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ON THE BEAM

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Managing Caution in an Organisation?

By Schon G Condon RFD

Today we are seeing increasing instances where the failure to apply a reasonable degree of caution can leave a business or organisation in a real world of hurt. Whether it is simply not maintaining software upgrades, opening emails that are clearly not right, or rushing into opportunities that should really be properly thought through.

In a modern world where the need often appears to be one of 'getting there first to make the biggest dollar regardless of the consequences' may well end up being the ruin of many organisations and/or careers. All this can be potentially avoided with the application of more abundant caution. The problem is however, that many people translate caution into other words that actually mean something completely different. Words such as indecision, posturing, vacillation, meandering, or worst of all, a lack of commitment!

Many people who seek to 'run their own agenda' will often use devices to remove any ability to consider caution or for that matter even reason in achieving their end; do I hear some element of doubt? Surely you've experienced the salesman that has said that the deal must be taken up now because the price will not be the same after they hang up; it's the same thing, I need you to make a decision without thought. I remember a long time ago a medical industry employer being offered syringes at half price, given the rate of use the offer was snapped up. Alas, the missing part of the offer was the quantity, when it became necessary to temporarily rent a warehouse to store the three semi-trailers of syringes they were no longer as much of a bargain!

Regrettably, these days there can often be a belief that near enough is good enough, however the problem with such attitudes is that the longer we apply it the further and further we can drift from what is either real or accurate. Reconciling a bank account must be done to the cent, it's just a simple fact, it either reconciles or it does not. Getting close could easily mean, as was a reality on at least one occasion, that the error was a million and one dollars one way, and a million dollars the other way, and buried beneath all of it was a thumping great, and long standing, fraud.

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Caution is a component of risk assessment, at least to the extent that one should determine that there is sufficient caution built into one's processes so as to reasonably minimise or control the risk levels of an organisation. Caution should not be hidden or miss-described, it is the component that is meant to allow you to properly say "is this really the correct action to take … now?"

There are an increasing number of very evident governance issues that are at least in part the result of Board's and/or Management's lack of caution to chase the idea that someone thought was the 'bees knees, the glory pot, the great victory' or whatever other title the real risk has been buried under. These days the damage can be quick, significant and in many cases permanent, all but for the mere exercise of a little caution.

So if your intent is to remain above water, then maintain a positive stance toward caution, believe in the fact that if it's too good to be true, then it is better bypassed. Consistent and constructive effort, good (or great) customer service, and proper management with genuine governance will produce substantive results and sustainability of just about any organisation regardless of the industry they are in.

Enjoy the read.

Richard Jones' Diary - The Latest Chapter and More Bad News

By Bob Cruickshanks

Mr Jones purchased his first Range Rover in 1976 and since then he has owned a series of them. He was always pleased with the performance of the vehicles until 2004 when he purchased a Range Rover costing $118,150 from Purnell Motors. Shortly after taking delivery of the vehicle, it developed numerous problems and was repaired by the dealer on a number of occasions but not to the satisfaction of Mr Jones.

In 2009, Mr Jones commenced Court proceedings against Purnell Motors and Jaguar Land Rover Australia Pty Ltd (Jaguar Land Rover), the local distributor of Range Rovers, making various claims in relation to his defective Range Rover.

Mr Jones settled his claim against Jaguar Land Rover. In 2010, the Court held that Mr Jones had suffered a loss of $100 which he had already received in a settlement from Jaguar Land Rover and for that reason, ordered a verdict in favour of Purnell Motors and ordered Mr Jones to pay 80% of Purnell Motors' costs. At that time, Mr Jones owned properties in Leichardt, Armidale and Dorrigo which were subject to mortgages. On 12 May 2010, Purnell Motors served Mr Jones with a Bill of Costs for $510,817.50 of which, 80% was $408,654.

On 13 July 2010, Mr Jones signed a transfer of his Armidale property in favour of Crest Australia Pty Ltd (Crest) - the Trustee of his superannuation fund for a purported consideration of $120,000. On 1 September 2010, Mr Jones signed a Transfer of his Dorrigo property to a friend for a purported consideration of $280,000.

On 20 September 2011, Purnell Motors entered Judgment for $282,686.93 being the assessed costs and commenced bankruptcy action against Mr Jones. On 5 October 2012, Mr Jones was made bankrupt by Court order and a registered trustee was appointed.

