Delay and Disruption Claims and Damages in relation to Construction Projects

by

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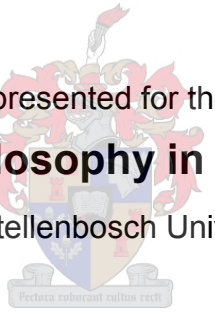

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SYNOPSIS

The project management triangle, also referred to as the "triple constraint" or the "iron triangle"[1] is a model of the constraints of project management. The triangle is used to illustrate that the success of project management is measured by the project team's ability to manage the project so that the expected results are produced while managing time and cost. Events or circumstances may occur during construction contracts which may delay or disrupt the execution of the works or cause loss of productivity.

All modern standard-form contracts provide for extending the date for completion under certain defined circumstances, but few contracts, if any, adequately address the question of on what basis exactly the extension of time is to be determined. This uncertainty and inconsistency creates numerous problems for the contractors in planning their work prospectively, and consequent delays may result in severe financial penalties, loss and expenses. This uncertainty and inconsistency may even have the completely opposite effect of relieving the contractor of his obligation to pay penalties and leaving the employer with the unexpected consequence of being obliged to prove its damages.

Where the contract does not make express provision for an eventuality or the allocation of risk, the circumstance will be governed by common law. In other words, if the contract is silent on some of above common issues, the parties will be obliged to revert to common law for the outcome of their dispute. The main source of common law in relation to construction law is case law, of which there is a relative dearth in South Africa on the many issues that arise from the interpretation of contractual provisions dealing with delay and disruption in construction projects. It is therefore important for contracts to provide expressly for risk allocation pertaining to possible delaying events and to determine the distinction between time risk and cost risk events. Delay and disruption matters, which may *inter alia* include issues involving extensions of time, penalties, critical path, ownership of float**,** concurrent delay, delay analysis methods, global claims, and time at large, among other factors,

[1] William T Cradock 'How Business Excellence Models Contribute to Project Sustainability and Project Success' in Silvius Gilbert *Sustainability Integration for Effective Project Management* (2013) at page 10.

all too often become disputes that have to be decided by third parties, including *inter alia* mediators, adjudicators, dispute review boards, arbitrators, and judges.

The number of such cases could be substantially reduced by the introduction of an unambiguous and consistent approach. This thesis will address the above concepts by analysing the applicable legal principles involved. This will be done through an analysis of case law and legal writings, and a comparison of different standard contracts from South Africa, England, and, to a lesser extent, other foreign jurisdictions.

This analysis will be applied and compared to the newly published JBCC suite of contracts (Edition 6.1 March 2014). Provisions of the JBCC extension of time regimen that are inconsistent and conflicting and may create ambiguity will be identified, and the thesis will propose amendments. Furthermore, provisions which are susceptible to time-at-large arguments will be analysed and appropriate amendments will be proposed. Finally, the thesis will endeavour to introduce Best Practice Project and Risk Management principles through its proposed amendments.

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CHAPTER 1

INTRODUCTION AND OVERVIEW

1.1 Introduction

The construction industry operates in a multifaceted and largely project-specific environment impacted on by a variety of regulations, legislation, and forms of contracts and subcontracts.[2] Owing to the industry's dynamic nature, which is such that every project involves the assembly of a new combination of resources and role players, the industry is not static. The instability is further compounded by the fact that the industry is competitive and involves high risk for both the client and the contractor.[3] In light of this, the government in 1999 published the White Paper on *'Creating an Enabling Environment for Reconstruction, Growth and Development in the Construction Industry'* (the White Paper),[4] paving the way for establishment of the Construction Industry Development Board (CIDB) through an Act of Parliament.[5]

The CIDB was established to provide leadership to stakeholders and to stimulate sustainable growth, reform and improvement of the construction sector for effective delivery and an enhanced role for the industry in the country's economy.[6] Prior to the establishment of the CIDB, different forms of contracts were being used, resulting in increased costs and claims due to the inconsistent interpretation of the varied approaches that were used to establish risks, liabilities and obligations of the parties to contracts and the associated administration procedures.[7] The CIDB is among other things mandated to promote and improve industry performance,[8] and to endorse uniform and ethical standards that 'regulate the actions, practices and procedures of parties engaged in construction contracts'.[9] In line with its mandate and in declaring procurement best practices, the CIDB recommends the following forms of Standard Construction Contracts to be used by the public sector:

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[2] The White Paper '*Creating an Enabling Environment for Reconstruction, Growth and Development in the Construction Industry*' (1999) at 11.
[3] Ibid.
[4] The White Paper op cit note 2.
[5] The Construction Industry Development Board Act 38 of 2000.
[6] http:www.cidb.org.za/default.aspx.
[7] CIDB ' Best Practice Guidelines #C2: Choosing an Appropriate Form of Contract for Engineering and Construction Works' (2005) at 2.
[8] Section 4*(c)* of Act 38 of 2000.
[9] Section 4*(f)* of Act 38 of 2000.

FIDIC's suite of books dealing with specific types of contract ('FIDIC' is the French acronym for 'International Federation of Consulting Engineers') (*Short contract* (1999a), and *Red Book* (1999b), *Yellow Book* (1999c) and *Silver Book* (1999d)); *General Conditions of Contract for Construction Works* (GCC) 2015; JBCC Series 2000 (*Principal Building Agreement* and *Minor Works Agreement*) and the *New Engineering Contract* (NEC3) (*Engineering and Construction Contract and Engineering and Construction Short Contract*).

1.2 Scope of study and methodology

Standard Construction Contracts are important as they provide a ready-made set of terms as to the allocation of risks and responsibilities, remedies and administrative practices; make the negotiation and tender process more efficient and less costly; and spell out the relationships between the different parties involved in a project.[10] Of the CIBD approved Standard Construction Contracts, this thesis focuses on the Joint Building Contracts Committee (JBCC) Edition 6.1 March 2014 Suite of Contracts (JBCC 2014 Suite) consisting of the Main Contract, the JBCC Principal Building Agreement Edition 6.1 March 2014 (JBCC PBA) and Subcontracts, the JBCC® Nominated/Selected Subcontract Agreement Edition 6.1 March 2014 (JBCC NSSA) as published by the Joint Building Contracts Committee (the Committee). This thesis specifically deals with the JBCC PBA. As a result, it is to be noted that any reference in this thesis to a Clause without the specification of a different Conditions of Contract, will mean that the Clause is in terms of the JBCC PBA.

The Committee was established in 1984 and published the first edition of the JBCC Principal Building Agreement in 1991.[11] In 1998 a revised Principal Agreement and suite of documents, designated Suite 2000, was published in the hope that the documents would meet the needs of all facets of the building industry with little or no amendments.[12] But like every aspect of modern life, the construction industry is dynamic. In the next few years the JBCC published further editions 2000, 2003, 2004, 2005, 2007, 2013 (published but recalled after a few

[10] Justin Sweet 'Standard Construction Contracts: Some Advice to Construction Lawyers' 40 S.C.L Rev 823 (1988) at 823.
[11] Eyvind Finsen 'The Building Contract: A commentary on the JBCC Agreements' (2005) at v.
[12] Ibid.

months), and finally 2014, to deal with changing circumstances.[13] This thesis focuses on the JBCC PBA rather than the other standard forms of contract because it is one of the South African drafted contracts, together with the GCC. The GCC is, however, largely drafted in conformity with the Society for Construction Law's *Delay and Disruption Protocol*.[14] This makes it less prone to disputes in comparison with the JBCC PBA, which is not in line with the *Protocol*. The JBCC can therefore be improved in this regard, as will be discussed in more detail in the following chapters. In addition, the JBCC it is widely used in South Africa, and its widespread acceptance has made it an industry standard for construction procurement in the country.[15] This makes it very relevant to the Construction industry in South Africa for a diverse range of construction projects.

The envisaged research is qualitative in nature and desk research was the chosen methodology. The study relied on primary sources in the form of various relevant standard forms of contract, case law and legislation. The majority of the case law relied on is from the English courts. Because of the lack of South African case law on certain construction law matters and the fact that South African Law is a so-called mixed legal system, comprising a foundation of Roman-Dutch Law with strong English influences, especially in the areas of commercial and construction law,[16] it is accepted that English law enjoys considerable relevance and persuasive value when it comes to the development, interpretation and application of South African law relating to construction contracts. Furthermore, the Constitutional Court, from its very first judgment in *S v Zuma and Others*,[17]considered and cited over 25 foreign precedents. Furthermore, in *Fose v Minister of Safety and Security*,[18] Justice O'Reagan stated the following:

[13] Ibid.
[14] Society for Construction Law, *Delay and Disruption Protocol* (October 2004 reprint) available at www.eotprotocol.com
[15] Peter Richards, Paul Bowen et al 'Client Strategic Objectives: The Impact of Choice of Construction Contract on Project Delivery' *Construction Law Journal* 7 (2005) 21 at page 4.
[16] See, eg, CG van der Merwe, JE du Plessis and MJ de Waal "Report 2 – South Africa" in VV Palmer (ed) *Mixed Jurisdictions Worlswide – The Third Legal Family* (2001, Oxford University Press).
[17] *S v Zuma and Others* 1995 (2) SA 642 (CC).
[18] *Fose v Minister of Safety and Security* (CCT14/96) [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 (5 June 1997) at 35.

> "It would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems grappling with issues similar to those with which we are confronted. Consideration of the responses of other legal systems may enlighten us in analysing our own law, and assist us in developing it further".

Owing to the strong historical linkage with England, and the aforementioned constitutional imperative, the law as applied and developed in the English courts has persuasive value in the development and application of the law in South Africa, especially where there is no clear directive in South African law on a specific matter. This approach is enunciated in the following terms by Van Rhyn J in *Colin v De Giusti and another*;[19]

> "Contemporary South African and English Law are mainly founded on the same legal principles pertaining to construction agreements, to such a degree that legal authorities are referred to with the same ease".

Textbooks and law journals are used as secondary sources of information.

1.3 Research justification and problem

My analysis of the JBCC® *Principal Building Agreement* Edition 6.1 March 2014 (JBCC PBA) revealed numerous instances of incorrect clause referencing,[20] conflicting provisions, and omissions from the contract data, emphasising the need for a revised edition or amendments in the form of contract supplements to remedy these problems. Contract Supplements should have the objectives of removing any conflicting or obvious errors in a Standard Contract; eliminating any ambiguity or uncertainty; and introducing Best Practices. The introduction of contractual supplements to amplify the Standard Conditions of Contract is not without criticism, however. The major argument against the adoption of such a course is that the addition to already huge volumes of text will make the contracts even more complex

[19] *Colin v De Giusti and Another* 1975 4 All SA 319 (NC).

[20] For general incorrect clause references refer, for example, to: Clause 15.2.2, which incorrectly references clause 15.1.5 instead of clause 11.4.1; and Clause 21.1, which incorrectly makes reference to clause 21.4.1 instead of 21.6.1, among others. It should be noted that the thesis will not be dealing with all incorrect clause referencing in the JBCC, but will limit the discussion only to references that are relevant to the scope of the thesis, those being the ones that impact on delay and disruption claims in construction projects.

than they are.[21] The Joint Building Contracts Committee's[22] resistance to any modifications is also evident in the *Warning note*[23] in the Preface of the JBCC Agreements against the dangers inherent in modifying any part of the JBCC documents.

However, in analysing the JBCC PBA, one finds that there is an obvious need to address certain problem areas and difficulties, some of which will be identified and analysed in the following chapters. While standard contracts are intended to provide certainty, the JBCC PBA is fraught with clauses that result in ambiguity. As a result, it is submitted that the JBCC PBA needs revision to address these defects. It is furthermore submitted that the JBCC in its revision should take cognisance of the Society of Construction Law's *Delay and Disruption Protocol* (the "Protocol"), published in 2002,[24] in order to determine and pave the way for the incorporation of best practice. The *Protocol* recognises that construction contracts must provide the mechanisms to manage change.[25] Although all the common standard forms of contract provide for the assessment of delay and compensation for prolongation, they do not all do so completely, or in exactly the same way.[26] The *Protocol*'s objective is to provide guidance on some of the common issues that arise in construction contracts.[27] It must, however, be noted that the *Protocol* itself states that although it is not a contract document and does not purport to take precedence over express terms of a contract, it represents a scheme of dealing with delay and disruption issues that is balanced.[28] The aim of the *Protocol* is that in time, most contracts will adopt its guidance as the best way to deal with delay and disruption issues.[29]

[21] Peter Aeberli, "The PFE Change Management Supplements: Are they what the industry wants?"(December 2005) page 4.
[22] The preface of the JBCC 2014 describes the committee as representative of building owners and developers, professional consultants and general and specialist contractors who contribute their knowledge and experience to the compilation of the JBCC documents.
[23] "*Experience has shown that changes drafted by others, including members of the building profession, often have results different from these intended that may be prejudicial to either, or both, parties.*"
[24] SCL *Protocol* op cit note 14
[25] SCL *Protocol* op cit note 14 at page 3.
[26] Ibid.
[27] SCL *Protocol* op cit note 14 at page 3.
[28] SCL *Protocol* op cit note 14 at 3
[29] SCL *Protocol* op cite note 14page3.

The benefit to the employer of using a contract which conforms to the *Protocol* is that it enables him to manage his own delay risks of change during the construction period.[30] This is opposed to having to depend on the contractor to either manage the delay risk for him under the aegis of a contractual provision requiring the contractor for example to "prevent delay in the progress of the works howsoever caused",[31] or any other similar provision.[32] Alternatively, the employer's delay risks are not managed at all during the construction period with the resultant inevitable overrun, compensation claims and the disputes that usually follow.[33] A benefit to the contractor is that he will be better able to manage the works and his own delay risk, and he will be able to secure speedy resolution of issues of extension of time and compensation, with the result that he is better able to manage the future works and improve his cash flow.[34]

It is the contention of this thesis that the use and application of some of the JBCC PBA provisions is problematic. This thesis therefore discusses the problematic provisions and provides recommendations on how the provisions can be revised to remove conflicting and obvious drafting errors, eliminate or reduce ambiguity and uncertainty and be aligned with best practices. This thesis through an analysis of the JBCC PBA contributes to the area of construction management, highlighting the shortcomings of the contract; this can help mitigate the potential conflicts and disputes that can arise between Parties as they will be aware of potential problem areas beforehand. It further provides recommendations which if implemented will allow Employers, Contractors and other industry professionals to avoid unnecessary disputes and inevitably complete their projects more efficiently while saving on costs that would otherwise result from said disputes.

[30] Pickavance Consulting, Fenwick Elliot 'The PFE Change Management Supplement for use with JCT98 Standard Form of Building Contract, Private Edition, With Quantities Incorporating Amendments 1–4' (2003) at page 2.
[31] JCT98 clause 25.3.4.1
[32] Pickavance op cit note 30.
[33] Ibid.
[34] Ibid.

It should be noted that throughout the thesis, where amendment is recommended, clauses indicated with an asterisk (*) show proposed amended clauses to replace the standard JBCC PBA provisions.

CHAPTER 2

COMPLETION DATES

2.1 Introduction

The law governing the various aspects of building contracts in South Africa is in general the common law of contracts and in Roman-Dutch law this type of contract falls into the category of letting and hiring.[35] As a general principle, a basic obligation of a contractor under a building or engineering contract is to complete the works on time.[36] This obligation may be expressed by stipulating in the contract an actual date by which completion is required.[37] It may alternatively stipulate a period for performance required to carry out the works, such period to run from whenever the Contractor is permitted and required to commence work or also defined as the commencement date.[38] In either event, failure by the Contractor to comply with this obligation is a breach of contract, carrying with it the liability to pay damages or penalties to the employer.[39]

Consequently, the date for completion is of outmost importance as it may, and most probably will, have a telling impact on the monetary aspect of the project.[40] Notwithstanding this importance, there is unnecessary confusion surrounding the concepts of date for completion *(contractual completion date)* and date of completion *(construction completion date).*[41] In practice the term "Completion Date" is used often but without a clear definition as to clarify the exact meaning thereof. Some use it to indicate the expiry of the time by which the Contractor has to fulfil the requirements of the contract, or the expiry of the "window of opportunity" within which he has to perform the work (*contractual completion date*), while others use it to indicate the expiry of the time the contractor actually used or even, in view of the contractor's

[35] H.S McKenzie and G.B Shapiro *The Law of Building Contracts and Arbitration in South Africa* (2014) at page 1.
[36] John Murdoch 'Contractual Overruns and Extension of Time' *Construction Law Journal* (1992) at 2.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] See *KNS Construction (Pty) Ltd v Genesis on Fairmount & Another* 21 August 2009 03/21585 [2009] ZAGPJHC 39 where the court found that by failing to achieve Practical Completion of the residential section by a specified date the contractor was in material breach of contract which entitled the employer to terminate the contract.
[41] Ferdinand Fourie 'Time-for Versus Time-of Performance' (2003*) AACE International Transactions CDR.21* at CDR.21.1.

construction programme, intended to use to complete the work (*construction completion date*).

Uncertainty and even ignorance of the difference between these concepts and the failure to define them properly in standard contract provisions result in confusion between employers and contractors. Often the *contractual completion date* and *construction completion date* are treated as if they have the same meaning. This can lead to uncertainty which may result in conflict, disagreements and disputes, which could have been avoided had the parties understood the basic and fundamental differences between these concepts. On most projects the contractor schedules the *construction completion date* to coincide with the *contractual completion date*. This blurs the distinction between these two separate concepts even further.

The JBCC PBA contract contributes to the confusion by not defining the terms unambiguously and by not applying them consistently. The distinction between these two terms is vital for determining penalties, extensions of time and expense and/or loss. This chapter analyses the various provisions of the JBCC PBA which deal with "Completion Dates" in different application areas and address the various issues that may arise.

2.2 JBCC contractual and construction completion dates

The JBCC PBA uses the terms "*date for Practical Completion*" and "*date of Practical Completion*" in a number of its provisions. The concepts "are unfortunately not dealt with in the JBCC PBA Definition Clause 1.1 and their meanings must therefore be inferred from the context in which they are used and the specific application areas in the Agreement. The JBCC PBA is, however, not as consistent with the use of these terms as the preceding Suites of 2005 and 2007 were.[42] On a reading of the contract, it becomes apparent that these terms are used interchangeably in a number of contexts.

This thesis argues that despite the JBCC PBA's own apparent oversight in failing to define the terms, a thorough examination of the contract reveals that these two terms are not interchangeable but refer to different concepts. It is submitted that "*date for*

[42] 2005 and 2007 used the date for Practical Completion as the contractual completion date and the date of Practical Completion as the construction completion date, and did not use the terms interchangeably.

Practical Completion" refers to the *contractual completion date,* which is the date by which the Contractor has to perform by completing the work. It is usually expressly stipulated in the contract. It therefore determines when an Employer would be able to recover penalties or liquidated damages should the Contractor fail to perform in a timely manner. The term "*date of Practical Completion*", on the other hand, refers to the *construction completion date* as initially intended or planned and finally the actual date on which the Contractor planned to or actually completed the work. Despite the failure to define the terms and in some cases to make a distinction between them by using them interchangeably, the JBCC PBA itself provides support for the argument that these concepts or definitions are distinct and have different meanings and consequences. Refer to Annexure A: Figures 1 to 3 "Contract Dates" for an illustration of the abovementioned concepts. The "date of Practical Completion" may be programmed to be achieved before the "date for Practical Completion" (Figure 1), on the "date for Practical Completion" (Figure 2) or after the "date for Practical Completion" (Figure 3). The first scenario in Figure 1 illustrates a planned early completion and the third scenario in Figure 3 illustrates the situation where the Contractor is late in achieving Practical Completion. The second scenario, where the "date of Practical Completion" and the "date for Practical Completion" coincide. represents the default position and will most of the time reflect the Contractor's programming method.

2.3 Consistent application of concepts

This part of the thesis analyses the JBCC PBA provisions which support the contention that "*date of Practical Completion*" and "*date for Practical Completion*" are separate and distinct concepts.

2.3.1 Penalty provisions

A reading of Clause 24 together with the definition of Practical Completion as found in the JBCC PBA Definition Clause 1.1 illustrates the meaning of and the distinction between "*date of Practical Completion"* and "*date for Practical Completion*". Refer to the JBC PBA Clauses and definitions below (*own emphasis*).

24.1 "Where the **contractor** fails to bring the **works** or a **section** thereof [CD][43] to **practical completion** by the date for **practical completion** [CD], or the revised date for **practical completion**, the **contractor** shall be liable to the **employer** for the **penalty** [CD]"

24.2 "Where the **employer** elects to levy such **penalty**, on notice thereof to the contractor, the **principal agent** shall determine the amount due from the later of the date for **practical completion** [CD], or the revised date for **practical completion** up to and including the earlier of:"

24.2.1 "The actual or deemed date of **practical completion** of the **works** [23.7.1] or a section thereof"

24.2.2 "The date of termination [29.0]"

Clause 24.1 makes it clear that the "*date for Practical Completion*" is the date stated in the Contract Data[44] on or before which the Contractor is obliged to complete the Works to the extent that Practical Completion has been achieved, failing which the Contractor will be in culpable delay and Penalties will be levied against it. Clause 24.2 suggests that the Penalties will be levied for the amount of days expired from the "*date for Practical Completion*" until the "*date of Practical Completion*" for such period of culpable delay. On the other hand the meaning of "*date of Practical Completion*" definition can be deduced from the definitions of Practical Completion and Certificate of Practical Completion in Clause 1.1 as quoted below.

1.1 **"PRACTICAL COMPLETION**: The stage of completion as certified by the **principal agent** where the **works** or a **section** thereof has been completed free of patent **defects** other than minor defects identified in the **list for completion** and can be used for the intended purpose [CD]"

From the above it follows that, practical completion is not a date; it is a stage or status[45] to be achieved before the due date, the "*date for Practical Completion*".

[43] [CD] is the notation used where project specific information is recorded in the Contract Data.

[44] The Contract Data is the document listing the contract variables.

[45] The same concept is illustrated in relation to the NEC. See Bronwyn Mitchell and Barry Trebes 'Managing Reality: Book Three Managing the Contract '(2005) at page 26.

1.1 **"CERTIFICATE OF PRACTICAL COMPLETION**: A certificate issued by the **principal agent** to the **contractor** with a copy to the **employer** stating that the date on which **practical completion** of the **works**, or of a **section** thereof, was achieved."

Accordingly the Principal Agent will issue a Certificate of Practical Completion once the construction status as defined by the phrase "Practical Completion" has been reached. Refer to Annexure A: Figure 4 "Culpable Delay" for an illustration of the abovementioned concept.

From a reading of these provisions it is clear that "*date of Practical Completion*" and "*date for Practical Completion*" are not and cannot be construed as bearing the same meaning. Penalties can only be calculated once the Contractor has passed the *contractual completion date* or the "*date for Practical Completion*" and these Penalties will be calculated as the amount of days expired from that date until the date when the construction of the Works has actually been and certified as Practical Completion in the Certificate of Practical Completion, which denotes the *construction completion date* or the "*date of Practical Completion*".

Simply put, in terms of the JBCC PBA terminology, Penalties will be calculated from the "*date for Practical Completion*" (due date) as included in the Contract Data or the revised "*date for Practical Completion*" if so extended in terms of the Agreement, until the "*date of Practical Completion*" as certified in the Certificate of Practical Completion (stage or status achieved).

2.3.2 Revision of the date for practical completion

The distinction between the "*date **for** Practical Completion*" and "*date **of** Practical Completion*" is further illustrated below in relation to the determination of extension of time and the resultant revision of the "*date for Practical Completion*". The Contractor's entitlement to a revision of the "*date for Practical Completion*" is governed by Clauses 23.1 to 3 as quoted below (*own emphasis*):

23.1 "The **contractor** is entitled to a revision of the date for **practical completion** by the **principal agent** without an adjustment to the **contract value** for a delay to **practical completion** caused by one or more of the following events: …"

23.2 "The **contractor** is entitled to a revision of the date for **practical completion** by the **principal agent** with an adjustment of the **contract value** [26.0], for a delay to **practical completion** caused by one or more of the following events: …"

23.3 "Further circumstances for which the **contractor** may be entitled to a revision of the date for **practical completion** and an adjustment of the **contract value** are delays to **practical completion** due to any other cause beyond the **contractor's** reasonable control and could not have reasonably been anticipated and provided for. The **principal agent** shall adjust the **contract value** where such delay is due to the **employer** and/or **agents** …"

In terms of Clauses 23.1 to 3 the Contractor is entitled to a revision of the "*date for Practical Completion*" (contractual completion date) for a delay caused to Practical Completion (construction completion date) by a Relevant Event.[46] Accordingly, if the *construction completion date* is delayed, the Contractor is entitled to a revision of the *contractual completion date*.

It is clear from the above that after actual Practical Completion has been achieved, the "*date of Practical Completion*" has the meaning of the date that has been certified in the Certificate of Practical Completion. However, before actual Practical Completion has been achieved, the "*date of Practical Completion*", represents the planned or anticipated date on which the Contractor programmes to complete the Works in order to achieve Practical Completion. The "*date of Practical Completion*" may be programmed earlier than the "*date for Practical Completion*" when the Contractor plans to complete the Works in order to achieve Practical Completion earlier than the "*date for Practical Completion*".[47] The "*date of Practical Completion*" may also be programmed later than the "*date for Practical Completion*" when the Programme is behind schedule and the Contractor is in culpable delay. It is accordingly possible that at any given time during the project, the Programme may

[46] A Relevant Event refers to an event that causes delay to the date for Practical Completion. In terms of the JBCC PBA terminology it refers to any event or circumstance in terms of Clause 23.1 to 3 and recognised by the contract to entitle the Contractor to an extension of time.

[47] See Annexure A – Figure 1 for illustration.

indicate the "*date of Practical Completion*" to be before, on[48] or after[49] the "*date for Practical Completion*".

These possible scenarios in turn create unnecessary confusion and uncertainty in practice as to how to deal with extension of time. However, this thesis argues that these possible scenarios do not affect the Contractor's entitlement to a revision of the "*date for Practical Completion*" in terms of Clauses 23.1, 2 and 3 and should not raise any confusion or uncertainty when applied correctly. The Contractor's entitlement to a revision of the "*date for Practical Completion*" depends solely on whether a Relevant Event delays Practical Completion. The Contractor will *inter alia* need to prove that the event impacted on the critical path[50] delaying the planned "*date of Practical Completion*" on the Programme irrespective of whether the "*date for Practical Completion*" is earlier, later or on the same date. The current "*date for Practical Completion*" at the time of the delay has accordingly no relevance to whether a Contractor is entitled to extension of time or not.

The "*date for Practical Completion*" is a contractual date in the Contract Data (or as subsequently revised) and is unrelated to the critical path of a Programme. Any argument or perception that the "*date for Practical Completion*" should be impacted or delayed by a Relevant Event for same to be revised does not have any legal basis. This misconception arises from the JCT contract Clause 25.3 as below (*own emphasis*):

25.3.1 "If in the opinion of the Architect, upon receipt of any notice, particulars and estimate under clauses 25.2.1.1, 25.2.2. and 25.2.3

25.3.1.1 any of the events which are stated by the Contractor to be the cause of the delay is a Relevant Event and

25.3.1.2 the completion of the Works is likely to be delayed thereby beyond the Completion date

[48] See Annexure A-Figure 2 for illustration.

[49] See Annexure A – Figure 3 for illustration.

[50] Keith Pickavance *Delay and Disruption in Construction Contracts* (2005) at page 7 the critical path as the longest path on the contractor's programme from notice to proceed to project completion, or the path with the least amount of slack or float. See also SCL op cit note 14 at page 54 which defines the critical path as "The sequence of activities through a project network from start to finish, the sum of whose duration determines the overall project duration."

> The Architect shall in writing to the Contractor give an extension of time by fixing such later date as the Completion date as he then estimates to be fair and reasonable. The Architect shall, in fixing the new Completion date, state …"

The above requirement in terms of Clause 25.3.1 implies that not only the *construction completion date* must be delayed but incorporates a further requirement that same must be delayed past the *contractual completion date* in order to be entitled to an extension of time. However, none of the standard contracts recommended by the CIDB has a similar requirement that the *construction completion date* needs to be delayed past the c*ontractual completion date* in order to have an entitlement to an extension of time.

The NEC ECC Clause 63.3 is perhaps the clearest illustration of this principle. Clause 63.3 stipulates that "A delay to the Completion Date[51] is assessed as the length of time that, due to the Compensation Event[52], planned Completion is later than planned Completion as shown in the Accepted Programme". The NEC manual further explains that terminal float[53] is retained by the Contractor, as stated in 63.3 above, where any delay to the Completion Date due to a Compensation Event is assessed as the length of time that planned Completion is later than planned Completion on the Accepted Programme.[54] The NEC manual additionally states that the Completion Date for the contract is something different from Completion.[55] Completion is submitted to be a status that is achieved when the Contractor has fulfilled his duties as described in the contract and can thus be achieved on, before or after the Completion Date.

It is accordingly submitted that the planned Completion, as defined by the NEC, can be equated to the JBCC PBA planned date of Practical Completion as programmed and that the NEC Completion Date be equated to the JBCC PBA "*date for Practical*

[51] Clause 11.3 of the NEC states: "The Completion Date is the *completion date* unless later changed in the accordance with this contract." The Construction Completion Date has the same meaning as the Contract Completion date and Completion has the same meaning as Practical Completion in terms of the JBCC PBA.
[52] Compensation Event in this context has the same meaning as Relevant Event.
[53] The period between planned Completion on the Programme and the Completion Date.
[54] Mitchell and Trebes op cit note 50 at page 26.
[55] Ibid.

Completion". Refer to Annexure A: Figure 5 "Float" and Figure 6 "Extension of Time" for an illustration of the above concepts.

2.3.3 Application areas

The JBCC PBA has in addition to the provisions discussed above various other application areas where the concepts of "*date for Practical Completion*" and "*date of Practical Completion*" are used consistently. Refer to the JBCC PBA Clauses below (*own emphasis*):

19.1 "The **principal agent** shall:

19.1.1 "Inspect the works at appropriate intervals to give the **contractor** interpretations and direction on the standard of work and the state of completion of the **works** required of the **contractor** to achieve **practical completion** [CD]''

The above process is consistent with the interpretation that Practical Completion is a status or state of completion to be achieved in order for the Principal Agent to issue a Certificate of Practical Completion.

8.1 "The **contractor** shall take full responsibility for the **works** from the date on which possession of the **site** is given to the **contractor** and up to the date of issue of the **certificate of practical completion** or deemed achievement of **practical completion** for a **section** or the **works** as a whole. Thereafter responsibility for the works shall pass to the **employer**

8.2 The **contractor** shall make good physical loss and repair damage to the **works** caused by or arising from:

8.2.1 Any cause before the date of **practical completion** [19.0]

8.2.2 Any act or omission of the **contractor** in the course of any work carried out in pursuance of the **contractor**'s obligations after the date of **practical completion**"

In the above Clauses the "*date of Practical Completion*" is used to denote the "*construction completion date*" when the Works achieved Practical Completion as certified in a Certificate of Practical Completion when the risk will accordingly revert

to the Employer. The "*date of Practical Completion*" is defined in Clause 8.2.1 is also cross referencing Clause 19 to define it as the "state of completion"

21.1 "The defects liability period for the **works** shall commence on the calendar day following the date of **practical completion** and end at midnight (00:00) ninety (90) calendar days from the date of **practical completion** [CD] or when work on the **list for final completion** has been satisfactorily completed [21.4.1], whichever is the later"

The "*date of Practical Completion*" triggers the commencement of the Defects Liability Period in terms of Clause 21.1 which is linked to the "state" of Practical Completion and not only the "due date" for Practical Completion. Refer to Annexure A: Figure 7 "Defects Liability Period" for an illustration of the concept.

17.4 "The **contractor** shall not be obliged to execute **contract instructions** or additional work issued after the certified date of **practical completion**"

The above provision stipulates that the Contractor is not obliged to execute a Contract Instruction for additional work issued after the certified "*date of Practical Completion*". This may, however, be after the "*date for Practical Completion*" where the Contractor is in culpable delay. This approach is also consistent with the other applicable principles. This provision implies that the Employer may issue orders for Variations to the Works at any time before the Contractor achieves Practical Completion. The Contractor is obliged to perform such Contract Instructions and will be in breach if it refuses to perform them. The Contractor will, however, be entitled to an adjustment to the Contract Value and for a revision of the date for Practical Completion in view of the effect of such instructions.

2.4 Inconsistent application of concepts

In light of the conclusion that the "*date of Practical Completion*" or the *contract completion date* and the "*date for Practical Completion*" or the *construction completion date* are separate and distinct concepts, this section of the thesis analyses the JBCC PBA provisions where the concepts are used interchangeably or applied incorrectly without taking into account their distinct meanings. The various seemingly unintended and unsatisfactory consequences which may result will be

illustrated, and amendments proposed, to align the concepts in order to create certainty.

2.4.1 Extension of time

Undoubtedly the most important area where certainty as to the concepts of "*date for Practical Completion*" and "*date of Practical Completion*" is required is in respect of the determination of delays, extensions of time and penalties. JBCC PBA Clause 23 deals with the Contractor's entitlement to a revision of the "*date for Practical Completion*" in certain circumstances or the occurrence of certain Relevant Events. This "*date for Practical Completion*" is initially the date as included in the Contract Data under section "19/20/24 Practical Completion/Penalty for late completion".[56] The Contract Data makes provision to include a "*date for Practical Completion*" for the Works as a whole or for the Works in Sections. There is also a provision to include a "Penalty Amount per Calendar day" next to the "*date for Practical Completion*".

Clauses 23.1 to 3 list certain events or circumstances which when they cause a delay to Practical Completion, will entitle the Contractor to a revision of the "*date for Practical Completion*". As contended above, the delay to Practical Completion denotes the stage of construction completion or a status. The "*date of Practical Completion*" will be evident and conclusive after being certified in a Certificate of Practical Completion, but up and until then, the "*date of Practical Completion*" will only be evident if properly indicated on a planned Programme.

In order to evaluate Clause 23 it is necessary to consider its application in three different scenarios where the "*date of Practical Completion*" is either before, on or after the "*date for Practical Completion*". As previously mentioned, it is possible for the anticipated or planned "*date of Practical Completion*" on the Programme to coincide with the contractual "*date for Practical Completion*" as included in the Contract Data or as subsequently revised. Clause 23.7 makes provision for the Principal Agent to revise the "*date for Practical Completion*" where the Contractor proves its entitlement under Clauses 23.1 to 3 for an appropriate extension of time. This scenario, where the two dates coincide will not pose any problems because

[56] The heading in the Contract Data of "Penalty for late completion" itself is not accurately defined as discussed in the previous section.

incorrect reference to a date, whether "*date of Practical Completion*" or "*date for Practical Completion*" will automatically be corrected because it refers to the same date or point in time.

However, in relation to the second scenario, where the Contractor plans to complete the Works earlier than the contractual "*date for Practical Completion*", an incorrect reference to "*date of Practical Completion*" and "*date for Practical Completion*" will have unanticipated and undesired consequences. There is much debate surrounding this scenario of early completion and the outcome thereof depends to a great extent on the status of the Programme which will be dealt with in more detail in Chapter 3.

The same unanticipated and undesirable consequences may occur in the third scenario where the Contractor is in culpable delay and where it is not possible to accelerate its Programme to meet the contractual "*date for Practical Completion*" when referencing to the concepts of "*date for Practical Completion*" and "*date of Practical Completion*" is incorrect. In practice most Contractors in such situations provide unrealistic Programmes showing the planned "*date of Practical Completion*" as meeting the anticipated or contractual "*date for Practical Completion*" even where there is no chance of completing the Contract on time. This should be discouraged because of the importance of a realistic Programme in order for both parties to manage their responsibilities.

