

CONSTRUCTIVE ACCELERATION
AND COST

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This dissertation is dedicated to Mohameed Jalaluddin and Muhammad Jihad and to all my family.

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ABSTRACT

The legal doctrine of constructive acceleration has developed into a relatively common claim on construction projects in the United States. The position there is that if an employer causes delay but refuses to grant an extension of time for it, and the contractor accelerates to win back the lost time, the refusal of the employer or his certifier is treated as a constructive instruction to accelerate, for which the contractor is entitled to compensation under the contract. English law, for that matter by inference in this regard Malaysian law, does not seem to implicitly accept this concept of constructive acceleration. It remains to be said that even if *'loss and expense'* or *'costs'* of constructive acceleration is claimable, this is strictly beyond the jurisdiction of the contract administrator and the same can only be pursued in arbitration or litigation. The essence of the problem is the exact nature of *'temporary default'*, when the contractor is not clear whether he is entitled to an extension of time and may appear to be in breach of contract pending the final determination of extension of time while left with the same choice, whether or not to accelerate. This dissertation is aimed at determining the contractor's entitlement to claim for cost of acceleration especially in the case of constructive acceleration. Given the legalistic nature of this dissertation, the approach adopted in this research is mainly case law based. Through the analysis of courts judgments, the meaning and effects of acceleration can be determined while contractor's obligation, acceleration claims and acceleration agreement can be identified and ascertained.

ABSTRAK

Doktrin undang-undang bagi “*constructive acceleration*” telah berkembang sebagai tuntutan yang biasa dalam projek pembinaan di Amerika. Kedudukan tuntutan ini di sana adalah, sekiranya pemilik projek yang menyebabkan kelewatan tetapi menolak kelulusan lanjutan masa bagi kelewatan tersebut dan kontraktor “*accelerate*” untuk menebus kelewatan, penolakan tersebut di sebagai arahan untuk “*constructive acceleration*” di mana kontraktor layak mendapat gantirugi menurut kontrak. Undang-undang Inggeris, secara kesimpulan merujuk undang-undang Malaysia seumpama tidak menerima secara tersirat konsep “*constructive acceleration*” ini. Walaupun tuntutan kerugian dan perbelanjaan atau kos bagi “*constructive acceleration*” layak dituntut, ia adalah di luar bidang kuasa pentadbir kontrak dan ia hanya boleh dituntut melalui proses timbang tara atau tindakan undang-undang. Masalah utama bagi tuntutan ini adalah sifat “*temporary default*”, apabila kontraktor tidak jelas samada beliau layak mendapat lanjutan masa dan mungkin melanggar kontrak sementara menunggu keputusan lanjutan masa dan perlu memilih samada meneruskan “*accelerate*” atau tidak. Disertasi ini bertujuan untuk menentukan kelayakan kontraktor bagi menuntut kos “*acceleration*” lebih-lebih lagi kos “*constructive acceleration*”. Oleh kerana disertasi ini bersifat legalistik, pendekatan yang digunakan adalah berasaskan “*case law*”. Melalui analisis keputusan mahkamah, keputusan dan kesan “*acceleration*” boleh ditentukan sementara kewajipan kontraktor, tuntutan “*acceleration*” dan perjanjian “*acceleration*” dapat dikenalpasti.

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CHAPTER 1

INTRODUCTION

1.1 Introduction

Modern construction contracts typically contain elaborate provisions stipulating the time within which the contractor is required to complete the construction of the works as well as the conditions under which such time may be extended.¹ The typical expressions used in construction contracts for the purpose of ascertaining state of completion of a particular works include '*practical completion*'² or '*substantial completion*',³ distinguishing the state of the works at the time of handover from that at final completion.⁴

It is normal for the contractual parties to fix a contract period for the completion of the works and whether time is of the essence is ascertained by examining the intention of the parties from the terms of the contract and the

¹ Fong C.K. (2012) *Law and Practice of Construction Contracts*, p.508

² The term 'practical completion' is the term used in Clause 15 of PAM 2006 Standard Building Form. This term is also the term used in Clause 39.2 of PWD Form 203A (Rev.1/2010)

³ The term 'substantial completion' is the term used in Clause 48 of ICE Conditions of Contract for Works of Civil Engineering Construction 7th Edition.

