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Whaley, AR, McAdam, WB and Crowe, P

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Authors	Whaley, AR, McAdam, WB and Crowe, P
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The acceleration dilemma: Can English law accommodate constructive acceleration?

1. Introduction

The complexity of construction work means delays are common. Delays in construction projects arise from an array of circumstances, including resource shortages, site access restrictions, delayed drawings/instructions, additional works and inclement weather (Haidar, 2011). Construction contracts typically make provision to allocate risk for delays between the employer and the contractor. Liquidated damages clauses compensate the employer for contractor delays. Extension of time and loss and expense clauses provide the contractor relief from liquidated damages during periods of ‘excusable’ delay, and additional payment for delay related costs where the excusable event is also deemed ‘compensable’. When the parties operate the contract properly, these contractual mechanisms ought to be sufficient in dealing with project delay. Yet commonly in practice, employers are more interested in achieving timely completion of the project than extending the original contract completion period (Abrahamson, 2003; Barnes, 2006). For example, a local authority might require completion of a school before the next term, or a developer the opening of a shopping centre at the start of a lucrative festive period.

This means that when delays occur, an employer or certifier may pressure the contractor to ‘accelerate’ construction to complete on time (Barnes, 2006), without the offer of remuneration. Acceleration of the works may be achieved by increasing resources levels, increasing working hours, re-sequencing activities, or introducing temporary works (Baker, 2012; Tweeddale, 2004). Ordinarily, contractors plan works to maximise efficiency rather than minimise project duration (Cooke & Williams, 2013), whereas acceleration measures tend to result in a substantial reduction in workforce productivity and higher overall construction costs. If an employer or certifier accepts liability for the initial delay, there is little scope for dispute over payment for the acceleration. However, where the employer disputes a contractor’s genuine entitlement to a time extension, but insists on acceleration regardless, does the contractor have a right to claim for additional costs? In the United States of America, the answer to that question might be a relatively unqualified ‘yes’. A similar answer in other jurisdictions would have an important implication for contracting, professional and employer organisations in practice.

2. The doctrine of constructive acceleration

The American legal doctrine of ‘constructive acceleration’ enables contractors to recover acceleration costs where the employer or certifier in a contract refuses to grant genuine time extension requests, forcing the contractor to accelerate to avoid liquidated damages (Thomas Kelleher, 2011)¹. The doctrine emerged from American Contract Appeals board

¹*Department of Transportation v Anjo Construction Co* (1995) 666 A2d 753; *Howard White Inc. v Varian Associates* (1960) 178 Cal App 2d 348; *Siefford v Housing Auth of City of Humboldt* (1974) 223 NW 2d 816.

decisions dealing with disputes under government contracts², which compensated contractors where the government required acceleration even though the causes of delay were ‘excusable’ under the contract. A contractual, rather than a common law interpretation of the claim was necessary because the boards were restricted to deciding on matters within the express framework of the contract (Cibinic, Nash, & Nagle, 2006). Whilst this justification became inapplicable after the Contract Disputes Act 1978 gave Contract Appeals boards wider jurisdiction, American courts continue to accept the doctrine as justification for acceleration costs. This policy remains due to a preference to deal with disputes under the contract,³ and the considerable body of case law dealing with constructive acceleration.⁴

The doctrine has now developed within American law to the extent that courts identify specific elements that claimants must establish to recover constructive acceleration costs:⁵

- (1) There must be an excusable delay;
- (2) The delay must have been notified in a timely manner and a time-extension requested by the contractor;
- (3) The time extension request must have been delayed or refused by the employer/certifier;
- (4) The employer/certifier must have (expressly or implicitly) directed the contractor to complete within the original completion period, and;
- (5) The contractor must implement acceleration and incur costs.

The first and second elements require that nature of the delay would entitle an extension of time and that the contractor has fulfilled any procedural pre-conditions to such entitlement. A delayed decision on a time extension otherwise time-barred under the contract cannot justify acceleration. The third and fourth elements require that the employer or certifier drives the acceleration measures, such that it is not undertaken voluntarily by the contractor. However the direction to accelerate need not be given ‘in explicitly mandatory terms’.⁶ For example, an employer’s request to bring additional resources to the site coupled with communication to the contractor’s bondsman have been sufficient to support a claim.⁷ The fifth element then requires the contractor to demonstrate that an acceleration has been attempted, and a cost incurred.

² E.g. *Sanders Army* BCA 1468, 4 CCF (1948), *Standard Store Equipment Co v United States* (1958) ASBCA No 4348; *Samuales et al. Exrs.*, Army BCA 1147, 4 CCF (1949).

³ *Johnson & Son Erectors v United States* (1982) ASBCA No 24564.

⁴ *Hardrives Inc v United States* (1992) IBCA 2319 94-1.

⁵ *Fraser Construction Co v United States* (2004) 384 F3d 1354, 1361; *Ace Constructors Inc v United States* (2006) 499 F3d 1357; *The Clark Construction Group Inc v United States* (2003) JCL BCA No 2003-1 05-1; *The Sherman R Smoot Company of Ohio v Ohio Department of Administrative Services* (2000) 736 NE 2d 69; *Envirotech Corporation v Tennesse Valley Authority* (1988) Civ A No 86-0285-P(J); *Nat Harrison Associates Inc v Gulf States Utilities Co* (1974) 491 F2d 578 No 73-1013; *Natkin & Company v George Fuller Company* (1972) 347 F Supp 17.

⁶ *Titan Pacific Construction Corporation*, ASBCA Nos 24,148, 24,616, 26,692, 87-1 BCA (CCH).

