

TELLING THE TRUTH IS STILL THE BEST POLICY: LAING O'ROURKE AUSTRALIA CONSTRUCTION PTY LTD V SAMSUNG C&T CORPORATION

The most recent instalment of the ongoing dispute between Laing O'Rourke Australian Construction Pty Ltd (LORAC) and Samsung C&T Corporation (Samsung)¹ is of interest to lawyers in the construction industry as it shows that a court will need very convincing evidence before stopping a party from making a demand on a performance bond on the basis that the demand was not, in the language of the relevant contract, "bona fide" or in good faith.

Relevant facts

The action arose out of the troubled Roy Hill project. LORAC was engaged by Samsung in 2014 under a modified form of the standard form AS4902² (subcontract) to construct structural steel and associated mechanical piping, electrical

and instrumentation works in the port landside package. The subcontract sum was c AUS\$200 million. LORAC was required to provide security for an amount equal to 10% of the subcontract sum. It duly did so.³

Less than a year later Samsung terminated the subcontract with LORAC for convenience⁴. In the aftermath of the termination LORAC and Samsung entered into an interim deed (interim deed) which imposed certain rights and obligations on the parties following the termination. Amongst other things, the interim deed provided for the performance securities under the subcontract to be replaced and reduced in value. LORAC complied with that obligation. The replacement security was stated to expire on 20 February 2016⁵.

1 *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASC 49 (17 February 2016) (*LORAC v Samsung*).

2 *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2015] WASC 237 (3 July 2015) [37].

3 *Supra* 1, at [3]-[4].

4 *Ibid*, [5].

5 *Ibid*, [6]-[7].



It is no secret that LORAC and Samsung are well advanced down the path to dispute⁶. During 2015 the parties engaged in some preliminary skirmishes in the Supreme Court of Western Australia⁷. Summed up briefly LORAC claims Samsung owes it over AUS\$90 million while Samsung claims LORAC owes it AUS\$55 million⁸. On any view it is a significant dispute and to prosecute it properly will place substantial financial pressures on the parties.

On 22 January 2016 Samsung gave LORAC notice, as it was required under the clause 7.3 of the interim deed⁹, that it intended to call upon the replacement security¹⁰. Three days later LORAC commenced proceedings seeking an injunction to stop Samsung from taking that step¹¹.

The issues

LORAC raised a number of grounds in support of its argument for the injunction. The most interesting of these was LORAC's argument that the conditions in which a call on the replacement security could be made had not been satisfied.

The court did not accept that contention, nor any of the other, more spurious, grounds advanced by LORAC¹², and accordingly declined to grant the injunction.

Samsung's right to call on the replacement security was governed by clauses in both the subcontract and the interim deed, relevantly, clause 5.2 of the subcontract

stated that Samsung could call on the replacement security where it "*considers, acting bona fide, that it is or will be entitled to recover the relevant amount from [LORAC] under or in respect of the subcontract*"¹³. The interim deed provided (at clause 7.3) that Samsung was obliged to give LORAC 48 hours notice of an intention to call on the replacement security¹⁴.

Tottle J considered that the effect of clause 5.2 was to create a negative stipulation on Samsung's right to call on the replacement security, namely that Samsung must "*consider, acting bona fide, that it is or will be entitled to recover the amount sought to be realised from LORAC, in this instance, AUS\$7.5 million.*"¹⁵

LORAC contended there were ten matters which, when considered together, gave rise to the inference that Samsung were not acting bona fide. However, the general thrust of LORAC's submission was that:

1. The valuations of the various claims and counter-claims had changed, in some cases dramatically, as the dispute matured.
2. The basis upon which Samsung had made its assessments could not easily be divined from the correspondence¹⁶.

LORAC also attacked Samsung's evidence arguing it was "*vague and convulsory*"¹⁷ and invited the court to draw an adverse inference¹⁸ against Samsung because Samsung didn't call evidence of the bona fides of its

claims from the subcontract manager responsible for the LORAC subcontract but, instead, relied on evidence from a commercial manager "*up the line*" from the subcontract manager¹⁹.

