Article Information

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A (working) holiday? Why it's all about – location, location, location: Lendlease Building Pty Ltd v BCS Airport Systems [2024] QSC 164

The next time you are passing through the Gold Coast Airport (airport), perhaps on your way to your holiday destination, spare a thought for *BCS Airport Systems Pty Ltd* (BCS) which had anything but a relaxing time when it contracted with *Lendlease Building Pty Ltd* (Lendlease) to undertake a portion of head contract works on the airport.

What might make the airport a desirable location for some made it a headache for BCS in seeking to recover a payment claim made under Queensland's security of payment legislation, the ***B**uilding **I**ndustry **F**airness (Security of Payment) **Act** 2017* (Qld).

The airport is bisected by the border between New South Wales and Queensland and where the construction work the subject of the contract was performed.[1] The airport is a designated "*Commonwealth place*"[2] under the *Commonwealth Places (Application of Laws) Act 1970* (Cth) (**CPAL Act**); and, on 6 December 2022 an adjudicator determined, in respect of BCS's payment claim made under the BIF Act, that Lendlease was liable to pay BCS the sum of $995,081.18.

Lendlease applied to the Queensland Supreme Court to have the determination declared, at least in part, void. Lendlease's application was founded, amongst other reasons, upon section 61(4) of the BIF Act which says:

> *"This chapter does not apply to a construction contract to the extent it deals with construction work carried out outside Queensland or related goods and services supplied for construction work carried out outside Queensland."*

The parties' submissions

The main divergence between the parties was Lendlease's contention – and focus – that the phrase "*construction work carried out*" was a reference to **the activity** of the carrying out of the work as opposed to the location of the final product of the activity. Lendlease also submitted that this required BCS to identify in its payment claim where the construction work was carried out.

BCS contended that the focus ought to be on the location of the building, structure, or work to which the activity applies. BCS further submitted that if, for example, the relevant construction work was in respect of a building that straddled the Queensland/New South Wales border, then the building was not external to or beyond the limits of Queensland (and therefore within the ambit of the BIF Act).

This was contrasted with a construction contract which, for example, required work in respect of two separate buildings, one entirely in New South Wales and the other entirely within Queensland. In that instance the New South Wales building work would be external to or beyond the limits of Queensland (and the BIF Act would have no application accordingly).

The Court's judgment

The Court ultimately preferred BCS's construction of s 61(4) of the BIF Act as it sat consistently with similar decisions

(some in other jurisdictions).[3] At [114] Sullivan J said:

> *"Sections 61(4) and 65(1) of the BIF Act can best sit together with the primary touchstone for each section being the location of the building, structure or works, as opposed to where each particular activity might take place disconnected from the location of the ultimate building, structure or works involved."*

A factor underpinning the Court's reasoning was that the preferred construction was one which best promoted the purpose and object of the BIF Act (namely a quick and inexpensive interim procedure for builders to be paid for their work).

Sullivan J observed that the alternative construction would involve a "*bolt-by-bolt analysis of work and materials for a building, structure or work which straddles* [a] *border*." Accordingly, at [121], Sullivan J held:

- section 61(4) gives rise to a jurisdictional exclusion in respect of the operation of Chapter 3 [of the BIF Act] as it applies to a construction contract in respect of the degree of construction work within that contract;
- the jurisdictional exclusion means that the identity of that degree of construction work excluded construction work will be the subject of a jurisdictional fact; and
- the identity of the excluded construction work will be construction work carried out on a building, structure or works situated wholly outside of Queensland.

As to the ancillary issues, his Honour said that:

- the BIF Act does not require a payment claim in a cross-border project to purport in a reasonable way to identify the location of the construction work; and
- on the facts before the Court, the CPAL Act had no application which rendered the adjudicator's determination invalid.

Lendlease's application was dismissed and the adjudicator's jurisdiction and determination of $995,081.18 on BCS's payment claim upheld.

Key takeaways

In many instances work and materials often take place and/or are supplied in one jurisdiction yet 'crystallise' in another. The chances of this no doubt increase when the relevant work or site is in close proximity to a state or territory border (or straddling it, as was the case in *Lendlease*).

With increases in technological capabilities and flexibility in the global supply chain, for example modular buildings manufactured overseas but installed in Australia, one can only imagine facts analogous to *Lendlease* becoming more likely.

Whilst the rationale behind the Court's decision in *Lendlease* is not necessarily novel (and given most, if not all, state and territory security of payment legislation has similar carve outs),[4] it reinforces the following messages for adjudicators, claimants, and respondents:

- an adjudicator will need to decide whether the construction work to which a payment claim the subject of an application relates is excluded from the adjudicator's jurisdiction by reason of its location;
- if the ultimate building, structure or works in respect of the construction work is *wholly* outside of the state or territory in question, then that jurisdiction's security of payment legislation is unlikely to apply (notwithstanding that the majority of construction work might in fact have been done there); and
- in a cross-border project, there is no requirement to identify the precise location of the construction work in question in the payment claim (although the payment claim still needs to meet the minimum requirements prescribed by the legislation as an essential pre-condition).

Notwithstanding the Court's decision in *Lendlease*, and as is always the case, each matter will turn on its specific facts.

[1] *Lendlease Building Pty Ltd v BCS Airport Systems Pty Ltd* [2024] QSC 164, at [4].

[2] Meaning, under the CPAL Act, *"a place (not being the seat of government) with respect to which the Parliament, by virtue of section 52 of the Constitution, has, subject to the Constitution, exclusive power to make laws for the peace, order, and good government of the Commonwealth*."

[3] See e.g., *Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd & Anor* [2011] NSWSC 165.

[4] See e.g., section 7(4) *Building and Construction Industry Security of Payment Act 1999* (NSW).