

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D576/2007

**CATCHWORDS**

Identity of contracting party – name on contract – different ABN's – extrinsic evidence

<b>APPLICANT</b>	Krongold Constructions (Australia) Pty Ltd
<b>FIRST RESPONDENT</b>	Brian Worsfold
<b>SECOND RESPONDENT</b>	Helena Worsfold
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Deputy President C. Aird
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	5 and 6 May 2008
<b>DATE OF ORDER</b>	18 June 2008
<b>CITATION</b>	Krongold Constructions (Australia) Pty Ltd v Worsfold (Domestic Building) [2008] VCAT 1003

**ORDER**

1. I declare the applicant is the builder and is entitled to payment of the certified sum of \$56,406.53.
2. Pursuant to s53(2)(bc) of the *Domestic Building Contracts Act 1995* I direct the Principal Registrar to arrange for payment of the sum of \$56,406.53 held in the Domestic Builders' Fund to the applicant as soon as practicable.
3. Costs reserved with liberty to apply.
4. **This proceeding is referred to a further directions hearing before Deputy President Aird at 2.15 p.m. on 1 July 2008 at 55 King Street Melbourne - allow 2 hours at which time any application for costs will be heard and the parties heard as to the further conduct of the proceeding.**

**DEPUTY PRESIDENT C. AIRD**

**APPEARANCES:**

For Applicant

Ms E. Porter of Counsel

For First and Second Respondents

Mr M. Whitten of Counsel

## REASONS

- 1 By contract dated 12 October 2005 the respondent owners entered into a contract for the construction of a new home. The applicant ('KCA') seeks payment of the final certified payment due under the contract. In October 2007 the Tribunal found that the builder, '*whichever entity that properly is*', was entitled to payment of the final certified sum of \$56,406.53 and ordered payment of that amount into the Domestic Builders' Fund pending determination of the identity of the builder. The parties have agreed that KCA's claim for payment of that sum should be determined prior to the hearing of the respondent's counterclaim (which includes claims of alleged defective and incomplete works).
- 2 The owners' dispute that KCA is entitled to payment contending that notwithstanding it is named as the contractor in the building contract, it is not the contracting party. The owners contend there is some confusion resulting from various copies of the contract containing different ABN's – none of which are that of KCA and that the contracting party is Krongold Constructions Pty Ltd. I have previously ruled<sup>1</sup> that this creates a degree of uncertainty/ambiguity and that it is appropriate to consider the extrinsic evidence in determining the identity of the builder.
- 3 The relevant ACN/ABN's are:
  - Krongold Constructions (Aust) Pty Ltd (KCA) (ABN 44 103 839 149) ('44')
  - KCA as trustee for the Krongold Constructions (Aust) Trust (KCA Trust') (ABN 15 254 937 154) ('15')
  - Krongold Constructions Pty Ltd (KC) (ACN 007 117 026) ('007')
  - KC as trustee for the KH Contractors Trust ('KHC Trust') (ABN 46 100 861 717) ('46')
- 4 By reference to the Historical Details Search included at PD<sup>2</sup> 94, Krongold Constructions has been a registered trading name of KCA since registration of KCA as a company in February 2003.
- 5 The owners' copy of the contract includes the ABN for KC as trustee for the KHC Trust (46). The architect's reference copy includes the ABN for KCA (44) and on the contractor's copy the ABN has been whited out and replaced with the ABN for KCA as trustee for the KCA Trust (15). The owners' and the architect's copies of the contract have been written in, what appears to be, the same hand but on the architect's copy it looks as though a 'P' has been altered to an 'A' at the beginning of 'Aust'. The architect's reference copy is not signed by the contractor. The ABN for KCA as trustee for the KCA Trust (15) has been written in on the contractor's copy.

