



Non compliant supporting statement means payment claim is invalid

Case note: Mt Lewis Estate Pty Ltd v Metricon Homes Pty Ltd [2017] NSWSC 1121

In the recent decision of Mt Lewis Estate Pty Ltd v Metricon Homes Pty Ltd [2017] NSWSC 1121 delivered on 24 August 2017; the Supreme Court held that a payment claim was invalid because the accompanying supporting statement did not comply with the requirements of section 13(7) and section 13(9) of the Building and Construction Industry Security of Payment Act 1999 (“the Act”).

The judgment of the Court provides some helpful guidance on the requirements of a compliant supporting statement under the Act and more particularly how a supporting statement should be completed to ensure that the payment claim is not invalid.

WHAT THE CASE IS ABOUT

The decision concerned a challenge by a Respondent (**St Lewis**) to the validity of a determination made by an Adjudicator under the Act in favour of a Claimant (**Metricon**) on grounds that:

- the Payment Claim was not validly served because it was not accompanied by a supporting statement which complied with section 13(9) of the Act
- the determination was made outside the time limit prescribed by section 21(3)(a) of the Act.

WHAT HAPPENED?

On 16 December 2016 Metricon served a payment claim on Mt Lewis in the sum of \$3,316,584 by email with a series of supporting documents, including a supporting statement.

In its Adjudication Response, Mt Lewis argued that the payment claim was not served for the purposes of the Act as it was not accompanied by a compliant supporting statement.

The Adjudicator determined the Payment Claim in favour of Metricon and that St Lewis was responsible to pay the Adjudicator's fees in their entirety.

St Lewis commenced proceedings in the Supreme Court to challenge the determination of the Adjudicator.

FIRST GROUND – THE SUPPORTING STATEMENT

The declaration in the Supporting Statement was made on 13 December 2016.

The Payment Claim however, was identified as being dated 15 December 2016. The actual date of the Payment Claim was 16 December 2016.

Mt Lewis argued that:

- a) the Act and Regulations require the declaration to speak as at the time at which the Payment Claim is made, and
- b) the declaration cannot be made on a date earlier than the payment claim.

WHAT DID THE COURT SAY?

he Court agreed with Mt Lewis.

The Court said:

- The prescribed form of Supporting Statement requires the Payment Claim to be identified both by reference to the work it covers and by date.
- The Supporting Statement itself must be signed and the signature must be dated.
- Ss 13(7) and (9) of the Act and the prescribed form requires a declaration to relate to a payment claim, that is a document which exists at the time the declaration is made.

THE SECOND GROUND - DETERMINATION VOID FOR BEING OUT OF TIME

Although the Court determined that the Payment Claim was invalid due a non compliant supporting statement; the Court still dealt with the second ground and held that the determination was void because it was not made within the time prescribed by section 21(3) of the Act.

WHAT TO TAKE AWAY

1. The decision is a strong and clear caution to Head Contractors to make sure that the Supporting Statements accompanying payment claims to principals are correct.
2. The Court will not hesitate to find that a payment claim is invalid if it is not accompanied by a compliant supporting statement.
3. The times and frequency at which the Head Contractor's payment claims are made will be governed by the terms and conditions of the contract between the Head Contractor and the Principal.

But the paperwork does not end with the Supporting Statement.

4. Head Contractors have separate legal obligation under the Worker's Compensation Act, Payroll Tax Act and the Industrial Relations Act.
6. Head Contractors should continue to require their sub-contractors to provide the statements notwithstanding the additional obligation for the Head Contractor to provide supporting statements under the Act.
7. The two obligations stand alone and are not related.

8. In the separate decision of *470 St Kilda Road Pty Ltd v Robinson* [2017] FCA 597 the Federal Court held that the Chief Operating Officer of Reed Constructions was personally liable for approximately \$1.5m for falsely declaring in a statutory declaration that all workers, subcontractors and suppliers had been paid.

See our article [Personal Liability for false and misleading Statutory Declarations](#).

9. Whether a false supporting statement under the Act will also result in personal liability as in the case of *470 St Kilda Road Pty Ltd v Robinson* remains to be seen.

It is clear, however, that the Courts are applying pressure on Head Contractors to improve payment behaviour.

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