⁷ *Ibid.*

Whilst the American doctrine seems to be a useful tool to resolve an otherwise complex legal problem, it does not rely on established common law principles due its origin in U.S. appeal board decisions. Even American authors suggest that more conventional grounds for such claims are ‘implied contract’ (Cibinic et al., 2006) or breach of contract (Barry Bramble & Callahan, 2011; Gusman, 1974). Gusman argues that the use of the ‘fictional’ constructive acceleration doctrine in place of more orthodox common-law grounds limits a contractor’s rights to an equitable remedy under the contract, when ‘the measure of recovery should be governed by the remedy of damages or restitution’ (1974, p. 243). In American government contracts, this limitation restricts foreseeable consequential costs, which would otherwise be recoverable in a claim for common-law damages (Cibinic et al., 2006).

Outside the United States, practitioners use ‘constructive acceleration’ more generally to describe acceleration implemented unilaterally to avoid liquidated damages where the certifier stalls, disputes, or obfuscates in dealing with time extension claims (Chappell & Dunn, 2009; Keane & Caletka, 2008). However constructive acceleration has received little judicial consideration within the English legal system. English law commentators are split on whether such a claim could succeed in an English court. Pickavance argues that the doctrine ‘provides a more realistic formula for applying the terms of a contract to the demands of the site and the conditions under which the construction industry is forced to work’ (2000 para. 11.193). The principle of the doctrine also finds favour with Lane (2000), who suggests that constructive acceleration might be couched as a claim based on implied instructions or collateral contract. Yet other commentators argue that an implied right to acceleration costs does not exist in English law (Davidson, 2008; Hoar, 2011). Wallace (1986 para. 8.54) rejects this type of claim on grounds that it is inequitable to hold a party liable for a mistaken position:

‘[it does not] seem a reasonable inference that a person mistakenly and wrongly blaming another for delay, and demanding an improvement in progress, can be said to be impliedly authorising a payment of compensation if that should turn out to be wrong.’

The peculiar origin of the American doctrine, and the dearth of case law dealing with constructive acceleration based on traditional common-law principles, leaves practitioners attempting to make or defend constructive acceleration claims with significant uncertainty. Nevertheless, it is an approach that many contractors operating under English law contracts would be interested in pursuing. Yet without re-establishing the claim within a more conventional common-law framework, English courts are unlikely to find claims for constructive acceleration relying on the American doctrine persuasive.

Given this lack of legal clarity, contractors face a dilemma. When denied a justified time-extension under a construction contract, should they accelerate the work to meet the original completion date, avoid late-completion damages, and attempt to recover acceleration costs later on? Or should they continue as normal in the hope that the employer will eventually grant a time extension and pay back any liquidated damages deducted? A clearer understanding of the English law surrounding constructive acceleration could ease the tension faced by contractors in situations where certifiers in construction contracts prevaricate or procrastinate in dealing with justified time extension requests. This paper attempts to address this uncertainty by exploring whether constructive acceleration claims can succeed on several common law grounds.

The remainder of this paper analyses the dilemma set out above. Adopting a ‘black letter’ approach, this study will first examine the contractual aspects of the claim by exploring the view held by some commentators that a claim might succeed based on ‘implied’ instructions under the contract, or whether the claim could be supported on the basis of a breach of contract or as mitigation of losses caused by a breach. Stepping outside of the law of contract, two areas of restitution will be examined as potential grounds for making a claim. The doctrine of unjust enrichment will be investigated to determine whether the benefit gained by the employer from a forced acceleration might support recovery of any resultant costs. The prospect of a claim for economic duress succeeding, based on pressure from the threat of liquidated damages, will also be explored. Finally the economic tort of intimidation will be examined in the context of constructive acceleration.

3. Claims based on implied instructions to accelerate

Some commentators suggest that a contractor might support a constructive acceleration claim on the basis of an ‘implied’ instruction under the contract (Lane, 2000; Pickavance, 1997). The instruction is said to be implied by the employer or certifier’s refusal to consider (genuine) time extension requests whilst at the same time pressuring the contractor to overcome delays.

Most standard contracts do not give the certifier express power to order acceleration⁸. An equivalent term could only be implied if required to give business efficacy to the contract, and on the basis that the term does not conflict with existing terms⁹. Given that construction contracts function without an acceleration clause, and in light of express variation provisions found in most contracts which establish the parties’ intention as to varying the contract, it is doubtful that a court would imply a term giving the certifier authority to order acceleration. Thus in the absence of express powers, acceleration driven by the certifier’s conduct is unlikely to bind the employer unless the certifier has acted as an agent on behalf of the employer, or that the employer has entered into an agreement with the contractor himself (Lane, 2000; Pickavance, 1997).

Lane (2000) argues that the employer’s ratification of the certifier’s avoidance of granting extensions of time and pressure to achieve earlier completion is by implication a variation of the certifier’s appointment, extending its powers to act on behalf of the employer. However, to establish an ‘apparent authority’, the claimant must *rely* on a representation from the principal.¹⁰ In *Armagas Ltd v Mundogas (The Ocean Frost)* Lord Keith stated:

‘It must be a most unusual and peculiar case where an agent who is known to have no general authority to enter into transactions of a certain type can by reason of

⁸ The Joint Contracts Tribunal, *JCT 2011 Standard Building Contract With Quantities (SBC/Q)* (Sweet and Maxwell 2011); International Federation of Consulting Engineers, *Conditions of Contract for Construction* (International Federation of Consulting Engineers 1999) Cl. 3.1; NEC3, *NEC3 Engineering and Construction Contract (ECC)* (Thomas Telford Publishing 2013) Cl. 36.1; The Institute of Civil Engineers, *ICE Conditions of Contract, 7th Edition* (The Institute of Civil Engineers 1999) Cl. 46.3; IChemE, *Lump Sum Contract (Red Book)* (IChemE 2013) Cl. 11.1; Cf The Association of Consultant Architects, *Project Partnering Contract, PPC2000* (The Association of Consultant Architects 2008) Cl. 6.6.

⁹ *BP Refinery Western Port v Shire of Hastings* (1977) 180 CLR 266 (PC) [50].

