason CJ and Dawson J said:

> "'expectation damages', 'damages for loss of profits', 'reliance damages' and 'damages for wasted expenditure' are simply manifestations of the central principle enunciated in *Robinson v Harman* rather than discrete and truly alternative measures of damages which a party not in breach may elect to claim."

Their Honours went on to observe that the corollary of the principle in *Robinson v Harman* is that a plaintiff is not entitled, by an award of damages for breach of

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15 Reasons for judgment of Keane J at [111]; see also reasons for judgment of Hayne J at [13].

16 (2009) 236 CLR 272 at 286 [13]; [2009] HCA 8.

17 (1848) 1 Exch 850 at 855 [154 ER 363 at 365].

18 (1991) 174 CLR 64 at 82; [1991] HCA 54.

contract, to be placed in a superior position to that in which he or she would have been had the contract been performed[19]. The plaintiff's loss must be genuine[20] and the expenses incurred in putting himself or herself in the position in which he or she would have been, had the contract been performed, must be reasonable[21]. The onus of proof in respect of a claim for contract damages is on the plaintiff[22].

28 It is the plaintiff's objectively determined expectation of recoupment of expenses which is protected by an award of damages for loss of a bargain[23]. This explains the prima facie measure of damages at common law in respect of a sale of goods stated in *Barrow v Arnaud*[24], and codified subsequently in sale of goods legislation. The measure is the market price of goods at the contractual time for delivery, less the contract price (if the latter has not been paid to the seller). This is the amount of money theoretically needed to put the promisee in the position which would have been achieved if the contract had been performed. Subject to being displaced for some reason, this is the applicable measure, notwithstanding the circumstance that a buyer is a non-profit organisation[25], or that the buyer is constrained in relation to market regulation and control as to the price at which the buyer could sell to a subsequent purchaser[26].

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19 (1991) 174 CLR 64 at 82.

20 *Radford v De Froberville* [1977] 1 WLR 1262 at 1270; [1978] 1 All ER 33 at 42.

21 *Erie County Natural Gas and Fuel Co v Carroll* [1911] AC 105 at 118; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at 288-290 [17]-[19].

22 *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80 per Mason CJ and Dawson J.

23 *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 85 per Mason CJ and Dawson J.

24 (1846) 8 QB 595 at 609-610 [115 ER 1000 at 1006]; see also *Hussey v Eels* [1990] 2 QB 227; see further McGregor, *McGregor on Damages*, 18th ed (2009) at 780 [20-004].

25 *Diamond Cutting Works Federation Ltd v Triefus & Co Ltd* [1956] 1 Lloyd's Rep 216.

26 *British Motor Trade Association v Gilbert* [1951] 2 All ER 641; *Mouat v Betts Motors Ltd* [1959] AC 71 at 82.

29 Whilst the second limb of *Hadley v Baxendale*[27] in respect of indirect loss is frequently invoked on behalf of a buyer when a figure higher than the normal measure of damages should apply, there is no reason in principle why it cannot also be relied on by a seller if the facts and circumstances are such that a figure lower than, or different from, the normal measure of damage should apply − for example, when the actual loss suffered is less than the prima facie measure of damages[28].

30 Resolution of this appeal does not turn on any distinction between a contract for the sale of goods and a contract for the sale of a business, or on the respondent's invocation of the second limb of *Hadley v Baxendale*[29] on the basis that replacement costs of non-compliant sperm would be passed on to patients. It is sufficient to dispose of the appeal on the basis that no facts or circumstances were proven which displaced the application of the normal measure of contract damages put forward by the appellant.

31 It was uncontroversial that, at all material times, assisted reproductive technology businesses conducted in New South Wales were subject to a statutory and regulatory regime. The appellant, as cross-claimant, obtained summary judgment in her favour, by consent, on the basis of admissions that the St George sperm failed to comply with the extant regulatory regime[30]. In seeking summary judgment against the vendor and the respondent (as guarantor) on the basis of certain claims, the appellant abandoned other claims including a claim for loss of profits in respect of embryos, a claim for loss of profits in respect of donor sperm having been abandoned at some point earlier in time.

32 This reduced the issue before the primary judge to an assessment of the value of the St George sperm which had not been delivered in accordance with the vendor's warranty. On the nature of the damages claimed, the appellant's pleadings stated:

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27 (1854) 9 Exch 341 [156 ER 145].

28 *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87; cf *Slater v Hoyle & Smith* [1920] 2 KB 11; see also McGregor, *McGregor on Damages*, 18th ed (2009) at 816-818 [20-065]-[20-067]; Beale (ed), *Chitty on Contracts*, 31st ed (2012), vol 2 at 1666 [43-452].

29 (1854) 9 Exch 341 [156 ER 145].

30 Code of Practice for Assisted Reproductive Technology Units of the Reproductive Technology Accreditation Committee.

> "the damages ... are in the nature of compensation which, so far as possible gives her the benefit of her bargain under the Deed by giving her, so far as money is capable of doing so, something equivalent to the value of the worthless Sperm delivered to her, as opposed to damages to compensate her specifically for her outlay to Xytex (the amount actually paid and payable to Xytex being no more than evidence of an appropriate measure of damages)".

33 The applicable regulatory scheme was such that a medical practitioner treating a patient was ethically bound not to treat donor sperm as a commodity, by profiting when using donor sperm for a patient's treatment. It also appeared to be uncontroversial that costs in relation to donor sperm which might be passed on to a patient included the costs of acquisition of donor sperm and related items such as storage costs.

34 The appellant gave evidence that Xytex Corporation ("Xytex") operated a business in which Xytex supplied donated sperm to buyers, which included both patients and medical practitioners. The appellant also gave uncontested evidence that in her business, during the period from 2002 to 2005, she used donor sperm from different local and overseas sources which included the St George sperm, her clinic's stock and stock obtained from Cryos International Sperm Bank, Queensland Fertility Clinic, Westmead Fertility Centre and Xytex. The appellant gave evidence that she did not make a profit from patients when using donor sperm which she had purchased and that there was always a "buffer" between the real costs to her and those passed on to a patient. Evidence was also given by and on behalf of the appellant of unsuccessful efforts to recruit local sperm donors through newspaper advertising in 2005, when the appellant had exhausted her stock of St George sperm which complied with the warranty. Further, evidence that a shortage of donors was occasioned in 2005 by requirements for donor identification was not disputed.

35 The respondent conceded in the Court of Appeal of the Supreme Court of New South Wales that some part of the sale price for the assets of the business related to the transfer of the St George sperm from the business to the appellant. Further, there was no issue that the appellant had used 504 straws of St George sperm which had complied with the warranty given.

36 In leading evidence of the costs of acquiring the Xytex sperm, the appellant discharged the onus on her to show the recoupment costs necessary to restore her to the position in which she would have been, absent the vendor's breach of warranty.

37 It was conceded that the costs of Xytex sperm which the appellant passed on to patients equalled the acquisition and other costs incurred by her. Importantly, contested issues concerning the Xytex sperm appeared not to

include an assertion that the appellant could have obtained replacement sperm more cheaply than she acquired such sperm from Xytex. The emphasis in the respondent's case was otherwise. It was contended on behalf of the respondent that Xytex sperm was not compliant with regulatory guidelines. That challenge failed before the primary judge. Then, it was contended that, since the appellant could pass on to patients the reasonable costs of procuring the replacement sperm, she had wholly mitigated her loss. This was the basis of the respondent's success in the Court of Appeal. Such an approach fails to take into account that the circumstances of the appellant's subsequent dealings with patients did not avoid, or increase or diminish, the loss of her bargain for delivery of St George sperm which was compliant with the warranty.

38 Regulatory constraints on a promisee's subsequent dealings with goods have no necessary relationship with the market price which a promisee may pay to be in as good a position as if a promisor had performed. In *Mouat v Betts Motors Ltd*[31], on behalf of the Privy Council, Lord Denning described the entitlements of a buyer of goods claiming the normal measure of contract damages, when the market in such goods is subject to price controls. He said:

> "It does not lie in [the seller's] mouth to say that, if he had fulfilled his covenant, the [buyers] could only resell the car for £1,207. That was a matter peculiar to the [buyers] which was no concern of his. The [buyers] were entitled in law to be put into as good a position as if he had fulfilled his covenant: and to do this they were entitled to go into the market and buy a similar car at the market price ... This rule applies even though the only available market is a surreptitious market which is fed by persons who have broken their covenants".

