



Proportionate Liability: Does it apply in arbitration?

Introduction

The High Court of Australia's recent ruling in *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24 has significant implications for the application of proportionate liability laws within arbitration proceedings. This article delves into the facts of the case, the legal principles involved, the judgment rendered by the High Court, and the broader implications for construction law and arbitration practices.

Background

Parties Involved

- (a) Tesseract International Pty Ltd: Engaged as an engineering consultancy to provide services for the design and construction of a warehouse facility.
- (b) Pascale Construction Pty Ltd: The principal contractor responsible for the construction project.

Contractual Context

- (a) The parties entered into a contract that included provisions for dispute resolution through conciliation followed by arbitration. A dispute arose regarding Tesseract's performance of its contractual obligations, leading Pascale to claim damages for:
 - (i) Breach of contract.
 - (ii) Negligence.
 - (iii) Misleading or deceptive conduct under section 18 of the Australian Consumer Law (ACL).
- (b) Pascale alleged that Tesseract's work did not meet the required standards, resulting in financial losses.

Legal Issues

Tesseract denied liability but argued that if any damages were awarded, they should be reduced based on the actions of a third-party concurrent wrongdoer. This was based on provisions in:

- (a) Part 3 of the Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA).
- (b) Part VIA of the Competition and Consumer Act 2010 (Cth).

The key question referred to the South Australian Court of Appeal was whether these proportionate liability provisions applied within arbitration proceedings.

Court of Appeal Decision

In *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2022] SASCA 107, the South Australian Court of Appeal ruled that these provisions did not apply to arbitration. The court held that:

- (a) The arbitrator could not apply proportionate liability laws without materially altering their intended application.
- (b) The inability to join all alleged wrongdoers to an arbitration without their consent meant that proportionate liability laws were inapplicable.

High Court Judgment

On August 7, 2024, the High Court delivered its judgment, overturning the Court of Appeal's decision by a majority of 5 to 2. The key findings included:

- (a) **Proportionate Liability Laws Apply:** The High Court confirmed that parties to an arbitration agreement do not automatically contract out of proportionate liability laws. The mere existence of an arbitration agreement does not negate these laws' applicability to disputes arising under that agreement.
- (b) **Concurrent Wrongdoers:** The inability to join all alleged concurrent wrongdoers in arbitration does not render proportionate liability laws inapplicable. The court recognised that these laws are part of the substantive law governing disputes and can be modified to apply within an arbitration context.
- (c) **Choice of Law:** The High Court emphasised that the law applicable to resolving disputes between Tesseract and Pascale is South Australian law, which includes its proportionate liability regime.
- (d) **Implications for Arbitration:** The ruling allows Tesseract to seek a reduction in any potential liability based on the conduct of third-party wrongdoers who are not parties to the arbitration agreement.

Implications for Construction Law and Arbitration

The decision has several critical implications. First, it shifts risk onto claimants, who may face greater challenges in recovering full compensation for losses in arbitration settings where proportionate

liability applies, as they must navigate potential claims against third-party wrongdoers outside of arbitration. Second, parties drafting contracts with arbitration clauses should consider explicitly addressing whether proportionate liability regimes apply, potentially negotiating terms that include or exclude such provisions based on their risk appetite. Additionally, commercial parties may need to review existing contracts containing arbitration agreements to assess how this ruling alters their risk profile and recovery strategies. Finally, the decision clarifies that proportionate liability regimes can be integrated into arbitral proceedings across jurisdictions, potentially influencing future arbitration agreements and practices.

Conclusion

The High Court's ruling in *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* marks a pivotal moment in understanding how proportionate liability applies within arbitration contexts. By affirming that these laws can influence arbitral outcomes, the court has reshaped expectations for parties involved in construction contracts and other commercial agreements that rely on arbitration as a dispute resolution mechanism. As businesses adapt to this new legal landscape, careful consideration will be essential in drafting contracts and managing risks associated with third-party claims.

More information

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