In June 2013, the trustee served Section 139ZQ Notices on to each of the transferees of the two properties asserting that the transfers were void against the trustee. The transferee of the Dorrigo property complied with Notice and transferred the property to the trustee but Crest did not do so.

In September 2014, Mr Jones now discharged from bankruptcy, commenced proceedings in the Federal Circuit Court seeking various orders against the trustee and others including relief concerning the Section 139ZQ notice issued to his friend in respect of the Dorrigo property.

The trustee responded with a cross claim against Mr Jones and Crest seeking declarations and orders that the transfers of the Armidale and Dorrigo properties were void against the trustee, plus an order that the trustee be granted possession of the Armidale property.

On 16 June 2017, the Federal Circuit found in favour of the trustee and declared that both of the property transfers were void against the trustee because it was clear that Mr Jones transferred the 2 properties shortly after he was served with the bill of costs for $408,654 and it was reasonable to expect that Purnell Motors would take bankruptcy action against him to recover its costs. The trustee was also granted a Writ of Possession for the Armidale property as a prelude to its sale.

So in hindsight, it has been a rather costly exercise for Mr Jones and the amount which it has cost him would have probably been enough to buy 3 Range Rovers from another dealer or perhaps a similar vehicle made by another manufacturer.

The Responsibilities That Come Along with Signing a Statutory Declaration

By Muna Laloo

A Statutory Declaration is a written statement which a person swears, affirms or declares to be true in the presence of an authorised witness.

In the case of *470 St Kilda Road Pty Ltd v Robinson*, the Federal Court found the declarant of a Statutory Declaration as to a contractor's payment of subcontractors, workmen and insurances, personally liable under the Australian Consumer Law for the amount of the payment claim.

At the relevant time, Glenn Roy Robinson was employed by Reed Constructions Australia Pty Ltd (Reed) – a company now in liquidation – as its Chief Operating Officer. Reed Construction was in the business of constructing medium to large buildings and other construction projects.

In or around October 2010, the applicant in the principal proceeding, 470 St Kilda Road Pty Ltd, and Reed entered into a written design and construct contract titled "Design and Construction Contract for Major Domestic Building Projects in Victoria AS4902-2000 As Amended" (the D&C Contract). It related to a construction project known as the 'Leopold Project' located at 470 St Kilda Road in Melbourne. Under the D&C Contract, 470 St Kilda Road Pty Ltd was the 'Principal' and Reed was the 'Contractor'. Reshape

Development Pty Ltd (Reshape) was appointed as the Principal's Representative under the said Contract. The Building and Construction Industry Security of Payments Act 2002 (Vic) applied to the D&C Contract. Under the terms of the D&C Contract:

(a) Reed was required to claim payments for work performed under the Contract on a progressive basis (progress claims); and

(b) 470 St Kilda Road Pty Ltd could request that Reed provide documentary evidence in support of progress claims. From time to time, Mr. Robinson signed Statutory Declarations in support of progress claims that included particulars of payments made to subcontractors.

In the course of preparing and issuing a payment claim by Reed to the Principal, Mr. Robinson swore a Statutory Declaration in relatively standard terms as to the payment of workers, subcontractors, suppliers and insurances. The Statutory Declaration included the statement that:

"...to the best of my knowledge and belief having made all reasonable enquiries… 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 all monies 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."

When Reed went into liquidation, like the other unsecured creditors, the Principal recovered nothing. The Principal successfully pursued a claim against Mr. Robinson that incorrect statements in the Statutory Declaration breached section 18 of the Australian Consumer Law - misleading or deceptive conduct. Justice O'Callaghan found that Mr. Robinson was personally liable for the amount of the payment made in respect of the Payment Claim, being AU$1.49 million.

One of the key matters discussed was whether Mr. Robinson had made all reasonable enquiries. On the presented evidence, Justice O'Callaghan found that he had not done so. It was found that Mr. Robinson:

- Did have knowledge of Reed's cash flow problems, that it had recently failed to pay subcontractors and suppliers in full, and critical path subcontractors had recently threatened to cease supply to the project;

- Failed to make any up to date enquiries of anyone who had access to Reed's accounting software, to look at any actual invoices or recent monthly reports and/or make enquiries of the actual trading terms of all relevant subcontractors and suppliers.