⁴ Kheng O.C. (2003) *Extension of Time and Liquidated Damages in Construction Contracts*, p.5

surrounding facts.⁵ The contractor's obligation to complete the works by the completion date is, like all such obligations, backed up by legal sanctions,⁶ and if the contract stipulated that time is '*of the essence*', the other party is entitled to terminate the contract due to any delay in the work performance.⁷

Delays may be categorized from causation perspectives. First, delays caused by the contractor are delays caused by parties for whom the contractor is responsible in law, which often referred to as 'culpable delay' and under most contracts the contractor is neither entitled to extension of time nor recovery of loss and/or expense on account of culpable delay.⁸ Second, delays caused by neutral events are those for which neither the employer nor the contractor is responsible, for example exceptionally adverse weather conditions. Most contracts allow the contractor more time to complete but with no corresponding entitlement to recover any loss and/or expense caused.⁹ Third, delays caused by the employer are delays caused by parties for whom the employer is responsible in law. In-most standard forms, the contractor is entitled to extension of time and recovery of loss and/or expense caused by this type of delay.¹⁰

There is an obvious tension between the contractual parties' financial interests in relation to delay because whoever is ultimately determined to be responsible for the event that caused the delay must bear the financial consequences.¹¹ From the contractor's perspective, delay on an activity can cause inefficiency in the carrying out the works and/or prolongation of the overall project duration because productivity may be lowered when worker are required to work

⁵ Philip C.F. Chan (2002) *Commonwealth Construction Cases*, p.125

⁶ Clause 20.1 of CIDB Standard Form of Contract for Building Works 2000 Edition

⁷ Chappell D. (2011) *Building Contract Claims, Fifth Edition*, p.20

⁸ Rawling B.E. *Concurrent Delays A Practical Approach – Part 1*, Brian E Rawling Association
<http://www.brianerawling.com/>

⁹ John K.P., Caletka A.F.(2009) *Delay Analysis in Construction Contracts*, p.123

¹⁰ *Ibid.*

¹¹ Dr C.S.Suryawanshi, *A Legal Analysis of Some Clausal-Related Disputes in Construction Contracts*, <http://www.nbmcw.com/>

overtime and when the contractor being compelled to abandon carefully designed work plans for less efficient work methods.¹²

The impact is therefore that the contractor incurs additional costs, thus reducing profitability.¹³ However, the prolongation impact often has more ruinous consequences on profitability but in a different manner whereby resources have to be kept on the project longer than planned, so the cost of the resources during the period of prolongation is therefore extra.¹⁴ Furthermore, the contractor loses the opportunity of redeploying his resources tied up on the delayed project on alternative work from which to earn additional contribution to its profit and head office overheads.¹⁵ Contractors therefore have a very strong incentive to lay the blame for delays on employers and demand financial compensation.¹⁶

Likewise, delay is equally a major financial risk to the employer. If the economic capability of the overall commercial venture depends on the project generating an income stream from a particular date, failure to complete the construction project by that date could turn a profitable venture into a loss making one.¹⁷ Even when the delay does not cause loss, it reduces profitability on account of delay in the inception of revenue generation.¹⁸ Therefore, employer would claim damages for breach of contract founded on the failure to complete on time which typically specified in the contract terms as the amount of money to be paid to the employer by the contractor for every day or week of delay in completing the project, referred to as 'liquidated damages'.

