IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
COMMERCIAL LIST

Not Restricted

S ECI 2020 01602

URBAN MOTO IMPORTS PTY LTD
(ACN 149 193 386) Plaintiff

v

KTM AG
(and others according to the schedule attached) Defendants

JUDGE:	Connock J
WHERE HELD:	Melbourne
DATE OF HEARING:	21 and 22 September 2021
DATE OF JUDGMENT:	22 September 2021 – oral reasons; written reasons 23 September 2021
CASE MAY BE CITED AS:	Urban Moto Imports Pty Ltd v KTM AG & Ors
MEDIUM NEUTRAL CITATION:	[2021] VSC 616

PRIVATE INTERNATIONAL LAW — Stay application — Exclusive jurisdiction clause — Choice of law clause — General principles — Laws of the Kingdom of Spain — Distribution agreement — Unconscionable conduct claim alleged to be window-dressing — Whether there are strong reasons to refuse to grant the stay — Where not all parties to proceeding are parties to agreement or exclusive jurisdiction clause — Prima facie position when additional parties to the proceeding — Fragmentation of litigation — Juridical advantage — Forum non conveniens — Supreme Court of Victoria not a clearly inappropriate forum — Stay refused.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	P Noonan	HWL Ebsworth
For the First, Second and Third Defendants	C van Proctor	DLA Piper
Fourth Defendant	M Galvin QC with S Burt	Mazzeo Lawyers

HIS HONOUR:

Introduction and summary

1 By its application by summons against the plaintiff the fourth defendant (**Torrot**) seeks a permanent stay or dismissal of the proceeding against it on the basis of its contention that the Supreme Court of Victoria is a clearly inappropriate forum.

2 Central to this contention is the existence and terms of a choice of law clause and an exclusive jurisdiction clause in a distribution agreement between the plaintiff and Torrot (**Distribution Agreement**) regarding the distribution in Australia by the plaintiff of particular products manufactured by Torrot in Spain.

3 The stay application was opposed by the plaintiff and by the first, second and third defendants (**KTM defendants**).

4 The affidavit evidence relied upon was very limited. Torrot relied on a short affidavit of its solicitor, Ms Fakhri, and the plaintiff relied upon a short affidavit in reply of its solicitor, Mr Stents.[1] There was no expert or other evidence regarding any foreign law. All parties relied upon written submissions filed in advance of the hearing, which were supplemented orally at the hearing.

5 For the reasons that follow Torrot's application will be dismissed. Although the Distribution Agreement contains a choice of law clause regarding the common law of the Kingdom of Spain (**Law Clause**), and an exclusive jurisdiction clause in favour of the courts of the 'city of Barcelona (Spain)' (**Jurisdiction Clause**), having regard to the circumstances and applicable principles:[2]

(a) the plaintiff and the KTM defendants have established that there are strong reasons not to enforce the Jurisdiction Clause; and

(b) Torrot has not established that the Supreme Court of Victoria is a clearly

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1 Torrot's letter to the plaintiff dated 22 January 2020 headed 'TERMINATION OF THE COMMERCIAL RELATIONSHIP' was also tendered by Torrot during the hearing without objection.

2 See the 'principles and observations' section of these reasons.

inappropriate forum.

Brief background

6 Torrot is a Spanish company that was engaged in the business of the manufacturing and sale of motorcycles, electric bikes and related products under the trademark 'GASGAS'. The plaintiff is an importer of motorcycles and electric vehicles in Australia and New Zealand.

7 The Distribution Agreement is dated 26 May 2017. Pursuant to its terms Torrot appointed the plaintiff as its exclusive distributor in Australia of particular 'Products' (as defined in the Distribution Agreement)[3] manufactured by Torrot under the 'GASGAS' trademark. The initial term of the appointment was five years, and expressed to run from 26 May 2017 to 25 May 2022.

8 The terms of the Distribution Agreement include the following:

> **2. Appointment of Distributor**
>
> The Company hereby appoints the Distributor as its exclusive importer and distributor, who shall have the right to purchase from the Company for re-sale in the Territory the Products upon the terms and subject to the conditions herein provided.
>
> **3. Exclusivity**
>
> The Company shall not, during the term of this Agreement, appoint any other distributor to sell the Products in the Territory. The Company will not, without Distributor's prior written consent, sell the Products to anyone other than the Distributor who carries on business whether directly or indirectly within the Territory.
>
> …
>
> **22. Duration**
>
> This Agreement shall be in effect from the date hereof through and including 25th of May 2022, and shall be deemed to be automatically renewed for successive terms of 1 year, after having approved the goals for each one of said successive one-year terms, unless any of the parties gives written notice to the other party of its decision not to renew this Agreement not less than two months in advance of the expiration of the initial term or any extended term of this Agreement.

[3] See Distribution Agreement at recitals (A) and (B); clauses 1.1 and 2; and Schedule 1.

…

27. Applicable Law

This Agreement shall be governed in all respects, including validity, interpretation and effect by the common law of the Kingdom of Spain, excluding any local laws.

28. Jurisdiction

For all purposes hereof, the parties expressly submit themselves to the jurisdiction of the Judges and Courts of the city of Barcelona (Spain) and expressly waive any other jurisdiction to which they may be entitled.

…

9 By letter dated 22 January 2020 (**Termination Letter**) Torrot informed the plaintiff that it had ceased to market on its own bikes and spare parts of the GASGAS brand for orders from January 2020 and that it regretted to inform the plaintiff of the '… cease of our commercial relationship for the sale of new models with immediate effects (sic) since TORROT is no longer the proprietary (sic) of the brand.'

10 By its further amended statement of claim (**FASOC**) the plaintiff alleges that, in breach of the Distribution Agreement, Torrot wrongfully terminated the Agreement on 22 January 2020 and wrongly facilitated and encouraged the first, second and third defendants (**KTM defendants**) to acquire (through a joint venture) Torrot's GASGAS business and assets, and create KTM Australia in order to establish a dealer network to exclusively distribute GASGAS products in Australia in place of the plaintiff.

11 By reason of the alleged conduct of Torrot referred to in the FASOC, including the breach of the Distribution Agreement, the plaintiff claims that Torrot engaged in unconscionable conduct in contravention of s 21 of the *Australian Consumer Law* (Sch 2, *Competition and Consumer Act 2010* (Cth)) (**ACL**) and seeks damages in excess of $2 million from Torrot under s 236 of the ACL. In its current form the FASOC alleges that the Distribution Agreement was breached and repudiated by Torrot but does not allege that loss was suffered or seek damages for breach of contract. When this issue was being addressed during the hearing counsel for the plaintiff informed the court that the FASOC will be amended to include an allegation of loss flowing from the breach of contract and a claim for damages.

12 Although service on Torrot was initially sought to be effected through the Supreme Court's foreign service process, various delays were encountered, including delays connected with the COVID-19 pandemic. Torrot's Melbourne solicitors were subsequently authorised to accept service, and on 30 April 2021, Torrot filed a notice of conditional appearance.

13 Pending the outcome of this application Torrot has not yet filed a defence in this proceeding.

14 At the directions hearing on 2 September 2021 junior counsel for Torrot informed the court that Torrot does not contend that this court does not have jurisdiction to hear and determine the claims against it, but would be contending that, in the exercise of the court's discretion, the proceeding against Torrot should be stayed or dismissed because this court is a clearly inappropriate forum. This position was confirmed by Torrot's senior counsel at the hearing of this application.

15 As against the KTM defendants, the plaintiff claims damages for allegedly inducing Torrot's breach of the Distribution Agreement, and damages under s 236 of the ACL for their alleged related unconscionable conduct, and involvement in Torrot's unconscionable conduct, in breach of s 21 of the ACL.

16 By their defence the KTM defendants deny liability and, among other things, allege that:

(a) The first defendant and related entities were party to a business and asset purchase contract with Torrot for the purpose of taking over the development, design, marketing sale and export of GASGAS products.

(b) The KTM defendants were not informed of and were not aware of the terms of any agreement providing the plaintiff with exclusive distribution rights in relation to GASGAS branded products in Australia.

(c) Torrot informed the KTM defendants that there was no contract in existence for the distribution of GASGAS products in Australia.

(d) The KTM defendants did not know or intend that the establishment of a proposed dealer network, or the distribution of GASGAS products in Australia by the second defendant or any other person, would or might cause Torrot to breach any obligation owed to the plaintiff under the Distribution Agreement.

(e) Any liability to the plaintiff under the Distribution Agreement is a liability of Torrot and not the KTM Defendants, who are not parties to that agreement.

