



HIGH COURT OF AUSTRALIA

7 August 2024

TESSERACT INTERNATIONAL PTY LTD v PASCALE CONSTRUCTION PTY LTD
[2024] HCA 24

Today, the High Court allowed an appeal from a decision of the Court of Appeal of the Supreme Court of South Australia. The central question in the appeal was whether the proportionate liability laws in Pt 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) ("the Law Reform Act") and Pt VIA of the *Competition and Consumer Act 2010* (Cth) ("the CCA") apply in an arbitration conducted pursuant to the *Commercial Arbitration Act 2011* (SA).

Tesseract and Pascale entered into a contract for the provision of engineering consultancy work by Tesseract in connection with building works comprising Pascale's design of a multilevel warehouse in South Australia. The contract provided for conciliation of any dispute between the parties. If a dispute was not resolved by conciliation, either party could refer the dispute to arbitration. A dispute regarding the standard of Tesseract's work was referred for arbitration, with Pascale claiming damages for breach of contract and negligence and, pursuant to s 236 of the *Australian Consumer Law*, for misleading or deceptive conduct in contravention of s 18 of the *Australian Consumer Law*. Tesseract denied liability or alternatively contended that liability should be reduced by reference to the alleged concurrent wrongdoing of a third party in accordance with Pt 3 of the Law Reform Act and/or Pt VIA of the CCA. As a non-party to the contract, the third party is not and cannot be required to be a party to the arbitration. Pascale denied the applicability of the proportionate liability laws in the arbitration.

In order to resolve the question of the applicability of the proportionate liability laws, the arbitrator ordered Tesseract to apply to the Supreme Court of South Australia, pursuant to s 27J of the *Commercial Arbitration Act*, for leave to obtain a determination by that Court of the following question of law: "Does Part 3 of [the Law Reform Act] and/or Part VIA of [the CCA] apply to this commercial arbitration proceeding conducted pursuant to the legislation and the [*Commercial Arbitration Act*]?" The question of law was referred to the Court of Appeal. The Court of Appeal granted leave and answered the question in the negative. The Court of Appeal concluded that the proportionate liability laws were not amenable to arbitration because the arbitrator could not apply the laws except in a manner that would differ materially from the regimes intended by the relevant legislatures. In reaching that conclusion, the Court of Appeal relied on two matters: (1) that both proportionate liability regimes contemplate that the plaintiff will have the opportunity to join all wrongdoers in the one set of proceedings; and (2) the inability to join all wrongdoers to an arbitration except by consent.

The High Court held, by majority, that the proportionate liability laws in Pt 3 of the Law Reform Act and Pt VIA of the CCA apply in the arbitration. The inability to join all alleged concurrent wrongdoers to the arbitration does not mean that the proportionate liability laws are inapplicable. The Court substituted an affirmative answer to the question of law referred to the Court of Appeal.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.