

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D733/2007

**CATCHWORDS**

Recovery proceeding by insurer – jurisdiction – s59A of the *Domestic Building Contracts Act 1995*-  
indemnity by director and registered building practitioner – contract of insurance

<b>APPLICANT</b>	Lumley General Insurance Ltd (ACN 006 544 690)
<b>RESPONDENT</b>	Jeffrey Raymond King
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Deputy President C. Aird
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	17 July 2008
<b>DATE OF RULING</b>	20 August 2008
<b>CITATION</b>	Lumley General Insurance Ltd v King (Domestic Building) [2008] VCAT 1788

**RULING**

1. The Tribunal has jurisdiction to hear and determine the applicant's claim.

**DEPUTY PRESIDENT C. AIRD**

**APPEARANCES:**

For Applicant	Mr P. Coldham, Solicitor
For Respondent	Mr E. Riegler of Counsel

## REASONS

- 1 On 17 May 2006 Darjelyn Pty Ltd of which the respondent, Mr King, is the sole director, completed an ‘Application for Renewal of Eligibility: Home Warranty Insurance’ to Australian Home Warranty. Darjelyn is named as the company in Item 1.1, and ‘Jeff King’ as the registered building practitioner in Item 1.3. Item 13 is headed “*Undertaking to complete incomplete works, to rectify defects and to reimburse claim payments and claim costs*’ and, in part, provides:

The applicant(s) [which is not separately identified] acknowledge and agree that if granted eligibility for insurance via Australian Home Warranty ... and in the event of a complaint or a claim being made under a policy of insurance issued by the Insurer(s), as a result of approval of this eligibility application or pursuant to approval under any previous eligibility application(s) lodged, whether or not conditions such as those stated in this eligibility application were part of any previous eligibility application, in respect of any work the Contractor has done or has failed to do, the Contractor and if a company, its directors, or if a partnership, its partners and the named building practitioners agree that they are jointly and severally liable to:

...

- (b) Reimburse the Insurer(s) any amount paid by the Insurer(s) in respect of the claim howsoever arising, including costs and expenses incurred in dealing with the claim;

- 2 The following warning appears under the heading ‘*Execution*’:

Before signing this agreement, AHW strongly recommend that the Contract, and if a company, its directors or if a partnership, its partners and the named building practitioners, all seek legal advice, to ensure that all persons and entities are aware of their legal obligations.

I/We the undersigned declare that all the information contained herein and in any attachments is true and complete. I/We also declare that I/We have read the entire application and understand and agree to be bound by all of the authorisations given and undertakings made by me/us.

then:

The sole proprietor/all directors/all partners/all building practitioners must sign here. (emphasis added).

The application is signed by ‘Jeff King’.

- 3 On 16 May 2006 application was made for Builders Warranty Insurance for a two unit development to be built by Darjelyn in Doncaster East. Under the heading ‘*Builder & Contractor Details*’ Darjelyn was identified as the Contractor, and ‘Jeff King’ as the Building Practitioner. The following appears under the heading ‘*Declaration and Counter Indemnity by the Builder(s)*’:

We/I the builder who name(s) appear on this application acknowledge and agree that:

...

4. the builder and if a company, also each of its directors, or if a partnership, also each of its partners will reimburse the Insurer any and all monies paid by the Insurer, howsoever arising, including all assessment, legal and handling costs in relation to each and every claim made under the Policy.
5. ...
6. the builder and if a company, also each of its directors, or if a partnership, also each of its partners agree to be bound and comply with the terms of the policy issued pursuant to this application.

The application is signed by 'Jeff King'. (In each of the extracts above emphasis has been added).

- 4 Certificates of Insurance (one for each unit) were issued by Australian Home Warranty Pty Ltd, as agent for Reward Insurance Limited, on 29 June 2006 and identify Darjelyn as the builder.
- 5 Darjelyn was placed into administration on 4 May 2007. On 22 May 2007 the owners of the units made a claim under the Policies of Warranty Insurance which was accepted, and the insurer paid them \$86,286.20. On 22 October 2007, Australian International Insurance Limited (to which Reward had been transferred) lodged an application seeking recovery of that amount and reimbursement of legal expenses of \$4730. The applicant was substituted for Australian International Insurance Limited by order dated 4 March 2008.
- 6 At the commencement of the hearing Mr Riegler of Counsel, who appeared on behalf of the respondent, raised the question of the Tribunal's jurisdiction to hear and determine this application. Upon hearing the submissions I reserved my decision on the preliminary question. After a short adjournment the parties agreed that it would be convenient for the hearing to continue subject to any decision being reserved pending the ruling on jurisdiction.
- 7 For various reasons which I do not need to consider here, the hearing was adjourned part-heard to an administrative mention. Irrespective of the response to the administrative mention, it was agreed that it was desirable that the question of jurisdiction be determined.