39 Issue having been joined, and the forensic contest having been fought as described, there was neither cross-examination of the appellant, nor production of any evidence in chief on behalf of the respondent, directed to the proposition that the acquisition costs of Xytex sperm were not an appropriate proxy for the value of the St George sperm, had it been compliant with the vendor's warranty. There being no evidence on the point, the respondent cannot sustain an argument that the measure of damages proven by the appellant was not the correct measure to be applied or that it should be displaced by some other measure. The submission, in the respondent's notice of contention, that "the cost of the acquisition of replacement Xytex sperm was not an appropriate proxy" for the value of the St George sperm must be rejected. There was no error in the decision of the primary judge.

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31 [1959] AC 71 at 82.

40 GAGELER J. This appeal concerns the measure of damages for breach of a warranty in a contract for the sale of a business. Its unusual facts give rise to unusual difficulties.

Facts

41 Dr Clark and Dr Macourt were, in 2002, obstetricians and gynaecologists practising assisted reproductive technology in New South Wales. Dr Clark ran a fertility clinic. Dr Macourt, through a company he had established in 1983 ("the company"), ran another fertility clinic.

42 In the conduct of their respective practices, Dr Clark and Dr Macourt were bound by ethical guidelines on assisted reproductive technology published by the National Health and Medical Research Council in 1996. The guidelines prohibited, as "ethically unacceptable", "[c]ommercial trading in gametes or embryos" and "[p]aying donors of gametes or embryos beyond reasonable expenses". Those ethical prohibitions came later to be overlaid by a criminal prohibition in s 16 of the *Human Cloning for Reproduction and Other Prohibited Practices Act* 2003 (NSW), inserted in 2007, making it an offence for a person intentionally to receive "valuable consideration" from another person for the supply of a human egg, human sperm or a human embryo and defining "valuable consideration" for this purpose to exclude "the payment of reasonable expenses incurred by the person in connection with the supply". Nothing turns on that later statutory development.

43 By a written contract entered into in 2002, the company agreed to "sell" its "assets" to Dr Clark. The purchase price, payable in three annual instalments, was to be calculated as a percentage of the amount by which Dr Clark's gross fee income for the calendar years 2002, 2003 and 2004 exceeded her gross fee income for the year 2001.

44 Included within the assets which the company was obliged to deliver to Dr Clark within 30 days of entering into the contract, and which Dr Clark was obliged to "keep and maintain … in accordance with recognized practice", was "all frozen sperm". The company warranted that "the consents, screening tests ... and identification … of donors" of that frozen sperm had been conducted in accordance with applicable guidelines. Dr Macourt guaranteed the obligations of the company under the contract.

45 The company in fact delivered some 3,500 straws of frozen sperm to Dr Clark. Dr Clark would have expected ultimately to have been able to use 2,500 of those straws, over several years, in the normal course of her practice. Dr Clark was in fact able to use only 504. The remaining straws were ultimately found to be unusable as a result of the company having breached its warranty concerning the consents, screening tests and identification of donors.

46 When Dr Clark realised in 2005 that she was unable to use the remaining straws, she began to acquire replacement sperm as and when required for the treatment of her patients from a supplier in the United States. She charged her patients for the use of that replacement sperm an amount covering most (but not all) of the cost and expense to her of its acquisition. Mindful of her ethical and legal obligations, she always wanted to ensure that there was a "buffer" between what she paid for the sperm and what the patient paid to her.

47 The total purchase price payable under the contract ended up being $386,950.91, of which Dr Clark paid only $167,000, leaving $219,950.91 outstanding.

48 The company sued Dr Clark in the Supreme Court of New South Wales for the outstanding amount of the purchase price. Dr Clark made a cross-claim against the company and Dr Macourt for breach of warranty by the company. Liability was found on the cross-claim.

49 The outcome of the appeal turns on a choice between competing approaches to the assessment of damages on the cross-claim adopted by the primary judge (Gzell J)[32] and by the Court of Appeal (Beazley and Barrett JJA and Tobias AJA)[33].

Primary judge

50 The primary judge proceeded on the basis that the breach of warranty deprived Dr Clark of the use of 1,996 straws of frozen sperm, which Dr Clark would have expected to have been able to use in the normal course of her practice had the company complied with the warranty[34]. No issue has been taken with that aspect of his reasoning.

51 The primary judge assessed Dr Clark's damages for the deprivation of the use of 1,996 straws as the difference, as at the date of delivery of the straws in 2002, between the amount that Dr Clark would have obtained in a "hypothetical sale" of 1,996 of the unusable straws delivered, and the amount that Dr Clark would have paid in a "hypothetical purchase" of 1,996 replacement straws[35].

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32 *St George Fertility Centre Pty Ltd v Clark* [2011] NSWSC 1276.

33 *Macourt v Clark* [2012] NSWCA 367.

34 [2011] NSWSC 1276 at [48], [96].

35 [2011] NSWSC 1276 at [9]-[10], [18]-[19], [108].

52 The primary judge implicitly accepted that the first amount was nothing. He found that the "best evidence" of the second amount was the amount (corresponding to $511.15 per straw) in fact first paid by Dr Clark to acquire donor sperm from the supplier in the United States in 2005[36].

53 The primary judge therefore calculated damages on the cross-claim (exclusive of interest) at $1,020,252.70. In what he described as "robust fashion", he accounted for the likely increase in the acquisition cost of a straw of sperm between the date of hypothetical purchase in 2002 and the date of that actual acquisition in 2005 by allowing interest on the damages so calculated only from the date of that acquisition in 2005[37].

Court of Appeal

54 The Court of Appeal rejected the primary judge's approach to the assessment of damages by reference to a hypothetical sale and purchase of straws in 2002.

55 Tobias AJA, with whom the other members of the Court of Appeal agreed, stressed that the contract was not for the sale of goods but for the sale of a business[38]. He noted that it was not suggested that Dr Clark could ever obtain title to the sperm, to be delivered to her as an asset of the business, and that Dr Clark had acknowledged in her evidence before the primary judge that ethical (and later legal) constraints prevented her profiting from its purchase or sale[39]. He found that it was "patently clear" that Dr Clark could not ethically have charged her patients for the supply of such usable sperm as she acquired under the contract, as there was no way of determining its cost given the terms by which the purchase price was to be calculated[40].

56 Turning to the identification of Dr Clark's loss, and to the steps she had by then taken to mitigate that loss by acquiring replacement sperm as needed and charging her patients something less than the total cost and expense to her of the acquisition of that replacement sperm, Tobias AJA explained[41]:

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36 [2011] NSWSC 1276 at [109]-[110].

37 [2011] NSWSC 1276 at [110]-[111].

38 [2012] NSWCA 367 at [42]-[50].

39 [2012] NSWCA 367 at [33]-[41], [67].

40 [2012] NSWCA 367 at [126].

41 [2012] NSWCA 367 at [127].

> "[The company's] breach of contract made it necessary for [Dr Clark] to acquire sperm from an alternative source. She did so at a cost to her. That cost represented the *prima facie* loss she suffered as a result of [the company's] breach, subject to the effects of such mitigation as she achieved or ought to have achieved. She in fact achieved mitigation to what was, in practical terms, the maximum extent allowed by the legal and ethical constraints under which she operated and which both parties necessarily had in contemplation as being operative in the particular circumstances."

57 The "true measure" of Dr Clark's loss, Tobias AJA went on to explain, consisted of an amount representing that part of the overall cost of sourcing straws of replacement sperm already acquired which had not been recouped from patients up to the date of trial, together with an amount representing the capitalised value of that part of the overall cost of sourcing replacements for the rest of the 1,996 straws which could be expected not to be able to be recouped from patients in the future. Dr Clark could have sought damages along those lines, but did not[42].

