SUPREME COURT OF QUEENSLAND

CITATION:	*Santos Limited v BNP Paribas* [2018] QSC 105
PARTIES:	**SANTOS LIMITED ABN 80 007 550 923** (plaintiff) **v** **BNP PARIBAS ABN 23 000 000 117** (defendant) **and** **FLUOR AUSTRALIA PTY LTD ABN 28 004 511 942** (first third party) **FLUOR CORPORATION** (second third party)
FILE NO/S:	BS No 11743 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 May 2018
DELIVERED AT:	Brisbane
HEARING DATE:	30 April 2018
JUDGE:	Jackson J
ORDER:	**The order of the Court is that:** **1. The plaintiff's claim is dismissed.** **2. The plaintiff pay the defendant's costs of the proceeding.** **3. The third party proceeding is dismissed.**
CATCHWORDS:	INTERPRETATION – GENERAL RULES OF CONSTRUCTION OF INSTRUMENTS – COMMERCIAL AND BUSINESS TRANSACTIONS – PARTICULAR TRANSACTIONS – BANKING AND FINANCE – INSTRUMENTS – MISCELLANEOUS – where defendant issued to plaintiff 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 "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

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – SECURITY AND RETENTION FUNDS – where bank guarantee issued in relation to EPC contract – where demand made – whether demand complies with terms of bank guarantee

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 cross-applications by plaintiff and defendant for summary judgment – whether no real prospect of succeeding on plaintiff's claim

Uniform Civil Procedure Rules 1999 (Qld), r 293

Barns v Queensland National Bank Ltd (1906) 3 CLR 925, cited
Bulgrains & Co Ltd v Shinhan Bank [2013] EWHC 2498 (QB), cited
Bunbury Foods Pty Ltd v National Bank of Australasia Ltd (1984) 153 CLR 491, cited
Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd (2017) 343 ALR 58, applied
Fortis Bank SA/NV & Anor v Indian Overseas Bank [2011] EWCA Civ 58, cited
Sea-Cargo Skips AS v State Bank of India [2013] EWHC 177 (Comm), cited
Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran [1993] 1 Lloyd's LR 236, cited
Simic v New South Wales Land and Housing Corporation (2016) 260 CLR 85, applied
Wood Hall Limited v Pipeline Authority (1979) 141 CLR 443, cited

COUNSEL: M Stewart QC, with S Cooper for the plaintiff
P Braham SC, with J Hutton and S Forrest for the defendant
D O'Sullivan QC, with D Turner for the third parties

SOLICITORS: Corrs Chambers Westgarth for the plaintiff
Deutsch Miller for the defendant
Jones Day for the third parties

[1] The plaintiff's claim is for payment of the amount of $55,000,000 as due and owing under a performance security signed by the defendant and delivered to the plaintiff on 30 January 2012, as amended, and interest under s 58 of the *Civil Proceedings Act* 2011 (Qld).

[2] The performance security is "in the nature of an unconditional bond to pay money on demand up to a stated maximum amount" and is headed, as is common although misleading, "Bank Guarantee".[1]

[3] By the terms of the performance security, the plaintiff was defined as the "Beneficiary", Fluor Australia Pty Ltd, a third party in this proceeding, was defined as the "Contractor" and the defendant was defined as the "Financial Institution".

[4] Paragraph (a) of the performance security provided that at the request of the Contractor and in consideration of the Beneficiary accepting the undertaking in respect of an identified engineering procurement construction and associated works contract between them, the Financial Institution:

> "unconditionally and irrevocably undertakes to pay on demand and without deduction or set off any sum or sums which may from time to time be demanded by the Beneficiary up to a maximum aggregate sum of … (Security Amount)."

[5] It is not in dispute that the performance security was amended on two occasions.

[6] On 21 December 2015, the plaintiff made demand upon the defendant in the form set out below:

> "18 December 2015
>
> **Our Ref: STO-BNP-EPC-L-006**
>
> BNP Paribas
>
> Group Operations – Guarantees
>
> Level 4, 60 Castlereagh Street
>
> Sydney, NSW, 2000 Australia
>
> e-mail: finance@au.bnpparibas.com
>
> Attention: Head of Operations

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1 *Wood Hall Limited v Pipeline Authority* (1979) 141 CLR 443, 445.

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:

Bank: ANZ Bank, 121 King William Street, Adelaide SA 5001

BSB: 015-010

Account: 8374-78516

Account Name: Santos Limited Payments Account

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

[signature]

Rob Simpson

General Manager Development

cc: SEJ; RSI; TBR; AJS; MSO; ND: AH; KB; SBI"

[7] The defendant did not pay the Security Amount or any amount to the plaintiff, hence the claim in this proceeding.

