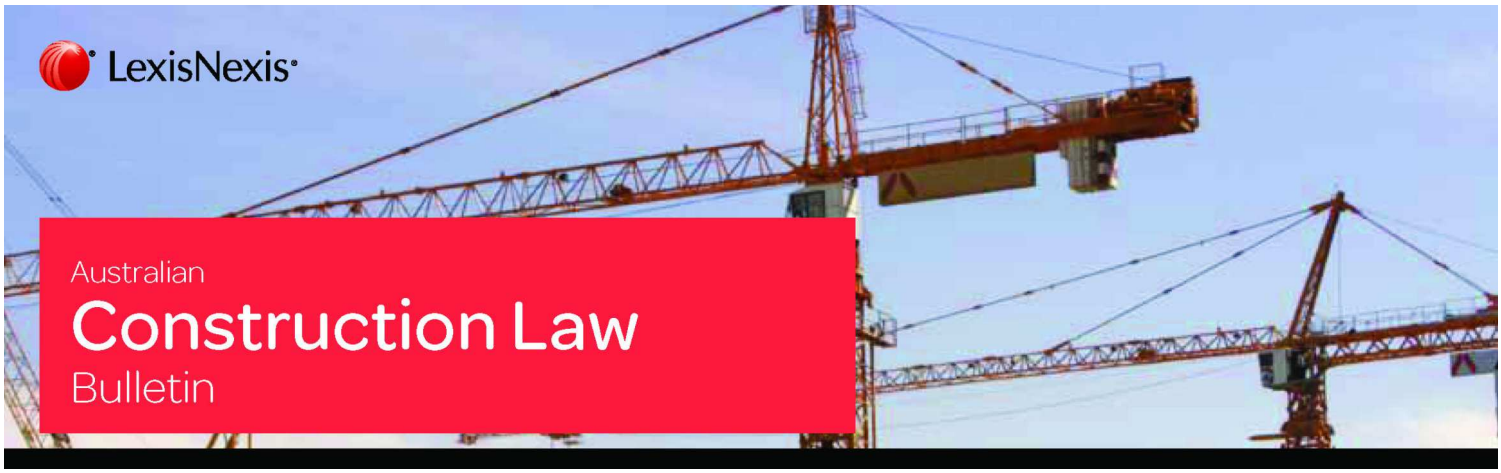

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Contents

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Australian
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Agency — it's all in the detail

Elisabeth Maryanov *DAVIDSON LEGAL*

It is not uncommon for businesses to operate under various contractual and corporate umbrella arrangements that can be advantageous for financial, risk, expertise, marketing and a multitude of other reasons. However, as lucrative as these arrangements can be when applied carefully and strategically, they can also prove extremely problematic when misapplied.

In the recent NSW Supreme Court case of *Cincotta v Russo*,[1] a builder discovered how just a few simple communications can mean the difference between personal liability and liability on the part of the company for defective and incomplete building work.

Facts

Mr and Mrs Cincotta (the Cincottas) were the registered proprietors of a residential property in Concord West. At around November 2013, they contacted Mr Russo, whom they had met before as their daughters went to the same school, and asked if he was interested in quoting to renovate the Cincottas' house.

Mr Russo held a qualified Supervisor Certificate No 47904S which stated that he could not contract directly with consumers. He was also employed as a building supervisor by Bespeak 3 Pty Ltd (Bespeak). Bespeak was a licensed builder under the Home Building Act 1989 (NSW) and held a contractor licence. For the purposes of that contractor licence, Mr Russo was the nominated supervisor. Mr Russo was also equal shareholder in Bespeak. The other shareholder was his wife who was also the sole director.