(f) If the KTM defendants engaged in or were involved in the alleged unconscionable conduct, or they induced the alleged breach of contract (all of which was denied):

(i) The claims are apportionable claims under s 87CB(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**), alternatively Part IVAA of the *Wrongs Act 1958* (Vic) (**Wrongs Act**).

(ii) Torrot was aware of the Distribution Agreement, failed to disclose it, and engaged in related misleading and deceptive conduct regarding the non-existence of the Distribution Agreement.

(iii) The KTM defendants and Torrot are concurrent wrongdoers within the meaning of s 87CB(3) of the CCA and/or s 24AH of the Wrongs Act.

(iv) The KTM defendants' liability to the plaintiff is limited to the amount reflecting the proportion of loss or damage claimed that the court considers just having regard to the extent of each of the said defendant's responsibility for the damage or loss pursuant to s 87CD of the CCA and/or s 24AI of the Wrongs Act.

17 During the directions hearing on 2 September 2021 counsel for the KTM defendants sought clarification from the plaintiff as to what its position with this proceeding will be if Torrot's stay application is successful. By email of 7 September 2021 the plaintiff's solicitors informed the other parties that if Torrot's stay application is successful the plaintiff will continue this proceeding in this court against the KTM defendants and

commence a separate proceeding in Spain against Torrot.

Principles and observations

18 Relevant principles and observations regarding the issues under consideration have been addressed in many cases and it is efficient and convenient to draw upon the same in the current context. First I address principles and observations relevant to the exercise of the court's discretion when dealing with exclusive jurisdiction clauses, and then the well-established principles regarding the clearly inappropriate forum test.

Exclusive jurisdiction clauses

19 An exclusive jurisdiction clause in a commercial contract should not be interpreted narrowly. In *Global Partners Fund Limited v Babcock & Brown Limited (in liq) and Ors,*[4] Spigelman CJ (with Giles JA, Tobias JA agreeing) put it this way:

> 60 Finally, in my opinion an exclusive jurisdiction clause should be interpreted in the same liberal manner as is authoritatively established with respect to arbitration clauses. The two kinds of clauses have frequently been treated as legally cognate and authorities on the scope of arbitration clauses are frequently cited in authorities on exclusive jurisdiction clauses. In both cases, all disputes which, as a matter of substance, arise from the contractual relationship between the parties are intended to be determined by the same tribunal. It is not appropriate to give general words in such a commercial context a narrow interpretation, with the consequence that some disputes which, in a practical sense, arise from the contractual relationship could be determined by courts or tribunals other than that to which the parties have agreed to submit their disputes.
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> 61 The oft-quoted decision of Gleeson CJ in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, made with respect to an arbitration clause, is applicable to exclusive jurisdiction clauses. His Honour said (at 165):
>
> > "When the parties to a commercial contract agree, at the time of making the contract, and before any disputes have yet arisen, to refer to arbitration any dispute or difference arising out of the agreement, their agreement should not be construed narrowly. They are unlikely to have intended that different disputes should be resolved before different tribunals or that the appropriate tribunal should be determined by fine shades of difference in the legal character of individual issues, or by the ingenuity of lawyers in developing points of argument."
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> 62 As Allsop J (as his Honour then was) said in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; (2006) 157 FCR 45,

[4] [2010] NSWCA 196.

with respect to an arbitration clause:

> "[164] … The court should, however, construe the contract giving meaning to the words chosen by the parties and giving liberal width and flexibility to elastic and general words of the contractual submission to arbitration.
>
> [165] This liberal approach is underpinned by the sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places. This may be seen to be especially so in circumstances where disputes can be given different labels, or placed into different juridical categories, possibly by reference to the approaches of different legal systems. The benevolent and encouraging approach to consensual alternative non-curial dispute resolution assists in the conclusion that words capable of broad and flexible meaning will be given liberal construction and content. This approach conforms with a common-sense approach to commercial agreements, in particular when the parties are operating in a truly international market and come from different countries and legal systems and it provides appropriate respect for party autonomy.

20 As to the proper approach to an application for stay based on an exclusive jurisdiction clause, in the same case Spigelman CJ said as follows:

> 88 In the case of an application for a stay based on an exclusive jurisdiction clause, the prima facie position is that a court will enforce the clause and grant the stay. In the context of an international investment arrangement, such as that presently under consideration, which potentially involves multiple different jurisdictions, the strength of the prima facie position is of a high order. (See the analysis at [62], [68]-[69] above.)
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> 89 The kinds of considerations which may lead to the prima facie position being overturned have been frequently expressed in forceful words of equivalent import such as:
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> > "A strong bias in favour" (*Huddart Parker v The Ship "Mill Hill"*, supra at 509).
> >
> > "Strong reasons" *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 259 per Gaudron J; *Akai v The People's Insurance Co* supra at 429 per Dawson and McHugh JJ and at 445 per Toohey, Gaudron and Gummow JJ.
> >
> > "Strong cause" *The Eleftheria* supra at 99.
> >
> > "Substantial grounds" *FAI v Ocean Marine Mutual* supra at 569; *Incitec v Alkimo Shipping Corp* supra at [42].
> >
> > "Strong countervailing circumstances" *Incitec v Alkimo Shipping*

Corp supra at [43].

21 In *Lew Footwear Holdings v Madden International*[5] (***Lew***), Elliott J shortly stated the key applicable principles in the following terms:

> (1) The contractual obligation imposed by an exclusive foreign jurisdiction clause does not operate to exclude the jurisdiction of this court, but it may constitute a ground for the court to refuse to exercise its jurisdiction.[6]
>
> (2) Where a contract contains an exclusive foreign jurisdiction clause, "the courts begin with a firm disposition in favour of maintaining that bargain unless strong reasons be adduced against a stay, it being the policy of the law that the parties who have made a contract should be kept to it".[7]
>
> (3) A stay may be refused where the exclusive foreign jurisdiction clause offends the public policy of the forum evinced by statute or judicial decision.[8]

22 The existence or otherwise of strong reasons is to be determined having regard to the particular facts and circumstances of each case. A review of the cases reveals that a variety of circumstances have fallen for consideration in this context, including, for example: prejudice to parties if a stay is granted; the position of parties to proceedings who are not parties to the exclusive jurisdiction clause or choice of law clause; whether the relevant clause might be seen to offend public policy; whether the relief sought or cause of action being pursued is available in the selected forum; the fragmentation or bifurcation of proceedings and the consequences that may flow from it; multiplicity of proceedings; an unforeseeable change in the procedure of a foreign court; the loss of a legitimate juridical advantage; and issues in a selected forum that may put a fair trial at risk.

23 As others have observed, there are public policy considerations in favour of ACL claims being heard in Australian courts. Referring to the observations of Byrne J,

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5 [2014] VSC 320, [232].

6 *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, 444.10–445.1 (Toohey, Gaudron and Gummow JJ), citing *Compagnie Des Messageries Maritimes v Wilson* (1954) 94 CLR 577, 586.5–587.10, 589.2; *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 224.3 (Brennan J), 259.3 (Gaudron J).

7 *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, 445.5, citing *Huddart Parker Ltd v The Ship "Mill Hill"* (1950) 81 CLR 502, 508.8–509.3 (Dixon J).

8 Ibid.

Justice Elliott in *Lew* said as follows:

> 233 A material matter relied upon by Lew Footwear in submitting a stay was inappropriate was the ability of Lew Footwear to make claims under Australian legislation that might be jeopardised if Lew Footwear was required to make its claims in a court of New York State. Speaking generally, it has been accepted that if a plaintiff makes a claim based on misleading or deceptive conduct in trade or commerce pursuant to the *Trade Practices Act* or the Australian Consumer Law, then that *may* give rise to public policy considerations which may override an otherwise binding exclusive foreign jurisdiction clause.[9] If it were otherwise, foreign corporations could place themselves outside the protection provided by this fundamental and important legislation which governs commercial interaction throughout Australia.
>
> 234 As was stated by Byrne J in *Commonwealth Bank of Australia v White,* in the context of discussing misleading and deceptive conduct and breaches of companies legislation:[10]
>
> > It is undesirable that parties should, by entering into an exclusive jurisdiction agreement, be able to circumvent a legislative scheme established by Parliament to protect investors purchasing interests or prescribed interests. Put more positively, the statutes creating these standards of commercial behaviour for persons doing business in this jurisdiction do not exempt foreign corporations. Moreover, the policy behind them would not be served if exemption might be achieved by inserting stipulations as to foreign law or forum.
>
> 235 Ordinarily[11] then, if an overseas corporation were to engage in conduct that was misleading or deceptive or likely to mislead or deceive in trade or commerce, and a plaintiff could establish that such conduct was committed within Victoria or caused damage suffered wholly or partly in Victoria, then it would be expected that an exclusive foreign jurisdiction clause would not be a proper basis for staying the proceeding. An obvious possible exception to this general proposition would be where there was a law in the competing foreign jurisdiction which substantially reflected the Australian or Victorian law which might otherwise be excluded.