[8] The defendant defends the claim on a number of grounds. It has also started a third party proceeding against Fluor Australia Pty Ltd and another corporation by which it seeks to claim over against them the amount of any sum that it is liable to pay the plaintiff under the performance security.

[9] The plaintiff and the defendant cross-apply for summary judgment, each on the ground that the other party has no real prospect of successfully making their case. Both applications were argued on the same day and reserved. Because of the view I take on one of the defendant's grounds in support of the defendant's application for summary judgment, it is unnecessary to deal with any other question.

[10] The plaintiff alleges that the demand was in the form of the "Annex A letter", amended as applicable, that was annexed to the performance security. That annexure was as follows:

> "(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"

[11] The defendant denies that the demand was in the form of the Annex A letter, amended as applicable, because the demand did not purport to be signed by an authorised representative of the plaintiff.

[12] In particular, the point is that the form of the Annex A letter required that the signatory be stated to be the "authorised signatory of Santos Limited", whereas the demand was merely signed by a person over the name Rob Simpson who was described as the "General Manager Development".

[13] The point is not that Mr Simpson lacked actual authority to sign the demand. It is that the demand did not expressly state that he was the authorised signatory of the plaintiff.

[14] Neither of the parties submits that as a matter of law, apart from the terms of the instrument comprising the performance security, any particular form of execution of the demand was required. The form of execution can and does matter in some situations, as a matter of law, such as execution of an instrument by an attorney so as to show the person does so as attorney,[2] but neither party submits that this is one of them, apart from the terms of the performance security.

[15] Both parties rely on paragraph (c) of the performance security that provides as follows:

> "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 of 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."

[16] The point of exception to the demand taken by the defendant is a point of form. The defendant submits that the requirement of par (c) of the performance security that it must make payment to the plaintiff immediately on receipt of a notice in writing in the form of the letter in Annex A, amended as applicable, is of importance as context in construing the instrument. As well, the defendant submits that the provision that the obligation to pay turns on receipt of a notice "purporting to be signed by an authorised representative of the Beneficiary" reinforces the conclusion that the proper construction of the instrument is that a notice desiring payment must state on its face that the signatory is an "authorised signatory of Santos Limited".

[17] The plaintiff submits that because Mr Simpson appended his signature under the words "Santos Limited" and gave his name and position, being that of General Manager Development, he purported to sign as an authorised representative and authorised signatory of the plaintiff. Further, the plaintiff submits that the words "authorised signatory" in Annex A are not critical, given the disconformity between those words and the words "authorised representative" in par (c).

[18] In my view, in construing the performance security, it is important to have regard to the commercial context in which such an instrument is issued and the purposes for which such an instrument is issued. At a general level, the construction of commercial contracts is to be undertaken having regard to those matters, inter alia, as recently restated by the High Court in *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd*:

> "It is well established that the terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract. In a practical sense, this requires that the reasonable businessperson be placed in the position of the parties. It is from that perspective that the court

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[2] *Property Law Act* 1974 (Qld), s 46(3); *Powers of Attorney Act* 1998 (Qld), s 69(2).

> considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it."[3] (footnotes omitted)

[19] The purpose of the instrument is to operate as a bond by a financial institution of worth that will unconditionally pay the amount promised to the named beneficiary when presented with a complying demand. The instrument is given as security for the performance by the beneficiary's contractual counter-party, the contractor, of an underlying construction contract. The contractual counter-party, or someone at its request, will usually promise to indemnify the issuing financial institution for any amount paid under the bond to the beneficiary. The financial institution's entitlement to indemnity will depend on the terms of the contract between it and the indemnifier. Usually, the financial institution must pay without reference to the indemnifier or the beneficiary's contractual counter-party, upon a complying demand. It is also usual that payment must be made immediately upon demand. In these senses, the bond is said to be "as good as cash" for the beneficiary. Accordingly, it is of critical importance that the financial institution pay only upon a complying demand, that entitles the financial institution to indemnity from the indemnifier, and that a complying demand must strictly comply with the requirements of the instrument for payment.

[20] In such a context, in my view, the signature by Mr Simpson coupled with the description of his position did not amount to a representation that he was an authorised representative or authorised signatory (if there be any difference) of the plaintiff. The position description did not represent anything about Mr Simpson's authority, per se. It follows, in my view, that the demand did not constitute a notice in writing purporting to be signed by an authorised representative of the plaintiff in compliance with paragraph (c) and Annex A.

