



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: A9/2023
File Title: Tesseract International Pty Ltd v. Pascale Construction Pty Ltd
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Important Information

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Note: see rule 44.08.2.

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY
NO A9/2023

BETWEEN: TESSERACT INTERNATIONAL PTY LTD
Applicant
and
PASCALE CONSTRUCTION PTY LTD
Respondent

RESPONDENT’S OUTLINE OF ORAL SUBMISSIONS

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

Part II: Outline of propositions to be advanced in oral argument

1. Part 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) (**LRA Part 3**) and Part VIA of the *Competition and Consumer Act 2010* (Cth) (**CCA Part VIA**) each constitute a whole statutory scheme for the imposition of proportionate liability in respect of concurrent wrongdoers, in place of common law solidary or joint and several liability for certain types of disputes¹ (**RWS [9]**).
2. An inevitable consequence of the statutory scheme is that, where invoked and applicable, it is necessary that the plaintiff sue all wrongdoers in order to recover the total loss or take the risk of less than complete recovery (**RWS [9]**).
3. Each scheme incorporates provisions which balance the interests of a plaintiff and a defendant in proceedings where the defendant asserts that it is entitled to the benefit of the statutory imposition of proportionate liability (**RWS [10, 11, 65]**). Moreover, the LRA Part 3 stipulates that the “*judgment first given*” in such proceedings is binding for the purposes of subsequent actions against any other asserted concurrent wrongdoer in significant respects (**RWS [17, 85-90]**).

¹ *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 656 at [10] (Joint Book of Authorities (**JBA**), Vol 3. Part C, No. 14, p. 289

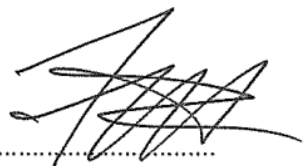
4. An integral feature of each regime is the opportunity for a plaintiff, when faced with a defendant who or which asserts that it is entitled to the benefit of the statutory imposition of proportionate liability, to join any concurrent wrongdoers, if possible, so as to have all matters of liability determined and obtain judgment for the whole of the loss suffered in one set of proceedings (RWS [11, 69-70, 72-78, 83]).
5. Commercial arbitration is a matter of contract and private law.² The agreement to arbitrate disputes is usually made in the context of a broader commercial bargain. The parties' choice that the determination of disputes shall be as between them, to the exclusion of the role, interests, and position of third parties in respect of their rights and liabilities, is often a critical and strategic part of a commercial transaction (RWS [20, 22, 24, 76, 79-83]).
6. The *Commercial Arbitration Act 2001* (SA) provides that the arbitral tribunal must decide the dispute in accordance with such rules of law as are chosen by the parties as applicable (s.28(1)) or, failing any designation, by applying the law determined by the conflict of laws rules which it considers applicable (s.28(3)). (RWS [24 - 27])
7. The law required to be applied by s.28(3) means the interconnecting, interdependent laws of South Australia, as interpreted and applied by the Courts. (AWS [21])
8. If the law incorporates a statutory provision or scheme which, either expressly or constructively, is excluded from or not available in arbitration then s.28(3) necessarily requires the exclusion of that statutory provision or scheme. It is the application of the law to do so.³ (RWS [12, 13, 25-27])
9. If the rules of law chosen pursuant to s.28(1) or the law determined by the default provisions of s.28(3) incorporates a statutory scheme which does not apply to arbitration, the exclusion of that statutory scheme for the purposes of determining the parties' disputes manifests the choice made or operation of the default provisions (RWS [17]).

² *TCL Air Conditioner Co Ltd (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 per French CJ and Gageler J at [9]-[11] (JBA, Vol. 3, Part C, No. 16, pp. 261-263); *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514, per Edelman J at [87] (JBA, Vol. 3, Part C, No. 15 p. 239).

³ *Tesseract v Pascale* [2022] SASCA 107 at [70]-[71], (Core Appeal Book (CAB), p. 46).

10. Whether a statutory provision or scheme may be invoked or is excluded as part of the law for the determination of disputes is to be determined by consideration of the force of their own terms⁴ or whether the scheme is amenable to arbitration.⁵ On this analysis, each scheme is excluded from or not available in arbitration.
11. The implied conferral of power on an arbitral described in *GIO v Atkinson*⁶ is predicated on: (A) the determination of disputes according to the “law of the land”; and (B) a claimant being entitled to the rights and remedies as would have been available in a court of appropriate jurisdiction (RWS [31]).
12. The question of what constitutes the “law of the land” is substantially the same as the question as to what constitutes the law for the purposes of s.28(3). Further, application of the general principle is informed by such qualifications as relevant statute law may require⁷ (RWS [29, 32-33]).
13. The claimant is not entitled to the rights and remedies as would have been available in a court of appropriate jurisdiction (joinder; determination of all matters of liability and recovery of all loss in one set of proceedings). There is no basis for invocation of either scheme by an implied conferral of power (RWS [16, 38 - 41]).
14. The statutory schemes under the LRA Part 3 and the CCA Part VIA are not applicable to arbitration and are therefore excluded from or not available in arbitration.⁸ (RWS [18, 20, 52 – 58, 59-71]). This reflects the choice and commercial bargain of the parties.⁹ (RWS [22, 76, 79 - 83]).
15. There is no moulding of each statutory scheme possible, only omission or partial application (RWS [93-99]).

Dated: 14 November 2023



Frank Hicks SC

⁴ *Tesseract v Pascale* [2022] SASCA 107 at [111]-[116], [119]-[122], [125]-[135] (CAB, pp. 57-60, pp. 61-63).

⁵ *Tesseract v Pascale* [2022] SASCA 107 at [176]-[179] (CAB, pp. 75-76).

⁶ (1981) 146 CLR 206 (JBA, Vol. 3, Part C, No. 13, p. 235).

⁷ *GIO v Atkinson-Leighton* (1981) 146 CLR 206 (JBA, Vol. 3, Part C, No. 13, p. 235; *Tesseract v Pascale* [2022] SASCA 107 at [140], [176]-[179] (CAB, No. 3, pp. 64, pp. 75-76).

⁸ *Tesseract v Pascale* [2022] SASCA 107 at [75] (CAB, No. 3, pp. 79-84).

⁹ *Tesseract v Pascale* [2022] SASCA 107 at [133] (CAB, No. 3, p. 63).