In order for an extension of time mechanism of a contract to function properly, its provisions should be able to function and have proper application in all these scenarios including where the Contractor is in culpable delay and the planned "*date of Practical Completion*" is later than the contractual "*date for Practical Completion*".

As mentioned above, no problem is anticipated for scenario one when the "*date for Practical Completion*" and "*date of Practical Completion*" coincide. The second scenario, where an early completion is anticipated will depend solely on the status of the Programme and this will be dealt with in more detail in Chapter 3. Therefore, for the remainder of this chapter the thesis will focus on the third scenario.

The JBCC extension of time contractual mechanism entails three requirements that need to be complied with in order for the Contractor to be successful with a claim. The first requirement is the contractual entitlement as provided by Clause 23.1 to 3.

The second requirement is to comply with all procedural and other conditions precedent including notices for a valid claim. Non-compliance with such prerequisites are often fatal to a successful claim as these elements are intended as time bars to the Contractor's right to claim. The third requirement is for the Contractor to prove the quantum of the claim, both in terms of time and money.

The purpose of the stringent procedural notice requirements is based on Risk Management best practice in order to identify risk early. By identifying risk early, the Parties can be proactive in managing it effectively by taking steps to avoid, mitigate or transferring it.

Clauses 23.4 to 7 deal with the procedural requirements including the aforesaid early warning notices to be met in order for the Contractor to enforce its entitlements. Refer to the JBCC PBA Clauses below (*own emphasis*):

3.4 "Should a listed circumstance occur [23.1-3] which could cause a delay to the date for **practical completion**, the **contractor** shall:

23.4.1 Take reasonable steps to avoid or reduce such delay

23.4.2 Within twenty (20) **working days** of becoming aware of such delay, give **notice** to the **principal agent** of the intention to submit a claim for revision to the date of **practical completion**, failing which the **contractor** shall forfeit such claim

23.5 The **contractor** shall submit a claim for the revision of the date of **practical completion** to the **principal agent** within forty (40) **working days**, or such extended period the **principal agent** may allow, from when the **contractor** is able to quantify the delay in terms of the **programme**

23.6 Where the **contractor** requests a revision of the date for **practical completion** the claim shall in respect of each circumstance separately state:

23.6.1 The relevant clause [23.1-3] on which the **contractor** relies

23.6.2 The cause and effect of the delay on the current date for **practical completion**, where appropriate, illustrated by a change to the critical path on the current **programme**

23.6.3 The extension period claimed in **working days** and the calculation thereof

23.7 The **principal agent** shall, within twenty (20) **working days** of receipt of the claim, grant in full, reduce or refuse the **working days** claimed, and:

23.7.1 Determine the revised date for **practical completion** as a result of the **working days** granted, where applicable

23.7.2 Identify each event and the reference clause for each revision granted or amended

23.7.3 Give reasons where such claim is refused or reduced"

Clause 23.4 refers to the first requirement as stated above, which requires an occurrence of a Relevant Event which triggers the contractor's entitlement to extension of time. However, on one hand Clauses 23.1 to 3 stipulate that the Relevant Event should cause delay to Practical Completion or "*date of Practical Completion*". Clause 23.4 on the other hand stipulates that the procedure set out in Clause 23.4.1 and 2 needs to be complied with a Relevant Event which causes a delay to the "*date for Practical Completion*".

This thesis submits that the above error or confusion with the concepts is further exacerbated by the incorrect reference to "*date of Practical Completion*" in Clause 23.4.2. The requirement to issue a notice of intention to submit a claim should be a condition precedent to a revision to the "*date for Practical Completion*" based on the entitlement provided by Clauses 23.1 to 3. The current Clause 23.4.2 makes the requirement to issue a notice of intention to submit a claim a requirement for a revision to the "*date of Practical Completion*" which is not relevant. Clause 23.4 should require the procedures included in Clause 23.4.2 and 23.5 to be followed should there be a delay to Practical Completion, which confers entitlements in terms of Clauses 23.1. The current Clause 23.4 lays down the procedures to be followed should the circumstances referred to in Clauses 23.1 to 3 cause a delay to the "*date for Practical Completion*". The "*date for Practical Completion*" is a contractual date

which should be revised if a delay to the "*date of Practical Completion*" occurs. It is not possible for the "*date for Practical Completion"* to be delayed by an event. It is the "*date of Practical Completion*" which will be delayed through a delaying event impacting on an activity on the critical path and as a consequence delays the end of the last activity on the critical path, the "*date of Practical Completion*".

Clause 23.5 requires the claim for the revision of the "*date of Practical Completion*" to be submitted within forty working days. Clause 23.1 to 3 provide for a revision of the "*date for Practical Completion*" where Practical Completion is delayed and not for a revision of the "*date of Practical Completion*" which is a state of completion which is programmed to be achieved at a specific point in time. It therefore stands to reason that the forty working days do not apply as a condition precedent to enforce entitlements in terms of Clause 23.1 to 3.

It is this thesis' contention that the incorrect application of the concepts of "*date of Practical Completion*" and "*date for Practical Completion*" as illustrated above, may have the effect that the intended time barring provisions for the late notices in terms of Clause 23.4.2 and late claim in terms of Clause 23.5 will not be enforceable against the Contractor.

The South African law of contract adopts the common law principle of *pacta sunt servanda*, which dictates that agreements are binding and enforceable. Accordingly, time-barring provisions in a contract freely entered into by the parties are enforceable under South African law.[57] While it is clear that time barring provisions are enforceable it is less clear what requirements a notice provision in a construction contract must meet in order to be enforceable. On this point one has to revert to English law where the legal principles and requirements applicable to the enforcement of time barring provisions in construction contracts are well established through various English authorities.[58] In *Bremer Handelsgesellschaft v Vanden Avenne-Izegem*[59] it was held that if a notice provision was to be enforced as a

[57] *Barkhuizen v Napier* 2007 (5) 323 (CC). See also the South African *cases Edward L Bateman Ltd V C A Brand Projects (Pty) Ltd* 1995 (4) SA 128 (T) and *Group Five Building Ltd v Minister of Public Works and Land Affairs* 1997 (3) SA 150 (C). In both cases, time-barring provisions were enforced.

[58] See *Obrascon Huarte Lain SA v Attorney General for Gilbraltar* [2014] EWHC 1028 (TCC) where the court considered a condition precedent clause and its effect on claims for additional time and money under a FIDIC contract. The court made it clear that a condition precedent clause should be worded in clear language.

[59] *Bremer Handelsgesellschaft v Vanden Avenne-Izegem* PVBA [1978] 2 Lloyd's Rep 109, HL.

condition precedent it should state expressly the precise time period within which the notice is to be served; the trigger event for the time period should be determinable; and it should state by express language that non-compliance will be sanctioned by the Contractor losing its right to claim. Clearly, time-barring provisions are likely to be examined closely and any ambiguity or inconsistency with other provisions is likely to be construed *contra proferentem*.[60]

It is therefore argued that based on the above authorities and principles, the JBCC PBA extension of time procedural requirements will not stand the test in order to be applied as conditions precedent or time barring in the event of the Contractor failing to comply with them. It is further argued that the aforesaid procedural provisions including, Clauses 23.4 and 23.6.2, will become inoperable where the Contractor is in culpable delay and the Programme indicates a planned "*date of Practical Completion*" later that the "*date for Practical Completion*" which has already been passed.

In terms of Clause 23.4 the Relevant Event delaying Practical Completion may occur after the "*date for Practical Completion*" while the Contractor is already in culpable delay, which will render Clause 23.4 entirely inoperable and unenforceable. The condition precedent or time bar purportedly contained in Clause 23.4.2 may therefore also yield against arguments that the time barring is not enforceable.

Clause 23.6 correctly makes provision for the revision of the "date for Practical Completion", but then confuses the concepts in Clause 23.6.2 by requiring the Contractor to state the cause and effect of the delay on the current "*date for Practical Completion*" rather than the "*date of Practical Completion*". In terms of Clause 23.6.2 the cause and effect or the delay caused by the event should be illustrated by the change to the critical path on the current Programme. However, the "*date for Practical Completion*" is not reflected on a critical path, it is the "*date of Practical Completion*" which is the time of completion of the last activity as programmed on the critical path that is impacted by the delay where the Contractor is in culpable delay and the Programme indicates a planned "*date of Practical Completion*" later than the contractual date "*date for Practical Completion*"

[60] Pickavance op cit note 50 at 143.

The above arguments may be supported by the Court's approach in applying a restrictive or narrow interpretation in relation to provisions which may have a serious effect on the rights of the Parties. The same rules of interpretation applicable to time barring and time at large (this will be discussed further in Chapter 4) should, as contended above, also be applicable to the construction of such provisions.

It is accordingly submitted that the above inconsistency and confusion of two important concepts may lead to serious uncertainty, which may in turn lead to unnecessary disputes.

In order to deal properly with the aforesaid application areas, it is proposed to introduce definitions for the "*date of Practical Completion*" and "*date for Practical Completion*", with Clauses 23.4 to 23.6 to be amended as follows:

> **DATE FOR PRACTICAL COMPLETION***: The contractual completion date or dates stated in the **contract data** or revision thereof [23.0] on or before which the **contractor** agrees to bring the **works** or **sections** thereof to **practical completion**. The **contractor** will be liable for the determined **penalty** [24.0] in failure to achieve **practical completion** on or before such date. References to "date for **practical completion**" will be included in the definitions where the "date for" is not bold in the standard **JBCC** text.
>
> **DATE OF PRACTICAL COMPLETION***: The *construction completion date* or dates, which is initially the intended or planned date or dates to bring the **works** or **sections** thereof to **practical completion** and subsequently the actual or deemed date or dates on which the **contractor** achieved **practical completion** as stated in a **certificate of practical completion**. References to "date of **practical completion**" will be included in the definition where the "date of" is not bold in the standard **JBCC** text.

23.4* Should a listed event or circumstance occur [23.1-3] which could cause a delay to the **date of practical completion**, the **contractor** shall:

23.4.1 *Give the **principal agent** reasonable and timeous **notice** of such event or circumstance and take reasonable steps to avoid or reduce such delay

23.4.2 *Within ten (10) **working days** of becoming aware, or ought reasonably to have become aware of such event or circumstances, give **notice** to the **principal agent** of the intention to submit a claim for a revision to the **date for practical completion**, failing which the **contractor** shall forfeit such claim

23.5* The **contractor** shall submit a claim for the revision of the **date for practical completion** to the **principal agent** within twenty (20) **working days**, or such extended period the **principal agent** may allow, from the end of the event or circumstance, failing which the **contractor** shall forfeit such claim

23.6* Where the **contractor** requests a revision of the **date for practical completion** the claim shall in respect of each event or circumstance separately state:

23.6.1* Particulars of such event or circumstance and the relevant clause [23.1-3] on which the **contractor** relies

23.6.2* The cause and effect of the delaying event or circumstance on the **date of practical completion**, illustrated by the impact and/or a change to the critical path on the **programme** by performing a time impact analysis

23.6.3*The extension period claimed in **working days** and the calculation thereof and the revised **date for practical completion** based on the extension of time period

2.4.2 Construction period

A further application area where the JBCC PBA is uses the concepts incorrectly with an attendant risk of conflict or uncertainty is in the determination of the adjustment of the Contract Value in relation to a successful claim to revise the "*date for Practical Completion*" in terms of Clause 23.7.

JBCC PBA Clause 1.1 defines construction period as follows (*own emphasis*):

> **"CONSTRUCTION PERIOD** the period commencing on the intended date [CD] of possession of the **site** by the **contractor** and ending on the date of **practical completion**, excluding annual industry holiday periods."

Clause 12.1.7 stipulates that the Employer shall "Give possession of the **site** to the **contractor** on the agreed date [CD]"

The definition of Construction Period is relevant to determining the adjustment of Preliminaries[61] in terms of Clause 26.9.4 as read with the following provision of the Contract Data – Option A[62]:

> "For the adjustment of **preliminaries** both the **contract sum** and the **contract value** (including **tax**) shall exclude the amount of **preliminaries**, all contingency sum(s) and any provision for Cost Price Adjustment Provisions:
>
> – An amount which shall not be varied
>
> – An amount varied in proportion to the **contract value** as compared to the **contract sum**
>
> – An amount varied in proportion to the **construction period** as compared to the initial **construction period** (excluding revisions to the **construction period** to which the **contractor** is not entitled) to adjustment of the **contract value** in terms of the **agreement**
>
> The **contractor** shall provide a breakdown of charges (including **tax**) within 15 **working days** of the date of acceptance of tender and, where applicable, an apportionment of preliminaries per section:
>
> Where such information is not provided the following subdivision shall be deemed to apply:
>
> – 10% of the amount shall not be varied
>
> – 15% varied in proportion of the **contract value** to the **contract sum**

[61] These are defined in 1.1 of the JBC PBA as "the priced items listed in the preliminaries document with any additions, alterations or modifications thereof incorporated in the **contract documents"**

[62] Option A is one of the alternatives which may be selected in the Contract data for the adjustment of Preliminaries.

– 75% varied in proportion to the revised **contract construction period** compared to the initial **construction period** …"

The intention of these Preliminary provisions is that the Contractor should be compensated for additional time related Preliminary costs to the extent that it is entitled to an extension of time and an adjustment to the Contract Value [26.0] in terms of Clause 23.2 or 3.

However, it is the revision of the "*date for Practical Completion*" that should attract time related Preliminaries where the delay is caused by an Employer Risk Event in terms of Clause 23.2 or 23.3 and not the "*date of Practical Completion*". The definition of Construction Period suggests that the period of delay under consideration will be determined by comparing the actual "*date of Practical Completion*" with the initial "*date of Practical Completion*". The actual "*date of Practical Completion*" will be the date as certified in the Certificate of Practical Completion and the initial "*date of Practical Completion*" will be the date as planned and indicated on the first or baseline Programme.

It is submitted that the revision of Construction Period is the wrong basis to determine the Contractor's entitlement to an adjustment to the Contract Value. The initial and final Construction Period may differ because of a delay in the Programme caused by the Contractor's own lack of performance without the impact of any Relevant Event and accordingly without the Contractor being entitled to any adjustment to the Contract Value. On an objective interpretation of the current Option A provisions, the Contractor shall be entitled to a proportional adjustment of Preliminaries for any delay to its Construction Period irrespective of the cause of delay. It is submitted that the adjustment of the Contract Value should depend on the revision of the "*date for Practical Completion*" which is independent to the "*date of Practical Completion*" and the associated definition of Construction Period. In order for the JBCC PBA to properly deal with the Contractor's entitlement to an adjustment of the Contract Value it should amend the provisions of the Option A for Preliminaries in the Contract Data and introduce a definition for Contract Period to distinguish between the concepts of "*date for Practical Completion*" and "*date for Practical Completion*".

It is proposed that the definition for a Contract Period should be introduced as below.

> **CONTRACT PERIOD***: The period commencing on the intended date [CD] of possession of the **site** by the **contractor** and ending on the **date for practical completion**.

Option A in the Contract Data should be amended as below to replace Construction Period with Contract Period.

Option A* For the adjustment of **preliminaries** both the **contract sum** and the **contract value** (including **tax**) shall exclude the amount of **preliminaries**, all contingency sum(s) and any provision for Cost Price Adjustment Provisions:

- An amount which shall not be varied
- An amount varied in proportion to the **contract value** as compared to the **contract sum**
- An amount varied in proportion to the revised **contract period** as compared to the initial **contract period,** excluding revisions to the **contract period** to which the **contractor** is not entitled to adjustment of the **contract value** [23.1]

The **contractor** shall provide a breakdown of charges (including **tax**) within 15 **working days** of the date of acceptance of tender and, where applicable, an apportionment of preliminaries per section:

Where such information is not provided the following subdivision shall be deemed to apply:

- 10% of the amount shall not be varied
- 15% varied in proportion of the **contract value** to the **contract sum**
- 75% varied in proportion to the revised **contract period** compared to the initial **contract period** as stated above.

2.4.3 Practical completion

Another application area is the procedure for the issuing of a Certificate of Practical Completion in terms of Clause 19 of JBCC PBA as quoted below.

19.1 "The **principal agent** shall:

19.1.1 Inspect the **works** at appropriate intervals to give the **contractor** interpretations and direction on the standard of work and the state of completion of the **works** required of the **contractor** to **achieve practical completion**

19.1.2 Issue a **contract instruction** [17.1.5-10] consequent on each such inspection, where necessary

19.1.3 Inspect the **works** within the period stated [CD]

19.2 The **contractor** shall:

19.2.1 Inspect the works in advance of the revised date for **practical completion** to confirm that the standard of work required and the state of completion of the **works** for **practical completion** [CD] has been achieved

19.2.2 Give timeous **notice** to the **principal agent** of the anticipated date for the inspection for **practical completion** of the **works** to meet the (revised) date for **practical completion** [CD]"

However, the JBCC PBA confuses the concepts of "*date **of** Practical Completion*" and "*date **for** Practical Completion*" for the greater part of the remainder of Clause 19. The purpose of Clause 19 is to set a process for achieving Practical Completion, because of the outmost importance this may hold for the Contractor. Any delay in the process of certifying Practical Completion may cause the Contractor to sustain severe financial damages due to penalties that may be imposed for any delay in achieving Practical Completion later than the date for Practical Completion in terms of Clause 24 as previously discussed. The non-achievement of Practical Completion before the "*date for Practical Completion*" also constitutes grounds for termination in terms of Clause 29.1.2, as was decided in the *KNS* case.[63] This approach is

[63] *KNS* supra note 40.

amplified by the fact that the Contractor will, pursuant to Clause 19.4, be entitled to rely on Practical Completion being deemed to have occurred in the event of the Principal Agent failing to comply with the contractual procedure.

The achievement of Practical Completion is accordingly a significant milestone which triggers important consequences not limited to Penalties and Termination as alluded to, but also includes that possession and risk for the care of the Works will revert to the Employer [8.1], security will be reduced [11.0], construction Instructions for additional work are no longer permitted [17.4] and the Defects Liability Period commences [21.1]

The process to achieve Practical Completion should therefore be clear and concise. Clause 19.2 will be a workable procedure only for the scenario where the planned "*date of Practical Completion*" and the "*date for Practical Completion*" coincide. In the event where the Contractor plans to achieve Practical Completion earlier or where Practical Completion is delayed beyond the "*date for Practical Completion*", Clause 19 fails to provide an adequate procedure.

It is proposed that Clauses 19.1 and 19.2 be revised as per below to provide an adequate procedure to achieve Practical Completion.

19.1.1* Inspect the **works** at appropriate intervals to give the **contractor** interpretations and direction on the standard of work, the state of completion of the **works** and the documentation to be prepared and submitted [12.2.19-20] as the criteria for the **contractor** to achieve **practical completion** [CD]

19.2.1* Inspect the **works** in advance of the anticipated **date of practical completion** to confirm that the standard of work required and the state of completion of the **works** has been achieved and documentation [12.2.19-20] has been provided for **practical completion** [CD] to be certified

19.2.2* Give timeous **notice** to the **principal agent** of the anticipated **date of practical completion** of the **works**, in order for the **principal agent** to inspect the **works** [19.1.3] so as to meet such date

It is further submitted that Clause 19.4 and 19.5 may have undesirable consequences where Practical Completion is deemed to be achieved. In this regard, reference may be made to JBCC PBA Clauses 1.2.5, 19.4 and 19.5 (*own emphasis*):

1.2.5 "The word 'deemed' shall be conclusive that something is fact, regardless of the objective truth"

19.4 "Should the **principal agent** not issue a **list for practical completion** or the updated list within five (5) **working days** after the inspection period, [19.3] the **contractor** shall give **notice** to the **employer** and the **principal agent**. Should the **principal agent** not issue such list within a further five (5) **working days** of receipt of such notice, **practical completion** shall be deemed to have been achieved on the intended/revised date for **practical completion** and the **principal agent** shall issue the **certificate of practical completion** forthwith

19.5 On issue of the **certificate of practical completion**, the **employer** shall be entitled to possession of the **works** and the **site** subject to the **contractor**'s lien, where applicable."

From these provisions it is clear that in the event of the Principal Agent failing to comply with the requirements as set out therein, Practical Completion shall be deemed to have been achieved on the "*date for Practical Completion*" and the Principal Agent shall issue the certificate of Practical Completion forthwith. In a scenario where the Contractor is in culpable delay (for example for one month), and the Principal Agent fails to issue the required list in time as specified, it will mean that Practical Completion will be deemed to have been achieved on the "*date for Practical Completion*". The Employer will accordingly be deprived from levying Penalties for the time (month) for which the Contractor was in culpable delay because the "*date of Practical Completion*" and the "*date for Practical Completion*" will be deemed to be on the same date. For the purpose of calculating Penalties in terms of Clause 24, the number of days between the "*date of Practical Completion*" and "*date for Practical Completion*" will be zero and no Penalties will be applicable. In amplification of this argument, Clause 1.2.5 stipulates that the deeming of Practical Completion in the present situation will be conclusive regardless of the objective truth. It is therefore contended that even though it was a fact that the Works

was not completed a month prior, it is contractually conclusive. Refer to Annexure A: Figure 8 “Deemed Practical Completion” for an illustration of the above concept.

Further consequences pertaining to the aforesaid undesirable contractual position is that the risk will revert to the Employer in terms of Clause 8.1. The obligation to provide insurance is linked in terms of Clause 10.1 to the moment when the Contractor’s responsibility terminates. Accordingly, the risk for loss that occurs after the Certificate of Practical Completion has been issued in terms of this deeming provision and up to the actual Practical Completion of the Works will be with the Employer and not covered by the Contractor’s insurance.

Another very important consequence is that the Defects Liability Period commences at the issuing of the Certificate of Practical Completion. The three months Defects Liability Period will be effectively reduced with the time which the Contractor was in culpable delay. The Contractor will accordingly benefit from this situation and when the culpable delay is more than the three month Defects Liability Period, the provision in relation to the issuing of the Certificate of Practical Completion will become inoperable. The three month Defects Liability Period may have expired before the actual “Practical Completion” of the Works has been achieved. This may in turn affect the issuing of the Final Payment Certificate, causing complete confusion.

The above adverse contractual positions will apply *mutatis mutandis* to the deeming of Practical Completion in terms of Clause 19.6. In terms of this provision the Principal Agent is obliged to issue a Certificate of Practical Completion for the Works which may be the whole of the Works or a Section of it in terms of Clause 20.0 when the Employer takes possession of a portion of the Works. A “portion” is not a defined pursuant to the JBCC PBA and can accordingly mean any small part of the Works stretching from a storey in a building to be occupied by tenants which is not defined as a separate Section to only one room which the Employer may use as an office.

The conclusive fact in terms of Clause 1.2.5 is that the whole of the Works will be deemed to have reached Practical Completion and the Principal Agent is obliged to issue a Certificate of Practical Completion on such date. In reality, the Works will not have reached Practical Completion, but the contractual consequences of Practical

Completion will be triggered as maintained above with some undesirable consequences.

The thesis proposes that in terms of Clause 19.4, Practical Completion should be deemed to have occurred on the expiry of the date on which the Principal Agent should have issued the list for Practical Completion or the anticipated "*date of Practical Completion*". It is accordingly proposed that Clause 19.4 be amended as follows.

19.4* Should the **principal agent** not issue a **list for practical completion** [19.3.1] after the **contractor's notice** [19.2.2] and the inspection period [19.1.3] or the updated list [19.3.2] within five (5) **working days** after the **contractor's notice** requesting a follow up inspection, the **contractor** shall give a further **notice** to the **employer** and the **principal agent** referring specifically to the previous **notice**. Should the **principal agent** not issue such list within five (5) **working days** of receipt of such further **notice**, **practical completion** shall be deemed to have been achieved on the anticipated **date of practical completion** as notified in the previous **notice** referred to and the **principal agent** shall issue the **certificate of practical completion** forthwith.

This proposition will not only limit the undesirable consequences but it is also in line with general principles of contract law where a party is in breach of its obligations. The Contractor will be placed in the position he would have been in had the Principal Agent complied with his obligations by achieving Practical Completion on the anticipated "*date of Practical Completion*". Clause 19.4 has the unacceptable result of allowing the Contractor to benefit from its own breach and to deprive the Employer of penalties, reduce the Defects Liability Period and expose the Employer to the risk of damage to the Works in terms of Clause 8 for the Contractor's delay or breach to complete on or before the "*date of Practical Completion*". It is my view that the current position also holds a high risk for the Principal Agent who fails to issue the required list in time. The Employer will undoubtedly have a good prospect of succeeding in a claim against the Principal Agent for a neglect of duty causing such harm to the Employer.

The thesis proposes that Clause 19.6 be amended to make provision for the Parties to agree on a new Section as part of their agreement to allow the Employer to take possession of a portion of the Works. Such agreement will constitute an amendment to the agreement and would need to be in writing and signed by both Parties.[64] The Principal Agent will not have authority to introduce new Sections to the Works.

By agreeing to a new Section, the Parties take care of the undesired consequences in terms of Penalties, risk and insurance, and the Defects Liability Period which applies separately to each Section in terms of Clause 20.1 without compromising their rights and obligations.

The proposed Clause 19.6 will be read with 19.8 as below.

19.6* Where the **employer** takes possession of the whole or a portion of the **works** by agreement the **agreement** will be amended to provide for the **works** to be completed in **sections** [20.0] and to include all the necessary contractual implications, *inter alia*, the definition of each **section**, the **date for practical completion** of each **section** and the **penalty** applicable for each **section**.

19.8* Where the **works** or a part thereof includes mechanical and/or electrical systems that are put to use for the convenience of the **employer** with the permission of the **contractor**, the guarantee period for such systems shall commence on the **date of practical completion** [19.0]. The aforesaid actions shall not constitute the taking of possession [19.6; 8.1] and the risk and responsibility shall accordingly not pass to the **employer**.

The premature issuing of a Certificate of Practical Completion in terms of Clause 19.6 will have the effect of reducing the Security prematurely in terms of Clause 11.1.2 and 11.1.3 and even to extinguish it in terms of Clause 11.1.2 where, as stated above, the culpable delay was more than three months.

2.4.4 Conclusion

This chapter has demonstrated some shortcomings of the JBCC PBA through the various inconsistent and conflicting provisions. Without a revision of the provisions

[64] JBCC PBA at page 32.

as suggested, the JBCC PBA will continue to lead to unnecessary uncertainty and disagreements.

This chapter illustrates the undesirable consequences that follow from the inconsistent use of "*date of Practical Completion*" and "*date for Practical Completion*". The effect of such inconsistency is far reaching and affects provisions which constitute the root of the contract.

As discussed, the inconsistencies may compromise the Employer's ability to rely on time barring of the Contractor's claims. The Contractor may accordingly succeed with claims without giving the notices required to warn the Employer or its Agents of possible risk events occurring. It deprives the Employer of the opportunity to take alternative steps and even to issue Variation Orders to mitigate or avoid the risk.

The above situation is further exacerbated by the fact that the JBCC PBA does not contain a full and final settlement provision at final completion like other standard contracts. The lack of any contractual time limitations will therefore mean that the Contractor will be entitled to institute claims at any time within the next three year period after the cause of action arose as prescribed by the Prescription Act, 68 of 1969.

The inconsistency relating to the extension of time or penalty contractual regimen may open the possibility for time at large arguments as will be discussed in more detail in Chapter 5.

The Agreement may be construed to afford the Contractor the right to Preliminaries even in situations where its delay to the Construction Period is not caused by a Relevant Event or other Employer risk events, but by its own risk events.

As further illustrated, the uncertainty in the process to achieve Practical Completion and the date for achieving same may lead to extremely undesirable situations where it will impact on Penalties, Termination, Risk of damage to the Works, lack of Insurance and reduction in Security.

Finally, this chapter proposed amendments to the application provisions to prevent the aforesaid consequences and uncertainty from occurring.

CHAPTER 3

PROGRAMME

3.1 Introduction

The previous chapter illustrates problems that parties to the JBCC PBA may encounter because of conflicting provisions and inconsistency in the use of the important concepts "*date of Practical Completion*" and the "*date for Practical Completion*". It is submitted that even if the amendments proposed to correct the use of these concepts in Chapter 2 were to be accepted, the uncertainty around the JBCC PBA programming requirements and obligations, including the status of the programme, may still cause difficulty and uncertainty.

It is contended that these problems may be resolved by elevating the status of the Programme to the contractual level as opposed to it functioning simply as a management tool without contractual significance. However, before analysing the legal or contractual significance of a Programme, it is necessary to consider the legal literature, case law and other standard form contracts to determine the industry perceptions regarding the purpose and status of a construction Programme.

3.2 Background

Modern construction, which may involve more than one direct or main contractor, specialist subcontractors, suppliers and design consultants require the managed interaction and coordination of work processes. The increased complexity on site requires a rapid and reliable means of analysing different events and effects, so that the process of construction can be managed efficiently. This is usually achieved through a properly developed Programme, showing the sequence in which activities are intended to be carried out.[65] It enables the Principal Agent and the Contractor to monitor the progress of the project and assess the delaying effects of any compensation event[66] that may arise.[67]

[65] Daniel Atkinson 'Delay and Disruption – The Role of the Programme of Works' available at http://www.atkinson-law.com/library/article.php?id=152 accessed 14 August 2015.
[66] A compensation event is a term used by the NEC to define Relevant Events. See note 39.
[67] Mitchell and Trebes op cit note 45 at page 22.

A properly developed Programme also enables the Principal Agent to establish the time effects of any instruction he may want to give to the Contractor, and also assist him to determine when he should issue Construction Information[68] necessary for the works.[69] One of the most important aspects of a Programme is that it provides evidence that can be used by the Contractor to prove delays in legal proceedings.[70] In addition, a Programme is relevant for determining a Contractor's entitlement to additional time, entitlement to payment for delay or disruption and payment for instructed acceleration.[71] For the Employer, the Programme serves to determine his right to deduct liquidated damages for a Contractor's failure to complete works on time and his right to terminate a contract for a Contractor's failure to comply with the obligation to progress the works.[72] The Employer should also use the Construction Programme as a baseline for its Consultants which are appointed in terms of its Professional Services Contracts[73] to develop a Documentation Programme.[74]

3.2.1 South African case law

In considering South African case law on the issue of Programming there are two important cases that are relevant. However, before going into the discussion on South African case law it is necessary to discuss the concept of *mora* as the concept provides a clear background of the arguments in the cases and of this thesis. *Mora* refers to when party to a contract fails to perform their obligations on time.[75] For a debtor to be in *mora*, performance must be due, the debtor must be aware or deemed to be aware of the performance required of them, the fact that it is due, and they must have no valid excuse for their failure to perform.[76] The concept of *mora* is employed when the consequences of a failure to perform a contractual obligation

[68] Define in Clause 1.1 of JBCC PBA as "All information issued by the **principal agent** and/or **agents** including the **contract documents**, specifications, drawings, schedules**, notices** and **contract instructions** required for the execution of the **works**"
[69] Mitchell and Trebes op cit note 50 at page 22.
[70] Mitchell and Trebes op cit note 50 at page 29.
[71] Roger Gibson 'Extension of Time and Prolongation Claims' (2008) at page 42.
[72] Gibson op cit note 71 at 42. See also *KNS* case supra note 40.
[73] The most suitable Professional Services Contract to be used with the JBCC PBA is the PROCSA (Professional Consultants Services Agreement Committee) Agreement.
[74] PROCSA defines Documentation Programme as "A schedule of activities necessary to manage the production of construction documentation.
[75] Phillip C Loots *Construction Law and Related Issues* (1995) at page 67.
[76] *Legogote Development Co (Pty) Ltd v Delta Trust and Finance Co* 1970 (1) SA 584 (T) at 587.

within the agreed time are determined.[77] The date for performance may be stipulated either expressly or tacitly and there must be certainty as to when it will arrive.[78] Thus, when the contract fixes the time for performance, *mora* is said to arise *ex re* (by the transaction) and demand (*interpellatio*) is not necessary to place the debtor in *mora*.[79] The fixed time, figuratively, makes the demand that would otherwise have had to be made by the creditor.[80] In contrast where the contract does not contain an express or tacit stipulation in regard to the date when performance is due, a demand (*interpellatio*) becomes necessary to put the debtor in *mora,* this is referred to as *mora ex persona*.[81] In this case the debtor does not necessarily fall into *mora* if he or she does not perform immediately or within a reasonable time but *mora* arises only upon failure by the debtor to comply with a valid demand by the creditor.[82]

In light of the discussion on *mora*, I now turn to a discussion of the two important programming cases in South Africa.

3.2.1.1 The *Ovcon* case

The first case is *Ovcon (Pty) Ltd v Administrator, Natal*,[83] which dealt with the issue of an Employer delay when the Contractor's Programme indicated early completion. The facts of the case were that the contract provided for completion of work in fifteen months but the Contractor had contemplated completing the works in eleven months. This was captured in the Contractor's progress chart (Programme) as required in the bill of quantities and was approved by the Employer.[84] During the course of the work the Employer through its agents caused certain delays that held up the work and caused the Contractor to exceed its planned completion date by three months.[85] Despite the delays, the work was completed within fifteen months, but not within the contemplated eleven months.[86]

[77] RH Christie 'The Law of Contract in South Africa' 5 ed (2006) p 544.
[78] *Scoin Trading (Pty) Ltd v Bernstein* (29/10) [2010] ZASCA 160 at page 5.
[79] Ibid.
[80] Ibid.
[81] Ibid.
[82] *Scoin Trading* supra note 78 at page 6.
[83] *Ovcon (Pty) Ltd v Administrator, Natal* 1991 (4) SA 71 (D).
[84] *Ovcon* supra note 84 at page 72.
[85] Ibid.
[86] *Ovcon* supra note 84 at page 73.

The issue before the court was whether the Contractor was entitled to claim in terms of the contract, expense and loss caused by the delay. In determining this, Hugo J stated: "[i]n the final instance it is the status of the progress chart upon which the plaintiff's case must stand or fall". This dictum establishes the importance of the status of a Programme in establishing the contractual entitlements of a Contractor. The Contractor argued that the acceptance by the Employer of the progress chart created an obligation on the Employer to do nothing that would prevent the completion of the works in the time envisaged by the Programme.[87]

In determining the status of the Programme the court considered the wording of the contract which stated that "The form, method of setting out, etc, of the chart is to be approved by the Director: Works…" Based on this clause Hugo J found that the Employer had only approved the form of the Programme and not its content or sequence of work and duration of the project.[88] The court dismissed the Contractor's contention that the Employer's acceptance of the Programme was an undertaking that it would prepare timeous drawings. The court reasoned that the objective of a bill of quantities was to allow the Contractor to price his tender, thus creating an obligation on the Contractor to prepare a progress chart and calculate a price in terms thereof.

The court stated further that as a result, the bill of quantities does not create any obligations for the Employer and as such the acceptance of the Programme by the Employer did not create any obligations for it. The court concluded that the Contractor was therefore not entitled to any claim for delays. Additionally, the court highlighted that the Contractor's claim was not one for damages but for expense and loss 'beyond that provided for in or reasonably contemplated by the contract'. The court reasoned that the contemplation referred to in the clause is that of the contract not the parties with the result that if the Contractor had taken the contemplated 15 months these expenses would have been incurred in any event.[89]

[87] *Ovcon* supra note 84 at page 74.
[88] *Ovcon* supra note 84 at page 77.
[89] *Ovcon* supra note 84at page 78.

