

Case in Brief: Principals beware, constructive acceleration is here

By Michelle Rubaduka

The road to a claim for constructive acceleration was laid in Australia when a project manager, heavily influenced by a principal and their agents, failed to act impartially and fairly.

In a recent decision *V601 Developments Pty Ltd v Probuild Constructions (Aust) Pty Ltd* [2021] VSC 849, the Supreme Court of Victoria reaffirmed the importance of the independence of project managers when performing independent functions. The Court found on the proper construction of the contract, there was a clear separation between the project manager's function as an agent of the principal and their independent function as an assessor and certifier.

The facts

In May 2011, 601 Developments PTY LTD (the **Principal**) engaged ProBuild Constructions (the **Contractor**) to design and construct a mixed-use commercial and residential development in Melbourne. The agreement was an amended Australian Standard Contract AS4902-2000 (the **Contract**).

The project manager was tasked with two primary functions: it was an agent of the Principal, and it was an *independent* assessor and certifier of extension of time (**EOT**), practical completion and delay in damages claims.

The Principal commenced proceedings claiming liquidated damages for late completion, relying on certificates issued by the project manager totaling just over \$4.7 million.

The Contractor, in its defence, highlighted the project manager's impartial conduct that resulted in the unjustified rejection of the Contractor's EOT claims. The Contractor counterclaimed EOTs, constructive acceleration costs, delayed

damages, payment for variation and early completion costs.

The decision

A contractor can claim damages for constructive acceleration if a principal wrongfully fails to grant an EOT claim. The damages are to compensate the contractor for the extra work that goes into accelerating the works to meet the extended target date.

The Contract obliged the project manager to act impartially and fairly in their independent functions, when acting as an assessor and certifier. Ordinarily, constructive acceleration would not be available in such circumstances, because the actions of the independent certifier cannot be traced back to the principal.

In this case, however, the Court found the project manager had attended meetings, been a party to communications regarding the defence of the builder's EOT claims, and acted in accordance with the Principal's instructions in relation to their independent functions: all of which actions were in direct breach of the Contract.

The Court found that the Principal intended to deprive the Contractor of its contractual entitlements in favor of the Principal's commercial interests. Further, the project manager's participation displayed a *fundamentally impaired understanding and appreciation for the level of independence required by the contract in relation to the assessment and verification function.*

The Principal's claim was dismissed, as the Court set aside the liquidated damages certificates and ascribed little value to the project manager's evidence.

The Court found in favour of the Contractor, granting its EOT claims, acceleration costs, delayed damages, payment for variation and early completion costs.

The Court also presented an interesting analysis in favour of the retrospective calculation of delay damages, and the decision addresses double recovery concerns with delay damages claims and acceleration costs.

Conclusion

Where there is a third-party administrator the conduct required to make a successful claim of constructive acceleration is difficult to establish.



The EOT claims were justly owed to the Contractor; and it was clear the Principal's undue influence and insertion into the project manager's assessment and certification functions resulted in a "late completion" determination.

The level of collusion present in this case is rare, but the conduct has essentially ushered in a successful claim of constructive acceleration in Australian courts where its existence was barely recognised.

This case serves as a reminder to project managers and all contract administrators to seek independent legal advice regarding their contractual obligations. It is also a reminder to lawyers advising and drafting construction contracts to ensure that clients are aware of their requirement to observe the separation between the administrator's independent functions and their functions as an agent of the principal.

ABOUT THE AUTHOR

Michelle began working at the Building Disputes Tribunal in her final year studying a BCom/LLB at the University of Auckland. She is now working towards being admitted as a barrister and solicitor of the High Court of New Zealand.

