**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**DOMESTIC BUILDING LIST**

**ANTI-DISCRIMINATION LIST**

VCAT REFERENCE NO.

D236/2010

## CATCHWORDS

Application pursuant to section 77 of the VCAT Act seeking to strike out application joining foreign companies to a Domestic Building dispute. One basis of joinder is an asserted "exclusive jurisdiction" clause compelling the parties to litigate in Belgium – whether "strong reasons" shown so as not to enforce the exclusive jurisdiction clause – application

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|---|---|
| **COMPLAINANT** | Ryestreet Pty Ltd |
| **RESPONDENT** | Dayview Window Company (Aust) Pty Ltd |
| **JOINED PARTIES** | Alternative Glass Supplies Pty Ltd, and<br>Don Mathieson & Staff Glass Pty Ltd, and<br>AGC Flat Glass Asia Pte Ltd and AGC Glass Europe S.A. |
| **WHERE HELD** | Melbourne |
| **BEFORE** | His Honour Judge Lacava<br>Vice President |
| **HEARING TYPE** | Hearing |
| **DATE OF HEARING** | 22 November 2010 |
| **DATE OF ORDER** | 25 November 2010 |
| **CITATION** | Ryestreet Pty Ltd v Dayview Window Company (Aust) Pty Ltd & Ors (Domestic Building) [2010] VCAT 1895 |

## ORDER

1 The application of the third and fourth joined parties dated 22 October 2010 is dismissed.

2 The third and fourth joined parties pay the costs of the second joined party of and incidental to the application in the absence of agreement as to amount to be taxed by the Registrar of the Costs Court on County Court Scale 'D'.

3 Reserve liberty to all parties to apply in respect of further directions and costs orders as they may be advised within seven (7) days.

**HIS HONOUR JUDGE LACAVA**
**VICE PRESIDENT**

## APPEARANCES:

| | |
|---|---|
| For Applicant | Mr. T Mengolian |
| For Respondent | Mr. Brutkovic |
| For First Joined Party | Mr. S Waldren |
| For Second Joined Party | Mr. Klempfner |
| For Third and Fourth Joined parties | Mr. T Warner |

## REASONS

## OUTCOME

4 The application of the third and fourth joined parties dated 22 October 2010 is dismissed.

5 The third and fourth joined parties pay the costs of the second joined party of and incidental to the application in the absence of agreement as to amount to be taxed by the Registrar of the Costs Court on County Court Scale 'D'.

6 Reserve liberty to all parties to apply in respect of further directions and costs orders as they may be advised within seven (7) days.

## INTRODUCTION AND BACKGROUND

7 On 10 September 2010 Senior Member Reigler made orders on the application of the second joined party (DMS) joining the second and third joined parties (AGC) as parties to this application. The application and orders were made pursuant to the power contained in section 60 of the *Victorian Civil and Administrative Tribunal Act 1998* ("the Act).

8 At the time of making his orders Senior Member Reigler expressly reserved liberty to AGC to apply to the tribunal for orders pursuant to sections 75 or 77 of the Act against DMS.

9 By application dated 22 October 2010 AGC seeks orders that the application brought against them collectively by DMS and dated 23 September 2010 be struck out on the ground that the subject matter of that proceeding is more appropriately dealt with by the law of Belgium in a court in Brussels.

10 Alternatively, AGC seeks an order under section 75 of the Act that the application by DMS against it dated 23 September 2010 be dismissed on

the ground that it is misconceived or lacking in substance or otherwise an abuse of process.

11 AGC also seeks orders that DMS pay its costs of the application under section 109 of the Act and, if necessary, consequential ancillary orders.

12 On the hearing of the application Mr Warner of counsel who appeared on behalf AGC conceded in argument that if his application was to succeed it would have to succeed under section 77 of the Act. Although his comprehensive and helpful written submissions dealt with his arguments under section 75, the argument before me concentrated upon the application made under section 77 of the Act and not section 75.

13 Similarly, Mr. Klempfner of counsel who appeared on behalf of DMS concentrated his oral submissions in opposing the application on the section 77 argument although his comprehensive and helpful written submissions also dealt with the section 75 arguments.

14 For the reasons that follow AGC could not have succeeded upon the ground contained in section 75 of the Act.

15 The representatives of the applicant, the respondent and the first joined party took no part in the argument. That is understandable. The relief sought by AGC was of no consequence to any of those parties. In my view there was no need for those parties to appear on this application. The legal practitioners incurred needless costs for their respective clients.

