PART 2: HOPE FOR 'CONSTRUCTIVE' ACCELERATION CLAIMS?

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In my previous article, I explained the various types of acceleration, and the difficulties in pleading such claims. It was hopefully evident that, despite the seemingly unequivocal definition of acceleration, the caselaw examples cited in Part 1 (*"Acceleration: The Need for Speed"*), only exemplified the legal 'hurdles', and the uncertainty to which party ultimately bear the financial consequences.

Of the most controversial types of acceleration occurs when an Employer's conduct is such that the Contractor feels it has no choice but to accelerate, even without a formal instruction to do so. This is commonly referred to as 'constructive acceleration' and is an emotive scenario that divides construction law professionals about whether such a claim can or should succeed (or even whether the principle is recognised under English law). Some consider for example that the notion is undermined by the Contractors statutory right to adjudicate[i] (so as to obtain an interim decision on the validity of its time claims, rather than accelerating).

Only recently, I was involved in an Adjudication where the Contractor claimed that the accelerative costs were borne out of "*pressure*" imposed by the Employer to finish by a certain date. The project was for a key piece of national infrastructure, with forecast delays to a critical section of the works. In the 'pressure cooker' environment of delivering such a major scheme, tensions heightened, and the Employer insisted that the Contractor meet the original completion date to avoid 'front page news' (this coupled with alleged threats by the Employer to terminate).

i Housing Grants, Construction and Regeneration Act 1996 c. 53

In response the Contractor implemented acceleration measures to 'compress' the programme to bring the programme back in line. The crux of the Contractors claim relied on the Employer's conduct amounting to an implied instruction. However, the Adjudicator ultimately found there to be insufficient evidence of the purported "*pressure*" meaning the claim for constructive acceleration failed.

Nevertheless, a recent Australian case caught my eye last year, in which a claim for constructive acceleration succeeded, and I wondered whether that case may reopen the debate in the UK?

RECENT DEVELOPMENTS DOWN UNDER...

In a recent decision in the Supreme Court of Victoria, a claim for constructive acceleration succeeded. Although an Australian case, its common law juridical system, like the UK, is based on an evolving precedent. In respect to construction disputes, the caselaw demonstrates considerable interplay between the two countries, with both jurisdictions drawing guidance from each other. As such, the interaction between UK and Commonwealth cases remains a much-debated topic, and although an Australian decision is not binding in the UK, the courts will, however, take note of judgements in other common law countries.

To that end, this recent decision provides an insight into how another common law jurisdiction has dealt with the problematic issue of constructive acceleration, and so may prove persuasive in the UK.

In *V601 Developments v Probuild Construction (2021)*[ii] , the court held that the failure to award an extension of time occurred because of a lack of independence by the Contract Administrator, which meant that the Contractor was entitled to recover accelerative costs. This helpful judgment had to consider the unique facts of the dispute, and the threshold a constructive acceleration claim must pass to succeed.

Probuild entered into an Australian Standard Contract with V601 Developments for the design and build of a mixed-use development, known as the Precinct Project. The project subsequently ran into delay, yet no extension of time was awarded (that Probuild felt was due), and as such, Probuild refused to pay damages. To that end, V601 commenced litigation proceedings seeking to recover liquidated damages that relied on certificates issued during the works by the Project Manager (appointed by V601 to act as Contract Administrator).

Probuild subsequently filed counterclaims alleging (among other things) that the Project Manager failed to award genuine extensions of time under the contract. In reply, V601 asserted that this was caused by Probuild's inability to provide programmes capable of being accepted, and that this caused the extension of time clause to become unworkable, as it needed an approved programme to be in place. However, Probuild had, in fact, provided not only a baseline programme, but

ii V601 Developments Pty Ltd v Probuild Constructions (Aust) Pty Ltd [2021] VSC 849

25 updated programmes, and therefore it claimed the Project Manager had repeatedly neglected to approve the programme without proper justification; it "*was not an innocent error*". Probuild sought to recover its costs of accelerating to complete the works by the unadjusted date.

