HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number:	A9/2023
File Title:	Tesseract International Pty Ltd v. Pascale Construction Pty Ltd
Registry:	Adelaide
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	25 Aug 2023

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN:

TESSERACT INTERNATIONAL PTY LTD
Appellant

and

PASCALE CONSTRUCTION PTY LTD
Respondent

APPELLANT'S REPLY

Part I: Certification

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

Part II: Argument

The Respondent's submissions

Agreement to arbitrate

2. The Respondent contends the "*agreement to arbitrate is itself a choice as to the rules of law applicable*" (*RWS*,[24]). Here, the relevant choice falling for consideration is the parties' agreement to arbitrate their dispute in accordance with the law of South Australia. The central issue is whether the Proportionate Liability Law forms part of the laws of South Australia.

3. The Respondent argues that the use of terminology commonly connected with curial proceedings provides "significant or substantial support" for the proposition that the Proportionate Liability Law is excluded from the implied conferral of power upon the arbitral tribunal (*RWS*, [33]). That submission fails to address the fact that in *GIO* (being the seminal authority relied upon in support of the conferral of an implied power), the High Court determined that an arbitrator has the power to award interest under section 94 of the Supreme Court Act 1970, which likewise employed terminology of "the court", "proceedings" and "judgment".

Multiparty litigation

4. The Respondent wrongly suggests that the Proportionate Liability Law only operates in respect of "multi-party litigation" (*RWS,* [35]). The regime is not so confined. It continues to operate *inter partes* in court proceedings in circumstances where a third party is not joined to the dispute, whether as a result of a choice by the claimant or by force of circumstance (for example, where the third party is insolvent).

Provision of information

5. The Respondent argues that on the Appellant's construction, a claimant in arbitral proceedings would be deprived of corresponding benefits and opportunities stipulated for information – presumably a reference to section 10 of the Law Reform Act – as to alleged concurrent wrongdoers (*RWS,* [36]). That is incorrect: a claimant in arbitral proceedings will still be entitled to the provision of the information required by s 10 of the Law Reform Act. Moreover, that information will still be of utility to such a claimant notwithstanding the limitations of joinder concomitant with bipartite arbitral proceedings.

Amenability of the Proportionate Liability Law to arbitral proceedings

6. The Respondent concedes that "*there is no question*" the Proportionate Liability Law may be applied in an arbitration by express agreement (*RWS*, [52]). That constitutes an acknowledgement that the regimes are *amenable* to arbitral proceedings. The fact third parties cannot be forced to participate in the process merely means a claimant is in the same situation as a plaintiff who is unable to proceed against a third party, either as a result of the third party's insolvency, obscurity or the fact it has ceased to exist. That does not constitute a reason to deprive a respondent of the reallocation brought about by the Proportionate Liability Law.

7. At (RWS [86]), the Respondent argues that the application of section 11 to an arbitral award binds a third party to the outcome of arbitral proceedings to which it was not a party and which it may not have known about. However, in litigation, the effect of section 11 may still bind a third party to the outcome of a proceeding to which it was not a party and which it may not have known about.

Subsequent proceedings

8. The Respondent disputes the application of the principles stated in *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government*[1] to the provisions of the *Law Reform Act* on the basis that it says that section 11 does not concern what might be recovered as "just and equitable" and otherwise that the circumstances falling for consideration in *Bitumen* could not arise here*:* (*RWS,* [87] to [90]).

9. Whilst section 11 does not by its own terms concern what sum might be recovered as just and equitable, section 8(2) of the Law Reform Act provides that if the limitation applies, the defendant's liability is limited to a percentage of the plaintiff's notional damages that is "*fair and equitable*" having regard to, inter alia, the extent of the defendant's responsibility for that harm and the extent of the responsibility of other wrongdoers (including wrongdoers who are not party to the proceedings) whose acts or omissions caused or contributed to the harm.

