

SUPREME COURT OF QUEENSLAND

CITATION: *Santos Limited v BNP Paribas* [2019] QCA 11

PARTIES: **SANTOS LIMITED**
ABN 80 007 550 923
(appellant)
v
BNP PARIBAS
ABN 23 000 000 117
(respondent)

FILE NO/S: Appeal No 6278 of 2018
SC No 11743 of 2017

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane – [2018] QSC 105 (Jackson J)

DELIVERED ON: 5 February 2019

DELIVERED AT: Brisbane

HEARING DATE: 19 September 2018

JUDGES: Holmes CJ and Fraser and Morrison JJA

ORDER: **The appeal is dismissed, with costs.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR DEFENDANT OR RESPONDENT: STAY OR DISMISSAL OF PROCEEDINGS – where the appellant appeals against the primary judge’s dismissal of its application for summary judgment on its claim for payment of a sum said to be due and owing under a performance security given by the respondent – where the primary judge refused summary judgment for the appellant because he found that the appellant had no real prospect of succeeding on its claim and there was no need for a trial – whether the finding was correctly made

INTERPRETATION – GENERAL RULES OF CONSTRUCTION OF INSTRUMENTS – COMMERCIAL AND BUSINESS TRANSACTIONS – PARTICULAR TRANSACTIONS – BANKING AND FINANCE – INSTRUMENTS – MISCELLANEOUS – where the respondent issued to the appellant a “bank guarantee” in the nature of an unconditional bond to pay money on demand up to a stated maximum amount – where bond requires demand to be “purporting to be signed by an authorised

representative” of plaintiff – where bond requires demand to be in form of letter annexed to demand which states under signature line “authorised signatory of Santos Limited” – where letter of demand stated above signature “Santos Limited – GLNG Upstream Project” and under signature a name and the title “General Manager Development” – where principle of strict compliance to be applied intelligently, not mechanically – whether demand was “purporting to be signed by an authorised representative” – whether demand complied with bond

Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451; [2004] HCA 35, referenced
Santos Limited v BNP Paribas [2018] QSC 105, referenced
Simic v New South Wales Land and Housing Corporation (2016) 260 CLR 85; [2016] HCA 47, cited

COUNSEL: B Walker SC, with C Schneider, for the appellant
 P Braham SC, with J Hutton, for the respondent

SOLICITORS: Corrs Chambers Westgarth for the appellant
 Deutsch Miller for the respondent

- [1] **HOLMES CJ:** The appellant, Santos Limited, appeals against an order dismissing its application for summary judgment on a claim for payment of the amount of \$55,000,000, said to be due and owing under a performance security given by the respondent, BNP Paribas. The performance security, in the form of a bank guarantee, was issued to secure the performance of a contractor, Fluor Australia Pty Ltd, in providing engineering and design services to Santos Limited’s coal seam gas extraction project.

The performance security and the demand

- [2] The performance security contained the following clause setting out the circumstance in which BNP Paribas was liable to pay the security amount to Santos Limited:

“(c) Should the Financial Institution receive a notice in writing in the form of the letter attached to this Bank Guarantee (amended as applicable), purporting to be signed by an authorised representative of the Beneficiary, that the Beneficiary desires payment to be made of any part or the whole of the Security Amount, the Financial Institution must make that payment to the Beneficiary immediately without reference to the Contractor and notwithstanding any notice given by the Contractor not to pay same.”

BNP Paribas was the “Financial Institution”, Santos Limited the “Beneficiary”.

- [3] The draft letter attached to the performance security was in the following terms:
 Annex “A”
 “(insert Santos Limited letterhead)
 To:
 BNP Paribas

60 Castlereagh Street
 Sydney NSW 2000

date:

Attention: Head of Operations

Dear Sir/Madam

Contractor – Bank Guarantee

We refer to the Bank Guarantee issued by you in our favour and dated 30th January, 2012 in relation to the EPC Contract.

We hereby demand payment under the Bank Guarantee of (insert amount).

Please make payment of this sum to the account of (insert) at (account number).

Capitalised words and expressions used in this demand shall have the same meanings as are ascribed to them in the Bank Guarantee.

