

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT Reference: D236/2010

APPLICANT: Ryestreet Pty Ltd (ACN: 059 643 211)

FIRST RESPONDENT: Dayview Window Company (Aust) Pty Ltd (ACN: 078 726 271)

FIRST JOINED PARTY Alternative Glass Supplies Pty Ltd (ACN: 006 396 078)

SECOND JOINED PARTY: Don Mathieson & Staff Glass Pty Ltd (ACN: 006 332 556) trading as DMS Glass (DMS)

THIRD JOINED PARTY: AGC Flat Glass Pacific Pty Ltd

FOURTH JOINED PARTY: AGC Glass Europe S.A.

WHERE HELD: Melbourne

BEFORE: Senior Member E. Riegler

HEARING TYPE: Directions Hearing

DATE OF HEARING: 10 September 2010

DATE OF ORDER: 10 September 2010

DATE OF REASONS: 27 September 2010

CITATION: Ryestreet Pty Ltd v Dayview Window Company (Aust) Pty Ltd & Ors (Domestic Building) [2010] VCAT 1583

ORDERS

1. Upon the application by the Second Joined Party and being satisfied that it is desirable to do so having regard to s 60 of the *Victorian Civil and Administrative Tribunal Act 1998*, AGC Flat Glass Pacific Pty Ltd, C/o of Corrs Chambers Westgarth, Lawyers, Governor Phillip Tower, Level 32, 1 Farrer Place, Sydney, NSW, 2000 is joined as the Third Joined Party to the proceeding.
2. Upon the application by the Second Joined Party and being satisfied that it is desirable to do so having regard to s 60 of the *Victorian Civil and Administrative Tribunal Act 1998*, AGC Glass Europe S.A., C/o of Corrs Chambers Westgarth, Lawyers, Governor Phillip Tower, Level 32, 1 Farrer Place, Sydney, NSW, 2000 is joined as the Fourth Joined Party to the proceeding.

3. BY 24 September 2010, the Second Joined Party must file and serve Points of Claim against the Third and Fourth Joined Parties, which shall include fully itemized particulars of the claim, loss and damage claimed, and the relief or remedy sought.
4. BY 15 October 2010, the Second Joined Party must file and serve Points of Defence to the First Joined Party's Points of Claim dated 21 June 2010 specifying the material facts relied upon.
5. BY 22 October 2010, the Third and Fourth Joined Parties must file and serve Points of Defence to the Second Joined Party's Points of Claim specifying the material facts relied upon.
6. **This proceeding is referred to compulsory conference to be conducted by any Member at 10.00 am on 29 November 2010 at 55 King Street Melbourne. Costs may be ordered if the compulsory conference is adjourned or delayed because of a failure to comply with directions including those relating to the compulsory conference.**
7. The parties may each be represented by professional advocates at the conference.
8. All parties must attend a compulsory conference personally or be represented by a duly authorised person with knowledge of the issues in dispute, and who has, for all practical purposes, authority to settle. Costs may be ordered if a party's representative does not have authority to settle, or where a party refuses to negotiate in good faith at the compulsory conference.
9. The parties must each prepare a document not exceeding 4 A4 pages setting out a summary of their positions and in the case of the Applicant, updated particulars of loss and damage.
10. The parties must exchange copies of their position papers by 4.00 pm on the business day prior to the compulsory conference, and provide the Tribunal with a copy at the commencement of the conference.
11. If the compulsory conference takes place but the parties do not settle, directions will be given and the matter fixed for hearing.
12. If the parties settle before the conference, they must notify the Registry immediately in writing.
13. Liberty to apply, including liberty for the Third and Fourth Joined Parties to make an application seeking orders pursuant to s 75 or s 77 of the *Victorian Civil and Administrative Tribunal Act 1998* against the Second Joined Party, should they consider that the Second Joined Party's Points of Claim warrant such an application being made.
14. Costs reserved.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant:

Mr J Mongolian, solicitor.

For the Respondent:

Mr Brutovic, solicitor.

For the First Joined Party:

Mr Waldren, solicitor.

For the Second Joined Party:

Mr D Klempfner of counsel.

For the Third and Fourth Joined
Parties:

Mr T Warner of counsel.