¹² Libor M.R. *Overview Of Potential Construction Claims*, p.12

¹³ Gray A. (2008) *Acceleration Measures on Construction Contracts*,
<http://www.constructionweekonline.com/>

¹⁴ Nelson D. (2013) *What Is Constructive About Acceleration?* p.13

¹⁵ *Ibid.*

¹⁶ *Ibid.n11*

¹⁷ Bajirao Patil (2011) *Claims for Losses on Account of Overheads and Profit due to Delay in Performance of Construction Contracts*, <http://www.legallyindia.com/>

¹⁸ *Ibid.n12*, p.3

However, for '*excusable delay*' the contractor is entitled to extension of time in the sense that, by being entitled to extension of time, the contractor is excused from liability for liquidated damages which would otherwise be payable. Delays for which the contractor is entitled to recovery of loss and expense are said to be 'compensable.'¹⁹ With the presence of extension of time and liquidated damages clauses, it can be said that most of the time, time is '*not of the essence*' in construction contracts with respect to the completion date.²⁰ That is to say, for the legal consequences flowing from a delay to the completion date or extended completion date in most construction contracts, the applicable provision in Contracts Act 1950 would be section 56(2).²¹

Somehow, it is normal for most contracts that get into delay, for whatever reason for the contractor to take delay mitigation or acceleration measures to reduce or extinguish such delay and to complete by the original date for completion or as soon as possible thereafter.²² If there had been delay to the completion of the works and the contractor is rightfully entitled to a time extension but, if the owner still requires the works to be completed by the contractual completion date, instruction can be issued to the contractor to increase the contractor's resources so as to catch-up with the shortfall. This would be straightforward if there is provision in the contract which allows for such a move.²³

Alternatively, a supplementary agreement can be entered into between the owner and the contractor to such effect.²⁴ In another situation where the contractor feels, correctly as it later turns out, that he is entitled to time extension but none has

¹⁹ *Ibid.n11*

²⁰ Murdoch J., Hughes W. (2008) *Construction Contracts Law and Management 4th Edition*, p.193

²¹ The only exception to this in a standard construction contract would be Clause 41.3 of JKR Standard Form of Design & Build/Turnkey Contract (PWD Form DB/T), 2002 Edition.

²² *Ibid.n8*, p.1

²³ Under clause 36.1 of NEC3 standard form of contract the project manager may instruct the contractor to submit an acceleration quotation. As with the JCT form, the stated aim of acceleration is to achieve completion before 'the Completion Date'.

²⁴ Nelson M. (2008) *To Accelerate or Not?*, Construction Management Guide

been awarded, or the award of such time extension is delayed, and fearful that liquidated damages may be imposed, the contractor without any instruction from the contract administrator increase his resources. The contractor then claim for 'loss and expense' or 'costs' incurred to reduce or extinguish delay. This situation would be called '*constructive acceleration*'.²⁵

The legal doctrine of constructive acceleration remains firmly established and has developed into a well-known and relatively common claim on construction projects in the United States.²⁶ The position there is that if an employer causes delay but refuses to grant an extension of time for it, and the contractor accelerates to win back the lost time, the refusal of the employer or his certifier is treated as a constructive instruction to accelerate, for which the contractor is entitled to compensation under the contract.²⁷

English law, for that matter by inference in this regard Malaysian law, does not seem to implicitly accept this concept of constructive acceleration even though American law does.²⁸ In a decision of New South Wales Supreme Court, it was held that as the certifier persistently ignores the contractor's request for time extension as a consequence of which the contractor accelerated to complete on time. The court decided the claim in favor of the contractor.²⁹

Somehow, at common law, it is not permitted for one party to unilaterally change the terms of a contract once the contract has come into existence, although a variation clause does of course give such a power in respect of what is to be built.³⁰ It remains to be said that even if 'loss and expense' or 'costs' of constructive

²⁵ *Ibid.n4*, p.15

²⁶ Zack J.G. (2011) *Constructive Acceleration – A Global Tour*, p.1

²⁷ *Ibid.n14*, p.3

²⁸ *Ibid.n4*, p.16

²⁹ *Perini Corporation v. Commonwealth of Australia* (1969) 12 BLR 90

³⁰ *Ibid.n20*, p.212

acceleration is claimable, this is strictly beyond the jurisdiction of the contract administrator and the same can only be pursued in arbitration or litigation.³¹

In the UK and other jurisdictions based upon UK law, contractors have for many years looked to recover from employers the additional costs of implementing acceleration measures even where there was no employer's instruction to implement such measures.³² Such claims were based upon the legal doctrine of mitigation. Although this philosophy does have its critics which advocate that the doctrine of mitigation does not apply when there is extension of time and additional payment clauses in a contract,³³ many contractors have been successful with acceleration claims where accordingly, proper procedures being put into place, notices issued and particulars of the acceleration measures carefully recorded to establish 'causal nexus' and the merits of such measures.³⁴