The significance of the *Ovcon* case when applying same to the JBCC PBA Programming provisions is the following:

Firstly, it means that a Bill of Quantities even though it is a Contract Document, does not expressly or by inference create obligations. If it sought to impose obligations it would be a simple matter of stating this in the conditions of contract. The JBCC PBA makes use of Preliminaries to purportedly infer obligations in relation to Programming and Construction Information to be provided by the Principal Agent. The Preliminaries per definition would generally be incorporated in the Agreement by the Pricing Document (or Bill of Quantities). From the *Ovcon* case, it is evident that the purported obligations will not be enforceable and would not have any contractual status inferring obligations on the Parties.

Secondly, it can also be inferred from the case that the "*date for Practical Completion*" cannot be amended by the approval of a Programme showing an earlier "*date of Practical Completion*". These are two distinct concepts, as previously demonstrated. This implication is also relevant to the proposition that a time for performance cannot be fixed "*ex re*", ie by the contract, by approving a Programme. Accordingly, in the absence of express terms to the contrary in the conditions of contract, the Programme will not have any legal status and will merely serve as a management tool without imposing any obligations.

3.2.1.2 The *McAlpine* case

The second South African case that has a bearing on a discussion on the legal significance of a Programme is *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration.*[90] In this case the contractor argued that the Employer was in breach of a tacit term of their contract for failing to issue drawings or give instructions within a reasonable time after the obligation to do so had arisen. The tacit term was formulated as follows:

> "The engineer is obliged to issue such drawings and give such instructions to the contractor as may be reasonably required by the contractor in order to enable him to execute the works, as defined in the general conditions of the

[90] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* [1977] 4 All SA 262 (T).

> contract. Each such drawing and instruction shall be issued or given, as the case may be, within a reasonable time after the obligation arises".[91]

The court, having established the existence of such a term, went on to discuss the issue of the time for performance. The court stated:

> "The general rule of law is that contractual obligations for the performance of which no definite time is specified are enforceable forthwith; but the rule is subject to the qualification that performance cannot be demanded unreasonably so as to defeat the objects of the contract or to allow an insufficient time for compliance. Thus, for example, in a contract of loan the borrower is, in the absence of express provision, allowed a reasonable time for repayment to enable him to have some real benefit from the transaction. (See generally *Mackay v Naylor* 1917 T.P.D. 533 at pp. 537–8; *Fluxman v Brittain* 1941 AD 273 at p. 294; *Nel v Cloete* 1972 (2) SA 150 (AD) at p. 169.)"
>
> Applying this general rule to the facts of this case, I am of the opinion that the obligation of the engineer to furnish drawings and instructions, though prima facie exigible forthwith (cf. Mackay v Naylor, supra at p. 539), could validly be performed within a reasonable time of the conclusion of the contract. It was manifestly the intention of the parties that not all such drawings, etc. would be required to be furnished forthwith and an insistence upon this would tend to defeat the objects of the contract.
>
> The determination of a reasonable time in any particular instance would depend upon a number of factors such as (the list is not intended to be in any way exhaustive) the contractor's programme of work and where the work to which the drawing or instruction related fitted into that programme; the actual progress of the work; the need of the contractor for reasonable advance knowledge of the content of the drawing or the nature of the instruction in order to make the necessary preparations and do the necessary pre-planning; the knowledge of the engineer as to the contractor's requirements; and

[91] *McAlpine* supra note 90 at page 268.

> whether the drawing or instruction related to the work as originally planned or to a variation thereof".[92]

The Employer argued in response that even if there were such a term, the Contractor was barred from claiming damages because it had failed to place the Employer in *mora* and had not given timeous notice of its intention to claim relief.[93] The Contractor in turn argued that the principles of *mora* did not apply to modern engineering contracts as they could not have been contemplated by the Roman and Roman-Dutch sources on which the doctrine is founded.[94] In considering the arguments the court had to consider how *mora* arises under South African law and whether it was a prerequisite for a debtor to have been placed in *mora* by means of an *interpellatio*. The court dismissed the Contractor's contention that *mora* did not apply to their contract and stated "the principles of our law relating to *mora* are of general application and hold true for all obligations *ex contractu*."[95]

The court stated further that:

> "On the pleadings the onus was on the plaintiff to establish that the defendant failed to issue the required drawings or instructions timeously in each of the instances enumerated in annexure E to its further particulars. Under the implied term the defendant was obliged to issue drawings and instructions timeously, and to that extent the defendant was, in effect, in the position of a debtor under the contract. Thus, *ex facie* the pleadings, the plaintiff's cause of action appears to be based on *mora debitoris*".[96]

Having established that the principles of *mora* applied in this case the court submitted that in a contract where time for performance is not fixed *ex re*, the debtor must be placed in *mora* by *interpellatio* before damages can be claimed for non-timeous performance.[97] The court submitted that the position is as follows:

[92] *McAlpine* supra note 90 at 279.
[93] Ibid.
[94] *McAlpine* supra note 90 at 298.
[95] *McAlpine* supra note 90 at 300.
[96] *McAlpine* supra note 90 at 292.
[97] *Mcalpine* supra note 90 at 297.

> "[A] demand is required in order to let mora ex persona arise where a time for performance has not been previously stipulated is so obvious that it scarcely needs further discussion. The general rule is that, where no time for performance has been agreed upon, performance is due immediately on conclusion of the contract or as soon thereafter as is reasonably possible under the circumstances. Mora does not, however, arise when performance is not made forthwith or within a reasonable time – it arises only when the debtor, after a demand has been made, is still in default. The same rule applies when a time for performance has been stipulated but where it is too vague to lead to mora ex re".[98]

The court highlighted further the basic requirements for a demand as a notice which:

> *"must state a certain date on or before which the debtor is required to perform, and it must make it clear to the debtor that the creditor insists upon performance by that date".*[99]

It must be emphasised that the notice of demand must be unambiguous. This point is clearly brought by the following *dictum* from the judgment of Wessels JA in *Nel v Cloete*,[100] which Trengove J cited with approval:

> "Indien die skuld'eiser stappe wil doen om die skuldenaar in mora te stel, is dit 'n vereiste dat hy 'n kennisgewing aan hom rig waarin hy die skuldenaar op ondubbelsinnige wyse maan dat hy op of voor 'n bepaalde dag moet presteer. Hierdie aanmaning is egter nie op ontbinding van die kontrak gerig nie, maar is slegs bedoel om 'n datum vir prestasie van 'n opeisbare vordering met sekerheid te bepaal, waar dit in die kontrak nòg uitdruklik nòg stilswyend beding is. Waar die tydperk wat gegun is, redelik blyk te wees, verkeer die skuldenaar in mora indien hy by verstryking daarvan in gebreke bly. (De Wet en Yeats, op. cit., bl. 109.) Tensy andersins in die kontrak bepaal is, kan hierdie aanmaning te enige tyd na kontraksluiting aan die skuldenaar gerig word, mits die vordering dan opeisbaar is, en 'n redelike tydperk vir vervulling toegelaat word."

[98] McAlpine supra note 90 at 293.
[99] *McAlpine* supra note 90 at 300.
[100] *Nel v Cloete* 1972 (2) SA 150 (A) at 159–160.

The court proceeded to state that

> "[a] demand or *interpellatio* is a call made by the creditor on the debtor to perform and serves to fix the time for performance with a sufficient degree of precision, where this has not been done in the contract itself, to give rise to *mora ex persona* if performance does not take place by the time mentioned".[101]

As a result, the question the court had to answer was whether the Employer had been placed in *mora* by means of a demand in respect of the alleged breaches of contract.[102] The Contractor submitted that the programme of works submitted to the engineer in compliance with the contract as well as the fortnightly, weekly and daily programmes subsequently provided had served the purpose and fulfilled the function of demands for the drawings and instructions in question.[103]

In this regard it was held that:

> "[t]he obvious purpose of such a programme is for the employer and the engineer to see that the contractor intends to execute the work at a sufficient rate or speed to complete the contract within the allotted time shown in the programme. Generally speaking, it is not intended to serve as an interpellatio. However, such a construction programme, depending on the details it contains and the way in which it is phrased, can fulfil the function of an interpellatio, but, in my view, that is not the position in the present instance".[104]

In coming to the conclusion that the Programme in this case could not function as an *interpellation*, the court stated:

> "I have come to the conclusion that exh. G cannot be regarded as having served the purpose of an interpellatio for the following reasons. It was never intended to be an interpellatio. It is also common cause that exh. G was not a geographical programme. Both Mr. Pain (vol. 2, p. 99) and Mr. Ovis (vol. 11, p. 807) conceded that exh. G does not show where on the road the contractor

[101] *McAlpine* supra note 90 at 300.
[102] *McAlpine* supra note 90 at 301.
[103] Ibid.
[104] McAlpine supra note 90 at 301.

> intended to work, nor is the information, set out in exh. G, specifically related to any particular drawing or instruction in respect of any of the items in schedule E. Thus it was not possible for the defendant to determine, with reference to exh. G, when exactly a particular drawing or instruction in respect of a particular item of work would become requisite. Moreover, the evidence shows that exh. G was flexible (Pain, vol. 5, p. 353, and Ovis, vol. 11, p. 807) and had to be adapted from time to time because variations, weather conditions and other unexpected circumstances affected the progress of the work from time to time. Thus, exh. G did not fix the time for performance of any of the obligations upon which schedule is based, with a sufficient degree of precision to satisfy the requirements of an *interpellatio*".[105]

Although the Contractor managed to succeed on some of his claims, it is submitted that these were not successful because the Programme was an *interpellatio,* but rather because the Contractor had provided other notices to the Employer that had placed him in *mora ex persona*. This is apparent from the following statement

> "The evidence shows that in December 1967 Mr. Ross called upon Mr. Evans to furnish the new drawings when work was resumed in the new year, and Mr. Evans promised to do so, as I have mentioned, by 8 January 1968. Mr. Ross' demand for the drawings by the new year and Mr. Evans' undertaking to provide them by 8 January 1968 must, in my view, be construed as a demand and an undertaking to provide the drawings by a fixed and stipulated date. Thus, in this instance, there was an interpellatio and it is common cause that the plans and drawings were not provided by the date stipulated".

The *McAlpine* case is therefore authority for the fact that an Employer and its Agents are bound to provide Construction Information within a reasonable time after a duty to co-operate arises. The general rule is that such a duty arises in relation to the original Scope of Work when the contract is entered into and in relation to Variation orders when they are issued. This rule is, however, subject to the qualification in construction contracts that in determining a reasonable time in any particular instance would depend on a number of factors pointed out in *McAlpine* as including:

[105] *McAlpine* supra note 90 at page 302.

(i) The sequence of Programme and part of Works relevant to information fits into the Programme.

(iii) The lead time needed after information is issued……..;

(iv) The actual progress of the Works;

(v) The original work or Variation Order;

(vi) The time needed by the Engineering Team to prepare Construction Information.

The general principles and concept of *mora* applies to modern construction contracts hold true for all obligations *ex contractu*. Where a time for performance is not fixed, the debtor must be put in *mora* by an *interpellatio* in order that the creditor may rely on *mora ex persona*. A demand is required in order to let *mora ex persona* arise before damages can be claimed for non-timeous performance. The onus is on the Contractor to establish that the Employer or its Agents failed to issue the required Construction Information timeously.

The *McAlpine* case makes it clear furthermore, that if the debtor knows or should have known from the circumstances what time is reasonable for performance, it does not constitute *mora ex re* and that to the extent that the decision in *Broderick Properties Ltd v Rood*[106] suggested otherwise, it dealt with the remedy of cancellation on the basis that "*time was of the essence*" of the contract and provided no authority for the proposition that a claim for damages may be brought without a proper demand where no specific time for performance has been fixed. [107]

Notwithstanding *McAlpine's* suggestion that a Programme may function as *interpellatio*, it is submitted that it is unlikely that the requirements formulated in *McAlpine* in order for it to do so will ever be met in practice.

[106] *Broderick Properties Ltd v Rood* 1962 (4) SA 447 (T).
[107] *McAlpine* supra note 90 at 296.

3.2.1.3 Summary from the cases

The main difficulty in construing a Programme as *interpellatio* is its flexibility and the need for it to be updated because of changing circumstances. The time for performance will have to be adjusted constantly to still be relevant at the time of the alleged non-timeous performance in order to claim damages. Where the creditor (Contractor) falls in *mora* the debtor's (Employer) obligation to perform will be relaxed. Accordingly, where the Contractor falls behind schedule, it will need to update its Programme in order to establish a new date for performance. It will not, however, prevent the Employer from continuously arguing in defence that the Contractor was behind schedule and that the time for performance should be relaxed, implying that a new date for performance should be demanded. The Employer will also be able to argue that the time set for performance is not reasonable by relying on the factors used by the courts to determine reasonableness.

3.2.2 Other standard contracts

The approach of many standard conditions of construction contracts to this issue is ambivalent from a legal perspective. It is contended that none of the South African CIDB recommended contracts, namely the NEC, FIDIC, GCC and JBCC make provision for a Programme to be incorporated as a Contract Document. However, McInnis expresses a different view with relation to the status of the Programme under the NEC contract.[108] He submits that the NEC contract permits parties to include the Programme as one of the Contract Documents either upon acceptance of the tender or later, when prepared and submitted by the Contractor in the early stages of the work.[109]

FIDIC Clause 8.3 stipulates that unless the Engineer notifies the Contractor within 21 days stating the extent to which the Programme does not comply with the contract, the Contractor shall proceed in accordance with the Programme and the Employer's Personnel, including the Engineer shall be entitled to rely on the Programme. The NEC and GCC require the Contractor to submit a Programme for approval to the

[108] See Arthur McInnis 'The New Engineering Contract: A Legal Commentary' (2001).
[109] McInnis op cit note 108 at 288-9.

Employer's Agent, either the Project Manager[110] or the Engineer.[111] Both the JBCC and the FIDIC require the Contractor to submit a Programme, but there is no requirement for the Principal Agent[112] or the Engineer[113] to approve it.

The GCC and FIDIC Conditions of Contract acknowledge the difficulties that may be encountered in relying on the Programme as notice of demand or *interpellatio* to set the time for performance *ex persona* by introducing a separate requirement to do so.

Clause 1.9 of FIDIC provides as quoted below (*own emphasis*):

> "The Contractor shall give notice to the Engineer whenever the Works are likely to be delayed or disrupted if any necessary drawing or instruction is not issued to the Contractor within a particular time, which shall be reasonable. The notice shall include details of the necessary drawing or instruction, details of why and by when it should be issued, and details of the nature and amount of the delay or disruption likely to be suffered if it is late.
>
> "If the Contractor suffers delay and/or incurs Cost as a result of the failure of the Engineer to issue the notified drawing or instruction within a time which is reasonable and is specified in the notice with supporting details, the Contractor shall give a further notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to:
>
> (a) An extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [*Extension of Time for Completion*], and
>
> (b) Payment of any such Cost plus reasonable profit, which shall be included in the Contract Price".
>
> After receiving this further notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree to determine these matters.

[110] NEC Clause 31.3
[111] GCC 2015 Clause 5.6.3
[112] JBCC Clause 12.2.6
[113] FIDIC Clause 8.3

However, if and to the extent that the Engineer's failure was caused by an error or delay by the Contractor, including an error in, or delay in the submission of, any of the Contractor's Documents, the Contractor shall not be entitled to such extension of time, Cost or profit."

The correlation between the above FIDIC Clause 1.9 requirements and those of an *interpellatio* is self-evident, but include the following:

(i) Details of the necessary drawing or instruction;

(ii) Details of why and

(ii) By when it should be issued.

GCC Clauses 5.9.2 to 5.9.6 provide as follows:

5.9.2 "The Engineer shall deliver to the Contractor from time to time, during the progress of the Works, drawings for construction purposes or instructions as shall be necessary for the proper and adequate construction, completion and defect correction of the Works.

5.9.3 The Contractor shall give adequate written notice to the Engineer of any requirements additional to that contained in the Scope of Work or drawings, which the Contractor may require for the execution of the Works and the Engineer shall deliver such instructions and/or drawings to the Contractor.

5.9.4 The aforesaid instructions and/or drawings referred to in Clause 5.9.3 shall be delivered in good time taking the approved programme into account.

5.9.5 The Contractor shall give effect to and be bound by any drawing or instruction given in terms of this Clause and, if such drawing or instruction shall require any variation of, addition to, or omission from the Works, Clause 6.3 shall apply.

5.9.6 If by reason of a failure by the Engineer, after his receipt of written notice from the Contractor in terms of Clause 5.9.3, to comply in good time with the provisions of Clause 5.9.4, the Contractor suffers delay to Practical Completion and/or incurs proven additional cost, he shall be entitled to make a claim in accordance with Clause 10.1, for which purpose the time

limit of 28 days in Clause 10.1.1.1 shall commence to run only from the time when the said instructions and/or drawings have actually been delivered."

Both of these contracts introduce this additional notification requirement which is in line with the requirements for an *interpellatio.* Only after it has been established that the Employer fell into mora *ex persona* for not providing the required Construction Information in time, will it constitute a Relevant Event. The Relevant Event will in turn trigger the contractual claim procedures in terms of FIDIC Clause 20.1 or GCC Clause 10.1 as referred to in the "*interpellatio Clauses*".

Both these contracts therefore, make provision for the additional notices to be issued to establish the time for performance for the Employer to provide Construction Information. This is on the assumption that the Programme is not sufficient on its own to establish a time for performance in order to put the Employer in *mora ex persona*.

3.3 Current position of the Programme in terms of JBCC PBA

The common law position is that in the absence of a stipulation that the work must be completed by a Contractor by a certain fixed date; the work has only to be completed within a reasonable time.[114] It is trite law that even where a certain date is stipulated, the Contractor is free to change the sequence, duration and timing of particular activities. He is, however, obliged to proceed regularly and diligently to meet the date as fixed in the contract.

3.3.1 The Contractor's obligation to complete the Works

JBCC amends this common law position by stipulating a "*date for Practical Completion*" in the Contract Data and including a further provision in terms of JBCC PBA quoted below (*own emphasis*):

[114] IN Duncan Wallace *Hudson's Building and Engineering Contracts* (1995) at page 563.

12.2 "The **contractor** shall:"

12.2.17 "On being given possession of the **site** commence the **works** within ten (10) **working days** and proceed with due diligence, regularity, expedition, skill and appropriate resources to bring the **works** to **practical completion** and **final completion**."

The importance of the obligation to proceed with due diligence and skill is echoed in Clause 29.1.2 which affords the Employer the right to terminate the Agreement where the Contractor has failed to comply with Clause 12.2.17. Refer to JBCC PBA Clause 29.1.2.

29.1.2 "Proceed with the **works** [12.2.17] within the period stated [CD]".

There is, however, no period stated in the Contract Data as specified in the above Clause 29.1.2, although the period of 10 working days is mentioned in Clause 12.2.17.

The JBCC therefore attempts to provide the Employer with more control over the Contractor than provided by the common law which only obliged the Contractor to complete within a reasonable time.[115] The Contractor is furthermore obliged to submit and maintain a Programme, a Schedule of outstanding Construction Information and Progress Reports in terms of Clause 12.2.6 to 8. (Refer to the relevant JBCC PBA Clauses below)

12.2.6 "Prepare and submit to the **principal agent** within fifteen (15) **working days** of receipt of **construction information** a **programme** for the **works** in sufficient detail to enable the **principal agent** to monitor the progress of the **works**

12.2.7: Co-ordinate the **programme** with **subcontractors**' and **direct contractors' programmes**

12.2.8: Regularly update the **programme** to illustrate progress of the **works**, and revise the **programme** where the **principal agent** has revised the date for **practical completion**."

[115] Ibid.

3.3.2 Status of the Programme

JBCC PBA defines the Programme as:

1.1 "A diagrammatic representation of the planned execution of units of work or activities indicating the dates of commencement and completion prepared and maintained by the **contractor**".

However, there is no obligation on the Contractor to comply with the Programme and no obligation on the Principal Agent to agree, approve, accept or even comment on the Programme as submitted or updated by the Contractor. It is submitted that currently, under the JBCC PBA, a Programme cannot and does not have any legal significance and does not infer any contractual obligations in the absence of agreement by the Parties to amend it.

In light of the above it is clear that the Employer is not obliged to agree on any times for performance or dates to be fixed *ex re* in terms of its reciprocal obligations to provide among, other things outstanding construction information, free issue, appoint subcontractors and accept selected subcontractors as per Clause 23. It is the thesis position that if the Employer follows this passive approach of not agreeing on any Programmes or schedules[116] provided by the Contractor, it will be difficult for the Contractor to prove entitlements and it will have to issue *interpellationes* to set times for performance *ex persona*. It will also be difficult for the Contractor to argue that the Employer had fallen into *mora ex persona* (or even *mora ex re*) on account of a failure to because of the following considerations:

The Agreement is very specific on the procedure to amend the Standard Provisions. The Contract Data under "Changes made to JBCC® documentation" on page 9 states:

> "Note: The amendments contained herein or in the single referenced Annexure constitute the only amendments to the standard JBCC Agreement that will apply. No other amendments shall be of any force or effect."

In addition to the above it is stipulated in the Contract Agreement as follows:

[116] It is common practice for a Contractor to provide Schedules with the outstanding Construction Information submitted separately from the Programme. Same is often referred to as "IRS" (Information Required Schedule".

> "No representations, terms, conditions or warranties not contained in this **agreement** shall be binding on the **parties**. No **agreement** or addendum varying, adding to, deleting or terminating this agreement including this clause shall be effective unless reduced to writing and signed by the **parties**".[117]

Clause 1.2.1 furthermore states:

> "In this document, unless inconsistent in the context, the words 'accept, allow, appoint, approve, authorise, certify, decide, demand, designate, grant, instruct, issue, list, **notice**, notify, object, record, reduce, refuse, request, state' and their derivatives require such acts to be in writing."

It may be open to a Contractor to argue that the Employer is obliged to act in terms of a Programme after *de facto* "approving" same, although the JBCC PBA does not require the Employer or its Agent to approve a Programme.

However, it is not often the Employer itself is involved to act in terms of the Agreement. The Employer is represented by a Principal Agent who in terms of Clause 6.1 has full authority and obligation to act and bind the Employer in terms of the Agreement. However, this authority is qualified as the same clause states that the Principal Agent cannot amend the Agreement.[118]

The Principal Agent's authority is only derived from the contract itself.[119] Accordingly, the JBCC provides the Principal Agent with authority to act and bind the employer with regard to approving work,[120] ordering additional work,[121] determining the value of variations to the works,[122] extending the construction period,[123] determining amounts of payment to be made under an interim[124] and a final payment certificate.[125] It is therefore submitted that it will be very unlikely that the Contractor

[117] Contract Agreement at page 32.
[118] Page 32 of the JBCC Agreement states that the Agreement can only be amended in writing and be signed for by both parties.
[119] *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] BLR 113 TCC, which discusses the role of a Principal Agent in terms of the contract. Though reference is not to the JBCC contract, this case is still relevant because of the similarity between the said contracts in terms of the authority given to the Principal Agent.
[120] Clause 6.1.
[121] Clause 17.
[122] Clause 17.1.2.
[123] Clause 23.0.
[124] Clause 25.0.
[125] Clause 26.0.

could succeed to prove any agreement by the Employer or its Principal Agent in order to enforce a fixed time for performance as included in a Programme.

It is therefore contended that the Programme does not have any legal significance without the Parties amending the Agreement. This has serious consequences and creates uncertainty for both Parties when attempting to rely on purported entitlements.[126] In the absence of an agreed Programme with contractual significance, no time for performance has been fixed, except for that which is expressly provided for in the Contract Data, i.e. the "*date for Practical Completion*" and the date for possession of the site. As a result the Parties will have to rely on common law and place each other in *mora ex persona* to enforce timeous performance of other obligations.

3.3.3 Extension of time entitlements

Perhaps the most important consequence of not having an agreed Programme with contractual significance to work from will be the impact it may have on the Contractor's extension of time entitlements. The Contractor's ability to succeed in proving any delays caused by the Relevant Events in terms of Clause 23 will be in jeopardy. The onus is on the Contractor to prove *inter alia*, the late or incorrect issuing of Construction Information,[127] late supply of free issue,[128] late appointment of a Subcontractor[129] and late acceptance by the Principal Agent or Agents of a design undertaken by a selected Subcontractor.[130]

There will be no contractual benchmark or agreed date for performance to prove the Contractor's entitlements and it will have to rely on the possibility alluded to in the *McAlpine*[131] case that the Programme served as an *interpellatio*. This will be the position even though both Parties knew that a performance would be necessary by a certain date in order not to delay the other party. The case of *Broderick Properties Ltd v Rood*[132] which supposedly is authority for this proposition was distinguished in

[126] Said entitlements will be discussed in more detail below.
[127] Clause 23.2.5
[128] Clause 23.2.6
[129] Clause 23.2.7
[130] Clause 23.2.8
[131] *McAlpine* supra note 90.
[132] *Broderick Properties* supra note 106.

the *McAlpine*[133] case on the basis that the requirements for a right of cancellation should not be equated to those for the right to claim damages.[134] The Contractor will have to show that the request for Construction Information, including Construction Instructions and drawings, was made at "reasonable times", meaning the requests were made on a date "neither unreasonably distant from nor unreasonably close"[135] to the date on which each item of Construction Information was required.

It is therefore contended that it will be a daunting and difficult task for the Contractor to succeed in its claim on the reliance on a Programme as basis to establish the time for performance with reference to the requirements of *interpellatio* and *mora ex persona*.

3.3.4 Proof of cause and effect on Critical Path

Another problem which the Contractor will face in the absence of an agreed Programme is to comply with the requirements laid down by Clause 23.6.1* to 3*,[136] which state as follows:

23.6* Where the **contractor** requests a revision of the **date for practical completion** the claim shall in respect of each event or circumstance separately state:

23.6.1* Particulars of such event or circumstance and the relevant clause [23.1-3] on which the **contractor** relies

23.6.2* The cause and effect of the delaying event or circumstance on the **date of practical completion**, illustrated by the impact and/or a change to the critical path on the **programme**

23.6.3* The extension period claimed in **working days** and the calculation thereof and the revised **date for practical completion** based on the extension period claimed."

[133] *McAlpine* supra note 90.
[134] *McAlpine* supra note 90 at page 296.
[135] See *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 at page 88.
[136] The thesis illustrates the impact of the absence in Programme based on the proposed amended version of Clause 23.6* in order to remove the initial confusion between the "*date for Practical Completion*" and "*date of Practical Completion*" as previously contended.

In terms of the above provisions it is submitted that the Contractor will need to prove and submit the following:

(i) A Relevant Event[137] occurred and provide particulars of it.

(ii) State the relevant provisions[138] that the Contractor relies on.

(iii) Provide a "current" Programme[139] that was updated and reflects actual progress just before the Relevant Event occurred.

(iv) The current Programme should reflect a critical path[140] leading up to an anticipated "*date of Practical Completion*"[141] signifying the completion of the last activity on the critical path.

(v) Provide a "claims" Programme illustrating the delaying impact or the cause and effect of the Relevant Event or the critical path activities and consequently the "*date of Practical Completion*".

(vi) The extension period claimed in working days[142] calculated from the planned "*date of Practical Completion*" on the "current" Programme to the delayed "*date of Practical Completion*" on the "claims" Programme.

(vii) Establish revised "*date for Practical Completion*".

It is submitted that if there is no agreement or a current Programme including the critical path and the actual progress to date to form the basis or foundation of a delay analysis, it will be difficult for the Contractor to prove the cause and effect of the delaying event allegedly entitling them to an extension of time.

As stated in *Balfour Beatty Construction Ltd v The London Borough of Lambeth*,[143] the success of determining an extension of time will depend on the foundation, which

[137] Clause 23.6 is specific that the Contractor will be prevented from submitting a Global Claim (A Global Claim is defined by the SCL *Protocol* op cit note 19 at page 56 as "one in which a Contractor seeks compensation for a group of Employer Risk Events but does not or cannot demonstrate a direct link between the loss incurred and the individual Employer Risk Events) in the phrase '…the claim shall in respect of each circumstance separately …' ".
[138] Clauses 23.1 to 3.
[139] Clause 23.6.2.
[140] Ibid.
[141] Ibid.
[142] Clause 23.6.3.
[143] *Balfour Beatty Construction Ltd v The London Borough of Lambeth* [2002] (TCC) BLR 288.

is a proper Programme including a critical path (if capable of justification and substantiation to show its validity and reliability as a contractual starting point), maintained and revised to be able to provide a satisfactory and convincing demonstration of cause and effect.[144] The following important issues to be taken out of this judgment are listed below:

- A proper programme should be maintained during the execution of the works.
- In determining an extension of time, the 'foundation' should be the original programme, and its success will similarly depend on the soundness of its revisions on the occurrence of every event, so as to be able to provide a satisfactory and convincing demonstration of cause and effect.
- A valid critical path, or paths, should be established as it, or they, will almost certainly change.
- Concurrent, or parallel, delays should be demonstrated where necessary.
- Links between trades should be shown.

3.3.5 The Programme as Contract Document

While the above discussion deals with one extreme of the spectrum regarding the status of a non-approved Programme it is submitted that the other extreme of making the Programme a Contract Document is also possible in terms of the JBCC PBA. It is submitted that by including the Programme in the list of other documents in the Contract Data under B5.0 Contract Documents, will define the Programme as a Contract Document. This will have the consequence that all the obligations contained in the Programme need to be carried out to the letter.

The majority in the literature on programming provisions argues that a programme should not be made a contract document.[145] It is submitted that if a programme is made a contract document, the Contractor will on one hand be bound to start and finish each and every activity on the dates specified on the programme.[146] On the other hand, the Employer will be bound to assist the Contractor in carrying out the work according to the Programme; in particular the Employer would have to provide

[144] *Balfour Beatty* supra note 144 at para 30.
[145] See Pickavance op cit note 50, J Roger Knowles *150 Contractual Problems and their Solutions* (2005) and Binnington and Copeland 'Status of the Programme' available at *http://www.bca.co.za/article/article-38-status-of-the-programme/*
[146] Pickavance op cit note 50 at 223 and Binnington and Copeland op cit note 135.

every piece of information timeously so that the Contractor will not be prevented from carrying out its programme obligations.[147] In both instances, Pickavance submits, this will be a breach of contract which leaves it open to the innocent party to terminate the contract.[148]

This thesis argues that Pickavance's submission that the innocent party will be entitled to terminate is not accurate and is arguably unfounded. At common law, a party is only entitled to terminate at contract due to a material breach of contract.[149] Based on this authority it is contended that not every failure to meet a specific date on the programme or to provide information will bring an entitlement to terminate the contract.

Knowles,[150] in his discussion on the effect of making a Programme a Contract Document, submits that to do so would mean the Contractor is required to comply with it to the letter and that the flexibility which is key to catching up when progress is behind, would thus be lost.[151] In support of his contention he refers to the cases *Yorkshire Water Authority v Sir Alfred McAlpine & Son (Northern) Ltd,*[152] *English Industrial Estates Corporation v Kier Construction Ltd and Others,*[153] and *Havant Borough Council v South Coast Shipping Company Ltd.*[154] However, a reading of these cases cited above shows that they referred to a method statement that had been made a Contract Document with the result that the contractor had an obligation to follow it.

Again, it seems that the warning against inclusion of the Programme as a Contract Document is arguably unfounded as the authority relied on for the contention refers not to the Programme but to the Method Statement. However, there are other civil construction contracts that do require the Method Statement to be part of the

[147] Pickavance op cit note 50 at 223.
[148] Pickavance op cit note 50 at 223.
[149] See *Erasmus v Pienaar* 1984 (4) SA 9 (T).
[150] Knowles op cit note 145 at 93.
[151] Ibid.
[152] *Yorkshire Water Authority v Sir Alfred McAlpine & Son (Northern) Ltd* (1985) 32 BLR 114.
[153] *English Industrial Estates Corporation v Kier Construction Ltd and Others* [1991] 56 BLR 93.
[154] *Havant Borough Council v South Coast Shipping Company Ltd* [1996] CILL 1146.

Programme.[155] In this case, when the Programme is made a Contract Document, the Method Statement will automatically have the same status.

It is therefore accepted that including the Method Statement as a Contract Document is problematic. As submitted by Pickavance, in the absence of contractual stipulation to the contrary, it is up to the Contractor to decide on its method of construction.[156] This contention is confirmed by *AMF International v Magnet Bowling*.[157] Where included as a Contract Document, however, a Method Statement will override this general principle and required changes to the method specified by the Contractor can give rise to variations.[158] It is submitted that the warnings against making a Method Statement a Contract Document are justified; however, the view that this also holds for a Programme as argued by some, is not persuasive.[159]

It is submitted that although it may be an acceptable option to make the Programme a Contract Document, this would not be compatible with the terms of the JBCC PBA provisions without amendments to modify them. One of the main problems is the rigidity of the Programme as a Contract Document and the absence of any provision for the revision and approval of subsequent updates which are essential for a Programme to have the status of a Contract Document. This option will be discussed further in the following section.

3.3.6 Summary of the current position

The legal nature and function of the Programme under the JBCC PBA does not provide legal certainty and does not reflect best practice in managing the construction project.

The times for performance, other than dates expressly incorporated in the Agreement by its inclusion in the Contract Data, are not contractually enforceable.

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[155] For example, the NEC contract.
[156] Pickavance op cit note 50 at 242.
[157] *AMF International v Magnet Bowling* [1968] 1 WLR 1028 where the court stated that an Architect had no right to instruct a builder on how to do his work as it is the builder's right and duty to carry out his building operations as he sees fit.
[158] Pickavance op cit note 50 at 242. Also see *Holland Dredging v Dredging and Construction Company* (1987) 37 BLR 1 (CA) where a Contractor's claim for a variation was approved on the grounds that the Method Statement was a contractual document
[159] See Binnington and Copeland op cit note 145 where it is argued that the same considerations apply with regard to submitting a programme and/or a method statement as a contract document. They further state that there is no benefit to either party to make a programme or method statement contractual documents.

The Contract Data fixes the date for possession of the Site and the date for Practical Completion, and a failure to meet them will result in *mora ex re* (from the transaction). However, within the window between these two defined dates, the times for performance are left open, and the parties need to establish a time for performance *ex persona* by issuing a demand for performance or an *interpellatio*.

As discussed above, it will be a difficult task for a Contractor to discharge its onus and of proving an entitlement or a Relevant Event to allow for a revision of the date for Practical Completion in terms of Clauses 23.2. The Contractor will need to prove that the Employer or his Agents failed to perform the specific obligation timeously. It is a daunting task for the Contractor to overcome this first obstacle without the times for performance being agreed upon pursuant to a Programme with contractual significance in order for *mora* to result *ex re*.

The second obstacle, namely to quantify the effects of the Relevant Event in terms of Clause 23.6.2, will be equally difficult to overcome. As discussed above, the current construction of the clause leads towards ambiguity, but even based on the proposed amendment Clause, will not leave the Contractor without a challenge. The Contractor needs to prove a delay caused by a Relevant Event on the date of Practical Completion illustrated on the critical path on the current Programme. As stated in the *Balfour Beatty*[160] case, the success of determining an extension of time will depend on the foundation, which is a proper Programme including a critical path (if capable of justification and substantiation to show its validity and reliability as a contractual starting point), maintained and revised to be able to provide a satisfactory and convincing demonstration of cause and effect.[161]

It is therefore submitted that the current JBCC Programme does not fulfil this important role and can at best function as a management tool with evidential value in performing a retrospective delay analysis and developing an as-built Programme.[162]

[160] *Balfour Beatty* supra note 144.
[161] *Balfour Beatty* supra note 144 at para 30.
[162] See SCL *Protocol* op cit note 14 at page 52 which defines an as built programme as "The record of the history of the construction project in the form of a programme. The as-built programme does not necessarily have any logic links. It can be merely a bar-chart record of the start and end dates of every activity that actually took place. 'As-constructed programme' has the same meaning."

