Building and Construction update: Proportionate liability and arbitration – it's a goer (at least for now)

On 2 October 2009 the Supreme Court of Tasmania in Aquagenics Pty Ltd v Break O'Day Council (No 2) [2009] TASSC 89 decided that the proportionate liability legislation applies in an arbitration between the parties to the arbitration in the same way as it would have applied to those parties in any Court proceeding between them.

In this case, the defendant Council brought an application under section 53(1) of the *Commercial Arbitration Act* to stay the proceeding (commenced by Aquagenics). The dispute was one that originated from an amended form of AS4300 1995 to design construct and commission upgrade works to a waste water treatment plant, involving claims of breach, damages, termination and repudiation.

The Honourable Justice Blow considered the applicability of proportionate liability to arbitrations and concluded that the likelihood of questions of law arising in arbitration proceedings should not necessarily be a sufficient reason to refuse to stay the Court action.

His Honour took the pragmatic approach that by their agreement the parties to the contract committed questions of both fact and law to the decision of an arbitrator.

His Honour said that it would be undesirable for the introduction of proportionate of liability to result in the Court more regularly refusing stay applications under the *Commercial Arbitration Act*, and also undesirable for the introduction of proportionate liability legislation resulting in a significant shift away from arbitration as a means of dispute resolution.

Those comments were made against the background that parties entering into an arrangement (to have disputes arbitrated) did so in the knowledge that claims could involve multiple parties, and that this is very much the norm when it come to engineering and construction project disputes including the institution of one or more other proceedings as a possibility rather than a certainty.

His Honour referred to established authority that a contract containing a provision for the resolution of disputes by arbitration will ordinarily contain an implied term that "the arbitrator is to have the authority to give the claimant such relief as would be available to him in a court of law having jurisdiction with respect to the subject matter": *Francis Travel Marking Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 per Gleeson CJ at 167.

At paragraph [24])) His Honour said as follows:

I think it must follow that, subject to any inconsistent express contractual terms, a contract by which dispute is referred to arbitration contains an implied term that a claimant is entitled to such rights and remedies as would have been available in a court of appropriate jurisdiction. The effect of such an implied term must be that, when a claimant's damages would have been reduced by a court pursuant to proportionate liability legislation, they must be similarly reduced by an arbitrator. I think it must follow that, when there is such an implied term and the claimant would have had its damages reduced by a court because of its contributory negligence, an arbitrator must similarly reduce the claimant's damage event though the legislation concerning contributory negligence requires a reduction to such extent "as the court thinks just and equitable": Wrongs Act 1954, s 4(1)

It is important to note that the dispute did not appear advanced enough before the Court to conclude a risk of parallel proceedings or different findings or applicability of arbitration in downstream subcontracts (paragraph 54 in particular).

The effect of the decision is twofold:

1. When considering drafting procedures for dispute resolution, parties can no longer assume that by choosing arbitration they will oust the application of the proportionate liability regime.
2. Whether a dispute between two parties involving proportionate liability claims can properly be arbitrated will depend on the nature of the dispute, the parties to it and the involvement of any other potential 'wrongdoers', the nature of their contractual relations and the risk of parallel proceedings.

Clearly, that requires a careful analysis of the nature and details of the dispute, and its potential reach.

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For more information

For more information, please contact one of the members of our Building and Construction team:

- Theo Kalyvas, Partner on 03 9321 7876 tkalyvas@rigbycooke.com.au
- Andrew Whitelaw, Partner on 03 9321 7836 awhitelaw@rigbycooke.com.au
- Bryan Thomas, Senior Consultant on 03 9321 7836 bthomas@rigbycooke.com.au
- Greg Bush, Special Counsel on 03 9321 7858 gbush@rigbycooke.com.au

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rigbycooke lawyers

Level 13, 469 La Trobe Street
Melbourne Vic 3000
T 61 3 9321 7888
F 61 3 9321 7900

www.rigbycooke.com.au

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