¹⁰ *Russo Chinese Bank v Li Yau Sam* [1910] AC 174 (PC); *Armagas Ltd v Mundogas SA* [1986] AC 717 (HL).

circumstances created by the principal reasonably be believed to have specific authority to enter into a particular transaction of that type'.¹¹

Because construction contracts normally express limits on the certifier's authority¹², it is unlikely that a contractor could demonstrate reliance on the certifier's unauthorised acts given that the limits to the certifier's powers ought to be well known¹³. In light of such provisions, any extension of the certifier's powers from a variation or collateral contract.

However, English courts are averse to finding collateral contracts without clearly evidenced intention to contract:¹⁴

'...collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an [intent to contract] on the part of all the parties to them must be clearly shewn. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into...'¹⁵

In circumstances where an employer disputes liability for delay, finding evidence of intention to contract will be challenging. Consequently, circumstances will be rare in which a collateral agreement could form the basis of a constructive acceleration claim.

The above analysis significantly narrows the circumstances in which a contractor could support a claim presented on the basis of an 'implied' instruction from the certifier or the employer, absent an acceleration clause. This still leaves open, however, whether a claim might succeed in the relatively rare instances that a contract *does* include an acceleration clause giving the certifier authority to order acceleration.

Even where the construction contract expressly empowers the certifier to instruct acceleration, the contractor faces further difficulties where, as is normally the case, written instructions are a condition precedent to recovering payment for additional work. A contractor might argue equitable principles of waiver or estoppel against an employer's defence made on the basis of lack of form (Lane, 2000; Pickavance, 1997). However, such principles normally apply where the defendant's conduct was such to infer that reliance on a particular defence would not be made:¹⁶

'If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, *if they carried out the work, he would accept it, and they did it*, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel.'¹⁷ [Emphasis added].

¹¹ *Armagas* (n 10) 779.

¹² The Joint Contracts Tribunal (n 8) cl. 3.14.

¹³ *Armagas* (n 11) [777]-[779].

¹⁴ *Heilbut Symons & Co v Buckleton* [1913] AC 30 (HL); *Strongman (1945) v Sincock* [1955] 2 QB 525 (CA) [534].

¹⁵ *Heilbut* (n 14) [47].

¹⁶ *Meyer v Gilmer* (1899) 18 NZLR 129 (NZSC); *Hill v South Staffordshire Railway* ((1874) LR 18 Eq 154 (Ch); *Astilleros Canarios SA v Cape Hatteras Shipping Co Inc (The Cape Hatteras)* [1982] 1 Lloyd's Rep 518 (QB).; *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616 (CA) [626].

¹⁷ *Charles Rickards* (n 16) [623]; *Taverner & Co Ltd v Glamorgan County Council* (1941) 57 TLR

Constructive acceleration arises from disputed liability for delays and thus acceleration costs. Therefore a contractor will face difficulty in demonstrating that such a representation has been made. Equally, English courts appear reluctant to ‘imply’ contractual instructions where an employer/certifier disputes liability for work allegedly instructed.¹⁸ In *Holland Hannen v Welsh Health*,¹⁹ the courts found it ‘impossible’ to imply an instruction in the face of an express refusal by the certifier to issue one.

On the other hand, if an instruction or certificate required by the contract *ought* to have been given but was not, English courts do have the authority to step in. Where a certifier fails to issue a certificate or instruction to which the contractor was entitled to under the contract, an English arbitrator,²⁰ or court²¹ is entitled to compensate the cost of work undertaken on the insistence of the employer/certifier as if the instruction had been issued:²²

‘If the arbitrator or the court decides that the [certifier] ought to have issued a certificate which he refused to issue..., they can, and ordinarily will, hold that the Contractor is entitled to payment as if such certificate had been issued and award or give judgment for the appropriate sum.’²³

Consequently the courts do not need to rely on waiver or estoppel to overcome the condition precedent clause, nor imply an instruction,²⁴ but instead retrospectively apply the applicable clause in the contract. Furthermore this maxim does not require evidence of a dishonest motive for withholding the instruction to be effective,²⁵ a factor which might dilute any defence made by the employer on the basis of a mistaken position as to liability at the time of the event.

This discussion suggests that the prospect of succeeding with claims for constructive acceleration based on ‘implied’ instructions is limited. One difficulty is that in most standard contracts, the certifier’s powers are expressly defined such that it is unlikely that a contractor could place any reliance on the certifier’s unauthorised acts. Another difficulty is that the employer’s denial of liability for delay in a constructive acceleration claim, also acts as a barrier to establishing that a binding (consensual) agreement has been made to support recovery of acceleration costs. Thus it seems that only where the contract provides the certifier power to order acceleration, and that power has not been properly executed, can the contractor succeed with a constructive acceleration claim *under* the contract.

243 (HC) [245].

¹⁸ *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd* [2008] EWCA Civ 1449, [2009] 1 WLR 1580; *Holland Hannen & Cubitts (Northern) Ltd v Welsh Health Technical Services Organisation* (1981) 18 BLR 80 (QB) [121].

¹⁹ (n 18) [121].

²⁰ *Brodie v Cardiff Corp* [1919] AC 337 (HL) [338], [353]; *Prestige v Brettell* [1938] 4 All ER 346 (CA).

²¹ *Liebe v Molloy* (1906) 4 CLR 347 (HCA); *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd and Others* [1999] AC 266 (HL) 20.

²² *Brodie* (n 20) [365]; *Prestige* (n 20); *Liebe* (n 21); *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] EWCA Civ 814, [2005] 1 WLR 3850; *Beaufort Developments* (n 21); *W. Hing Construction Co Limited v Boost Investments Limited* [2009] BLR 339 [99].

²³ *Henry Boot* (n 22) [23].

²⁴ *Ibid* [41].

²⁵ *Brodie* (n 20) [337].

