

Construction Arbitration Newsletter

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Construction Arbitration Law Firm

- **Claim for additional payment due to hard rock found during excavation - for the Contractor to succeed it should have ensured such a provision in the contract in the event of unforeseen conditions being encountered - conversely, even if the original survey had mistakenly and negligently calculated the price too low, the Contractor would be entitled to an increased price on completion of the work whether or not adverse conditions had been encountered.**
- **Limitation period of 3 years for filing of counter claims by the Employer would commence when the cause of action arose - the date of filing or institution of the counter claims would be reckoned as the date on which the counter claims are filed.**

[Nabinagar Power Generating Company Ltd. v. AMR India Ltd. - Delhi High Court - Decided on 20.3.2023]

[Workshop Tarmacadam v. Hannaby, Court of Appeal, United Kingdom - [1995] 66 Con LR 105]

- **Counter claim by the Employer - limitation period of 3 years - Employer after termination of the contract, proceeded to award the contract for execution of the balance works to four separate entities and claimed additional amount for execution of works at risk and cost of the Contractor - claim raised more than 3 years prior to the filing of the statement of counter claims by the Employer - claim relating to delay on the part of the Contractor also three years prior to filing of the statement of counter claims - counter claims raised by the Employer is barred by limitation.**
- **Employer issuing communications to the Contractor stating that the same were without prejudice to its rights or further action, would not extend the period of limitation - negotiation and exchange of communication after the disputes have arisen will not extend the period of limitation.**



- **Claim for disruption and prolongation arising out of unforeseen ground conditions** - an experienced Contractor at tender stage would not simply limit itself to an analysis of the geotechnical information contained in the pre-contract site investigation report and sampling exercise.
- **Obligation of an experienced Contractor** - every experienced Contractor knows that ground investigations can only be 100% accurate in the precise locations in which they are carried out - it is for an experienced Contractor to fill in the gaps and take an informed decision as to what the likely conditions would be overall - arbitral tribunal to determine whether there were different conditions such that they could not reasonably have been expected to have been foreseen by an experienced Contractor.
- **Relevance of contemporaneous documents** - contemporaneous documents are a useful starting point when trying to work out what was happening on site at any given time, and what the relevant individuals thought were the important events on site during the works.

*[Van Oord UK Ltd & Anor v. Allseas UK Ltd. - Queen's Bench Division, Technology and Construction Court
- Decided on 12.11.2015]*



Workshop Tarmacadam v. Hannaby, Court of Appeal, United Kingdom - [1995] 66 Con LR 105

The Contractor was awarded the work for development on a plot of land after competitive tendering process. The contract inter alia provided for “All work will be measured on completion” and “Variation of Work”. Clause 8 dealing with ‘Variation of Work’ provided that variation means the alteration or modification of the design, quality or quantity of the work as shown in the contract and included the addition, omission or substitution of any work. Clause 15 of the contract provided that “At any time before completion of the contract the company shall be entitled to vary the price and take into account all or any of the following factors”. The Court held that the contract was for a lump sum amount subject to variations and was not a contract where the prices appearing on the face of the tender was subject to variation, either upwards or downwards, in a way that is not specifically provided for in the specific conditions.

The contract provided for increase in prices in the event of change in labour charges during the course of work in addition to the tender price. The Court observed the contract did not provide for additional payment or cost as a result of unforeseen site conditions or hard rock encountered during the excavation because “Had the plaintiffs wished to make such a provision in the event of unforeseen conditions being encountered, it would have been the easiest thing in the world for them so to have provided in specific terms. They did not do so.”

**Nabinagar Power Generating Company Ltd. v. AMR India Ltd. - Delhi High Court
- Decided on 20.3.2023**

Disputes between the Employer and the Contractor arose in connection with the work for "Site Levelling and Infrastructure Package for Nabinagar Super Thermal Power Project (3 X 660 MW)". The execution of the contract was delayed. The works were required to be completed within the period of 30 calendar months i.e on 10.11.2013. The Employer claimed that the progress of the work was very poor. Employer removed some of the works from the Contractor's scope of work. Subsequently, the Employer terminated the contract on 21.10.2013 and informed the Contractor that it would get the work executed through a suitable agency at the risk and cost of the Contractor. The Contractor issued a notice dated 29.3.2014 invoking the arbitration agreement. On 13.2.2017, the Contractor issued another notice yet again seeking reference of the disputes to arbitration. The Contractor approached Court seeking appointment of the arbitral tribunal and a sole arbitrator was appointed. The Contractor filed its Statement of Claims before the arbitral tribunal on 10.8.2017 and the Employer filed its Statement of Defence and the counter claims on 18.9.2017. The arbitral tribunal held that the Employer's counter claims were barred by limitation. The Court upheld the finding of the arbitral tribunal and observed that the Employer had awarded the balance work of site levelling and infrastructure package to various agencies on 4.3.2013, 25.1.2014, 5.6.2014 and 14.6.2014. Since the cause of action for raising the counter claims by the Employer had arisen in the year 2013-2014, the counter claims filed by the Employer after 3 years from the date of cause of action, were barred by limitation. The dispute in this regard had arisen with the Contractor contesting the allegation that the delay was attributable to it and seeking reference of the disputes to arbitration. The counter claims were also not the subject matter of any negotiation between the parties.



The Contractor made a claim for disruption and prolongation arising out of unforeseen ground conditions. The Contractor pleaded that because peat was encountered at greater depths than they could reasonably have foreseen in some section of the works, the Contractor was obliged to build stone embankment and lay the pipe within that embankment. The Court held that an experienced Contractor must make allowance for unforeseen ground conditions at site and areas which have not been tested. The Court found that the sub-surface conditions were not different from those described in the contract documents. It is only if the conditions actually encountered were different to those set out in the contract documents would it be useful to decide whether there were different subsurface conditions such that they could not reasonably have been expected to have been foreseen by an experienced Contractor. The Court found, based on evidence, that an experienced contractor would reasonably have been expected to foresee many pockets of deep peat. Contractors are provided with all available information as to ground conditions, but ultimately it is a matter for their judgment as to the extent to which they rely upon that information. It is wrong in principle for a Contractor to argue that, merely because, in some particular locations, the conditions were different to those set out in the pre-contract information, those different conditions must somehow have been unforeseeable. A claim based on different ground conditions encountered would fail if it is such as would not substantially modify the contractual scope of work or the contract price. The Contractor has the burden to demonstrate and lead evidence to show that the ground condition was a substantial modification to the contractual scope of work.



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