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E-alert: Here’s to you, Mr Robinson: Damages awarded for misleading statutory declaration accompanying progress claim

By ,

A recent Federal Court of Australia decision is a reminder to individuals to take care when making statutory declarations for progress claims.[1]

Background

Reed Constructions Australia Pty Ltd (**Reed**) entered into a design and construction contract, with Reshape Developments Pty Ltd (**Reshape**). The contract allowed Reed to make progress claims. Each claim was to be supported by a statutory declaration confirming that Reed had paid to its subcontractors and suppliers.

In December 2011, Reed made progress claim number 15. The payment claim was supported by a statutory declaration from Reed’s Chief Operating Officer, Mr Robinson, which asserted that, to the best of Mr Robinson’s knowledge and belief and having made all reasonable enquiries:

- *All workmen, subcontractors and suppliers of material had been paid all monies payable to them under the terms of their respective agreements; and*
- *No disputes existed with workmen, subcontractors or suppliers.*

Subsequently, Reed issued an invoice to Reshape for $1,426,641.70 and Reshape paid that amount to Reed.

In July 2012 Reed had a liquidator appointed and it was revealed Reed had liabilities to unsecured creditors the amount of $132M.

The hearing

Reshape brought proceedings against Mr Robinson alleging Mr Robinson’s:

- representation that, to the best of his knowledge and belief and having made reasonable enquiries, all subcontractors and suppliers had been paid in full all monies owed to them, was misleading and deceptive; and
- that Mr Robinson’s representation also involved a negligent misstatement.

The evidence at the trial was that:

- Mr Robinson’s duty as Chief Operating Officer for Reed was to manage the cash flow of Reed.
- Mr Robinson did not have direct access to Reed’s financial software, but, he could and often would seek access from the accounts department regarding what payments were due.
- Mr Robinson knew of severe cash flow problems in August 2011 and that by October 2011 he knew there was a “looming financial crisis” for Reed.[2]

It was submitted by Reshape that if Reshape had of known of the actual state of affairs of Reed, Reshape would not

have certified the payment to Reed and withheld the payment under the contract until Reed had complied with its obligations to pay the subcontractors.[3]

Decision

O'Callaghan J found that at the time of making the statutory declaration Mr Robinson:

- knew of the dire cash flow issue;
- knew the subcontractors had not been paid in full and had threatened to cease work on the project; and
- had failed to make any enquiries relating to the financial software, which if he had, would have shown that all subcontractors and suppliers had not been paid on time.[4]

For these reasons His Honour accepted that Mr Robinson had engaged in misleading and deceptive conduct and that the statutory declaration had included the making of a negligent misstatement. Mr Robinson was ordered to pay damages of nearly $1.5m.

For completeness, it should be noted that His Honour rejected Mr Robinson's submission that Reed should be 50% liable for the damage caused to the Applicant. His Honour accepted that Reed did not mislead Mr Robinson because the statutory declaration was made by Mr Robinson personally and that the declaration was made based on Mr Robinson's own knowledge and belief.[5]

Take Home Points

Those making statutory declarations (upon which other parties will rely) should always ensure that the contents are true and correct.

If you are concerned that a statutory declaration in support of a progress claim contains a misrepresentation as to the true state of affairs in relation to a project, we recommend you obtain legal advice as a matter of urgency.

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[1] *470 St Kilda Road Pty Ltd v Robinson* [2017] FCA 597.

[2] Ibid, [62]-[66].

[3] Ibid, [90].

[4] Ibid, [70].

[5] Ibid, [92]-[97].

Should you wish to discuss any matters arising out of this article, please contact the author:

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