Another key disputed issue was whether the Statutory Declaration was an 'absolute statement' that all subcontractors and suppliers had been paid. The Court found that it was, and because there were unpaid debts due and payable to subcontractors and suppliers at the time it was made, found that the Statutory Declaration was materially deceptive.

It validates that, given the exposure to claims under the Australian Consumer Law, declarants can no longer take statutory declarations required to accompany payment claims for granted.

Recent NSW Court of Appeal Decision – Unfair Preferences Will Come Back to Bite You!

By Jessica Lin

As those in the insolvency industry know, or ought to know, unfair preferences are payments or transfers of assets that give a creditor an advantage over other creditors.

Pursuant to section 588FA of the Corporations Act ("the Act"), the normal procedure for a Liquidator to successfully prove a preference claim is as follows:

- The company (in Liquidation) and an unsecured creditor of said company were parties to the transaction;

- The transaction took place during the relation-back period:

  (a) 6 months for non-related parties; or
  (b) 4 years for related parties; or
  (c) 10 years for any evidence of "attempt to defeat, delay or interfere" with the rights of creditors;

- The company was insolvent at the time of the transaction or the transaction caused the company to become insolvent;

- The creditor received a better return than it would have if the company went into Liquidation; and

- The creditor knew, suspected or ought to have known that the company was insolvent when it received the payment.

If the above conditions are successfully proven by the Liquidator, the Liquidator can request the repayment of the unfair preference and the creditor must prove their debt in the Liquidation.

Assuming the conditions set out in Section 588FA of the Act are satisfied, the Liquidator has a reasonable chance of making an application to the court to recover ("claw back" pursuant to sections 588FA and 588FB of the Act) the monies. However, a creditor may be able to defend itself against an unfair preference claim.

Furthermore, the Liquidator has a limited period to claw back unfair preference claims. Pursuant to Section 588FF of the Act, the time period during which a Liquidator can bring a voidable transaction claim to a court is three years after the relation-back day, or 12 months after the date of appointment of the Liquidator, whichever is later. The applicable time limit can only be extended by a court order made under Section 588FF (3)(b) of the Act and which is applied for before the expiry of the applicable time period.

However, the NSW Court of Appeal has recently handed down a judgement concerning the limitation period for a Liquidator to bring a claim for preference payments.

In the case of *Sydney Recycling Park Pty Ltd v Cardinal Group Ltd (in Liquidation) [2016] NSWCA 329*, the Liquidators brought preference payment recovery proceedings against Sydney Recycling Park. The proceedings were filed within the statutory time limit pursuant to Section 588FF(3)(a) of the Act.

After the applicable statutory time limit, the Liquidators sought leave to amend the claim which included additional alleged preference payments. In the Court's opinion, the alleged preference payments arose from the same or substantially the same facts as those in the original Statement of Claim. The Liquidators stated that the additional alleged preference payments were absent from their original Statement of Claim by reason of further investigations, evidence and discovery.

The case upholds the authority that in specific circumstances, a Liquidator can add additional preference payments that fall outside the applicable time limit to a claim to an existing proceeding.

The above decision appears to be a prudent one. In the past, if additional payments are uncovered after the time limit stipulated in Section 588FF of the Act has expired, one consequence would be that the Liquidator could not amend their claim to include the additional alleged preference payments. This case is a positive decision for Liquidators who uncover additional preference payments after the time limit for filing the initial claim for preference payment recovery has lapsed.

Condon Update

The Condon Forum ("It's Accrual World - Tax Still Hasn't Gone Away") was held on 31 May 2017. Michael Collett (Tax Principal, Nexia Australia), Brett Young (Barrister, State Chambers) and Schon Condon (Managing Principal, Condon Associates Group) shared their experience and professional knowledge on the latest in taxation.

Thank you to Joel Brooks from Chef's Special Catering for preparing the delicious food on the night - we all enjoyed it. If you would like to get in contact with Joel please email him at info@cscatering.com.au or call him on 0413 067 768.

Upcoming Events

14 August 2017	-	Parramatta Accountants Discussion Group
7 September 2017	-	Annual Charity Golf Day

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