16 Before getting to the heart of the matter it is necessary to set the scene by way of background.

17 On 31 March 2010 the applicant lodged a claim in the tribunal against the respondent claiming damages alleged to have been suffered by it as a result of the installation of alleged faulty window glass in a house in Toorak Victoria.

18 The respondent denies liability and has joined the first joined party. The first joined party in turn denies liability and has joined DMS.

19 DMS in turn also denies liability and has joined AGC. DMS asserts that one or other of the AGC companies was the manufacturer and ultimate supplier of the glass to it. It asserts that if there be fault with the window glass, AGC as the manufacturer and supplier ought be held responsible.

**Points of Claim by DMS**

20 When the application was made to Senior Member Reigler by DMS the application was supported in the usual way by provision of draft points of claim.

21 On 23 September 2010 having obtained leave to join AGC, DMS filed and served points of claim against AGC. It is the claims in that document in respect of which AGC now seeks relief.

22 Paragraphs 15 to 23 inclusive of the points of claim assert an agreement between DMS and AGC dated around February 2005 whereby AGC was to supply glass to DMS. The agreement is said to have been constituted by a purchase order numbered PO04975 and a confirmation order from AGC dated 7 February 2005.

23 DMS alleges there were terms and condition implied in the agreement as to fitness for purpose, merchantable quality and sale by description.

24 In paragraph 24 of the points of claim DMS specifically alleges the dispute between it and AGC is a "consumer and trader dispute" within section 107 of the *Fair Trading Act 1999 (Vic)* ("the FTA").

25 At paragraphs 25 to 31 of the points of claim DMS pleads that the dispute relating to the supply of the glass concerned is of a kind contemplated by terms of settlement entered into between itself and AGC on 11 December 2008. It is alleged that the dispute being of the kind contemplated by the terms of settlement, AGC having had the claim by the applicants brought to its attention by DMS, AGC has failed to use its best endeavours to settle the claim. DMS asserts it was a term of the terms of settlement that AGC having been put on notice of the claim was bound to use its best endeavours

to resolve it and has failed to do so thereby breaching the terms of settlement.

26 The asserted breach of the terms of settlement is pleaded as a further "consumer and trader dispute" within section 107 of the FTA between the parties.

**Affidavit Material on the Application**

21 In support of the Application, the AGC parties have filed three affidavits sworn by Mr Olivier Hansen in Singapore before a Notary Public, dated:

(a) 9 September 2010 (*First Hansen Affidavit*);

(b) 1 November 2010 (*Second Hansen Affidavit*); and

(c) 18 November 2010 (*Third Hansen Affidavit*) respectively.

22. In opposition to the application, DMS has filed two affidavits of Gerard McCluskey sworn 30 July 2010 (*First McCluskey Affidavit*) and 15 November 2010 (*Second McCluskey Affidavit*), and an affidavit of Adrian Sella sworn 10 September 2010.

23. In deciding this matter I have had full regard to the content of each of these affidavits and the exhibits attached.

24. From the affidavit material filed by the parties, there appears to be no factual dispute as to the following matters:

(d) the confirmation, which is described in the particulars to paragraph 15 of DMS' Points of Claim as part of the Supply Agreement, and exhibited as GMcC - 2 the First McCluskey Affidavit and A to Second Hansen Affidavit, (*AGC Confirmation*) was issued by Glaverbel SA, now known as AGC Europe.

(e) the AGC Confirmation issued by AGC Europe *refers* to the order being accepted subject to general terms and conditions, and refers to them having been previously sent to DMS;

(f) the general terms and conditions exhibited as B to the First Hansen Affidavit are the general terms and conditions of AGC Europe applicable as at February 2005; and

(g) DMS had received a copy of those general terms and conditions prior to the date of the AGC Confirmation.

**The Argument by AGC**

25 The following statement appears on the first page of the AGC Confirmation, Exhibit GMcC - 2 to the First McCluskey Affidavit and exhibit A to the First Hansen Affidavit:

"*THANK YOU FOR YOUR ORDER. IT IS ACCEPTED SUBJECT TO THE GENERAL TERMS, INCLUDING A CLAUSE OF OWNERSHIP RETENTION, AND CONDITIONS OF GLAVERBEL WHICH HAVE PREVIOUSLY BEEN SENT TO YOU.*"

26. The General Terms of Conditions referred to in the AGC Confirmation appear as Exhibit B to the First Hansen Affidavit (*General Terms and Conditions*).

27. The General Terms and Conditions are headed "*General Terms of Sale for the Glaverbel Group*". AGC Europe was formerly known as Glaverbel S.A.