4. Claims based on breach of contract

Constructive acceleration is sometimes interpreted as a claim for breach of contract (Gusman, 1974). As with any claim for breach of contract, a claimant has two hurdles to overcome. The claimant must first demonstrate that the defendant has failed to fulfil an obligation under the contract. The claimant must then establish that this failure caused a loss. The principle of such a claim was accepted in *Amec Process & Energy Ltd v Stork Engineers & Contractors BV*²⁶, where the High Court recognised that a failure of the contractor to properly fulfil its certifier function under a subcontract might amount to a breach and recoverable damages in the form of acceleration costs:

‘Such breaches may arise out of failure by [the contractor] to carry out its obligations in dealing with [the subcontractor’s] rights to or requests for variations, and the damages recoverable may include the cost of what [the subcontractor] may classify as ‘accelerative measures’...whether any such breach is established and whether the damages recoverable include any such element are questions to be decided...by applying the relevant contractual terms and the law, in particular the law of damages...’²⁷

This preliminary issue never reached subsequent hearings,²⁸ and the case dealt with a bespoke contract rather than a standard contract widely used in England. In standard form construction contracts, it is the unreasonable delay or refusal by the *certifier* to deal with time extension requests that is said to force the acceleration, meaning that any claim for breach of contract must be attributed in some way to the employer (Pickavance, 2000). Therefore a claim made on this basis might need to rely on a contractual term, express or implied, which requires the employer to ensure that the certifier deals with time extensions in a timely manner.

Whether the employer can become liable for its certifier’s acts is a complicated issue. An employer is normally prevented from interfering in the certifier’s function.²⁹ However when the Court of Appeal in *Lubenham Fidelities v South Pembrokeshire DC*³⁰ examined whether an employer was liable for the accuracy of the certifier’s interim payment certificates, the court rejected that the employer had an obligation to *step in* and correct the certifier’s defaults. This was due to the contractor’s access to fast-track dispute resolution:

‘In the light of the arbitration clause in the instant contract, we do not think that there is any need or scope for the implication of any further term in it, as there was in the *Panamena*³¹...there was one simple remedy available to *Lubenhams* needing no implied term, namely to go to arbitration upon them and have them corrected.’³²

²⁶ (1999) 68 Con LR 17 (QB).

²⁷ *Ibid* [110].

²⁸ *Amec Process & Energy Ltd v Stork Engineers & Contractors BV (No 4)* (QB, 15 March 2002).

²⁹ *Compania Panamena Europea Navigacion Limitada v Frederick Leyland & Co Ltd* (1943) 76 Ll. L. Rep. 113; affirmed in *Panamena Europea Navigacion v Frederick Leyland Ltd* [1947] AC 428 (HL); *Penwith District Council v VP Development Ltd* [1999] 05 APP LR 21 (QB); *BR and EP Cantrell v Wright and Fuller* [2003] EWHC 1545 TCC, [2003] BLR 412.

³⁰ (1986) 33 BLR 39 (CA).

³¹ *Panamena* (n 29).

³² *Lubenham* (n 30) 47.

Given that English contractors will normally have recourse to adjudication, whether by statute³³ or contract, *Lubenham*³⁴ suggests the employer's obligation to correct its certifier's failings could be limited. Therefore it may only be in circumstances that an employer influences the certifier that a breach could be established, justifying a constructive acceleration claim.

Several Commonwealth decisions demonstrate that a *policy decision* by the employer to refuse time extensions is sufficient a breach of contract to support a claim for acceleration costs flowing from the breach. In *Perini Corporation v Commonwealth of Australia*³⁵ the Supreme Court of New South Wales found that a departmental policy which pressured the certifier to avoid granting time extensions amounted to a breach of contract. Similarly the Canadian case of *Morrison-Knudsen Company v B.C. Hydro & Power Authority*³⁶ followed in *W.A. Stephenson Construction (Western) Ltd. v. Metro Canada Ltd.*³⁷ found that an employer's policy of refusing time extensions amounted to breach of contract. In all of these cases acceleration damages were deemed a foreseeable consequence of the breach.

The grounds for establishing a breach of contract become less clear, however, when a delay in dealing with extensions of time, rather than an outright refusal, is the basis of the constructive acceleration claim. Standard form contracts normally set express time limits for certifiers' decisions.³⁸ For example the JCT SBC stipulates that the certifier 'shall notify the Contractor in writing of his decision [on extensions of time] as soon as is reasonably practicable and in any event within 12 weeks of receipt of the required particulars'³⁹. Arguably a claim might be supportable when acceleration measures are implemented upon expiry of the time limit. In the case of the JCT SBC, any 'impediment, prevention or default' of the employer or *certifier* is recognised as a compensable event,⁴⁰ which means a contractor *might* even be able to justify a claim for acceleration costs as direct loss and expense.

However, English courts have been somewhat flexible in their interpretation of contractual time limits for time extension awards. The Court of Appeal concluded that such provisions were only 'directory' in *Temloc Ltd v Errill Properties Ltd*⁴¹. Similarly in *Cantrell & Another v Wright & Fuller Ltd*⁴² the High Court found that otherwise mandatory time limits to issue the final certificate under a JCT contract could be relaxed if required to give business efficacy to the contract. This might be justified in the case of particularly complex facts. Consequently it appears that only a wholly unreasonable delay in granting time extensions driven by the employer, might constitute a breach of contract material enough to support a constructive acceleration claim.

³³ The Housing Grants and Regeneration Act 1996 Sect. 108.

³⁴ *Lubenham* (n 30).

³⁵ (1969) 12 BLR 82 (SCNSW).

³⁶ (1978) 85 DLR (3d) 186 (BCCA).

³⁷ (1987) 27 CLR 113 (BCSC).

³⁸ The Joint Contracts Tribunal (n 8) Cl. 2.28.2; International Federation of Consulting Engineers (n 8) Cl. 20.1; NEC3 (n 8) Cl. 61.

³⁹ The Joint Contracts Tribunal (n 8) Cl. 2.28.2.

⁴⁰ The Joint Contracts Tribunal (n 8) Cl. 4.24.5.

⁴¹ (1987) 39 BLR 30 (CA).

⁴² (2003) 91 Con LR 97 147 (CA).