58 The Court of Appeal accordingly reduced the assessment of damages on the cross-claim to nothing.

Analysis

59 Choosing between the competing approaches of the primary judge and of the Court of Appeal requires a return to first principles[43]:

> "The settled principle governing the assessment of compensatory damages, whether in actions of tort or contract, is that the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed. Compensation is the cardinal concept. It is the 'one principle that is absolutely firm, and which must control all else'. Cognate with this concept is the rule, described … as universal, that a plaintiff cannot recover more than he or she has lost."

60 The assessment of compensatory damages for breach of contract at common law is accordingly subject to the "ruling principle" that the injured party "is, so far as money can do it, to be placed in the same situation, with respect to

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42 [2012] NSWCA 367 at [128]-[131].

43 *Haines v Bendall* (1991) 172 CLR 60 at 63; [1991] HCA 15 (references omitted).

damages, as if the contract had been performed"[44] as well as to its corollary that the injured party "is not entitled, by the award of damages upon breach, to be placed in a superior position to that which he or she would have been in had the contract been performed"[45].

61 The "expectation interest" sometimes identified as protected by an award of damages for breach of contract at common law is a reflection of that ruling principle and of its corollary. The expectation interest is no less, but no more, than the interest protected by seeking "to give [a] promisee the value of the expectancy which the promise created"[46]. In other words, it is the interest of the injured party "in having the benefit of [the contractual] bargain by being put in as good a position as he [or she] would have been in had the contract been performed"[47].

62 The common law does not compensate an injured party for the non-fulfilment of an expectation which could not reasonably be supposed to have been within the contemplation of other parties when they made the contract as the probable result of breach[48]. That limitation can for present purposes be put to one side.

63 Dr Clark accepts the Court of Appeal's identification of her loss as the cost to her of acquiring replacement sperm from an alternative source, and properly points out that her need to acquire replacement sperm from an alternative source can reasonably be supposed to have been within the contemplation of all parties, when they made the contract in 2002, as the probable result of breach of warranty by the company. Dr Clark has at no stage suggested that her loss is to be identified as the difference between the value of the business she acquired and the value of the business for which she contracted[49], and at an early stage

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44 *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at 286 [13]; [2009] HCA 8, quoting *Robinson v Harman* (1848) 1 Ex 850 at 855 [154 ER 363 at 365].

45 *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 82; [1991] HCA 54.

46 Fuller and Perdue, "The Reliance Interest in Contract Damages: 1", (1936) 46 *Yale Law Journal* 52 at 54.

47 Restatement, Second, Contracts, §344.

48 *European Bank Ltd v Evans* (2010) 240 CLR 432 at 438 [12]-[13]; [2010] HCA 6, referring to *Hadley v Baxendale* (1854) 9 Ex 341 [156 ER 145].

49 Cf *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep 423 at 429.

abandoned a claim that a component of her loss was consequential loss of profits in the conduct of her business. She has at every stage sought substantial, not merely nominal, damages.

64 Dr Macourt, for his part, points to the remarkable prospect of being saddled, if the primary judge's measure were to be upheld, with an obligation to pay Dr Clark $1,020,252.70 in damages as a consequence of the company in effect failing to deliver one asset of a business which the company ended up selling to Dr Clark for a total price of only $386,950.91. But Dr Macourt does not seek to attach any particular legal significance to the disparity between those two figures[50].

65 The precise question in the appeal, given the way in which issue has been joined between the parties, is therefore limited to asking: which of the competing approaches to the assessment of damages adopted by the primary judge and by the Court of Appeal goes furthest in placing Dr Clark, so far as money can achieve the result, in the same position she would have been in had the company complied with its contractual obligation and had she thereby been able to use in the normal course of her practice a further 1,996 straws of the frozen sperm delivered to her by the company?

66 In answering that question, statements of subsidiary principle framed in the context of working out the ruling principle in standard categories of case must be approached with circumspection[51]. There is, as has often been pointed out, "a danger in elevating into general principles what are in truth mere applications to particular facts or situations of the overriding general principle"[52]. The measure appropriate in a particular case "cannot be divorced from the [claimant's] personal position and obligations, both legal and moral, or from what the [claimant] ought reasonably to do by way of mitigation"[53], and a rigid distinction cannot always be drawn between measure and mitigation[54].

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50 Cf *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, referred to in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at 289 [18].

51 *Wenham v Ella* (1972) 127 CLR 454 at 467; [1972] HCA 43, quoting *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] AC 196 at 223.

52 *Radford v De Froberville* [1977] 1 WLR 1262 at 1270; [1978] 1 All ER 33 at 42, citing *Admiralty Commissioners v SS Susquehanna* [1926] AC 655 at 661 and *Admiralty Commissioners v SS Chekiang* [1926] AC 637 at 643-644.

53 [1977] 1 WLR 1262 at 1270; [1978] 1 All ER 33 at 42.

54 [1977] 1 WLR 1262 at 1272-1273; [1978] 1 All ER 33 at 44.

67 To measure a buyer's damages as the difference, as at the date of delivery, between what the buyer would have obtained in a hypothetical sale of contractually non-compliant goods delivered and what the buyer would have paid in a hypothetical purchase to obtain delivery of contractually compliant goods from another seller is ordinarily appropriate in the standard category of case where a seller fails to deliver marketable goods to a buyer in compliance with a contractual warranty[55]. That is because the measure ordinarily gives to the buyer the monetary equivalent of the value to the buyer of the performance of the contract by the seller. The value to the buyer of having ownership of, and control over, contractually compliant goods that can be bought and sold in a market as at the time of delivery ordinarily equates to the market value of those goods at that date. The market value of goods is not ordinarily dependent on circumstances peculiar to an individual seller or individual buyer. Accordingly, it ordinarily makes no difference why the buyer chose to purchase the goods[56] or whether the buyer could be expected actually to realise the monetary equivalent of that value by re-selling or otherwise disposing of the goods[57].

68 This case does not fit within that standard category. The critical difference does not lie in the difference between a sale of goods and the sale of a business or in such difficulty as may exist in allocating some part of the overall purchase price for the business to a particular asset. The critical difference lies in the limited value to the buyer (Dr Clark) of the performance of the contract by the seller (the company) given the peculiar nature of the asset (frozen sperm) which the company was obliged to deliver under the contract.

69 There is no suggestion that the frozen sperm was of any use to Dr Clark, or would have been of any use to another purchaser of the company's assets, other than for the treatment of patients in the normal course of practice. In using frozen sperm for the treatment of patients, Dr Clark was in 2002 ethically bound not to charge patients more than the costs and expenses of acquiring the sperm, whatever those costs and expenses happened to be. Dr Clark's evidence before the primary judge about those ethical obligations was unequivocal. She considered it unethical to profit from buying or selling sperm, was not doing so, and had never done so. A technical submission made on her behalf, that the ethical guidelines published by the National Health and Medical Research

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55 *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at 286 [13]. See also *Wertheim v Chicoutimi Pulp Company* [1911] AC 301 at 307-308; *Slater v Hoyle & Smith* [1920] 2 KB 11.

56 *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at 287-288 [16].

57 Eg *Diamond Cutting Works Federation Ltd v Triefus & Co Ltd* [1956] 1 Lloyd's Rep 216 at 227.

Council, on their proper construction, did not have that effect, is to be rejected. The guidelines had the effect Dr Clark acknowledged in her evidence.

70 The value to Dr Clark of the company delivering frozen sperm in 2002 in compliance with the contract could not, in those circumstances, be equated with the value to a buyer of having dominion over contractually compliant goods of a nature which would be available to be re-sold by the buyer in a market at the time of delivery. The value to Dr Clark of the company delivering contractually compliant frozen sperm lay rather in Dr Clark gaining control over a stock of frozen sperm which she could then use for the treatment of her patients in the normal course of her practice. That is to say, if she had been able to take possession from the company of contractually compliant frozen sperm, Dr Clark would have had the benefit of being relieved of the need thereafter to source sperm from somewhere else as and when she needed sperm to treat her patients.

