

## Article Information

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## **\$55M demand scuppered in battle of form over substance. (Very) strict compliance is required when it comes to calls on performance security**

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In the recent decision of *Santos Limited v BNP Paribas* [2019] QCA 11, the Queensland Court of Appeal upheld a decision that a failure to include the words “authorised signatory of Santos Limited” meant that a demand made upon a bank guarantee was invalid. Given the principle of “strict compliance”, the employee’s signature and position description did not amount to a representation that he was an authorised representative of Santos Limited.

Historically, courts have enforced letters of demand in circumstances where they could establish the parties’ intentions or that a reasonable person in the position of the recipient would have understood the intention of the demand. In *Pacific Carriers Ltd v BNP Paribas* the court stated that “*the... letters of indemnity is to be determined by what a reasonable person in the position of Pacific would have understood them to mean*”. Likewise in *Simic v New South Wales Land and Housing Corporation (Simic)*, the High Court rectified the demand in question so that it “*conform(ed) to the true agreement of the parties where the writing by common mistake fails to express that agreement accurately*”. This decision of the Queensland Court of Appeal signals a departure from those cases and empathises the need for (very) “strict compliance” with an agreed form of demand.

### **Background**

Santos Limited (**Santos**) issued a demand on BNP Paribas (**BNP**) for the payment of a \$55 million bank guarantee. BNP refused to comply with the demand as it did not comply with the specific formal requirements of a demand where the guarantee provided for payment by BNP to Santos upon receipt of “*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*”.

The draft letter attached to bank guarantee included at the top a direction “*(insert Santos Limited letter head)* and the following signature block:

*Yours faithfully*

.....

*Authorised signatory of*

*Santos Limited*”

The form of demand made by Santos, whilst generally adopting the draft form of bank guarantee template, departed from the template in two key respects: the demand issued bore the letterhead of “*Santos, GLNG Project*” and the signature block, whilst noting the signatory as the “*General Manager Development*”, did not follow the form of the template in the bank guarantee in so far as it omitted the words “*Authorised signatory of Santos Limited*”. This later departure proved critical.

In summary judgment proceedings in the Supreme Court of Queensland a dispute as to the validity of the demand ensued. At first instance, the Court found in favour of BNP on the basis that the signatory’s mere inclusion of his position did not amount to a representation that he was an authorised representative of Santos Limited, nor did it represent that he had authority to sign the document on behalf of Santos. The Court relied on to the High Court decision of *Simic*<sup>[1]</sup> stating that the nature of a performance security means 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...".*

### **Appeal**

Santos appealed the decision on grounds that:

1. strict compliance with the words "authorised signatory of Santos Limited" was not necessary for the demand to be valid;
2. the Court failed to consider the demand as a whole and the context in which it was given; and
3. the Court failed to consider that the demand could be "amended as applicable".

The Court of Appeal found that the primary judge did not require the specific use of the words "authorised signatory of Santos Limited" to be used in order to constitute a valid demand; only that a "statement to that effect" was necessary. It also held that the "strict compliance" principle required Santos to "*deliver a letter of demand on the face of which all essential matters appeared, without any obligation... to supplement any deficiency with conjecture or investigation.*"

In these circumstances, the form of demand issued required further investigation by BNP as to its validity and therefore did not satisfy the principle of strict compliance. Whilst Santos was permitted to amend the demand "as applicable", that did not extend to omitting essential features. The Court therefore found that the position description was insufficient to satisfy the recipient that the signatory was in fact an authorised representative of Santos.

The Court's requirement that parties "strictly comply" with contractual requirements arises in the context where such compliance was "fundamental to the efficacy and dependability" of performance security documents<sup>[1]</sup>, however parties would be wise to consider the risk that such a principle may be extended to documents to which they are a party (including as to notice requirements arising under construction contracts). It should be borne in mind that where parties have agreed to use particular words or phrases, the better course is that any demand / notice made in respect of such documents ought strictly comply with the required wording. In particular, the maker of the demand (or the giver of any notice) must do its best to ensure that there can be no issue (or need for enquiry) arising on the part of the recipient of such document as to the authority of the signatory to issue such notice on behalf of the party requiring to give it.

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<sup>[1]</sup> Referencing *Simic* [(2016) 260 CLR 85 at 97]

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<sup>[1]</sup> *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85; [2016] HCA 47,