

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D272/2007

CATCHWORDS

Domestic building contract – identity of builder

FIRST APPLICANT	Anton Bianco
SECOND APPLICANT	Sharon Bianco
RESPONDENT	Sharanton Pty Ltd (ACN 074 264 378)
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	19 September 2008
DATE OF ORDER & REASONS	19 September 2008
CITATION	Bianco v Sharanton Pty Ltd (Domestic Building) [2008] VCAT 2086

ORDER

The Tribunal finds and declares:

1. Sharanton Pty Ltd (ACN 074 264 378) is the builder under the contract for the construction of a residential dwelling dated 22 December 2005.

The Tribunal orders by consent of the Second Applicant and the Respondent:

1. The Second Applicant, Sharon Bianco, is removed as a party to the proceeding.
2. The counterclaim insofar as it concerns Sharon Bianco is struck out.

The Tribunal further orders

1. By 27 October 2008 the parties must file and serve Witness Statements. Each statement must consist of a narrative of the evidence to be given by each witness. (Witness Statements need not be filed and served for expert

witnesses unless further expert or lay evidence is to be called from a particular expert).

2. By 12 November 2008 the parties must file and serve Witness Statements in Reply (if any).
3. **This proceeding (and any counterclaim) is set down for hearing on 15 December 2008 commencing at 10.00 a.m. at 55 King Street, Melbourne with an estimated hearing time of 5 days. Costs may be ordered if the hearing is adjourned or delayed because of a failure to comply with directions.**
4. Liberty to apply until 4.00 p.m. on 8 December 2008.
5. If the parties consider that the time allocated for the hearing is insufficient they must advise the Principal Registrar in writing together with suggestions as to a revised hearing time.
6. Liberty to the parties to apply by consent for the proceeding to be referred to a further compulsory conference.
7. The Respondent's costs of and incidental to this hearing are costs in the cause.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For First Applicant	No appearance
For Second Applicant and Second Respondent to Counterclaim	Mr A. Beck-Godoy of Counsel
For Respondent	Mr A. Ritchie of Counsel
For Third Respondent to Counterclaim	No appearance

REASONS

- 1 On 22 December 2005 Mr Dinovic entered into a contract for the construction of a new home. On 2 May 2007 Anton Bianco, as applicant, lodged an application under cover of a letter dated 2 May 2007 on letterhead of Stone & Mortar Constructions which was signed by Anton Bianco, Director Sharanton Pty Ltd. On 3 September 2007 Mr Bianco's then solicitors wrote to the tribunal advising they had recently received instructions to act for Sharon Bianco and:

Sharon Bianco and Anton Bianco were partners in the business central to this dispute. As such, we request that she be added as an Applicant to these proceedings.

Subsequently, Mrs Bianco was joined with the Mr Dinovic's consent. Although a Business Name Search reveals that the proprietors of the business name 'Stone and Mortar Constructions' are Anton and Sharon Bianco, Mrs Bianco, in her affidavit sworn 12 September 2008 denies that she ever a partner in the business, and further states that she did not provide instructions to the applicants' former solicitors to join her as a party to this proceeding. Mrs Bianco further states that she was not aware that she had included as a joint owner of the registered business name until August 2007.

- 2 On 12 February 2008 the tribunal received notice that the applicants' former solicitors had ceased to act. On 29 April 2008, upon application by Mr Dinovic, Sharanton Pty Ltd was joined to the proceeding as third respondent to counterclaim. At the time the tribunal noted that *'the first named director [Anton Bianco] is the sole director of Sharanton Pty Ltd'*. .
- 3 Following an unsuccessful compulsory conference, the tribunal set aside for determination the following preliminary question:

The following question is set aside for preliminary hearing, namely what is the identity of the builder under the contract for construction of the home being one of the following:

- Anton Bianco
- Anton Bianco and Sharon Bianco
- Sharanton Pty Ltd
- Sharanton Pty Ltd and Anton Bianco
- Sharanton Pty Ltd and Anton Bianco and Sharon Bianco

Orders were also made for further discovery by Mr Bianco, and the filing and service of affidavit material by all parties. I have before me affidavits by Mr Dinovic and Mrs Bianco. Mr Bianco has filed a statutory declaration dated 10 September 2008 to which he exhibits various documents but in which he makes no statement. The parties were also ordered to file and serve Statements of Facts and Contentions. These were filed on behalf of

Mr Dinovic. Mrs Bianco's solicitor advised that she agreed with those filed on behalf of Mr Dinovic. A Statement of Facts and Contention was not received from Mr Bianco nor did he attend the preliminary hearing at which Mr Dinovic was represented by Mr Ritchie of Counsel, and Mrs Bianco was represented by Mr Beck-Godoy of Counsel.

- 4 Having heard from Mr Ritchie, and Mr Beck-Godoy, and considered the material filed by the parties, I find that the builder under the contracts is Sharanton Pty Ltd. 'Builder' is defined in Section A – Clause 1 of the contract as *'the person as stated in Item 2 of the Appendix and includes permitted assignees and transferees'*. In the owner's copy of the contract, 'Stone + Mortar Con/T.A. Sharanton Pty Ltd' is named in Item 2 of the Appendix as the builder. The ABN and the ACN in Item 2 are those of Sharanton Pty Ltd. In the builder's copy of the contract the builder is named as 'Stone + Mortar Cons' and is identified as a Registered Business Name (there is no such identification on the owner's copy). Once again Sharanton's ABN and ACN are included.
- 5 Sharanton Pty Ltd is the applicant on the 'Application for Certificate of [warranty] Insurance' to Lumley General Insurance Limited, and the Certificate issued by Lumley issued on 16 May 2005 relates to the work at the subject property to be carried out by Sharanton Pty Ltd t/as Stone & Mortar Constructions. The number of this Certificate is set out in Item 3 of the Appendix to the contract relating to warranty insurance.
- 6 Whilst it is clear from a Business Name search that Anton and Sharon Bianco are the proprietors of the business name 'Stone & Mortar Constructions' I am satisfied that, at least insofar as this contract is concerned, Sharanton Pty Ltd is the builder. Sharanton not Stone & Mortar Constructions is the legal entity and I am satisfied that Item 2 in the Appendix should have named the builder as 'Sharanton Pty Ltd trading as Stone & Mortar Constructions' It seems to me that any confusion or uncertainty has arisen because Anton Bianco was named as the applicant in the application lodged with the tribunal, albeit under cover of a letter signed by him as director of Sharanton.
- 7 Application was made on behalf of Mr Dinovic for costs of the appearance at today's preliminary hearing. Considering the history of this proceeding I am satisfied that the appropriate order is that those costs be costs in the cause. Mr Beck-Godoy advised that Mrs Bianco was prepared to bear her own costs.

DEPUTY PRESIDENT C. AIRD