

**LATENT CONDITIONS****Casenote BMD Major Projects Pty Ltd v Victorian Urban Development Authority [2007]VSC 409**

This case dealt with a latent condition claim made by a contractor under AS 2124 1992 where there was a discrepancy between the actual site conditions and those described in the tender documents.

The case is important because it highlighted the relevant test for a latent condition under the contract and identified some of the factors that the court considered in determining whether the test was satisfied.

The case represents a victory for contractors in latent conditions claims

**Facts**

BMD Major Projects Pty Ltd [BMD] made claims against the Victorian Urban Development Authority under a latent conditions clause based on an AS2124 1992.

BMD contracted to undertake excavation, filling and rehabilitation works at a former quarry site.

It was claimed by BMD that its expectation of the physical conditions of the site was materially different from the actual physical conditions encountered on site.

The site had been used to quarry basalt rock.

The contract between the parties was for a lump sum for the works but entitled BMD to claim additional amounts if it encountered latent conditions.

The contract provided:

1. for the provision of notice of the latent condition to superintendent,
2. an entitlement to an extension of time if the latent condition caused delay and
3. that a valuation be made if a latent condition caused the contractor to carry out additional work or use additional constructional plant and incur extra costs

BMD claimed that it encountered latent conditions which caused it to carry out additional works and incur additional costs in the performance of additional works in the amount of \$6.9 m.

BMD contended that it complied with the notice requirements of the contract for latent conditions. It also claimed an extension of time. The Superintendent allowed sum of the claims but not all leaving a disputed amount of approximately \$6.3m.

Vic Urban argued that the claim did not constitute a latent condition under clause 12.1 of the contract.

The essence of a latent condition under clause 12.1 is that the physical conditions found on site or its surroundings differed materially from the physical conditions which should reasonably have been anticipated by the contractor at the time of tender if the contractor undertaken the enquiries and information identified in clause 12.1(a)(i) to (v).

Clause 12.1(a)(i) to (v) states as follows:

Latent conditions are:

- (a) Physical conditions on the site of its surroundings, including artificial things but excluding weather conditions which differ materially from the physical conditions which should reasonably have been anticipated by the Contractor at the time of the contractor's tender if the contractor had:
  - (i) examined all information made available in writing by the Principal to the contractor for the purposes of tendering; and
  - (ii) examined all information relevant to the risks, contingencies and other circumstances- having an effect on the tender and obtained by the making of reasonable enquiries; and
  - (iii) inspected the site, its surroundings and all improvements and fixtures on the site and its surrounds (including all physical conditions and characteristics, facilities, services and access);



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- (iv) all information relevant to the risks, contingencies and other circumstances having effect on the tender and obtainable by making or reasonable enquiries; and
- (v) all other risks, matters and things which may be relevant to the carrying out of the work under the contract or the performance of the contractors' other obligations under the contract..."

Vic Urban contended that BMD did not make the enquiries it ought to have made as required by clause 12.1(a) because it did not examine all the information contained in file that it had in its possession from the quarrying division of the company that had purchased the Quarry.

Vic Urban argued that had BMD examined the contents of the file, it would have led BMD to the conclusion that there was a discrepancy between the tender plans and the quarry as it had been excavated in 1974.

A number of important principles were identified in the case:

1. the conditions upon which clause 12.1 operates are to be determined objectively; that is what should have been anticipated by the contractor at the time of tender is to be determined by an objective assessment of the facts rather than what the particular contractor may have done or not have done.
2. the types of questions raised by clause 12.1 include:
  - (a) what conditions had been encountered
  - (b) were they physical conditions
  - (c) did the conditions differ materially from those that were ascertainable and what could have reasonably been anticipated

BMD argued that because the standard under clause 12 was objective, it is irrelevant for the court to consider whether or not it had the Boral file.

The Court disagreed with that argument because the purpose of clause 12 was to encourage and require the making of enquiries by a contractor.

Vic Urban agreed to accept an additional risk of a latent condition but only if the contractor had done all that it reasonably could or should.

The facts were that BMD did undertake enquiries of others about the conditions of the site and by those enquiries came into possession of the file.

All that BMD did with the file was to see if its contents could assist in the preparation of the tender and in the detailing and programming of the job.

The expert evidence of Mr Clark of Vic Urban was that on examining the file a reasonable contractor would have been alerted to possible differences in the natural surface level to those shown in the maximum extent of excavation plan.

Vic urban also called a geotechnical engineer.

Under cross examination he said that a contractor would need to have had reasonable expertise in geotechnical engineering or hired a technical engineer to analyse the contents of the Boral file to have found something of geotechnical significance.

