

## Concurrently delayed?

Is an employer or contractor entitled to an extension of time and/or claim for damages in a situation where there are two or more events that have caused a delay, and where the delays caused by such events ran concurrently?

There does not seem to be a conclusive answer on how a situation of concurrent delays, where one delay was the risk of the employer and the other delay the risk of the contractor, should be dealt with in construction agreements. Looking at various articles and case law, the following approaches seem to exist, which will be discussed in more detail below:

- An apportionment
- The American approach
- The "but-for" test
- The dominant-cause approach
- The *Malmaison* approach
- The "new test"

### Definition of concurrent delay

The concept of a concurrent delay has been defined as denoting "a period of project overrun which is caused by two or more effective causes of delays which are of approximately equal causative potency".<sup>1</sup> There does not seem to exist a definition of "concurrent delay" apart from this one, which has been authoritatively accepted by the courts and thus formally adopted.

Further, it has been mentioned that it is always necessary to distinguish between cases involving truly concurrent causes of delay and cases which, upon proper factual analysis, involve sequential or separate aspects of delay attributable to various competing causes. It has been stated that in the latter situation, the "but-for" test of causation should be applied.<sup>2</sup>

It has been suggested that true concurrency occurs when both events cause delay and project overrun, the delaying effect of the events is felt at the same time and (crucially) the same period of project overrun, which is caused by two or more effective causes of delay that are of approximately equal causative potency.<sup>3</sup>



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<sup>1</sup> John Marrin QC's SCL paper "Concurrent Delay" (February 2002), which has been adopted in Keating on Construction Contracts (9<sup>th</sup> Ed).

<sup>2</sup> Vincent Moran QC "Causation in construction law: the demise of the 'dominant cause' test." (June 2014).

<sup>3</sup> *Idem*.

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Thus in circumstances where one delay-causing event has more "causative potency" than another, the party whose delay has substantially less causative potency will be entitled to relief for the delay in terms of the contract.

### **The apportionment**

The apportionment basically entails the allocation of the time and money effects of the delay to project completion based on the relative causative potency or significance of the competing causes of delay.

The apportionment seems to have been applied in some cases in the past, most notably the case of *City Inn Ltd v Shepherd Construction Ltd* [2010] BLR 473, [2010] CILL 2889, InnerHouse, Ct of Session, where it was held that if it is not possible to determine which delay causing event is the "dominant cause", under such circumstances the architect, project manager, engineer, etc, as the case may be, should exercise his/her discretion in determining an outcome which is "fair and reasonable".<sup>4</sup>

### **The American approach**

This may be summarised briefly as follows<sup>5</sup>:

Where an excusable delay occurs concurrently with an inexcusable delay, neither the contractor nor the employer would be entitled to recover compensation. The contractor would be entitled to an extension of time without financial compensation.

Where a compensable delay occurs concurrently with a non-compensable delay, the contractor would be entitled to an extension of time without financial compensation. Each of these will be briefly described unless he can establish that the compensable delay was the sole cause of the loss.

Similarly, the employer can only recover to the extent that it is able to demonstrate that the inexcusable delay by the contractor is the sole cause of the delay. The American approach is highly dependent on the terms of contract and risk and allocation within the contract and has not been supported by English courts.

### **The "but-for" test**

This is the well-known test usually applied in South African jurisprudence to determine factual causation in delictual disputes as well as contractual disputes, under certain circumstances.

In the construction arena the test has been formulated in the following manner:

Ignoring the contractor-caused delay, would the finalisation of the project have overrun but for the delay caused by the event for which the employer bears the risk. Thus, the test appears to be that if one thinks

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<sup>4</sup> It should be noted that the construction agreement in question was the JCT agreement, which seems to be a standard form agreement in the UK.

<sup>5</sup> <http://www.bca.co.za/Articles/article24>

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away the employer's risk event and the delay would not as a matter of fact also disappear, then one cannot say that the employer is liable for the delay.

Some criticisms have been levied against this approach specifically in the field of construction law as being pointless if concurrent delays occur that are of equal causal potency. Further it has also been stated that this test, although based on common sense, is often considered to be too imprecise and could be misleading.<sup>6</sup>

It seems that this test does not have wide support under construction jurisprudence and is therefore not the likely test to be applied when determining liability for delays which are concurrent.

### **The dominant-cause approach<sup>7</sup>**

The dominant cause test prevailed during the 1980s and 1990s in the world of construction claims.

It originated, however, not in authority but as a result of its inclusion in the leading practitioner work in this field and was summarised as follows:

"If there are two causes, one the contractual responsibility of the Defendant and the other the contractual responsibility of the Plaintiff, the Plaintiff succeeds if he establishes that the cause for which the Defendant is responsible is the effective, dominant cause. Which cause is dominant is a question of fact, which is not solved by the mere point of order in time, but is to be decided by applying common sense standards".

There are now, of course, well documented problems with adopting the dominant cause test generally to extension of time, loss and expense and damages claims under building contracts.

First, the dominant case test does not resolve the problem created where there is no one dominant cause of the relevant delay or loss (that is, where there are two or more concurrent causes of equal or approximately equal causative potency).