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<sup>1</sup> *Krongold Constructions (Australia) Pty Ltd v Worsfold* [2008] VCAT 837

<sup>2</sup> Parties' documents

- 6 The owners' and the contractor's copies of the 'Introduction' page are signed by Wayne Krongold under the heading 'If the contractor is an individual or partnership' rather than under the heading 'If the contractor is a corporation'. Nothing turns on this for current purposes and my attention was not drawn to it by counsel for either party.
- 7 Ms Porter of counsel appeared on behalf of the applicant, and Mr Whitten of counsel appeared on behalf of the owners. The parties agreed that the witness statements which had been filed would be tendered but that there would be no cross examination. Although not formally tendered at the hearing, in light of counsels' confirmation that this was the agreed course I have had regard to the witness statements, although they have been of little assistance in determining the issue. I accept the 'evidence' of each of the witnesses, it not having been tested. I am unable to conclude, as suggested by counsel for the owners that Wayne Krongold's statement, that KCA did not have its own letterhead until 2006, is ridiculous.
- 8 My earlier ruling was made in circumstances where I was satisfied that there was a degree of uncertainty/ambiguity as to the identity of the builder because of the four different versions of the Introduction Page of the Contract, all naming the contractor as KCA but each with different ABN's. At that time I had not considered the extrinsic evidence. Having now heard and considered the very careful and helpful submissions made on behalf of each of the parties, the witness statements and the documents contained in the parties book of documents, I think the comments by Kirby J in *Royal Botanic Gardens & Domain Trust v South Sydney Council* (2002) 76 ALJR 436 at [105]: '*in the end, it is the written text that governs the rights of parties*' are apposite. The naming of KCA as the contractor is the most reliable source of determining the identity of the contracting party. The extrinsic evidence does not assist. If anything it only serves to confuse the issue – this applies equally to the pre-contractual and the post-contractual conduct/'evidence'. As will become apparent, there is no consistency in the use of KC, KCA or KC Constructions by what I will call the 'Krongold Group'. They appear to be used interchangeably.
- 9 It is helpful to set out a short chronology by way of background by reference to the chronology prepared by Mr Whitten, and the folder of parties' documents handed up at the commencement of the hearing.

### Chronology

6 October 1993	ATO approval of GST Group – representative member KC – ABN 46. Members of the group are KCA, Wave Properties Pty Ltd, and The Trustee for the W Krongold Trust.
7 February 2005	Application to Contractors Bonding Limited (CBL) for renewal of builders warranty insurance by KC as trustee for KHCTrust

14 April 2005	CBL issued certificate of eligibility to KC for 12 month period
20 September 2005	Tender by KC for Worsfold project
10 October 2005	KCA appointed trustee for the KCA Trust
12 October 2005	Building contract signed
13 October 2005	<p>Certificate of Insurance Application, under the heading 'Contractor Details'. KCA is noted as the business and trading names, and as the builder under the heading 'Construction Details'.</p> <p>The ABN for KC is included under ABN but there is a handwritten note "<i>ABN should be 44 103 839 149</i>" (KCA's ABN) and in the same hand a further notation: '<i>I Copy of Contract</i>'.</p> <p>I have no evidence before me as to when, how or by whom the handwritten notations were made.</p>
29 January 2007	Another Certificate of Insurance Application was completed, once again noting KCA as the business, trading and builder's name, but this time including the ABN of KCA as trustee for the KCA Trust.

- 10 Although it is rare that the post-contractual conduct of the parties will be admissible in interpreting the contract (*Collins Hill Group Oty Ltd v Trollope Silverwood & Beck Pty Ltd* [2002] VSCA 205, in this case, even if admissible, it does not assist in identifying the contracting party. However, for the sake of completeness I will discuss the various issues raised in relation to the pre-contract and post contract conduct of the parties.

### **The tender documents and quotations**

- 11 The letter accompanying the tender is on KC letterhead but does not include an ABN or ACN. The tender identifies the tenderer as Krongold Constructions and includes the ABN for KC as trustee for the KHC trust (46). A number of the quotations provided by potential trade contractors, apparently used in the preparation of the tender are addressed variously to KC and Krongold Constructions.
- 12 A number of the documents from trade contractors to which I was referred do not assist. For instance, some are addressed to KC and others simply to Krongold Constructions including the quotation from Hudson Frames & Truss and those for the electrical and plumbing specifications from Aloha Pools which was accompanied by an email addressed to campbell@krongoldgroup'.

