

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D576/2007

CATCHWORDS

Identity of builder – name in contract – ABN as an ‘identifier’

APPLICANT	Krongold Constructions (Australia) Pty Ltd
RESPONDENTS	Brian Worsfold, Helena Worsfold
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	5 May 2008
DATE OF RULING	5 May 2008
CITATION	Krongold Constructions (Australia) Pty Ltd v Worsfold (Domestic Building) [2008] VCAT 837

RULING

- 1 The applicant applies for payment of a sum certified by the architect under an ABIC SW-1 Simple Works Contract. There is a dispute between the parties as to the identity of the builder – whether it is the applicant, Krongold Constructions (Australia) Pty Ltd (‘KCA’) or Krongold Constructions Pty Ltd (‘KC’). Although KCA is named as the contractor, the ABN noted in the contract is KC’s.
- 2 In October 2007 the Tribunal found that the builder, *‘whichever entity that properly is’*, was entitled to payment and ordered payment of the certified sum into the Domestic Builders’ Fund. The parties have agreed that the right of the applicant in this case, KCA, to seek payment of that sum should be determined prior to the hearing of the respondent’s counterclaim. Essentially this means I am asked to determine the identity of the builder– is it KCA or is it KC? Witness statements have been filed, with a further witness statement having been filed by Mr Krongold of the applicant as late as last Friday – the business day before this hearing was due to commence.
- 3 At the commencement of the hearing today Ms Porter of Counsel, appearing on behalf of the applicant, said that having reviewed the material,

the applicant would not be seeking to rely on any evidence. The applicant would simply rely on the name of the contractor in the building contract – KCA – as being the relevant entity and thereby evidence of its entitlement to be paid the certified sum. I note in passing that this was not a conclusion the Tribunal was prepared to come to when the application for summary judgement was before it in October 2007.

- 4 The applicant submits that, in the absence of any ambiguity as to the identity of the contractor as noted on the contract, extrinsic evidence is not relevant or admissible.
- 5 Mr Whitten of Counsel appears on behalf of the respondents and submits that there is an ambiguity and uncertainty as to the identity of the contracting party and referred me to the three ABN's set out on the various copies of the Introduction Sheet – Contractor, a page of the contract. There is no provision for an ACN to be included but it does require an ABN. The applicant submits this is immaterial as the ABN is created and required for taxation purposes only - in particular the GST legislation.
- 6 The applicant submits that the ABN is not an 'identifier' and the only identification of the contractor is the name in the contract - KCA. The applicant relies on the naming of KCA as the contractor as being evidence that KCA is the contracting party. The applicant also relies on the Warranties by Contractor in Schedule 2 of the Special Conditions to Contract whereby the contractor named in the contract warrants that the ABN is correct. If there is a breach of that warranty, the applicant submits that whilst this might give the respondent a cause of action for breach of warranty, it is not a breach of the contract.
- 7 However, whilst a company is not accorded a separate legal entity by registration under *A New Tax System (Australian Business Number) Act 1999* ('the ABN Act'), the ABN Act makes it quite clear that before an ABN can be created, the person applying, if a company, must already be registered with an ACN. Generally, the ACN will be incorporated into the ABN. The practice of using the ABN as an identifier has been approved, and, one could say actively encouraged by the Australian Taxation Office. The following appears on the Australian Business Register website (which is also in the name of the Australian Government and the Australian Taxation Office) under 'Help':

WHAT IS THE RELATIONSHIP BETWEEN AN ACN/ARBN AND AN ABN?

When you register for an Australian business number (ABN), we will use your Australian Company Number (ACN) or Australian Registered Body Number (ARBN) to create your ABN. Your ABN is actually two check digits followed by the nine existing digits of your ACN or ARBN.

You can use your ABN in place of your ACN or ARBN provided:

- your ABN includes your ACN or ARBN in the last nine digits

- you quote your ABN in the same way as you quote your ACN or ARBN. For example, if you use your ACN and your legal name on your letterhead, you can use your ABN in place of your ACN (emphasis added).

8 I also note that other Government Instrumentalities allow for an ABN to be used in lieu of an ACN. For instance, the Registrar-General in NSW has directed:

Australian Company Number (ACN)

...

Under the *Corporations Act 2001* (Commonwealth) all Australian companies have a nine digit ACN issued by the Australian Securities and Investments Commission (ASIC). The ACN is used to ensure adequate identification of the company when transacting business.

A dealing or document drawn in the name of an Australian company, including building societies, credit unions and friendly societies, and except for those listed below, must state the ACN directly after the company name where it first appears on the dealing or document. The ACN is not required to be stated again after the first instance.

The ACN must appear in the company seal.

Note:

- the 11 digit ABN is acceptable in lieu of the ACN for a company.
Note: the ABN may appear in a company seal in lieu of the ACN providing the dealing or document was executed on or after 1.7.2003. ...(emphasis added)

9 In circumstances where this contract does not call for, and there is no space for an ACN, and considering the various copies of the Information Page bearing different ABN's I am satisfied that there is a degree of ambiguity and/or uncertainty as to the identity of the builder and that I should hear the extrinsic evidence.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant	Ms E. Porter of Counsel
For the Respondents	Mr M. Whitten of Counsel