Yours faithfully

.....
 Authorised signatory of
 Santos Limited”

- [4] The performance security issued on 30 January 2012 in an amount just short of \$75,000,000, and was expressed to be in force until 30 June 2013. It was twice amended: on the first occasion, to extend its term to 31 December 2013, and on the second (on 8 January 2014), to reduce its value to \$55,000,000 and to vary its term to 31 December 2015. BNP Paribas contended that the latter date was inserted in error; the expiry date Fluor had instructed it to insert was 31 December 2014.
- [5] Santos Limited delivered a letter of demand to BNP Paribas in December 2015. The letter, dated 18 December 2015, bore the letterhead:

“**Santos**

GLNG Project”

and was addressed to BNP Paribas at the address set out in the draft letter. The remainder of the letter (omitting account details) was as follows:

“Dear Sir or Madam,

Performance Payment Security – Bank Guarantee No 120054 – Gladstone LNG Upstream Project EPC Contract

We refer to the above noted Bank Guarantee (copy appended) issued by you in our favour dated 8 January 2014 and with an expiry date of 31 December 2015 (Amendment No. 2).

We hereby demand payment under the Bank Guarantee of Australian Dollars Fifty-five Million only (AUD 55,000,000.00).

Please make payment of this sum to the account of Santos Limited per the details below:
[the account details were set out].

Capitalised words and expressions used in this demand shall have the same meanings as are ascribed to them in the Bank Guarantee.

Yours sincerely,

Santos Limited – GLNG Upstream Project

[a handwritten signature appeared]

Rob Simpson

General Manager Development”

A copy of the performance security, together with the amending documents, was delivered with the letter of demand. BNP Paribas refused to meet the demand, on the bases that it was defective because its maker did not purport to be authorised to make it and it was not made on Santos Limited letterhead. It asserted that it would seek rectification in relation to the term of the performance security.

The applications for summary judgment

- [6] At first instance, Santos Limited and BNP Paribas sought summary judgment against each other, Santos Limited on the basis that its demand met the requirements of the performance security and BNP Paribas on the basis that it did not. BNP Paribas also resisted Santos Limited’s summary judgment application, contending that it had defences: that the preconditions for Santos Limited’s demand had not been met; that it was entitled to seek rectification of the instrument by reason of unilateral mistake, known to Santos Limited, as to the expiry date of the performance security; and that Santos Limited’s conduct in making the demand was unconscionable. It also took issue with Santos Limited’s claim for pre-judgment interest.

The judgment

- [7] The learned primary judge granted BNP Paribas’ application for summary judgment. His Honour noted the commercial context of a performance security: that it was to operate as a bond by a financial institution that it would unconditionally pay the promised amount, usually without reference to the indemnifying party, immediately upon a complying demand. In particular, his Honour adverted to the considerations and principles applicable to demands on performance securities which the High Court set out in *Simic v New South Wales Land and Housing Corporation*.¹ The plurality observed that the issuer of a security of the kind was not required to concern itself with the terms of the underlying contract or whether the contractor had performed its obligations, its sole concern being to provide security as it was contracted to do, and to determine whether the specified event triggering its obligation to pay had arisen. Securities of the kind were treated as being “as good as cash”.² The principle of strict compliance, which was “fundamental to the efficacy and dependability” of such instruments, necessitated that an issuer of a security should only accept documents which complied strictly with the requirements stipulated in the instrument.³ The principle

¹ (2016) 260 CLR 85. I have omitted references to the cases cited in *Simic* for the propositions which follow.

² (2016) 260 CLR 85 at [88].

³ (2016) 260 CLR 85 at [97].

applied after the construction of the instrument, and rather than being a “rigid rule” was to be “applied intelligently, not mechanically.”⁴

- [8] Mr Simpson’s signature, with the description of his position, did not, the primary judge found, amount to a representation that he was an authorised representative or authorised signatory of Santos Limited. The position description said nothing about Mr Simpson’s authority. Construing the performance security “intelligently, not mechanically”, his Honour concluded that in omitting any statement that the letter’s signatory was the authorised representative or the authorised signatory of Santos Limited, the letter of demand failed to comply with the requirements of the performance security. The failure to include such a statement “was not a mere mechanical omission”.⁵ Accordingly, his Honour gave judgment for BNP Paribas on Santos Limited’s claim.

The grounds of appeal

- [9] The appeal grounds were that the primary judge fell into error in finding that Mr Simpson’s signature, coupled with his position description, did not amount to the necessary representation of his authority, or, alternatively, that in considering that question his Honour had erred in not considering the demand as a whole, or considering it as a whole in the context in which it was given. His Honour was also said to have erred in construing the performance security as requiring that any demand must include the words “authorised signatory of Santos Limited” and in failing to conclude that Santos Limited could adapt the form of the annexed draft letter, provided that it met the requirements of paragraph (c) of the performance security, and that the demand could be in the form used here. Finally, error was alleged in his Honour’s failures to consider whether, apart from the question of the demand’s compliance with the terms of the performance security, BNP Paribas had any real prospect of successfully defending Santos Limited’s claim, and to decide the issue in the negative.
- [10] BNP Paribas filed a notice of contention in which it sought to rely on additional bases for saying the demand did not meet the requirements of the performance security: that it was not issued on Santos Limited letterhead and did not identify the latter as the person desiring payment; and that it did not properly identify the performance security. It also contended, in effect, that the court could not in any event have found that it had no real prospect of successfully defending Santos Limited’s claim or that its defences did not require a trial.