REASONS

1. On 10 September 2010, I heard an application brought by the Second Joined Party, Don Mathieson & Staff Glass Pty Ltd trading as DMS Glass (“DMS”), under s 60 of the *Victorian Civil and Administrative Tribunal Act 1998*, to join AGC Flat Glass Asia Pacific Pty Ltd and AGC Glass Europe S.A. (collectively known as “AGC”) to the proceeding. The purpose of joining AGC was to enable DMS to claim contribution against those parties under s 23B of the *Wrongs Act 1958*. At the conclusion of that hearing, I ordered that AGC be joined to the proceeding as the Third and Fourth Joined Parties respectively. Following the making of those orders, counsel for AGC requested that I provide written reasons, which I now provide.
2. This proceeding concerns a claim made by Ryestreet Pty Ltd against Dayview Window Company (Aust) Pty Ltd (“Dayview”) in relation to alleged defective glazing installed in a dwelling located in Toorak. Dayview subsequently joined Alternative Glass Supplies Pty Ltd, which supplied the glazing to Dayview. Alternative Glass Supplies Pty Ltd, in turn, joined DMS on the ground that DMS supplied the glass to it. DMS now seeks to join AGC on the same basis, namely, that AGC supplied the glass to it.

Joinder

3. The Tribunal’s jurisdiction to join a party to a proceeding is found in s 60 of the *Victorian Civil and Administrative Tribunal Act 1998* (“the Act”) which provides:
 - (1) The Tribunal may order that a person be joined as a party to a proceeding if the Tribunal considers that—
 - (a) the person ought to be bound by, or have the benefit of, an order of the Tribunal in the proceeding; or
 - (b) the person's interests are affected by the proceeding; or
 - (c) for any other reason it is desirable that the person be joined as a party.
 - (2) The Tribunal may make an order under sub-section (1) on its own initiative or on the application of any person.
4. In considering this application for joinder, I must be satisfied that the claim made against AGC is *open and arguable*;¹ or it is otherwise desirable that AGC be joined as parties to the proceeding.²

¹ *Zervos v Perpetual Nominees Limited* [2005] VSC 380 per Cummins J at [11].

² *Gregor v Victoria* [2000] VCAT 414.

DMS's case for joinder

5. Mr Klempfner, of counsel, who appeared on behalf of DMS, submitted that it was appropriate to join AGC because they were the original suppliers of the alleged defective glass. He relied upon an affidavit of Gerard Michael McCluskey sworn on 30 July 2010 (**'the McCluskey Affidavit'**) and an affidavit of Adrian Sella sworn on 10 September 2010 in support of the application.
6. The relevant paragraphs of the McCluskey Affidavit are:
 7. DMS supplied the 29 sheets of 10.76 mm Clear Sunergy Laminated glass, each measuring 3210 mm by 2550 mm ("the DMS glazing") to Alternative Glass Supplies Pty Ltd which are the subject of the dispute being litigated in this proceeding.
 9. The 4 mm Clear Sunergy glass was purchased from AGC Glass Europe SA (then known as Glaverbel SA) through the agency of AGC Flat Glass (then known as Glaverbel Asia-Pacific Pte Ltd).
 13. The Applicant's complaints about the DMS glass installed at the Property relates to haziness, clouding and delamination of the DMS glazing...
 14. The problems with the Synergy glass experienced by the Applicant and the Property's owner, Mr Stewart Baron, are not unique. Viridian has faced more than 40 product claims in respect of Synergy glass supplied by AGC Glass Europe SA.
 15. Indeed, on 11 December 2008 the CSR Group and the AGC Group entered into Terms of Settlement which set out the way in which past, current and future Sunergy claims would be handled.
 16. At the date of swearing this affidavit, neither AGC Flat Glass Asia Pte Ltd nor AGC Glass Europe SA (being members of the AGC Group) have agreed to indemnify DMS for the problems with the Sunergy glass installed at the Property.
7. The proposed *Points of Claim Against Third and Fourth Joined Parties* exhibited to the McCluskey Affidavit allege that AGC breached its contract with DMS by failing to supply glass that was reasonably fit for purpose, did not match its description and was not of merchantable quality. In the prayer for relief, DMS claims contribution against DMS to the extent that it is found liable in the proceeding. However, no claim is made under the terms of settlement referred to in paragraph 15 of the McCluskey Affidavit. Nevertheless, Mr Klempfner argued that the claim would, in its final form, also include a claim made under the terms of settlement.
8. Mr Klempfner further argued that there is a jurisdictional basis to join those entities under s 23B(6) of the *Wrongs Act 1958*, notwithstanding the fact that they are foreign companies.

9. Sections 23B (1) and (6) of the *Wrongs Act 1958* state:

- (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).
- (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.

10. It is not clear to me whether s 23B(6) operates to give the Tribunal extra-jurisdictional powers as submitted by Mr Klempfner. It seems to me that the reference to an action that *was or would be determined (in accordance with the rules of private international law) by reference to the law of a place outside Victoria* relates to the principal claim, being the claim made by the primary applicant against the party who seeks to be indemnified, rather than the third party claim. Nevertheless, Mr Warner, of counsel, who appeared on behalf of AGC, did not oppose the joinder application on the ground that the Tribunal did not have extra-jurisdictional power.