The above analysis demonstrates the inherent difficulties in attributing the failures of the certifier to the employer to establish a breach of contract. Thus in circumstances of third party certification, a contractor must evidence that the employer has materially influenced the certifier to support a claim for breach of contract. Where this influence arises from an outward refusal to award extensions of time, a breach of contract may not be difficult to establish and this might support an acceleration claim. However, where the failure arises from a mere delay in making decisions, establishing a breach becomes significantly more difficult due to the attitude taken by courts with respect to time limits on administrative contractual provisions.

5. Claims based on mitigation of loss

Another approach suggests that a constructive acceleration claim might succeed if presented as a common-law mitigation claim (Bailey, 2011). This approach assumes that the contractor's acceleration is implemented to minimise time related project overhead costs which might otherwise be incurred from the projected delay arising from the employer's influence in refusing to grant time extensions, or the original employer's breach of contract giving rise to the time extension request.

The law of damages expects a claimant to take 'all reasonable steps to mitigate the loss consequent upon the breach,'⁴³ including a breach of tortious duty.⁴⁴ This principle is not an obligation, but a consideration taken by courts when awarding damages.⁴⁵ Under the mitigation doctrine, reasonable expenses incurred in mitigating loss are recoverable (McGregor, 2009). The costs of a claimant's reasonable attempts⁴⁶ to mitigate are recoverable⁴⁷ even if the mitigation is unsuccessful.⁴⁸

Applying this doctrine in the case of constructive acceleration, if an *employer's* breach of contract causes a *predicted* loss arising from a delay in completion, and through acceleration measures, the contractor attempts to mitigate that loss, the costs of such acceleration *might* be recoverable without a prior agreement if the contractor can demonstrate that the acceleration measures were reasonable attempts to mitigate the losses predicted to arise as a result of the employer's default.⁴⁹

For instance in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*,⁵⁰ the employer failed to discharge an express obligation to clear parts of the site prior to commencement. The British Columbia Supreme Court found this amounted to a breach of contract and accepted that acceleration costs incurred to overcome the resulting delay were not too remote to preclude recovery as damages.⁵¹ The same court followed this

⁴³ *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 (HL) [689].

⁴⁴ *Downs v Chappell* [1997] 1 WLR 426 (CA).

⁴⁵ *Darbishire v Warran* [1963] 1 WLR 1067 (CA) [1075].

⁴⁶ *Wilding v British Telecommunications Plc* [2002] EWCA Civ 349, [2002] ICR 1079 [55].

⁴⁷ *Lloyds and Scottish Finance Limited v Modern Cars and Caravans* 1966] 1 QB 764 (QB) 782.

⁴⁸ *Owners of the Andros Springs v Owners of the World Beauty (The World Beauty)* [1970] P 144 (CA) [156].

⁴⁹ *Wilding* (n 46) [55]; *Lloyds and Scottish Finance* (n 47) 782.

⁵⁰ [1993] 1 SCR 12 (SCCA).

⁵¹ *Ibid* [48].

precedent in *Foundation Co of Canada Ltd v. United Grain Growers Ltd.*⁵² in finding that the contractor could recover acceleration costs as damages in the form of an ‘impact cost’ (i.e. a consequential cost, Barry Bramble & Callahan, 2011) or mitigation cost⁵³ flowing from the employer’s delayed performance. The claim was allowed even though, or perhaps because, the contractor’s claim for time extension and loss and expense under the contract was limited due to a failure to issue timely notices of claim⁵⁴.

The High Court in England recognised acceleration as a form of mitigation in *Great Eastern Hotel Company v John Laing Construction Ltd*⁵⁵. This case dealt with a management contractor who, following breach of his consultancy agreement, resisted liability for acceleration costs expended by the employer to overcome the breach. The court found:

‘Any acceleration measures even if partially successful, were clearly measures adopted in order to mitigate [the employer’s] losses and as such the cost of such measures are recoverable from the contract breaker’.⁵⁶

*Great Eastern Hotel*⁵⁷ endorses acceleration measures as a form of mitigation, although the case is peculiar in addressing an acceleration claim from an employer to a contractor.

However when the High Court considered another acceleration claim based on mitigation in *Ascon Contracting Ltd v Alfred McAlpine Construction Isle of Man Ltd*,⁵⁸ the claimant subcontractor failed in his claim. The court first questioned whether there could be a claim for common-law mitigation where the contract contains time extension and loss and expense provisions⁵⁹. However, in the event the court rejected the subcontractor’s claim on the following basis:

‘...there cannot be both an extension to the full extent of the employer’s culpable delay, with damages on that basis, and also damages in the form of expense incurred by way of mitigation, *unless it is alleged and established that the attempt at mitigation, although reasonable, was wholly ineffective*. That is certainly not how [the subcontractor] puts its case here; it contends that the work was indeed completed sooner than it would have been in the absence of its accelerative measures.’⁶⁰ [Emphasis added].

The reasoning cited above is perhaps best understood within the factual context of the case. The court had previously in the decision awarded the subcontractor an extension of time with costs of 14 days from 39 days claimed, in the context of the overall project delay being 65 days⁶¹. The court appears to have considered that the loss and expense provisions provided exhaustive compensation to the subcontractor for the excusable period of delay, and that to the extent the subcontractor did engage in additional ‘mitigatory’ accelerative measures, these could only be attributed to the subcontractor’s culpable delay. Had the

⁵² CanLII 3392 (SCBC).

⁵³ Ibid. [659].

⁵⁴ Ibid. [498].

⁵⁵ [2005] EWHC 181 (TCC), (2005) 99 Con LR 4.

⁵⁶ Ibid [321].

⁵⁷ Ibid.

⁵⁸ [1999] 66 Con LR 119 (QB) 132.

⁵⁹ Ibid [56].

⁶⁰ *Ascon* (n 58) [56].

⁶¹ Ibid.

mitigation been attributed to the compensable delay period, the court *may* have found the other way, albeit the extent to which such an approach would have provided compensation additional to that available under the contract is not clear.