Under the Contract, the Project Manager's role was to "*act as an agent*" for V601 and "*as an independent assessor and certifier*". While the court appreciated the role, at times, "*may give rise to tension*" by virtue of being in the 'middle' of both parties, the court nevertheless, held "*the Project Manager failed to appreciate the standard of independence*" it should have applied from the outset of the project. Furthermore, in dealing with Probuild's claims, the court held the Project Manager "*colluded*" with V601 to "*work in unison*" to devise a "*collective strategy to delay and reduce the Contractor's entitlements to extensions of time*".

In its closing statement, Probuild contended that the failure to grant an extension of time effectively acted as "*a direction to accelerate*" which required it to complete by the unadjusted completion date (this being more akin to a 'traditional' constructive acceleration claim). While the judge was unconvinced by this point, he considered "*whether acceleration measures may be recognised as a form of mitigation*" (this being similar to the UK caselaw position). Probuild had referred the court to *Great Eastern Hotel Company v John Laing Construction (2005)*, which was considered to be of assistance, despite being a UK case, and not binding in Australia. Here the court held:

> "...it follows that delays to completion would have been greater, and thus Laing's liability for costs consequent on such delays correspondingly larger in the absence of acceleration. Any acceleration measures, even if partially successful, were clearly measures adopted in order to mitigate GEH's losses and as such the cost of such measures are recoverable[iii] "

Following a detailed review of authorities, the Supreme Court of Victoria found that Probuild was entitled to recover the additional costs owing to its efforts to overcome the critical delays. In reaching a decision, the judge considered the accelerative costs to be a reasonable mitigation measure that was necessary... owing to a breach of contract by

iii Great Eastern Hotel Company v John Laing Construction [2005] EWHC 181 (TCC)

V601. That is, by denying Probuild an extension of time, it was forced to make efforts to reduce delay, to try and achieve an unadjusted completion date. The judge gave credence to the fact the accelerative costs, due to the breach, were foreseeable, and were therefore within both parties' contemplation.

While the facts of *V601 Developments v Probuild Construction* may be 'extreme', the case provides a reminder that constructive acceleration claims can succeed, if rarely. While some authors may consider the facts of this case unique, it is not uncommon that the Contract Administrator is either directly or indirectly employed by the Employer (and so may hold the same interests). A key factor in this case was V601's pressure and influence over the Project Manager, and their willingness to conspire to deny Probuild a valid extension of time. That "*collusion*" constituted a breach of contract. Had the Project Manager made a genuine mistake (i.e., 'simply got it wrong') and there had been no interference from the Employer, then a claim for constructive acceleration may have likely failed. Additionally, it should be noted that Probuild were only entitled to recover as damages the costs of taking reasonable steps to mitigate its loss from V601's breach in contract.

On the face of it, this decision appears to be consistent with the position on 'constructive acceleration' under English law, and despite not being binding in UK courts, I wonder if it might 'lift the lid' on the issue once more, and so re-open the debate on constructive acceleration in the UK?

WHAT ARE THE KEY TAKEAWAYS?

While these two articles do no more than touch on the many difficulties in pursuing an acceleration claim, and provide some 'food for thought' in light of UK caselaw examples, as well as the recent development on constructive acceleration in Australia, I hope that it also offers some useful key takeaways:

- Carefully consider the contract terms before instructing (or implementing) any accelerative measures.
- If not provided for by the contract, take time to understand your common law obligations. Without an express term, an Employer cannot unilaterally instruct a Contractor to finish early.
- A party 'faces an uphill battle' if seeking to plead a 'constructive acceleration' claim:
    - The term is not a recognised doctrine in English Law.
    - In cases akin to 'constructive acceleration' the courts often instead look to award damages for the mitigation costs owing to an Employer's breach of contract.
    - These cases often have a unique factual background whereby the Contractor is 'penned into a corner'. Is that a genuine factor in your case?
- If a Contractor believes it has a genuine entitlement to an extension of time, then other (possibly better) options may be available, rather than acceleration. For example, in the UK there is a statutory right to take a dispute to adjudication to gain a speedy resolution (and failing to take such measures may undermine the reasonability of any constructive acceleration claim made).