24 In *Epic Games Inc v Apple Inc*[12] (***Epic Games***), the Full Federal Court made the below observations on the topic:

> 82 The primary judge was right to identify at [40] that the present case is different from *Akai* in that the US Court could hear and determine Epic's proceeding on the basis of the substantive law of Australia if proved as a matter of fact in those proceeding by way of expert evidence. The better view of the majority judgment in *Akai* at 445 is that if the party resisting the stay application on the basis of an exclusive forum clause establishes that there are aspects of

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9 See, for example, *Commonwealth Bank of Australia v White* [1999] 2 VR 681, 704 [89] (Byrne J), referred to with approval in *Commonwealth Bank of Australia v White (No 4)* [2001] VSC 511, [40] (Warren J) and *Quinlan v Safe International Försäkrings AB* (2006) 14 ANZ Ins Cas 61-693, 75,358 [49(f)] (Nicholson J).

10 [1999] 2 VR 681, 704 [89].

11 I preface the sentence with 'Ordinarily' as each case must depend on its own facts.

12 [2021] FCAFC 122 [111] (Middleton, Jagot and Moshinsky JJ).

> Australian law that would not apply in the foreign court, the non-application of which involves depriving that party of a legitimate juridical advantage, that may comprise strong reasons not to grant a stay unless the party seeking the stay proves to the contrary.
>
> 83 Contrary to Epic's submissions, we do not consider that the majority in *Akai* were proposing that where a party responds to a stay application by asserting that a law of the invoked jurisdiction confers upon it a juridical advantage, the onus shifts to the party seeking the stay of proceedings. In such a case, in our view, the onus remains on the party seeking to resist the enforcement of the exclusive jurisdiction clause to prove strong reasons not to enforce the exclusive jurisdiction clause: *Australian Health* at [79]. It does not generally matter if the exclusive jurisdiction clause is itself part of the contract sought to be impugned on some or other ground. Provided the exclusive jurisdiction clause appears to bind the party resisting the stay and the commencement of the proceedings involves a prima facie contravention of the exclusive jurisdiction clause, it is for the party resisting the stay to prove the existence of the strong reasons not to enforce the clause.

25 Very recently in *Karpik v Carnival plc (The Ruby Princess) (Stay Application)*[13] (***Karpik***), Stewart J described the position in the following terms:

> 337 Whilst not to the same extent as those in respect of CCA Pt IV proceedings as explained in *Epic v Apple* (FCAFC) (at [95]-[122]), I consider that there are public policy considerations in favour of ACL claims being heard in Australian courts. They are not such as to by themselves constitute "strong reasons" to refuse the stay application, but they are to be considered cumulatively with other considerations which together can amount to "strong reasons". The policy considerations include that the various provisions of the ACL articulate standards of commercial behaviour that are expected of corporations undertaking trade and commerce in Australia and they offer protections and remedies to consumers in Australia. The ACL thus sets normative standards for commercial conduct in Australia, and it provides remedies and protections when those standards are not observed. It is desirable, although not mandatory, that the ACL's normative standards and remedies are interpreted and applied by an Australian court.

26 Although the determination of a stay application is always one involving the proper exercise of the court's discretion, strong observations have been made in a number of cases regarding the force of the public policy considerations attending fragmentation and multiplicity of proceedings when weighed against the public policy consideration of holding the parties to their bargain. These cases include, for example: *Incitec Ltd v*

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13 [2021] FCA 1082.

Alkimos Shipping Corporation & Anor[14] (***Incitec***); *Faxtech Pty Ltd v ITL Optronics Ltd*[15] (***Faxtech***); *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd*[16] (***Australian Health***); *A Nelson & Co v Martin & Pleasance (Stay Application)*[17] (***A Nelson***); *Karpik*[18] and *Epic Games*.[19]

27 The observations of Perram J in *A Nelson*[20] are a recent illustration:

> 10. There is no dispute that an exclusive jurisdiction clause like cl 32 should be enforced unless strong reasons are shown why it should not: *Huddart Parker Ltd v Ship 'Mill Hill'* (1950) 81 CLR 502 at 508-509 per Dixon J; *The Eleftheria* [1970] P 94 at 99 per Brandon J; *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 427-429 per Dawson and McHugh JJ, at 445 per Toohey, Gaudron and Gummow JJ; *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* [2010] NSWCA 196 at [88]-[89] per Spigelman CJ, Giles JA agreeing at [101], Tobias JA agreeing at [102].
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> 11. However, it is equally well established that a procedure which permits of the possibility of different conclusions by different courts made perhaps on different evidence usually supplies a strong reason for not granting a stay under an exclusive jurisdiction clause. Allsop J reviewed the authorities in this area in *Incitec Ltd v Alkimos Shipping Corporation* [2004] FCA 698; 138 FCR 496 ('*Incitec*') and said this at [62]:
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> > 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. If I may be permitted to say, respectfully, the views of judges of such eminence and experience as McNair J, Lord Denning, Lord Brandon, Colman J, Rix J and the Law Lords in *Donohue v Armco* are overwhelmingly persuasive of the great importance of this consideration. Related to it, but a distinct and equally powerful consideration in the administration of justice, is the inability to be certain that third parties, whether as witnesses or as parties, will not become involved in the London proceedings as well as the Australian proceedings at duplicated inconvenience and cost. …
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> 12. Ordinarily therefore applications for a stay such as the present require

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14 (2004) 138 FCR 496.
15 [2011] FCA 1320.
16 (2019) 99 NSWLR 419.
17 [2021] FCA 754.
18 [2021] FCA 1082.
19 [2021] FCAFC 122 [111] (Middleton, Jagot and Moshinsky JJ).
20 [2021] FCA 754.

> attention to be given to the practical desirability of avoiding fragmentation of one dispute into several courts: *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* [2019] NSWCA 61; 99 NSWLR 419 ('*Australian Health*') at [81] per Bell P, Bathurst CJ and Leeming JA agreeing at [1].

28 That said, the observations of Bell P (Bathurst CJ and Leeming JA agreeing) in *Australian Health*[21] regarding the nature of the court's discretionary task warrant extraction:

> 91 The decision of the primary judge in the present case involved, as Rebel and Sanitarium accept, the exercise of a judicial discretion. His Honour was alive to and indeed adverted to the desirability of avoiding a multiplicity of suits. His reasoning made it plain that he gave great weight in his deliberations to that consideration, but the case law does not require that a stay of proceedings always be granted, nor that a stay be granted presumptively, where there is the possibility of a multiplicity of proceedings or even of inconsistent decisions, as undesirable as that possibility may be. That would be to apply "too broad and indiscriminate a brush" to the "parties' careful selection of palette": *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 Lloyd's Rep 767 at 777 per Rix J (as his Lordship then was).
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> 92 The discretion is ultimately to be exercised by reference to the facts of the particular case and a careful consideration, in light of those facts, of the nature and complexity of the matters in issue, the degree of risk of inconsistent decisions and the weight to be attributed to that possibility as against the weight to be attributed to the consequences of one party losing the real benefit of an exclusive jurisdiction clause for which it bargained and secured as part of the overall commercial arrangement between the parties.

29 It is also to be observed that in *Australian Health*[22] the New South Wales Court of Appeal concluded that, where not all parties are party to the exclusive jurisdiction clause, the court ought not to start with a prima facie disposition in favour of a stay of proceedings:[23]

> 81 In such cases, two very powerful policy considerations may be in play and, depending on the facts, in tension. They are, on the one hand, the desire to and importance of holding commercial parties to their bargain, and, on the other hand, trying to ensure that all aspects of a dispute between all parties (including, relevantly, non-contracting parties) be resolved in one place at the one time, the rationale for this being not only judicial "tidiness" and "efficiency" but, perhaps more

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21 [2019] NSWCA 61; 99 NSWLR 419.

22 Ibid.

23 [2019] NSWCA 61; 99 NSWLR 419, [81]–[91]. But see also the recent decision of Stewart J in *Karpik* at [189]–[192].