The above illustrates that English cases dealing with mitigation and acceleration produce differing results. The apparent limitation proclaimed by the High Court in *Ascon*⁶² poses the biggest challenge, although the court's reasoning appears to have been influenced by the claimant's contribution to the delay. Because only High Court cases appear to have tackled this issue, the opportunity remains for the development of this area of the law by higher courts. Therefore, where a contractor can demonstrate that acceleration measures could reasonably have reduced the loss arising from an employer's breach, an acceleration claim might be justified under the mitigation doctrine.

6. Claims based on unjust enrichment

As an alternative to making a claim under the construction contract or for a breach of its terms, a contractor might in some cases rely on principles of unjust enrichment to justify a claim for constructive acceleration in restitution. Three elements must be in place to support an unjust enrichment claim.⁶³ First, the defendant must receive a benefit or be enriched from the claimant's acts. Second, the claimant must actually incur an expense from undertaking the act. Third, the defendant's enrichment must be seen to be 'unjust'.

To apply this doctrine to the constructive acceleration case, the employer can be said to have taken the benefit of earlier completion at the expense of the contractor's acceleration measures. The first hurdle in establishing this argument is that English law⁶⁴ limits restitution claims to circumstances where no contract exists to provide for the claim.⁶⁵ If the contractor fails to satisfy conditions precedent under a subsisting contract, there is no alternative claim available in restitution.⁶⁶ However, where the additional work requested is not within the scope of the contract, as may be the case where the contract does not include an acceleration clause, a contractor may be entitled to recover costs incurred in performing the request,⁶⁷ including the costs of acceleration. On this basis, the issue is whether the employer's enrichment was unjust.

Unjustness can be established where a defendant freely accepted performance for which it knew, *or ought to have known*, would result in an expectation to pay.⁶⁸ But in order to make a person liable, 'there has to be a necessary implication that the person liable is agreeing to pay.'⁶⁹ There is no assumption to pay in English law.⁷⁰ In constructive acceleration, the

⁶² Ibid.

⁶³ *Banque Financiere De La Cite v Parc (Battersea) Ltd and Others* [1999] AC 221 (HL) 227.

⁶⁴ *Mowlem Plc (t/a Mowlem Marine) v Stena Line Ports Ltd* [2004] EWHC 2206 (TCC).

⁶⁵ *Mowlem Plc* (n 64); *Trimis & Anor v Mina* [1999] NSWCA 140 (NSWCA); *S & W Process Engineering Ltd v Cauldron Foods Ltd* [2005] EWHC 153 (TCC).

⁶⁶ *S & W Process* (n 65) [53]; *The Olanda Stoomvaart Maatschappij Nederlandsche Lloyd v General Mercantile Company Ltd* [1919] 2 KB 728 (HL) [730]; *Gilbert & Partners v Knight* [1968] 2 All ER 248 (CA).

⁶⁷ *Costain Civil Engineering v Zanen Dredging* (1996) 85 BLR 77 (QB) 93-94.

⁶⁸ *The Queen On the application of Charles Rowe v Vale of White Horse District Council* [2003] EWHC 388, [2003] 1 LR 418 [13].

⁶⁹ *Gilbert & Partners* (n 66) [251].

⁷⁰ *Mowlem Plc (Formerly John Mowlem and Company Plc) v PHI Group Limited* [2004] BLR 421 (QB) [14]-[15].

employer or certifier's refusal to acknowledge liability means finding an implied agreement to pay could be difficult. However an implication of agreement to pay might arise where the contractor has notified the employer of its intention to recover payment for acceleration measures following a wrongful refusal time extension requests, but the employer continued to pressure regardless. The High Court appeared to contemplate this situation in *S & W Process Engineering Ltd v Cauldron Foods Ltd*.⁷¹

‘...[the contractor’s] alternative claim would have to demonstrate that, in some way, [the employer] freely accepted services in circumstances where they should have known that [the contractor] would expect to be paid for them, and that might be difficult where the item of extra work in dispute was not clearly requested/ instructed/ authorised...’⁷²

A further issue is that the law limits recovery in restitution where the benefit provided to the defendant arose from acts motivated by the claimant’s self-interest.⁷³ Therefore, a contractor who is partially responsible for delays must demonstrate that acceleration measures requested by the employer go beyond what would otherwise be required to overcome the contractor’s own delay. Thus contractor’s face significant difficulty in making claims on this basis. Where the employer disputes entitlement to time-extensions and/or acceleration costs, only a clear acceleration request coupled with notice of claim from the contractor could support a constructive acceleration claim in restitution. Any claim would then be limited to exclude the cost of any acceleration measures that the contractor implemented to overcome its culpable delay.

7. Claims based on economic duress

Economic duress is an unjust factor giving rise to a potential entitlement to payment in restitution (Mitchell, Mitchell, & Watterson, 2011; Tettenborn, 2001), where a claimant is forced to perform acts by illegitimate threats. The pressure placed on contractors in the case of constructive acceleration may amount to an illegitimate threat sufficient to form the legal basis for a constructive acceleration claim.

To establish economic duress, the claimant⁷⁴ must prove that the illegitimate threat⁷⁵ was a significant cause of acts implemented to remedy the threat,⁷⁶ and that the claimant had no practical alternative but to submit to the threat.⁷⁷ A threat is illegitimate⁷⁸ if the threat

⁷¹ (n 65).

⁷² Ibid [53].

⁷³ *Ruabon Steamship Co Ltd v London Assurance; The Ruabon* [1900] AC 6 (HL); *Mowlem Plc* (n 70) [13].

⁷⁴ *DSND Subsea Ltd v Petroleum Geo-Services ASA* [2000] BLR 530 (QB) [546]; *Universe Tankships Inc of Monrovia v International Transport Workers Federation (The Universe Sentinel)* [1983] 1 AC 366 [400]; *Dimskal Shipping Co SA v International Transport Workers Federation (The Evia Luck) (No.2)* [1992] 2 AC 152 (HL) 165.