Despite these attacks, Tottle J was not persuaded that LORAC had "*established to the requisite standard that Samsung [had] not acted bona fide.*"²⁰ He examined the evidence in detail in order to come to that conclusion²¹. However, in coming to that judgment made two general observations which are of broader application:

[First,] a provisional conclusion as to a lack of bona fides can only be made on the basis of persuasive evidence. In assessing the allegation of a breach of bona fides, a court will look for undisputed facts and facts not surrounded by controversy from which to draw inferences. In this case, many of the matters relied upon by LORAC are so bound up in the controversies involved in the underlying dispute that it is difficult to draw the inference of a lack of bona fides for which LORAC contends.

[Second,] the effect of granting the relief sought by LORAC will be to deprive Samsung of the benefit of the bargain for which it contracted... The injunction will not preserve the status quo but will change it. ... LORAC must demonstrate a prima facie case of sufficient strength to engender confidence that it would succeed if the matter went to trial. LORAC has raised a serious question but its prima

6 Ibid, [10].

7 Supra, 2 and *Samsung C&T Corporation v Laing O'Rourke Australia Construction Pty Ltd* [2015] WASC 83 (9 March 2015).

8 Supra 1, at [10].

9 Ibid, [107].

10 Ibid, [11].

11 Ibid, [14].

12 Ibid, [17], [50]-[54] [55]-[56].

13 Ibid, [105].

14 Ibid, [107].

15 Ibid, [108].

16 Ibid, [123].

17 Ibid, [124].

18 Relying on *Jones v Dunkel* (1959) 101 CLR 298.

19 Supra 17.

20 Ibid, [133].

21 Ibid, [136]-[148].



facie case is not sufficiently strong. Put another way, LORAC's case is not sufficiently strong to tilt the balance of the risk of an injustice in its favour²².

Lessons for construction industry participants

This decision is an interlocutory application meaning that it is attended by the usual procedural limitations of such decisions²³. However, that is also the reason why it is interesting.

The inclusion of the negative stipulation in clause 5.2 is a departure from the standard form. The inclusion of the term "bona fide" was likely intended to be a means of giving LORAC comfort about the circumstances in which its security would be at risk. It is not unusual for contractors to seek this sort of protection when negotiating these types of clauses.

Nonetheless, this decision appears to stand for the proposition that it will usually be straightforward for a construction principal to establish that they have acted on a bona fide basis. That is particularly so given that the issue will usually only arise in an interlocutory setting, such as an injunction application, where, as Tottle J stated, there are procedural limitations and evidence is not usually tested by cross examination.

An initial view of the decision might be that the requirement for demands on security to be made on a bona fides basis offers no protection to contractors given the relative ease by



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which Samsung appeared to jump the hurdle.

However, there is another way of looking at the case.

When coupled with a notification period, as was the case here, the inclusion of a requirement that the principal to act reasonably (or bona fides) will, in most circumstances, permit a contractor to argue that they are not. Thus, there will almost always be an opportunity for a contractor to bring an injunction application and thereby force the principal to prove its bona fides.

While that application might not always succeed, indeed, this decision suggests it will usually fail if that is the only argument, the mere ability to legitimately make the argument

will usually have an added collateral benefit of buying the parties more time to continue to negotiate. It might even give a contractor who was in a weak negotiating position a stronger position while the principal diverts resources into defending the injunction application.

In parallel, the time taken for the application to make its way through the court process might give the contractor time to negotiate with its bankers so that even if a call on the security is made there are alternative financing arrangements in place to soften the blow of such a call.

So, while it might be easy for a principal to establish its bona fides, forcing it to do so could just be a lifesaver for the contractor!

²² Ibid, [134]--[135].

²³ Ibid, [134].



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