> profoundly, the high desirability of minimising the possibility or prospect of different courts reaching different decisions (whether as to the facts or the law or both) in relation to the same dispute, a consequence apt to undermine confidence in the rule of law were it to materialise.
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> …
>
> 90 In cases such as the present, when not all parties to the proceedings are party to an exclusive jurisdiction clause, the court should not, in my view, start with a prima facie disposition in favour of a stay of proceedings, which is the default starting point where the litigation only involves parties who are bound by the exclusive jurisdiction clause (cf the various formulations collated by Spigelman CJ in *Global Partners* set out at [79] above). In the passage from Lord Bingham's speech in *Donohue v Armco*, which I have cited at [78] above, his Lordship was careful to qualify his observations with the phrase "and the interests of other parties are not involved". The importance of holding parties to their bargain is a very powerful consideration but is not one that should be elevated or given some special status in the hierarchy of factors where not all parties to the dispute are parties to the exclusive jurisdiction clause.

30 This was considered very recently by Stewart J in *Karpik*[24] where his Honour concluded that *Australian Health* did not '… as ratio, establish a different rule to the rule in *Akai* …'[25] because the trial judge in *Australian Health* decided the case on the basis of the rule in *Akai Pty Ltd v People's Insurance Co Ltd*[26] (***Akai***) and on appeal it was held that the trial judge had not made any error in principle. Stewart J therefore concluded that the Court of Appeal decided the case on the basis of *Akai* and not on the basis of a new or independent principle.

31 Stewart J also concluded that in *Karpik* the 'debate' as to whether there is a different test where not all the parties to the proceedings are parties to the exclusive jurisdiction clause was 'ultimately sterile'. This was because '… the very factors that might be said to lead to the application of a different rule or test are factors that will be weighed, and may well be decisive, in the consideration of the "strong reasons" to refuse the stay: *A Nelson and Co v Martin and Pleasance (Stay Application)* [2021] FCA 754 at [10]-[12] and [25] per Perram J'.[27]

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24 [2021] FCA 1082 [189]–[194].
25 At [194].
26 (1996) 188 CLR 418.
27 *Karpik* [192].

32 As will be seen later in these reasons, whether I adopt the approach identified by Bell P in *Australian Health* or the approach in *Akai*, the result is no different and it is therefore not necessary for me to engage further on the topic. That said, and with respect, the approach of the Court of Appeal in *Australian Health* has much to commend it and had it been necessary to engage further I would be inclined to follow it. This also sits comfortably with the observations of the High Court in *Farah Constructions Pty Ltd v Say Dee Pty Ltd*[28] regarding a first instance court not departing from a decision on a point of non-statutory law of an intermediate appellate court in another Australian jurisdiction.

33 Given the conflation of issues that occurred in part in Torrot's and the plaintiff's submissions in this case it is desirable to reiterate that there is a distinction between an application for a stay based on an exclusive jurisdiction clause and an application for a stay based on a contention that the jurisdiction invoked is a clearly inappropriate forum. Although there may be an overlap of some relevant considerations when undertaking the analysis, the tests and approach are different in each case. In *Reinsurance Australia Corp Ltd v HIH Casualty and General Insurance Ltd (in liq)* (2003) 254 ALR 29, Jacobson J addressed the distinction firmly as follows:

> [342] The factors which are taken into account on an application for a stay on "clearly inappropriate forum" grounds do not apply where there is a submission to the exclusive jurisdiction of the courts of another country. There is abundant authority that, in those circumstances, the parties should be held to their bargain but the court has a discretion whether or not to grant a stay. The court should do so unless a strong case for not granting a stay is made out; see *McGuid v Office de Commercialisation et D'Exportation* [1999] NSWSC 931 at [51] per Einstein J; see also *Wool International v Sedgwick Ltd (No 4)* (Beaumont J, 2 October 1997, unreported)

34 The point is also partially well illustrated by the observations regarding financial or forensic inconvenience in *Incitec*,[29] where Allsop J stated that '[t]o the extent that the operation of the exclusive jurisdiction clause causes financial or forensic

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28 (2007) 230 CLR 89, [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). See also *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492 regarding Commonwealth or uniform legislation.

29 (2004) 138 FCR 496, [49].

inconvenience to the party which bound itself to the clause, that, of itself, is to be seen as only the direct consequence of the bargain entered and, generally, can be set to one side'.

Clearly inappropriate forum

35 Relevant principles regarding the clearly inappropriate forum test were recently set out by Almond J in n *Lighthouse Corporation Limited & Anor v Republica Democratica de Timor Leste & Anor*[30] (***Lighthouse***):

> **Applicable principles**
>
> 60 A party who has regularly invoked the jurisdiction of a competent court has a prima facie right to insist upon the exercise of the jurisdiction and have the claim heard and determined.[31]
>
> 61 This prima facie right may be displaced when it can be demonstrated that the local forum is a clearly inappropriate forum for the determination of the claim.
>
> 62 Jurisdiction to stay or dismiss a proceeding should only be exercised 'with great care' or 'extreme caution'.[32]
>
> 63 The power to stay proceedings which have been regularly commenced on inappropriate forum grounds is to be exercised in accordance with 'the general principle empowering a court to dismiss or stay proceedings which are vexatious or oppressive or an abuse of process'.[33]
>
> 64 Further, '[t]he mere fact that the balance of convenience favours another jurisdiction or that some other jurisdiction would provide a more appropriate forum does not justify the dismissal of the action or the grant of a stay.'[34]
>
> 65 As the plurality observed in *Voth*,
>
> > the "clearly inappropriate forum" test is similar to and, for that reason, is likely to yield the same result as the "more appropriate forum" [*Spiliada*] test in the majority of cases. The difference between the two tests will be of critical significance only in those cases … in which it is held that an available foreign tribunal is the natural or more appropriate forum but in which

30 [2019] VSC 278.
31 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 241, 243 (Deane J) ('*Oceanic*').
32 *Oceanic*, 244 (Deane J); *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 554 (Mason CJ, Deane, Dawson and Gaudron JJ) ('*Voth*').
33 *Oceanic*, 242 (Deane J); see also *Voth*, 554 (Mason CJ, Deane, Dawson and Gaudron JJ).
34 *Voth*, 554 (Mason CJ, Deane, Dawson and Gaudron JJ); *Oceanic*, 248 (Deane J) (cf. *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460, 478.

> it cannot be said that the local tribunal is a clearly inappropriate one.[35]
>
> 66 The availability of relief in a foreign forum will always be a relevant factor in deciding whether or not the local forum is a clearly inappropriate one. A decision on this question does not turn upon an assessment of the comparative procedural or other claims of the foreign forum, nor does it require 'the formation of subjective views about either the merits of that forum's legal system or the standards and impartiality of those who administer it.'[36]
>
> 67 As to the proper approach to be taken in dealing with forum non conveniens applications, the majority of the High Court in *Voth* said that the judge should consider the materials, the law and submissions in the quiet of judicial chambers without expense to the parties, and that ordinarily it would be unnecessary to do more than briefly indicate that having examined the material in evidence and having taken account of the competing written and oral submissions, the primary judge is of the view that the proceedings should or should not be stayed on forum non conveniens grounds.[37] I propose to adopt that approach in this case.

36 On appeal this formulation was not the subject of criticism by the parties or the court, although it is useful also to extract the Court of Appeal's truncated recitation of key principles underlying the *forum non conveniens* inquiry,[38] which was in the following terms:

> 40 In *Voth v Manildra Flour Mills Pty Ltd* ('*Voth*'),[39] the High Court held that a defendant will ordinarily be entitled to a permanent stay of proceedings instituted against it and regularly served upon it within the jurisdiction, if the defendant persuades the local court that, having regard to the circumstances of the particular case, and the availability of an alternative foreign forum to whose jurisdiction the defendant is amenable, the local court is a 'clearly inappropriate forum' for determination of the dispute.[40]
>
> 41 The principle is a manifestation of the broader power reposed in a superior court to stay proceedings if they are oppressive, vexatious or an abuse of process, or are productive of injustice in the particular case.
>
> 42 In many cases, the Court said, the application of the 'clearly inappropriate' test — which focuses on the inappropriateness of the

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35 *Voth*, 558 (Mason CJ, Deane, Dawson and Gaudron JJ).

36 *Voth*, 558 (Mason CJ, Deane, Dawson and Gaudron JJ).

37 *Voth*, 565 (Mason CJ, Deane, Dawson and Gaudron JJ), citing the advice contained in the speech of Lord Templeman in *Spiliada*.

38 *Republica Democratica de Timor Leste v Lighthouse Corp Ltd* [2019] VSCA 290.

39 (1990) 171 CLR 538.

40 *Puttick v Tenon Ltd* (2008) 238 CLR 265, 276 [27] (French CJ, Gummow, Hayne and Kiefel JJ) ('*Puttick*'), citing *Voth* (1990) 171 CLR 538, 549, 565.