AGC opposition to joinder

11. Mr Warner opposed the joinder application on two grounds. In his written *Outline of Submissions* he summarised those grounds as follows:

The basis for the AGC Companies' opposition to the Application is that:

- (a) pursuant to the "DMS-AGC Supply agreement", which is defined at paragraph 15 of the Proposed Claim and forms the basis for DMS's claim against the AGC Companies, the courts of Belgium have exclusive jurisdiction over the Proposed Claim) subject to AGC Europe's right to institute proceedings in Australia); and/or
- (b) the Proposed Claim does not come within the scope of the *Domestic Building Contracts Act 1995*, and no other basis for VCAT jurisdiction has been put forward by DMS (paragraphs 11 and 12 of the Hansen Affidavit).

12. Mr Warner relied on the un-sworn affidavit of Olivier Hansen dated 9 September 2010 (**'the Hansen Affidavit'**) and an affidavit of Ian Leslie Dallin sworn on 9 September 2010 (**'the Dallen Affidavit'**).

13. Mr Warner referred me to paragraphs 13 and 14 of the Dallen Affidavit and paragraphs 13 to 15 of the Hansen Affidavit as evidence that the terms and conditions of the supply agreement contained an exclusive jurisdiction clause.

14. The relevant paragraphs in the Dallen Affidavit stated:

13 A copy of the general terms and conditions of Glaverbel SA [AGC] applicable to the sale the subject of the AGC Confirmation are annexed and marked “E” (Glaverbel terms and Conditions).

14 The Glaverbel Terms and Conditions include, at clause 9, a governing law and jurisdiction clause.

15. The relevant paragraphs in the Dallen Affidavit stated:

13 The AGC Confirmation at Exhibit “GMcC 2” refers to and is subject to the general terms and conditions of Glaverbel SA (as AGC Europe was then known) which were applicable at the time.

14 These terms and conditions had previously been provided to DMS by AGC Europe in the course of their business dealings with each other.

16. Mr Warner referred me to a number of authorities in support of the proposition that the courts have generally upheld exclusive jurisdiction clauses because the parties ought to be bound to the terms of the contract that they make. I agree with that general proposition, although for the reasons set out below, this application did not ultimately turn on that proposition.

Arguments in reply

17. Mr Klempfner argued that it was not clear from the Hanson Affidavit as to when, in fact, DMS received the terms and conditions containing the exclusive jurisdiction clause. In other words, he submitted that there was a question as to whether those terms and conditions actually formed part of the particular transaction, the subject of this proceeding.

18. Mr Klempfner further submitted that irrespective of the jurisdictional clause argument, there was a separate cause of action arising under the settlement agreement between AGC and DMS. He argued that the settlement agreement did not contain an exclusive jurisdictional clause and expressly provided a mechanism by which DMS was to be indemnified in respect to claims made against it arising out of the use of glass supplied by AGC, which is the subject of complaint in this proceeding. He further argued that the claim could be brought under the *Fair Trading Act* 1999, which would give the Tribunal jurisdiction, irrespective of whether the dispute fell within the meaning of a *domestic building dispute* as defined in s 3 of the *Domestic Building Contracts Act* 1995.

19. Mr Warner argued that I should have no regard to any claim made under the settlement agreement between DMS and AGC because that was not a matter pleaded in the proposed points of claim against AGC.

20. In answer to that submission, Mr Klempfner said that it was still desirable that the Tribunal join AGC but order that DMS subsequently file and serve different points of claim alleging that alternative cause of action. He argued that if those

revised points of claim did not then disclose an open and arguable claim against AGC, it would still be open for AGC to make an application under s 75 of the *Victorian Civil and Administrative Tribunal Act 1998* seeking an order to strike out or dismiss the claim against AGC.