71 The primary judge found that the company's failure to deliver 3,500 contractually compliant straws of frozen sperm deprived Dr Clark of the expected use in the normal course of her practice of 1,996 of those straws. To what extent was Dr Clark worse off in that factual position of non-fulfilment of her contractual expectation of taking possession of frozen sperm of which she could have used 1,996 straws in the normal course of her practice than she would have been in the counterfactual position of having that contractual expectation fulfilled? Dr Clark was worse off to the extent that later she was forced to incur, but was not able to recoup from her patients, the additional costs of sourcing 1,996 straws of sperm from an alternative supplier.

Conclusion

72 The appropriate measure of Dr Clark's loss is so much of the cost to Dr Clark of sourcing 1,996 straws of replacement sperm for the treatment of her patients as she had been, and would be, unable to recoup from those patients. That measure, adopted by the Court of Appeal, is appropriate because it yields an amount which places Dr Clark in the same position as if the contract had been performed so as to provide her with the expected use in the normal course of her practice of 1,996 straws of the frozen sperm delivered to her by the company.

73 To Dr Clark's protest that adoption of that measure leaves her without an award of damages in circumstances where the company has been found to have breached its warranty, the answer lies in the way she has chosen to put her case. She has made a forensic choice to eschew the measure which, together with the Court of Appeal, I would hold to be the appropriate measure.

74 The appeal should be dismissed with costs.

75 KEANE J. At issue in this appeal is the measure of the damages recoverable by a purchaser of assets of a business where the vendor has failed to meet its obligations in relation to the delivery of stock of the business. Because of the unusual nature of the stock involved, the case has given rise to a contest between an approach to the measure of recoverable loss which is focused upon the loss to the purchaser of the value of the stock at the date of completion of the purchase, and one which is focused on the expense incurred by the purchaser to acquire substitute stock in the ongoing conduct of her business. For the reasons which follow, the former approach is correct.

76 An understanding of the terms of the parties' agreement, and its commercial context, is necessary to gain an appreciation of the competing arguments.

Factual background

77 The appellant and St George Fertility Centre Pty Ltd ("St George") each conducted an assisted reproductive technology ("ART") medical practice in Sydney. Each practice provided ART treatments for patients aimed at inducing pregnancy by means other than sexual intercourse. The ART treatments included intrauterine insemination ("IUI"), which is the transfer of sperm via a catheter into the uterus. Sperm that has been donated by a male unknown to the female patient is used in some IUI procedures. Sperm from such donors is stored in thin straws about a hand-length long and up to 5 mm wide.

78 In January 2002, the appellant and St George entered into a deed ("the Deed") whereby the appellant agreed to purchase, and St George agreed to sell, "assets" used in, or attached to, St George's ART practice. The respondent guaranteed the performance of St George's obligations under the Deed; he is the only respondent to the appeal because St George is now in liquidation.

79 Clause 18.1 of the Deed contained the following definitions:

> "**Assets** means the following assets of the vendor used in or attached to the Business, being the goodwill of the vendor in respect of the Business, Records, Embryos (to the extent title in them can at law pass to the Purchaser) and Sperm but specifically excluding Plant & Equipment and any debts owed to the vendor in respect of the Business as at completion.
>
> **Business** means the ART business known as 'St George Fertility Centre' conducted by the Vendor.
>
> …
>
> **Records** means all of the records of the Business, including all original and copy records of donor and patient screening records (at both storage and 6 month quarantine for the Sperm) lists of Sperm donors and patients,

all patient records, consent forms and the vendor's Patient List of the Business excluding the Accounting Records.

RTAC means the Reproductive Technology Accreditation Committee of the Fertility Society of Australia.

Sperm means all frozen sperm whether from donors, stored for patients or reserved for patients with the vendor in the Business."

80 Clause 2a of the Deed provided that the purchase price for "the assets" was to be calculated according to the following formulation:

> "In respect of each of the calendar years 2002, 2003 and 2004, 15% of the amount by which the purchaser's gross fee income exceeds 105%, 110% and 115% respectively of the fee income of the purchaser for the calendar year 2001."

81 It was common ground that, as at 8 April 2005, the total amount payable by the appellant to St George for the assets under this provision was $386,950.91. The appellant had paid St George only $167,000, leaving a balance of $219,950.91 outstanding[58]. St George sued the appellant to recover that balance.

82 The appellant counter-sued St George and the respondent for damages for breach of a number of warranties under the Deed[59].

83 Under cl 5.1(a) of the Deed, St George warranted relevantly that:

> "the consents, screening tests (including at storage and after 6 months quarantine) and identification (including identification, contact details and physical characteristics) of donors of Sperm … have been conducted in compliance with the guidelines of RTAC".

84 Under cl 9.1 of the Deed, St George was relevantly obliged at completion to:

> "(a) give to the Purchaser:
>
> (i) except as is otherwise provided by this contract, to the extent title in them can at law pass to the Purchaser,

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58 *Macourt v Clark* [2012] NSWCA 367 at [16].

59 [2012] NSWCA 367 at [17].

unencumbered title to the Assets, free from any charges, liens or restrictions;

(ii) possession of the Assets;

(iii) a copy of the vendor's Patient List;

(iv) all patient records for the Sperm, which must include details of the Sperm donor, consent forms, results of screening tests and sufficient information to allow identification in accordance with RTAC guidelines of all Sperm".

85 On completion, St George delivered to the appellant 3,513 straws of donor sperm, but the appellant used only 504 of those straws, the balance being discarded due to the breaches of contract by St George[60].

86 By September 2005, the appellant had exhausted the stock of usable sperm straws obtained from St George. The only donor sperm available to the appellant to meet the shortfall resulting from St George's breach of contract, and which complied with all requisite regulatory and legislative requirements, was supplied by a company in the United States called Xytex Corporation ("Xytex")[61].

87 The appellant's case of breach of contract against St George was established primarily on the basis of admissions made by the respondent that "sperm donor records were not maintained in each case as required"[62]. St George's breaches of warranty were not at issue in the task of assessment of damages, which fell to the primary judge, Gzell J.

The decision at first instance

88 His Honour assessed the appellant's damages at $1,246,025.01, being the value of 1,996 warranty-compliant sperm straws at the date of the completion of the acquisition of the assets[63].

89 His Honour arrived at the figure of 1,996 sperm straws in the following way:

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60 [2012] NSWCA 367 at [28].

61 *St George Fertility Centre Pty Ltd v Clark* [2011] NSWSC 1276 at [41]-[42], [82].

62 [2012] NSWCA 367 at [159].

63 [2011] NSWSC 1276 at [110]-[111].

- St George transferred 3,513 straws of donor sperm, of which only 504 were usable as a result of St George's breaches of warranty.

- Not all of the 3,513 straws could have been used even if all warranties had been complied with because of the effect of the "family limit rule" in par 9.14 of the RTAC Code of Practice. The rule stipulated that an ART practice must have a policy that limits the number of children generated by any one donor to no more than 10 in order to avoid "accidental consanguinity within the community"[64]. Of the 3,513 straws transferred, the appellant could reasonably have expected to be able to use "at least 2,500"[65].

- The number of straws actually used was deducted from the amount the appellant could reasonably have expected to be able to use.

- The resulting figure was 1,996[66].

90 The primary judge quantified the appellant's loss by calculating what it would have cost the appellant to purchase 1,996 warranty-compliant sperm straws at the date of St George's breach of contract[67].

91 St George and the respondent contended that the date for assessment of damages should have been the date of trial. They argued that any loss suffered by the appellant was suffered during the period between completion of the contract and trial, and during that period the purchaser recovered the cost of acquisition, transport and storage of sperm by charging those costs to patients. On that approach, the appellant had suffered no loss by the date of trial. The primary judge rejected that contention, applying "the general rule of common law … that damages are assessed at the time of breach of contract or when the cause of action arises"[68].

92 The date of breach was the date of completion of the acquisition, that is, early 2002. The primary judge used the cost of acquiring 1,996 sperm straws from Xytex after September 2005 to determine the notional cost to the appellant

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64 [2011] NSWSC 1276 at [34].

65 [2011] NSWSC 1276 at [45].

66 [2011] NSWSC 1276 at [48].

67 [2011] NSWSC 1276 at [18].