1.1 Problem Statements

Most standard forms of contract in Malaysia, namely PWD Form 203A (Rev.1/2010), PAM Contract 2006 and CIDB Standard Form of Contract For Building Works 2000 Edition do not show express power that consents the owner or contract administrator to instruct the contractor to accelerate the works. Where such a provision does exist, the employer or contract administrator's authority to issue an express instruction to accelerate the work normally arises only where the contractor

³¹ *Ibid.n4*, p.16

³² *Ibid.n14*, p.3

³³ Refer to *Ascon Contracting Limited v Alfred McAlpine Construction Isle of Man Limited* (1999) 66 Con. LR 119

³⁴ *Ibid.n8*, p.1

is himself responsible for the delay and he is required to expedite the progress of work and accountable for any resulting costs.³⁵

Even if the contractor is responsible for the delay, he may opt not to accelerate and may rather pay liquidated damages, especially if the liquidated damages rate is set too low. The contractor may discover that the cheaper option is simply to overrun the project and incur the liquidated damages, rather than the more expensive acceleration costs to complete the project on time.³⁶ Therefore the employer may only claim liquidated damages in this situation.

Nevertheless, what if the contractor is not liable for delays, but at the same time entitlement to an extension of time has not been recognized? How can it be possible to interpret the lack of action on the part of the contract administrator as an *'implied instruction'* to accelerate? Can the contractor assume an implied action from the contract administrator's conduct where he does not recognize any entitlement to claim for delays initially?

The authority of the contract administrator comes from the provisions of the contract.³⁷ Whilst some standard forms of contract give authority to the contract administrator to instruct a change to the sequence or timing of the work under the variation provisions,³⁸ this does not give the contract administrator the power to instruct the contractor to accelerate the work so as to complete earlier than the then date for completion while the contractor may not be required to actively co-operate

³⁵ Sub-clause 8.6 of the FIDIC Conditions of Contract for Construction (1999), Clause 46(1) of the ICE Form of Contract 7th Edition

³⁶ O'Neill P.J. (2008) *Challenges to Liquidated Damages*, p.2

³⁷ Refer Clause 3.0 of CIDB 2000 on Superintending Officer's Instruction, Clause 2.0 of PAM 2006 Standard Building Form on Architect's Instruction and Clause 5.0 of PWD Form 203A (Rev.1/2010) on S.O.'s Instruction

³⁸ Refer Clause 11.1(d)(i) and (iv) of PAM 2006 Standard Building Form and Clause on definition of variation that includes any changes to the provision in the Contract with regards to: any limitation of working hours and the execution and completion of the work in any specific order

to enable the earlier date to be achieved but was only required not to hinder completion.³⁹

In one situation, acceleration arises if the contractor is required to complete earlier than the contract date fixed for completion.⁴⁰ The main issue will be whether this requirement is variation to the contract. In practice the issue will turn on whether it can be established that an instruction was given in those terms. A complication is whether the failure of the contract administrator to properly grant an extension of time, or simply the timing of the ascertainment of the extension of time due, together with pressure from the employer or his agents for the contractor to complete by the then fixed date for completion, is effectively an instruction to accelerate. This is the issue of the '*constructive acceleration*'.⁴¹

The essence of the problem is the exact nature of '*temporary default*', when the contractor is not clear whether he is entitled to an extension of time and may appear to be in breach of contract pending the final determination of extension of time while left with the same choice, whether or not to accelerate.⁴² Until the extension of time is granted, the contractor is in default or likely to be in default and may decide that the most reasonable action in his commercial interests is to take acceleration measures rather than incur potential liquidated damages.⁴³

It is often disputed that the contractor should simply continue with the works knowing that he is entitled to an extension of time and that he will recover any prolongation costs and any liquidated damages wrongfully deducted when the matter is reviewed by the appropriate tribunal.⁴⁴ Indeed, if the contractor does increase