> local forum, rather than on the appropriateness of any other forum — is likely to yield the same result as an inquiry as to which of the two fora is the 'more appropriate forum'.[41] Further, the inquiry will inevitably involve an assessment of the relevant 'connecting factors', including the nature of the dispute and cause of action, the law to be applied, the location of the cause and the location of witnesses.
>
> 43 The fact that the law of the forum provides the governing law of the cause may be important, but is not necessarily determinative. So much follows from the choice of law rules which permit a local court to apply the law of a foreign jurisdiction. It may be that the existence of a much stronger connection with a foreign forum may justify a conclusion that the local court is clearly inappropriate notwithstanding that the law of the cause may not be the law of the foreign forum.
>
> 44 The onus remains on the party seeking the stay to establish that the chosen forum is clearly inappropriate. The test is a stringent one that requires the party seeking a stay to establish not only that the local forum is inappropriate, but that it is clearly so.[42] This indicates that 'something more than merely balancing relevant considerations is required'.[43]

37 As emphasised by Deane J in *Oceanic Sun Line Special Shipping v Fay*,[44] the terms 'oppressive' and 'vexatious' are not to be narrowly construed or applied, and 'on that approach, "oppressive" should, in this context, be understood as meaning seriously and unfairly burdensome, prejudicial or damaging while "vexatious" should be understood as meaning productive of serious and unjustified trouble and harassment'.[45]

38 Connecting factors relevant to the clearly inappropriate forum inquiry have been addressed in many cases and have included, for example: convenience and expense; the location of evidence; the governing law; the parties' places of residence or business; the location of witnesses; the existence or otherwise of legitimate juridical advantages; where relevant acts and omissions occurred; the existence and terms of any choice of law and/or exclusive or non-exclusive jurisdiction clauses; fragmentation of litigation; and multiplicity of proceedings.

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41 *Voth* (1990) 171 CLR 538, 558 (Mason CJ, Deane, Dawson and Gaudron JJ).

42 *Murakami v Wiryadi* (2010) 268 ALR 377, 388 [53] (Spigelman CJ) ('*Murakami*').

43 Ibid.

44 (1988) 165 CLR 197 at 246–8.

45 See also, for example, *Henry v Henry* (1996) 185 CLR 571, 587 (Dawson, Gaudron, McHugh, Gummow JJ).

39 Again, each case is to be decided having regard to its particular facts and circumstances and there is limited assistance to be gained from a review of the particular facts in other cases. In *Voth v Manildara Flour Mills Pty Ltd*[46] (***Voth***) this was underscored by the observation that a court '… should not be burdened by unhelpful references to other decisions on other facts'.[47]

Submissions

Torrot's submissions

40 Torrot's written submissions were centred upon the forum contention, it being submitted that the issue for determination was whether the plaintiff '… had brought its claims against Torrot in a clearly inappropriate forum'.[48] It was in this context that heavy reliance was placed upon the Law Clause and the Jurisdiction Clause. As is further discussed later in these reasons, in approaching the matter in this way Torrot somewhat conflated two issues, namely: first, whether effect should be given to the Jurisdiction Clause by the court granting a stay of the proceeding against Torrot (**Jurisdiction Clause Issue**); secondly, if not, whether the proceeding against Torrot should be stayed in any event because this court is a clearly inappropriate forum (**Inappropriate Forum Issue**). Although the issues are different, there is often overlap between factors and considerations relevant to the determination of each of them. This conflation was properly acknowledged by senior counsel for Torrot during the hearing. It was confirmed that Torrot's application was really pressed in two parts in the manner I have referred to, and the issues became more distilled through Torrot's senior counsel's able oral submissions and the exchanges with the Bench during the hearing.

41 There was no relevant controversy between the parties regarding the applicable principles, and Torrot referred to a number of the observations and authorities I have referred to above.

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46 (1990 171 CLR 538, 565 (Mason CJ, Deane, Dawson and Gaudron JJ).
47 Ibid.
48 Torrot written submissions [5].

42 Placing emphasis on the terms of the Law Clause and the Jurisdiction Clause, which were variously described as a 'critical', 'cogent', and 'significant', Torrot submitted that this court is a clearly inappropriate forum for the determination of a dispute arising out of an agreement, the governing law of which is the law of Spain, and pursuant to which the parties have bound themselves to submit to the exclusive jurisdiction of the 'Courts of the city of Barcelona (Spain)'. It was also said that the terms of the 'unequivocal' Jurisdiction Clause were '… determinative and points to Victoria being a clearly inappropriate forum'.[49]

43 A number of other matters were raised in support of Torrot's position which, briefly and in substance, were as follows:

(a) The undesirability of this court having to apply foreign law when the courts in Spain are better placed to do so and where requiring this court to do so would risk imprecision and prejudice.

(b) Factors going to convenience, expense, evidence, and the availability of witnesses. It was said that the substantial body of relevant evidence was to be found in Spain, that Torrot's headquarters were located in Spain, and the most likely witnesses were located in Spain. These were identified as including two former chief executive officers, a former business development manager, and a former sales manager.

(c) Although it was acknowledged that this court is capable of using technology to overcome practical issues associated with witnesses, it was contended that because a number of the witnesses were no longer within the control of Torrot it was likely to compromise the fair, economic and efficient running of the proceeding.

(d) There was no legitimate juridical advantage in having the matter heard under the ACL. Further, the present case could be distinguished from the decision of the High Court in *Akai* because the ACL does not contain an equivalent

[49] Torrot's written submissions [18].

provision to the *Insurance Contracts Act 1984* (Cth) that would operate to exclude exclusive jurisdiction clauses that detract from the ACL.

(e) The ACL may also 'arguably not apply' to Torrot. It is not a body corporate incorporated in Australia, an Australian citizen or a person ordinarily resident within Australia, and therefore it will need to be established that Torrot was carrying on business within Australia within the meaning of that expression in s 5 of the CCA. It was submitted that the plaintiff has 'arguable difficulties' in establishing that this is so.

(f) In its written submissions Torrot submitted that if the plaintiff was to proceed against it in Spain the plaintiff would not be deprived of any rights or ultimate remedies to which they are entitled, submitting that various aspects of the Spanish Civil Code and other laws provided analogous rights and remedies to the unconscionable conduct laws under s 21 of the ACL. However, this was not touched upon in Torrot's oral submissions and no expert or other evidence was adduced by Torrot regarding any aspect of the law of Spain.[50]

44 It was submitted, that in reality the claim against Torrot was for breach of contract and that the unconscionable conduct claim was 'window-dressing' directed at stepping around the effect of the Jurisdiction Clause and the Law Clause. This was said to be supported by, among other things, the nature of the claim, the terms of Torrot's letter of 22 January 2020, the way in which the claim is pleaded, the absence of a damages claim for breach of contract, and the breach of contract being the foundation of the basis for the unconscionable conduct claim. Attention was also drawn to observations made in *Epic Games*[51] when the court was referring to related comments of Jagot J in *Casaceli v Natuzzi Spa*.[52] The fact that the plaintiff now proposed to amend the claim to include a claim for damages for breach of contract was said not to detract from the

50 Counsel for the KTM defendants also raised the issue in her oral submissions and suggested that it appeared that the issue was not being pressed. Senior counsel for Torrot did not contradict this contention or address the issue in his reply oral submission.

51 At [95].

52 [2012] FCA 691.

force of the window-dressing submission.

45 Torrot further submitted that the question of the breach of contract will necessarily involve consideration of the proper construction and operation of the Distribution Agreement and that the defence to the claim will also involve consideration of possible implied terms in the context of the GASGAS asset and business sale. This, so it was said, will need to be the subject of Spanish law and there was no basis to conclude that the contract issue would be straightforward or simple in the way that the plaintiff had contended during oral submissions. Emphasis was again placed on the undesirability of this court having to address issues of Spanish law.

46 Although it was acknowledged that each case is dependent on its own facts, Torrot submitted that the public policy considerations that were present in *Akai* and in *Epic Games* were absent in this case because there was no provision similar to that considered in *Akai*, and the present case does not concern the competition related issues that were considered in *Epic Games*.

47 Although senior counsel for Torrot understandably did not seek to contest or deny that fragmentation and bifurcation issues are likely to arise if a stay is granted, it was submitted that this was outweighed by the other considerations and, in particular, the public policy consideration of having the plaintiff held to the bargain reflected in the Jurisdiction Clause. It was noted further that the foreshadowed cross-claim by the KTM defendants against Torrot had not yet been brought, although senior counsel for Torrot responsibly accepted that this was because the KTM defendants had not yet seen the position Torrot is going to take because it had not yet been required to file a defence.

Plaintiff's submissions

48 The plaintiff also somewhat conflated the Jurisdiction Clause Issue and the Inappropriate Forum Issue, although this was disentangled to some extent during oral submissions at the hearing.

