Proportionate liability in arbitrations in Australia: Resolution of some uncertainties

David Levin QC*

This article is a follow up to the author's earlier piece on proportionate liability in commercial arbitrations in Australia, taking into account recent high level courts' decisions on the subject.

In an article written in mid-2009[1] this writer explored the somewhat vexed issue as to the applicability in commercial arbitrations in Australia of the various statutory provisions enacting proportionate liability in the various Australian States and Territories. Since the commercial arbitration legislation and the proportionate liability enactments each lack uniformity, the analysis was, of necessity, somewhat disjointed. The article was, however, firm in its conclusion that it would eventually be determined that the relevant apportionment legislation was not applicable to arbitrations conducted under the Commercial Arbitration Acts.

After the final proof of the article had been submitted but shortly prior to its publication, the Full Court of the Tasmanian Supreme Court published its judgment in *Aquagenics v Break O'Day Council*.[2] In that decision the Full Court found it unnecessary to come to a final conclusion as to whether the *Civil Liability Act 2002* (Tas), the legislation applying proportionate liability in Tasmania, was applicable in an arbitration conducted under the *Commercial Arbitration Act 1986* (Tas). However, two of the three judges (Tennent and Wood JJ) expressed clear views, albeit obiter, that proportionate liability could not apply in arbitrations.

Now the Supreme Court of Western Australia has ruled in *Curtin University of Technology v Woods Bagot Pty Ltd*[3] that Pt 1F of the *Civil Liability Act 2002* (WA), the Western Australian version of the proportionate liability legislation, does not apply to commercial arbitrations conducted in that State under the *Commercial Arbitration Act 1985* (WA) (CAA). In *Curtin*, the question was posed in an unambiguous fashion: "Does Part 1F of the *Civil Liability Act 2002* (WA) apply to commercial arbitration proceedings pursuant to the CAA?"

This question was referred to the Supreme Court with the consent of the arbitrator by the claimant pursuant to s 39(2) of the CAA and was expressly considered as a matter of statutory construction only. The judge did not address the issue of whether by implication in the arbitration agreement the proportionate liability regime could be applicable.

In arriving at his decision, Beech J set out the principles of statutory construction which were not in dispute and which he had to apply as follows:

(a) the starting point for construction is the text of the applicable legislation;
(b) interpretation of the legislation should give consideration to the context in its widest form and have regard to the legislative purpose;
(c) the propositions expounded by Spigelman J in *R v Young*[4] (relied upon by both parties) were adopted;
(d) the requirement provided for in s 18 of the *Interpretation Act 1984* (WA) that, if there is a choice, preference should be given to an interpretation which prefers the stated purpose of a written law, should be followed; and

* MA (Cantab), MCIArb, MLCIA, IAMA Grade 1 Arbitrator, Accredited Mediator, Australian National Mediator, WIPO Domain Name Panellist, Member of the WIPO List of Neutrals, Queen's Counsel at the Victorian Bar, member of Melbourne TEC Chambers and Fenners Chambers in Cambridge.

[1] Levin D, "Proportionate Liability in Arbitrations in Australia?" (2009) 25 BCL 298.

[2] *Aquagenics v Break O'Day Council* [2009] TASSC 89.

[3] *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449.

[4] *R v Young* (1999) 46 NSWLR 681 at [3]-[31].

(e) a construction should be capable of being adopted consistently throughout all the provisions of the legislation.

The judge then applied the principles and came to his conclusion on the question before him.

Beech J concluded that Pt 1F, which referred to the application of proportionate liability in court where the word "court" was not defined, did not "comfortably encompass" arbitrators. He was reinforced in this view by reference to other phrases used in the legislation, such as "actions for damages" which phrase did not naturally encompass a claim in an arbitration and "judgment", which was not usually descriptive of an award of an arbitrator.

The word "court" only appears in Pt 1F in ss 5AK and 5AN. In the latter section, where the court is empowered to join other persons as defendants, the word was inappropriate to have a meaning extended to include "arbitrator", who did not have the power to join parties save with the consent of that proposed party and the existing parties. Consistency required the same meaning be given through both sections, thus supporting a narrow interpretation in s 5AK.

In considering the purpose and object of the proportionate liability scheme, the judge referred in detail to the explanation given by Finkelstein J in *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 2)*[5] and to the relevant Second Reading Speeches delivered when the 2003 and 2004 Western Australia proportionate liability Bills were presented to Parliament. The conclusion that the judge drew from these explanations was that a purpose of the proportionate liability scheme was to decrease insurance premiums, especially on professionals, and to legislate to change the "deep pocket syndrome" whereby a defendant with insurance would commonly bear a disproportionate amount of damages awarded to a successful plaintiff. It was a central tenet of the respondent's argument that furthering this purpose would be achieved by construing the legislation as applying to arbitrations.

Beech J, however, considered that a key feature of arbitration was its voluntary process, being a dispute resolution system to which each party agreed. In the absence of consent there was no power to refer to arbitration a matter to which a party had not agreed to resolve disputes by way of arbitration. He referred to s 22 of the CAA and its reference to determination "according to law" and to the decision of the South Australian Full Court in *South Australian Superannuation Fund Investment Trust v Leighton Contractors Pty Ltd*[6] holding that the phrase "according to law" in s 22 meant according to the principles of common law and that no authority suggested that it could or should be interpreted to extend to statutory provisions.

Beech J gave lengthy consideration to the question whether the arbitrator had an implied power to determine the dispute in accordance with the general law applicable to the dispute and give the claimant such relief as would be available in a court.[7] Given the limited nature of the question which he had been called upon to resolve, he did not express a view as to whether any implication might exist in the present case. However, he did opine, albeit probably obiter, that the inability of an arbitrator to join any further parties alleged to be proportionately liable (even though the Western Australia legislation does not demand the joinder to the proceedings of all arguably proportionately liable parties) could well cause injustice or hardship to a claimant.[8] He found support in this conclusion from the terms of s 5AKA which imposes an adverse costs order on a defendant who fails to notify a plaintiff of another party who might be alleged to be a concurrent wrongdoer. The purpose of such a provision, in his view, must be to permit the plaintiff to seek to join all possibly concurrently liable parties should it wish to do so, an entitlement which could not be given effect at arbitration.

The judge found further support for his conclusion as to the interpretation of Pt 1F:

[5] *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No 2)* [2008] FCA 1656.

[6] *South Australian Superannuation Fund Investment Trust v Leighton Contractors Pty Ltd* (1996) 66 SASR 509 at 512.

[7] *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [72]-[84].

[8] *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [85]-[86].

(a) from the distinction between the provisions of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) which to some extent overlapped with the provisions of Pt 1F, yet expressly provided for definitions of "action" and "court" which included arbitration and arbitrator;[9] and

(b) from obiter observations of judges of other courts,[10] including the Tasmanian Full Court in *Aquagenics* and Cavenough J in *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd*.[11]

The planets are aligning against any interpretation of Australian proportionate liability legislation that seeks to impose proportionate liability on disputes subject to resolution at arbitration.

[9] *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [92].

[10] *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [93]-[94].

[11] *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd* [2009] 69 ACSR 418.