28. Mr Hansen in his second affidavit deposed to the fact that a copy of the General Terms and Conditions would have been provided to DMS on or about the date of the order by DMS – i.e. 4 February 2005. Mr Hansen also deposed that DMS was a substantial customer of AGC prior to the date of the Supply Agreement (since at least 2003). Between the

beginning of 2003 and the date of the Supply Agreement, AGC Europe had invoiced DMS for in excess of €1,000,000 in glass sales. Each sale was said to be subject to the AGC Europe General Terms and Conditions. That evidence was not contradicted by DMS.

29. In the Third Hansen Affidavit, Mr Hansen has also deposed to the fact that after April 2005, the AGC Parties changed their practices with respect to DMS, such that DMS was henceforth invoiced by AGC Asia rather than AGC Europe. As a consequence, the transactions between the parties (AGC Asia and DMS) after this date were subject to AGC Asia's General Sales Conditions, as contained in exhibit GMcC-2 to the Second McCluskey Affidavit. AGC Asia's General Sales Conditions are of no relevance to the transaction the subject of the DMS Proceeding.

30. Clause 9 of the General Terms and Conditions is critical to deciding this application. It provides a choice of law and choice of forum clause. It is in the following terms:

> The contract is governed by the law of the State of the seller. In the event of a dispute, the buyer and the seller/manufacturer shall seek an amicable solution before submitting their differences to the court of the legal district where the seller's registered office is located; this court shall have sole jurisdiction, even in the event of several defendants or in the event of a call for guarantee. However, if the buyer is established in another country then the sellers' country, the seller/manufacturer shall have the right to bring the dispute before the court of the buyer's domicile

31. For the purposes of the Supply Agreement, DMS is the 'buyer' and AGC Europe is the 'seller' and the 'manufacturer'. AGC Europe is incorporated in Belgium and has its registered office in Belgium. AGC Europe has not instituted proceedings against DMS in Australia.

32. On these facts Mr Warner submits that on the clear terms of the Supply Agreement upon which DMS sues the AGC parties:

(h) the enforceability and scope of the rights and obligations of the parties to the Supply Agreement are governed by Belgian law – i.e. the 'proper law' of the contract; and

(i) the courts of Belgium have exclusive jurisdiction over disputes between the parties to the Supply Agreement.

33. In argument, Mr Klempfner made it clear DMS does not accept those facts. For the purposes of deciding this application only, I have proceeded on the basis that there was as part of the agreement between the relevant parties an exclusive jurisdiction clause.

34. Mr Warner conceded as he must the terms of settlement do not contain either a choice of law clause or a choice of jurisdiction clause.[1]

35. Relying upon paragraph 11c of the Second Hansen Affidavit, Mr Warner argued the DMS application would ordinarily be brought in the Commercial Court of Brussels. He contends that is what the parties agreed and that therefore the dispute between DMS and AGC should not be heard in this tribunal but in the Commercial Court of Brussels.

36. Referring to the FTA Mr Warner submitted the provisions of the FTA granting the Tribunal's jurisdiction to hear "consumer and trader disputes" (ss.107 and 108) relied upon by DMS, are not mandatory forum laws. He compared s.11 of the *Carriage of Goods by Sea Act* (Cwth).

37. He argued Sub-sections 111(1)(b) and (c) of the FTA expressly contemplate the tribunal relinquishing jurisdiction in accordance with s.77 of the VCAT Act.

38. Mr Warner submitted DMS do not allege any breach of the FTA (or any other Victorian Act) by AGC parties: He compared this with the facts of *CBA v White: Ex parte The Society of Lloyd's* [1999] 2 VR 274. There is, he argued, no 'magic' to Victorian law that DMS can point to and contend it will be prejudiced if it loses its protection.

[1] Exhibit GMcC – 3 to the First McCluskey Affidavi

39. Mr Warner argued this case is fundamentally different from more traditional consumer disputes (including those referred to at s.109(4) of the FTA), in which the "protective" nature of other aspects of the FTA might impact upon the Tribunal's determination to seize jurisdiction for itself.

40. Mr Warner turned to the relevant law in Australia relating to clauses in contracts providing for exclusive jurisdiction. Relying upon the judgment of Dixon J (as he then was) in *Huddart Parker Ltd* v *The Ship Mill Hill*[2] Mr Warner submitted it is well established in Australia that, in the absence of any mandatory forum laws, parties to contracts are free to submit exclusively to one jurisdiction, and courts are to exercise "*a strong bias in favour of maintaining the special bargain"* between the parties constituted by an exclusive jurisdiction clause.