## The contract documents

- 13 KCA asserts it is properly identified as the contractor on the 'Introduction' page of the contract and that it is the name of the contractor not the ABN which is important in identifying the contracting party, as every copy of the contract names KCA as the contractor.
- 14 It is suggested by KCA that the architect provided the parties' details for the contract and that although he recorded the correct name of the contracting party (KCA) he recorded the incorrect ABN (46). Mr Krongold states in his witness statement that when he became aware of this error in January 2006 he advised the architect of the correct ABN which was then recorded on the applicant's copy of the contract (presumably by Mr Krongold). Mr Krongold subsequently arranged for the Certificate of Warranty Insurance to be reissued with the 'correct ABN' (in January 2007). A copy was provided to Mr Worsfold on 31 January 2007.
- 15 The first seven (of twenty) progress claims were made by KC. From May 2006 they were issued to KCA. The progress claims were sent to the architect by the 'builder'. The architect certified the amount payable and the 'builder' then issued a Tax Invoice – for the first seven progress certificates the tax invoices were issued by KC, the rest by KCA. The progress certificates are in the name of KC but carry the ABN for KC as trustee for the KCH Trust (46). Payments by the owners were made variously to 'Krongold', 'Krongolds' and 'Krongold Constructions'.
- 16 Although from May 2006 progress claims were made by KCA the architect continued to certify payments and issue other documents in the name of KC – for instance at PD 264 the Notice of Practical Completion dated 3 September 2007 has KC as the Contractor. On 28 September 2007 Jo Greaves, Senior Project Manager for KCA emailed the architect instructing him to

‘...re-issue the last progress certificate and Practical Completion notice in the correct name (Krongold Constructions (Aust) Pty Ltd). I need this urgently and would really appreciate your prompt response. Email copy is acceptable with original to follow by mail. This should also be sent to the Worsfolds ASAP (mail and email). All dates to remain the same.’
- 17 The progress claims issued by KCA carry its ABN (44) not the ABN of KC as the trustee for the KCA Trust (15) (the ABN on the contractor's copy of the Information Page from the contract). I accept that the contractor is required to issue a Tax Invoice for the value of the progress certificate. In this instance KCA issued a tax invoice consistent with its progress claims. The architect may well have included the wrong name on the progress certificate when he certified that payment was due to 'the contractor'. When requested to do so by KCA, the architect re-issued the last progress certificate in the name of KCA.

- 18 I reject any suggestion that the issuing of the progress certificates by the architect in the name of KC, in respect of progress claims made by KCA, is conclusive, or even indicative, that KC is the contractor.

### **The 'insurance documents'**

- 19 The owners appear to have had access to the insurer's records and a limited number of the insurer's documents have been included in the PD folder. I have now had an opportunity to carefully consider the documents which have been provided and they do not assist in identifying the contracting party. Rather, they confuse matters even further.

### Certificate of Insurance Application

- 20 As seen from the chronology, the initial Certificate of Insurance Application for the owners' project was made in the name of KCA but with the ABN of KC as trustee for the KHC Trust (46) although there is a handwritten notation on the Certificate noting the correct ABN for KCA (44). The further Certificate of Insurance Application, seemingly faxed to the insurer on 29 January 2007, is in the name of KCA but includes the ABN for KCA as trustee for the KCA Trust (15).

### Certificates of Insurance

- 21 Both Certificates of Insurance for the owners' project identify Wayne Krongold as the builder and note his Practitioner No. The first Certificate of Insurance was issued on 13 October 2005 and is addressed to KC with its ACN (007). The 'second' Certificate of Insurance is addressed to KCA and includes KCA's ABN (44) although the ABN for KCA as trustee for the KCA Trust (15) is the ABN on the second Certificate of Insurance Application. Interestingly, this second Certificate has a facsimile stamp as having been faxed by Krongold Constructions on '29 Jan 2007', it would seem to Instrat (the insurer's Australian broker), yet on 24 January 2007 Wayne Krongold wrote to George Iliov of Instrat:

Certificate No 102951X should be for Company Krongold Constructions (Aust) P/L not Krongold Constructions P/L as per certificate of insurance. The ABN No. listed is 46 103 839 140 not 007 117 026 which is an ACN No. Please forward adjusted paper works ASAP.