68 [2011] NSWSC 1276 at [13].

of acquiring, transporting and storing Xytex sperm straws in early 2002[69]. His Honour acknowledged that the price at that time was likely to have been less than the price as at September 2005, and adjusted for that circumstance by not allowing the appellant any interest for the intervening three and a half year period[70].

The decision of the Court of Appeal

93 The Court of Appeal of New South Wales (Beazley and Barrett JJA and Tobias AJA) allowed the respondent's appeal against the judgment of the primary judge.

94 Several propositions were brought together in two broad strands of reasoning to support the Court of Appeal's conclusion. First, the Court of Appeal was disposed to regard the Deed as a contract for the sale of a business, not a sale of goods[71], and to treat this difference as a reason for holding that the measure of damages applied by the primary judge was not applicable in this case. Further, the Court of Appeal said that the method of calculation of the purchase price provided by cl 2a of the Deed made it "extremely difficult, if not impossible, to determine" what portion of the purchase price could be attributed to the sperm[72]. In this regard, Tobias AJA noted that "[t]here was no apportionment in the purchase price of an amount which could be attributed to that sperm and no attempt was made by [the appellant] to do so at trial."[73] On that footing, the Court of Appeal concluded that it could not be demonstrated that the appellant had actually paid anything for the sperm pursuant to the terms of the Deed[74]. On this approach, the appellant suffered no loss by reason of the circumstance that St George's sperm straws were worthless.

95 The second broad strand of the reasoning of the Court of Appeal was that the appellant had suffered no loss because she recovered her expenditure on the Xytex stock from her patients in the course of providing ART treatments in the period between completion of the contract and the trial.

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69 [2011] NSWSC 1276 at [109]-[110].

70 [2011] NSWSC 1276 at [111].

71 [2012] NSWCA 367 at [8]-[10], [49]-[50], [67].

72 [2012] NSWCA 367 at [66].

73 [2012] NSWCA 367 at [49].

74 [2012] NSWCA 367 at [66].

96 The two broad strands of reasoning of the Court of Appeal, and the propositions collected to support them, can be seen in the following passage. It is necessary to set the passage out in full[75]:

> "Of particular significance to the issues on the appeal was his Honour['s] reference[76] to the contention by St George and [the respondent] that damages should be assessed at the date of trial because Fertility First recovered the cost to it of the acquisition and storage of sperm purchased from Xytex by charging those costs to patients. Accordingly, [the appellant] had suffered no loss.
>
> The primary judge's response to this submission was as follows[77]:
>
> > 'The simple answer to that proposition is that [the appellant] paid twice for the use of sperm and recovery of the cost of acquisition and storage of the sperm purchased from Xytex still *left her out of pocket for the amount paid under the deed*.'
>
> It is convenient to immediately identify the flaw to this response of the primary judge. The answer may indeed have been simple if [the appellant] had in fact paid twice for the St George sperm on the one hand and the Xytex sperm on the other but that required proof that she was in fact out of pocket for the amount paid for the St George sperm under the Deed. However … there was no evidence that she paid anything for the St George sperm under the terms of the Deed. The method of calculation of the purchase price pursuant to clause 2a of the Deed made this extremely difficult, if not impossible, to determine.
>
> Although the transaction involved her taking possession of the St George sperm as part of the sale of its business to her, it was conceded first, that the St George sperm was in all probability obtained from local donors and, secondly, that apart from any expenses incurred by such donors in making the donation, s 32(1) of the *Human Tissue Act* 1983 [(NSW) ('the Human Tissue Act')] prohibited any donor receiving valuable consideration for his donation. In these circumstances, it is not surprising that no amount of the purchase price payable under clause 2a of the Deed was (or could be) apportioned to the St George sperm which [the appellant] was to receive as part of 'the Assets'. As I observed … above, the contract constituted by the Deed was for the sale of [St George's] business or practice, not one for

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75 [2012] NSWCA 367 at [64]-[68].

76 [2011] NSWSC 1276 at [20].

77 [2011] NSWSC 1276 at [21].

> the sale of goods, in whole or in part. I would add that it was not suggested that [the appellant] would obtain title to that sperm because she acknowledged that a donor could always withdraw his consent to the use of his sperm at any time.
>
> It must therefore follow that contrary to his Honour's finding[78] … [the appellant] was not 'left out of pocket for the amount paid under the Deed' for the St George sperm. Furthermore, the evidence of [the appellant] to which I have already referred demonstrates that she recovered the full cost of acquiring the replacement Xytex sperm from her patients. Accordingly, she was also not 'left out of pocket' for those costs." (emphasis of Tobias AJA)

97 It may be noted here, before turning to discuss the arguments agitated in this Court, that, having regard to the measure of damages applied by the primary judge, it was perhaps unfortunate that his Honour spoke of the appellant as having been "left … out of pocket for the amount paid under the [D]eed". This flourish was not necessary to the application of the measure of loss applied by his Honour, and it seems to have served as a distraction to the Court of Appeal.

The appeal

98 The appellant's challenge to the decision of the Court of Appeal may be stated succinctly. St George's breach of contract meant that the value of the sperm straws as assets acquired by the appellant under the Deed was less than it would have been if St George's promises had been kept. The appellant suffered that loss of value at the date of completion of the acquisition of the assets.

99 On this approach, the first strand of the Court of Appeal's reasoning failed to appreciate that her claim did not require proof of the price paid by the appellant specifically for the non-compliant sperm.

100 As to the second strand of the reasoning of the Court of Appeal, the appellant argued that the Court of Appeal erred in treating her claim as if it was for the recovery of outlays incurred to obtain replacement stock in the course of her practice. The appellant contended that she had claimed the value of the sperm which should have been delivered to her by St George, the amount paid to Xytex being evidence of that value. That being her claim, she was entitled to recover the monetary equivalent of the value which St George failed to transfer to her.

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78 [2011] NSWSC 1276 at [21].

What did the appellant claim?

101 The respondent contended that the appellant's claim was not for the value of the sperm to which she was entitled, but for the costs and expenses associated with the "procurement of replacement sperm". The respondent said that these costs and expenses were incurred subsequent to the date of breach and, accordingly, should have been assessed at the date of trial.

102 The forensic advantage to the respondent of framing the appellant's claim in this way was that it opened the way for the argument, accepted by the Court of Appeal, that the appellant recouped from her dealings with her patients the costs and expenses incurred by her in procuring replacement sperm, so that she suffered no loss by reason of St George's breach of contract[79].

103 The respondent's contention under this heading should be rejected. The appellant was entitled to frame her claim in the manner most advantageous to her, and to have that claim determined. The nature of the appellant's claim was made clear in par 13(a) of the appellant's reply in the Supreme Court. Her claim for damages was for an award which:

> "gives her the benefit of her bargain under the Deed by giving her, so far as money is capable of doing so, something equivalent to the value of the worthless Sperm delivered to her, as opposed to damages to compensate her specifically for her outlay to Xytex (the amount actually paid and payable to Xytex being no more than evidence of an appropriate measure of damages)".

104 It was this measure which the primary judge applied[80], notwithstanding the rhetorical flourish criticised by the Court of Appeal. The Court of Appeal disagreed with the primary judge's approach, but did not suggest that the terms in which the appellant advanced her claim meant that the approach taken by the primary judge was not open as a matter of procedural fairness.

105 One may now turn to consider whether the measure applied by the primary judge was correct in principle.

Damages for breach of contract: the ruling principle

106 The principle according to which damages for breach of contract are awarded is that the damages should put the promisee in the same situation with

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79 *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 at 691.

80 [2011] NSWSC 1276 at [7]-[19], [96], [111].

respect to damages, so far as money can do it, as it would have been in had the broken promise been performed[81]. The appellant was entitled to claim this measure, rather than a measure based, either on the difference between what she paid for the sperm straws and what they were worth, or on the expense "of undoing the harm which [her] reliance on the defendant's promise has caused [her]."[82] This Court said in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*[83]:

> "The 'ruling principle'[84], confirmed in this Court on numerous occasions[85], with respect to damages at common law for breach of contract is that stated by Parke B in *Robinson v Harman*[86]:
>
> > 'The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.'"