[21] Both parties relied upon the decision of the High Court in *Simic v New South Wales Land and Housing Corporation*.[4] The ultimate issue in that case was whether a performance bond that had been issued mistakenly, with a non-existent party as the named beneficiary, could be rectified. However, the reasons of the Court required a close consideration of the principles of construction that apply to a beneficiary's entitlement to payment under a performance bond including whether a demand purportedly made upon a performance bond is compliant.

[22] As to the proper construction of the performance bond itself, the reasons of the plurality recognise that "[t]he starting point for the proper construction …. is the language used…".[5] They also recognise that:

> "Under [this] form of security, the issuer… is not required or intended to be concerned with the terms of the underlying contract… or, subsequently, with whether the construction contractor… has sufficiently performed its obligations under that contract. The issuer's sole concern is to provide security in accordance with its contract with its customer… and, when the security is issued, to see whether there has occurred the event stipulated in the instrument on which the issuer's obligation to pay arises. In effect, such securities 'create a type of

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3 (2017) 343 ALR 58, 63 [16].
4 (2016) 260 CLR 85.
5 (2016) 260 CLR 85, 111 [79].

> currency' and are treated as being 'as good as cash'. Instruments of this nature are essential to international commerce…"[6] (footnotes omitted)

[23] The plurality continued:

> "Finally on this aspect of the matter, it is necessary to say something about the principle of strict compliance – that an issuer (like a bank) should only accept documents that comply strictly with the requirements stipulated in an instrument of this nature. The principle is fundamental to the efficacy and dependability of banking instruments such as the Undertakings. As Viscount Sumner said in *Equitable Trust Co of New York v Dawson Partners Ltd*:
>
> > 'It is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity if the conditions on which it is authorised to accept are… strictly observed. There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines.'"[7] (footnotes omitted)

[24] In another important passage, the plurality then said:

> "As the primary judge and Emmett A-JA correctly concluded, **the principle of strict compliance** applies after the instrument has been construed, and it **is not a rigid rule**. **It must be applied intelligently, not mechanically**; the issuer must exercise its own judgment about whether the requirements stipulated in the instrument have been satisfied."[8] (emphasis added) (footnotes omitted)

[25] Those reasons reflect the considerations applicable to a demand upon an instrument of the kind represented by the performance security in the present case. They may be distinguished from the less strict principles as to a valid demand that apply, as a matter of construction, in the context of creditor making demand for a debt before appointing a receiver,[9] or applying to a demand on default under a mortgage,[10] or in some statutory contexts.

[26] In reaching the conclusion expressed above, I have approached the matter as one where the defendant was required to consider the instrument intelligently, not mechanically. In my view, the absence of a statement that the signatory was the authorised representative or the authorised signatory of the defendant in the demand was not a mere mechanical omission. The defendant was not obliged to pay the Security Amount because the demand did not comply with the requirements of the performance security.

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6 (2016) 260 CLR 85, 113 [88].
7 (2016) 260 CLR 85, 115-116 [97].
8 (2016) 260 CLR 85, 116 [99].
9 *Bunbury Foods Pty Ltd v National Bank of Australasia Ltd* (1984) 153 CLR 491, 502-504.
10 *Barns v Queensland National Bank Ltd* (1906) 3 CLR 925, 935.

[27] I note that the defendant sought to rely on a number of other cases in aid of its submission that the demand was non-compliant.[11] Whilst I have not ignored those cases, the approach I have taken is that the principle to apply is that stated by the High Court in *Simic*, in the language of the plurality, rather than any different expressions adopted in the English cases.

[28] On this application for summary judgment made under r 293 of the *Uniform Civil Procedure Rules* 1999 (Qld), the question is whether the defendant has shown that the plaintiff has no real prospect of succeeding on the plaintiff's claim and there is no need for a trial. In my view, the defendant has discharged that onus. The question upon this discrete ground of defence is one of construction of the instrument and of the demand made under it. There is no suggestion that any different or further consideration might arise at the trial of the proceeding so that it cannot be said now that the plaintiff has no real prospect of succeeding on the claim and there is no need for a trial of the claim.

[29] Accordingly, there should be judgment for the defendant on the plaintiff's claim.

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[11] *Bulgrains & Co Ltd v Shinhan Bank* [2013] EWHC 2498 (QB), [16]-[24]; *Sea-Cargo Skips AS v State Bank of India* [2013] EWHC 177 (Comm), [26]-[35]; *Fortis Bank SA/NV & Anor v Indian Overseas Bank* [2011] EWCA Civ 58, [16]-[19]; and *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1993] 1 Lloyd's LR 236, 239-240.