49 No issue of principle emerged from the plaintiff's submissions, with the plaintiff also

referring to frequently cited authorities and observations of the kind earlier referred to. In respect of the Inappropriate Forum Issue the plaintiff: emphasised that the onus was on Torrot; referred to judicial observations regarding the need to exercise caution before acceding to a stay application on forum grounds; reiterated that the test was not one based on the balance of convenience as between the competing forums; drew attention to the apportionment issues and litigation fragmentation risks; and relied on the plaintiff's inability to pursue the ACL unconscionable conduct claims in Spain.

50 The plaintiff further submitted that the proceeding was more connected to Australia than Spain and referred to three of the parties being based in Australia, the Distribution Agreement relating to Australia, the loss of profits claim relating to Australian business conditions, and the witnesses being predominantly based in Australia. The connection with Spain was said to be 'tenuous' because only one of the five parties is located in Spain, and no relevant aspect of the Distribution Agreement coming into effect in Australia (or its operation thereafter) had anything to do with Spain. The only material connection with Spain was said to be the Law Clause and the Jurisdiction Clause. It was also submitted that the role of Torrot's former sales manager, Mr Martinez, related more to the unconscionable conduct claim and inducing breach of contract claim than it did to the breach of contract allegations against Torrot.

51 The plaintiff denied that the unconscionable conduct claim could be characterised as window-dressing, which it said was supported by the related claims against the KTM defendants. It contended that the unconscionable conduct claim was a substantive and material part of the claim in respect of a mandatory Australian law and that it would be deprived of its ability to exercise its rights under that Australian law if a stay was granted. It also informed the court that it would be amending the claim to bring a damages claim for breach of contract.

52 During oral submissions heavy emphasis was placed on the likely fragmentation and bifurcation of proceedings if a stay was granted, which it was submitted was the 'dominant factor'.

53 As to Spanish law, although it was acknowledged that the Law Clause and the Jurisdiction Clause would engage with the breach of contract allegations, it was submitted that Torrot's emphasis on the complexity of applying Spanish law was overstated because the breach issue was straightforward and there appeared to be no defence to it. This was also said to be supported by the Termination Letter — which senior counsel acknowledged for the purposes of this application may be difficult to deny amounted to a repudiation of the Distribution Agreement.[53]

54 In summarising its position the plaintiff contended that the Law Clause and Jurisdiction Clause and other matters raised by Torrot do not establish that this court is a clearly inappropriate forum. It said further that in this case the public policy behind holding a party to its bargain is materially outweighed by the public policy consideration associated with fragmentation of proceedings, and the inability to pursue the claim under ss 21 and 236 of the ACL, which were said to be very significant matters in this case.

KTM defendants' submissions

55 The KTM defendants' submissions did not conflate the issues in the same way as the other parties, having as their primary focus what I have described as the Jurisdiction Clause Issue. Emphasis was placed upon, among other things, fragmentation, the overlapping and interlinked nature of the claims against the different defendants, and the fact that the KTM defendants are not parties to the Distribution Agreement.

56 It was initially submitted that there was an issue as to whether the Law Clause and Jurisdiction Clause are relevantly engaged because the plaintiff did not make any claim against Torrot for damages for breach of the Distribution Agreement and therefore, so it was said, the claims made do not concern the validity, interpretation or effect of the Distribution Agreement.[54] Because the court was informed that the plaintiff will now be making such a claim this point was not pressed. Its force was limited in any event because the alleged breach of the Distribution Agreement is said

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53 Although this was said in a context where there was no evidence or submissions regarding the content, operation or application of any relevant Spanish Law on the point.

54 See the terms of the Law Clause and the Jurisdiction Clause above.

to form part of Torrot's contravening conduct, which necessitates consideration of the construction and operation of the relevant terms of the Distribution Agreement.

57 If the Jurisdiction Clause is engaged it was submitted that:

(a) the usual rule or prima facie position is that the bargain of the parties is to be enforced and a stay should be granted unless strong reasons are shown that it should not be;

(b) where not all parties to the proceeding are party to an exclusive jurisdiction clause, the court should not start with the prima facie disposition in favour of a stay; and

(c) there are at least two matters that, separately and together, provide strong reasons not to stay the proceeding. First, the grant of a stay will likely result in the fragmentation of proceedings into more than one jurisdiction, with all the attendant problems of fragmentation. Secondly, if the jurisdiction clause is given effect it will likely defeat a mandatory law of the forum in circumstances where it is not apparent that the courts of Barcelona would apply s 21 of the ACL. In this context reference was also made to the observations of Stewart J in *Karpik*[55] regarding the mandatory nature of the relevant laws.

58 The KTM defendants' position was said to be supported by: the obvious overlap of factual and legal issues raised by the claims against the KTM defendants and the claims against Torrot; the pleaded apportionment allegations against Torrot by the KTM defendants; the prospect of a third party claim against Torrot; and the serious risks and issues associated with fragmentation of proceedings, including inconsistent findings, cost and inconvenience, and the potential for witnesses having to give evidence more than once. The fragmentation issues were said to be overwhelming.

59 The KTM defendants further submitted that it was not open to the court to conclude that there were Spanish laws that would operate similarly to s 21 of the ACL,

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55 [2021] FCA 1082, [123], [276], [337].

emphasising that there was no evidence at all regarding Spanish law and that no findings could be made on the topic given only the generalised unsupported assertions in Torrot's written submissions, which it was said appeared not to be pressed in any event.[56]

60 It was submitted that if Torrot did not remain a party then the KTM defendants would suffer prejudice because, at least in relation to their apportionment claim under the Wrongs Act, Torrot needed to be a party. It was said that there would be a need to join Torrot for that purpose and, further, depending on the position to be taken by Torrot when it files a defence, there was a real prospect of a direct cross-claim being made against Torrot by the KTM defendants in relation to the asset and business sale agreement. In this context reference was made to aspects of the KTM defendants' defence and allegations regarding Torrot's obligation to indemnify the relevant entity in respect of the plaintiff's claim.

61 The above matters were also relied upon by the KTM defendants in answer to Torrot's contention that this court is a clearly inappropriate forum.

Consideration and disposition

Jurisdiction Clause Issue

62 At this point I proceed on the assumption that the Jurisdiction Clause is relevantly engaged in respect of the plaintiff's claims brought against Torrot, which counsel for the plaintiff properly acknowledged would be the case in relation to the breach of contract allegations and the proposed breach of contract damages claim in any event.

63 Having regard to the principles and observations earlier referred to, I have concluded that it has been established that there are strong reasons for not enforcing the Jurisdiction Clause. The first relates to the risk of fragmentation of litigation and that which is associated with it, and the second relates to the risk to the plaintiff of the loss of the right to bring an unconscionable conduct claim under s 21 of the ACL in a Spanish court. In the particular circumstances of this case they each constitute a strong

[56] During oral submissions senior counsel for Torrot also responsibly stated that he did not know what the position would be under Spanish law.

and sufficient reason to decline to enforce the Jurisdiction Clause by the ordering of a stay of the proceeding against Torrot. Their cumulative effect is even greater.

64 There is at least a material risk, if not high likelihood, that if a stay is ordered it will result in the undesirable fragmentation of litigation in connection with the same subject matter that is the subject of this proceeding. As was observed by Allsop J in *Incitec*, such a consideration is a cogent consideration for 'good and powerful reasons …',[57] including cost, inconvenience, the risk of inconsistent findings, and the prospect or possibility of witnesses and/or parties becoming involved in two proceedings in different jurisdictions. As noted above, observations of this character have been made in many cases.

65 Although each case depends on its own facts and a careful consideration of the position in the light of those facts, there are a number of matters in this case that reveal that the fragmentation risk is real. It weighs heavily in the analysis.

66 First, the KTM defendants are not parties to the Distribution Agreement or subject to its terms.

67 Second, there is extensive overlap between the underlying factual context and issues involved in the claims against Torrot and the claims against the KTM defendants. One example is the allegation that the KTM defendants induced Torrot to breach the Distribution Agreement. The allegations of breach and inducement also relate to and involve the dealings that occurred between Torrot and one or more of the KTM defendants in relation to the sale and purchase of the GASGAS business and assets.

68 Third, the evidence revealed that if a stay is ordered the plaintiff proposes to continue this proceeding against the KTM defendants in this court and commence separate proceedings in Spain against Torrot. It is plain that in each proceeding factual and legal issues regarding, at least, the alleged breach and repudiation of the Distribution Agreement and the alleged loss and damage will fall to be agitated in respect of largely

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57 (2004) 138 FCR 496, [62].

overlapping factual allegations.