Mr Russo agreed to provide a quote to the Cincottas. On 27 November 2013, he provided them with a "Quotation Report" on SER Constructions letterhead. The quotation report said that SER Constructions was "a nominee of Bespeak Pty Ltd". It quoted a "total construction cost" of $610,000 including GST for providing new additions and alterations including a swimming pool, and concluded with the words "Kind Regards Sam Russo".[2]

On 2 January 2014, the Cincottas met with Mr Russo. During the meeting, Mr Russo provided the Cincottas with a contract and said he would fill out the details with them so that they were "clear and comfortable with everything". Mr Russo explained that he did not have with him his builder's licence as it was in the post, being transferred from his former company to his own personal name. The Cincottas accepted this explanation and were content to proceed "as long as [they were] dealing with [Mr Russo]".[3]

Mr Russo proceeded to fill in the contract document — adjacent to "Builder", he wrote his own personal name; adjacent to "Licence No" he wrote his supervisor certificate number; and adjacent to "ABN No" he wrote Bespeak's Australian Business Number (ABN). In the schedule Mr Russo wrote "yes" to the question "does the contractor Builder hold a current Builder's licence?". This was incorrect — in fact Mr Russo was a nominated supervisor of the party that did hold the licence, namely Bespeak.

The Cincottas and Mr Russo signed the contract.

Subsequently, QBE Insurance Group Ltd issued a certificate of insurance for home warranty insurance. It was addressed to the Cincottas but named the builder as Bespeak and quoted Bespeak's builder registration number (which corresponds to the contractor licence number). Mr Russo did not give this document to the Cincottas and it was only received by their solicitor over a year later.

During the course of the project, the Cincottas received a series of invoices from SER Constructions, each of which was stipulated as the "builder licence" Bespeak's contractor licence number.

A variety of issues arose with the residential building work. The Cincottas commenced proceedings, claiming that the work was not done in accordance with either the contract or the warranties implied by the Home Building Act. They argued that:[4]

> (a) Mr Russo entered the Contract as agent for Bespeak as undisclosed principal;
> (b) Bespeak was the builder under the Contract;
> (c) both Mr Russo and Bespeak were contracting parties under the Contract; and
> (d) judgment should be entered against Mr Russo … (accepting that … they [were] not entitled to judgment against both Mr Russo and Bespeak).

The court noted that Bespeak was in liquidation but gave the Cincottas leave to proceed against Bespeak on the basis of an undertaking not to enforce any judgment against Bespeak otherwise than in the winding up of the company.

The decision

Stevenson J commenced his consideration of the legal issues by returning to the principles governing the law of agency. His Honour noted the general principle that "if a [person] signs a written contract, [that person] is to be considered as the contracting party, unless it clearly appears that [that person] executes it as agent only".[5]

Ultimately an agent's liability in circumstances where that person contracts as agent for a named or unidentified principal will turn on the facts of the case and will depend on the intention of the parties. Ascertaining the intention of the parties will include a consideration of the terms of the contract as a whole and in context, having regard to the surrounding circumstances.[6]

His Honour referred to the summary of the law of agency applied by Kiefel J in *Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales) Pty Ltd* and in particular to the fact that:

> Generally speaking, where a party signs a contract without qualification as to the capacity in which they are signing, they are taken to be contracting personally. This may be otherwise where disclosure of the agency is made, but it needs to be clear that the party is acting as agent in the legal sense …[7]

The court noted that what is required is an assessment of what a reasonable person, with the knowledge of the communications between the parties and the surrounding circumstances, would conclude the parties had intended.[8] In the current instance, Mr Russo had executed the contract as the "Builder"; he had previously told the Cincottas that he had a builder's licence and that he would be their point of contact.

Based on the evidence, the court found these representations to be false and that in fact Mr Russo intended the building work to be carried out by Bespeak. He did not say this to the Cincottas and they had no reasonable basis to reach this conclusion themselves.

The court acknowledged that the Cincottas did know of the existence of Bespeak and noted that Mr Russo used Bespeak's ABN on the contract. However, the court did not consider this sufficient to conclude that reasonable people in the Cincottas' position would have deduced from this that Mr Russo was intending to execute the contract as agent for Bespeak.

