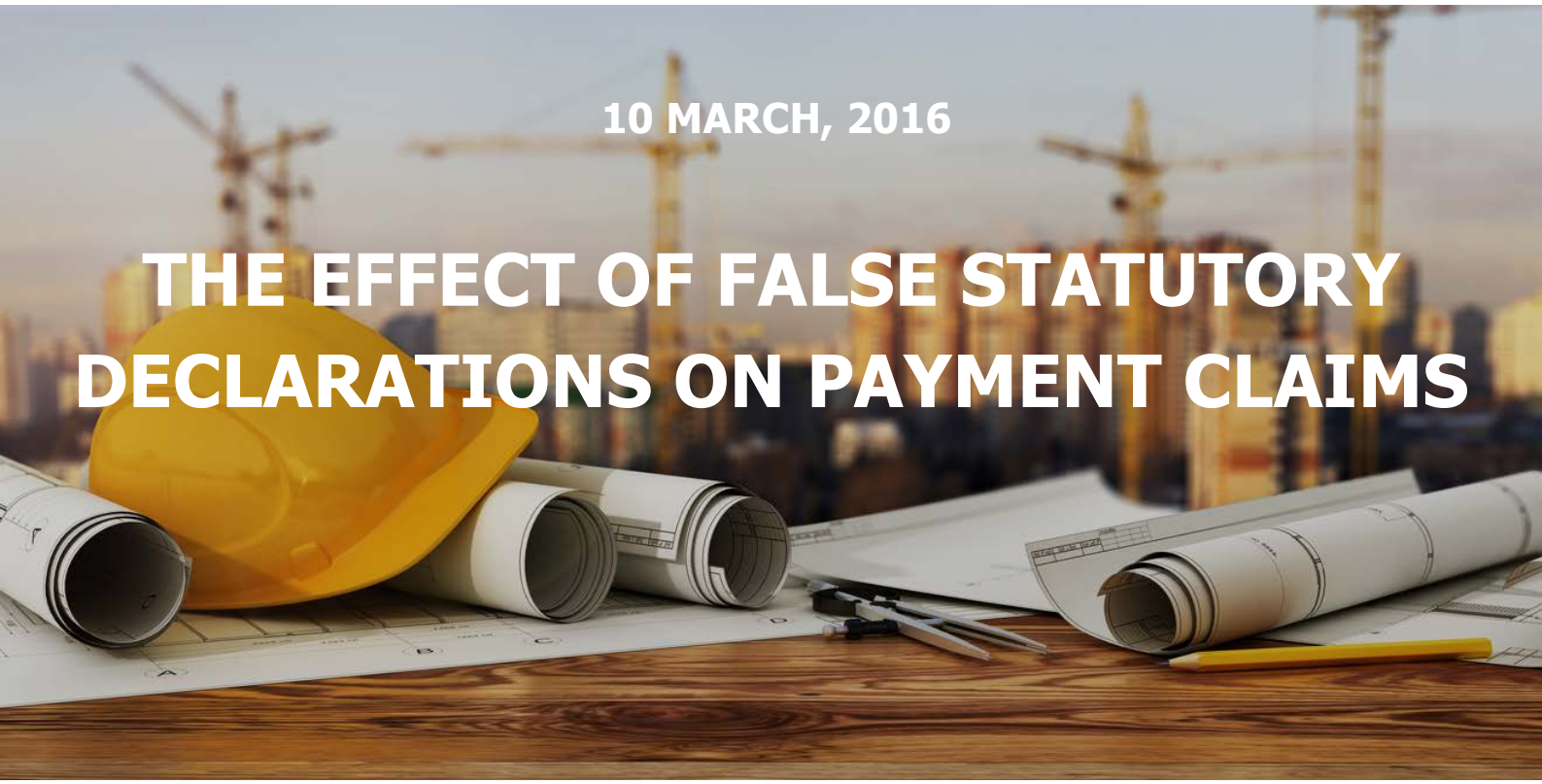


10 MARCH, 2016

THE EFFECT OF FALSE STATUTORY DECLARATIONS ON PAYMENT CLAIMS

INTRODUCTION

A recent case, *J Hutchinson Pty Ltd v Glavcon Pty Ltd*, has reinforced the notion that the Court will not allow parties to contract out of the Building and *Construction Industry Payments Act 2004* (QLD) ('the Act') by imposing additional preconditions to payment through contractual terms.

When looking at payment conditions under a construction contract the Courts will look to whether the terms enhance the intention of the SOP Act, that is, to ensure that those who perform construction work and services have cashflow to meet their financial obligation. Where a provision in a contract attempts to "contract out" of the provisions of the Act, the courts will not hesitate to find that provision void.

FACTS

In *J Hutchinson Pty Ltd v Glavcon Pty Ltd*, the subcontractor, Glavcon Pty Ltd ('Glavcon') was contracted to complete works at Bondi Pacific Development in Bondi, Sydney. The subcontract required a statutory declaration by the Director with each payment claim declaring that:

1. the subcontractor's suppliers had been paid all costs that had become due and payable

2. Payment of workers compensation insurance premiums had been met.

During the project, a payment claim (which was accompanied by a statutory declaration) was referred to adjudication and a determination was made in favour of Glavcon.

Sometime after the adjudication determination was issued, a workers

compensation insurer commenced proceedings against Glavcon for failing to pay compensation insurance premiums. This raised the issue of whether the statutory declaration that was accompanied with the payment claim that was referred to adjudication was in fact false. On this basis, J Hutchinson Pty Ltd commenced proceedings to have the adjudication determination declared void on the basis that the statutory declaration was fraudulent and thus invalidating the payment claim.

ISSUE BEFORE THE COURT

The issue before the New South Wales Supreme Court was whether the adjudication was obtained via fraud.

DECISION

The Court considered what the Director of Glavcon knew about the workers compensation payments and whether it was reasonable in the circumstances for the director to rely on the advice that was relayed to him. Based on the evidence, the Court decided that it was reasonable in those circumstances to rely upon the advice given to him because his focus was directed at sales, contracting, supervising the workforce and factory.

The Court found that there was insufficient evidence as to whether the director intentionally or recklessly executed the declaration, and thus could not make out an allegation of fraud.

Furthermore, the court stated that even if a director knowingly or recklessly falsely executed a statutory declaration, there would be no consequence due to Section 34 of the Act. Section 34 provides that, despite contrary provisions in a contract, there can be "no contracting out" of the requirements of the Act.

TAKE AWAY POINT

The lesson that we can learn from J Hutchinson Pty Ltd v Glavcon Pty Ltd – is that the Courts will render contractual provisions, which attempt to "contract out" of the requirements of the Security of Payment Act 1999 (NSW) void. The Courts will act to further the purpose of the Act, which is to ensure that contractors have a cash flow from the work they do and can meet their financial obligations.

For more information

For more information on issues relating to liquidate damages, contact our Principal Solicitor/ Director

Jessica Rippon

T + 0285919132
E: admin@constructionlegal.com.au