The current ambivalent legal position of the Programme and the corresponding extension of time or Penalty regimen do not only pose a risk for the Contractor who believes them to have contractual significance, but also for the Employer who may be deprived from levying Penalties. The Contractor may proceed with the contract on the belief, as generally is the case in the industry,[163] that the Programme establishes times for performance and that the Contractor can rely on these to prove a lack of Agents' timeous performance on part of the Employer or Principal in relation to the matters as set out above.

The uncertainty created by a Programme without legal or contractual significance may also have a surprisingly negative effect on an Employer who wants to levy penalties against the Contractor who has missed the date for Practical Completion. There is authority for the argument by a Contractor that time is at large[164] in situations where it has been deprived of its right of prospective certainty in terms of its completion requirements.[165] Courts have found in similar situations that time is at large and that the Employer is precluded from levying liquidated damages and left with the onus of proving actual damages.[166] This argument will be discussed in more detail in Chapter 4.

At worst, the aforesaid uncertainty may continue for a period of three years during which any of the Parties are open to declare a disagreement in relation to the above possible misconceptions.[167] The JBCC PBA does not have any time limit for raising a disagreement in terms of Clause 30.1. Either party may give notice of a disagreement to the other. Due to this lack of a time limit, it is left to the Prescription Act,[168] which in sec 11(d) provides that debts generally prescribe after a three year period. The Employer or Contractor is accordingly able to raise a disagreement with the Agent's ruling on any claim within the three year prescription period, after which the right to a claim will cease.

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[163] This generalisation comes from personal knowledge from having worked in the Construction Industry for 20 years.
[164] Time at large will be discussed in more detail in Chapter 4.
[165] See *Hawl-Mac Construction Ltd v District of Campbell River, British Columbia* 60 B.L.R. 57.
[166] Cases will be discussed in detail in Chapter 4.
[167] For example where a Principal Agent made a ruling in favour of the Contractor based on a Programme which the Principal Agent would have incorrectly perceived to introduce fixed times for performance to establish late performance in order to effect *mora ex re* and entitling the Contractor to a claim.
[168] The Prescription Act 68 of 1969.

3.4 Proposed methodology relating to the contractual position of the Programme in terms of the JBCC PBA

The absence of an approved Programme leaves an array of matters open to interpretation and creates immense uncertainty which, as submitted above, may lead to disputes. From the perspectives of both Parties, it is important to commit to certain agreed dates in order to co-operate and not prevent or hinder each other's performance. Further, where the failure of the one party may entitle the other to extension of time or compensation or both, it is important to establish the time of performance of obligations.

From this perspective, it is critical for the Contractor to fix the Employer's or Principal Agent's time for performance contractually without the need to have to prove that it complied with the common law requirements to establish the time for performance *ex persona* through the issuing of a letter of demand (*interpellatio*). The Contractor would need to perform a very complex delay analysis process to prove that the Employer fell into *mora ex persona* and this will become even more difficult if the Contractor contends that it planned to complete the Works before the date of Practical Completion. The challenge in such a case will be to establish the date of Practical Completion even before applying any delay analysis.

This thesis argues that the point of departure in revising the current JBCC PBA position of the Programme should be to follow the basic guidelines recommended by the Society of Construction Law Delay and Disruption Protocol.[169] The SCL also recommends a Model Specification Clause[170] that may be of assistance in proposing amendments to the JBCC PBA. The *Protocol* recommends that a proper programme should be submitted by the contractor and approved by the contract administrator[171] (or principal agent). The programme should show the manner and sequence in which the contractor plans to carry out the works.[172] While recognising that the form of the programme will depend upon the "type and complexity of the project", the

[169] SCL *Protocol* op cit note 14.
[170] SCL *Protocol* op cit note 14 at Appendix B.
[171] The Protocol (see note 1) defines the Contract Administrator as the person responsible for administration of the contract, including certifying what extensions of time are due, or what additional costs or loss and expense is to be compensated. Depending on the form of contract the person may be referred to by such terms as Principal Agent – JBCC, Project Manager – NEC or the Engineer – FIDIC and GCC.
[172] SCLProtocol (see note 1) Guidance Section 2.2 (page 35)

Protocol recommends that it should be prepared in the form of a critical path network using commercially available planning software.[173]

The *Protocol* further recommends that, once accepted, the programme should be updated electronically at intervals of no longer than a month.[174] Each update should then be saved, the purpose being "to provide good contemporaneous evidence of what happened on the project". This makes a number of assumptions (for example, as to the accuracy and veracity of the updates). Although updating programmes contemporaneously might well assist project management, in terms of actual evidence, there can be no substitute for accurate records of actual progress made on a daily, or weekly, basis. Indeed, as the *Protocol* states elsewhere, the starting point for any delay analysis is "to understand what work was carried out and when it was carried out".[175]

The *Protocol* envisages that the updated programme will be the main tool for determining the duration of the extension time.[176] It further envisages that the programme will be brought fully up to date prior to the occurrence of a relevant employer event and thus enable an accurate assessment of the extent of further time required when such an event occurs[177].

The *Protocol*'s aforesaid propositions were to a great measure confirmed by Judge Humphrey Lloyd in the *Balfour Beatty*[178] case. There are some important guidelines to be taken out of this judgment, such as:

- A proper programme should be maintained during the execution of the works.
- In determining an extension of time, the 'foundation' should be the original programme, and its success will similarly depend on the soundness of its revisions on the occurrence of every event, so as to be able to provide a satisfactory and convincing demonstration of cause and effect.
- A valid critical path, or paths, should be established as it, or they, will almost certainly change.

[173] SCL *Protocol* (see note 1) Guidance Section 2.2.1.1 (page 35)
[174] SCL *Protocol* (see note 1) Guidance Section 2.2.1.5 (page 38)
[175] SCL *Protocol* op cit note 14 at page41.
[176] SCL *Protocol* op cit note 14 at page 38.
[177] Ibid.
[178] *Balfour Beatty* op cit note 144.

- Concurrent, or parallel, delays should be demonstrated where necessary.
- Links between trades.

3.5 Proposed amendments to the JBCC PBA 2014 programming provisions

The first category of provisions which this thesis argues is in need of amendment concerns primary provisions, including the definition of the Programme, the obligation to submit it and the requirements relating to the Programme itself. The second category is the secondary provisions referring to the Programme and which rely on the Programme to establish entitlements and cause and effect (or both) in order to quantify delay and damages.

3.5.1 Primary provisions

The obligation on the Contractor to prepare and submit a Programme is found in Clause 12.2.6 as quoted below.

12.2.6 "Prepare and submit to the **principal agent** within fifteen (15) **working days** of receipt of **construction information** a **programme** for the **works** in sufficient detail to enable the **principal agent** to monitor the progress of the **works**".

The definition of Programme does not extensively specify the requirements to be included. Clause 1.1 defines Programme as below.

> **"PROGRAMME**: A diagrammatic representation of the planned execution of units of work or activities indicating the dates for commencement and completion prepared and maintained by the **contractor**".

Therefore, as read with Clause 12.2.6, the purpose of the Programme is merely to provide "sufficient details to enable the **principal agent** to monitor the progress of the **works**". From the discussion above as to the importance of the contractually significant Programme, these provisions are extremely unsatisfactory.

Furthermore, given the limited purpose and requirement of the Programme, the timing requirement for its submission is very vague. Clause 12.2.6 requires that the Programme should be submitted "within fifteen (15) **working days** of receipt of **construction information**…"

JBCC Clause 1 defines Construction Information as follows (*own emphasis*):

> "**CONSTRUCTION INFORMATION**: All information issued by the **principal agent** and/or **agents** including the **contract documents**, specifications, drawings, schedules, **notices** and **contract instructions** required for the execution of the **works**".

As contended previously, the definition of Construction Information purportedly includes all the information issued and required for the execution of the Works. It is difficult to envisage how the receipt of this can trigger the fifteen working days for the Programme to be submitted. Construction Information is accordingly used in the widest sense to *inter alia* include all Contract Documents and Contract Instructions. Contract Documents are generally defined as the documents drawn up at the conclusion of the contract to comprise the entire contract.[179] Contract Information will be issued during the progress of the Works to, *inter alia*, populate certain drawings in more detail as the designs were developed during the construction. It is therefore contended that Construction Information can only have a similar meaning as "As-built Documentation" which can only be finalised after all the above documentation has been issued.

The following amendments are proposed:

> **PROGRAMME***: A diagrammatic representation of the planned execution of units of work or activities indicating the dates for commencement and completion prepared and maintained by the **contractor**. The **programme** will be developed in the software as stated in the **contract data** or otherwise agreed by the **parties**. When reference is made to submit or update the **programme** it will mean in a soft and hard copy of it. The latest **programme** uploaded by the **principal agent** will supersede the previous **programme**.

[179] Clause 1.1 defines contract documents as "This **agreement**, the **contract drawings**, the **priced document** and other identified documents [CD]".

12.2.6* The **contractor** shall prepare and submit to the **principal agent** within fifteen (15) **working days** of the receipt of the **contract documents** an initial **programme** in the detail as required below of carrying out the Works in order to meet the **date for practical completion**.

12.2.6.1* the initial **programme** and all subsequent updated **programmes** shall show the sequence of the execution of the **works**, the reciprocal obligations of the **employer** and the other information as including but not limited to:

12.2.6.1.1* the date of possession of the **site** and/or access to any part of the **site** or **works** [23.2.1]

12.2.6.1.2* outstanding **construction information** [23.2.5]

12.2.6.1.3* **Free issue** [23.2.6]

12.2.6.1.4* the appointments of **subcontractors** [23.2.7]

12.2.6.1.5* acceptance of designs of selected **subcontractors** [23.2.8]

12.2.6.1.6* **date for practical completion** as a whole or **dates for practical completion** in **sections** [CD]

12.2.6.1.7* **date of practical completion** as a whole or dates of **practical completion** in **sections** [19.3.3]

12.2.6.1.8* critical path and float

12.2.6.1.9* health and safety requirements

12.2.6.1.10* approvals by authorities, **employer** or **agents**

12.2.6.1.11* all contractual notices issued and claims submitted [23.0; 26.0]

12.2.6.2* The **contractor** shall program the **works** by taking full cognisance and should comply with any programming requirements in relation to, *inter alia* sequencing, key dates, milestones, restrictions or constraints as included in the **contract data**.

12.2.6.3* The **principal agent** shall, within five (5) **working days** after the **contractor** has submitted an initial or updated **programme**, approve and agree on the specific dates for performance by the **employer** included in such **programme** or, rejecting same with reasons and instruct the **contractor** to amend such **programme**. Reasons for rejecting a **programme** are *inter alia* that it is not in accordance with the **agreement** or does not reflect the actual progress. The **principal agent's** failure to approve or reject with reasons the submitted **programme**,

12.2.6.3.1* shall, in the event of the submitted **programme** being an adjusted **programme**, be deemed to have been approved; and

12.2.6.3.2* shall, in the event of the submitted programme being an initial **programme**, not be deemed to constitute approval. However, the **contractor** shall have the right to suspend the **works** [6.4]

12.2.6.4* The **programme** shall be subject to review on a monthly basis. The **contractor** shall deliver to the **principal agent** an updated **programme** reflecting actual progress and updated dates in accordance with [12.2.6.1], even though it may reflect that the planned date(s) of **practical completion** will be later than the corresponding date(s) for **practical completion**. The fact that the contractor may be in culpable delay does not relieve him from submitting an updated **programme** every month, and in addition;

12.2.6.4.1* when a specific event or circumstance occurs which may cause a delay to the date of **practical completion** [23.6.2];

12.2.6.4.2* when a specific event or circumstance occur which may cause expense and/or loss or both [26.5];

12.2.6.4.3* with each claim [23.6.2; 26.5]; and

12.2.6.4.4* after each assessment or ruling [23.7; 26,7]

12.2.6.5* where the **parties** fail to reach agreement on an updated **programme** within a further five (5) **working days** after the **principal agent**'s rejection of a **programme** [12.2.6.3], the **programme** shall be deemed to be a dispute [30.2] and referred to adjudication [30.6]

These proposed increased obligations in relation to the Programming requirements inevitably impose more management and functions responsibility, resources and as a consequence cost. However, these proactive risk management functions are beneficial during the initial planning stage of the contract when the ability to influence risk is high and the cost relating low compared to the construction stage where the ability to influence risk is low and the cost high. During the initial stage risk can be mitigated or even avoided, but during the actual construction stage, claims need to be submitted and if rejected other expensive legal processes would need to be provided. As a result following this proactive programming or risk management process is more cost effective than employing claim consultants to perform retrospective delay analysis in order to prepare an as-built Programme in preparation for a claim.

3.5.2 Secondary provisions

The secondary provisions which rely on the Programme to establish entitlements and cause and effect or both in order to quantify delays should be amended. The time for performance should be contractually agreed on initially in the first Programme and thereafter revised in each updated Programme, without the need to rely on the common law position to prove *mora ex persona*.

This proposal entails that the approved and agreed Programme will determine which obligations need to be fulfilled and at what time. The time for performance will accordingly be fixed and agreed on by the Parties in terms of each updated and agreed Programme. The Clause 23.2 Contractor entitlements for a revision of the date of Practical Completion and adjustment of the Contract Value will be revised accordingly. The Contractor's entitlements under Clause 23.2 for the Employer's failure to perform timeously will specifically be conditional to the time for performance set by the Programme.

3.5.3 Amendments to Clause 23.2 provisions

The Clause 23.2 provisions need the following amendments to provide clarity in general and in order to unambiguously secure the Contractor's entitlement based on the failure by the Employer to comply with its obligations as agreed in the Programme.

23.2 "The **contractor** is entitled to a revision of the date for **practical completion** by the **principal agent** with an adjustment to the **contract value** [26.0], for a delay to **practical completion** caused by one or more of the following events:

23.2.1 Delayed possession of the **site** [12.1.6]"

The above Clause 23.2.1 dealing with late possession of the site should be amended to read as below.

23.2.1* Delayed possession of the **site** [sic 12.1.7][180] and/or access to any part of the **site** or **works** in terms of the **programme**

This Clause needs modification to make provision for the case where the scope of works specifies that the Contractor will be afforded limited access at different time periods. This may be due to the Works being executed in different Sections. Direct Contractors may need to complete certain Works and hand over parts thereof at different times before the Contractor can execute the Works, Approvals to execute the Works may be forthcoming for certain parts at different time periods.

The current Clause 23.2.3 dealing with Contract Instructions, which reads:

23.2.3 "**contract instructions** [17.1-2] not occasioned by the **contractor**'s default"

should be amended to read:

23.2.3*: **contract instructions** [17.1-2; 17.1.13] not occasioned by the **contractor**'s default

[180] Clause 23.2.1 erroneously refers to [12.1.6] while the correct reference should be [12.1.7].

Clause 23.2.3 should also include additional works executed through the Contract Instructions to execute budgetary allowances, prime cost amounts and provisional sums where adequate provision was not made in the Programme, hence the inclusion of a reference to [12.1.13]. The Contractor should make assumptions in its Programme to allow for the aforesaid items and be entitled to a revision of the date for Practical Completion and adjustment to the Contract Value in the event of these proving to be different from the assumption.

The current Clause 23.2.5 dealing with late and incorrect Construction Information, reading:

23.2.5 "Late or incorrect issue of **construction information** [5.5; 6.4; 13.2.3; 17.1.1-2]

should be amended as follows:

23.2.5* Incorrect issue of **construction information** and the late issue of outstanding **construction information** in terms of the **programme** [12.2.8; 13.2.3; 17.1.1-2; 17.1.13].

This clause reflects two different scenarios. The first scenario is the late issue of outstanding Construction Information in terms of the Programme. The second scenario is the incorrect issue of Construction Information where the mistake leads to a delay. The impact of the variation order itself is covered under Clause 23.2.3, but if it includes incorrect Construction Information, it needs to be covered under Clause 23.2.5

The addition of Clause 17.1.13 is proposed as reference to include Construction Instructions to execute budgetary allowances, prime cost amounts and provision of sums.

The current Clause 23.2.5, however, omits a reference to Clause 12.2.8 which, as stated previously, deals with the Contractor's submission of outstanding information This is one of the major causes of delay in construction contracts and should accordingly be included.

It is further submitted that an entitlement to extension of time in the event of a delay caused by a breach in terms of Clause 6.4, of any Agent to act in terms of the Agreement, should be claimed through Clause 23.2.13: "**suspension** of the **works**". Clause 6.4 should therefore be removed from the references contained in Clause 23.2.5.

The current Clause 23.2.6 dealing with Free Issue, reading:

23.2.6 "Late supply of **free issue**, **materials** and **goods** for which the **employer** is responsible [12.1.11]"

should be amended as follows:

23.2.6* Late supply of **free issue** in terms of the agreed **programme** [12.1.12]

Free issue is defined in the contract as "**Materials** and **goods** provided at no cost to the **contractor** by the **employer** for inclusion in the **works** whether stored on or off **site** or in transit [CD]".

Clause 23.2.6 should be amended not to repeat "**materials and goods**" as this is not additional to "**free issue**" but included in it. The Employer is also responsible for this and the reference to Clause 12.1.11 is also incorrect, it should refer to Clause 12.1.12.

Clause 23.2.7 refers to the "agreed Programme" which does not actually exist in terms of the JBCC PBA. However, the Clause is fully compatible with the proposed amendments which make provision for an "agreed Programme" as proposed here.

The current Clause 23.2.8 should be amended as follows to include reference to the agreed Programme:

23.2.8* Late acceptance in terms of the agreed **programme** by the **principal agent** and/or **agents** of a design undertaken by a selected **subcontractor** where the **contractor**'s obligations have been met

Clause 23.3 makes provision for “further circumstances” or Relevant Events that have not been included specifically under Clause 23.1 or 2. The Clause reads:

23.3 “Further circumstances for which the **contractor** may be entitled to a revision of the date for **practical completion** and an adjustment of the **contract value** are delays to **practical completion** due to any other cause beyond the **contractor**’s reasonable control that could not have reasonably been anticipated and provided for. The **principal agent** shall adjust the **contract value** where such delay is due to the **employer** and/or **agents**…”

This Clause is, however, not properly drafted. It should provide for an entitlement to a revision of the date for Practical Completion for any Relevant Event “beyond the Contractor’s reasonable control and could not have reasonably been anticipated or prepared for”. These include Neutral and Employer Risk Events which are not specifically included in Clauses 23.1 and 23.2 respectively. The adjustment to the Contract Value should only be applicable to the Clause 23.2: Type of Relevant Event or Employer Risk Events caused by the Employer and his Agents or both of them. It is not certain what is envisaged by the open ended portion and it is recommended that it be amended to read “Employer and/or Agent’s default”.

Clause 23.2 should be amended to state the following:

23.3* Further circumstances for which the **contractor** may be entitled to a revision of the date for **practical completion** are delays to **practical completion** due to any other cause beyond the **contractor**'s reasonable control that could not have reasonably been anticipated and provided for. The **contractor** is entitled to an adjustment to the **contract value** [26.9.4] where such delay is caused by the default or prevention act of the **employer** and/or **agents**

Clause 23.6.2 needs modification to ensure that the agreed Programme can be efficiently used for determining the cause and effect of an event once it has been established that it is in fact a Relevant Event in terms of Clause 23.

Clause 23.6.2 should be amended to state:

23.6.2* The cause and effect of the delaying event or circumstance on the anticipated **date of practical completion**, where appropriate, illustrated by the impact and/or a change to the critical path on the updated and approved **programme**

The onus will accordingly be on the Contractor to prove that the Relevant Event has delayed the "*date of Practical Completion*" (*construction completion date)* as agreed in the Programme. The amended definition of Programme accepts that the Programme is the last updated and approved Programme as agreed by the Parties in terms of Clause 12.2.6.4*. Therefore, the contractual starting point is clearly defined and not in dispute as might have been the case with the JBCC PBA.

3.6 Conclusion

The above amendments will assist the Parties to assess and determine the entitlement to a revision of the "*date for Practical Completion*" and to quantify the claim by proving cause and effect by utilising the Programme as a legal instrument and not merely a management tool. The Contractor will accordingly be relieved from the onerous task of proving that the Employer was placed in *mora ex persona* to establish non-timeous performance. The proposed amendments to the Programming provisions of JBCC PBA 2014 have as the main objective to introduce a scheme of contractual provisions to expressly supersede the common law provisions. The scheme provisions also have the objective to improve, clarify and reflect best practices and are premised in the following:

(i) The updated Programme should reasonably represent the actual progress in site.

(ii) The remainder of the Programme should reflect the same activities, logic of pre and post decessors, sequence and critical path of the previous approved Programme.

(iii) The updated Programme should indicate the impact of any delays in the period from the previous update.

(iv) It should accompany a Report including the details of all above delaying events.

It should also be noted that the lack of an approved Programme does not only affect the Contractor. It also affects the Employer's ability to prove certain damages or loss which he may incur due to the Contractor's default or failure to meet certain defined dates in the Programme.

As a result, it is of cardinal importance to introduce the above amendments to afford the Programme contractual significance. The contract should not be a "Contract Document" which is static and has the effect of each activity introducing a contractual obligation. It should be a legal instrument with a dynamic nature, capable of being updated and which only confers obligations on the Parties to the extent specifically provided in the Conditions of Contract. The Contractor should be required to provide a Programme as a contractual deliverable complying with the specific contractual requirements including the fixing of time for performance of the reciprocal obligations of the Parties to facilitate co-operation and to prevent hindrance or delay. It should be approved or rejected by the Employer's Agent who should be authorised by the Agreement to do so, in order to agree and fix on the respective times for performance and fix same.

The Programme should be updated regularly as agreed, and when a delaying event occurs, it should show the impact of same.

If the Parties cannot agree on the revised Programme, they should give notice of a disagreement and resolve the dispute as soon as possible, while all the facts are evident.

CHAPTER 4

TIME AT LARGE

4.1 Introduction

This thesis argued in the previous chapters that because of uncertainty and misconceptions in the industry and the fact that Programmes lack legal or contractual significance create a vacuum in relation to the JBCC PBA extension of time mechanism which may cause confusion and lead to disputes. This interpretational ambiguity and uncertainty furthermore opens the possibility for the application of the Time at Large concept.

The "Time at large" concept often features in contractors' claims in England. Although as far as back as 1928, a Contractor succeeded with an application to strike out penalties on the basis of the "Prevention Principle", this concept is relatively unfamiliar in the South African industry.[181]

The expression 'Time at Large' indicates that a claimant believes that for one reason or another there is no enforceable date for the completion of the works.[182] Therefore, because there is no date from which it can be calculated, the Employer's right to liquidated damages is defeated.[183] On this basis the Contractor's obligation is to complete the works within a reasonable time.[184] If the Contractor does not complete within such a reasonable time, the Employer may recover its losses as general damages at common law.[185]

Before pursuing "Time at Large"-type arguments, it is necessary to consider the substantive law which is applicable to the contract in question.[186] It is the thesis objective to determine whether there are legal principles on which similar legal outcomes can be reached in terms of South African law. The circumstances in which the Employer will be prevented from levying Penalties are discussed below.

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[181] *Kelly and Hingle's Trustees v Union Government (Minister of Public Works)* 1928 TPD 272.
[182] Keith Pickavance and Wendy MacLaughlin 'A little of Time at Large: Proof of a Reasonable Time to Complete in the Absence of a Completion Date' (2005) at 1.
[183] Ibid.
[184] Ibid.
[185] Ibid.
[186] John Bellhouse and Paul Cowen 'Common Law "Time at Large" Arguments in a Civil Law Context' *Construction Law Journal Issue 8* (2007) at page 2.

"Time at Large" and the "Prevention Principle" are sometimes used or referred to as equivalent concepts. What they have in common is that both embody considerations which may result in the Employer being prevented from levying Penalties and the Contractor being exonerated therefrom. The "Prevention Principle", however, is a narrower concept. Where the Employer or Agent through an "act of prevention" prevents the Contractor from performing, Time is rendered "at Large" in the absence of a provision entitling the Employer or his Agent to extend the date from which Penalties are exacted. The Contractor's obligation to complete the works within the specified time is lost and it will be exonerated from Penalties.

The "Prevention Principle" is one of a number of situations that may render the time for completion "at large". The Employer may also be prevented from levying Penalties in situations where the Penalty Provisions are defective or not clearly or unambiguously defined which will result in the Employer becoming ineligible to exact Penalties.

4.2 The Prevention Principle

The "Prevention Principle" will apply where a Contractor is delayed by an Employer's act of prevention and where the contract has no mechanism for extending the contractual completion dateIn such case the Employer will not be able to enforce Penalties on account of the Contractor's failure to meet the contractual completion date.

4.2.1 English authority

The approach of the English courts[187] in relation to the "Prevention Principle" was summarised in *Group Five Building Ltd v Minister of Community Development*[188] as follows:

"1 A contractor is bound to complete the work by the date stipulated in the contract for its completion. If he fails to do so he will be liable, if so agreed, for liquidated damages to the employer.

[187] See *Holme v Guppy* (1838) 3 M. & W. 387 (150 E.R. 1195); *Russel v Sa Da Bandeira (Viscount)* (1862) 13 C.B. (NS) 149; *James v St Johns College Oxford* (1870) L.R. 6 Q.B.115; *Dodd v Churton* [1897] 1 Q.B. 562; *Wells v Army & Navy Co-Operative Society* [1902] 86 L.T. 764; *Trollope & Colls Ltd v Northwest Metropolitan Regional Hospital GLC* [1982] 1 W.L.R. 794 (HL); *Percy Bilton Ltd v GLC* [1982] 1 W.L.R. 794, HL.

[188] *Group Five Building Ltd v Minister of Community Development* 1993 (3) SA 629 (A) at 650 C.

2 The employer will not, however, be entitled to liquidated damages if by his act or omission he prevented the contractor from completing the contract by the agreed date. As it was put by Vaughan Williams LJ in *Wells'* case supra at 354:

'[I]n the contract one finds the time limited within which the builder is to do this work. That means, not only that he is to do it within that time, but it means also that he is to have that time within which to do it.'

Any conduct on the part of the employer or his agent, whether authorised (for example, the issue of variation or suspension orders) or wrongful (for example, the failure to deliver the building site or plans or instructions by an agreed date), exonerates the contractor from completing the contract by the contractual completion date. Time then becomes, as it is sometimes stated, at large. The work must then be completed within a reasonable time.

3 The qualification of proposition 1 by proposition 2 is itself subject to the further qualification that the latter must yield to the express terms of the contract. One such express term would be the authority granted to a contractor to apply for an extension of time within which to complete the work, for example, where variation orders are issued or extra work is ordered which delay its completion.

4 But where the extension clause lists specific grounds on which the contractor may ask for an extension of time and adds the words 'or other causes beyond the contractor's control' the latter phrase must be interpreted narrowly and *eiusdem generis* with the preceding categories. Wrongful conduct of the employer which caused delay would in particular be excluded, at any rate when, in terms of other provisions in the contract, the decision about extra time rests with the employer himself and is final (for otherwise, if not excluded, the employer becomes arbiter of, and gains an advantage from, his own wrong). Proposition 3 accordingly does not apply and proposition 2 does: consequently the employer would not be entitled to enforce a claim for liquidated damages."[189]

[189] *Group Five* supra note 188 at 650.

The “Prevention Principle” has long been a part of English law. One of its earliest recorded cases in which it was applied in the construction field was in the first half of the 19th century in the case of *Holme v Guppy.*[190] In that case, the work was due to be completed within a specified time and liquidated damages were payable if the work was not completed in that time. However, there was no contractual provision for an extension of time of the date for completion. The work was subsequently delayed, by among other things the employer giving late possession and by the activities of others employed directly by him (commonly referred to as direct contractors). It was held that the employer's act of prevention excused the contractor from performing in accordance with the time constraints in the contract and therefore the contractor was not liable to pay liquidated damages.

A series of cases followed in terms of which the decision in *Holme v Guppy*[191] was upheld and applied.[192] In *Hansen and Schrader v Deare*[193] reference was made to this case as follows;

> "The case of *Holme v Guppy* is founded on principles of law common to the Roman-Dutch, the Civil, and the English law. If a man by his own act prevents the performance of what another has stipulated to perform, he cannot take advantage of his own wrong."

In another case, *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board*,[194] this legal principle was approved in the following passage from Lord Denning M.R. in the Court of Appeal:

> "...It is well settled that in building contracts – and in other contracts too – when there is a stipulation for work to be done in a limited time, if one party by his conduct – it may be quite legitimate conduct, such as ordering extra work – renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can

[190] *Holme v Guppy* supra note 187.
[191] Ibid.
[192] The Court of Appeal in *Dodd v Churton* supra note 187 which was itself upheld by the House of Lords in *Trollope & Colls* supra note 177.
[193] *Hansen and Schrader v Deare* (3 EDC 36).
[194] *Trollope & Colls* supra note 177.

> no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time."

In the English case of *Wells v Army and Navy Co-operative Society*,[195] a Contractor undertook to erect a building within a year unless delayed by alterations, subcontractors, strikes, or other causes beyond the Contractor's control. There was an Extension of Time Clause in relation to which the decision of the Employer's directors would be final and there was provision for Liquidated and Ascertained Damages if the Contractor failed to complete within a time considered reasonable by the directors. There was a one year delay and the directors allowed a three month extension of time for delays caused by subcontractors, but the main contractor contended that this was insufficient as there had also been delays due to late possession of site, late plans and alterations. The Court held that, on the evidence, there was substance in all these complaints, but it was impossible to say to what extent each one cause contributed to the delay, but held that the words, "other causes beyond the contractor's control" could not include other prevention acts of not supplying plans or drawings in due time and not giving possession with the result that time was "at large" and Liquidated and Ascertained Damages could not be deducted.

The Wells decision was followed in *Peak Construction (Liverpool) Ltd v McKinney Foundation Ltd.*[196] In this case, the Employer issued a contract containing an Extension of Time clause that included "additions to the Works, strikes, force majeure, or other unavoidable circumstances". As the main Contractor was about to erect some columns, their bases, which had been erected by Sub-contractors, were found to be defective, leading to a suspension of work and a reconsideration of the design. The Sub-contractor suggested remedial measures which were swiftly approved by the Engineer but there was an inordinate delay on the part of the Employer in instructing the remedial work. The Employer then sought to deduct Liquidated and Ascertained Damages for the entire period between suspension and recommencement. The Court held that, since the Employer was responsible for part of the suspension and the circumstances were not covered by the Extension of Time Clause, the Liquidated and Ascertained Damages could no longer be invoked and

[195] *Wells* case supra note 187.
[196] *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 111.

the Employer was left to recover at common law such damages as he could prove over a reasonable time. Salmon J. at page 121 stated as follows:

> "If the failure to complete on time is due to the fault of both the Employer and the Contractor, in my view the [Liquidated and Ascertained Damages] Clause does not bite. I cannot see how, in the ordinary course, the Employer can insist on compliance with a Condition if it is partly his own fault that it cannot be fulfilled... I consider that ... the Employer, in the circumstances postulated, is left to his ordinary remedy; that is to say, to recover such damages as he can prove flow from the Contractor's breach... The Liquidated and Ascertained Damages and Extension of Time Clauses in printed forms of contract must be construed strictly contra proferentem. If the Employer wishes to recover Liquidated and Ascertained Damages for a failure by the Contractors to complete on time in spite of the fact that some of the delay is due to the Employer's own fault or Breach of Contract, any Extension of Time Clause should provide, expressly or by implication, for an extension on account of such fault or breach on the part of the Employer."

4.2.2 South African authority

In the *Group Five* case Judge Nienaber analysed the applicable English cases by reducing them to four Propositions. The four Propositions include competing legal principles which qualify one other in some instances. The Propositions and their interactions with one another are summarised below and will be hereinafter be referred to as the "Proposition Matrix"

Proposition 1 – Penalty

The general rule is that a Contractor is bound to complete the Works within a fixed period, which expiry signifies a fixed date. When the Contractor fails to complete the Works within this fixed period or before this fixed date, the Contractor falls into *mora ex re* and, if so agreed, will be liable for Penalties.

Proposition 2 – Prevention Act

An exception to the above general rule is that if the Employer prevents the Contractor from completing the Works on a fixed date time will become at large. The Contractor will be exonerated from completing on the fixed date and the provision regarding Penalties will become inoperative. The qualification of Proposition 1 by Proposition 2 is subject to a further qualification by Proposition 3

Proposition 3 – Extension of Time

Proposition 2 must yield to the express terms of the Contract. One such express term may be where the Contractor is entitled to an extension of time and the Engineer has the jurisdiction to fix a new date for completion.

Proposition 3 is subject to the contract being properly drafted in terms of the rules laid down by Proposition 4, otherwise Proposition 3 will not apply and Proposition 2 would apply.

Proposition 4 – Restrictive Interpretation

The onus will be on the Employer to frame the Extension of Time or Penalty Regimen in terms favourable to himself and will not be entitled to have its terms stretched against the Contractor in order to cover a contingency for which he has omitted to make express provision.

4.2.2.1 *Kelly and Hingle's Trustees v Union Government*

In *Kelly and Hingle's* it was held that "the words '*other causes beyond the contractor's contro*l' in clause 17 did not include delay caused by the building owner ordering alterations or additions under clause 3, that engineer therefore had no jurisdiction under clause 17 to assess delay occasioned by such causes, and that immediately it was proved to the Court that any such delay had occasioned the provision regarding liquidated damages became wholly inoperative, in as much as the building owner had by his own act prevented the completion of the building within the time provided in the contract."[197]

[197] *Kelly and Hingle's* supra note 181 at 273.

This ruling is analysed by the “Proposition Matrix” as follows:

Proposition 1 – Penalty

The contract made provision for Penalties and had a fixed period for completion of 24 months.

Clause 17 “…. the said works shall be commenced and proceeded with, with all due diligence to the satisfaction of the engineer, and the whole shall be completed within twenty-four calendar months from the date of handing over the site.”

Clause 18 “….Time shall be considered as the essence of the contract. If, therefore, the contractor fails to . . . complete the works in compliance with the preceding clause and in the manner therein stated" the building owner shall have the right "to allow the contractor . . . to proceed with the works and to deduct the sum of £25 per day for every day on which the completion of the works may be in arrear under clause 17.”

Proposition 1 (the general rule) was qualified by Proposition 2 (exception to the general rule) stating the following:

Proposition 2 – Prevention Act

The Employer issued variation orders which were authorised under Clause 3, but which prevented the Contractor from completing on the initially fixed date for completion.

Clause 3: “…without invalidating the contract, the engineer shall have the right, by varying the drawings, specification, and schedule of quantities, to increase or decrease the quantities of any item or items or to omit any item or items or to insert any additional item or items…”

The qualification of Proposition 1 by Proposition 2 was subject to a further qualification by Proposition 3 (express provision for extension of time) in terms of which Proposition 2 must yield subject to the condition that Proposition 3 is properly drafted.

Proposition 3 – Extension of Time

The contract contained the following extension of time provision:

Clause 17: "….If the works should be delayed by reason of special inclement weather, combinations or strikes of workmen, or *other causes beyond the contractor's control*, the contractor must afford proof to the satisfaction of the engineer, whose decision as to whether extra time shall be allowed or not is final."