He said that a contractor looking at the Boral file would have been unable to find something of geotechnical significance but that a contractor who engaged a geotechnical engineer would have found something of geotechnical significance.

The material in the Boral file did not contain information in a form that without more would make a reader realize that the information on the tender plans was wrong or needed to be re examined.

The issue in the case was therefore whether BMD ought to have done more than it did in considering the Boral file.

BMD did not ignore its contents.

The consideration of the file by BMD did not prompt them to undertake any further analysis or put on a chain of enquiry to look for inaccuracies in the information provided prior to tender

Significantly, Vic Urban was not able to point to any particular fact or matter on the face of the Boral file which would cause a non expert in the position of a contractor to seek the assistance of a geotechnical engineer

The Court held that without the assistance of expert geotechnical advice, BMD would not have apprehended that there was a need to give a further consideration to the Boral file.



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The Court also looked at the context in which the file was provided.

It was a single file which was in addition to the voluminous material supplied by Vic Urban. The tender material had been prepared by reputable and experienced experts.

Vic Urban did not warrant the accuracy of the information and urged tenderers including BMD to satisfy themselves about the accuracy of the information that had been supplied to assist them in the tender process.

What was important to note was that BMD's entitlement under the latent condition clause did not depend upon the information supplied containing an error.

The test is what BMD as a competent and suitably qualified contractor would expect to encounter by way of physical conditions in the execution of the works.

Having regard to all the facts, His Honour said:

"... I do not consider that BMD should reasonably have anticipated that the natural surface levels were different from those shown on the maximum extent of excavation plan even allowing for the qualifications of accuracy and cautions in the materials and reports conveyed to [BMT] to assist them in their tender....."

#### RE Notice

Another issue that the court had to consider was whether BMD had given effective notice 'forthwith' of its claims as required by the contract.

BMD became aware of the latent condition at the end of July 2002 and orally notified VicUrban at that time. Written notice of the latent condition was not sent until 6 August 2002.

The court noted that 'forthwith' had variously been taken to mean 'immediately', 'without delay', 'as soon as reasonably practicable' and 'as soon as reasonably possible'.

In this particular case the Court favoured the meaning 'as soon as reasonably practicable' or 'as soon as reasonably possible'.

The court was of the view that interpreting 'forthwith' strictly would simply mean that contractors would be more concerned about anxiously satisfying the formal notice requirements of the contract instead of exploring the underlying needs and circumstances.

The Court held that the notice dated 2 August 2002 was on the facts and context sent forthwith that is "sent without delay and as soon as reasonably practicable or as soon as reasonably possible in all the circumstances..."

#### Second latent condition claim

Although the court found in favour of the latent condition claim, there was a second latent condition claim which was not successful.

The second claim was a claim that the particle size of the composition of the stock pile material differed materially from that which could reasonably have been anticipated at the time of tender.

This resulted in BMD carrying out additional work namely in the crushing of oversized rock.

At the time of tender BMD had two reports prepared by Golder and Associates dated 2 November 1998. Golder had been engaged by Vic urban and are reputed to be pre eminent specialist geotechnical consultants in Melbourne.

In the first report Golder expressed the opinion that "it appears overall about 35% of the fill material in the stockpiles A to E is likely to comprise of basalt, cobbles and /or bolders"

BMD argued that it was entitled to rely on the opinion as to the likely composition of the fill material in the stockpile without being required to undertake further enquiries or to engage geotechnical engineers to second guess that conclusion.

The Court disagreed.

It was found that a reasonable contractor would not simply accept these reports as accurately and reliably describing all of the material in the stockpiles and the distribution of materials throughout them.

A reasonable geotechnical engineer would have correlated the data on particle size distribution in the Golder's compilation and assessment reports and would have provided BMD with an overall interpretation.

#### Lessons to be learn

The case confirms that irrespective of the information is provided to a contractor what the contractor should be on notice about from the information will be ascertained having regard to the objective, reasonably competent contractor test.



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In this case a reasonably competent contractor could not have been expected to investigate the information to the extent alleged by VicUrban.

In relation to the first latent defect claim Vic Urban was liable for those site conditions which were not reasonably clear on the face of the documents provided.

In relation to the second latent defect claim, the position was quite different. BMD could not blindly accept the conclusions of the Golder Report without more enquiry.

The balance of the proceedings comprises of BMD's claims against VicUrban for breach of contractual warranties, contractual variations, extensions of time, breaches of the Trade Practices Act 1974 (Cth) (TPA), unjust enrichment and other claims on the contract.

*If you would like any further information on this topic, please contact David Glinatsis on 8239 6502 or [david.glinatsis@kreissonlegal.com.au](mailto:david.glinatsis@kreissonlegal.com.au)*



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