The arguments on appeal

- [11] In Santos Limited’s contention, the primary judge had proceeded on the basis that the demand had to contain a representation that the signatory was an authorised representative or authorised signatory of Santos and that in order to do so, the words “authorised representative or authorised signatory” must be included. His Honour had not given sufficient weight to the words “amended as applicable” in paragraph (c). The use of those words made it clear that the demand need not strictly follow the draft letter. The expression plainly referred to more than mere insertions of date or account number.

⁴ (2016) 260 CLR 85 at [99].

⁵ *Santos Limited v BNP Paribas* [2018] QSC 105 at [26].

- [12] “Purporting” had properly been regarded by the primary judge as synonymous with “representing”. What was required was the substance of representation, rather than the use of the actual word “representative” or the word “authorised”. It was unnecessary that express words be used; the issue was whether the letter of demand conveyed authorisation. The common law did not discriminate between express and implied representations; the latter were equally actionable. A principal could represent an agent as having authority by equipping him or her “with a certain title, status and facilities” and permitting him or her “to act in a certain manner without taking proper safeguards against misrepresentation”: *Pacific Carriers Ltd v BNP Paribas*.⁶
- [13] Santos Limited took issue with a proposition put by BNP Paribas, that the principle of strict compliance had a bearing on construction; any suggestion that performance securities were to be construed more strictly than other commercial instruments was wrong. To read the requirements for the demand as literally and restrictively as BNP Paribas contended for would be inconsistent with the commercial object of a performance security, to provide an instrument which was “as good as cash”.
- [14] The principle of strict compliance was to be applied intelligently, not mechanically, requiring the issuer of the performance bond to exercise its own judgement about whether the letter of demand was compliant. To insist on complete adherence to the wording of the draft would be absurd; for example, it would not be an intelligent understanding of the demand to insist that the expression “yours faithfully” in the draft be replicated in the demand. All that BNP Paribas had to be concerned with was the appearance of what purported to be a signature by an authorised representative; whether or not the signer was in fact authorised was immaterial.
- [15] The letter of demand complied with the requirements of paragraph (c) of the guarantee. Mr Simpson had applied his signature immediately following the words “Santos Limited”, giving a description of his position; thus representing that he signed for Santos. The document was clearly a demand by Santos and contained a Santos letterhead. It was impossible that anyone looking at the document could have understood Mr Simpson to be signing other than for Santos Limited, given that it was the latter’s demand and that it could only act through the agency of a natural person. Taken altogether, there could be no doubt that there was a representation about Mr Simpson’s authority to sign it. That could be illustrated by the fact that Mr Simpson would have no prospect of resisting an action for breach of warranty of authority; it was clear that he could not deny the appearance of his purported authority to sign.
- [16] BNP Paribas’ primary argument was that Santos Limited was required to give notice in the precise form of the draft letter which was annexed to the guarantee. The words “amended as applicable” in paragraph (c) permitted insertion of details, and inclusion of additional detail, but not the removal or substitution of text. It was necessary for it to use Santos Limited letterhead and the words “authorised signatory of Santos Limited” in the signature block. Alternatively, even if literal adherence to the form were not necessary, the requirement of purported authority combined with the form of the draft demand led to a construction of the requirement as entailing an express statement of authority. The signatory’s authority to sign as Santos Limited’s representative had to be manifested on the face of the document. If the signature alone were sufficient to convey the purporting of authority, the

⁶ (2004) 218 CLR 451 at [38].

requirement of signature “by an authorised representative” in paragraph (c) would be rendered otiose.

- [17] Santos Limited’s example of the signer’s liability to an action of breach of warranty of authority provided a useful contrast, because in that instance it would be relevant to enquire beyond the document itself as to what other conduct or words there had been on the part of the signatory which might negate any representation of authority. An enquiry of that kind was, as the authorities demonstrated, antithetical to the proper approach to instruments of this kind. In addition to the failure to state that the signatory was authorised, the demand letter was non-compliant in other respects. The letterhead used was not “Santos Limited letterhead”, as the draft letter prescribed. The demand did not identify Santos Limited as the entity seeking payment, while the reference to “GLNG Project” confused the issue of from whom the demand emanated. Correct identification of the performance security was vital: the demand wrongly referred to it as dated 8 January 2014, when in fact it was dated, and issued on, 30 January 2012.