10. Therefore, if a claimant successfully establishes a respondent is liable to it in arbitral proceedings, then brings separate court proceedings against a third-party wrongdoer, the arbitral award may be said to constitute, or at least be probative, in determining the amount of the plaintiff's notional damages (CA [200]).The operation of ss 8 and 11 are subject to the qualification identified at (*AWS* [83]).

Intervener's submissions

11. The Intervener contends that the Appellant (along with the SASCA and the Respondent) has embraced the notion that the application of a particular substantive law depends on whether it is *amenable* to arbitration (*IWS,* [13]). That is incorrect. The Appellant submits that the mandatory wording in s 28(1) and (3) requires the arbitrator to "decide" or "apply the law" in accordance with rules of law chosen by the parties or determined by the conflict of laws rules which it considers applicable: see *AWS* at [16] to [22]. The parties have accepted that the system of law governing the determination of the dispute under s 28(3) is the law of South Australia: (CA [43] (CAB p.39) and [58] (CAB p.43). As the Proportionate Liability Law falls within the scope of the law of South Australia, those laws are required to be applied by s 28(3) of the CAA.

[1] *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government* (1955) 92 CLR 200.

12. The Appellant also rejects the introduction of a new threshold requirement by the SASCA, that finds no expression in the words of the CAA, as to whether a substantive law is "amenable" to arbitration: see AWS [43] to [44]. The Appellant also agrees that considerations of arbitrability and public policy do not provide a basis in principle on which the relevant substantive law can or ought to be disapplied by reference to legislative intention (*IWS*, [26]).

13. It is accepted that the principles of arbitrability and public policy may operate, in very limited circumstances, to impose a practical limitation on the application of substantive law pursuant to s 28(1) and (3) of the CAA (*IWS*, [20] to [26]). But those limitations do not arise here. Indeed, that is not in dispute: both the CA and the Respondent have implicitly acknowledged that the Proportionate Liability Law is arbitrable and not limited from operation by issues of public policy: see (*RWS*, [52]) and (CA [205]).

14. As such, the Intervener's position as to the operation of s 28 of the CAA broadly aligns with the Appellant's primary position. The application of the parties' choice of law via s 28 of the CAA is mandatory. There is no basis to exclude the operation of the Proportionate Liability Law from the arbitral proceedings.

15. It is relevant to recognise in the context of this appeal that the Proportionate Liability Law is otherwise amenable to arbitration, in the sense that concept is used by the SASCA: see *AWS* at [43] to [92]. That does not derogate from the Appellant's primary position regarding the mandatory nature of s 28 of the CAA.

16. The Appellant otherwise maintains that the arbitrator's obligation to apply 'the law' also arises from the implied term in the parties' arbitration agreement: see *AWS* at [23] to [37]. Whilst the central issue falling for disposition in this appeal is addressed by the operation of s 28 of the CAA, the implied term is a further basis upon which the arbitrator is conferred with the power to determine the dispute in accordance with the applicable law. Notwithstanding the developments in the arbitral legislative framework since *GIO* (see *IWS* at [28] to [35]), it remains good law. Subject to the terms of the arbitration agreement, the arbitrator is required to apply the 'law of the land'. Here, that includes the Proportionate Liability Law. The fact the statutory framework now reflects the position at common law does not provide a sound basis

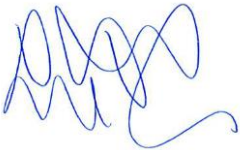
for excluding the operation of the implied term recognised by this court in *GIO* and *Codelfa*.

Dated: 25 August 2023

Bret Walker

T J Margetts

L J Connolly



Andrew Graham McAdam
Lawyer for the Appellant

Annexure A

In accordance with paragraph 3 of Practice Direction No 1 of 2019 – Legislation and Authorities, Appeals and Other Full Court Matters

No	Legislation	Version	Provisions
1.	Supreme Court Act 1970 (NSW)	As enacted	Section 94