However, Proposition 3 was further subject to Proposition 4 which requires that the Extension of Time provisions be properly drafted without any ambiguity and expressly authorise the engineer to revise the contractual completion date.

Proposition 4 – Restrictive Interpretation

In casu, the court held that "*On this interpretation of the words – "other causes beyond the contractors' control" – the engineer has no jurisdiction* under clause 17 to assess delay caused by the action of the building owner in ordering extras; that contingency is, therefore, not covered by any provision of the penalty clause, and, as soon as it is established that delay was caused by such action, the penalty clause ceases to apply, for the contractor will in that case have been deprived, owing to the delay caused by the execution of extra works, of part of the given period allowed (in this case twenty-four months from the 10th September, 1923 – the date of handing over the site), for the completion of the building and the clause makes no provision for the proportionate lengthening of that original period, or for the substitution of some other period, in such an eventuality. (*vide Holme v Guppy*, and *Dodd v Churton, supra*)".[198]

Proposition 3 accordingly did not apply and Proposition 2 applied, therefore rendering time at large and exonerating the Contractor from Penalties.

4.2.2.2 *Group Five Building Ltd v Minister of Community Development*

Notwithstanding the above ruling, Nienaber JA in *Group Five Building Ltd v Minister of Community Development*[199] expressed doubt, albeit *obiter*, whether the concept of "time at large" is consonant with South African law. It was held that an alleged tacit

[198] *Group Five* op cit note 188 at page 285.
[199] *Group Five* op cit note 188 at page 165.

term could not co-exist with a contradictory express term of the contract. The Plaintiff's case was founded on the premises that the express completion date was overtaken by a contrary tacit term that the time and date for completion would no longer apply and that it was accordingly entitled to damages for the overrun period.

It is, however, contended that this conclusion in the *Group Five* judgment is distinguishable from the "Prevention Principle" issue. *Group Five* did not involve an application by the Contractor to be exonerated from Penalties. The plaintiff alleged that the "completion of the works was delayed beyond the extended date for completion by reason of breaches of contract or other acts of delay by the defendant which fell outside the scope of the powers of extension allowed to the engineer by clause 17(ii) of the contract."[200]

The plaintiff relied on three categories[201] of alleged breach by the defendant:

1. Unauthorised suspension of the works

2. Delayed issue of variation orders which allegedly might have delayed completing the works by or after the extended completion date;

3. The issue of variation orders which disrupted the progress of the works.

"The plaintiff attributes the delay to completion on the defendant (or its employees or agents). It alleges that without the interventions, the work would have been completed on the programmed date for completion (14 December 1984) which was well in advance of the extended contractual completion date. Such interventions by way of late variation orders and instructions and unauthorised suspension orders are alleged to constitute breaches of contract by the defendant and if not at the very least fall outside the ambit of clause 17(ii) of the conditions of contract which is the clause providing for extension of time."[202]

Central to all the Contractor's claims was the proposition that the works had to be completed within a reasonable time as the contractual completion date had ceased to be of application:

[200] *Group Five* supra note 188 at page 631.
[201] Ibid.
[202] *Group Five* supra note 188 at pages 645–646.

> "According to counsel the proposition was drafted into the present contract as an implied term in the sense of 'a standardised one, amounting to a rule of law …' *(per* Corbett AJA in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration (supra* at 532G)). The rule of law, so it was submitted, is derived from some English building cases *(Holme v Guppy* (1838) 3 M & W 387 (150 ER 1195); *Russell v Sa da Bandeira (Viscount)* (1862) 13 CB (NS) 149; *Jones v St John's College, Oxford* (1870) LR 6 QB 115; *Dodd v Churton* [1897] 1 QB 562; *Wells v Army & Navy Co-operative Society* [1902] 86 LT 764 *(Hudson's Building Contracts* 4th ed at 346; *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 (HL) ([1973] 2 All ER 260); *Percy Bilton Ltd v Greater London Council* [1982] 1 WLR 794 (HL) ([1982] 2 All ER 623), which have been echoed in some South African ones *(Hansen and Schrader v Deare* (1883) 3 EDC 36; *Barker v Townsend* (1903) 24 NLR 145 and, noticeably, *Kelly and Hingle's Trustees v Union Government (Minister of Public Works)* 1928 TPD 272)."[203]

It is important to note that as pointed out above, the plaintiff in this case is not, of course, facing a claim for liquidated damages. The plaintiff is merely using the interpretational rules applicable to time at large cases to argue that the extension of time claim did not cover the events delaying him and that it could therefore not be an embarrassment to its claim for damages.

The real issue therefore did not turn on Proposition 2, but was whether Proposition 4 was sound, but overridden by Proposition 3. The case revolved purely on a matter of interpretation and does not fit into the "Proposition Matrix" involving the competing principles of levying Penalties, Prevention acts, Extension of Time provisions as well as interpretational issues.

It is therefore contended that the *Group Five* case must be distinguished and should not be cited as authority in relation to the "Prevention Principle". The Contractor attempted to circumvent an express provision of the contract, including preconditions for a claim for damages. It is trite law that a party may not revert to the common law

[203] *Group Five* supra note 188at page 649.

or any supposed tacit term in order to bypass or circumvent the express provisions of a contract.[204]

In casu the onus of proof should revert to the Contractor to prove on a balance of probabilities that the contractual Extension of Time provision, Clause 17, did not cover the alleged delaying event. Proposition 4, laying down the rules for Restrictive Interpretation in relation to the "Prevention Principle" – in which case the onus is on the Employer to properly draft the Extension of Time Clauses in order to preserve its right to levy Penalties – should therefore not apply in the present case. When interpreted outside of the "Proposition Matrix" and in the absence of Penalties being applicable, Proposition 4 should not have the same impact on Proposition 3. The Judge distinguishes the present case from decisions governing the application of Penalty Clauses and the rules taken into account in the interpretation of thereof.

Therefore, the judge did not only find that the plaintiff's arguments were partly unconvincing, but also that the principles for applying a restrictive interpretation did not apply for *inter alia* the following reasons[205]:

(i) The extension of time clause provided expressly for the very eventuality which the plaintiff alleged occurred. The plaintiff chose not to apply for an extension of time;

(ii) The extension of time clause was not ambiguous;

(iii) The Employer would not become judge in his own cause. The decision was not final, however, and could be referred to a court of law;

(iv) The Employer was not in default. The alleged "wrong" was permitted and contemplated by the contract and

(v) The plaintiff's case was founded and pleaded on the premise that an implied term had the effect that an express term providing for a completion date be disregarded. An implied term cannot, however, co-exist with a contradictory express term.

[204] *Group Five* at supra note 188 at page 653.
[205] *Group Five* supra note 188 at pages 651-2.

4.2.3 "Time at Large", the "Prevention Principle" and the "Ineligibility of Penalties" under South African law

From the analysis of the *Group Five* case it is evident that the legal principles and *ratio* of the case cannot determine the applicability of the "Prevention Principle", "Time at Large" and the general ineligibility to levy Penalties in South Africa. Therefore, the legal criticisms alleging that these principles are not consistent with South African law are unfounded and the matter remains at least uncertain. In order for the thesis to analyse and evaluate the applicability of the "Prevention Principle" and "Time at Large" in South African law, the relevant legal principles from cases will be categorised and included in a "Proposition Matrix" as proposed below.

4.2.3.1 Proposition 1 – Penalty

The general rule is that a Contractor is bound to complete the works within a fixed period. The contract period will begin to run from the commencement date and expire on the fixed date for completion (also defined as a contractual completion date). When the Contractor fails to complete the works by this fixed date, the Contractor falls into *mora ex re* and, if so agreed, will be liable for Penalties.

Penalties are governed by the Conventional Penalties Act[206] which stipulates in sections 1 and 3:

1 "Stipulations for penalties in case of breach of contract to be enforceable

(1) "A stipulation, hereinafter referred to as a penalty stipulation, whereby it is provided that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or to deliver or perform anything for the benefit of any other person, herein after referred to as a creditor, either by way of a penalty or as liquidated damages, shall, subject to the provisions of this Act, be capable of being enforced in any competent court."

(2) "Any sum of money for the payment of which or anything for the delivery or performance of which a person may so become liable, is in this Act referred to as a penalty" (*own emphasis*).

[206] Conventional Penalties, Act 15 of 1962.

3 "Reduction of excessive penalty

"If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question" (*own emphasis*).

4.2.3.2 Proposition 2 – Prevention Act

An exception to the above general rule of Proposition 1 is that if the Employer prevents the Contractor from completing the Works on a date fixed by the contract (*ex re)*, the Contractor will be exonerated from completing on the fixed date and the provision regarding Penalties will become inoperative. There will no longer be a fixed date in the Contract and the time will become "at large".

In the *Wells* case[207] Vaugh Williams LJ stated as follows: "In the contract one finds the time limited within which the builder is to do his work. That means, not only that he has to do it within that time, but it means also that he is to have that time within which to do it."[208] Most standard contracts contain express terms which provide for the time for performance and the scope of the works to be performed.

In the case *Alyne Bingham Price v Horace Mann Life Insurance Company*[209] it was stated that this maxim of English law is well entrenched and defines an extent of time a party to a contract has before the other party (i.e owner) would be able to exercise its remedies for late performance.[210] This is the 'window of opportunity' in which the contractor can perform without consequence.[211] It is the period that the owner must allow the Contractor for completion and as such the contractor has the legal right to this time.[212] It would be unreasonable to arrive at an interpretation of a contract

[207] *Wells* case supra note 187.
[208] *Wells* case supra note 187 at page 354.
[209] *Alyne Bingham Price v Horace Mann Life Insurance Company,* 590 S.W.2d 644 (Tex. Civ. App. 1979).
[210] Fourie op cit note 41 at page 1-2.
[211] Ibid.
[212] Ibid.

where the employer is the drafter of the contract which stipulates that it contains a penalty provision for lateness and then the employer itself can increase the scope of the work without increasing the time for performance. The same proposition will apply if the employer unilaterally reduced the time for performance by for example handing over the site to the contractor late without extending the contract completion date or not providing the contractor with a right to claim extension of time.

In the *Kelly and Hingle's* case it was found that the court was not entitled to deduct the total time saved from the time lost because the Penalty provision became wholly inoperative.[213] The contract did not make provision for a proportionate lengthening of the contract period.[214]

In *Hansen and Schrader v Deare,*[215] the court refers to the *Holme and Guppy*[216] case as follows: "The case of *Holme v Guppy* is founded on principles of law common to the Roman-Dutch, the Civil, and the English law. If a man by his own act prevents the performance of what another has stipulated to perform, he cannot take advantage of his own wrong."

Kelly and Hingle's[217] is authority for the principle that if an Employer impacts on the time required to complete the work, he is thereby disentitled to claim Penalties for non-completion provided for by the contract because an unreasonable burden would be imposed on the Contractor.

Nienaber JA expressed reservations regarding aspects of Proposition 2 in so far as South African law is concerned in the following terms in the *Group Five* case:

> "When parties agree that a contract is to be implemented by a fixed date, conduct by the employer which is authorised by the contract (for example, issuing variation orders, ordering extra work) surely cannot alter or nullify the agreed date for completion. It is for that very reason that building contracts nowadays almost invariably contain express provisions making allowance for extensions of time. When, on the other hand, the conduct of the employer is unlawful (and constitutes a breach of contract) the position may be different,

[213] *Kelly and Hingle's supra* note 181 at page 285 para 2.
[214] Ibid.
[215] *Hansen and Schrader* op cit note 193 at page 45.
[216] *Holme* supra note 187.
[217] *Kelly and Hingle's* supra note 181 at page 279.

> for it stands to reason that a debtor is excused from performing an obligation on time if his creditor wrongfully prevented him from doing so (cf Van der Merwe, Van Huyssteen and Others *Contract* at 271). So, for example, it has been held that a building owner cannot enforce a penalty clause if the delay complained of was caused by his or his agent's default (cf *Hansen and Schrader v Deare (supra* at 45); *Cullinan v The Bettelheim Building Co* (1890) 3 SAR 235; *Hendricks and Soeker v Atkins* (1903) 20 SC 310). The contractor, in addition, will retain his common-law remedies, especially his claim for damages, unless this is expressly excluded."[218]

Although Nienaber JA expressed reservation about certain aspects of Proposition 2, it seems that he is in agreement with the principle that the Employer will not be able to enforce a Penalty clause where he himself is unlawfully delaying the Contractor or effectively in breach of contract.

It seems that the reservations were pertaining to the situation where the employer's "prevention act" was authorised by the contract. The learned judge was of the view that lawful conduct such as the issuing of variation orders or the ordering of extra work could not alter or nullify the agreed date for completion or in this context, set time at large.[219]

The position of the above proposition is indeed not certain under South African law, but some arguments that may be put forward by a Contractor in an attempt to be relieved from Penalties may include the argument that the Employer was estopped from relying on the Penalty provision. The Contractor may also attempt to argue that the Employer unilaterally, through the conduct of his agent, waived its right to Penalties.

However, it is contended that the application area of the aforesaid scenario is very limited in terms of the JBCC PBA. Most of the potential "prevention acts" which are authorised by the contract are covered by the provisions entitling the Contractor to extension of time and should accordingly not pose any real problems or threats for the Employer in relation to being deprived from levying Penalties.

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[218] *Group Five* supra note 188 at page 651.
[219] Ibid.

It may also be argued that conduct which is authorised, that is; the issuing of Variation Orders is not per se unlawful but once it impacts on the Contractor's express right to the extent of time available to perform the works, it may become unlawful.[220] An example may be where the Employer has the right in terms of the contract to issue or vary the scope of work to be included in a provisional sum, but it will become a breach of contract when the information is issued late in terms of the Programme.

In the event that a party has failed to perform timeously, that party is said to be in *mora* according to Roman-Dutch law. However, for a party to be in *mora*, there are requirements to be met. These include that the performance has to be due, the party (debtor) must be aware of the performance required of it and the fact that it is due and it must have no valid excuse for its non-performance. Whether the performance is due will depend on the contract specifying a fixed or determined time for performance. If the time for performance is fixed or determined in the contract itself, then failure to comply with it will result in *mora* and the latter is said to arise *ex re* (from the transaction).[221] Accordingly, he (the debtor) will be in breach of his contractual obligations, *mora debitoris.* On the other hand, when the contract does not state a time for performance, performance must be rendered within a reasonable time, failing which the innocent party must place the defaulting party in *mora* by a proper notice to this effect.[222]

Mora debitoris or a so-called negative malperformance therefore occurs where a contractor fails to complete the works within the time for performance.

For the purposes of this thesis, it is also important to note that as a result of the nature of the construction contract as reciprocal, the employer, can in its capacity as creditor, also be guilty of breach in the form of *mora creditoris* in the event that it fails to co-operate with the debtor (contractor) to enable it to perform. [223]

[220] See Patrick M.M Lane 'Disruption and Delay: Fair Entitlement and Regulation of Risk' *Construction Law Journal* (2006) at page 4 where he refers to the English case of *Southern Foundries (1926) v Shirlaw* [1940] A.C 701 as being authoritative in holding the position that it is a positive rule of contract that conduct of either the promissor, or promise which prevents the other from performing is itself in breach of contract.
[221] P.C Loots op cit note 75at page 67.
[222] See *McAlpine* case supra note 90 and *Ovcon* case supra note 84.
[223] Loots op cit note 75 at page 67.

A leading decision in this regard is that of *Martin Harris & Seuns Ovs (Edms) Bpk V Qwa Qwa Regeringsdiens*[224] where it was held:

> "*Mora creditoris* kom te pas waar die skuldenaar nie sonder die medewerking van die skuldeiser kan presteer nie. Vir die bestaan van *mora creditoris* is dit nodig dat die skuldeiser deur die skuldenaar opgeroep of aangespreek moet word om die verlangde medewerking te verleen. ('n Sodanige oproep is egter nie nodig waar óf die ooreenkoms óf die skuldeiser self 'n tyd vir prestasie deur die skuldenaar – en dus 'n tyd vir medewerking deur die skuldeiser – voorgeskryf het nie)."

For the purposes of this thesis the concept of *mora creditoris* finds application in the construction context where the contractor's performance as debtor is dependent on the performance of the employer as creditor and in particular the latter's duty to co-operate to enable the contractor to comply with its obligations. Thus, if the employer fails to perform its obligations and that causes a delay to the contractor's completion of the works, *mora creditoris* can occur. An example of this will be where the Employer does not supply the construction information to the contractor to enable him to proceed with the works. *Mora* may exist *ex re* if a predetermined time is set for the supply of such information. However, *mora creditoris* may come about where there is not merely a failure to perform by the employer, but the employer actively prevents or hinders the performance of the contractor.

In the case where a contractor fails to complete the works by the specified time as a result of the failure of the Employer to co-operate, the law, on the authority of *Erasmus v Pienaar,*[225] dictates that a debtor and a creditor cannot simultaneously be in *mora* and that *mora debitoris* on the part of the contractor is cured or terminated when the creditor fails to co-operate or prevents performance by the debtor.

The following passage in *Erasmus v Pienaar,*[226] sheds light on this aspect of the effects of *mora creditoris* and how it correlates with the consequence of time being at large under English law:

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[224] *Martin Harris & Seuns Ovs (Edms) Bpk V Qwa Qwa Regeringsdiens* 2000 (3) SA 339 (SCA).
[225] *Erasmus v Pienaar* supra note 149.
[226] Ibid.

> "*Mora creditoris* het tot gevolg dat die skuldenaar se aanspreeklikheid in verskeie opsigte verslap word." (Sien De Wet en Yeats *Kontraktereg en Handelsreg* 4de uitg op 169–170 en sake daar aangehaal en De Villiers (op cit op 207 ev).) De Wet en Yeats (op cit op 169), met 'n beroep op D 50.17.173.2 ("*Unicuique qua mora nocet*") en Voet 22.1.28 ("*De caetero mora regulariter soli nocet, non alteri*"), verduidelik hierdie verslapping op die basis "dat iemand se *mora* net homself behoort te benadeel en nie sy teenparty of selfs 'n derde nie".

De Villiers (op cit op 209) verduidelik dit op dieselfde basis:

> "As die verbintenis egter heeltemal onveranderd, en in sy volle strengheid, sou bly voortbestaan na die intrede van *mora creditoris* totdat dit uiteindelik die skuldeiser sou pas om sy toepaslike medewerkingshandeling te verrig, sou van die skuldenaar meer geverg word as wat hy verplig is om te doen. As die verbintenis so onveranderd sou bly voortbestaan, sou die skuldeiser homself ten koste van die skuldenaar kon bevoordeel terwyl *debet neutri sua frustratio prodesse* (D 17.1.37), en die grondbeginsel in verband met *mora* as vorm van kontrakbreuk *unicuique sua mora noce*t is.
>
> "*Mora debitoris* het die gevolg dat die verpligtinge van die skuldenaar 'n verhoging en uitbreiding ondergaan. By *mora creditoris* geld die teenoorgestelde. Terwyl die verbintenis as gevolg van *mora debitoris* stywer aangetrek word, word dit na die intrede van *mora creditoris* slapper."

The above passage indicates that the effect of *mora creditoris*, is that the obligation of the debtor is relaxed. In *Kelly and Hingle's* it was stated that where the engineer had no jurisdiction to assess the delay caused by the action of the building owner, "the contingency is therefore not covered by any provision of the penalty clause, and, as soon as it is established that delay was caused by such action, the penalty clause ceases to apply, for the contractor will in that case have been deprived, owing to the delay caused by the execution of extra works, of part of the given period allowed (in this case twenty-four months from 10 September 1923 – the date of handing over the site), for the completion of the building and the clause makes no provision for the proportionate lengthening of that original period, or for the substitution of some other period, in such an eventuality." Accordingly, the fixed date for completion cannot

exist where there is no mechanism in the contract to establish a new date for completion, to the extent of the delay and time will become at large.

It is evident from the above authorities that the engineer does not have any jurisdiction in the absence of an extension of time clause to proportionally lengthen the contractual period in order to preserve the Employer's right to Penalties. It may be argued that the Conventional Penalties Act[227] makes provision for such eventuality by allowing the Penalty to be reduced in proportion to the prejudice suffered. In other words the Penalty will be reduced to the extent that the delay is caused by the Employer.

However, by considering the Conventional Penalties Act,[228] the conclusion must be drawn that it is only the court's jurisdiction to possibly reduce such Penalty. It is contended that the application area of the Penalties Act should not be extended to be included as a qualifying factor in the proposed "Proposition Matrix".

It is therefore the submission of this thesis that the application of Proposition 2 is consonant with the applicable South African legal principles not only where the Contractor's progress has been delayed due to the default of the Employer or its Agents but also any other act or omission impacting on the Contractor's express right to a certain amount of time to perform the works. The Contractor will be able to argue that the fixed completion date has become inoperable, could be disregarded and time became at large.

The authority for the "Time at Large" argument is, however, not founded solely on the "Prevention Principle". In England the "Prevention Principle" is the implied term which was defined in the *Holme v Guppy* case as "[i]f a man by his own act prevents the performance of what another has stipulated to perform, he cannot take advantage of his own wrong".

In light of the *Group Five* decision that a tacit term cannot co-exist with a contradictory express one should the "prevention Principle" should find application in South Africa on another basis.

[227] Act 15 of 1962.
[228] Ibid.

The application of Proposition 2 in South Africa should therefore be based on the notion that the Contractor has an express right to complete a certain Scope of Works within a certain time period. When the Employer unilaterally impacts on this right without a contractual mechanism (from the transaction) to fix a new date for completion (*ex re*), time will be at large.

This Proposition 2 may, however, be qualified by Proposition 3, which is subject to Proposition 4, as will be further discussed hereunder.

4.2.3.3 Proposition 3 – Extension of Time

Proposition 1 is the general rule that the Employer is entitled to levy a penalty payable by the Contractor for late completion. Proposition 1 is, however, qualified by Proposition 2, as an exception to the general rule, where the delay was caused by an Employer's act of prevention.

The qualification of Proposition 1 by Proposition 2 is, however, subject to a further qualification by Proposition 3, in terms of which Proposition 2 must yield to the express terms of the Contract.

The important consideration in relation to Proposition 3 is whether the contract has an extension of time mechanism to fix a new date for completion *ex re* (by the transaction) where the previous fixed date became inoperable because of the operation of Proposition 2.

Proposition 3 will have the effect of preventing the fixed date for completion from being disregarded and time becoming "at large". The operation and effectiveness of Proposition 3 will depend on the interpretation of the scope of the "prevention acts' covered.

The applicability of Proposition 3 will further depend on the jurisdiction of the Contract Administrator[229] or Principal Agent (in terms of the JBCC PBA). A Contract

[229] General term used by the SCL *Protocol* op cite note 14 at page 53. A Contract Administrator is defined as: "The person responsible for the administration of the contract, including certifying what extension of times are due, or what additional costs or loss and expense is to be compensated. Depending on the form of contract the person may be referred to by such terms Employer's Agent, Employer's Representative, Contract Administrator, Project manager or Supervising Officer or be specified as a particular professional, such as the Architect or the Engineer. The Contract Administrator may be one of the Employer's employees."
The JBCC PBA uses the term Principal Agent to denote the Contract Administrator.

Administrator derives its authority to act from the contract itself and does not have jurisdiction to fix a new date for completion where such authority is not specifically derived from the contract.

In determining the ambit of the provisions covering the extension of time events and the jurisdiction of the Contract Administrator, Proposition 3 will be subject to the rules governing the interpretation of Proposition 4.

4.2.3.4 Proposition 4 – Restrictive interpretation

As stated above Proposition 4 introduces the rules of interpretation which will apply to determine the ambit of Proposition 3 and whether same has the effect of qualifying Proposition 2.

Therefore if it is determined that, in terms of Proposition 3 the contractual extension of time mechanism allows for a new date for completion to be fixed in the event of an Employer Risk Event,[230] the penalty provision will remain enforceable.

Accordingly if the extension of time clause, subject to a Proposition 4 restrictive interpretation, is wide enough to cover the circumstances or the event causing the delay and affording the Contract Administrator authority to apply it, a new date for completion will be fixed. Penalties will remain enforceable if the Contractor fails to complete the works by the revised new date for completion.

However, if it is found that in terms of Proposition 3, the contractual extension of time mechanism does not on a proper interpretation include the specific event or circumstance or does not provide the Contract Administrator with the jurisdiction to fix a new date for completion *ex re* (by the transaction), time will become "at large" and the Penalty provision will become inoperable.

Therefore, because the applicability of Proposition 3 will have a direct impact on the enforceability of Penalties in relation to Proposition 1, it will be subject to restrictive interpretational rules as laid down by the various authorities as applicable to Penalty provisions.

[230] SCL *Protocol* op cit note 14 at page 56 defines an Employer Risk Event as "An event or cause of delay which under the Contract is at the risk and responsibility of the Employer".

In the *Kelly and Hingle's* case, Judge Feetham enunciated the following: "I have to take into account the rules which are recognised in, or may be deduced from, that case and the earlier decisions as governing the application of penalty clauses in building contracts; namely, (1) that where a building owner by his own act prevents performance he is not, apart from special stipulation, entitled to take advantage of his own wrong; (2) that where the terms of the contract are ambiguous, and one construction would lead to an unreasonable result the Court will be unwilling to adopt that construction: (3) that an unreasonable burden is cast upon the contractor where the work to be done in a limited time subject to a penalty clause may be increased at the will of the building owner; and (4) that, where the terms of the contract are such as in effect to make the building owner judge in his own cause on questions of delay, such provisions are to receive a restrictive interpretation."[231]

In the *Wells* case, the decision given by Judge Wright, and confirmed by the court of appeal is clear authority in favour of a restrictive interpretation on the basis of the *euisdem generis* rule.

Judge Salmon in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*[232] stated the following: "The Liquidated and Ascertained Damages and Extension of Time Clauses in printed forms of contract must be construed strictly *contra proferentem*. If the Employer wishes to recover Liquidated and Ascertained Damages for a failure by the Contractors to complete on time in spite of the fact that some of the delay is due to the Employer's own fault or Breach of Contract, any Extension of Time Clause should provide, expressly or by implication, for an extension on account of such fault or breach on the part of the Employer."

"No doubt it may be said against this restrictive construction that in such a contract as this variations involving additions to the works as described in the contract documents, and consequent delay in completion, must have been anticipated by both parties as highly probable if not inevitable, and that it can never have been the intention of the building owner that the penalty clause should cease to apply immediately such a variation was made; but I must take the words of the penalty clause as actually framed as expressing the intention of the parties, and if the

[231] *Kelly and Hingle's* supra note 181 at page 284.
[232] *Peak Construction* supra note 196.

building owner, who is responsible for framing the conditions of contract, has failed to frame the penalty clause in terms as favourable to himself as he intended, he is not entitled to have its terms stretched against the contractor in order to cover a contingency for which he has omitted to make express provision; in case of ambiguity the rule in favour of construction *contra preferentem* clearly applies to such a penalty clause."[233]

In *Dodd v Churton*,[234] it was stated that "one rule of construction with regard to contracts is that when the terms of a contract are ambiguous and one construction would lead to an unreasonable result, the Court will be unwilling to adopt that construction."[235]

It is evident from the authorities cited above that there is a general rule of construction that, subject to any express term to the contrary, ambiguities, or inconsistencies, in contract documents should be construed *contra proferentem*, and particularly with regard to liquidated damages and penalty clauses. The above quotes have been included to illustrate the operation of the restrictive interpretation rules more conveniently. It is uncertain whether the South African courts would follow this restrictive interpretation or opt for the purposive interpretational approach. However, a Contractor may still argue that the restrictive interpretation rules are applicable in South Africa. It is therefore pertinent that these gaps that allow for potential dispute be closed.

In one of the more recent cases in England, *Multiplex Constructions (UK) v Honeywell Control Systems Ltd,*[236] Jackson, J derived three propositions regarding the prevention principle of which the last is particularly relevant to the interpretation of extension of time clauses, which stated:

(i) "Actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause delay beyond the contractual completion date.

[233] *Kelly and Hingle's* supra note 181 at 284-5.
[234] *Dodd v Churton* supra note 187.
[235] *Kelly and Hingle's* supra note 181 at 282.
[236] *Multiplex Constructions (UK) v Honeywell Control Systems Ltd* [2007] EWHC 447 (TCC) B.L.R. 195 (QBD (TCC).

(ii) Acts of prevention by an employer do not set time at large, if the contract provides for extension of time in respect of those events.

(iii) In so far as the extension of time clause is ambiguous, it should be construed in favour of the contractor"

The English case of *Bramall & Ogden Limited v Sheffield City Council*[237] involved a contractor being contracted by a local authority to construct a number of dwelling houses. This contract was based on the terms of JCT Standard Form of Building Contract (1963 edn), which is the standard building contract in use in the United Kingdom. The contract had provision for sectional completion but in the present case provided for a single completion date for the whole of the works. The contract appendix, however, defined the rate of liquidated damages as based on the number of houses which remained "uncompleted". Thus, the contract linked the rate of liquidated damages to sectional completion of the works. It was held that the sectional basis of the liquidated damages was inconsistent with the non-sectional definition of the Works and the completion date. Thus, the fact that the contract did not provide for completion of the houses individually or in sections, but for the works as a whole meant that the liquidated damages provision was inconsistent with the provisions for the completion of the whole of the works as stated in the contract. On this basis, and guided by the principle that liquidated damages provisions should be construed strictly and *contra proferentem*, the court held that this inconsistency between the relevant contractual provisions had the effect of preventing the employer from enforcing his rights to liquidated damages against the contractor.

Another illustration of this area of application is found in the case of *Arnhold & Co Ltd v Attorney General of Hong Kong,*[238] in which the contractor undertook to execute works for the construction of sewerage works. There were substantial delays in completion of the works and the government sought to deduct liquidated damages. The liquidated damages provision provided for a minimum and a maximum amount to be deductible per day. A clause provided that above the minimum the sum should vary in accordance with the extent to which any part of the works was capable of occupation or use by the government. The contractor sought a declaration that the

[237] *Bramall & Ogden Limited v Sheffield City Council* (1983) 29 B.L.R. 76.
[238] *Arnhold & Co Ltd v Attorney General of Hong Kong* (1989) 47. B.L.R. 129.

government was not legally entitled to the deduction because the term containing the right to liquidated damages was void for uncertainty. In this case the uncertainty in the contract also gave rise to the findings of the court that the liquidated damages provision was void for uncertainty, because there was nothing within the contract documents which indicated what principles governed the liquidated damages being fixed as a figure between the maximum and the minimum figures or how such fixing should be done.

In considering the above authorities on the interpretational rules as envisaged by Proposition 4 based on "Penalty Clauses", the earlier cases also referred to the "Extension of Time Clauses" as "Penalty Clauses" and used same interchangeably. In *Kelly and Hingle's* Judge Feetham referred to the interpretation of the words "….other causes beyond the contractor's control" in terms of Clause 17 and ruled that "ordering extras" was not covered by the "Penalty Clause". Generally the aforesaid clause will be referred to as an "Extension of Time Clause" and not a "Penalty Clause".

Based on the "Proposition Matrix", the interpretation rules included in Proposition 4 were specifically in relation to Proposition 3 which includes the "Extension of Time Clauses".

However, in the two modern cases, *Bramall*[239] and *Arnhold*,[240] quoted above, the interpretational rules also relate to the Liquidated Damages or Penalty provisions or "Penalty Clauses" itself. It should therefore be concluded that these add another dimension to the "Proposition Matrix". The two cases cited above provide authority that not only Proposition 3 (extension of time) is subject to Proposition 4 (Restrictive Interpretation), but Proposition 1 (Penalty) should also be subject to Proposition 4 in determining whether it is enforceable.

It is therefore concluded that the "Proposition Matrix" should be expanded not only to include the possible scenarios of applying to the "Prevention Principle" or "Time at Large" but to also cover the wider concept of "Ineligibility of Penalties". The legal issue to be determined in the above scenario is then whether the Employer is

[239] *Bramall* supra note 237.
[240] *Arnold* supra note 238.

entitled to levy Penalties or the Employer is deprived of such right and must claim and prove damages.

Therefore the starting point should always be Proposition 1. However, even before considering whether Proposition 1 should be qualified by Proposition 2, same should be subject to Proposition 4. The Penalty provision itself should be construed strictly and *contra proferentem* and any inconsistency between the relevant contractual provisions should have the effect of preventing the Employer from enforcing his rights to levy Penalties against the Contractor. Only after passing this first hurdle would Proposition 2 find application as illustrated above. Even though Proposition 2 was considered contentious in the *Group Five* case, it is submited that the Contractor does not have to rely on an implied term to overtake an express fixed date or completion date as contended in the case. The Contractor's right to a certain construction period is also an express term and Proposition 2 has equal weight to qualify the Penalty Provision of Proposition 1.

It is therefore contended by this thesis that all the legal principles included the "Proposition Matrix" are consistent with and applicable in South African law.

4.3 Application areas in terms of JBCC PBA

4.3.1 Proposition 1 – Penalty

From the *Bramall*[241] and *Arnhold*[242] cases it is evident that the Contractor may succeed in contesting Penalties being levied on grounds that the Penalty Provision is ambiguous or inconsistent and same should be construed strictly and *contra proferentem*, in other words, in favour of the Contractor.

JBCC PBA provides for the levying of Penalties in Clause 24:

24.1 "Where the **contractor** fails to bring the **works** or a **section** thereof [CD] to **practical completion** by the date for **practical completion** [CD], or the revised date for **practical completion**, the **contractor** shall be liable to the **employer** for the **penalty** [CD]

[241] *Bramall* supra note 237.
[242] *Arnold* supra note 238.

24.2 Where the **employer** elects to levy such **penalty**, on **notice** thereof to the **contractor**, the **principal agent** shall determine the amount due from the later of the date for **practical completion** [CD], or the revised date for **practical completion** up to and including the earlier of:

24.2.1 The actual or deemed date of **practical completion** of the **works** [23.7.1] or a section thereof

24.2.2 The date of termination [29.0]."

Provision is made on page 7 of the Contract Data, under the heading "19/20/24 Practical Completion/penalty for late completion", "to include the 'date for practical completion' and the 'Penalty amount per calendar day'".

The Contract Data allows the above options for "**Practical completion** of the **works** as a whole" OR "**Practical completion** of the **works** in **sections**".

It often happens in the industry that the Contract Data is completed to provide for Sectional Completion on specified Dates for Practical Completion, without properly defining the Section of the Works in the contract.

In other occasions, the Contract Data will not provide for Sections and will accordingly have a Date for Practical Completion for the Works as a whole, with a corresponding Penalty. On site, however, the different units will, for example, be certified as Practically Complete on different dates to facilitate the handing over to the Employer. In such situations the Penalty will then often be applied proportionally to the amount specified in the Contract Data.

The above are scenarios where the Employer will run the risk of being deprived of levying Penalties on the basis of Proposition 1 being subject to Proposition 4.

A further possible application area will be based on the interpretation of Clause 24 itself.

Clause 24.2 stipulates that the Principal Agent shall determine the amount due from the Date for Practical Completion as included in the Contract Data or revised Date for Practical Completion. Accordingly, this denotes an original Date for Practical

Completion or revised Date for Practical Completion in terms of Clause 23.7.1 by the Principal Agent after a claim was received.

Clause 24.2.1 stipulates further that the duration of delay for the purposes of calculating the Penalties shall be until actual or deemed Date of Practical Completion of the Works in terms of Clause 23.7.1. The Clause is inconsistent in that the date of Practical Completion should be certified by the Principal Agent in a Certificate of Practical Completion in terms of Clause 19.4 and not as revised in terms of Clause 23.7.1.

