

## Article Information

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## Statutory declarations Do Matter

**Statutory declarations are often used in the building industry, although the truth of the statements in them is rarely tested. In the recent decision of 470 St Kilda Road Pty Ltd v Robinson [2017] FCA 597, the Federal Court of Australia imposed personal liability on a director for making a false statement in a statutory declaration accompanying a payment claim under the Building and Construction Industry Security of Payment Act. Megan Calder, Partner and Jeremy Chan, Lawyer discuss.**

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### Facts

470 St Kilda Road Pty Ltd (**Principal**) and Reed Constructions Pty Ltd (**Contractor**) entered into a design and construct contract to convert an office building into an apartment building known as “The Leopold”. In respect of each payment claim, the contract allowed the Principal to request that the Contractor provide documentary evidence showing that it had paid all money due and payable to workers and subcontractors.

For the duration of the works, Robinson was the Chief Operating Officer of Reed and, from payment claim 11 onwards, had the responsibility of making the statutory declarations on behalf of the Contractor. Robinson made a statutory declaration in respect of payment claim 15 containing the following statements (**Statutory Declaration**):

*“That to the best of my knowledge and belief having made all reasonable enquiries, at this date -*

*...*

*All sub-contractors or suppliers of materials who are or at any time have been engaged on the work under the Contract have been paid in full which have become payable to the sub-contractor under terms of the sub-contract or to the supplier of materials under the terms of agreement for supply.”*

A short time after the submission of payment claim 16, accompanied by a similar declaration, all of the Contractor’s subcontractors abandoned the site and the Contractor provided the Principal with a Creditor List, showing the moneys that were owed to subcontractors and suppliers. In response the Principal issued a contractual notice to show cause on the basis that the Contractor had knowingly provided a statutory declaration containing an untrue statement. The Principal terminated the contract a month later.

### Held

At trial, Robinson agreed that, as at the date of the Statutory Declaration, subcontractors and suppliers had not been paid all monies owed to them in full. On this basis, O’Callaghan J in delivering his judgment in *470 St Kilda Road Pty Ltd v Robinson* [2017] FCA 597 considered whether the Contractor and/or Robinson were liable under the *Australian Consumer Law* in relation to the misleading Statutory Declaration.

Robinson’s Reasonable Enquiries

In determining whether Robinson had made reasonable enquiries, O'Callaghan J noted that the test is "*what reasonable enquiries anyone in Mr Robinson's position ought to have made*". The following considerations were pertinent in applying this test:

1. the Contractor's financial predicament at the time before to the date of the statutory declaration;
2. Robinson's knowledge of the Contractor's financial predicament; and
3. what Robinson knew or ought to have known about whether all subcontractors and suppliers had indeed been paid in full.

During the course of the trial, it was found that, while he did not have access to the Contractor's cash flow software, Robinson could seek and sometimes had sought information from the software which would indicate when invoices fell due and if they were overdue at any given point in time. At the time of signing the Statutory Declaration, Robinson had failed to check these financial records, the Contractor's Monthly Project Progress Reports or individual invoices to obtain the necessary information. Robinson also conceded that he knew that the Contractor had experienced severe cash flow problems up to 4 months prior to the date of the Statutory Declaration.

Ultimately, it was held that the limited enquiries that Robinson had made were insufficient suggest that "all reasonable enquiries" had been made and, therefore, Robinson's false statement in the declaration was misleading and deceptive.

#### Reliance and Causation

In determining whether the Principal had suffered loss and damage due to Robinson's the misleading and deceptive conduct, O'Callaghan J considered that causation is established where disclosure of the true circumstances would have caused action different from that in fact taken. His Honour was satisfied that the Principal would have, as it did in respect of payment claim 16, withheld the entire amount of payment claim 15, issued a show cause notice and terminated the contract if it had known the Contractor's true financial position.

#### Proportionate Liability

O'Callaghan J rejected Robinson's apportioning of 50% of the liability to the Contractor, stating that there was no evidence to suggest that the Contractor had misled Robinson or caused him to make the Statutory Declaration. Further, the wording of the Statutory Declaration was clear that it was Robinson making the enquiries and that he was making the statements from his own knowledge and belief. Robinson's status as an employee alone did not justify the apportionment of liability.

#### General Comments

O'Callaghan J also provided general comments on statutory declarations and their standing. In this regard, his Honour held that a statutory declaration "*is a solemn promise, containing... an acknowledgement that it is true and correct and is made in the belief that making a false declaration will render the maker liable to the penalties of perjury.*" Further, his Honour stated that the "*declaration is an absolute statement to the effect that, to the knowledge of the declarant, all subcontractors and suppliers had been paid in full all moneys which had become payable.*"

#### Outcome

The Court ordered that Robinson was personally liable to the Principal for the sum of \$1,426,641.70, being the amount claimed and paid in respect of payment claim 15, plus interest.

#### **Practical Implications**

In the context of Security of Payment adjudications, it has previously been held that Adjudicators were not required to consider the truth of statutory declarations where the provision of a statutory declaration was a precondition to payment. Instead, the factual consideration is whether or not the declaration was actually provided.<sup>1</sup> The imposition of personal liability on Robinson under the *Australian Consumer Law*, however, means that those signing statutory declarations should always have knowledge of their contents and make reasonable enquiries where necessary.

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1. *J Hutchinson Pty Ltd v Glavcom Pty Ltd* [2016] NSWSC 126, [24]