Findings

21. The relevant terms of the settlement agreement are as follows:

1. The parties agree to settle all past, current and future Sunergy Claims as follows:
 - b. In relation to each Sunergy Claim greater than AU\$80,000, the parties will in good faith and using their best endeavours seek to resolve the Sunergy Claim (including following the procedure set out in Term 4 below).
3. Upon resolution of a Sunergy Claim in accordance with Term 1 (b) above, and payment by AGC Singapore of the agreed sum, the CSR Group will release and indemnify the AGC Group from all claims whatsoever (past, present or future) at common law, in equity or under statute in relation to, or arising from that Sunergy Claim.
4. Where a Sunergy Claim is greater than AU\$80,000, the parties agree to adopt the following process:
 - a. Viridian in good faith and using their best endeavours will obtain three (3) quotations from local, reputable glazing contractors which include all necessary labour, caulking, scaffolding, lifting equipment necessary to carry out the rectification of the Sunergy Claim.
 - b. Viridian will provide the three (3) quotations referred to in Term 4(a) above to the Australian representative of AGC Singapore;
 - c. Viridian and AGC Singapore will, in consultation with each other, determine the most suitable quotation.
 - d. Thereafter, the parties agree to negotiate to resolve the Sunergy Claim commercially between them.
6. In this document the following means:
 - a. AGC Group means AGC Flat Glass Asia Pacific Pte Ltd, AGC Flat Glass Europe SA and their related body coporates.
 - b. AGC Singapore means AGC Flat Glass Asia Pacific Pte Ltd.
 - c. CSR Group means CSR Limited, CSR Building Products Ltd, Don Mathieson & Staff Glass Pty Ltd and their related body corporates.

- d. Viridian means CSR Building Products Ltd.
 - e. Sunergy Claims means each and every claim (past, current and future) arising from the coating deterioration of “Sunergy” glass (including the claims set out in the attached letter from Viridian to AGC Singapore dated 12 August 2008).
22. The terms of the settlement agreement read against the matters raised in the McClusky Affidavit, and the claims brought in this proceeding, lead me to conclude that it is desirable to join AGC to this proceeding. In particular, the quantum of indemnity that AGC might provide under the terms of settlement could be directly related to the quantum claimed against DMS in this proceeding. Further, pursuing relief under the terms of settlement is likely to canvass common questions of fact or law. Moreover, the joinder would enable all the issues in dispute to be determined in the one proceeding. In my view, these are matters relevant to the exercise of my discretion.³
23. There are, however, two further factors that weigh in favour of joining AGC to this proceeding.
24. First, even if the exclusive jurisdiction clause was valid, ignoring for the moment any contest as to whether or not the terms and conditions formed part of the relevant transaction, I do not think that that would be the end of the matter from the perspective of DMS. According to Mr Klempfner, DMS would simply re-agitate this joinder application but with different points of claim - relying upon the terms of settlement as the basis upon which it claims against AGC and invoking the jurisdiction of the Tribunal under the *Fair Trading Act* 1999, rather than couching the claim in terms of a domestic building dispute.
25. In my view, the matters raised in paragraphs 15 and 16 of the McClusky Affidavit (see above) and by Mr Klempfner during oral argument disclose an open and arguable claim against AGC, in the sense that there seems to be a live issue as whether the terms of settlement have been complied with. If the Tribunal finds there is a breach of those terms, I consider it open and arguable that a claim for damages might arise under those terms of settlement. For example, it is open and arguable that if AGC breached the terms of the settlement by refusing to negotiate *to resolve the Sunergy Claim commercially*, DMS may suffer loss and damage as a result. According to Mr Klempfner such a claim would be brought under the *Fair Trading Act* 1999. In that regard, I agree with previous decisions of this Tribunal that by the operation of s 6 the *Fair Trading Act* 1999, the legislature made express provision for the extra-territorial operation of that Act, which includes the jurisdiction given to the Tribunal.⁴
26. Second, neither the Hansen Affidavit nor the Dallen Affidavit expressly state that

³ *Gregor v Victoria* [2000] VCAT 414

⁴ *Reid v Jet Aviation JT Aviation Management AG* [2000] VCAT 1858; *BCP International Pty Ltd v Fook Huat Tong Kee Pty Ltd* [2005] VCAT 2362; *Froesch v Mohi* [2005] VCAT 1933

DMS received a copy of the terms and conditions of the supply agreement, which have been exhibited to those affidavits, prior to entering into the transaction, the subject of this proceeding. Mr Warner argued that I should, nevertheless, infer that was the case. I do not consider that it is appropriate for me to draw such an inference in circumstances where DMS have not had sufficient time to respond to the affidavit material filed by AGC and where the application is of an interlocutory nature. In my view, this matter is best determined at final hearing.

27. Taking all the above factors into consideration, I find that it is appropriate to join AGC to this proceeding. I will order, however, that revised points of claim are filed and served within an appropriate time. In making that order, AGC retains liberty to make an application pursuant to s 75 or 77 of the Act seeking an order striking out the points of claim should they fail to disclose an arguable cause of action.
28. In my view, this course is more appropriate than refusing the application, particularly given the comments made by Mr Klempfner that the application would be re-agitated in any event, albeit on alternate or additional grounds and with further affidavit material. As I have already indicated, the matters raised in the draft points of claim, the McClusky Affidavit and in Mr Klempfner's submissions lead me to conclude that it is desirable to join AGC to this proceeding.

SENIOR MEMBER E. RIEGLER