### Instrat Report

- 22 The owners seek to rely on a report prepared by Instrat listing the 'Builders Warranty Current Client Policies' for 'Krongold Constructions Pty Ltd' which includes the owners' project. This report is at PD 203 and notes the ABN for KC as trustee for the KHC Trust (46), not the ACN for KC (007).

### Applications for Other Projects

- 23 The owners also rely on a number of other Certificates of Insurance Applications made in the name of KC in 2005. However, as can be seen

from the following table these are of limited assistance and demonstrate little, if any, consistency in the description of the company and use of the ABN. In at least two instances, although KC is identified as the trading name, the builder is identified as Krongold Constructions – the proprietor of that business name is KCA not KC.

PD	Business Name	Trading Name	Builders Name	Whose ACN/ABN
237	KC	KC	KC	KC
238	Krongold Constructions	KC	Krongold Constructions	KC as trustee for the KHC Trust
239	KC	Blank	KC	KC
240	KC	KC	Krongold Constructions	KC as trustee for the KHC Trust
241	KC	KC	KC	KC as trustee for the KHC Trust

- 24 There are a number of handwritten notations on the Certificate at PD 238, to which my attention was not drawn by counsel for either party, including the following signed note:

OK to issue Indemnity and Guarantee is on the Wave file 9.6.05.

I have no evidence before me as to whose handwriting or signature this is, but nevertheless note the reference to the ‘Wave file’ which I can only assume is a reference to Wave Properties Pty Ltd which as we have seen above is a member of the ‘GST Group’ as is KCA.

### Discussion

- 25 I have been provided with copies of the Certificates of Eligibility [for warranty insurance] issued by the insurer on 14 April 2005 and 14 April 2006 which are addressed to KC and identify the contractor as KC although there is no ACN or ABN. However, I do not have copies of the corresponding ‘Applications for Warranty Insurance. I do have a copy of the application for warranty insurance headed ‘Application for Renewal of Residential Builders Warranty Insurance, Victoria, Australia’ dated 14 March 2006 and the supporting documentation but I am unable to determine whether I have a copy of the corresponding Certificate of Eligibility. It may be that the one dated 14 April 2006, which confirms eligibility for 12 months from that date, was backdated by the insurer.
- 26 The application dated 14 March 2006 has ‘Krongold Constructions Pty Ltd ATF K.H. Contractors Trust’ as the trading name, and Krongold Constructions Pty Ltd as the ‘Company Name’ and includes the ABN for KC as trustee for the KHC Trust (46). On 6 June 2006 ‘*more financials and construction updates*’ were provided by Instrat to the insurer, having been provided to Instrat by the Krongold Group’s accountants. These were the financial reports for KCA, the W Krongold Trust and Marion Nominees PL ATF The LM Krongold Family Trust.

- 27 I do not know what financial reports initially accompanied the application for insurance, or the circumstances in which the additional documents were sought. However, they are indicative of the 'Group' accounts being considered by the insurer, not just those of KC.
- 28 Although the premium for the owners' insurance was paid by KC this is not in my view evidence that KC was the contractor. The owners have expressed concern as to whether they are covered by a relevant policy of warranty insurance, this is not a matter to be considered or determined in this proceedings. Any issues in relation to the insurance will be determined if and when a claim is made.

### **The building permit**

- 29 Although the building permit identifies KC as the builder I do not have a copy of the application for building permit or the supporting documentation.

### **The Bank Accounts**

- 30 The owners seek to rely on bank accounts which show that the initial payments were made into an ANZ account in the name of KC, and subsequently payments were made into Investec and ANZ accounts in the name of KCA. The first payment I am referred to as being paid into an Investec account in the name of KCA is recorded on a Statement dated 2 May 2006 as having been deposited on 27 April 2006. This is before progress claims and tax invoices started to appear on KCA letterhead. It seems from the handwritten notations on the 2 May 2006 statement that deposits were made by both KC and KCA into that account during April 2006.
- 31 It is apparent from Krongold's documents that this project was 'moved' from KC's to KCA's books in May 2006. However, this does not assist in identifying the parties to the contract. A group's accounting arrangements are rarely conclusive in determining parties rights and obligations under contracts.