107 In *Bellgrove v Eldridge*[87], Dixon CJ, Webb and Taylor JJ explained that the practical operation of the ruling principle may vary depending on the commercial context; but that the principle is always applied with a view to assuring to the purchaser the monetary value of faithful performance by the vendor of the bargain[88]. The decision in *Bellgrove v Eldridge* confirms that the circumstance that a case does not involve the transfer of marketable commodities

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81 *Robinson v Harman* (1848) 1 Ex 850 at 855 [154 ER 363 at 365]; *Wenham v Ella* (1972) 127 CLR 454 at 460, 471; [1972] HCA 43; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at 286 [13]; [2009] HCA 8.

82 Fuller and Perdue, "The Reliance Interest in Contract Damages: 1", (1936) 46 *Yale Law Journal* 52 at 54.

83 (2009) 236 CLR 272 at 286 [13].

84 *Wertheim v Chicoutimi Pulp Co* [1911] AC 301 at 307.

85 See, for example, *Wenham v Ella* (1972) 127 CLR 454 at 460, 471.

86 (1848) 1 Ex 850 at 855 [154 ER 363 at 365].

87 (1954) 90 CLR 613 at 617-618; [1954] HCA 36.

88 As Fuller and Perdue explained in "The Reliance Interest in Contract Damages: 1", (1936) 46 *Yale Law Journal* 52 at 65, "such transactions form the very mechanism by which production is organized in a capitalistic society."

does not displace the application of the ruling principle. To the same effect, in *Tabcorp* the Court went on to say[89]:

> "Oliver J was correct to say in *Radford v De Froberville*[90] that the words 'the same situation, with respect to damages, as if the contract had been performed' do not mean 'as good a *financial* position as if the contract had been performed' (emphasis added [by their Honours]). In some circumstances putting the innocent party into 'the same situation … as if the contract had been performed' will coincide with placing the party into the same financial situation. Thus, in the case of the supply of defective goods, the prima facie measure of damages is the difference in value between the contract goods and the goods supplied. But as Staughton LJ explained in *Ruxley Electronics Ltd v Forsyth*[91] such a measure of damages seeks only to reflect the financial consequences of a notional transaction whereby the buyer sells the defective goods on the market and purchases the contract goods. The buyer is thus placed in the 'same situation … as if the contract had been performed', with the loss being the difference in market value. However, in cases where the contract is not for the sale of marketable commodities, selling the defective item and purchasing an item corresponding with the contract is not possible. In such cases, diminution in value damages will not restore the innocent party to the 'same situation … as if the contract had been performed'."

108 The ruling principle governs the assessment of damages, not only in the case of a failure to supply goods in accordance with the requirements of a contract for the sale of goods, but also in a case where, as here, the goods are supplied as an aspect of performance under a contract for the sale of assets of a business. The application of the ruling principle does not depend on characterising the Deed as a contract for the sale of goods. The rule in s 54(3) of the *Sale of Goods Act* 1923 (NSW), whereby a purchaser is "prima facie" entitled to recover "the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty", is a statutory expression of the ruling principle, but it does not exhaust its operation[92].

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89 (2009) 236 CLR 272 at 286 [13].

90 [1977] 1 WLR 1262 at 1273; [1978] 1 All ER 33 at 44.

91 [1994] 1 WLR 650 at 655; [1994] 3 All ER 801 at 806.

92 *Johnson v Perez* (1988) 166 CLR 351 at 355-356; [1988] HCA 64. See also *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* [2007] 2 AC 353 at 396-397 [79].

109 The value to be paid in accordance with the ruling principle is assessed at the date of breach of contract, not as a matter of discretion, but as 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 that performance was promised. In this way, the measure of damages captures for the purchaser the benefit of the bargain and so compensates the purchaser for the loss of that benefit[93].

110 The application of the ruling principle to measure value lost at the date of breach of contract serves the important end of bringing finality and certainty to commercial dealings. It ensures that whatever might befall the purchaser after the date of breach, for good or ill, and whether by reason of the purchaser's acumen, or lack of it, in dealing with other persons who were not party to the contract, and whatever movements may occur in the market, these developments have no bearing on the entitlement of the purchaser and the liability of the seller[94].

Application of the principle and the reasoning of the Court of Appeal

111 As to the first strand of the reasoning of the Court of Appeal, it is true to say that the contract did not permit a calculation of the price paid by the appellant specifically for the St George sperm. But that circumstance was irrelevant to the application of the ruling principle. Because the ruling principle is concerned to provide the purchaser with compensation for the loss of the benefit of the bargain, it does not require an apportionment of the components of the bargain. It was not necessary for the appellant to demonstrate that a particular part of the price paid for the business was referable to the sperm acquired as part of the transaction. Her loss fell to be measured, not by reference to what she outlaid as compared with 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. As Warrington LJ said in *Slater v Hoyle & Smith Ltd*[95], where the purchaser has "received inferior goods of smaller value than those he ought to have received … [h]e has lost the difference in the two values … In truth … the contract price does not directly enter into the calculation at all."

112 Accordingly, the circumstance that there was no way of determining under the Deed the cost to the appellant of the St George sperm to which she was entitled, a central element of the first strand of the reasoning of the Court of

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93 *Johnson v Perez* (1988) 166 CLR 351 at 355-356.

94 *Benjamin's Sale of Goods*, 8th ed (2010) at [17-056].

95 [1920] 2 KB 11 at 18; see to similar effect at 22-23 per Scrutton LJ.

Appeal, is immaterial to the true measure of damages to which the appellant was entitled.

113 The respondent sought to meet the difficulties which application of the ruling principle poses for the first strand of the Court of Appeal's reasoning by arguing that, even if the St George sperm delivered to the appellant had complied with the warranties in the Deed, the sperm would have been valueless.

Would compliant sperm have been valueless?

114 At the outset of the discussion of this question, it should be noted that, in this Court, the appellant denied making the concession attributed to her by Tobias AJA in the passage cited above[96], viz "s 32(1) of the [Human Tissue Act] prohibited any donor receiving valuable consideration for his donation." Section 32(1)(a) of the Human Tissue Act provides, it may be noted, that "[a] person must not enter into … a contract or arrangement under which any person agrees, for valuable consideration … to the sale or supply of tissue from any such person's body or from the body of any other person". Tobias AJA went on to say that, having regard to this concession, "it is not surprising that no amount of the purchase price payable under clause 2a of the Deed was (or could be) apportioned to the St George sperm which [the appellant] was to receive as part of 'the Assets'."

115 In this Court, the respondent was not disposed to dispute the appellant's contention that the concession attributed to her was not made; and the respondent did not, in his submissions, seek to rely upon s 32(1) of the Human Tissue Act. That the respondent was right to take this course is apparent from the terms of s 32(2), which provides that the prohibition in s 32(1) "does not apply to or in respect of the sale or supply of tissue if the tissue has been subjected to processing or treatment and the sale or supply is made for the purpose of enabling the tissue to be used for therapeutic purposes [or] medical purposes". Section 32(2) ensured that neither the sale by St George to the appellant, the sale of replacement sperm to the appellant by Xytex, nor the use of any sperm by the appellant in treating her patients was prohibited by s 32(1) of the Human Tissue Act.

116 In this Court, the respondent did contend, as the Court of Appeal appears to have accepted[97], that the appellant could not ethically charge patients for sperm used by her in treatments because she had not actually paid St George for any sperm at all.

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96 [2012] NSWCA 367 at [67].

97 [2012] NSWCA 367 at [67], [118]-[119], [127].

117 The respondent submitted that, at the time of entry into the Deed, it would have been within the "reasonable contemplation" of the parties that the appellant could not ethically, and so would not in fact, make any charge to the patients to whom she supplied the sperm in respect of the cost to her of that sperm.

118 Somewhat inconsistently, when supporting the second strand of the Court of Appeal's reasoning, the respondent also sought to invoke the rule in *Hadley v Baxendale*[98] in support of the contention that it was outside the contemplation of the parties that, if the St George sperm did not comply with the Deed, the appellant would incur expense to acquire replacement sperm that she would *not* pass on to her patients.