41. Mr Warner submitted that part of the logic underpinning the principle is the recognition that a choice of forum (and law) forms a tangible aspect of the bargain struck between the contracting parties (similarly to the price, time, etc.). Any considerations of inconvenience or increased costs that a party may raise in opposition to the enforcement of a choice of forum clause were foreseeable at the time they entered into the agreement – and a party cannot only honour those aspects of a contract that are convenient to it and ignore the rest.

42. Mr Warner submitted the authorities require "*strong reasons*" why parties to an exclusive jurisdiction clause should not be kept to it and "*begin with a firm disposition in favour of maintaining* [the] *bargain*".[3]

43. Mr Warner submitted the tribunal's analysis of whether such supposed "strong reasons" exist is not comparable to an analysis of a *forum non conveniens* stay application – in which considerations such as the convenience of joining an existing proceeding with common issues, the

[2] (1950) 81 CLR 502 at 509
[3] *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 427-8 per Dawson J and McHugh J and 445 per Toohey, Gaudron and Gummow JJ.

location of witnesses, unreasonable costs likely to accrue to the plaintiff and similar issues can often determine the outcome. He relied upon *Global Partner Fund Ltd v Babcock & Brown Ltd (in liq)* [2010] NSWCA 196 (12 August 2010).

44. Mr Warner argued DMS had identified no material grounds why the exclusive jurisdiction clause ought to be ignored in the affidavit material filed by it. He further contended on the known facts that DMS as a subsidiary of an ASX Listed Company, CSR Limited, the tribunal can take comfort that DMS is both a sophisticated 'consumer', and litigant. By entering into the Supply Agreement it sought to source goods from overseas and in a foreign currency. The Tribunal can also reasonably assume that it did so (rather than sourcing the goods in Victoria, or elsewhere in Australia) for commercial reasons. Part of the commercial bargain it struck with AGC Europe was to purchase the 21.35 kg of glass products for the price of €15,940.53. That the Belgian Courts were to have exclusive jurisdiction over disputes was, Mr Warner submitted, equally part of the commercial bargain struck. Nothing in the Terms of Settlement in any way alters this position, despite any argument DMS may now raise to the contrary.

45. Mr. Warner submitted there are no grounds, beyond DMS's own inconvenience, not to give effect to the parties' choice of forum. He contended, on the facts as known, here there are no substantial grounds of the kind referred to in the authorities.

46. Mr Warner pointed to what he described as "practical" and "public policy" matters relevant. Having regard to the basis upon which I have decided this matter I am uninfluenced by those considerations set out on pages 11 to 13 of Mr Warner's outline.

**The Argument by DMS**

47. DMS disputes the supply contract is governed by Belgian law. Mr Klempfner submits that at its highest, the evidence suggests that AGC waivers between contending that the contract is governed by Singaporean or Belgian law.

48. Further, DMS does not accept an exclusive jurisdiction clause was incorporated by reference into its supply contract with AGC. As I said above, I proceed to decide this application on the basis that there exists an exclusive jurisdiction clause.

49. Mr Klempfner submits DMS's claim against AGC relates to two distinct issues:

    a) the supply by AGC of the 4mm clear Sunergy glass in 2005; and

    b) the terms of settlement struck between AGC and DMS on 11 December 2008[4].

50. Mr Klempfner argues both aspects of the claim come within the definition of a "consumer and trader dispute" for the purposes of section 107 of the FTA. A "consumer and trader dispute" (as opposed to a "consumer dispute" or a "trader-trader dispute") is:

> … *a dispute or claim arising between a purchaser or possible purchaser of goods and services and a supplier or possible supplier of goods or services in relation to a supply or possible supply of goods or services.*

50. Section 6 of the FTA provides:

    *a. This Act applies within and outside Victoria*[5]*;*

[4] Exhibit GMcC-3
[5] s. 6(1), *Fair Trading Act* 1999

*b.* *This Act applies outside Victoria to the full extent of the extra-territorial legislative power of the Parliament*[6].