⁷⁵ *Occidental Worldwide Investment Corp v Skibs A/S Avanti (The Siboen and The Sibotre)* [1976] 1 Lloyd’s Rep 293 (QB); *North Ocean Shipping Co v Hyundai Construction Co (The Atlantic Baron)* [1979] AC 705 (QB); *Pao On v Lau Yiu Long* [1980] AC 614 (PC); *Burmah Oil Co v Bank of England* [1980] AC 1090 (HL) [1140]; *Kolmar Group AG v Traxpo Enterprises PVT Ltd* [2010] EWHC 113, [2011] 1 All ER 46 [92].

⁷⁶ *Barton v Armstrong* [1976] AC 104 (PC) 121; *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyds Rep 620 (QB) 636.

⁷⁷ *Huyton SA* (n 76) 636.

⁷⁸ *Barton* (n 76) 121.

maker knew that the actions threatened would amount to a breach of duty⁷⁹ or contract.⁸⁰ A threat may still be illegitimate even if the threat maker honestly believed his actions were justified.⁸¹ An exception might arise where the threat amounted to ‘reasonable behaviour by a [party] acting bona fide in a very difficult situation,’⁸² even if the action threatened amounted to a breach of contract.⁸³ A threat is a ‘significant cause’ if it satisfies the ‘but for’ test – would the party have acted but for the threat?⁸⁴ Therefore, if the party is already undertaking an action demanded by the threat, his action is voluntary.⁸⁵ Similarly, a court is unlikely to find economic duress in circumstances where the innocent party concedes to the threat without resistance.⁸⁶ Whether or not a practical alternative is available depends on the urgency manifested from the threat.⁸⁷ Therefore, no liability will arise where an innocent party ‘decides, as a matter of choice, not to pursue an alternative remedy which a reasonable person in his circumstances would have pursued.’⁸⁸

Accordingly, an employer’s improper refusal of a time-extension and pressure to complete on time in the face of liquidated damages, or even threats to withhold certificates or payments, might amount to duress from which acceleration costs are recoverable. Also, because the contractor’s loss in this situation arises from acceleration implemented to avoid the threat, the ‘but for’ test is fulfilled. Whilst particularly complex facts might create an exception, the principal difficulty is demonstrating that no realistic practical alternative was available but to accelerate. Perhaps the most obvious alternative to constructive acceleration is in utilising fast track dispute resolution procedures, such as statutory adjudication⁸⁹, to obtain a declaration as to entitlement to extensions of time.

The High Court considered whether adjudication was a practical alternative to submitting to a threat in *Carillion Construction Limited v. Felix (UK) Limited*.⁹⁰ The court found that the availability of an adjudication decision within six weeks was not a practical alternative to submitting to a subcontractor’s threat to suspend performance given the potential substantial liquidated damages four months in the future⁹¹. Similarly, litigation to recover damages for non-performance *after* the threat is not a practical alternative to submitting to the threat.⁹² The High Court appeared to take a similar approach in *Motherwell Bridge Construction Limited v Micafil Vakuumtechnik*.⁹³ Despite that the case followed a previous adjudication, the High Court awarded acceleration costs where significant delay damages were anticipated:

⁷⁹ *Alf Vaughan & Co Ltd v Royscot Trust Plc* [1999] 1 All ER (Comm) 856 (Ch) 863.

⁸⁰ *B&S Contracts and Design v Victor Green Publications* [1984] ICR 419 (CA) 428.

⁸¹ *Huyton SA* (n 76); *CTN Cash & Carry v Gallagher* [1994] 4 All ER 714 (HL) 717; *Universe Tankships* (n 74).

⁸² *DSND Subsea Ltd* (n 74) [546].

⁸³ *Ibid*.

⁸⁴ *Huyton SA* (n 76) 636.

⁸⁵ *Pao On* (n 75) [635]; *Huyton SA* (n 76) 638.

⁸⁶ *Huyton SA* (n 76) 638.

⁸⁷ *Astley v Reynolds* (1731) 93 ER 939 (KB); *Close v Phipps* (1844) 135 ER 236 (CP) [590].

⁸⁸ *Huyton SA* (n 76) 638.

⁸⁹ The Housing Grants and Regeneration Act 1996 Sct. 108.

⁹⁰ [2001] BLR 1 (QB).

⁹¹ *Ibid* [42].

⁹² *B&S Contracts* (n 80) 428.

⁹³ [2002] 81 ConLR 44 (QB).

‘I am satisfied that [the acceleration costs] were incurred by [the subcontractor] in an attempt to recover time lost in completing the work in circumstances where [the subcontractor was] subject to significant penalties for delay if they failed to complete the work on time. The causes were in particular the restrictions which [the subcontractor] encountered when they entered on site and the very substantially increased scope of the work.’⁹⁴

Regrettably, the High Court provided little reasoning to determine the legal basis of the contractor’s liability in this case. Factors including pressure to complete⁹⁵, access restrictions⁹⁶, scope changes⁹⁷ and heavy liquidated damages⁹⁸ all seemed relevant. Accordingly, resolving this issue will depend heavily on the facts. One important factor is that ‘damages follow breach of contract, they do not anticipate it’ (Eggleston, 2009, p. 189). Liquidated damages set off in anticipation of an alleged delay are not enforceable until after the contractual completion date has lapsed.⁹⁹ Thus, adjudication might prove a practical alternative where a premature deduction is threatened. However where works have significantly progressed as in *Carillion*,¹⁰⁰ any threats of liquidated damages will have significantly more weight in supporting a claim for constructive acceleration.

8. Claims based on the economic tort of intimidation

Finally, a claimant might conceivably base a constructive acceleration claim on the economic tort of intimidation. An intimidation claim might arise where a threat by one party to use unlawful means, such as breach of duty or contract,¹⁰¹ compels another to submit to the threat to its detriment.¹⁰² Because economic torts look to unlawful acts to find liability, pure economic loss is recoverable (Carty, 2010) and so too may be the costs of acceleration.