The court did, however, find that Bespeak was in fact the principal under the contract — Bespeak, under the business name "SER Constructions", undertook the work, invoiced and was paid for the work. According to the court, each of these elements showed that Bespeak was the ultimate principal and that Mr Russo simply entered the contract as agent for Bespeak.

That said, his Honour emphasised that Bespeak was an undisclosed principal — undisclosed in the sense that the *fact* that Bespeak was to carry out the building work was not disclosed to the Cincottas, rather than the actual *identity* of the principal.

In these circumstances, his Honour held that the Cincottas were entitled to judgment against Mr Russo, who was also ordered to pay the Cincottas' costs.

Implications

This case was clearly determined on its particular facts. However, it nevertheless offers a number of useful reminders for both builders and owners.

When receiving quotes for residential work, owners are often provided written estimates of varying quality — some stipulate complete and proper company names with corresponding and accurate Australian Company Numbers (ACNs), making it clear and simple for the owner to understand the party with whom a contract is to be signed. Others, however, are far less formal, with letterheads that only refer to a business name (maybe with an ABN) that look official but in fact are not. When the waters are further muddied with individual representatives who indicate expressly or impliedly that they are the person with whom you are contracting, it is not surprising that confusion ensues.

Similarly, principals should be alert to their own corporate structure — which principals are actually companies that simply trade under different business names or, in the case of smaller businesses, are in fact an individual person, trading under a business name.

Importantly for both sides of the fence, identifying the role to be played by the individual negotiating the contract or acting as the "point of contact" is integral. If that individual is genuinely intended to act as agent for the principal, it should say so in the contract. Failure to do so could result in unwelcome liability for some and stressful litigation for others.

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Footnotes

1. *Cincotta v Russo* [2019] NSWSC 272; BC201901811.
2. Above n 1, at [16]–[17].
3. Above n 1, at [18].
4. Above n 1, at [5].
5. Above n 1, at [30].

6. Above.
7. Above n 1, at [32] citing *Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales) Pty Ltd* (2006) 236 ALR 115; [2006] FCA 1324; BC200608065 at [105].
8. Above n 1, at [33].

If you want security of payment, an "other arrangement" must give rise to a legally binding obligation

Andrew Hales *and* ***Jessie Jagger*** *MINTERELLISON*

In *Lendlease Engineering Pty Ltd v Timecon Pty Ltd*[1] Ball J has determined that an "other arrangement" within the meaning of "construction contract" as defined in s 4 of the Building and Construction Industry Security of Payment Act 1999 (NSW) (SOP Act), must be an arrangement that gives rise to a legally binding obligation, although it need not be contractual in nature.

This decision does not follow earlier NSWSC decisions that an "other arrangement" is not required to be a legally enforceable arrangement in order to fall within the ambit of the SOP Act.

The facts

In summary:

- The unincorporated joint venture formed by Lendlease Engineering Pty Ltd and Bouygues Construction Australia Pty Ltd (the LLBJV) is the head contractor on the NorthConnex Project.
- The LLBJV was the respondent to an adjudication application made by Timecon Pty Ltd (Timecon) relating to the disposal of tunnel spoil to a site in Somersby, NSW.
- The adjudicator made an adjudication determination in favour of Timecon.
- LLBJV commenced proceedings to have the adjudication determination set aside on the basis of jurisdictional error. The LLBJV contended that there was no "contract or other arrangement" between it and Timecon, and if there was a "contract or other arrangement", it was not one under which Timecon undertook to carry out construction work or to supply related goods and services for the LLBJV.

