

Risky Business: The Experienced Contractor Test

In construction contracts, latent conditions are physical conditions which could not be identified by the contractor at the time of tender. When a contractor encounters a latent condition, they may be entitled to an extension of time or additional payments.

In deciding whether a condition is a latent condition, the 'experienced contractor test' is applied. Variations of the test can be found in standard form construction contracts. Essentially, it is a comparison of what physical conditions were encountered, and whether they differed materially from those which could reasonably have been foreseen by an experienced contractor.

In *Latent Conditions and the Experienced Contractor Test* [2016] ICLR 390, the author Gordon Smith refers to international and Australian case law to guide contractors and principals in assessing liability for latent conditions. The cases below provide a brief summary of that article and the Courts' interpretation of the test.

1. Objective Nature of the Test

In *Glenorchy City Council v Tacon Pty Ltd* [2000] TASSC 51, Glenorchy City Council (GCC) sought leave to appeal an arbitrator's decision to award Tacon Pty Ltd (Tacon). Tacon made a claim for latent conditions in relation to a construction of piles. GCC provided Tacon with a report which had inaccurate information regarding depths to substrata. Although Tacon allowed 1.5m to 2m additional length per pile, the arbitrator found the actual length required could not have been reasonably anticipated on the information available at tender. GCC sought leave to appeal the decision. GCC claimed the arbitrator's finding was not supported by evidence, as Tacon had in fact been provided with the report several months after tender.

In rejecting leave, Cox CJ found that the definition contemplates:

"the difference of conditions between what are in fact encountered and what the contractor should reasonably have expected if he had examined the relevant information, rather than between what are encountered and what the contractor, having actually examined the information, did reasonably expect".

Cox CJ went on to say it is irrelevant whether the contractor actually examines the documents. The contractor is taking a risk by failing to examine documents and instead relying on conditions at inspection. Taking this risk, however, does not preclude the contractor from asserting a latent condition claim.

2. Relying on inaccurate information

Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2014] EWHC 1028; [2014] BLR 484 concerned the contract for the design and construction of a tunnel under the runway of the Gibraltar airport. Obrascon Huarte Lain SA (Obrascon) brought a latent condition claim when the Government of Gibraltar terminated their contract. They claimed the extent and amount of contaminated materials was not reasonably foreseeable by an experienced contractor at the time of tender.

Obrascon sought to rely on the environmental statement which estimated that the work would require removal of 10,000m³ of contaminated land. They claimed removal of more contaminated land was not foreseeable. In rejecting Obrascon's claim, Akenhead J stated "the contractor cannot simply accept

someone else's interpretation of the data and say that is all that was foreseeable." Akenhead J found that an experienced contractor would have looked past the environment statement and referred to the history of the site. The site had previously been a runway, a fuel farm and a rifle range. Therefore, an experienced contractor could expect extensive lead and hydrocarbon residues at the site and therefore a greater allowance in removal of land.

3. Disclaimers

Although principals may assert that disclaimers nullify a contractor's latent condition claim, Smith submits that latent condition clauses operate as a separate independent test. The court will look at the information available and assess whether it would be reasonable for an experienced contractor to undertake further analysis and investigation.

In *BMD Major Projects Pty Ltd v Victorian Urban Development Authority* [2007] VSC 409, the Court held that the provision of the documents regarding the accuracy of the information could not succeed in avoiding liability for the latent condition. The Court reasoned an experienced contractor would not have reasonably anticipated that there was a discrepancy between the anticipated physical conditions provided for by the information, and those that were encountered.

When contractors enter into construction contracts, it is important to ensure that the contract contains a latent condition clause which allows for an extension of time and cost. The absence of such clause places all responsibility for ground conditions encountered on the contractor.

If you have any questions or concerns about how to safeguard against the consequences of latent condition claims call Integra on +61 8 92188588 and a member of our Construction, Property/Leasing and Insurance Teams can assist.