Construction of the performance security

- [18] In construing the requirements imposed by paragraph (c), it is relevant to consider its commercial purpose of the performance security, that it is to be “as good as cash”, in the sense of being capable of being honoured with similar expedition and ease on the presentation of a complying demand. Hence the strict compliance principle, which relieves the issuer of the necessity to look beyond whether the party making the demand has met the stipulations of the performance security. In this case, those stipulations being entirely concerned with the form and content of the demand, Santos Limited was required to deliver a letter of demand on the face of which all essential matters appeared, without any obligation, or indeed entitlement, in BNP Paribas to supplement any deficiency with conjecture or investigation.
- [19] Paragraph (c) of the performance security made these requirements of the demand: that it be a notice in writing that Santos Limited sought payment of the security amount; that it be in the form of the draft letter, amended as applicable; and that it purport to be signed by an authorised representative of Santos Limited. But for the second requirement, there would be force to Santos Limited’s argument that if the demand as a whole conveyed the authority of the signatory to sign it on behalf of Santos Limited, it would meet the description of “purporting to be signed by [the latter’s] authorised representative”. “Purporting”, in other contexts, might be read as extending to a general holding out of a person, whether by himself or a principal, as having authority. But the clause must be read with the draft letter, which sets out the content of the required notice.
- [20] The requirement of paragraph (c) is not that the demand be in the language of the draft letter, but it does require adherence to its form; that is to say, the demand must contain the essential features of the draft letter. The effect of the expression “amended as applicable” can only, in context, refer to the insertion and addition of detail, not the omission of any of those features. While some of the features of the letter – for example the formula of “yours faithfully” for the close – are clearly inessential, that cannot be said of the statement of authority to sign, which is the expression of one of the three matters which the performance security specified as necessary. The draft letter, by containing the words “Authorised signatory of

Santos Limited”, makes it clear that an express statement of authority is required. Cases concerning representations of authority by holding out in various ways are, in consequence, irrelevant here. The use of the word “purporting” in paragraph (c) is qualified and illuminated by the terms of the draft letter. Its role is to make it clear that the issuer need be concerned only with whether the required representation appears, not with questions of actual authority.

Compliance with the performance security

- [21] Compliance with the requirement that the letter of demand be in the form of the draft letter would not, in my view, necessitate strict adherence to the language of the latter; that would be inconsistent with an intelligent application of the strict compliance principle. So, for example, a more accurate identification of the bank guarantee by reference to it in its current amended form, while annexing both the original and amending documents, did not make the demand non-compliant. I might mention here, too, although it is not strictly necessary, that for similar reasons I do not consider other arguments of BNP Paribas compelling. Nothing in the draft letter required Santos Limited to use a letterhead which featured the actual words “Santos Limited”, as opposed to one which belonged to it; which the letterhead used recognisably did. The performance security did not make any requirement as to letterhead; rather, it required that the letter of demand make it clear Santos Limited was seeking payment. No sensible reading of this document, which sought payment to Santos Limited’s account and identified Santos Limited as its sender, could lead to any other conclusion.
- [22] But an intelligent application of the strict compliance principle did require BNP Paribas to look for a statement of the signatory’s authority. I am not convinced by Santos Limited’s submission that the primary judge construed the performance security as requiring that the specific words “authorised representative” or “authorised signatory” be used, as opposed to requiring a statement to that effect. But it does not matter. As his Honour observed, Mr Simpson’s signature coupled with his position description did not amount to a representation that he was an authorised representative or authorised signatory. The words “General Manager Development” merely indicated that he held a particular position in the company and said nothing as to his authority in that role. The letter of demand contained no statement of his authority to sign on Santos Limited’s behalf. For BNP Paribas in the absence of such a statement to resort to inference would have been to disregard the requirement for strict compliance.

Conclusion

- [23] It is unnecessary to consider the notice of contention. Santos Limited’s notice of demand did not comply with the requirements of the performance security. The primary judge correctly gave summary judgment in BNP Paribas’ favour. I would dismiss the appeal with costs.
- [24] **FRASER JA:** I agree with the reasons for judgment of Holmes CJ and the order proposed by her Honour.
- [25] **MORRISON JA:** I have read the reasons of Holmes CJ and agree with those reasons and the order her Honour proposes.