

Performance bonds: making a compliant demand for payment

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In *Santos Limited v BNP Paribas* [2018] QSC 105, the Supreme Court of Queensland held that in determining whether a demand for payment complied with the terms of the performance bond, it is essential that such demands strictly follow the requirements as set out in the terms of the bond.

It is important that an issuer of performance security (usually a bank or other financial institution) only accepts documents that comply strictly with the requirements in the underlying security document. This principle of 'strict compliance' should be an application of intelligence, and not of mechanics, and the issuer should exercise its own judgment in deciding whether the requirements have been satisfied.

The recent Supreme Court of Queensland decision in *Santos Limited v BNP Paribas* highlights the importance for both the issuer and beneficiary of such security to ensure that any demand fully satisfies the requirements set out in the underlying security document, as failing to do so could invalidate the demand issued.

Key facts

On 8 January 2014, the Defendant ("**BNP Paribas**") issued the Claimant ("**Santos**") a bank guarantee in the form of a performance bond, where Santos had the option to demand payment up to a stated maximum amount, to protect itself in the event of a counter-party failing to perform its obligations under its EPC contract. Paragraph (c) of the performance bond set out the requirement that:

"Should the Financial Institution receive a notice in writing in the form of the letter attached to this Bank Guarantee (...) purported 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 (...)". [Emphasis added]

Such demand of payment was to be made in the form of the 'Annex A letter' that was annexed to the bond, which included the following template signature:

"Yours sincerely,

[signature]

Authorised signatory of Santos Limited". [Emphasis added]

On 18 December 2015, Santos issued a demand for payment under the bond in the amount of AUD 55 million, where the demand included the following signature:

"Yours sincerely,

Santos Limited – GLNG Upstream Project

[signature]

Rob Simpson

General Manager Development”.

BNP Paribas refused the demand for payment.

The basis for doing so was that the demand was not correctly made. BNP Paribas took the position that the form of demand was required to state that the signatory was an ‘authorised signatory of Santos Limited’, and a demand merely being signed by a gentleman with a title of ‘General Manager Development’ did not fulfil this requirement.

Santos submitted that because Mr. Simpson added his signature, name and position under ‘Santos Limited’, he purported to sign as an authorised representative and authorised signatory of Santos.

Decision

The court rejected Santos’ argument, and held in favour of BNP Paribas. The court reasoned that the signature with the description in the demand did not amount to a representation that Mr. Simpson was an authorised representative or an authorised signatory. The absence of the statement that Mr. Simpson was an “authorised signatory” was not a mechanical omission that BNP Paribas could disregard. As a result, the demand did not constitute a notice in writing purported to be signed by an authorised representative of Santos in line with the requirements of the performance bond.

Comment

This strict approach is also taken under English law, as seen previously in cases such as *Sea-Cargo Skips AS v State Bank of India* [2013] EWHC 177 (Comm), where a demand was issued under a refund guarantee that failed to provide a specific statement required under the guarantee. The court took a strict approach and held that even though the exact wording of such statement did not need to be precisely used, the absence of such statement as a whole made the demand non-compliant. The court held that an ‘ambiguous demand cannot be compliant’.

In determining whether a demand complies with the terms of a bond, the courts will consider the construction of both the bond and the demand through evaluating in what commercial context, and for what purposes, the bond had originally been issued for. The courts have highlighted that the issuing bank should only pay the demand when the relevant demand complies strictly with the requirements set out in the bond. This principle is important for the efficacy and dependability of such bank instruments, and a deviation from that approach could compromise the utility of such instruments. Although pedantry is rarely a virtue, in making demands under performance bonds it becomes a necessity.

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