### **Discussion**

- 32 For the reasons set out above I am satisfied that the naming of KCA in the contract is the best available evidence in determining the identity of the contracting party and thereby, the builder. The extrinsic evidence has been of little assistance, and rather than clarifying issues has only served to confuse them more. The comments by Wright, Walton and Hungerford JJ in *Manpac Industries Pty Ltd v Work Cover Authority of New South Wales* [2001] NSW IRComm 190; (2001) 106 IR 435 are apposite. At [29] they said:

The said maxim [falsa demonstratio non nocent] , literally meaning that a false description does not vitiate a document, has application in law to the effect that if a description of something is partly true and

partly false then, if the true part describes the subject with sufficient certainty, the false part will be ignored. In conceptual terms, it seems to us the maxim is apt to apply in the present case because the identification of the defendant was correct in the name but where an incorrect ACN was added ... We should not be seen as holding that the maxim *falsa demonstratio non nocet* is decisive of the issues as it is but a guide, to be utilised in appropriate circumstances, where a false description may sensibly be rectified if it is in the interests of justice to do so. (emphasis added)

- 33 In any event this application must be considered in light of the tribunal having previously determined '*it was satisfied the amount certified as due is due to the builder (whichever entity that properly is) and is unpaid*'. I cannot now look behind the certificate to determine if it was validly issued and I am satisfied the certified amount is due and payable to the applicant - KCA.
- 34 Although the contracts were prepared by Russell Barrett of Russell Barrett Pty Ltd, the architect appointed to administer the contract, Mr Barrett was not called to give evidence, and has not filed a witness statement. Mr Whitten said this was because Mr Barrett was reluctant to become involved in this proceeding. It seems to me that as the person who prepared the contracts and subsequently made the alterations when requested to do so, and issued the progress certificates to KC although the progress claims were made by KCA, his evidence could well have helped explain the anomalies. However, he was not called, and I have no alternative but to apply the rule in *Jones v Dunkel* (1959) 101 CLR 29 and draw a negative inference from the owners' failure to call him – whether by him attending voluntarily or in response to a subpoena.

### **Estoppel**

- 35 Even if I were persuaded that KC was the contracting party, and for the reasons set out above, I am not, I am satisfied that the owners are estopped from denying KCA is entitled to payment of the certified sum.
- 36 In January 2005 Mr Worsfold sent the following email to Wayne Krongold:
- Wayne, it is my intention that we pay amounts due to your company on a monthly basis and I intend to keep doing that...
- On another issue, I am confused about which company holds my contract and the status of that company and its financial viability as the contract we have together shows a different company name to the ACN number. If I could have that point clarified it would greatly assist.
- The last point, we never did receive the number of the warranty insurance.
- 37 On 31 January 2007 Wayne Krongold responded by email:

'The ACN: on the contract was incorrectly recorded by Russell's Office [Russell Barrett], this was changed and the details were sent to Russell's office early in January 2006. The current position of the company is very strong and I am happy to sit down and discuss with you at a later date the background behind ACN: 007 117 026[KC]'

38 Mr Worsfold responded by email the same day:

'thank you for the insurance certificate. I would still like to catch up with yourself, and Jon and Wayne to see if we can have a frank discussion and get resolutions to the outstanding issues between ourselves. I have sent Jon my list of issues and had requested yours. Also what is the ACN number we should have had by the contract'

39 Apart from raising the issue, Mr Worsfold does not appear to have pursued his concerns about the identity of the contracting party. Having received the email from Mr Krongold of 31 January 2006 and the second certificate of warranty insurance he continued to make monthly payments variously to 'Krongold' and 'Krongold Constructions' except for the final certified payment which is the subject of this application. It seems it was not until the parties fell into dispute towards the end of the project that this issue was formally raised.

### **Conclusion**

40 Being satisfied KCA is entitled to payment of the certified sum I will order that the sum of \$56,406.53, which was paid into the Domestic Builders' Fund pursuant to the tribunal's order of 11 October 2007, be paid to KCA. I will reserve the question of costs. As the parties agreed that the hearing of the application for payment of the certified sum should proceed before the hearing of the owners' counterclaim, I will order that the proceeding be listed for a directions hearing to consider the further conduct of the proceeding and any application for costs.

**DEPUTY PRESIDENT C. AIRD**