



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: A9/2023
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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN:

TESSERACT INTERNATIONAL PTY LTD
Appellant

and

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PASCALE CONSTRUCTION PTY LTD
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

This submission is in a form suitable for publication on the Internet.

Part II: Outline of argument

1. Section 28(3) of the CAA requires the arbitral tribunal to apply 'the law' determined by conflict of laws rules which it considers applicable: (AWS [16] - [22]). Here the parties have agreed 'the law' that must be applied for the purposes of s 28(3) is the substantive law of South Australia (AWS [20]).
2. The Proportionate Liability Law is part of the substantive law of South Australia (AWS [43]).
3. By referring their dispute to arbitration, the parties impliedly conferred upon the arbitrator the authority to give such relief as would be available in a court of law having jurisdiction with respect to the matter: *GIO, Codelfa, IBM, Francis Travel, Passlow v Butmac* (AWS [23] - [37]).
4. The Proportionate Liability Law operates to fundamentally alter the regime of solidary liability by limiting a defendant's liability to a proportion of the plaintiff's notional damages, having regard to the responsibility of the defendant and the other wrongdoers for the plaintiff's harm (AWS [46] - [54]).
5. The Proportionate Liability Law is just as capable of being applied in arbitral proceedings as in judicial proceedings (AWS [68] - [89]).

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6. Any wording in the statute that requires modification to account for the terminology differences between curial and arbitral proceedings can be ‘moulded’ in the manner contemplated by Mason J in *Codelfa*, (AWS [15]; [31] - [35]; [90] - [92]).
7. The COA’s concerns regarding the ability to join other wrongdoers to the arbitral proceeding, the plaintiff’s entitlement to the benefit of information (s 10(2)), the risk of inconsistent findings and the extent to which an arbitral proceeding involving the Proportionate Liability Law may bind a non-party, are overstated in comparison with the position in litigation: (AWS [70] - [74]; [81] - [84]).
8. The mere fact that third parties cannot be joined, absent consent, does not mean that the Proportionate Liability Law is not arbitrable and does not preclude the operation of the scheme: (AWS [71] - [74]) (Appellant’s Reply Submissions (ARS) [6] - [7]). Consent is the foundation of arbitration and should not be regarded as a disqualifying disadvantage.
9. Parties are aware of the limitations of arbitration. The risk of inconsistent findings commonly arises in multi-party disputes where only two of those parties have agreed to arbitration (AWS [75] - [80]). Section 11 of the Law Reform Act operates to reduce that risk. But section 11 does not operate to determine the rights of a third party (AWS [49] [81] - [84]) (ARS [8] - [10]).
10. Contrary to Doyle JA’s statement at CA [192], a claimant in an arbitral proceeding will still be entitled to the provision of the information required by s 10 of the Law Reform Act (AWS [70]).
11. The fact that the outcome of a bipartite arbitral proceeding may affect the liability of another party or parties in a subsequent court proceeding is not unusual and does not warrant excluding the Proportionate Liability Law from arbitral proceedings (AWS [81]).
12. The quite different provisions of 87CG of the CCA present even less risk of discordance between successive proceedings (AWS [50] – [54]).
13. To exclude Proportionate Liability Law from arbitral proceedings would create significant disconformity between curial and arbitral proceedings and create uncertainty by undermining party choice (AWS [15]; [19] - [22]). There is nothing in

14. the allocation of proportionate liability that indicates that only judicial tribunals can properly discharge that aspect of dispute resolution.

14 November 2023



Bret Walker

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