Decision: an arrangement must give rise to a legally binding obligation but need not be contractual in nature

Ball J considered and did not follow the relevant authorities below in which the respective courts took the view that the "arrangement" need not be legally binding:[2]

- *Okaroo Pty Ltd v Vos Construction and Joinery Pty Ltd*[3]
- *Machkevitch v Andrew Building Constructions Pty Ltd*[4]
- *IWD No 2 Pty Ltd v Level Orange Pty Ltd*[5]

In any event, his Honour found that the facts of each of the above cases suggested that the relevant arrangement in each case was in fact a legally binding arrangement.[6]

None of the above cases had considered the effect of s 32 of the SOP Act on the issue.[7] This section renders ultimately returnable any payment made resulting from the adjudication of a payment claim where the claimant is found, in civil proceedings, to have no underlying right to be paid. In light of s 32, it makes no sense to interpret the SOP Act as creating a right to a progress claim where the claimant has no underlying right to be paid any amount at any time, as the purpose of the SOP Act would not be advanced by such an interpretation.[8]

On the facts of the case, his Honour decided that there was no contract or other arrangement between LLBJV and Timecon for the disposal of tunnel spoil from the NorthConnex Project.[9] Consequently, the adjudication determination was declared void.[10]

His Honour also found, in obiter, that even if he had concluded that there was a contract or other arrangement between Timecon and the LLBJV, he would not have concluded that the contract or other arrangement was for construction work at the Somersby site, or for the supply of related goods and services in relation to construction work carried on as part of the NorthConnex Project.[11]

Comments

The decision provides a greater degree of certainty to parties who enter into negotiations but do not conclude them by the formal execution of a contract. Care is, however, still required when seeking to make arrangements for the undertaking of construction work so that the parties are aware of the rights and obligations that such arrangements may confer under the SOP Act.

Principals and contractors should carefully consider whether, in cases where there is no written or oral

contract between them, any alleged arrangement gives rise to legally binding obligations. This may shape parties' decisions to make or respond to payment claims, proceed to adjudication, respond to adjudication applications or to challenge adjudication determinations, as the case may be.

Note: MinterEllison acted for the LLBJV.

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Footnotes

1. *Lendlease Engineering Pty Ltd v Timecon Pty Ltd* [2019] NSWSC 685; BC201904932.
2. Above n 1, at [87].
3. *Okaroo Pty Ltd v Vos Construction and Joinery Pty Ltd* [2005] NSWSC 45; BC200500407.
4. *Machkevitch v Andrew Building Constructions Pty Ltd* [2012] NSWSC 546; BC201203428.
5. *IWD No 2 Pty Ltd v Level Orange Pty Ltd* [2012] NSWSC 1439; BC201210604.
6. Above n 1, at [81].
7. Above n 1, at [84].
8. Above n 1, at [69].
9. Above n 1, at [104].
10. Above n 1, at [115].
11. Above n 1, at [113] and [114].

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The doctrine of strict compliance in performance securities — a cautionary tale: *Santos Ltd v BNP Paribas*

Bea Dubinsky *and* ***Jos Mulcahy*** *RUSSELL KENNEDY LAWYERS*

Introduction

A recent decision by the Supreme Court of Queensland reinforced adherence to the doctrine of strict compliance in relation to calls on performance securities. Courts have historically ruled in favour of strict adherence to the instrument's terms before requiring that a financial institution make payment. This is because performance securities are designed to provide beneficiaries with a swift self-help remedy without the burden of proving that a default has occurred. This approach was confirmed in the recent case of *Santos Ltd v BNP Paribas*,[1] (*Santos v BNP)*.

Background

In *Santos v BNP* a performance security, in the form of a bank guarantee, was issued by BNP Paribas (BNP) in favour of Santos Ltd (Santos), to secure the performance of a contractor, Fluor Australia Pty Ltd, in providing engineering and design services for a coal seam gas extraction project being undertaken by Santos.

The performance security contained a set of mandatory requirements that would activate the obligation of BNP to pay the security amount. Upon the receipt of "a notice in writing":[2]

- "in the form of the letter attached to this Bank Guarantee" (Draft Letter);
- "amended as applicable";
- "purporting to be signed by an authorised representative of the Beneficiary"; and
- indicating that the Beneficiary desires payment to be made,

BNP was liable to pay the security amount to Santos.

The Draft Letter required a signature followed by the words "Authorised signatory of Santos Limited".