69 Fourth, having regard to the first, second and third matters: the risk of inconsistent findings; increased inefficiency, cost and expense associated with dual litigation; and the risk of witnesses having to give evidence in two proceedings, are real and not theoretical concerns. As others have observed, there are powerful public policy reasons for seeking to avoid these outcomes.

70 Fifth, the KTM defendants wish to press in this court allegations regarding apportionment and the degree of responsibility as between themselves and Torrot. At least insofar as this defence is to be pursued under the Wrongs Act it is necessary for Torrot to be a party to the proceeding – and it was not contended otherwise by Torrot. That apportionment defence has already been pleaded by the KTM defendants.

71 Sixth, there is at least a prospect of the KTM defendants seeking to bring a direct third party claim against Torrot if the stay is ordered.[58] The KTM defendants allege in their defence, among other things, that pursuant to clause 6.2 of the sale contract Torrot is liable to indemnify a related entity in respect of any third party liability and allegations of misrepresentation are also raised. Counsel for the KTM defendants explained that the cross-claim had not yet been brought because they are waiting to see the position that Torrot will take in its defence before framing such a claim.

72 Seventh, the evidence did not address or suggest that the plaintiff could also pursue the claims against the KTM defendants in Spain. In this context it may be noted that the first defendant was incorporated in Austria, the second defendant was incorporated and located in Australia, and the third defendant resides in Australia. Further, if proceedings are commenced by the plaintiff against the KTM defendants in Spain, counsel for the KTM defendants informed the court that they do not presently intend to submit to the jurisdiction of Spain.

73 Although it does not inexorably follow that a stay should be refused because of the risk of fragmentation, in this case the risk or likelihood of fragmentation presents as a

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58 Although the position would not change even if this were not so.

strong and powerful reason for the court declining to enforce the Jurisdiction Clause when considered in the context of all the circumstances, including those relied upon by Torrot. The extent of the risk and consequences regarding the potential for inconsistent findings, increased cost and expense, multiplicity of proceedings, prejudice to the KTM defendants, and witnesses and parties being involved with two proceedings in my view outweighs materially the competing policy consideration of holding the plaintiff to the bargain reflected in the Jurisdiction Clause. Understandably, Torrot did not submit that the fragmentation risks were not real, or that they might be materially mitigated in some other way.

74 It follows that I do not accept Torrot's submission that the public policy in holding Torrot to its bargain as reflected in the Jurisdiction Clause outweighs the public policy considerations associated with fragmentation of litigation. The balance is the other way, and materially so.

75 In this case, this result follows whether the court starts with a prima facie disposition in favour of a stay of proceedings of the kind addressed in the authorities before *Australian Health*, or whether the court starts from a more neutral position given the involvement in the proceeding of non-parties to the Jurisdiction Clause, namely, the KTM defendants. As mentioned earlier, it is therefore not necessary for me to say anything further regarding that which was said on this topic by the New South Wales Court of Appeal in *Australian Health* or by Stewart J in *Karpik*.

76 I turn to the second strong reason for declining to enforce the Jurisdiction Clause. It has been demonstrated that there is, at least, a material risk, if not high likelihood, that if a stay is granted the unconscionable conduct laws relied upon by the plaintiff against Torrot would not be applied in Spain and the plaintiff would be deprived of a legitimate juridical advantage.[59] Indeed, it appeared to be common ground that this aspect of mandatory Australian law would not be applied in Spain and senior counsel for Torrot did not contend otherwise. So much was also reinforced by the somewhat illusory references to aspects of Spanish law in Torrot's submissions, which implicitly

[59] See, for example, *Epic Games* [82]–[83] and the observations there made regarding the decision in *Akai*.

proceeded on the basis that the Australian law on the topic would not be applied in Spain.

77 That the relevant part of the ACL law forms part of the mandatory law of Australia has been addressed in various cases, and perhaps most recently by Stewart J in *Karpik*.[60] It was also understandably not contested by Torrot. Similar or related issues regarding the impact of an exclusive jurisdiction clause have arisen in other cases, including, for example: *Akai*; *Commonwealth Bank*; *Lew*; *Reinsurance Australia*; *Babcock & Brown DIF III Global Co-Investment Fund LP v Babcock & Brown International Pty Ltd* (***Babcock***);[61] *Vautin v BY Winddown, Inc (Inc) (No 2)*;[62] and *Epic Games*.

78 It is important to emphasise that the existence of such an issue is a factor that *may* — not which must — provide a strong reason for not enforcing an exclusive jurisdiction clause, as the cases have demonstrated. Again this important policy consideration is to be considered in the circumstances of each case, although I draw attention to the forceful observations made in this court by Byrne J in *Commonwealth Bank v White*, and echoed by Elliott J in *Lew*.

79 As I have said, in this case I have concluded that this loss of a juridical advantage issue is a strong reason of itself for not enforcing the Jurisdiction Clause. If that is wrong, it becomes so when blended with the fragmentation reason.[63] The s 21 ACL claim is a primary part of the claim against Torrot which it appears will be unable to be pursued if a stay is granted. I am also unable to be satisfied that the likely loss of such rights is ameliorated by any relevant features of Spanish law. No expert or other evidence was led about Spanish law and it was not addressed at the hearing. To the extent they were ultimately pressed,[64] the limited references in the written submissions to Spanish Law, in the absence of evidence, do not provide a sound or legitimate basis for concluding that there are or may be relevantly similar or analogous rights available to

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60 [2021] FCA 1082, [123], [337].
61 [2016] VSC 623.
62 [2016] FCA 1235.
63 Assuming the Jurisdiction Clause relevantly engages with this unconscionable conduct claim, which is not necessary to decide.
64 And it appeared from the hearing that they were not, or if so, only faintly.

the plaintiff under Spanish law.

80 For completeness I add that, again, this result follows whether the inquiry is approached with a prima facie disposition in favour of enforcing the Jurisdiction Clause or the approach taken in *Australian Health* is adopted.

81 In reaching the above conclusions regarding the existence of strong reasons I have taken into account the various matters raised by Torrot in its written and oral submissions. In deference to the submissions made, I shall make some brief comments and observations regarding a number of them.

82 I accept that there are distinctions to be drawn between the facts in *Akai* and *Epic Games* when compared to the facts in this case — and that aspects of the public policy considerations were different given the different provisions and rights being considered in those cases. However, this does not detract from the matters raised above, or from observations of the kind made by Byrne J in *Commonwealth Bank* and echoed by Elliott J in *Lew*, or the Full Federal Court's more general observations in *Epic Games* regarding the decision in *Akai*.[65]

83 Torrot's contention that the ACL may arguably not apply because the plaintiff needs to establish that Torrot was carrying on business in Australia does not, in isolation or together with other matters raised, alter the position. This is a question of fact that, if ultimately contested, will fall for determination at trial in the light of the evidence then before the court. Torrot's submission framed the issue as it being arguable that it did not carry on business in Australia. Little evidence was advanced by either party on the point,[66] and it was not addressed at the hearing in oral submissions. It was also not a matter that the parties contended could or should be determined on this application, whether on a prima facie basis or otherwise.[67]

84 When regard is had to the observations made in cases such as *Bray v F Hoffman-La*

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65 [2021] FCAFC 122, [82]–[83].

66 Which is not to overlook paragraphs 3, 16(i) and 19 of Ms Fakhri's affidavit.

67 It is also to be remembered that Torrot does not contest the jurisdiction of the court to hear and determine the proceeding against it.

Roche;[68] *Pioneer Concrete Services Ltd v Galli*;[69] *Gebo Investments (Labuna) Ltd v Signatorey Investments Pty Ltd*;[70] *ACCC v Valve Corporation (No 3)*;[71] and *Vautin No 2*;[72] and *Vautin v BY Winddown, Inc (No 4)*[73] regarding the meaning of the expression carrying on business in Australia, it is readily apparent that it can be a challenging contested factual question, as it may turn out to be in this case. However, having regard to the observations in *Vautin No 2* and *Vautin No 4*, and the cases there cited, there is in my view at least a serious question to be tried on the issue, which is reinforced by various terms and features of the Distribution Agreement and the arrangements between the parties, and that which they reveal about Torrot's business model, profit motive and operations.

85 Without being exhaustive, these terms and features include: what can be inferred regarding the existence of Torrot's distribution network in numerous countries; Torrot's appointment of the plaintiff in Australia; the relationship as reflected in the Distribution Agreement; Torrot's involvement with the activities in Australia including in relation to its dealings with the plaintiff, the inclusion of Torrot warranties and maintenance books, and engagement with advertising and promotional material; Torrot's warranty support and supply of replacement spare parts; Torrot's rights to inspect the plaintiff's books, records and information in Australia at any time it deems appropriate; the requirement to indicate on all quotations, letters and invoices that products are products of Torrot; and the obligation to establish and maintain suitable workshop facilities and an efficient field maintenance service so that the plaintiff can attend to, among other things, service and warranty related work on Torrot products.