Second, the dominant cause test is inconsistent with the but-for test since there is no need to identify a "dominant" cause unless there is some other cause of the delay/loss which, but for the dominant cause, would have resulted in the same delay/loss being sustained.

Thus, notwithstanding the fact that the claimed delay or loss/expense would have been incurred anyway, if the dominant cause test is applicable the contractor would nevertheless become entitled to a further extension of time/payment as long as the employer risk event is construed as the dominant of the competing causes.

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<sup>6</sup> *Ibid* Vincent Moran.

<sup>7</sup> *Idem*.

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Furthermore, the marked absence of specific support in any authority for the application of the dominant cause test in construction claims is becoming more telling with time.

It has been held that the dominant cause approach is most useful in situations where a "delay, at risk of one of the parties, is contained wholly within the start and completion dates of a delay at risk of the other party".<sup>8</sup>

Thus, even though the dominant cause approach does not seem to be able to always give a definitive answer of liability in concurrent delays, this approach still seems to be relevant and has been supported in foreign case law and therefore should have persuasive value in a South African court.

It should, however, be noted that some<sup>9</sup> are of the view that the dominant cause approach has now been laid to rest in the UK in the case of *Petroleo Brasileiro v ENS 1 Kos Ltd*<sup>10</sup>.

### **The *Malmaison* approach**

This approach has been adopted in case of *Henry Boot Construction (UK) Ltd v Malmaison Hotel*<sup>11</sup>. This approach has been followed in subsequent cases in England and has also been referenced by various authors. The relevant extract from the judgment is as follows:

“...it is agreed 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. Thus, to take a simple example, if no work is possible on a site for a week not only because of exceptionally inclement weather (a relevant event), but also because the contractor has a shortage of labour (not a relevant event) and if the failure to work during that week is likely to delay the works beyond the completion date by one week, then if he considers it fair and reasonable to do so, the architect is required to grant an extension of time of one week. He cannot refuse to do so on the grounds that the delay would have occurred in any event by reason of the shortage of labour”.

This approach has been held to be the "generally accepted approach in resolving issues of 'true concurrency' (ie in the event of delay events of approximately equal causative potency)".<sup>12</sup>

This approach was once again formulated on an interpretation of the JCT standard form contract.

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<sup>8</sup> *Ibid* fn 5.

<sup>9</sup> *Ibid* Vincent Moran p.16.

<sup>10</sup> [2012] UKSC 17.

<sup>11</sup> (1999) 70 Con. L.R. 32.

<sup>12</sup> *Ibid* Vincent Moran.

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The phrase relevant event apparently bears the definition of "an event that causes a delay to the completion date, which is caused by the client, or a neutral event not caused by either party."<sup>13</sup> It is further mentioned that relevant events can include the following:

Variations; exceptionally adverse weather; civil commotion or terrorism; failure to provide information; delay on the part of a nominated sub-contractor; statutory undertaker's work; delay in giving the contractor possession of the site; force majeure (such as a war or an epidemic); loss from a specified peril such as flood; the supply of materials and goods by the client; national strikes; changes in statutory requirements.

Therefore it seems that those events that can be defined as a relevant event would equate to a large extent to what would amount to a compensation event under the NEC3 Engineering and Construction Contracts. Thus, the *Malmaison* approach can be applied in South Africa in cases where there is a compensation event as well as a contractor's risk event, which both cause a delay concurrently. The outcome of such an application would be that the contractor would be entitled to an extension of time (which would be fair and reasonable), but would however not be entitled to claim damages from the employer and likewise the employer would also not be entitled to damages from the contractor.

It should be noted, however, that under the JCT agreement the "architect" has discretion to grant extensions of time or not. If no such equivalent discretion can be found in a construction agreement under consideration in South Africa, then the *Malmaison* approach may not be able to be applied as the a court cannot read provisions into the contract which the parties have not agreed to.

### **The new test**

There seems to be a new development in English jurisprudence in which a new test may be said to have been adopted.

This test has been referred to as the effective cause test.<sup>14</sup>

In the case of *De Beers UK Ltd v Atos Origin IT Services UK Ltd*<sup>15</sup> the court has made the following statement:

"The general rule in construction and engineering cases is that where there is concurrent delay to completion by matters for which both employer and contractor are responsible, the contractor is entitled to an extension of time but he cannot recover in respect of the loss caused by the delay. In the case of the former, this is because the rule where delay is caused by the employer is that not only must the contractor complete within a reasonable time but also the contractor must have a reasonable time within which to complete. It therefore does not matter if the contractor would have been unable to complete by the

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<sup>13</sup> [http://www.designingbuildings.co.uk/wiki/Relevant\\_events\\_v\\_relevant\\_matters](http://www.designingbuildings.co.uk/wiki/Relevant_events_v_relevant_matters)

<sup>14</sup> *Ibid* Vincent Moran p.14.

<sup>15</sup> [2011] B.L.R. 274.

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contractual completion date if there had been no breaches of contract by the employer (or other events which entitled the contractor to an extension of time) because he is entitled to have the time within which to complete which the contract allows or which the employer's conduct has made reasonably necessary.”

Although this has been dubbed as a possible new test it seems to largely coincide with the *Malmaison* approach discussed above.

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