Santos sent a letter of demand to BNP requiring payment of $55,000,000 under the performance security. The letter of demand was similar but not identical to the Draft Letter. The letter of demand displayed a signature which appeared immediately after the words, "Santos Limited – GLNG Project", and was followed by the name of the signatory and his position description, "General Manager Development".

BNP declined to honour the demand, citing numerous defects in the demand that allegedly amounted to non-compliance with the requirements of the performance security.

Judgment at first instance

Both Santos and BNP sought summary judgment against each other. The primary judge granted summary judgment in favour of BNP. In doing so the primary judge followed the High Court's decision in *Simic v New South Wales Land and Housing Corp*[3] (*Simic*) which affirmed the principle of strict compliance as "fundamental to the efficacy and dependability" of performance securities.[4] Although the principle requires that the financial institution only accept documents which strictly comply with the requirements stipulated in the instrument,[5] it is not a "rigid rule", but one that must be "applied intelligently, not mechanically".[6] Applying *Simic*, the primary judge found that the failure to include any statement that the signatory was the "authorised representative" or "authorised signatory" of Santos "was not a mere mechanical omission".[7] Accordingly, his Honour approved BNP's refusal to meet the demand for payment.

The appeal findings

The Queensland Supreme Court of Appeal affirmed the original ruling, finding that the signature and position description did not amount to a necessary representation of authority, rendering the demand defective.[8]

In determining the proper construction of the strict compliance principle in relation to Santos' letter of demand, the court considered each of the mandatory requirements of the performance security.

Deconstructing the meaning and effect of "purporting"

As the security required that the notice purport to be signed by an authorised representative, Santos argued that BNP ought to have confined its concerns to the

appearance of what purported to be a signature by an authorised representative, not whether the signer was in fact authorised.[9] As "purporting" was deemed synonymous with "representing" by the primary judge,[10] Santos further contended that the notice necessitated only the substance of representation. Since the common law does not discriminate between express and implied representations, which are equally actionable, Santos reasoned that the question ought to be framed in terms of whether the letter of demand conveyed authorisation.[11]

On the one hand, the court accepted Santos' argument that the function of the term, "purporting", was to convey that the issuer need only be concerned that the required representation appears, not with questions of actual authority.[12] Holmes CJ moreover acknowledged that in other contexts "purporting" may be read as encompassing a general holding out of a person as having authority, whether it be through the conduct or words of the agent or principal.

However, the requirement that the notice be in the form of the Draft Letter led the court to find that the word, "purporting", was qualified and illuminated by the terms of the Draft Letter.[13] Holmes CJ stated that the security's mandatory criteria must be read in conjunction with the Draft Letter, which sets out the content of the required notice.[14] In containing the words, "authorised signatory of Santos Limited", the Draft Letter makes it apparent that an express statement of authority is required, such that cases concerning representations of authority by holding out in various ways are irrelevant to the question at hand.[15] Consequently, his Honour rejected Santos' argument that if the demand as a whole conveyed the authority of the signatory to sign on Santos' behalf, it would satisfy the requirement of "purporting to be signed by an authorised representative".[16]

Deconstructing notice "in the form" of the Draft Letter

BNP argued that strict compliance equated to an adherence to the precise form of the Draft Letter. This would require Santos to use the words, "authorised signatory of Santos Limited", which appeared in the signature block of the Draft Letter.[17] By contrast, Santos' letter of demand letter contained a handwritten signature, which was applied immediately after the words, "Santos Limited – GLNG Upstream Project", and was followed by his printed name and position description. Santos contended that insistence on complete adherence to the wording of the draft would be absurd since an intelligent application of the strict compliance principle required BNP to exercise its own judgment as to whether the letter of demand was compliant.[18]

Deconstructing "amended as applicable"

In support of its argument, Santos cited the expression, "amended as applicable", which qualified the requirement that the notice be in the form of the Draft Letter. Santos reasoned that this expression demonstrated that the demand need not strictly conform to the Draft Letter and plainly permitted more than mere insertions of date and account details.[19] BNP conversely argued that this expression only allowed for insertions and additions, not the removal or substitution of text.[20] BNP posited that if the signature alone was sufficient to convey purported authority, the words, "by an authorised representative", in the signature block of the Draft Letter would be rendered redundant.[21]