In the industry, the above inconsistency is not contentious as industry members apply Penalties until the date as certified in the Certificate of Practical Completion without contestation. However, on the authorities cited above and if challenged by a scrupulous Contractor, the court may be forced to approach same differently.

Clause 24.2 further stipulates that the Principal Agent shall determine the amount due after a notice has been issued by the Employer to the Contractor in the event of the former electing to levy such a penalty.

The Employer is very rarely involved in any of the administration procedures and it may very well happen that the Principal Agent levies Penalties without the Employer notifying the Contractor.

Courts may consider the notification as a condition precedent to the levying of Penalties. It will also be open to the Contractor to argue that the Principal Agent has only jurisdiction to levy Penalties from the time of such Notice and not retrospectively.

The following amendments to JBCC PBA Clause 24 are proposed to remove these doubts and inconsistencies.

24.1* “Where the **contractor** fails to bring the **works** or a **section** thereof [CD] to **practical completion** by the **date for practical completion** [CD], or the revised **date for practical completion**, the **contractor** shall be liable to the **employer** for the **penalty** [CD]

24.2* Where the **employer** elects to levy such **penalty**, the **principal agent** shall notify the **contractor** thereof and shall determine the amount due from the **date for practical completion** up to and including the earlier of:

24.2.1* The actual [19.3.3] or deemed [19.4] **date of practical completion** of the **works** or a **section** thereof

24.2.2* The date of termination [29.0]."

4.3.2 Proposition 3 – Extension of Time

As discussed above, in order to prevent time from becoming at large and accordingly for the Employer to preserve its right to levy Penalties, Proposition 3 should qualify Proposition 2 in order for Proposition 1 to remain applicable.

In order to determine the above legal issue, the interpretational rules of Proposition 4 shall apply. Proposition 3 is therefore subject to Proposition 4.

Proposition 3 should therefore comply with two separate requirements. Firstly, the Contract Administrator should have powers conferred by the contract to revise the Date for Practical Completion and secondly, the delaying event allegedly causing the delay should be covered by the Extension of Time Provision in the contract.

4.3.2.1 Principal Agent's jurisdiction

In terms of the JBCC PBA, the Principal Agent derives its power and authority to act and bind the Employer from the terms of the Agreement. Refer to JBCC Clause 6.1 and the definition of the Principal Agent.

6.1 "The **employer** warrants that the **principal agent** has full authority and obligation to act and bind the **employer** in terms of this **agreement**. The **principal agent** has no authority to amend this **agreement"**

"PRINCIPAL AGENT: The entity [CD] appointed by the **employer** with full authority and obligation to act in terms of this **agreement**"

In relation with the Principal Agent's Authority and power to revise the date for Practical Completion, the following provisions are relevant.

JBCC PBA Clauses 23.1 to 3 set out the events and circumstances entitling the

Contractor to claim a revision of the date for Practical Completion for a delay to Practical Completion caused by such events. Refer to Clause 23.1 below (*own emphasis*).

23.1 The **contractor** is entitled to a revision of the date for **practical completion** by the **principal agent** without an adjustment of the **contract value** for a delay to **practical completion** caused by one or more of the following events:

JBCC PBA Clause 23.4 lays down the procedure for such claim and the authority of the Principal Agent to determine the revised Date for Practical Completion in terms of Clause 23.7 after receipt of the claim.

However, Clause 23.4 provides for a claim procedure where the events or circumstances listed in Clause 23.1 to 3 could cause a delay to the Date for Practical Completion. As illustrated in Chapter 2 above, the Date for Practical Completion will not be delayed by an event delaying the critical path of the Programme. It will be the Date of Practical Completion (construction completion date) that will be delayed, which should entitle the Contractor to a revision of the Date for Practical Completion (contractual completion date).

Furthermore, Clause 23.4.2 provides for a notice to be issued by the Contractor of its intention to claim for a revision to the Date of Practical Completion and Clause 23.5 provides for the Contractor to submit a claim for the revision of the Date of Practical Completion to the Principal Agent.

Accordingly, Clause 23.4, 23.4.2 and 23.5 provide for the procedure and conditions precedent for such claim for the revision of the date of Practical Completion caused by a delay to the Date for Practical Completion to be deemed by the Principal Agent in terms of Clause 23.7.

When applying the restrictive interpretational rules of Proposition 4, it may be found due to the inconsistency, that the Principal Agent has no authority to determine a claim for the revision of the Date for Practical Completion caused by a delay to the Date of Practical Completion according to the Contractor's entitlement in terms of Clause 23.1 to 3.

In order to prevent the possibility it is recommended that the relevant JBCC Clauses be amended as follows:

23.4* Should a listed event or circumstance occur [23.1-3] which could cause a delay to the **date of practical completion**, the **contractor** shall:

23.4.1 *Give the **principal agent** reasonable and timeous notice of such event or circumstance and take reasonable steps to avoid or reduce such delay

23.4.2 *Within ten (10) **working days** of becoming aware, or when it ought reasonably to have become aware of such event or circumstances, give **notice** to the **principal agent** of the intention to submit a claim for a revision to the **date for practical completion**, failing which the **contractor** shall forfeit such claim

23.5* The **contractor** shall submit a claim for the revision of the **date for practical completion** to the **principal agent** within twenty (20) **working days**, or such extended period the **principal agent** may allow, from the end of the event or circumstance, failing which the **contractor** shall forfeit such claim

4.3.2.2 Ambit of Extension of Time provisions

The importance for the Employer to properly frame the Extension of Time Clause as favourably as possible for him in order to cover a wide contingency of events, is clearly evident from the cited authorities that pertain to the “Prevention Principle”. The Extension of Time Clause is like a two-edged sword: on the one hand, it entitles the Contractor to more time to escape Penalties from being levied; and on the other hand, it preserves the right of the Employer to levy Penalties and prevent time from becoming at large. Almost all modern contracts would have closed this gap by including a general Extension of Time provision to revise the Date for Completion to the following effect:

“Any delay, impediment or prevention caused by or attributable to the Employer, the Employer’s Personnel, or Employer’s other contractors on the Site.”[243]

[243] FIDIC Clause 8.4(e).

JBCC PBA drafters might have attempted to achieve this with Clause 23.3. It is, however, questionable whether they managed to close this gap in order to preserve the Employer's right to levy Penalties.

Clause 23.3 relies on the phrase "….due to any other cause beyond the **contractor**'s reasonable control that could not have reasonably been anticipated and provided for", to cover any prevention act of the Employer or its Agents. It further states that the "**principal agent** shall adjust the **contract value** where such delay is due to the **employer** and/or **agents**…."

In *Kelly and Hingle's* the expression "….other causes beyond the Contractor's control" was, on a strict interpretation, construed not to include the ordering of alterations and additions.

It is furthermore submitted that the words added to the phrase "that could have reasonably been anticipated and provided for" further narrows down the ambit of Clause 23.3. On construing Clause 23.3 *contra proferentem* against the Employer it could be argued that any construction related delaying event, albeit not under the Contractor's reasonable control, should have been reasonably anticipated and therefore not in the ambit of Clause 23.3. In addition, it may be further argued that there could be provided for most delaying events by building float into the Programme. From the above it is evident that there are shortcomings in the Clause 23.3 to counter "Time at Large" arguments by Contractors.

A specific area where the JBCC PBA may be vulnerable in relation to "Time at Large" arguments is in the event where outstanding Construction Information has been issued late by the Agents. It may be argued by a Contractor that Clause 23.2.5 on a restrictive, *contra proferentem* interpretation against the Employer does not cover the event envisaged by Clause 12.2.8.

12.2.8 "Regularly submit to the **principal agent** a progress report and a schedule of outstanding **construction information** to avoid delays to the **works**"

Clause 23.2.5 specifically provides for late Construction Information in terms of Clauses 5.5, 6.4, 13.2.3, and 17.1.1–2.

23.2.5 "Late or incorrect issue of **construction information** [5.5; 6.4; 13.2.3;17.1.1–2]"

It may therefore be contended that by applying *eiusdem generis* interpretation as envisaged by the interpretational rules as laid down by Proposition 4, it does not include the late issue of outstanding Construction Information as provided for in terms of Clause 12.2.8

It is often found that the Principal Agents out of ignorance delete certain specific prevention acts from Clause 23.2.[244] The Contractor may use the opportunity to argue that time became at large on the occurrence of such events where there is no specific provision for Extension of Time. The Employer will then need to argue that Clause 23.3 is wide enough to cover this. However, with the possible narrow interpretation of Clause 23.3 the Contractor may succeed in their argument which may be fatal for the Employer to preserve Penalties and prevent time from becoming at large.

It is therefore recommended to remove doubt and uncertainty by specifically including the following provision to cover any prevention act.

23.2.13* Any delay, impediment or prevention caused by or attributable to the **employer**, the **principal agent** and/or **agents**, or other **direct contractors** on the **site**

4.4 Conclusion

The above amendments will close the gap for Contractors to bring arguments against the Employer's entitlement to levy Penalties. The first category of amendments pertaining to Clause 24 will ensure consistency in defining the Penalty amounts and the calculation of such. In conjunction with same, the Principal Agent should ensure that the Contract Data is completed properly, especially where the Works will be executed in Sections. Penalties and Dates for Practical Completion should be separately included for each Section and the Scope of the Works pertaining to such Section should be clearly defined.

[244] Examples which may be fatal include Clause 23.2.1, 23.2.3, 23.2.4, 23.2.5, 23.2.6, 23.2.7, 23.2.8, 23.2.11 and 23.2.13.

The second category of amendments will ensure that there is no lack of jurisdiction or authority for the Principal Agent to determine Extension of Time Claims. On a restrictive *contra proferentem* interpretation it may be argued that due to the inconsistency in Clause 23.4 to 5 the Principal Agent lacks jurisdiction to revise the Date for Practical Completion as envisaged by Clause 23.1 to 3 entitling the Contractor to same.

The third category of amendments widens the ambit of the Extension of Time Provisions to specifically include any delay, impediment or prevention caused or attributable to the Employer, his Agents or Direct Contractors.

As mentioned, the concept of “Time at Large” is relatively unfamiliar to the South African industry. It is, however, worth the effort to apply the lessons learnt in England to prevent unnecessary disputes and litigation suits. The JBCC PBA as illustrated above can be amended with relative ease to prevent uncertainty in this potentially hazardous area of litigation.

CHAPTER 5

DELAY ANALYSIS

5.1 Introduction

The use of Critical Path Method (CPM) based programming techniques to analyse construction contract disputes in the USA and the UK have increased dramatically over the past 25 years.[245] CPM techniques are used for proving the effect of causal events rather than inferring the cause from the perceived event.[246] In principle, there are three methods of analysis available that rely on a fixed baseline, which are referred to as static methods and one method that relies on a shifting baseline and is referred to as a dynamic method.[247] The static methods are: (i) as-planned versus as-built, (ii) as planned impacted and (iii) as-built but-for and the dynamic method which entails a time impact analysis.[248]

Given that many of the events causing delay are interrelated and competing, problems often arise in determining cause and effect. Most standard construction contracts are not only silent on which of the delay analysis techniques is to be used, but also on important issues such as how to deal with float, concurrent delays and global claims.[249] The thesis will further deal with these uncertainties in relation to the JBCC PBA from a South African law perspective.

It is submitted that the static methods of delay analysis are not compatible with the proposed methodology and amendments to the contractual provisions which increase the legal significance of the Programme as discussed in Chapter 3 of this thesis.

The time impact analysis is the only method which is consistent with the key principles which are incorporated as a result of the proposed amendment of JBCC PBA Clause 12.2.6.

[245] Pickavance op cit note 50 at 555.
[246] Pickavance op cit note 50 at 556.
[247] Ibid.
[248] Ibid.
[249] Float, concurrent delay and global claims will be defined under the relevant subheadings.

5.2 Time Impact Analysis

Time impact methodology, also referred to as the snapshot or time slice method, is an impact technique that examines Employer Risk Events and their effects at different times during the progress of the project. Events are analysed contemporaneously, with each event being judged on its own merits and information available at the time.[250] This method has been recognised as an appropriate method of analysis by the United States Board of Contract Appeals, is expressly required by USA government contracts and is acknowledged by the SCL *Protocol* as the appropriate method for contemporaneous analysis.[251] It is a dynamic method of calculation which derives its baseline from the Contractor's changing programme during the course of the works, to which is added fragments of events that have occurred in order to calculate their effect on the programme expressly or impliedly in use at the time of the event.[252] In doing so account is taken of the changing pattern of float and the shift in the critical path.[253]

This contemporaneous approach to delay analysis allows assessment to be made of three important aspects that tend to be unavailable with other methods:

1. "The actual state of progress at the time the event was initiated;
2. the changing nature of the critical path as a result of delay to progress and acceleration; and
3. the concurrency of delays to progress and to completion."[254]

Gibson[255] submits that the following should be done for each Employer Risk Event:

1. Update the as-planned programme to show what had actually been achieved at the time of the Employer Risk Event.
2. Analyse the updated programme which represents the position of the project at the time of the event, this programme will forecast whether the project is likely to be completed ahead of, on or behind schedule.

[250] Gibson op cit note 71 at page 175.
[251] Pickavance op cit note 50 at page 569.
[252] Pickavance op cit note 50 at page 569-70.
[253] Pickavance op cit note 50 at 570
[254] Ibid.
[255] Gibson op cit note 71.

3. Create an impacted programme demonstrating, with descriptions, the duration of new activities flowing from the delay event, and their logical interface with the remaining contract works. It is recommended that a subnet be created for this.

4. Add that subnet into the impacted programme and link this to the existing programme activities and reanalyse the impacted programme.

5. If the planned construction completion date is later than the planned construction completion date on the current updated programme, then there is an entitlement to an extension of time.

6. The extent of the extension of time is the slippage between the construction completion date on the current updated programme and that shown on the impacted programme.[256]

This prospective method analyses the likely or expected effect of the delay event on the completion of the works, and therefore shows a Contractor's entitlement to extension of time.[257]

It is therefore recommended that the JBCC PBA incorporate the dynamic impact analysis method as the required method to prove cause and effect. JBCC Clause 23.6.2 should accordingly be amended as follows:

23.6.2* The cause and effect of the delaying event or circumstance on the **date of practical completion**, illustrated by the impact and/or a change to the critical path on the **programme** by performing a time impact analysis

Furthermore the time impact analysis is the only analysis technique that affords an acceptable framework for the legal principles discussed hereunder.

[256] Gibson op cit note 71 at page 175.
[257] Gibson op cit note 71 at page 176.

5.3 Concurrency

Concurrent delay is defined by the SCL *Protocol* as "the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event and the effects of which are felt at the same time."[258] Contract Administrators often find claims involving concurrent delay difficult to resolve due to the fact that standard forms of contract do not address this particular issue. Due to a lack of case law on many construction matters, South African courts, as previously discussed, often turn to English cases for guidance. This section discusses concurrent delays and analyses how they are dealt with under English law with a view to determine if South Africa can rely on English law for guidance on this issue. It is further important to take into consideration and compare the specific contractual settings to determine whether the English position involving the JCT[259] is consistent with the South African position under the JBCC PBA.

5.3.1 English position[260]

The point of departure for establishing the English position on concurrency is the recent case of *Walter Lilly & Company LTD v Mackay & Anor*,[261] which approved and accepted the *Malmaison* approach as reflecting the UK law as consistently applied in the English courts.[262]

This approach is derived from *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*, where the court in deciding on extension of time in relation to concurrent delays, stated:

> "…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

[258] SCL *Protocol* op cit note 14 at 53.
[259] The Joint Contracts Tribunal Standard Form of Building Contract 1998 Edition.
[260] It must be noted that the position as discussed in this thesis is in relation to the JCT contract as all cases referred to dealt with same.
[261] *Walter Lilly & Company LTD v Mackay & Anor* [2010] EWHC 1773 (TCC).
[262] See *De Beers v Atos Origin IT Services UK Ltd* [2011] BLR 274 and *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848.

> the exceptionally inclement weather (a relevant event), and if the failure to work during the week is likely to delay the Works beyond the completion date by one week, and then if he considers it fair and reasonable to do so, the architect is required to grant an extension 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."[263]

The case of *Peak Construction (Liverpool) Ltd v McKinney Foundations* Ltd[264] makes this position clear when the court states:

> "If the failure to complete on time is due to the fault of both the Employer and the Contractor, in my view [Liquidated and Ascertained Damages] Clause does not bite. I cannot see how, in the ordinary course, the Employer can insist on compliance with a Condition if it is partly his own fault that it cannot be fulfilled….I consider that….the Employer, in the circumstances postulated, is left to his ordinary remedy; that is to say, to recover such damages as he can prove flow from the Contractor's breach…The Liquidated and Ascertained Damages and Extension of Time Clauses in printed forms of contract must be construed strictly contra proferentem. If the Employer wishes to recover Liquidated and Ascertained Damages for a failure by the Contractors to complete on time in spite of the fact that some of the delay is due to the Employer's own fault or Breach of Contract, any Extension of Time Clause should provide, expressly or by implication, for an extension on account of such fault or breach on the part of the Employer."[265]

The court's reasoning was further enunciated in *Walter Lilly* as follows:

> "Part of the logic of this is that many of the Relevant Events would otherwise amount to acts of prevention and that it would be wrong in principle to construe Clause 25 on the basis that the Contractor should be denied a full extension of time in those circumstances. More importantly however, there is a straight contractual interpretation of Clause 25 which points very strongly in favour of the view that, provided that the Relevant Event can be shown to

[263] *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester)* Ltd (1990) 70 Con LR 32.
[264] *Peak Construction* supra note 196.
[265] *Wells* supra note 187 at page 121.

> have delayed the Works, the Contractor is entitled to an extension of time for the whole period of delay caused by the Relevant Events in question. There is nothing in the wording of Clause 25 which expressly suggests that there is any sort of proviso to the effect that an extension should be reduced if the causation criterion is established. The fact that the Architect has to award a "fair and reasonable" extension does not imply that there should be some apportionment in the case of concurrent delays…."[266]

The *Malmaison* approach has been justified with reference to several legal principles, including prevention principle, the doctrine of penalties, the burden of proof and the contractual status of the programme.[267] The *Malmaison* approach has also been adopted by the SCL *Protocol*. The *Protocol* formulated the approach as follows:

> "Where the Contractor Delay[268] to Completion occurs concurrently with Employer Delay[269] to Completion, the Contractor's concurrent delay should not reduce any EOT[270] due."[271]

The *Walter Lilly*[272] case further justifies the *Malmaison* approach on a "straight interpretation of clause 25" of the JCT contract, which states as follows:

JCT Clause 25.3.1

"If, in the opinion of the Architect/the Contract Administrator…any of the events which are stated by the Contractor to be the cause of delay is a Relevant Event and…the completion of the Works is likely to be delayed thereby beyond the Completion Date, the Architect/Contract Administrator shall in writing to the Contractor give an extension of time by fixing such later date as the Completion Date as he then estimates to be fair and reasonable …"

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[266] *Walter Lilly* supra note 261.
[267] See Pickavance op cit note 50 at 624.
[268] The SCL *Protocol* defines this as an "Expression commonly used to describe any delay caused by a Contractor Risk Event." It further states that a Contractor Delay to Completion is "a delay which will cause a contract completion date not to be met."
[269] The SCL *Protocol* defines this as an "Expression commonly used to describe any delay caused by an Employer Risk Event." It further states that an Employer Delay to Completion is "a delay which will cause a contract completion date not to be met."
[270] Extension of Time.
[271] SCL *Protocol* op cit note 14 at page 15.
[272] Walter Lilly supra note 261.

It is therefore important to note that the analysis of the English position on concurrency with reference to the aforesaid legal principles including the prevention principle, the doctrine of penalties, burden of proof and the contractual status of the programme, are specifically based on a JCT contractual setting.

5.3.1.1 Prevention Principle

As already discussed, the "Prevention Principle" is a common law principle that "no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself".[273] It is a consequence of this principle that where the contract does not have a clause providing for the Contract Administrator to extend time for the delay to completion caused by the Employer then the mechanism for liquidated damages will fail and time will become "at large".[274]

5.3.1.2 Doctrine of Penalties

Where liquidated damages are deductible only for delays to completion at the Contractor's risk, it is arguable that in situations of concurrent delays the damages so deducted cannot be liquidated damages because it cannot be established that the delay to completion was caused by the Contractor.[275] In this instance, the damages will be a penalty, and penalties are not enforceable in English courts.[276]

Alternatively, a failure to grant the Contractor an extension of time may arguably result in a penal deduction of damages by the Employer when there is no real loss.[277] As the purpose of an extension of time is to preserve the Employer's right to deduct liquidated damages, extension of time should therefore be granted to preserve that right.[278] In line with this argument, any contractual Clause purporting to allocate a time related risk of concurrent delay to the Contractor will not be valid or, failing that, any clause providing for liquidated damages will be unenforceable as a penalty.[279]

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[273] *Roberts v The Bury Improvement Commissioners* (1870) LR 5 CP 310 at page 326.
[274] Pickavance op cit note 50 at page 624–625.
[275] Pickavance op cit note 50 at page 625.
[276] Ibid. See also *Bramall* supra note 237.
[277] Ibid.
[278] Ibid.
[279] Pickavance op cit note 50 at page 625.

5.3.1.3 Burden of proof

It has also been argued that in situations of true concurrency, contractual responsibility for delay to completion can be considered indeterminate.[280] The Employer will be unable to positively determine its entitlement to liquidated damages and the Contractor will also be unable to prove its corresponding entitlements to reimbursement of its time related costs and accordingly the losses will be left where they fall.[281]

5.3.1.4 Contractual status of the Programme

Further support for the approach of granting extension of time in the case of concurrent delays is provided by a consideration of the contractual status of construction Programmes.[282] Under most standard forms of contract, Contractors are not required to perform the activities comprising the work in any particular order or sequence.[283] The Contractor must start on the commencement date and complete by the completion date but between those dates it can work at any pace whether it complies with the Programme or not.[284] How the Contractor proceeds with the work between commencement and completion dates is up to it, provided it does not suspend works or fail to proceed regularly and diligently.[285] Under this regimen the Employer cannot do anything to control the timing or duration of individual activities or their sequence. Unless the Employer is of the opinion that the Contractor is unlikely to complete the Works by the completion date, there is rarely any reason for the Employer to want to control the sequence, timing or order of the Contractor's work.[286]

When the Contractor sets down its programme, it registers its intent for the duration and sequence of the activities in its Programme.[287] However, subject to the terms of the specific contract, this intention is not usually a contractually fixed intention.[288] If the Contractor wishes to make changes to the sequence, duration and timing of

[280] Ibid.
[281] Ibid.
[282] Pickavance op cit note 50at page 626.
[283] Ibid.
[284] Ibid.
[285] Ibid.
[286] Ibid.
[287] Ibid.
[288] Ibid.

particular activities it is free to do so, but his delay to progress is measured by reference to the difference between the intention that is shown on its programme and what, in fact, it achieves.[289]

5.3.1.5 Compensation for prolongation

The *Protocol* formulates recommendations on compensation in relation to concurrent events as follows:

> "Where an Employer Risk Event and a Contractor Risk Event have concurrent effect, the Contractor may not recover compensation in respect of the Employer Risk Event unless it can separate the loss and/or expense that flows from the Employer Risk Event from that which flow from the Contractor Risk Event. If it would have incurred the additional costs in any event as a result of Contractor Delays, the Contractor will not be entitled to recover these additional costs. In most cases this will mean that the Contractor will be entitled to compensation only for any period by which the Employer Delay exceeded the duration of the Contractor Delay."[290]

In most cases, the awarding of an extension of time and fixing of a new contractual completion date would precede any concomitant expense and/or loss. Most standard construction contracts envisage that the Contract Administrator will determine extension of time on a prospective approach whereas determining expense and/or loss involves a review based on a retrospective approach. Thus the evidence used by the Contract Administrator in forming his view on extension of time and the duration arrived at can be useful (but not conclusive) in determining expense and/or loss caused by the delay. While it may not be prudent to rely solely on the extensions to the contractual completion date as the prime evidence for calculating expense and/or loss, it cannot be ignored. The Architect is required under JCT Clause 26.3 to disclose what extension of time he has granted in respect of causes which also give rise to a claim for reimbursement of loss and/or expenses, if this is necessary for the purposes of ascertainment.[291]

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[289] Ibid.
[290] SCL *Protocol* op cit note 14 at page 23.
[291] Ibid.

JCT Clause 26.3 states as follows: "If and to the extent that it is necessary for ascertainment under clause 26.1 of loss and/or expense the Architect shall state in writing to the Contractor what extension of time, if any, has been made under clause 25 in respect of the Relevant Event or Events referred to in Clause 25.4.5.1 (so far as that clause refers to clauses 2.3, 13.2, 13.3 and 23.2) and in clauses 25.4.5.2, 25.4.6, 25.4.8 and 25.4.12."

In *Walter Lilly*[292] it was stated that claims by Contractors for delay and disruption related claims must be proved as a matter of fact.[293] The Contractor will have to demonstrate on a balance of probabilities that: (i) events occurred which entitle it to loss and expense; (ii) those events caused delay and/or disruption; (iii) such delay or disruption caused it to incur loss and/or expense.[294]

The Employer will always have a positive and a negative defence to such claim. The negative defence amounts to saying that the activities relied on by the Contractor did not cause delay because they were not on the critical path and therefore did not cause delay.[295] The positive defence is that the true delay was not caused by Relevant Events but by events for which the Contractor was responsible.[296]

The above discussion has highlighted the way the English courts deal with concurrent delays and the reasoning behind the said approach. It is clear from the *Walter Lilly* case that the *Malmaison* approach that where the 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 a full extension of time has its roots in the "Prevention Principle" (as enunciated in *Peak Construction*) and the wording of the JCT. Furthermore, it is clear that a Contractor is not entitled to any monetary claim for loss and expenses for concurrent delays unless it can discharge the onus of proving causation by showing that, without the Employer's risk event relied upon, the postulated loss or expense would not have been incurred.[297]

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[292] *Walter Lilly* supra note 261.
[293] *Walter Lilly* supra note 261 at page 129.
[294] *Walter Lilly* supra note 261at page 129.
[295] *Henry Boot* supra note 263 at para 15.
[296] Ibid.
[297] Vincent Moran 'Causation in construction law: the demise of the 'dominant cause' test (2014).

5.3.2 South African position

Where the English courts have adopted the *Malmaison* approach to deal with concurrent delays, the South African courts are yet to deal with this matter. South African courts are not bound to follow English court decisions as they only enjoy persuasive force here, but given the lack of construction case law on the issue, English law will in all likelihood be followed unless there is a good reason to depart from it. This part of the thesis seeks to determine the applicability of the *Malmaison* approach in dealing with concurrent delays under the JBCC PBA.

Any such analysis should firstly compare the contractual interpretation of JBCC PBA Clauses 23 and 26 with JCT Clauses 25 and 26 and secondly the applicability of the underlying legal principles on which the *Malmaison* approach is based, namely; the prevention principle, doctrine of penalties, the burden of proof and the contractual status of the Programme.

5.3.2.1 Contractual comparison

By comparing the extension of time provisions of JCT Clause 25 with the JBCC Clause 23 the distinguishing factors can be summarised as follows:

(i) Submission of Claim

The Contractor submits a claim in terms of JBCC Clause 23.5 in order to enforce its contractual entitlement provided by JBCC Clauses 23.1 to 3 and the Principal Agent determines the claim in terms of Clause 23.7. The claim shall in respect of each event[298] or circumstance separately state "the cause and effect of the delaying event."[299]

The Contractor in terms of JCT Clause 25.2 notifies the Architect of material circumstances which may delay the works, including the cause of the delay and identifies the Relevant Event. The Architect will award an extension of time as he estimates to be fair and reasonable.

[298] Clause 23.6* Where the **contractor** requests a revision of the **date for practical completion** the claim shall in respect of each event or circumstance separately state:
[299] Clause 23.6.2*The cause and effect of the delaying event or circumstance on the **date of practical completion**, illustrated by the impact and/or a change to the critical path on the **programme.**

(ii) Compensation related to Extension of Time

The Contractor is entitled to an adjustment of the Contract Value in terms of JBCC Clause 26.0 if it is successful in an extension of time claim in terms of events listed under JBCC Clause 23.2.

The Contractor must prove expense and loss or both under JCT Clause 26 and is not entitled to an automatic adjustment to the Contract Value.

The thesis therefore contends that on a contractual interpretation of the JBCC Clause 23, the onus is on the Contractor to prove on a balance of probabilities that:

(a) In terms of Clause 23.4 that the Relevant Event provided for by Clause 23.1 to 3 has occurred;

(b) in terms of Clause 23.6.2 that the Relevant Event caused a delay to the date of Practical Completion by illustrating it on a critical path of an approved Programme and

(c) in terms of Clause 23.6.3, the quantification or calculation of the working days has been delayed.

Clause 23 of the JBCC should therefore be distinguished from Clause 25 of the JCT on two major grounds. Firstly, the JBCC Clause 23 onus of proof requirements for extension of time compares with the requirements as accepted in the *Walter Lilly*[300] case to prove expense or loss in relation to JCT Clause 26. The discretion of the Architect in terms of JCT Clause 25 to award an extension of time he estimates to be fair and reasonable does not exist in JBCC Clause 23. Secondly, JBCC Clause 23 makes provision for compensation which may also be the main reason for the required onus of proof. Whereas JCT Clause 25 merely entitles the Contractor to an extension of time to exonerate them from Penalties, JBCC Clause 23 also includes compensation. The same interpretation as applied by Judge Akenhead in *Walter Lilly* in relation to JCT Clause 25 pertaining to concurrent delays can therefore not be applied to the JBCC PBA Clause 23.

[300] *Walter Lilly* supra note 261.

It is therefore submitted that the JBCC position regarding concurrent delays renders an already challenging legal conundrum even more complicated. The competing factors in deciding between the two events, one a Relevant Event entitling the Contractor to extension of time and the other a Contractor's Risk Event which does not entitle the Contractor to extension of time, is more contentious because of the possibility that the Contractor will be entitled to compensation in the event of extension of time.

Where the Relevant Event is fully within JBCC Clause 23.1, it is a Neutral Event affording the Contractor an extension of time without compensation and can therefore be compared to the JCT Clause 25. However, where the Relevant Event is within terms of Clause JBCC 23.2, it adds another dimension because of the Contractor's entitlement to compensation in addition to extension of time.

JBCC Clause 23.2 entitles the Contractor to an adjustment to the Contract Value in terms of Clause 26.0. This in turn entails two separate entitlements. Firstly, Clause 26.9.4, which is an automatic or proportionate entitlement to time related Preliminaries as defined in the Bill of Quantities and in terms of the method selected in the Contract Data. Therefore, no additional proof of any actual damages or prolongation cost is required. These time related Preliminaries may be viewed in the same light as Penalties or liquidated ascertained damages (LADs). The time related Preliminaries can be seen as a "liquidated prolongation cost" or the converse of Penalties. The time related Preliminaries are due to the Contractor in the event of an extension of time, without the need to prove any actual cost or expense and/or loss.

Secondly, the Contractor is entitled in terms of Clause 26.5 to claim actual proven expense and/or loss in addition to the related Preliminaries in terms of Clause 26.9.4. Clause 26.5 is worded very widely to include expense and/or loss for which provision was not required in the Contract Sum. If the aforesaid clause is compared with Clause 32.5 of the JBCC 2007, the predecessor of the JBCC PBA, it is evident that its wide ambit may pose a risk for the Employer which may as a result face unexpected claims.

Clause 32.5 of the JBCC 2007 was in line with Clause 26 of JCT by listing certain events which may entitle the Contractor to expense and/or loss to circumstances due to no fault of the Contractor. The listed events inter alia include:

32.5.1 The issue of **contract instruction**

32.5.2 The failure to issue or the late issue of **contract instruction** following a timeous request from the **contractor** [15.6]

32.5.3 Nondisclosure of changes made to the provisions of **JBCC** standard documentation

32.5.4 Expense and loss caused by a **direct contractor** [22.4]

32.5.5 Default by the **employer** or his **agents**

32.5.6 Suspension or termination of a n/s subcontract due to default by the **employer** or his **agents**

32.5.7 Default or insolvency of a **nominated subcontractor**

32.5.8 Suspension of the **works** [31.15]

It is the submission of this thesis that the JBCC PBA should not follow the JCT approach on extension of time in relation to concurrent delays. The difference in interpretation and the automatic entitlement to compensation when extension of time is awarded, distinguish these two Clauses. Accordingly, in the event of concurrent delays, the Contractor should only be entitled to extension of time to the extent that it is able to prove that the Relevant Event in question delayed the date of Practical Completion on the critical path of an approved Programme.

5.3.2.2 Burden of Proof Approach

The above are the recommendations pertaining to and based on an interpretation of the JBCC as compared and distinguished from the JCT. These should be further tested to determine their compatibility with the legal principles used to support the *Malmaison* approach to evaluate the enforceability of the proposed “Burden of Proof Approach”.

It is contended, as a point of departure, that following the impact delay analysis method to determine cause and effect of a potential Relevant Event will eliminate many of the potential problems. A purported Employer Risk Event in terms of a static

delay analysis method may in fact not be a Relevant Event if analysed by a dynamic delay analysis method.

As discussed in Chapter 3 and 4, the time for performance by the Employer or its Agent's reciprocal obligations should not be static, but should be dynamic and be adjusted by the updated Programmes. Therefore, if a Programme is updated to reflect actual progress, the Contractor's Delay must be programmed as part of the actual progress which will adjust the time for performance of the Employer accordingly. On such an adjusted or delayed Programme it may be evident that the Employer is not in *mora* and the event therefore does not constitute a Relevant Event in terms of the contract. As a consequence of the dynamic approach, the time for performance by the Employer will be relaxed and therefore there will be no concurrent delay situation.

(i) The Prevention Principle

As previously stated, the Prevention Principle is a common law rule which applies to construction contracts. On the authority of the *Group Five*[301] case, such a rule, often called an implied term cannot in South African law co-exist with a conflicting express term. The Prevention Principle will accordingly not have the same impact in South African law as illustrated in the UK cases of *Henry Boot*[302], *Peak Construction*[303] and *Walter Lilly*.[304].

It is therefore argued that the Prevention Principle is no constraint or prohibition for applying the proposed Burden of Proof Approach.

(ii) Doctrine of Penalties

The same arguments against the enforceability of liquidated damages in terms of the UK law do not apply in terms of South African law. Under South African law the Employer does not need to prove any delay damages. Penalties are enforceable in terms of the Conventional Penalties Act.[305] In the UK it may be argued that the

[301] *Group Five* supra note 188.
[302] *Henry Boot* supra note 163.
[303] *Peak Construction* supra note 196.
[304] *Walter Lilly* supra note 261
[305] Conventional Penalties Act 15 of 1962.

liquidated damages, when disproportionate to the actual damages, constitute a Penalty, which is not enforceable under English law.

(iii) Contractual Status of the Programme

The proposed methodology on the Programme as set out in Chapter 3 changes the general position as put forward as support for the approach of granting extension of time in case of concurrent delay. The position adopted by Pickavance,[306] where the Contractor must start on the commencement date and complete by the completion date but can between those dates work at any tempo, whether it complies with the Programme or not, has been changed in relation to the JBCC PBA amendments.

The above principle is therefore a *fortiori* in relation to the Burden of Proof Approach as proposed in relation to concurrent delays.