119 Under the rule in *Hadley v Baxendale*, the entitlement of a plaintiff to recover damages for breach of contract is limited to such damages as arise naturally, that is, according to the usual course of things, from the breach of contract, or such damages as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of the breach[99].

120 In *European Bank Ltd v Evans*[100], French CJ, Gummow, Hayne, Heydon and Kiefel JJ approved the view of Mason CJ and Dawson J in *The Commonwealth v Amann Aviation Pty Ltd*[101] that the two limbs of the rule in *Hadley v Baxendale* represent the statement of a single principle, and that the application of that principle may depend on the degree of relevant knowledge possessed by the defendant in the particular case. In the present case, given the terms of the Deed and the commercial context in which it was made, there can be no doubt that St George and the respondent knew that the sperm straws were likely to be deployed in the provision of ART services by the appellant.

121 The respondent's contention ultimately rested upon the Code of Practice promulgated by RTAC. The respondent relied upon cll 11.9 and 11.10 of the National Health and Medical Research Council guidelines imported into the RTAC Code by cl 7.1 of the Code. These guidelines were concerned to prevent commercial trading in human sperm; and they also contemplated that practitioners were entitled to recover their reasonable expenses. The appellant denied that she had made a profit from supplying sperm, and there was no reason

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98 (1854) 9 Ex 341 [156 ER 145].

99 *European Bank Ltd v Evans* (2010) 240 CLR 432 at 437-438 [11]-[13]; [2010] HCA 6.

100 (2010) 240 CLR 432 at 438 [13].

101 (1991) 174 CLR 64 at 92; [1991] HCA 54.

to doubt her evidence. The appellant, in providing ART services for a fee, cannot sensibly be said to be engaging in commercial trading in sperm for a profit.

122 In this Court, the respondent also sought to base the contention that compliant St George sperm would have been worthless upon s 16 of the *Human Cloning for Reproduction and Other Prohibited Practices Act* 2003 (NSW) ("the Human Cloning Act"). That provision is in the following terms:

> "(1) A person commits an offence if the person intentionally gives or offers valuable consideration to another person for the supply of a human egg, human sperm or a human embryo.
>
> Maximum penalty: Imprisonment for 15 years.
>
> (2) A person commits an offence if the person intentionally receives, or offers to receive, valuable consideration from another person for the supply of a human egg, human sperm or a human embryo.
>
> Maximum penalty: Imprisonment for 15 years.
>
> (3) In this section:
>
> ***reasonable expenses***:
>
> (a) in relation to the supply of a human egg or human sperm includes, but is not limited to, expenses relating to the collection, storage or transport of the egg or sperm, and
>
> (b) in relation to the supply of a human embryo:
>
> (i) does not include any expenses incurred by a person before the time when the embryo became an excess ART embryo within the meaning of the *Prohibition of Human Cloning for Reproduction Act 2002* of the Commonwealth, and
>
> (ii) includes, but is not limited to, expenses relating to the storage or transport of the embryo.
>
> ***valuable consideration***, in relation to the supply of a human egg, human sperm or a human embryo by a person, includes any inducement, discount or priority in the provision of a service to the person, but does not include the payment of reasonable expenses incurred by the person in connection with the supply."

123 The Human Cloning Act was not in force at the date of the making or completion of the Deed. It was not suggested that it operated retrospectively upon the Deed. Accordingly, it does not affect the lawfulness of the Deed, or the expectations of the parties to it, or claims to enforce those expectations.

No title to the sperm

124 The last point to be made in relation to the first strand of the reasoning of the Court of Appeal is that the observations by Tobias AJA that the appellant did not obtain title to the sperm acquired from St George and that a "donor could always withdraw his consent to the use of his sperm at any time", cited above, are irrelevant. There was no suggestion in the evidence that the value of the appellant's contractual entitlements might be in any way diminished by those circumstances.

Was the appellant's loss mitigated?

125 In support of the second strand of the reasoning of the Court of Appeal, the respondent contended that, irrespective of whether the Deed was or was not a contract for the sale of goods, or whether it contained a sale of sperm, the loss claimed by the appellant was fully mitigated by recovery from her patients of the outlays she made in respect of the Xytex sperm.

126 In the reasons of Tobias AJA, his Honour returned to the second strand of his reasoning, focusing upon an argument by the appellant that St George and the respondent[102]:

> "had not demonstrated that [the appellant's] prima facie damages were diminished or mitigated by the receipt of payments from her patients for the supply of Xytex sperm. This was because it was not established that receipts of that magnitude could not have been received by [the appellant] in respect of hypothetically compliant St George sperm."

127 In rejecting that argument, Tobias AJA said[103]:

> "In my view, it cannot be gainsaid that [the appellant] took steps to mitigate her loss and that those steps met with a high degree of success. St George's breach of contract made it necessary for her to acquire sperm from an alternative source. She did so at a cost to her. That cost represented the *prima facie* loss she suffered as a result of St George's breach, subject to the effects of such mitigation as she achieved or ought

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102 [2012] NSWCA 367 at [125].

103 [2012] NSWCA 367 at [127].

> to have achieved. She in fact achieved mitigation to what was, in practical terms, the maximum extent allowed by the legal and ethical constraints under which she operated and which both parties necessarily had in contemplation as being operative in the particular circumstances."

128 To say that in the conduct of the appellant's practice she was able to recover the cost to her of the Xytex sperm incurred in the course of her practice after acquiring the assets is to fail to address the claim which the appellant actually made. The loss for which the appellant claimed compensation occurred at the completion of the Deed, at which time the assets which she acquired were not as valuable as they would have been had St George's performance measured up to its warranties. One may make this point, without dwelling impermissibly on "circumstances peculiar to the plaintiff"[104], by observing that, at the completion of the Deed, if the appellant had been minded to on-sell her business (enhanced by the acquisition of the assets from St George) the value of that business would have been substantially less because much of the stock in trade could not have been profitably deployed by the purchaser. That the appellant was not, in fact, in the market to sell her business or its assets including its stock in trade is beside the point, which point is that the appellant's post-acquisition assets were less valuable than should have been the case.

129 The point that the appellant had suffered a real loss in terms of the benefit of her bargain at the date of completion of the acquisition of the assets may be made another way. The appellant may have been able to charge fees for her services in the conduct of her practice which were within the market range but returned her a greater profit because she was not obliged to incur the extra cost of replacement sperm. Whether or not she chose to realise the value of compliant St George sperm in this way was a matter for her. Whether or not she would have been disposed to take such a course was not explored in evidence at trial; but that is not a deficit in her claim. She was entitled to claim the measure of damages under the ruling principle without going into such matters. It would be an unprecedented application of the rule in *Hadley v Baxendale* to confine the measure of a purchaser's damages by reference to the likely effects of the particular decisions of the purchaser as to how she might choose commercially to exploit the assets acquired from a seller. The point is that one cannot say that the appellant's loss was confined to the expense that she had to incur (but was able to recoup from patients) in acquiring 1,996 straws of sperm from an alternative supplier as and when she needed those straws for the treatment of patients.

130 On behalf of the respondent, reliance was placed on the observations of Lord Atkinson on behalf of the Judicial Committee of the Privy Council in

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104 *Slater v Hoyle & Smith Ltd* [1920] 2 KB 11 at 23.

Wertheim v Chicoutimi Pulp Co[105]. His Lordship began by articulating the ruling principle:

> "And it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed: *Irvine v Midland Ry Co (Ireland)*[106], approved of by Palles CB in *Hamilton v Magill*[107]. That is a ruling principle. It is a just principle. The rule which prescribes as a measure of damages the difference in market prices at the respective times … is merely designed to apply this principle and … it generally secures a complete indemnity to the purchaser. But it is intended to secure only an indemnity. The market value is taken because it is presumed to be the true value of the goods to the purchaser. In the case of non-delivery, where the purchaser does not get the goods he purchased, it is assumed that these would be worth to him, if he had them, what they would fetch in the open market; and that, if he wanted to get others in their stead, he could obtain them in that market at that price. In such a case, the price at which the purchaser might in anticipation of delivery have resold the goods is properly treated, where no question of loss of profit arises, as an entirely irrelevant matter: *Rodocanachi v Milburn*[108]."