On the one hand, Holmes CJ concurred with Santos in finding that the security did not mandate a strict adherence to the language of the Draft Letter; such a reading would be inconsistent with an intelligent application of the strict compliance principle.[22] On the other hand, his Honour construed adherence to the Draft Letter's form as necessitating the retention of its essential features.[23] The court distinguished between inessential features such as the sign-off, "yours faithfully", and the statement of authority to sign, which his Honour identified as one of the essential matters specified in the performance security.[24] Accordingly, Holmes CJ preferred BNP's construction of the expression, "amended as applicable", as permitting the insertion and addition of detail, but not the omission of any of those vital features.[25] The court thereby held that whilst the express use of the words, "authorised representative" or "authorised signatory" were not required, an express statement to that effect was.[26]

Other errors and omissions

BNP alleged that the letter of demand further failed to use the company letterhead and thereby did not identify Santos as the entity seeking payment, while the reference to the GLNG Project created further uncertainty as to the identity of the beneficiary. Holmes CJ found the Draft Letter did not require Santos to use a letterhead featuring the specific words, "Santos Limited". The performance security contained no requirements as to letterhead; rather it required that the letter of demand clearly convey that Santos was seeking payment. In the court's view, this was achieved by the fact that the letter sought payment into Santos' account and identified Santos as its sender; these features could lead to no other reasonable conclusion.[27] The court similarly rejected BNP's contention that the letter was invalid on the grounds that it did not correctly identify the performance security,[28] which was vital information, or identify the correct issue date.[29] His Honour held that these inaccuracies did not render the demand non-compliant.

The court then proceeded to determine the final question, whether Santos' demand complied with the required form. Santos argued that the letter of demand satisfied the instrument's three mandatory requirements as the signature appeared immediately after the words, "Santos Limited", and was followed by a description of his position, representing that he had signed for Santos. The document was clearly a demand by Santos and contained a Santos letterhead. Given that the letter was evidently a demand from and by Santos, which could only act through the agency of a natural person, the document could only be interpreted as conveying the impression that the signatory was signing on Santos' behalf. Santos submitted that it was undoubtedly a representation of the signatory's authority to sign.[30]

However, the court ruled that a signature coupled with a position description did not amount to such a representation; it merely indicated that the signatory held a particular position in the company while saying nothing as to his authority in that role.[31] Accordingly, Holmes CJ concluded that the absence of any statement of the signatory's authority to sign on Santos' behalf meant that his authority to sign as Santos' representative was not manifested on the face of the document. The court resultantly found the demand to be invalid.

Santos argued that performance securities ought not be construed more strictly than other commercial instruments; such a literal and restrictive reading of the notice requirements as BNP advocated would be inconsistent with the commercial object of a performance security, to provide an instrument that was "as good as cash".[32] While affirming the primary judge's emphasis on the commercial purpose of a performance security,[33] the court rejected Santos' reasoning. As a performance security must be capable of being honoured with comparable expedition and ease on the presentation of a complying demand, the court held that the strict compliance principle is what enables the issuer to be relieved of the burden of looking beyond whether the beneficiary has in fact met the stipulations of the security.[34]

For this reason, Holmes CJ also dismissed Santos' analogy to an action for breach of warranty of authority.[35] Santos had contended that the signatory would have no prospect of resisting such an action given he could not deny the appearance of his purported authority to sign. However, the legal test for breach of warranty actions includes enquiries beyond the document itself, to other conduct or words by the signatory that may negate the representation of authority. By contrast, such inquiries are antithetical to the process for actioning performance securities, which are not intended to impose upon the financial institution any obligations of investigation.[36] Rather the instrument is to operate as a bond that the issuer would immediately and unconditionally pay without any reference to the indemnifying party.[37]