86 To employ the words of Gibbs J in *Luckins v Highway Motel (Carnarvon) Pty Limited*,[74] matters such as those that I have mentioned might be seen to connote at least the doing

68 (2002) 118 FCR 1.
69 [1985] VR 675.
70 (2005) 190 FLR 209.
71 [2016] FCA 196.
72 [2016] FCA 1235.
73 [2018] FCA 426.
74 (1975) 133 CLR 164, 178.

of a succession of acts designed to advance some enterprise of the company pursued with a view to pecuniary gain.[75]

87 Further, given the allegations made against the KTM defendants that they were involved in the unconscionable conduct of Torrot, it appears that the carrying on business issue will fall for consideration in any event even if a stay were to be granted.

88 There is also another relevant matter. The court was informed by counsel acting for the plaintiff that it will amend its claim to add a damages claim in respect of the existing pleaded breaches of contract. Pleadings have not closed and such an amendment can be made as of right, noting also that Torrot has not filed a defence. Even if leave was required, on the information before the court such an amendment application would be almost certain to succeed. To the extent that it was submitted that the court ought not or cannot take this position of the plaintiff into account, I do not accept that submission. It would be unrealistic not to do so and in my view inconsistent with the court's obligations under the *Civil Procedure Act 2010* (Vic).[76]

89 That being so, even if it were to be assumed that Torrot was not carrying on a business in Australia so as to fail to attract the operation of the relevant provisions of the ACL, it would remain a party to the proceeding facing a breach of contract claim and therefore the fragmentation issue would remain, which is a strong and sufficient reason of itself not to enforce the Jurisdiction Clause in this case.

90 Whilst I accept that the manner in which the plaintiff's claim was pleaded and the nature of the claim raises a question as to whether the omission of a damages claim for breach of contract might have been directed at enhancing the plaintiff's position on any stay application, I do not agree that the plaintiff's claim under ss 21 and 236 of the ACL can fairly be characterised as window-dressing. It is now to be one of two primary claims brought against the plaintiff and in respect of which substantial damages are claimed in connection with what the plaintiff characterises as the

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75 See also *Vautin No 2* [2016] FCA 1235, [48].

76 For completeness, I note that when judgment was delivered orally orders were made for the filing of a further amended statement of claim.

consequential destruction of its business. In any event, the claim exists.

91 Further, even if the claim could fairly be described as window-dressing, and its loss was not of significance to the plaintiff, it is clear that Torrot will be facing the contract damages claim and that the fragmentation risks and concerns remain.

92 Although there is force in Torrot's observations regarding the desirability of Spanish courts applying Spanish law, they are of limited moment in this context. This is primarily because they do not detract from either of the two reasons raised above. For completeness, I add that I accept Torrot's contention that the court cannot, at least at this stage, proceed on the basis that any issues of Spanish law will be straightforward. There is simply no evidence upon which to base such a conclusion — although that does not detract from the ability of this court to apply Spanish law in the usual way that the application of foreign law is dealt with in this jurisdiction.

93 The issues raised by Torrot regarding evidence, witnesses and cost do not materially resonate, even if the position is assumed to be as described by Torrot. Again, this is because they do not detract from the two strong reasons referred to. The same can be said of the fact that the contract allegations made and to be made will almost inevitably result in the need to address the terms, construction and operation of the Distribution Agreement.

94 I turn now to what in reality was the second part of Torrot's application, being the Inappropriate Forum Issue.

Inappropriate Forum Issue

95 As stated in the introduction and summary above, I do not accept that Torrot has established that this court is a clearly inappropriate forum.

96 In reaching this conclusion I have had regard to all of the circumstances and applied the non-controversial principles and observations earlier referred to regarding the clearly inappropriate forum test. Given the above discussion of the Jurisdiction Clause Issue and the overlapping considerations, my reasons for so concluding can be

more shortly stated than might otherwise have been the case.[77]

97 Torrot relied upon the factors referred to in its submissions in support of its contention that this court is a clearly inappropriate forum, which I have taken into account. I make the following brief observations about a number of those factors.

98 As submitted by the plaintiff and the KTM defendants, the fragmentation issues and their attendant risks and challenges (discussed above) weigh materially against Torrot's position for the reasons earlier mentioned. The existence of the juridical advantage that the plaintiff has of being able to pursue its unconscionable conduct claim in this jurisdiction also weighs against Torrot's forum contention. These two matters, individually or in combination are material, although it is the case that in my view the first is even more significant than the second.

99 Despite the submissions of Torrot and the plaintiff, if a single trial was to be conducted I see the factors regarding the inconvenience, expense, and location of witnesses to be more evenly balanced than each party submitted. This is influenced by the spread of the parties and witnesses involved, although I am more influenced in this way by the position of the KTM defendants given the existence and terms of the Law Clause and the Jurisdiction Clause that formed part of the bargain between Torrot and the plaintiff. But even if it is assumed that the position is as Torrot contended, it would not alter the outcome. I also take into account that this court has more than adequate technology to deal with remote hearings and witnesses which it has had for many years. Using technology for remote hearings has also been an everyday occurrence in the Commercial Court during the COVID-19 pandemic.

100 I do not accept Torrot's submission that the fair, economic and efficient running of the action is likely to be compromised because a number of the witnesses are said to be former officers of Torrot located in Spain. Even if they are, there is nothing intrinsic about these matters that supports the contention — and the existence and common use of technology in court rooms in the Commercial Court tends against it. This

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77 I am also mindful of the observations of the High Court in *Voth* regarding the absence of the need to provide detailed reasons, which was also referred to by Almond J in *Lighthouse* [2019] VSC 278, [67].

submission is in my view without any material force.

101 Torrot's observations regarding the ACL 'arguably' not applying to Torrot do not advance its position as to why this court is an inappropriate forum. Indeed, this court may be best placed to deal with the determination of the 'carrying on business in Australia' issue having regard to the statutory source of the issue and the body of Australian authority that exists in relation to it. I also refer to my earlier remarks on this topic.

102 Even if it were to be assumed that the plaintiff's 'unconscionable conduct' claim was not its primary claim, was 'window-dressing', or that it was used to seek to side step the impact of the Jurisdiction Clause, this says little as to how or why this court is a clearly inappropriate forum. It is a fact that the claim has been brought and that it exists — and it has not been contended nor established that the bringing of the claim is or was an abuse of process. And even if that were to be so contended, this court has well developed jurisprudence and procedures for dealing with such matters.

103 As mentioned, there is force in Torrot's submission regarding the desirability of Spanish law being applied by Spanish courts rather than this court, as other cases have recognised. But this has to be weighed in the analysis with all other considerations, which I have. Given the other matters favouring the plaintiff's position – and particularly the fragmentation related issues — this consideration has less force than it might have in other cases where the circumstances are different. This court is also able to consider and apply Spanish law where appropriate.

104 On the evidence there is no basis upon which it can be concluded that the plaintiff has substantially similar or analogous rights under Spanish law as those provided for by ss 21 and 236 of the ACL. I refer in this regard to my earlier observations regarding the absence of expert or other evidence on Spanish law.

105 Having regard to the principles and observations earlier referred to it is in my view clear that Torrot has not established that this court is a clearly inappropriate forum.

Conclusion and proposed orders

106 Torrot's application for a permanent stay or dismissal of the proceeding against it should be dismissed. Although the Distribution Agreement contains a choice of law clause and an exclusive jurisdiction clause:

(a) the plaintiff and the KTM defendants have established that there are strong reasons not to enforce the Jurisdiction Clause; and

(b) Torrot has not established that the Supreme Court of Victoria is a clearly inappropriate forum.

107 I will hear from the parties in relation to costs and further directions.

SCHEDULE OF PARTIES

S ECI 2020 01602

BETWEEN:

URBAN MOTO IMPORTS PTY LTD (ACN 149 193 386)	Plaintiff
- and -	
KTM AG	First Defendant
KTM AUSTRALIA PTY LTD (CAN 009 323 899)	Second Defendant
JEFFERY LEISK	Third Defendant
TORROT ELECTRIC EUROPA S.L	Fourth Defendant

CERTIFICATE

I certify that this and the 37 preceding pages are a true copy of the reasons for judgment of Justice Connock of the Supreme Court of Victoria delivered on 23 September 2021.

DATED this twenty-third day of September 2021.

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Associate