5.3.2.3 Further clarification in relation to the JBCC PBA

The onus of proof is the same in terms of JBCC Clause 23 for all Relevant Events, irrespective of whether Clause 23.2 (Employer Risk Events) or Clause 23.1 (Neutral Events) apply. In terms of the JBCC PBA, if a Neutral Risk Event caused delay to Practical Completion, the Contractor will not be entitled to compensation in terms of Clause 23.1 whereas when the delay is caused by an Employer Risk Event, the Contractor will be entitled to compensation in terms of Clause 23.2. The UK authorities do not provide any clarity on the distinction when the Relevant Event is an Employer Risk Event or a Neutral Event. The UK position where the Contractor is entitled to a full extension of time in the event of a concurrent delay caused by a Contractor's Risk Event and a Neutral Risk Event is not supportive of the notion that it is based on the prevention principle. A Neutral Event such as inclement weather is not an "act of prevention" as envisaged by the prevention principle.

There is no legal basis for determining concurrency based on two Relevant Events, one a Neutral Event without compensation and the other a Relevant Event with compensation.

[306] Pickavance op cit note 50 at 626.

It is therefore proposed that the contract should specifically provide that the Contractor's entitlement in terms of Clause 23.2 is subject to Clause 23.1. In other words, the Contractor will be entitled to compensation only to the extent that the delay is not caused by a Neutral Risk Event in terms of Clause 23.1 but by an Employer Risk Event in terms of Clause 23.2. The same defences will then be available for an Employer in defence against such claims in the form of the negative and positive defences as previously discussed.

The JBCC Clause 23.2 should accordingly be amended as follows:

23.2* The contractor is entitled to a revision of the **date for practical completion** by the **principal agent** with an adjustment to the **contract value** [26.0], for a delay to **practical completion** caused by one or more of the events listed below. Such entitlement shall be subject to the entitlement provided [23.1]. Therefore if a concurrent delay to **practical completion** is caused by both a [23.1] and [23.2] event, then [23.1] shall apply and the **contractor** shall be entitled to a revision of the **date for practical completion** by the **principal agent** without an adjustment of the **contract value**.

5.4 Ownership of Float

Terminal or Total Float[307] is defined by the SCL *Protocol* as the period of time that an activity may be delayed beyond its early start or early finish dates without delaying the contractual completion date.[308]

The contractual completion date in question may be a sectional completion date, the overall completion of the works or an interim milestone or key date.[309] The 'ownership' of float causes particular arguments in disputes over entitlement to extension of time.[310] A Contractor may argue that it 'owns' the float, because, in planning how it proposes to carry out the works, it has allowed additional or float time to give itself some flexibility in the event that it is not able to carry out the works as quickly as it planned.[311] If, therefore, there is any delay to the Contractor's progress for which the Contractor is not responsible, it may contend that it is entitled to an

[307] Refer to illustration in Annexure A: Figure 5 "Float".
[308] SCL *Protocol* op cit note14 at 62.
[309] SCL *Protocol* op cit note 14 at page 13.
[310] Ibid.
[311] Ibid.

extension of time, even if the delay to progress will not result in the contract completion date being missed, but merely in erosion of its float.[312] On the other hand, an Employer may typically argue that the Contractor has no contractual remedy for being prevented from completing the works at any time prior to the contractual completion date, and is therefore not entitled to an extension of time unless the delay to progress will result in a contractual completion date being missed. The Employer may therefore say that the project owns the float.[313]

The expression 'float' hardly if ever appears in standard form conditions of contract.[314] Where the wording of the extension of time clause in a contract is such that an extension of time is only to be granted if an Employer Risk Event delays construction completion beyond the contractual completion date, then the likely effect of that wording is that float has to be used up before an extension of time will be due.[315] If the wording of the extension of time clause is such that an extension of time will be due whenever an Employer Risk Event delays the Contractor's planned construction completion date, then float will probably not be available for the benefit of the Employer and the Contractor should accordingly be awarded an extension of time.[316] Some conditions of contract give no indication as to whether an Employer Risk Event has to affect the contractual completion date or merely the Contractor's planned construction completion date before an extension of time is due.[317]

Each of the permutations described above can create unfairness and uncertainty or both of these consequences.[318] Under contracts where the Employer Risk Event has to affect the contractual completion date, if an Employer Risk Event occurs first and uses up the float, then the Contractor can find itself in delay and paying Penalties as a result of a subsequent Contractor Risk Event which would not have been critical if the Employer Risk Event had not occurred first.[319] Under contracts where the Employer Risk Event only has to affect the Contractor's planned construction completion date, the Contractor is potentially entitled to an extension of time every

[312] Ibid.
[313] Ibid.
[314] SCL *Protocol* op cit note 14 at page 15.
[315] Ibid.
[316] Ibid.
[317] Ibid.
[318] Ibid.
[319] Ibid.

time the Employer or Contract Administrator delays any of its activities on the critical path, irrespective of their impact to meeting the contractual completion date.[320] Under the type of contract that is silent or ambiguous about float, uncertainty exists and disputes are likely to follow.[321]

5.4.1 South African position

There is a misconception in the South African industry on the issue of ownership of float. The perception that the Employer "owns" the float is due firstly to the fact that in terms of JCT Clause 25 the Employer "owns" the float and due to the judgment in the *Ovcon*[322] case.

The Management Guide to the General Conditions of Contract (GCC) 2010 submits that float belongs to the owner and cites the *Ovcon*[323] case as authority for this contention.[324] It states that if an event prevents the Contractor from completing the Works by his programmed completion date, being a date earlier than the Due Completion Date, the Contractor is only entitled to extension of time in so far as it exceeds the Due Completion Date.[325] As a result the Contractor will not get an extension of time for delays to an earlier planned construction completion date.

The above submission is based on Clause 5.12.1 of the GCC 2010 which states:

"If the Contractor considers himself entitled to an extension of time for circumstances of any kind whatsoever which may occur that will, in fact, delay Practical Completion of the Works, the Contractor shall claim in accordance with Clause 10.1 such extension of time as is appropriate. Such extension of time shall take into account any special non-working days and all relevant circumstances, including concurrent delays or savings of time which might apply in respect of such claim" (*own emphasis*).

[320] Ibid.
[321] Ibid.
[322] *Ovcon* supra note 84.
[323] Ibid.
[324] Willie Claasens *The Management Guide to the General Conditions of Contract* (2010) at page 68.
[325] Ibid.

The aforesaid clause falls into the category where the Contractor should get extension of time whenever the planned construction completion date (Practical Completion *in casu*) is delayed.

As stated above, the JCT falls into the category in which the Contractor should only get extension of time where the planned completion date has been delayed beyond the contractual completion date. JCT clause 25.3.1 states as follows:

"If, in the opinion of the Architect/the Contract Administrator…any of the events which are stated by the Contractor to be the cause of delay is a Relevant Event and…the completion of the Works is likely to be delayed thereby beyond the Completion Date, the Architect/Contract Administrator shall in writing to the Contractor give an extension of time by fixing such later date as the Completion Date as he then estimates to be fair and reasonable…" (*own emphasis*).

On the other hand JBCC Clauses 23.1, 23.2 and 23.3 provides as follows:

23.1 "The **contractor** is entitled to a revision of the date for **practical completion** by the **principal agent** without an adjustment to the **contract value** for a delay to **practical completion** caused by one or more of the following events:…"

23.2 "The **contractor** is entitled to a revision of the date for **practical completion** by the **principal agent** with an adjustment of the **contract value** [26.0], for a delay to **practical completion** caused by one or more of the following events: …" (*own emphasis*).

23.3 "Further circumstances for which the **contractor** may be entitled to a revision of the date for **practical completion** and an adjustment of the contract value are delays to **practical completion** due to any other cause beyond the **contractor**'s reasonable control that could not have reasonably been anticipated and provided for. The **principal agent** shall adjust the **contract value** where such delay is due to the **employer** and/or **agents**" (*own emphasis*).

There is accordingly no requirement that Practical Completion should be delayed beyond the date for Practical Completion.

It is therefore contended that the "ownership" of float should not pose any problems in terms of the JBCC PBA, because it is purely a matter of contractual interpretation.

An attempt to apply case law to solve the issue of "ownership of float" will be ineffective as clearly stated in the *Ovcon*[326] case where the Contractor, the plaintiff in this case, argued that the acceptance by the Director Works of the programme creates an obligation on the employer, or defendant in this case, to do nothing that will prevent the completion of works within the time envisaged in the programme and quoted Loots Engineering and Construction Law at page 126 as authority for its contention:

> "Programmes which are approved by the engineer and which show completion considerably in advance of the contract completion date may be used correctly by the contractor to justify a claim for late information or to allege failure to give access or to found a claim for additional preliminary and general costs, even where the contractor completes before the contract completion date."[327]

Judge Hugo distinguished the above arguments by stating:

> "These statements from these authors are well-nigh useless unless they are reduced to their particular contractual setting. Loots' statement for example is based upon clause 14 of the Standard Form of Engineering J Contracts in the 1982 version. The powers given the engineer under the remaining subclauses of clause 14 are much wider than those given under the instant contract. For these reasons but little light can be gleaned from the textbooks."[328]

It is the author's submission that this matter is dealt with in South Africa in an unsatisfactory manner, to a great extent because of the position taken in the *Ovcon* case. As previously stated, the *Ovcon* case is quoted as authority for the proposition that the "float belongs to the Employer". This statement is completely unsubstantiated for the following reasons:

[326] *Ovcon* supra note 84.
[327] *Ovcon* supra note 84 at page 75.
[328] Ibid.

- The claim was not for extension of time, but for expense or loss beyond that provided for in or reasonably by the contract; and
- There was no approved programme (or progress chart).

This was a typical case where the Contractor could have been entitled to extension of time, but did not follow the Extension of Time provisions as provided for under its contract.

In an attempt to circumvent the possible time barring provisions or in ignorance, the Contractor couched its claim under expense or loss which failed based on the specific interpretation of the contractual provisions relied on.

Judge Hugo emphasised in his judgement that each case must be reduced to its particular contractual setting and he specifically maintained that in the final instance the plaintiff's case would stand or fall on the status of the Programme.[329] In this case much emphasis was thus put on the status of the programme which eventually dictated the outcome of the case. With this background it should be concluded that the precedent created by the *Ovcon* case cannot be applied to an Extension of Time matter and secondly that it must be distinguished from any case where an approved Programme existed.

In accordance with the *obiter dictum* made by Judge Hugo in the aforesaid decision, it is submitted that each case must be reduced to its contractual setting and be determined by the interpretation of the particular provisions of the contract, rather than with reference to supposed legal principles, maxims or guidelines such as to whom the ownership of float belongs.

It is, however, important that the contract make provision for the Programme to be approved. The ownership of float would therefore be problematic if applied to the JBCC PBA 2014 unamended version, which does not make provision for the Programme to be agreed on and approved. An Employer may, however, be unwilling to agree to a Programme that reflects an early construction completion date for several reasons. Firstly their operations or lease may only be commencing at a later date, in line with the Date for Practical Completion. Secondly, early completion of

[329] *Ovcon* supra note 84 at page 74.

construction will have the effect of them taking possession with the result that the risk for damage to the works will pass to them. This, in turn will mean that their insurance must be in place and that they will be responsible for the security of the site. Thirdly, the Employer's cash-flow may be budgeted in line with the Contract Period (until the construction completion date) as provided for in the contract and does not allow for an accelerated Construction Period as proposed in the Programme. However, once a Programme reflecting early completion has been agreed on and approved by the Employer, the Contractor should be entitled to extension of time for delays to Practical Completion and accordingly the float should belong to the Contractor.

5.5 Global claims

In the *Walter Lilly* case, a global claim is defined as "a contractor's claim which identifies numerous potential or actual causes of delay or disruption, a total cost on the job, a net payment from the employer and a claim for the balance between costs and payment which is attributed without more and by inference to the causes of delay and disruption relied on."[330]

Giving judgment overwhelmingly in favour of the Contractor, the Court in *Walter Lilly* held that the Contractor was entitled to an extension of time and held that the Contractor had established a link between the events identified and resources expended. Akenhead J reviewed relevant authorities on global claims and summarised the law. He *inter alia* stated the following:

(i) Claims by contractors for delay or disruption related loss and expense must be proved as a matter of fact. The Contractor has to demonstrate on a balance of probabilities that, first, events occurred which entitle it to loss and expense, secondly, that those events caused delay and/or disruption and thirdly that such delay or disruption caused it to incur loss and/or expense.

(ii) Determine if there are contractual restrictions on global claims by the interpretation of the contractual clause relied on.

(iii) The Contractor will need to comply with conditions precedent.

[330] *Walter Lilly* supra note 261 at page 119.

(iv) It is open to contractors to prove these elements with whatever evidence will satisfy the requisite standard of proof.

(v) There is nothing wrong in principle with a total or global cost claim, but there are added evidential difficulties which a claimant contractor will have to overcome.

(vi) The fact that one or a series of events or factors (unpleaded or which are the risk or fault of the claimant contractor) caused or contributed (or cannot be proved not to have caused or contributed) to the total or global loss does not necessarily mean that the claimant contractor can recover nothing. It depends on the impact of those events or factors.[331]

In relation to global claims for extension of time, it is contended that the JBCC Clause 23.6, as quoted below should be the determining factor.

23.6* Where the **contractor** requests a revision of the **date for practical completion** the claim shall in respect of each event or circumstance separately state:

23.6.1* Particulars of such event or circumstance and the relevant clause [23.1-3] on which the **contractor** relies

23.6.2* The cause and effect of the delaying event or circumstance on the **date of practical completion**, illustrated by the impact and/or a change to the critical path on the **programme**

23.6.2* The cause and effect of the delaying event or circumstance on the **date of practical completion**, illustrated by the impact and/or a change to the critical path on the **programme** by performing a time impact analysis

The Clause pertinently states that "….the claim shall in respect of each event or circumstance separately state..." and furthermore that the cause and effect of the delaying event or circumstance be….. illustrated by the impact and/or a change to the critical path on the programme". It is therefore contended that the JBCC PBA rules out the possibility of submitting global claims in relation to extension of time.

[331] *Walter Lilly* supra note 261 at page 119-20.

5.6 Conclusion

The general principle that manifested through all the above in solving the legal issues is that firstly, the substantive law needs to be applied and secondly, the importance of interpreting the specific contractual provisions.

The discussion emphasises the importance to create certainty and consistency in contracts. The amendments in relation to the contractual status of the Programme are shown by this chapter to be crucial in relation to dealing contractually with difficult issues such as concurrency and float.

A properly agreed and approved Programme and subsequently updated Programmes are also essential to the success of any delay analysis, but specifically pertaining to the dynamic time impact delay analysis method.

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 Conclusions and recommendations

This thesis researched delay and disruption matters in relation to the JBCC Principal Building Agreement Edition 6.1 March 2014. This was done through an analysis of the application of the concepts; extension of time, penalties, critical path, ownership of float, concurrent delays, delay analysis methods and time at large.

This analysis revealed not only shortcomings in dealing with the above concepts but also numerous instances of incorrect clause referencing, conflicting provisions and omissions from the Contract Data emphasising the need for revision in order to remove obvious errors and eliminate ambiguity and uncertainty.

Chapter two demonstrated the shortcomings which have been caused by the various inconsistent and conflicting uses of JBCC PBA provisions. The effect of such inconsistency impacts on material terms such as Penalties, Termination, Risk of damage to the Works, Insurance, Security, and Time Barring, as illustrated.

Chapter three highlights that the current legal position and status of the Programme is unsatisfactory. The times for performance, other than dates expressly incorporated in the Agreement by its inclusion in the Contract Data, are not contractually enforceable. The Contract Data fix the date for possession of the Site and the date for Practical Completion, and a failure to meet these dates will result in *mora ex re* (delay arising from the transaction). However, within the window between these two defined dates, the times for performance are left open, and the parties need to establish a time for performance *ex persona* by issuing a demand for performance or an *interpellatio*. As long as the Programme has no legal significance, there will be no agreed times for performance. Accordingly, it will be very difficult for the Contractor to prove Employer Risk Delays. The current JBCC Programme will at best function as a management tool with evidentiary value.

The absence of an approved Programme leaves an array of matters open to interpretation and creates immense uncertainty which, as submitted above, may lead to disputes. From both Parties' perspectives it is important to commit to certain

agreed dates in order to co-operate and not prevent or hinder each other's performance. Further, where the failure of the one party may entitle the other to extension of time or compensation or both, it is important to establish the time of performance of obligations.

From this perspective, it is critical for the Contractor to fix the Employer's or Principal Agent's time for performance contractually without the need to have to prove that it complied with the common law requirements to establish the time for performance *ex persona* through the issuing of a letter of demand (*interpellatio*).

It is recommended that the JBCC PBA follow the basic guidelines recommended by the SCL *Protocol* as fully motivated in Chapter 3.

Chapter Four considered the legal position and possible application of the "Prevention Principle" and "Time at Large" in South Africa. These concepts were researched and analysed with the view to determine the vulnerability of the JBCC PBA against possible Contractor's applications to strike out the Penalties. The conclusion is that although there is no certainty on whether these concepts are consistent with South African law, they may still be brought as a defence against the Employer's claim for Penalties. Alternatively, the Contractor may attempt to use other interpretational rules or principles on which similar legal outcomes may be reached.

It is recommended that the possible contractual gaps be closed by proper wording such as to exclude time being rendered at large and the Employer's right to levy Penalties being preserved.

Chapter Five suggested that the prospective dynamic analysis method is superior to the retrospective static methods. It is also submitted that the contemporaneous approach to delay analysis incorporates the key aspects of actual progress, possible changing of critical path, float and concurrency.

The process of performing time impact analysis is compatible with the proposed "Burden of Proof Approach" on concurrent delays. Any possible disputes will manifest early in the process of determining possible extension of time and would be capable of being adjudicated with contemporaneous information available.

It is submitted that on a straight contractual interpretation of Clause 23 of the JBCC PBA, together with the South African law approach to the legal principles including the prevention principle, doctrine of penalties, burden of proof and the contractual status of the programme, the *Malmaison* Approach as followed by English courts should not be used in South Africa. The recommended amendments to the JBCC PBA as discussed by the thesis are included as Annexure B.

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ANNEXURE A:

Figures 1-8

Figure 1 - Completion Dates

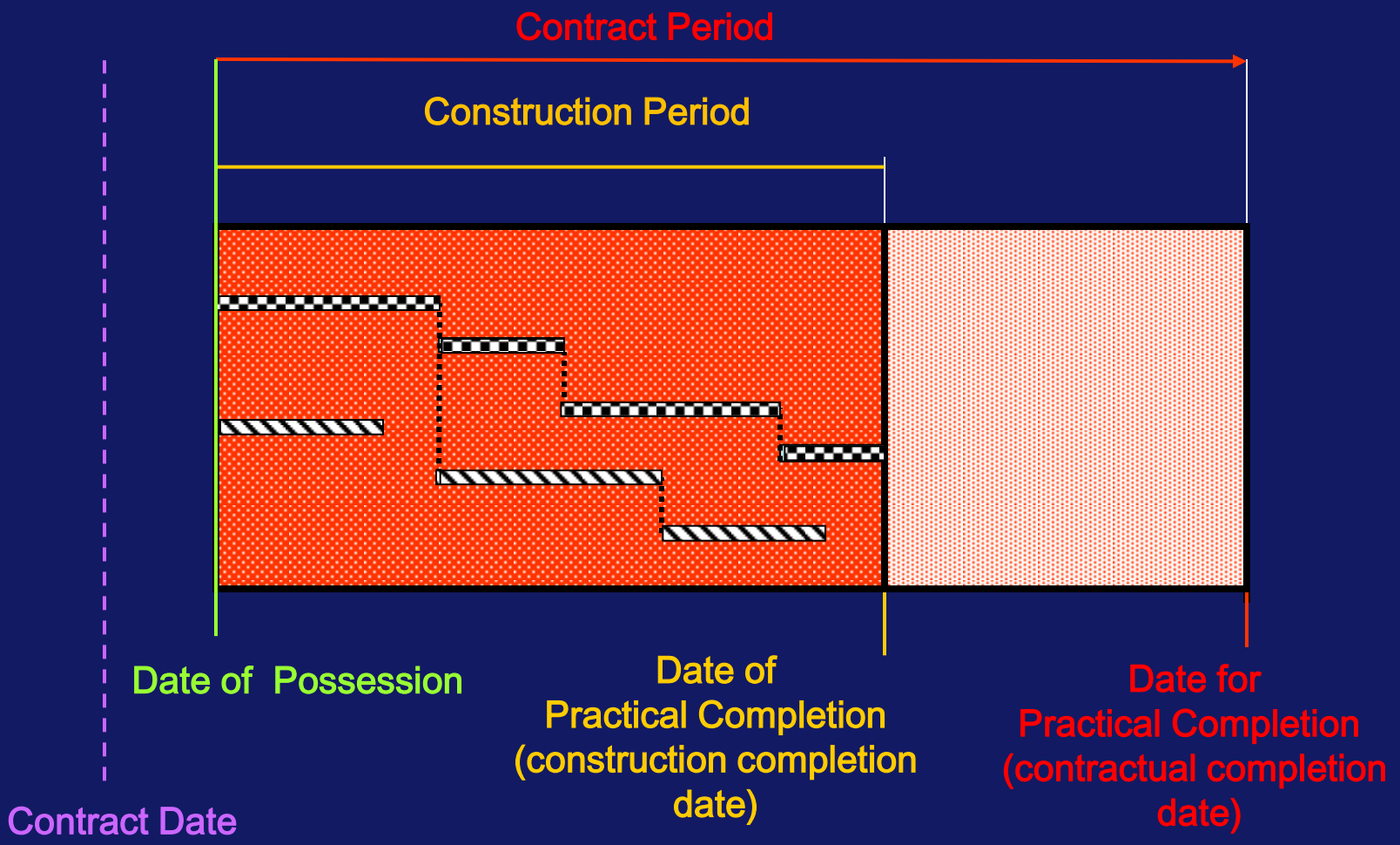


Figure 2 - Completion Dates

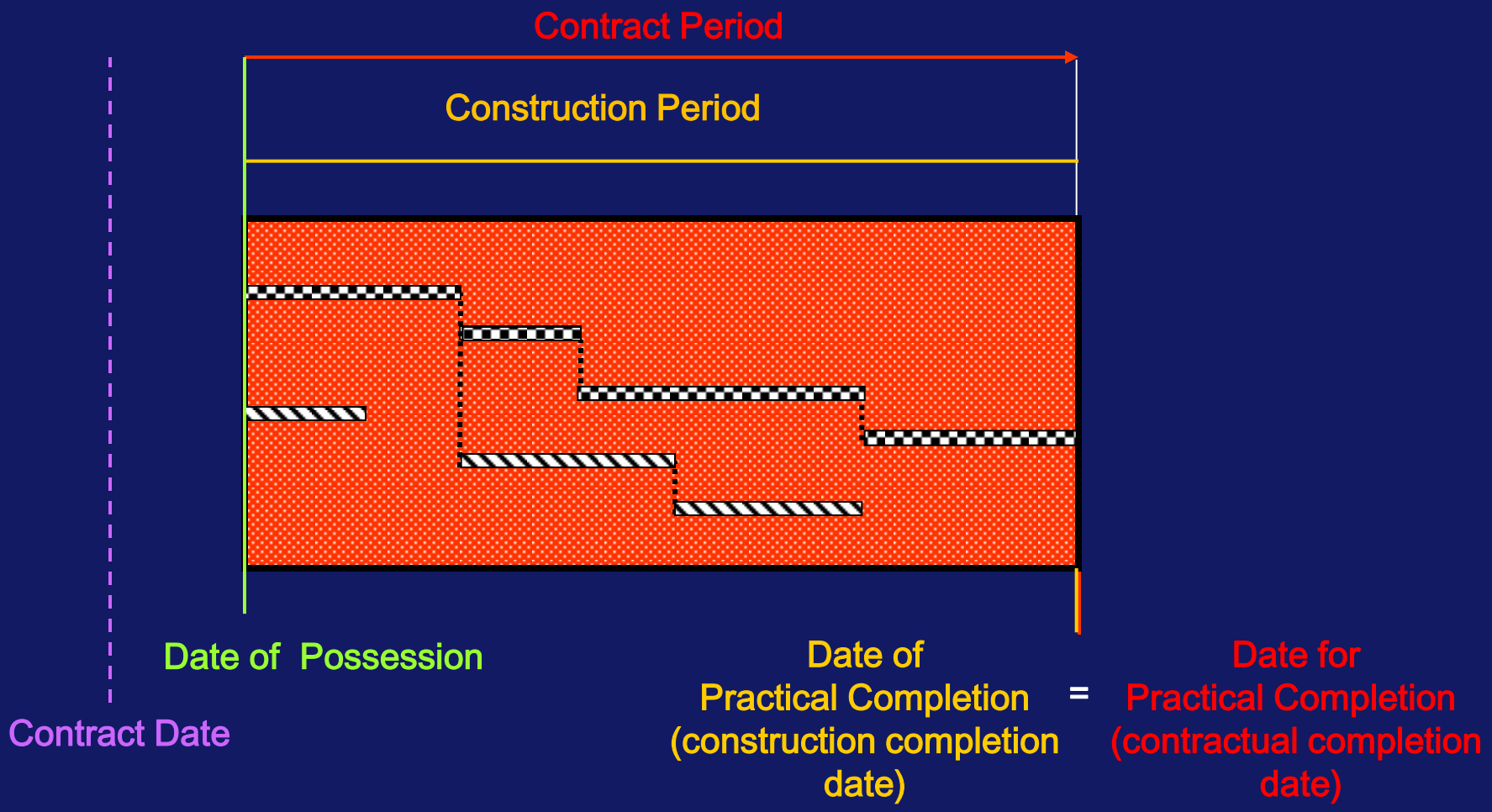


Figure 3 - Completion Dates

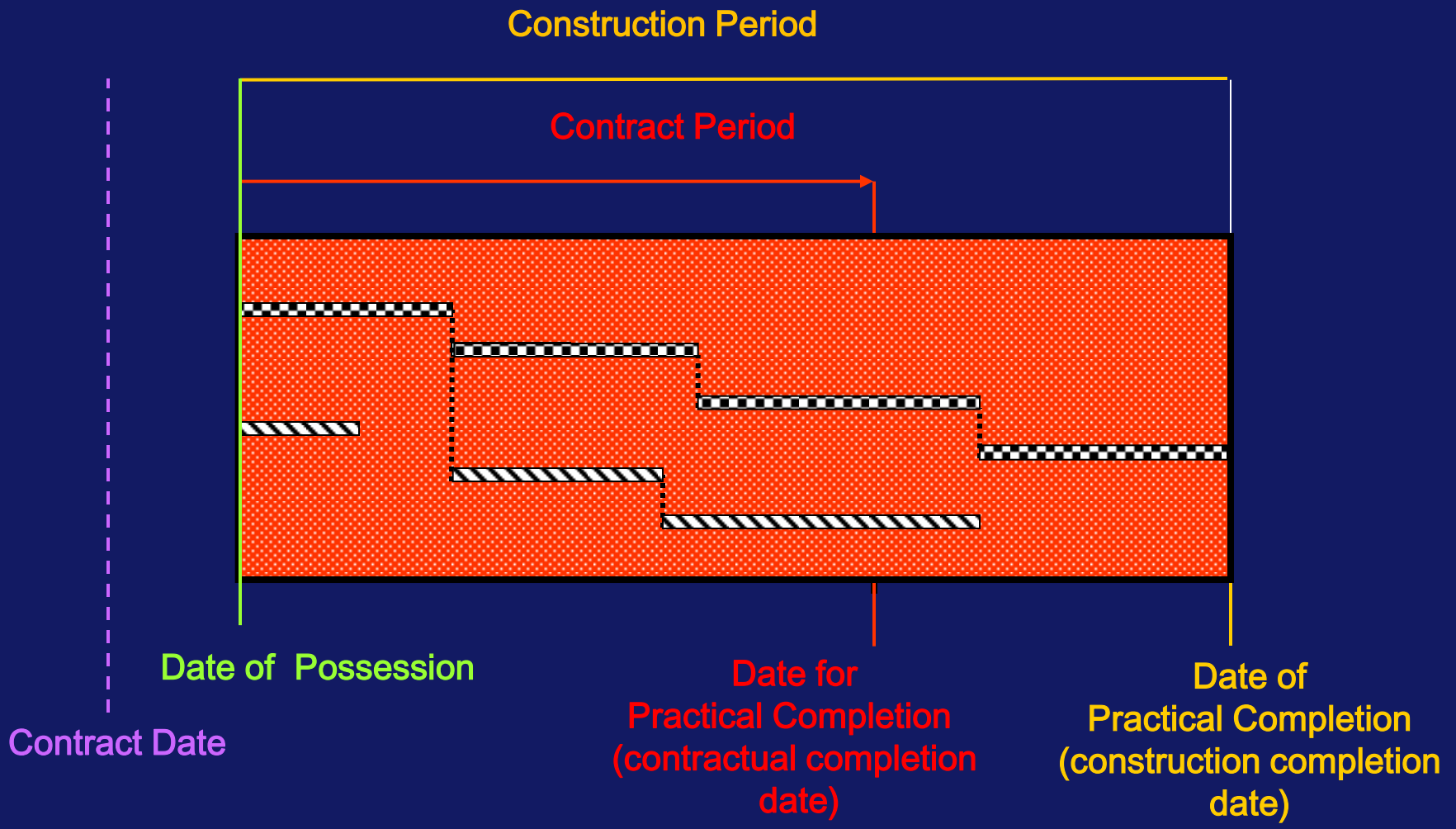
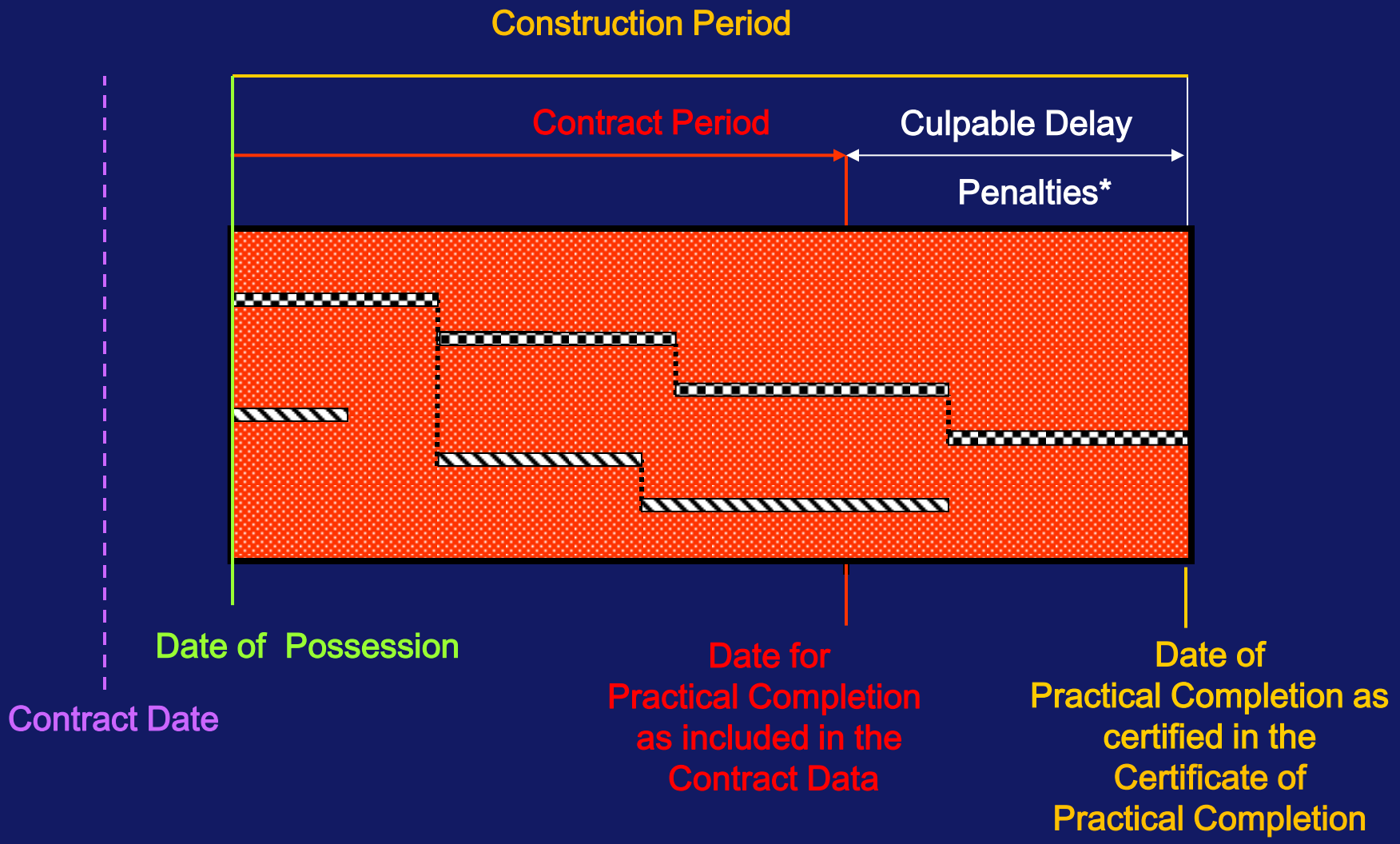


