
CREDIT ISSUES

WOODGATE & CO.

Chartered Accountants

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FALSE STATUTORY DECLARATIONS IN THE CONSTRUCTION INDUSTRY

Introduction

According to the Australian Bureau of Statistics during the year ended 30 June 2015, the construction industry accounted for 7% of Australia's gross domestic product. The Australian Securities and Investments Commission ("ASIC") statistics for the same year showed that the construction industry accounted for 17% of the country's corporate failures. Therefore, the number of construction companies that fail is significantly overrepresented, when compared to the construction industry's share of the economy. Further, ASIC also recorded that during the financial years ended 30 June 2011, 2012, 2013, 2014 and 2015, the construction industry has been either the first or second most frequently listed industry for corporate failure. One factor which has been identified as contributing to this trend of failures is poor management, of which the practice of issuing false statutory declarations in the industry is an example.

It has become routine practice in the construction industry that requests for payment are required to be submitted with a statutory declaration, stating that the contractor has paid all wages

due and payable to its employees and any payments due to its sub-contractors. Presumably, the declaration is supposed to act as a risk mitigation tool for principals/developers to protect them from pressure to pay twice for the same work performed, if the contractor becomes insolvent. Further, making the provision of a statutory declaration a prerequisite to receiving payment, also provides a system which encourages contractors to ensure that they have paid their sub-contractors and employees, as and when those debts become due and payable. Theoretically, this system should reduce the level of insolvencies in the construction industry, by improving cash flow for contractors and sub-contractors.

To achieve this objective, the requirement for statutory declarations relies on the contractor making bona fide and honest declarations. As noted in the 2012 Collins inquiry report into the construction industry in New South Wales ("Collins report"), anecdotally the provision of false or misleading statutory declarations is widespread across the construction industry. A surveillance campaign was recently concluded by ASIC over the activities of 40 contracting companies, on eight commercial projects in New South

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Wales, Victoria and Queensland. As at March 2015, ASIC had identified eight separate instances of subcontractors submitting false statutory declarations to head contractors. This provides some hard evidence to support the anecdotal evidence in the Collins report.

In December 2015 the Federal Senate Economics References Committee (“SERC”) released its report on insolvency in the Australian construction industry. In Chapter 9 of that report, the SERC discussed the problems it had identified with the various State and Territory Security of Payments Acts. It identified false statutory declarations as one such area. The SERC noted that “the prevalence of false statutory declarations is troubling”. Numerous witnesses gave evidence to the SERC that false statutory declarations were issued routinely and without apparent regard to the integrity of those documents. However, another issue identified by the SERC was the lack of any enforcement. The issuing of a false statutory declaration is a criminal offence. The investigation of such offences is the preserve of the State and Territory Police Services, for whom the investigation of corporate misconduct can be low on the list of priorities, compared to other criminal matters.

Security of Payments legislation

The SERC identified that “the requirement that contractors sign statutory declarations to the effect that all subcontractors have been paid when submitting a progress claim to the principal contractor is an important legislative provision”. Yet, only in New South Wales does the *Building and Construction Industry Security of Payments Act 1999* (NSW) provide

that a claimant is required, under Section 13, to include a statutory declaration with the payment claim. Submitting a payment summary without a declaration or with a false or misleading declaration is an offence under the Act which carries a maximum fine of \$22,000, or 3 months’ imprisonment, or both. Those amendments became effective in April 2014, following recommendations in the Collins report. Outside of New South Wales, the best commercial option available for affected parties may be legal proceedings against the contractor.

Some difficulties in practice

One recent case has highlighted the difficulties a principal or developer may encounter in taking that approach. The matter of *470 St Kilda Road Pty Ltd v Reed Construction Australia Pty Ltd* [2012] VSC 235 centred on a disputed payment claim issued in respect of the redevelopment of an office building into a residential apartment block. Reed Construction Australia Pty Ltd (“Reed”) had issued a payment claim, with a statutory declaration attached, to 470 St Kilda Road Pty Ltd (“St Kilda”) on 31 January 2012 for \$760,699. Whilst St Kilda did not dispute that the works claimed had been completed, it refused to pay Reed on the basis that Reed was insolvent and therefore the statutory declaration attached to the claim was false. Reed entered into voluntary administration on 15 June 2012. On 9 July 2012 the Administrators’ appointments were terminated by Order of the Supreme Court of New South Wales and the company wound up.

St Kilda argued that the provision of the false statutory declaration demonstrated that the payment claim

had not been made in good faith, as required under the contract, and was not bona fide. At an earlier adjudication, Reed had been successful and St Kilda had applied to the Supreme Court of Victoria to set aside the Adjudicator's decision.

St Kilda argued that the Court should adopt the approach taken by the New South Wales Court of Appeal in *FPM Constructions Pty Ltd v Council of the City of Blue Mountains* [2005] NSWCA 340 which found that in a situation where an untrue or false declaration was provided with a payment claim, that would be a sufficient reason to withhold payment of the claim. However, in this matter the Court declined to follow that approach and refused to overturn the Adjudicator's decision. Instead, the Court agreed with the Adjudicator's original decision that, even though St Kilda questioned the legitimacy of the statutory declaration, by submitting a statutory declaration with its payment claim, Reed had complied with the legal requirements in the construction contract. Therefore, the false declaration was an insufficient reason to withhold payment.

An alternative approach

St Kilda then commenced legal proceedings against Mr Glenn Robinson, Reed's former Chief Operating Officer ("COO"), for damages in the sum of \$1.426M arising from alleged misleading and deceptive conduct and negligence. As the COO, Mr Robinson was, from time to time, responsible for the swearing of statutory declarations in support of progress claims. He had been the signatory on the statutory declarations attached to Reed's payment claims to St Kilda. Mr Robinson then cross claimed against Chubb Insurance,

under the Directors and Officers' ("D&O") insurance policy held by Reed. Chubb Insurance denied liability under the policy, arguing that by signing the false statutory declarations Mr Robinson had engaged in actions which would exclude him from coverage under the policy. In *470 St Kilda Road v Robinson* [2013] FCA 1420 the question of whether Mr Robinson was excluded from the policy was determined, with the Federal Court of Australia finding that his actions were not excluded from coverage by the relevant D&O policy. That judgment was appealed by Chubb Insurance. On 26 February 2016 in *Chubb Insurance Company of Australia v Robinson* [2016] FCAFC 17 the Full Court of the Federal Court of Australia dismissed the Appeal, with costs. The proceedings against Mr Robinson for alleged misleading and deceptive conduct were dismissed on 10 June 2016, by consent. The costs of the three Reed cases, which ran for four days, have no doubt been considerable both in terms of legal fees but also in respect of the time of those former employees of Reed, who were required to give evidence.

Another example

In a recent liquidation conducted by Woodgate & Co., eight creditors, with claims totalling \$900,000, had submitted fraud complaints to the New South Wales Police alleging that false statutory declarations were submitted by the insolvent building and company to the principal/developer. Following our appointment, the investigation was discontinued by the NSW Police. ASIC also declined to investigate the allegations. No criminal charges were brought against the company's directors as a result of that investigation.

Conclusion

No-one wants to be the company director who signed false statutory declarations, when the Police do investigate. Signing false statutory declarations can result in significant reputation damage, even if it does not result in criminal prosecution. As the St Kilda cases show, false statutory declarations that become subject to civil proceedings can also result in

significant costs in terms of legal fees and time that could be expended more productively in other areas, not to mention having to cope with the stress involved. If solvency or cash flow issues are affecting your business so that signing a false statutory declaration seems like an attractive course of action, then do not hesitate to call Woodgate & Co. to discuss the other options.

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