The court concluded that Santos' omission would require BNP to "resort to inference", which was incompatible with the principle of strict compliance.[38] Accordingly, Holmes CJ found:

> Santos Limited was required to deliver a letter of demand on the face of which all the essential matters appeared, without any obligation, or indeed entitlement, in BNP Paribas to supplement any deficiency with conjecture or investigation.[39]

Key takeaways

Echoing previous Australian and English authorities,[40] this case recognised that financial institutions and banks are not at liberty to investigate whether the contractor's performance of the underlying contract was sufficient to give rise to the demand. Therefore, ensuring that the demand strictly complies with the terms of the performance security is the only protection afforded to financial institutions against wrongly making payment of significant sums, often in the order of tens of millions of dollars, which may not be recoverable. Implicit in this ruling is the court's appreciation of the important role of strict compliance in upholding protections for financial institutions.

The court thus ruled that an intelligent application of the strict compliance principle required a statement of the signatory's authority. Santos' failure to include an express statement to this effect was ultimately fatal to its application. This decision elucidates the application of the strict compliance doctrine: in rejecting BNP's literal construction while insisting on a strict adherence to form, the court illustrated that this principle is indeed not a "rigid rule", but one that is to be "applied intelligently, not mechanically".[41]

Whilst the cases of *AES-3C Maritza East 1 Eood v Credit Agricole Corporate and Investment Bank*[42] and *Simic*[43] illustrate that it is possible to cure a defective demand by subsequently issuing a compliant one, reliance on remedial action is problematic and risky. As calls are frequently made close to the expiry date of the performance security, there may be insufficient time to submit a new demand. Further, the contractor for whom the performance security was issued may seek an injunction to prevent payment in the intervening period. While such injunctions are often unsuccessful, they can delay the issuing of payment under the security, undermining the very object of on-demand performance securities to provide a swift remedy for default. Beneficiaries of performance securities should therefore adhere strictly to the terms of the instrument before demanding payment.

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Footnotes

1. *Santos Ltd v BNP Paribas* [2019] QCA 11; BC201900431.
2. Above, at [2].
3. *Simic v New South Wales Land and Housing Corp* (2016) 260 CLR 85; 339 ALR 200; [2016] HCA 47; BC201610423.
4. Above, at [97].
5. Above.
6. Above n 3, at [99].
7. *Santos Ltd v BNP Paribas* [2018] QSC 105; BC201803998 at [26].
8. Above n 1, at [22].
9. Above n 1, at [14].
10. Above n 1, at [12].
11. Above n 1, at [12].
12. Above n 1, at [20].
13. Above n 1, at [20].
14. Above n 1, at [19].
15. Above n 1, at [20].
16. Above n 1, at [19].
17. Above n 1, at [16].
18. Above n 1, at [14].
19. Above n 1, at [11].
20. Above n 1, at [20].
21. Above n 1, at [16].
22. Above n 1, at [21].
23. Above n 1, at [20].
24. Above.
25. Above.
26. Above.
27. Above n 1, at [21].
28. Above n 1, at [10].
29. Above n 1, at [17].
30. Above n 1, at [15].
31. Above n 1, at [22].
32. Above n 1, at [13].
33. Above n 1, at [18].
34. Above.
35. Above n 1, at [15].
36. Above n 1, at [17].
37. Above n 1, at [7] citing above n 7.
38. Above n 1, at [22].
39. Above n 1, at [18].
40. *Frans Maas (UK) Ltd v Habib Bank AG Zurich* [2001] Lloyd's Rep Bank 14; [2001] CLC 89; *AES-3C Maritza East 1 Eood v Credit Agricole Corporate and Investment Bank* [2011] EWHC 123 (TCC); [2011] BLR 249 (*Maritza*); *Sea-Cargo Skips AS v State Bank of India* [2013] EWHC 177 (Comm); [2013] 2 Lloyd's Rep 477.
41. Above n 3, at [99].
42. *Maritza*, above n 40.
43. Above n 2.

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