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Variations

- Power to order change (additional/ omission of work)
- Omission of work and appointing another contractor to perform
- Assessment of changes

Notification

- Conditions precedent
- Time bars
- Mode

Quantum Claims - Assessing

- Causes
- Loss and/or expense
- Compensation events
- Damages/ Liquidated damages
- Records

Payment

- Payment mechanisms and the requirements of Housing Grants, Construction & Regeneration Act 1996 as amended
- Amount Due, basis of calculation
- Payment Schedules and the problem with their use
- Payment application, notice requirements and consequence of failing to notify

Time & Programme

- Commencement, planned Completion, Completion
- Preparing an Initial Programme - Good Practice
- Programme Updating / Revisions - Good Practice

Delay claims

- What makes a "good claim"
- Delay Assessment (Critical Path Methods - Advantages and Disadvantages)
- Demonstrating Causation
- Trickier issues: Float and "Concurrent causes" of delay

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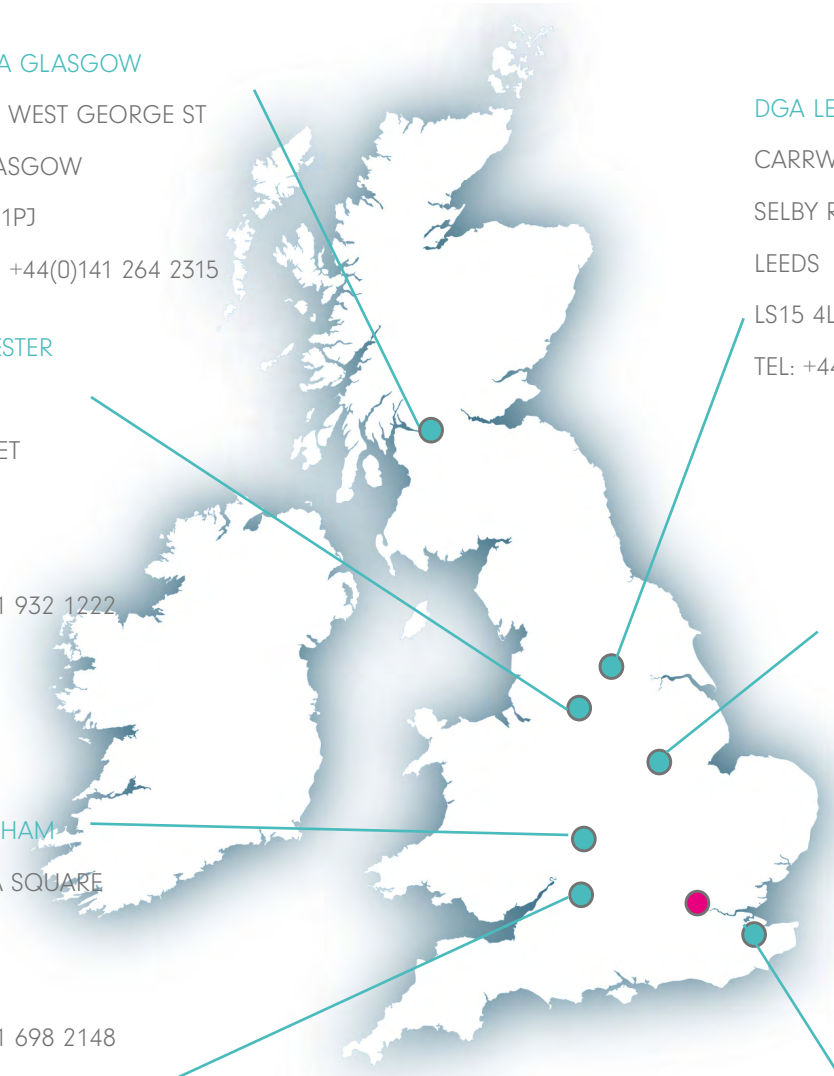

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