131 This passage provides general support for the appellant's position rather than that of the respondent.

132 Lord Atkinson went on, however, to give an example of an exception to the presumption that the market value of goods which comply with contractual requirements reflects their value. His Lordship said[109]:

> "[B]ut if in fact the purchaser, when he obtains possession of the goods, sells them at a price greatly in advance of the then market value, that presumption is rebutted and the real value of the goods to him is proved by the very fact of this sale to be more than market value, and the loss he sustains must be measured by that price, unless he is, against all justice, to be permitted to make a profit by the breach of contract, be compensated

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105 [1911] AC 301 at 307-308.

106 (1880) 6 LR Ir 55 at 63.

107 (1883) 12 LR Ir 186 at 202.

108 (1886) 18 QBD 67.

109 [1911] AC 301 at 308.

> for a loss he never suffered, and be put, as far as money can do it, not in the same position in which he would have been if the contract had been performed, but in a much better position."

133 In *Slater v Hoyle & Smith Ltd*, the Court of Appeal of England and Wales distinguished *Wertheim* in this respect. Warrington LJ said of the facts in *Slater*[110]:

> "The purchaser here has received inferior goods of smaller value than those he ought to have received. He has lost the difference in the two values, and it seems to me immaterial that by some good fortune, with which the [sellers] have nothing to do, he has been able to recoup himself what he paid for the goods."

134 The observations of Warrington LJ apply with equal force to the present case. The value of the St George sperm lay not in what it might bring in a market for sperm as a commodity, but, as the Deed contemplated, as stock of a business. And as stock of the business they were distinctly inferior.

135 As noted above, there is no room to doubt that the parties to the Deed had it in contemplation that the sperm straws acquired from St George would ultimately be deployed in an ART practice. The failure of St George to meet its warranties in relation to the sperm being transferred meant that the appellant's business was not augmented as expected by the addition of a quantity of stock in trade. It was said, however, on behalf of the respondent, to be counter-intuitive that a contract for the 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 only of the assets. This appeal to intuition is unsupported by evidence, and should not be countenanced for several reasons. First, this is the complaint of any vendor in breach of a contract in which the purchaser made the better bargain. The fundamental value protected by the law of contract is that *pacta sunt servanda*, bargains are to be kept. That the contract crystallises a state of affairs in which the purchaser's gain is the vendor's loss is a characteristic of commerce in a capitalistic economy[111].

136 Secondly, the only source of replacement sperm was Xytex: the appellant was obliged to incur storage and transport costs associated with getting sperm from the United States, and, on the evidence adduced at trial, the exchange rate

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110 [1920] 2 KB 11 at 18.

111 Fuller and Perdue, "The Reliance Interest in Contract Damages: 1", (1936) 46 *Yale Law Journal* 52 at 65.

between the US dollar and the Australian dollar was, at the relevant time, substantially to the disadvantage of the Australian dollar[112].

137 Thirdly, the respondent's appeal to intuition ignores the possibility that St George's sperm straws would have been, within the contemplation of the parties, deployed on a higher turnover, as stock of the appellant's expanded business, than had previously been achieved by St George or the appellant. The appellant's acquisition of St George's assets (which included its goodwill and patient lists) expanded her client base, and the sale of the assets by St George meant that the potential for the expansion of the appellant's business would be realised in a market from which St George had been removed as a competitor. The acquisition may have generated greater demand for, and a concomitant increase in the rate of turnover of, sperm straws in comparison with the turnover relevant to the pre-acquisition gross fee income referred to in cl 2a of the Deed. That possibility would, of course, be consistent with the price formula in cl 2a of the Deed.

138 Fourthly, at trial St George and the respondent did not seek to advance an evidentiary basis for a finding as to the true value of the St George sperm had St George kept its contractual obligations. In this respect, the elements of the primary judge's calculation based on the cost of replacement sperm from Xytex were not challenged. It may also be noted here that the respondent sought leave to file out of time a notice of contention to the effect that, if the appellant was entitled to recover damages assessed by reference to the non-delivery of the contract sperm, then the cost of the acquisition of the Xytex sperm was not an accurate proxy for that value. But the respondent did not adduce any evidence to establish a more reliable proxy. The view formed by the primary judge on this factual matter was not unreasonable. The submission advanced pursuant to the notice of contention should be rejected.

Betterment discount?

139 The respondent also argued that the appellant was better off by utilising replacement donor sperm in patient treatments, as compared to if she had been able to use contractually compliant St George donor sperm. At trial, the respondent advanced an argument that the sperm the appellant obtained from Xytex was superior to the sperm that would have been supplied by St George if it had complied with its warranty obligations[113].

140 The primary judge accepted that the information available concerning Xytex's donors was more extensive than would have been available for compliant

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112 [2012] NSWCA 367 at [32].

113 [2011] NSWSC 1276 at [76].

St George sperm; but his Honour held that St George and the respondent failed to prove "the presence of betterment and its quantum"[114]. His Honour concluded[115]:

> "Here the market comprised but one seller, Xytex. [The appellant] had no choice. It was not suggested that she could have acquired the sperm more cheaply elsewhere. It was not suggested that the price paid was inflated by the agreement for exclusive supply to [the appellant]. And St George Fertility and [the respondent] failed to establish the quantum of any benefit."

141 The Court of Appeal did not address this aspect of the case.

142 The respondent's argument should be rejected. This case is not analogous to *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd*[116], on which the respondent relied. In that case, the cost of machines purchased as substitutes for defective machines was recoverable but subject to a reduction to take account of any extra profit to the buyer resulting from the replacement of the defective machines. It is not suggested that the evidence established extra profitability attributable to the use of the Xytex sperm. As noted above, the respondent did not advance evidence which might have permitted a finding that the Xytex sperm was of a quality which would have commanded a higher price than the St George sperm would have had it satisfied the warranties in the Deed. Rather, the respondent's case was that the appellant's claim was flawed in point of principle so that no damages were recoverable, and he advanced no evidence to establish a basis for a "betterment discount"[117].

143 *British Westinghouse* is irrelevant in this case for the further reason that the buyer in that case did not claim the difference between the actual value of the goods at the time of delivery and the value they would have had if they had complied with the seller's contractual obligations. Because the buyer claimed the cost of buying substitute goods several years after the original delivery, the House of Lords held that the buyer's action "formed part of a continuous dealing with the situation in which [the buyer] found [itself], and was not an independent or disconnected transaction."[118] As *Benjamin's Sale of Goods* explains, if the

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114 [2011] NSWSC 1276 at [79]-[83].

115 [2011] NSWSC 1276 at [82].

116 [1912] AC 673.

117 *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at 291 [24]-[25].

118 [1912] AC 673 at 692.

buyer in *British Westinghouse* had claimed the difference between the value of the goods and the value of compliant goods at the time of delivery, that claim could not have been reduced[119].

The purchase price covered the breach

144 The respondent also advanced an argument that it was within the parties' contemplation that any consequence for breach of warranty in respect of the donor sperm was built into the contract itself. According to this argument, if the appellant was unable to use some or all of the sperm in medical procedures and treatments, there would be a resultant reduction in the increase in fees that she might otherwise have received from performing those procedures and treatments. This would, in turn, result in a reduction in the purchase price the appellant would be required to pay St George under cl 2a of the Deed.

145 This argument should be rejected. It is predicated on the assumption that the protection afforded to the appellant's interests by the warranties in the Deed was exhaustively addressed by the prospect of downward adjustment in the purchase price payable by her. But the terms of the Deed contain no hint that the parties had any such common intention. Indeed, the argument is contrary to the evident intention of cl 2a of the Deed, whereby both vendor and purchaser expected to share in the benefit of the greater profitability of the appellant's business to be expected from the deployment of the assets in that (expanded) business. That common intention would not be advanced if St George's warranties were not made good.

Conclusion and orders

146 The appeal should be allowed and consequential orders should be made.

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119 *Benjamin's Sale of Goods*, 8th ed (2010) at [17-056].