51. Mr Klempfner argues section 111(1) of the FTA provides:

> *Once an application has been made to the Tribunal in accordance with the Victorian Civil and Administrative Tribunal Act* 1998 *in respect of a consumer and trader dispute or in respect of any other matter in respect of which the Tribunal has jurisdiction under this Act, the issues in dispute are not justiciable at any time by a Court unless –*
>
> *(a)* *the proceeding in that court was commenced before the application to the Tribunal was made and that proceeding is still pending; or*
>
> *(b)* *the application to the Tribunal is withdrawn or struck out for want of jurisdiction; or*
>
> *(c)* *the Tribunal refers the proceeding to that court under section 77 of the Victorian Civil and Administrative Tribunal Act 1998.*

52. Mr. Klempfner submits, section 111 of the FTA displaces any choice of jurisdiction clause agreed between the parties where there is a consumer-trader dispute. He submits section 111 of the FTA has the effect of vesting exclusive jurisdiction for the determination of consumer-trader disputes in the tribunal once an application has been made to it, as here by DMS.

53. Mr Klempfner submits, that for this reason alone, AGC's application must be dismissed.

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[6] s. 6(2), *Fair Trading Act* 1999

54. I do not accept that submission. Section 111 of the FTA in terms recognises the possibility of an application under section 77 of the Act. AGC can make its application under that section as it has done in this application which must be decided on its merits according to law.

55. But there are other reasons why Mr. Klempfner argues this application ought be dismissed.

56. Although not yet pleaded in the DMS points of claim against AGC, Mr Klempfner informed me DMS would seek to enforce its right to contribution against AGC in the event it is found liable for any part of the applicant's claim. Those rights to contribution are contained in section 23B of the *Wrongs Act* 1958 which relevantly provides as follows:

Section 23B(1)

*Subject to the following provisions of this section, a person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with the first-mentioned person or otherwise).*

Section 23B(6)

*References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against that person in Victoria by or on behalf of the person who suffered the damage and it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a place outside Victoria.*

57. Mr Klempfner submits DMS's claim against AGC is purely contingent upon the outcome of the back to back claims made by the Applicant against the Respondent, the Respondent against the First Joined Party and the First Joined Party against DMS in turn. The DMS case is that if there indeed is an exclusive jurisdiction clause in any agreement between itself

and AGC, that is irrelevant to a determination of its entitlement to contribution under section 23B(1) of the *Wrongs Act* 1958 and reliance is placed on section 23B(6) of that Act. If that claim to contribution is being made the points of claim should be soon amended as I understand they will be.

58. Mr Klempfner submits sections 23B(1) and 23B(6) of the *Wrongs Act* 1958 provide his client with statutory rights to contribution which it would not have were the matter to be litigated in Belgium.

59. Mr Klempfner argued that even if there was in existence in the agreement between the parties an exclusive jurisdiction clause that is not the end of the matter. The tribunal he submitted still has a discretion not to hold the parties to the exclusive jurisdiction clause where 'substantial grounds' exist. He contended this was such a case.

60. Mr Klempfner relied upon *Incitec Ltd v Alkimos Shipping Corporation*[7] a decision of Allsop J in the Federal Court of Australia. See also CBA v White (supra) at pages 704 to 705.

61. In *Incitec* Allsop J said:[8]

*The principles to be applied in deciding whether to stay proceedings brought in defiance of an exclusive jurisdiction clause were not in dispute. The discretion not to grant a stay requires substantial grounds. It is not a matter of mere convenience or of forum non conveniens.*

62. In CBA v White (supra) Justice Byrne required the defendant to show "strong cause" why the exclusive jurisdiction clause should not be enforced between the parties.

63. Mr Klempfner submitted there were both strong and substantial reasons here why I should not accede to AGC's application that I effectively compel the parties to the exclusive jurisdiction clause. He submitted this

[7] (2004) 138 FCR 496
[8] at [42]

case had a number of similarities to *Incitec* (supra) noting that Alsop J said, inter alia:

*The very existence of the possibility, if not probability, of duplicated litigation is, on modern authority of the highest persuasive stature a cogent consideration in assessing the effect of an exclusive jurisdiction clause. This is for good and powerful reasons based on the cost and inconvenience of litigation and the desire not to foster the circumstances of courts coming to different conclusions about the same facts on perhaps different, or even the same, evidence.*

*The balance is a fine one, but overall in my view this Court should not promote competing and potentially conflicting litigation in circumstances where one venue can conveniently and promptly deal with the whole controversy*[9]

64. Mr Klempfner argued that DMS did not initiate the current VCAT litigation. DMS he said is an unwilling defendant to proceedings brought by other parties not bound by an exclusive jurisdiction clause. Thus he argued it cannot be said that DMS has capriciously brought proceedings in breach of the bargain it has struck with AGC as to the forum in which any disputes are to be litigated. Rather, DMS has had to bring AGC into proceedings initiated by other parties in respect of defective glass supplied by AGC.