### **The respondent's position**

- 8 The respondent submits that the applicant's claim is pursuant to a contract of indemnity and, in challenging the Tribunal's jurisdiction, relies on *Vero Insurance Limited v Witherow* [2004] VSC 272. Counsel submitted the facts in *Witherow* are analogous to those in this proceeding. In *Witherow*, the issuing of the relevant policy of warranty insurance was conditional upon Mr Witherow and his mother executing a deed of indemnity indemnifying the insurer in respect of any payments made under the policy.

A claim was made under the policy by the owners, which was accepted by the insurer and payment made to them. The insurer subsequently sought to recover the amount paid to the owners by sending Mr Witherow a letter of demand. Mr Witherow sought a review of the insurer's decision to demand payment under the deed of indemnity. On appeal, Hollingworth J determined the Tribunal did not have jurisdiction under s60 of the *Domestic Building Contracts Act 1995* to review the demand for payment, as it was not a decision arising from the required insurance. She said at [30]:

Even if one gives s60 [of the *Domestic Building Contracts Act 1995*] a broad construction, the reviewable decision must still be one with respect to something "arising from" required insurance. Had Witherow sought to challenge the insurance decision, there would clearly have been a dispute arising from required insurance. But the application seeks to challenge the demand by the insurer under the indemnity deed. The indemnity deed is a commercial agreement separate from the required insurance. Of course it has some connection with the required insurance. However, it is conceptually and contractually separate from the insurance. The indemnity deed is not, and does not "arise from" the required insurance (emphasis added).

### **The insurer's position**

- 9 Mr Coldham on behalf of the insurer, submitted that the insurer is entitled to seek recovery under the contract of insurance and that the undertaking by Mr King, as a director of Darjelyn, and as the registered building practitioner to reimburse the insurer in the event of an accepted claim is a term of the contract of insurance. He contends that it is not a '*commercial agreement separate from the required insurance*' as in *Witherow*.

### **Discussion**

- 10 Unlike *Witherow*, this is not an application by Mr King for a review of a demand by the insurer for payment under a deed of indemnity. Rather, it is an application by the insurer for reimbursement of monies paid to the owners under the relevant Policies of Warranty Insurance, by reference to the undertaking or 'agreement' contained in the 'Application for Renewal of Eligibility' and the "Application for Builder's Warranty Insurance". As noted above, the applicant is not separately identified in the applications for eligibility and warranty insurance. The contractor is identified as Darjelyn and both applications were signed by Mr King, who is identified in the applications as the registered building practitioner. Although some questions were raised during the hearing as to the enforceability of an undertaking or, what Counsel described as a contract of indemnity, these are not matters which are relevant in determining jurisdiction.
- 11 Here, I am satisfied that Darjelyn and Mr King both in his capacity as a director of Darjelyn, and as the registered building practitioner, are parties to the contract of insurance giving rise to the issuing of the relevant Policies of Warranty Insurance. The 'Application for Renewal of Eligibility' and

the ‘Applications for Builder’s Warranty Insurance’ set out the terms and conditions upon which warranty insurance will be provided to approved builders, and are terms of the contract of insurance. However described, the agreement to reimburse the insurer for any amounts paid out under the relevant Policies of Warranty Insurance formed part of the application for insurance and, is therefore a term of the contract of insurance. It is not a separate and distinct agreement as in *Witherow*.

12 Section 59A of the *DBC Act* provides:

- (1) The Tribunal has jurisdiction to hear and determine any dispute concerning an insurance claim concerning domestic building work or an insurer's decision on such a claim.
- (2) The Tribunal may make any order it considers fair to resolve a dispute referred to in subsection (1).
- (3) The Tribunal may hear and determine a dispute under this section on the application of—
  - (a) a party to the dispute; or
  - (b) the Director acting on behalf of one or more building owners who are parties to the dispute.

13 Having found that the agreement to reimburse the insurer was a term of the contract of insurance I am satisfied that the current proceeding arises out of the policies of insurance issued pursuant to the contract of insurance, and jurisdiction is enlivened under s59A.

14 Further, in his affidavit dated 30 May 2008, Mr King deposes to the circumstances surrounding the termination of the domestic building contract. He contends that the insurer did not take into account all relevant facts and circumstances when assessing the owners’ claim, and that the owners have been overpaid. This of itself, is clearly a dispute arising under the contract of insurance being a dispute as to the insurer’s performance of its contractual obligations. By necessity a consideration of the dispute will require an interpretation of the contract of insurance, and the terms of the policies. Accordingly, I am satisfied there is a dispute concerning an insurance claim for the purposes of s59A. which the Tribunal has jurisdiction to hear and determine.

15 I will reserve the question of costs but note that the hearing otherwise continued as scheduled and the proceeding has been adjourned to an administrative mention because of other unrelated issues identified during the course of the hearing.

**DEPUTY PRESIDENT C. AIRD**