Canadian courts came close to awarding acceleration costs arising from an intimidation in *Golden Hill Ventures Ltd v Kemess Mines Inc*¹⁰³. The tort liability arose from employer threats to terminate the contract, withholds payment, and seize the contractor’s equipment for failing to follow the employer’s instructions. One threat required the contractor to increase backfilling depth during heavy rain, a method change akin to acceleration measures¹⁰⁴.

A benefit of this approach is that the law of damages in tort only requires that a loss is of a ‘kind’ that was foreseeable when the breach occurred¹⁰⁵ (Harpwood, 2009). Even a ‘slight possibility’¹⁰⁶ of loss occurring¹⁰⁷ is enough to found liability. Thus, a contractor

⁹⁴ Ibid [548].

⁹⁵ Ibid [553].

⁹⁶ Ibid [549].

⁹⁷ Ibid [547].

⁹⁸ Ibid [548], [553].

⁹⁹ *Lubenham* (n 30) 47.

¹⁰⁰ *Carillion* (n 90).

¹⁰¹ Ibid.

¹⁰² *Morgan v Fry* [1968] 2 QB 710.

¹⁰³ (2002) 1460 CanLII (BCSC).

¹⁰⁴ Ibid [677].

¹⁰⁵ *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd* [1961] AC 388 (PC); *Hughes v Lord Advocate* [1963] AC 837 (HL); *Doughty v Turner Manufacturing Company* [1964] 1 QB 518 (CA); *Jolley v Sutton LBC* [2000] 3 All ER 409 (HL).

¹⁰⁶ *Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791 (CA) 813.

¹⁰⁷ *Koufos v Czarnekov Ltd (The Heron II)* [1969] 1 AC 350 (HL).

implementing acceleration to reduce the effect of a tortious intimidation of might have less difficulty in establishing the requirement for causation than in a breach of contract claim. However, case law is lacking in this area, and some commentators suggest that a court may be reluctant to allow a claimant to escape limits on recovery otherwise effective under a subsisting contract (Beale, 2008).

9. Conclusion

The aim of this paper has been to establish the extent to which a contractor can legitimately recover damages for constructive acceleration under the law of England and Wales. The conclusion is that whereas such recovery appears relatively uncontroversial in American law given appropriate circumstances, the English position is considerably more nuanced, as summarised in the following table:

[Table, centred, full width]

The challenge now is to leverage practical conclusions from this analysis. Two outcomes are clear. First, constructive acceleration claims *can* succeed under English law, but second, they are limited to quite a narrow area of operation. The analysis reveals that a recurrent basis for the failure of such claims is that the employer/contractor relationship tends already to be well catered for in contractual terms. There needs to be a good reason why the express contractual regime should not be the exclusive source of redress for the disappointed contractor. Consequently, the case where constructive acceleration claims appear to be most certain, is also the case where such claims are most contractually mandated, by for example the existence of an acceleration clause.

Beyond that, the observation that is perhaps most interesting and potentially useful from this analysis, is how crucial the employer's behaviour is in framing a constructive acceleration claim. There is a temptation to focus on the trials and tribulations of the contractor, scrabbling to make up time on a difficult project, and give those concerns pre-eminence when considering the success or failure of a claim. However, what is obvious from the way in which constructive acceleration can operate is that the employer needs to be (or be put) objectively in the wrong. The more the contractor can demonstrate that the employer has pushed towards the original contractual deadline, regardless of entitlement for extension of time, the greater the prospects that the contractor may have of establishing a constructive acceleration claim. Stoicism may have its place in other circumstances, but a contractor seeking to maximise prospects of success in an acceleration claim must also remain alive to other contractual remedies that are available in lieu of acceleration, as the above analysis indicates that the possibility of early resolution of an extension of time issue may have a strong possibility of precluding success. If the prospect of constructive acceleration remains attractive after taking this view, the contractor ultimately needs evidence of employer consent, or employer culpable pressure, and must therefore consider what approach to engaging with the employer might best provide this.

This paper sets out a conclusion in respect of constructive acceleration in England and Wales. However, that conclusion is complex, and this complexity is caused arguably by the absence of a discrete "construction acceleration" doctrine within this jurisdiction. At the same time, the problem of delay in construction, with its concomitant pressures, is universal. Each jurisdiction will have developed or adapted its own solutions to cope with constructive acceleration claims. This paper has touched on one such solution by considering the American position in the context of English law. However, a broader

consideration of a wider range of alternative jurisdictional solutions to the constructive acceleration problem would provide a fuller picture of this problematic practical issue. It would shed further light on the English position, and may even provide a platform to argue for reform of the relevant law. That additional work may form the basis of a future paper on this topic.

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Table:

Basis of Constructive Acceleration Claim	Issues/Likelihood
Implied instruction to operate contractual acceleration clause.	Given contractual acceleration clause and culpable failure to operate it, good prospects of establishing claim.
Employer's culpable failure to issue extension timeously.	Possible, but requires that Employer is implicated for failure to issue extension (e.g. by influencing certifier) and that acceleration claim is justified, notwithstanding the common practice of retrospective issuance of extensions.
Mitigation of losses envisaged by late completion.	Not entirely excluded by case law and not tested by higher courts, but likely to be limited where the contract caters for recovery of losses during employer delay, or where contractor shares responsibility for the delay.
Employer is unjustly enriched by the acceleration measures taken by the contractor.	Difficult as contractor must prove both that the acceleration measures were <u>not</u> taken as part of contractual obligations <u>and</u> that the employer impliedly agreed to pay for these measures.
Economic duress by unlawful threat of levy of liquidated damages.	Can only succeed if there is no reasonable alternative to capitulation; availability of fast track dispute resolution methods may be seen as a reasonable alternative depending on the urgency of the threat.
Tortious intimidation by, for example, wrongful failure to issue extension.	Has potential advantages in terms of tortious loss recovery which could theoretically extend beyond contractual losses, but there is little case law support for the approach.