65. Mr Klempfner argued that were I to grant AGC's application there would be the risk of "competing and potentially conflicting litigation in circumstances where one venue can conveniently and promptly deal with the whole controversy".

66. Mr. Klempfner further argued it is wholly undesirable for proceedings involving the quality of glass installed in a property in Toorak, Victoria to be litigated in Brussels. He contended that if the dispute was solely

[9] at [62] et seq

focussed on, say, the interpretation of a contract, there may be no real prejudice in conducting a trial far from the *locus quo*. However, this case will necessarily involve evidence from local Victorian lay and expert witnesses together with the need to access and inspect the Toorak property. He contended it is impractical, bordering on the absurd, to suggest that a recovery proceeding between DMS and AGC could be economically, efficiently or expeditiously conducted in Belgium.

67. In addition he argued, by divorcing DMS's claim against AGC from the claims made against DMS there is the risk not only of inconsistent judgments but inconsistent legal principles being applied as one case will proceed in a common law system and the other in a Roman law system. Given the nature of DMS's claim as a recovery proceeding, it is undesirable he said for two proceedings relating to the same subject matter to be conducted within a framework of entirely different legal systems and principles.

68. Finally he turned to the claim based upon the asserted failure to comply with the terms of settlement. Whereas the strike out application based upon an exclusive jurisdiction clause can only relate to the claims based on the 2005 supply contract, the 2008 Terms of Settlement do not contain any exclusive jurisdiction clause. The claims based upon enforcing the Terms of Settlement clearly relate to matters to be performed within Australia by AGC. Thus Mr Klempfner submitted those aspects of DMS's claim that relate to the Terms of Settlement must be allowed to proceed in the tribunal. In the exercise of a discretion, Mr Klempfner submitted this was a powerful factor which he said militates against any stay of the claims made in relation to the 2005 supply agreement as similar facts will need to be ventilated with respect to both issues.

**Conclusion**

69. I have reached the decision that the application by AGC must be dismissed.

70. In my judgment DMS has demonstrated strong reasons why I should exercise my discretion not to compel AGC to comply with the asserted exclusive jurisdiction clause.

71. In my judgment, the most compelling reasons are both the existence in Victoria of the contribution rights under section 23B of the *Wrongs Act 1958* and the fact the parties, separate from the supply agreement, entered into the terms of the 2008 Terms of Settlement which in my view arguably place obligations upon AGC in relation to the issues raised by the applicant in the main application. The Terms of Settlement contain no exclusive jurisdiction clause and in my view are enforceable in Victoria.

72. There are other reasons that in my view are less compelling but nonetheless should be weighed into the exercise of my discretion.

73. I agree with Mr Klempfner that it is undesirable for part of a dispute relating to installation of glass in a house in Toorak Victoria to be resolved in Brussels.

74. I agree were I to accede to AGC's application there is a possibility of inconsistent judgments.

75. I agree this is not a case where DMS initiated the litigation flying in the face of the exclusive jurisdiction clause. That is especially relevant insofar as the application of DMS seeks to call in aid the Terms of Settlement where AGC allegedly has not complied with them in a claim expressly contemplated by those terms. Those Terms of Settlement being actionable in Victoria and absent an exclusive jurisdiction clause within them, it is in no party's interest to fragment the litigation having one part dealt with in Brussels and another part dealt with in Victoria.

76. I do not accept the argument that the asserted exclusive jurisdiction clause applies to the Terms of Settlement which in my view stand alone.

77. For these reasons the application of AGC dated 22 October 2010 will be dismissed.

**Costs**

78. In its application AGC sought its costs. It failed in its application and is therefore undeserving of a costs order.

79. For its part, in its written submissions DMS sought costs under section 109 of the Act.

80. DMS having succeeded it is I think entitled to an order for costs and I will make one accordingly.

81. At the hearing and in this reasons I was critical of the applicant, the respondent and the first joined party appearing on this application. None of those parties were relevant to the application and nor could any order have been made by me contrary to the interests of those parties. I repeat my view that by appearing the practitioners concerned have incurred needless costs for their clients. I am also of the view that it would be entirely inappropriate for me to order AGC to pay the costs of the applicant, the respondent and the first joined party on the application.

82. However, as I have reached that view absent any argument as part I my orders I will reserve to all parties liberty to apply in respect of any further directions and/or my costs orders within seven days.

**HIS HONOUR JUDGE LACAVA**
**VICE PRESIDENT**