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Prevention is Cheaper than Cure

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APPLYING CONCURRENCY PRINCIPLES TO THE JBCC

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As those familiar with JBCC will know, the JBCC contract provides for delay events that entitle the contractor to an extension of time only (those listed in clause 23.1) and delay events that entitle the contractor to an extension of time with an adjustment of the contract value (those listed in clause 23.2). So, what happens when events from both clauses occur concurrently – The JBCC does not expressly deal with such a circumstance – so, does the contractor receive additional compensation or not?

The events in clauses 23.1 and 23.2 can occur at the same time. For example, it is possible that an inability to obtain materials and goods or adverse weather conditions (both clause 23.1 events) can occur at the same time as delayed possession of the site (a clause 23.2 event). How does the principal agent assess this? Does he adjust the contract value or not?

When two effective causes of delay cause a project overrun, they are said to be "*concurrent*". The definition of concurrency that tends to be preferred is the one put forward by John Marrin QC - "*A period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency.*" [1]

Given that construction matters rarely see their day in court in South Africa, we have no comprehensive law on the principle of "*concurrency*". The principle has, however, been grappled with at length in other jurisdictions, in particular the United Kingdom – a jurisdiction we turn to as persuasive for many of our construction law matters.

1 Concurrent Delay by John Marrin QC (2002) 18 Const LJ No. 6 436.

The question that the UK courts have contended with is whether, in circumstances where the contractor is in delay, but the employer also appears to be delaying the contract, the contractor is entitled to an extension of time.

There are two schools of thought in the UK – the English approach and the Scottish approach.

In the English case of *Walter Lily v MacKay & Others*, Justice Akenhead determined that where there is an extension of time clause in the contract and where delay is caused by two or more effective causes, one of which entitles the contractor to an extension of time as being a relevant event, the contractor is entitled to the full extension of time.[2] This decision, however, was based on a contractual interpretation of the express wording of the English JCT contract as well as the English principle of "*prevention*". The wording of the JBCC is different to the JCT and the prevention principle is not part of South African law.

The *Walter Lily* case was preceded by *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*[3]. This case is the case generally referred to as authority for the UK's position on concurrency. In this case, Justice Dyson determined that if there are two concurrent causes of delay, one of which is a relevant event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event.[4] He used the example of inclement weather and a shortage of labour and stated that the contract administrator cannot refuse to grant an extension based on inclement weather (a relevant event) on the basis that the delay would have occurred in any event due to the shortage of labour.

The Scottish approach, which is not accepted in the UK, was defined in the case of *City Inn Ltd v Shepherd Construction Ltd*.[5] In this case, Lord Drummond Young determined that where there is true concurrency between a relevant event and a contractor default, it may be appropriate to apportion responsibility for the delay between the two causes. On appeal,[6] Lord Osbourne took a slightly different approach concluding that if a dominant cause can be identified as the cause of a particular delay in completion, effect will be given to that by leaving out of account any causes which are not material. However, where neither event can be described as dominant, the decision-maker must apportion the delay in completion as between the relevant event and the other event.

You will notice that all the above-mentioned cases refer to a "*relevant event*". This is a term in the UK's JCT contract. Under the JCT contract, the contractor is entitled to an extension of time where the delay is caused by a relevant event. The above-mentioned cases addressed the scenario where one event which was a "*relevant event*" took place concurrently with another event that was not listed in the contract as giving the contractor an entitlement to an extension of time.

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2 [2012] EWHC 1173 (TCC) at para 370.

3 (1999) 70 Con LR 32.

4 Henry Boot at para 13.

5 [2007] CSOH 190.

6 [2010] CSIH 6.

This would be the equivalent to where a delay event not listed in clauses 23.1 and 23.2 (i.e. an event that does not entitle the contractor to an extension of time) is concurrent with an event from either clause 23.1 or 23.2 (both of which entitle the contractor to an extension of time).

The question posed in this article is not whether the contractor is entitled to an extension of time or not (which is what the cases on concurrency address) but rather whether the contractor is entitled to additional payment when two events, both entitling it to an extension of time, take place concurrently.

The English cases referred to above do not assist in answering this question. The *Scottish City Inn case*, however, assists in that it refers with approval to the "*dominant cause*" approach. The dominant cause approach is one that was popular during the 1980s and 1990s in the world of construction disputes. Sir Anthony May summarised this approach as – If there are two causes, one the contractual responsibility of the plaintiff and one of the defendant, the plaintiff succeeds if he establishes that the cause for which the defendant is responsible is the dominant cause. The question of which event was the dominant cause of the delay is to be resolved by application of common sense and logical to the facts and applying the principles of causation.[7]

If an employer's event is not the dominant cause of the delay to the contractor's works but the event was a material cause of the delay, it may be possible, and indeed appropriate, for the contractor to be awarded compensation to reflect a proportion of the overall delay.[8] This may also be the case where the event for which the employer was responsible is truly concurrent with those for which the employer was not responsible.[9] This approach of apportioning the financial effects of delay is not supported by calculation or strict logic as it is generally not possible to make a precise allocation of responsibility for the delay.[10]

This approach could be applied to concurrency between clause 23.1 and 23.2 events. In other words, where the principal agent is faced with a situation where there is true concurrency between clause 23.1 and 23.2 events, he should apportion the delay between the two causes in a fair and reasonable manner. In the case of absolute true concurrency, a fair and reasonable determination, in our view, would be to award the contractor costs for half the length of extension of time granted. Where there is not absolute concurrency, the principal agent should exercise his judgment to determine the extent to which completion was delayed by each event – such determination must also be made on a fair and reasonable basis.

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7 Julian Bailey, "Construction Law", Volume 2, 2nd edition, Informa Law, (2016) at p1026.

8 Bailey at p1026.

9 Bailey at p1027.

10 Bailey at p1027.

The JBCC does not expressly define how to deal with concurrency between clause 23.1 and 23.2 events. Accordingly, in our view, principal agents faced with this situation (and who truly wish to act fairly and independently, as they should in this role) should adopt the dominant cause approach described above. Obviously, no principal agent is bound to this as the approach is not prescribed in South African law, but in our view it is the most sensible and reasonable in circumstances where the contract itself is silent on the matter.