³⁹ Refer *Glenlion Construction Ltd v Guinness Trust* (1987) 11 Con LR 126 at 127

⁴⁰ *Ibid.n12*, p.11

⁴¹ *Ibid.n14*, p.3

⁴² Atkinson D. (2002) *Delay and Disruption – Acceleration*

⁴³ *Ibid*

⁴⁴ *Ibid.n14*, p.9

resources, that is a matter of choice on the part of the contractor unless at that stage he is confident of attributing the delays as a direct employer breach.⁴⁵

If he picked to accelerate, the contractor has to support his entitlement to compensate acceleration claim based on proof of action and show that there is no culpable delay on his part.⁴⁶ Furthermore the contractor needs to demonstrate that there is no prospect of an award of an extension of time, ever, and that any liquidated damages payable would affect his business.⁴⁷

Another difficulty faced by the contractor is that many standard forms of contract visualise several stages in the determination of extensions of time by the owner or contract administrator whereby some standard forms provide for the interim assessment of extension of time followed by final review at some later stage.⁴⁸ Therefore, the interim assessment is critical for the contractor to be able to justify excusable delay and demonstrate the reasonableness of that '*updated schedule*'⁴⁹ and its status at the time of the acceleration order.⁵⁰

Depending on which stage the project is at when accelerative works need to be undertaken, the contractor may find it challenging to satisfy the causation requirements demonstrating that the need to accelerate is exclusively as a result of the employers' actions or inactions and associated refusals to address the issue of time. Now, with the availability of interim mechanism such as Dispute Adjudication

⁴⁵ *Ibid.n14*, p.11

⁴⁶ Wray R.W. (2008) *Constructive Acceleration*, Wray & Pierce. L.L.P.

⁴⁷ *Ibid.n14*, p.11

⁴⁸ Refer to Clause 23.1(a) and 23.1(b) of PAM Contract 2006 for initial estimate followed by final claim for extension of time respectively

⁴⁹ One way for the contractor to show that the excusable delay has actually affected the project completion date is, by adding the period of excusable delay to its current planned schedule updated at the time of the delay and calculate a new completion date.

⁵⁰ *Ibid.n46*

Board's, the entitlement of extension of time may be resolved without waiting for work completion.⁵¹

There is also the related issue of the extent of the contractors' obligation to take measures to mitigate the consequences of a delay for which he may be entitled to an extension of time and the effect this has on any entitlement to extension of time and whether he can recover the cost of such measures.⁵²

1.3 Objective

This dissertation is aimed at determining the contractor's entitlement to claim for cost of acceleration especially in the case of constructive acceleration. This is despite the lack of instruction or an implied instruction by the owner or contract administrator to accelerate.

The study is intended to analyse the recommended six points test used in litigation or arbitration in determining whether a constructive acceleration had occurred on a project;⁵³ i) excusable delay was encountered; ii) notice and extension of time application was submitted; iii) no or less time extension was granted; iv) contractor was threatened or coerced into accelerating to recover the time not extended; v) contractor notify such action is tantamount to an instruction to accelerate; vi) contractor accelerated and substantiated with documentation.. Findings of this dissertation will identify possible legal mechanisms to compensate the contractor in the case of constructive acceleration.

⁵¹ *Ibid.n14*, p.12

⁵² *Ibid.42*

⁵³ *Ibid.n1*, p.625

1.4 Significance of the Study

This dissertation should be a good reference especially for the contractors on the possible rights to claim for acceleration carried out in order to complete work on contractual completion date or even earlier.

1.5 Research Methodology

This dissertation involves extensive literature review on latest related matters in the construction industry including standard forms of contracts, standard guidance notes, reference books, journals, seminar papers and website resources.

Given the legalistic nature of this dissertation, the approach adopted in this research is mainly case law based. Reference for case law reports is made to the Lexis-Nexis website database. An overview of acceleration costs and established principles for assessment is provided. Through the analysis of courts judgments, the meaning and effects of acceleration can be determined while contractor's obligation, acceleration claims and agreement can be identified and ascertained.

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