Figure 4 – Culpable Delay



* The amount of Penalties per day will be included in the Contract Data

Figure 5 – Float

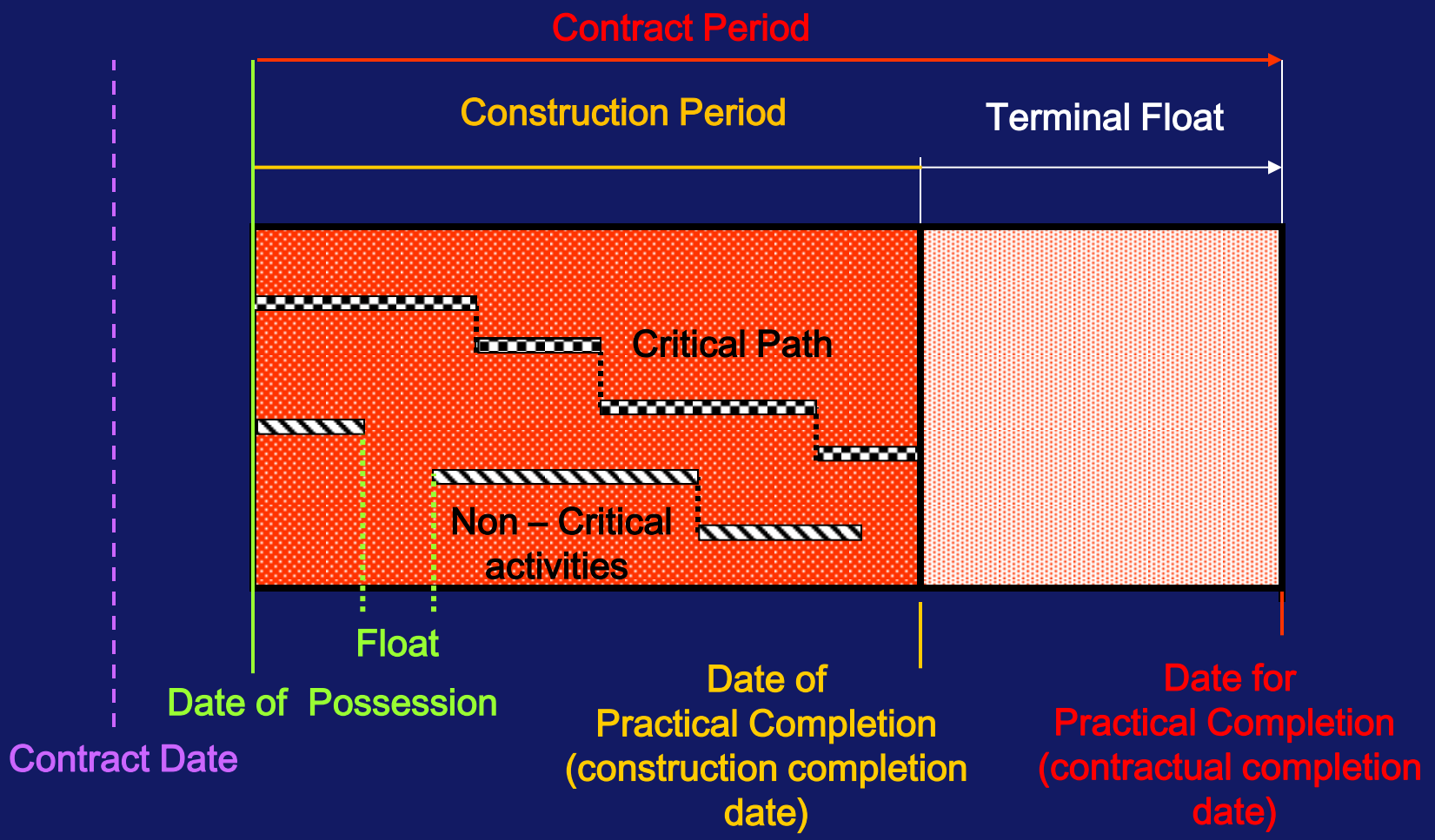


Figure 6 – Extension of Time

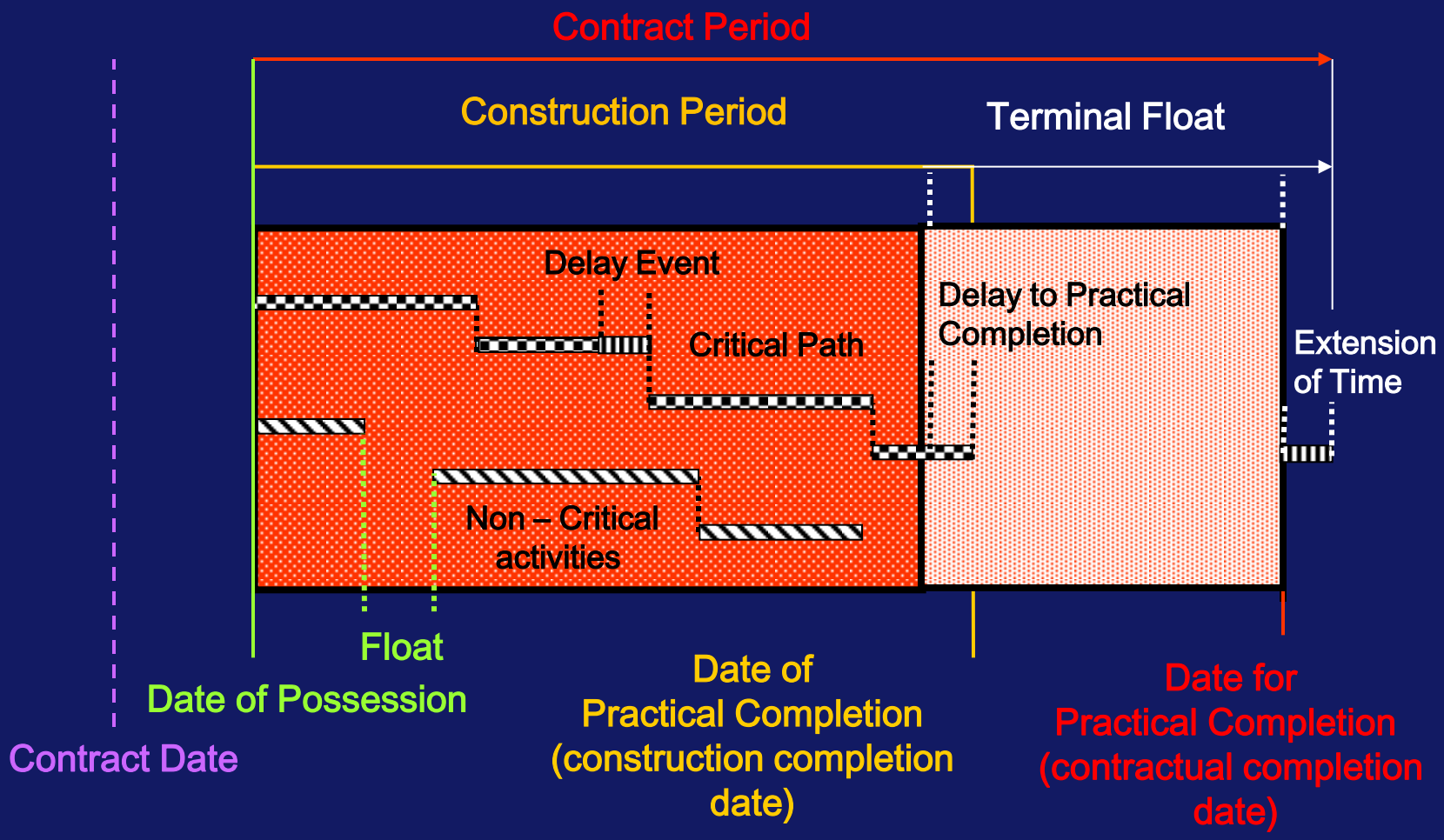


Figure 7 – Defects Liability Period

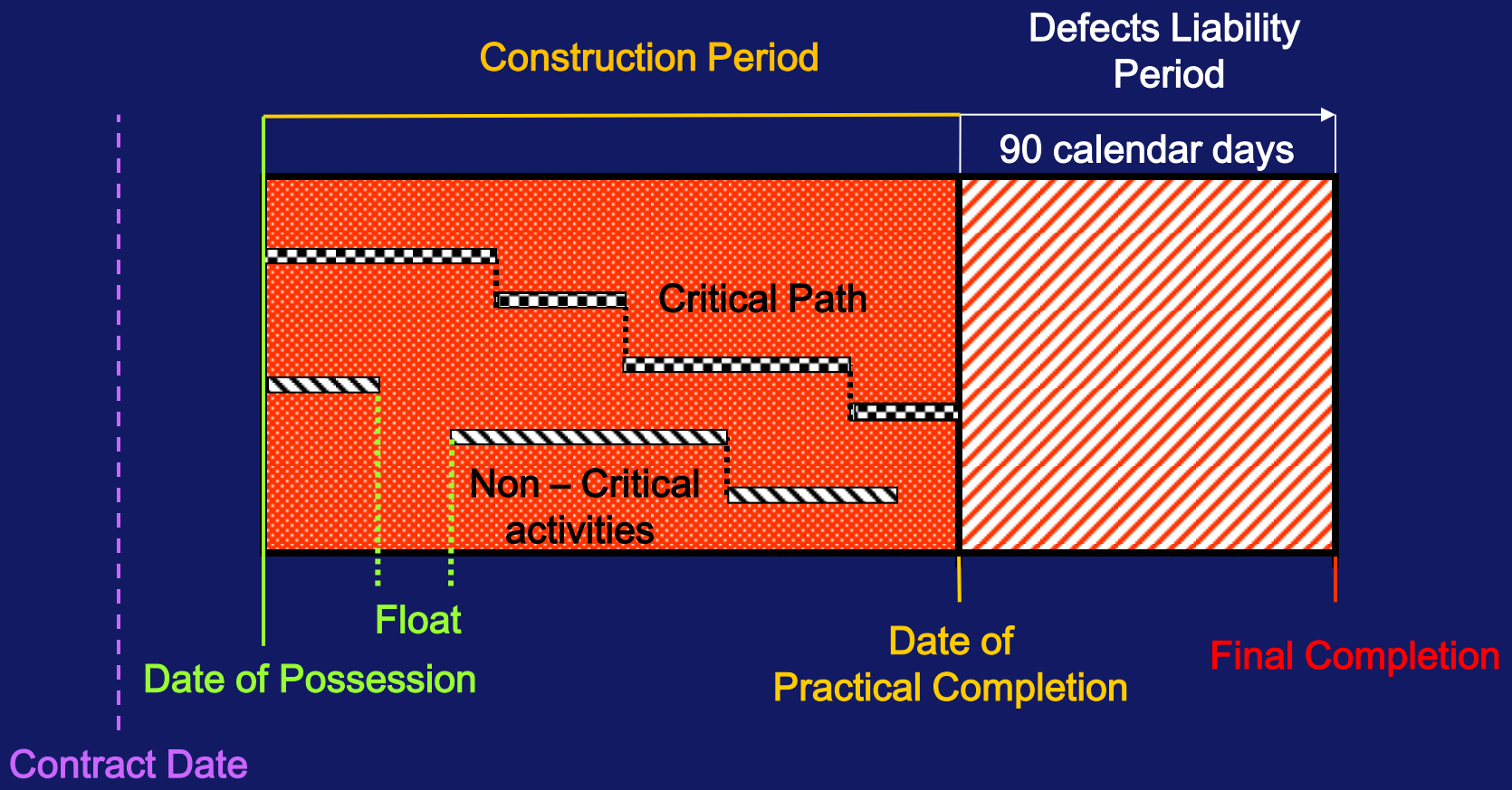
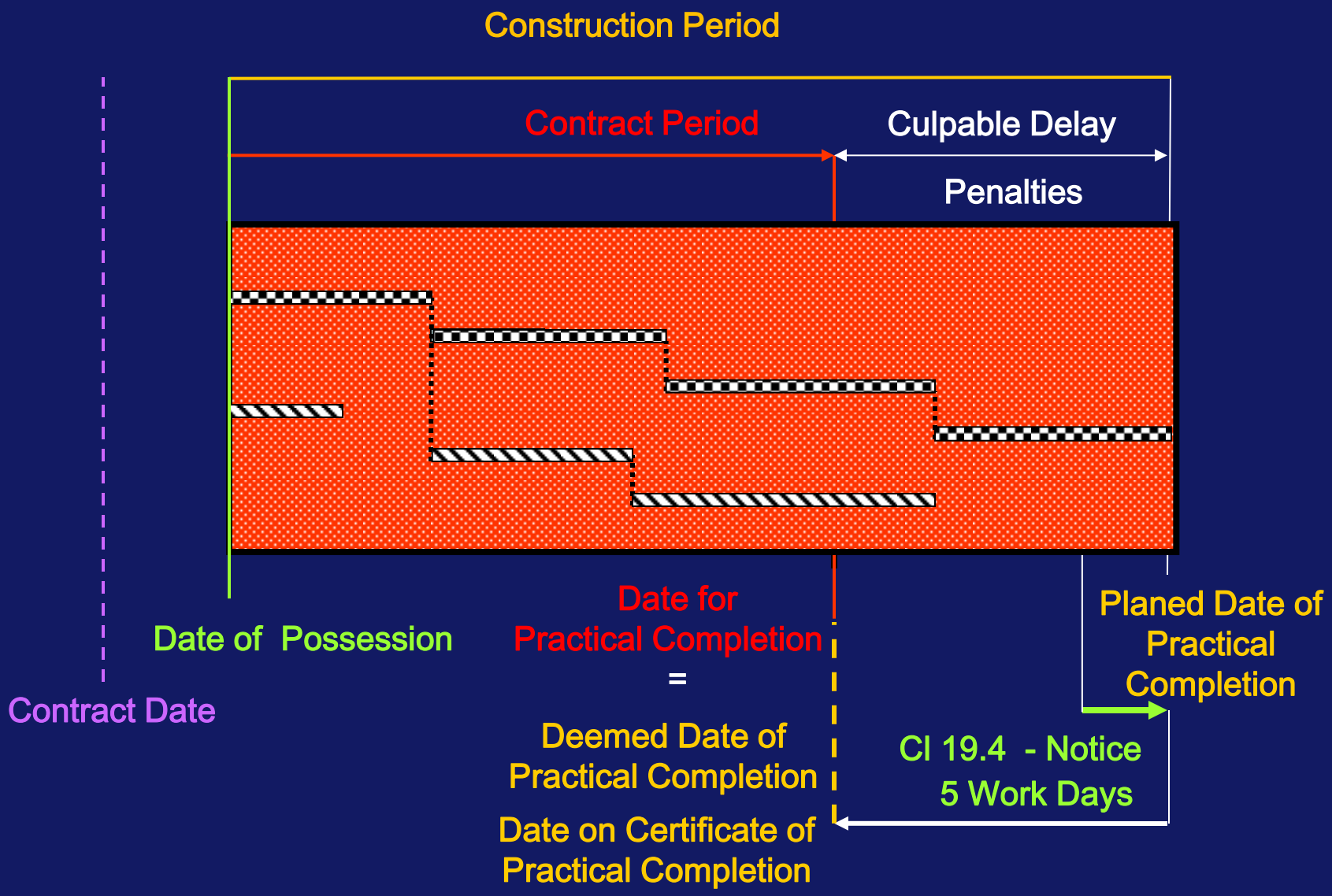


Figure 8 – Deemed Practical Completion



ANNEXURE B:

Details of the changes made to standard documentation

ANNEXURE B

DETAILS OF CHANGES MADE TO THE PROVISIONS OF JBCC STANDARD DOCUMENTATION AND EXPRESS AMENDMENTS TO THE PROVISIONS OF THE JBCC PRINCIPAL BUILDING AGREEMENT AND CONTRACT DATA – March 2014 Edition 6.1

In this regard, the Standard JBCC **Principal Building Agreement** and **Contract Data** 2014 is amended by the numbered clauses set out below, as follows:

(i) where the Standard JBCC **Principal Building Agreement** and **Contract Data** 2014 contains no provision with the corresponding clause number, the clause set out herein is inserted into the contract; and

(ii) where the Standard JBCC **Principal Building Agreement** and **Contract Data** 2014 contains a provision with the corresponding clause number, the same is deleted in its entirety and replaced with the provision having such clause number, as set out herein.

Save as amended in terms of this document, the provisions of the Standard **Principal Building Agreement** and **Contract Data** 2014 shall remain unchanged.

1.0 DEFINITIONS and INTERPRETATION

1.1 Definitions

CONTRACT PERIOD*: The period commencing on the intended date [CD] of possession of the **site** by the **contractor** and ending on the **date for practical completion**.

DATE FOR PRACTICAL COMPLETION*: The contractual completion date or dates stated in the **contract data** or revision thereof [23.0] on or before which the **contractor** agrees to bring the works or sections thereof to **practical completion**.

The **contractor** will be liable for the determined **penalty** [24.0] in failure to achieve **practical completion** on or before such date. References to “date for **practical completion**” will be included in the definitions where the “date for” is not bold in the standard **JBCC** text.

DATE OF PRACTICAL COMPLETION*: The construction completion date or dates, which is initially the intended or planned date or dates to bring the **works** or **sections** thereof to **practical completion** and subsequently the actual or deemed date or dates on which the **contractor** achieved **practical completion** as stated in a **certificate of practical completion**. References to “date of **practical completion**” will be included in the definition where the “date of” is not bold in the standard **JBCC** text.

PROGRAMME: A diagrammatic representation of the planned execution of units of work or activities indicating the dates for commencement and completion prepared and maintained by the **contractor**. The **programme** will be developed in the software as stated in the **contract data** or otherwise agreed by the **parties**. When reference is made to submit or update the **programme** it will mean in a soft and hard copy of it. The latest programme uploaded by the **principal agent** will supercede the previous **programme**.

EXECUTION

12.0 DUTIES OF THE PARTIES

12.2.6. The **contractor** shall prepare and submit to the **principal agent** within fifteen (15) **working days** of the receipt of the **contract documents** an initial **programme** in the detail as required below of carrying out the Works in order to meet the **date for practical completion**.

12.2.6.1 the initial **programme** and all subsequent updated **programmes** shall show the sequence of the execution of the **works**, the reciprocal obligations of the **employer** and the other information as including but not limited to:

12.2.6.1.1 the date of possession of the **site** and/or access to any part of the **site** or **works** [23.2.1]

12.2.6.1.2 outstanding **construction information** [23.2.5]

12.2.6.1.3 **Free issue** [23.2.6]

12.2.6.1.4 the appointments of **subcontractors** [23.2.7]

12.2.6.1.5 acceptance of designs of selected **subcontractors** [23.2.8]

12.2.6.1.6 **date for practical completion** as a whole or **dates for practical completion** in **sections** [CD]

12.2.6.1.7 **date of practical completion** as a whole or dates of **practical completion** in **sections** [19.3.3]

12.2.6.1.8 critical path and float

12.2.6.1.9 health and safety requirements

12.2.6.1.10 approvals by authorities, **employer** or **agents**

12.2.6.1.11 all contractual notices issued and claims submitted [23.0;26.0]

12.2.6.2 The **contractor** shall program the **works** by taking full cognisance and should comply with any programming requirements in relation to, *inter alia* sequencing, key dates, milestones, restrictions or constraints as included in the **contract data**.

12.2.6.3 The **principal agent** shall, within five (5) **working days** after the **contractor** has submitted an initial or updated **programme**, approve and agree on the specific dates for performance by the **employer** included in such **programme** or, rejecting same with reasons and instruct the **contractor** to amend such **programme**. Reasons for rejecting a **programme** are *inter alia* that it is not in accordance with the **agreement** or does not reflect the actual progress. The **principal agent's** failure to approve or reject with reasons the submitted **programme**.

12.2.6.3.1 shall, in the event of the submitted **programme** being an adjusted **programme**, be deemed to have been approved; and

12.2.6.3.2 shall, in the event of the submitted programme being an initial **programme**, not be deemed to constitute approval. However, the **contractor** shall have the right to suspend the **works** [6.4]

12.2.6.4 The **programme** shall be subject to review on a monthly basis. The **contractor** shall deliver to the **principal agent** an updated **programme** reflecting actual progress and updated dates in accordance with [12.2.6.1], even though it may reflect that the planned date(s) of **practical completion** will be later than the corresponding date(s) for **practical completion**. The fact that the contractor may be in culpable delay does not relieve him from submitting an updated **programme**

every month, and in addition;

12.2.6.4.1 when a specific event or circumstance occurs which may cause a delay to the date of **practical completion** [23.6.2];

12.2.6.4.2 when a specific event or circumstance occur which may cause expense and/or loss or both [26.5];

12.2.6.4.3 with each claim [23.6.2; 26.5]; and

12.2.6.4.4 after each assessment or ruling [23.7; 26,7]

12.2.6.4.6 where the **parties** fail to reach agreement on an updated **programme** within a further fife (5) **working days** after the **principal agent**'s rejection of a **programme** [12.2.6.3], the **programme** shall be deemed to be a dispute [30.2] and referred to adjudication [30.6]

19.0 PRACTICAL COMPLETION

19.1 The **principal agent** shall:

19.1.1 Inspect the **works** at appropriate intervals to give the **contractor** interpretations and direction on the standard of work, the state of completion of the **works** and the documentation to be prepared and submitted [12.2.19-20] as a required criteria of the **contractor** to achieve **practical completion** [CD]

19.2 The **contractor** shall:

19.2.1 Inspect the **works** in advance of the anticipated **date of practical completion** to confirm that the standard of work required and the state of completion of the **works** has been achieved and documentation [12.2.19-20] has been provided for **practical completion** [CD] to be

certified

19.2.2 Give timeous **notice** to the **principal agent** of the anticipated **date of practical completion** of the **works**, in order for the **principal agent** to inspect the **works** [19.1.3] so as to meet such date

19.4 Should the **principal agent** not issue a **list for practical completion** [19.3.1] after the **contractor's notice** [19.2.2] and the inspection period [19.1.3] or the updated list [19.3.2] within five (5) **working days** after the **contractor's notice** requesting a follow up inspection, the **contractor** shall give a further **notice** to the **employer** and the **principal agent** referring specifically to the previous **notice**. Should the **principal agent** not issue such list within five (5) **working days** of receipt of such further **notice**, **practical completion** shall be deemed to have been achieved on the anticipated **date of practical completion** as notified in the previous **notice** referred to and the **principal agent** shall issue the **certificate of practical completion** forthwith

19.6 Where the **employer** takes possession of the whole or a portion of the **works** by agreement the **agreement** will be amended to provide for the **works** to be completed in **sections** [20.0] and to include all the necessary contractual implications, *inter alia*, the definition of each **section**, the **date for practical completion** of each **section** and the **penalty** applicable for each **section**.

19.8 Where the **works** or a part thereof includes mechanical and/or electrical systems that are put to use for the convenience of the **employer** with the permission of the **contractor**, the guarantee period for such systems shall commence on the **date of practical completion** [19.0]. The aforesaid actions shall not constitute the taking of possession [19.6; 8.1] and the risk and responsibility shall accordingly not pass to the **employer**.

23.0 REVISION OF THE DATE FOR PRACTICAL COMPLETION

23.2 The **contractor** is entitled to a revision of the **date for practical completion** by the **principal agent** with an adjustment to the **contract value** [26.0], for a delay to **practical completion** caused by one or more of the events listed below. Such entitlement shall be subject to the entitlement provided in [23.1]. Therefore if a concurrent delay to **practical completion** is caused both by a [23.1] and a [23.2] event, then [23.1] shall apply and the **contractor** shall be entitled to a revision of the **date for practical completion** by the **principal agent** without an adjustment of the **contract value**.

23.2.1 Delayed possession of the **site** [12.1.7] and/or access to any part of the **site** or **works** in terms of the **programme**

23.2.3 **contract instructions** [17.1-2; 17.1.13] not occasioned by the **contractor's** default

23.2.5 Incorrect issue of **construction information** and the late issue of outstanding **construction information** in terms of the **programme** [12.2.8; 13.2.3; 17.1.1-2; 17.1.13].

23.2.6 Late supply of **free issue** in terms of the agreed **programme** [12.1.12]

23.2.8 Late acceptance in terms of the agreed **programme** by the **principal agent** and/or **agents** of a design undertaken by a selected **subcontractor** where the **contractor**'s obligations have been met

23.2.13 Any delay, impediment or prevention caused by or attributable to the **employer**, the **principal agent** and/or **agents**, or other **direct contractors** on the **site**

23.3 Further circumstances for which the **contractor** may be entitled to a

revision of the date for **practical completion** are delays to **practical completion** due to any other cause beyond the **contractor**'s reasonable control that could not have reasonably been anticipated and provided for. The **contractor** is entitled to an adjustment to the **contract value** [26.9.4] where such delay is caused by the default or prevention act of the **employer** and/or **agents**

23.4 Should a listed event or circumstance occur [23.1-3] which could cause a delay to the **date of practical completion**, the **contractor** shall:

23.4.1 Give the **principal agent** reasonable and timeous notice of such event or circumstance and take reasonable steps to avoid or reduce such delay

23.4.2 Within ten (10) **working days** of becoming aware, or ought reasonably to have become aware of such event or circumstances, give **notice** to the **principal agent** of the intention to submit a claim for a revision to the **date for practical completion**, failing which the **contractor** shall forfeit such claim

23.5 The **contractor** shall submit a claim for the revision of the **date for practical completion** to the **principal agent** within twenty (20) **working days**, or such extended period the **principal agent** may allow, from the end of the event or circumstance, failing which the **contractor** shall forfeit such claim

23.6 Where the **contractor** requests a revision of the **date for practical completion** the claim shall in respect of each event or circumstance separately state:

23.6.1 Particulars of such event or circumstance and the relevant clause [23.1-3] on which the **contractor** relies

23.6.2 The cause and effect of the delaying event or circumstance on the **date of practical completion**, illustrated by the impact and/or a change to the critical path on the **programme** by performing a time impact analysis

23.6.3 The extension period claimed in **working days,** and the calculation thereof and the revised **date for practical completion** based on the extension period claimed

24.0 PENALTY FOR LATE OR NON-COMPLETION

24.1 Where the **contractor** fails to bring the **works** or a **section** thereof [CD] to **practical completion** by the **date for practical completion** [CD], or the revised **date for practical completion**, the **contractor** shall be liable to the **employer** for the **penalty** [CD]

24.2 Where the **employer** elects to levy such **penalty**, the **principal agent** shall notify the **contractor** thereof and shall determine the amount due from the **date for practical completion** up to and including the earlier of:

24.2.1 The actual [19.3.3] or deemed [19.4] **date of practical completion** of the **works** or a **section** thereof

24.2.2 The date of termination [29.0]

CONTRACT DATA:

Option A*

For the adjustment of **preliminaries** both the **contract sum** and the **contract value** (including **tax**) shall exclude the amount of **preliminaries**, all contingency sum(s) and any provision for Cost Price Adjustment Provisions:-

- An amount which shall not be varied
- An amount varied in proportion to the **contract value** as compared to the **contract sum**
- An amount varied in proportion to the revised **contract period** as compared to the initial **contract period,** excluding revisions to the **contract period** to which the **contractor** is not entitled to adjustment of the **contract value** [23.1]

The **contractor** shall provide a breakdown of charges (including **tax**) within 15 **working days** of the date of acceptance of tender and, where applicable, an apportionment of preliminaries per section:

Where such information is not provided the following subdivision shall be deemed to apply:
- 10% of the amount shall not be varied
- 15% varied in proportion of the **contract value** to the **contract sum**
- 75% varied in proportion to the revised **contract period** compared to the initial **contract period** as stated above

ANNEXURE C:

Glossary of terms

ANNEXURE C: GLOSSARY OF TERMS

Contra proferentum – A doctrine of contractual interpretation providing that, where a promise, agreement or term is ambiguous, the preferred meaning should be the one that works against the interests of the party who provided the wording.

Eiusdem generis – An interpretational rule that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.

Ex contractu – Indicates a consequence flowing from the contract.

Interpellatio – A letter of demand sent by a creditor to a debtor demanding that a creditor perform his/her obligation by a specific time.

Mora – When a party to a contract fails to perform his/her obligations on time, he/she is said to be in *mora.*

Mora creditioris – Creditor fails to accept proper performance by the debtor or does not co-operate in order to enable debtor to perform.

Mora debitoris – Debtor does not perform timeously in terms of the contract.

Mora ex persona – When a contract does not contain an express or tacit stipulation with regard to the date when performance is due, a demand (*interpellatio*) becomes necessary to put the debtor in *mora*. This is referred to as *mora ex persona*.

Mora ex re – When the contract fixes the time for performance, mora is said to arise *ex re*, and demand (*interpellatio*) is not necessary to place the debtor in *mor*a.

Mutatis mutandis – With the necessary changes.

Obiter dictum – A judge's expression of opinion uttered in court or in a written judgment, but not essential to the decision and therefore not legally binding as a precedent.

Pacta sunt servanda – The principle that agreements are binding and enforceable on the parties.

Ratio decidendi or *ratio* – The rationale (reason) for the court's decision or the principle that the case establishes.

Annexure D:

Clause comparison

ANNEXURE D: CLAUSE COMPARISON

CURRENT JBCC PBA CLAUSES		PROPOSED AMENDMENTS TO CURRENT JBCC PBA CLAUSES
CONSTRUCTION PERIOD the period commencing on the intended date [CD] of possession of the **site** by the **contractor** and ending on the date of practical completion, excluding annual industry holiday periods"		**CONTRACT PERIOD*:** The period commencing on the intended date [CD] of possession of the **site** by the **contractor** and ending on the **date for practical completion**.
No Clause		**DATE FOR PRACTICAL COMPLETION***: The contractual completion date or dates stated in the **contract data** or revision thereof [23.0] on or before which the **contractor** agrees to bring the **works** or **sections** thereof to **practical completion**. The **contractor** will be liable for the determined **penalty** [24.0] in failure to achieve **practical completion** on or before such date. References to "date for **practical completion**" will be included in the definitions where the "date for" is not bold in the standard **JBCC** text.
No Clause		**DATE OF PRACTICAL COMPLETION***: The *construction completion date* or dates, which is initially the intended or planned date or dates to bring the **works** or **sections** thereof

		to **practical completion** and subsequently the actual or deemed date or dates on which the **contractor** achieved **practical completion** as stated in a **certificate of practical completion**. References to "date of **practical completion**" will be included in the definition where the "date of" is not bold in the standard **JBCC** text.
PROGRAMME: A diagrammatic representation of the planned execution of units of work or activities indicating the dates for commencement and completion prepared and maintained by the **contractor**		**PROGRAMME***: A diagrammatic representation of the planned execution of units of work or activities indicating the dates for commencement and completion prepared and maintained by the **contractor**. The **programme** will be developed in the software as stated in the **contract data** or otherwise agreed by the **parties**. When reference is made to submit or update the **programme** it will mean in a soft and hard copy of it. The latest **programme** uploaded by the **principal agent** will supercede the previous **programme**.
Contract Data - Option A : "For the adjustment of preliminaries both the contract sum and the contract value (including tax) shall exclude the amount of preliminaries, all contingency sum(s) and any provision for Cost Price Adjustment Provisions:-		Option A* For the adjustment of preliminaries both the contract sum and the contract value (including tax) shall exclude the amount of preliminaries, all contingency sum(s) and any provision for Cost Price Adjustment Provisions:- - An amount which shall not be varied - An amount varied in proportion to the contract value as

- An amount which shall not be varied - An amount varied in proportion to the contract value as compared to the contract sum - An amount varied in proportion to the construction period as compared to the initial construction period (excluding revisions to the construction period to which the contractor is not entitled) to adjustment of the contract value in terms of the agreement The contractor shall provide a breakdown of charges (including tax) within 15 working days of the date of acceptance of tender and, where applicable, an apportionment of preliminaries per section: Where such information is not provided the following subdivision shall be deemed to apply: - 10% of the amount shall not be varied - 15% varied in proportion of the contract value to the contract sum - 75% varied in proportion to the revised contract construction period compared to the initial construction period …"		compared to the contract sum - An amount varied in proportion to the revised contract period as compared to the initial contract period, excluding revisions to the contract period to which the contractor is not entitled to adjustment of the contract value [23.1] The contractor shall provide a breakdown of charges (including tax) within 15 working days of the date of acceptance of tender and, where applicable, an apportionment of preliminaries per section: Where such information is not provided the following subdivision shall be deemed to apply: - 10% of the amount shall not be varied - 15% varied in proportion of the contract value to the contract sum - 75% varied in proportion to the revised contract period compared to the initial contract period as stated above:
12.2.6 "Prepare and submit to the **principal agent** within		12.2.6* The **contractor** shall prepare and submit to the

fifteen (15) **working days** of receipt of **construction information** a **programme** for the **works** in sufficient detail to enable the **principal agent** to monitor the progress of the **works**".		**principal agent** within fifteen (15) **working days** of the receipt of the **contract documents** an initial **programme** in the detail as required below of carrying out the Works in order to meet the **date for practical completion**. 12.2.6.1* the initial **programme** and all subsequent updated **programmes** shall show the sequence of the execution of the **works**, the reciprocal obligations of the **employer** and the other information as including but not limited to: 12.2.6.1.1* the date of possession of the **site** and/or access to any part of the **site** or **works** [23.2.1] 12.2.6.1.2* outstanding **construction information** [23.2.5] 12.2.6.1.3* **Free issue** [23.2.6] 12.2.6.1.4* the appointments of **subcontractors** [23.2.7] 12.2.6.1.5* acceptance of designs of selected **subcontractors** [23.2.8] 12.2.6.1.6* **date for practical completion** as a whole or **dates for practical completion** in **sections** [CD]

		12.2.6.1.7* **date of practical completion** as a whole or dates of **practical completion** in **sections** [19.3.3] 12.2.6.1.8* critical path and float 12.2.6.1.9* health and safety requirements 12.2.6.1.10* approvals by authorities, **employer** or **agents** 12.2.6.1.11* all contractual notices issued and claims submitted [23.0;26.0] 12.2.6.2* The **contractor** shall program the **works** by taking full cognisance and should comply with any programming requirements in relation to, *inter alia* sequencing, key dates, milestones, restrictions or constraints as included in the **contract data**. 12.2.6.3* The **principal agent** shall, within five (5) **working days** after the **contractor** has submitted an initial or updated **programme**, approve and agree on the specific dates for performance by the **employer** included in such **programme** or, rejecting same with reasons and instruct the **contractor** to amend such **programme**. Reasons for rejecting a **programme** are *inter alia* that it is not in accordance with the **agreement** or does not reflect the actual progress. The

		principal agent's failure to approve or reject with reasons the submitted **programme**, 12.2.6.3.1* shall, in the event of the submitted **programme** being an adjusted **programme**, be deemed to have been approved; and 12.2.6.3.2* shall, in the event of the submitted programme being an initial **programme**, not be deemed to constitute approval. However, the **contractor** shall have the right to suspend the **works** [6.4] 12.2.6.4* The **programme** shall be subject to review on a monthly basis. The **contractor** shall deliver to the **principal agent** an updated **programme** reflecting actual progress and updated dates in accordance with [12.2.6.1], even though it may reflect that the planned date(s) of **practical completion** will be later than the corresponding date(s) for **practical completion**. The fact that the contractor may be in culpable delay does not relieve him from submitting an updated **programme** every month, and in addition; 12.2.6.4.1* when a specific event or circumstance occurs which may cause a delay to the date of **practical completion** [23.6.2];

		12.2.6.4.2* when a specific event or circumstance occur which may cause expense and/or loss or both [26.5]; 12.2.6.4.3* with each claim [23.6.2; 26.5]; and 12.2.6.4.4* after each assessment or ruling [23.7; 26,7] 12.2.6.5* where the **parties** fail to reach agreement on an updated **programme** within a further five (5) **working days** after the **principal agent**'s rejection of a **programme** [12.2.6.3], the **programme** shall be deemed to be a dispute [30.2] and referred to adjudication [30.6]
19.1 The **principal agent** shall: 19.1.1 Inspect the **works** at appropriate intervals to give the **contractor** interpretations and direction on the standard of work and the state of completion of the **works** required of the **contractor** to **achieve practical completion**		19.1.1* Inspect the **works** at appropriate intervals to give the **contractor** interpretations and direction on the standard of work, the state of completion of the **works** and the documentation to be prepared and submitted [12.2.19-20] as the criteria for the **contractor** to achieve **practical completion** [CD]
19.2.1 Inspect the works in advance of the revised date for		19.2.1* Inspect the **works** in advance of the anticipated **date**

practical completion to confirm that the standard of work required and the state of completion of the **works** for **practical completion** [CD] has been achieved 19.2.2 Give timeous **notice** to the **principal agent** of the anticipated date for the inspection for **practical completion** of the **works** to meet the (revised) date for **practical completion** [CD]"		**of practical completion** to confirm that the standard of work required and the state of completion of the **works** has been achieved and documentation [12.2.19-20] has been provided for **practical completion** [CD] to be certified 19.2.2* Give timeous **notice** to the **principal agent** of the anticipated **date of practical completion** of the **works**, in order for the **principal agent** to inspect the **works** [19.1.3] so as to meet such date
19.4 "Should the **principal agent** not issue a **list for practical completion** or the updated list within five (5) **working days** after the inspection period, [19.3] the **contractor** shall give **notice** to the **employer** and the **principal agent**. Should the **principal agent** not issue such list within a further five (5) **working days** of receipt of such notice, **practical completion** shall be deemed to have been achieved on the intended/revised date for **practical completion** and the **principal agent** shall issue the **certificate of practical completion** forthwith		19.4* Should the **principal agent** not issue a **list for practical completion** [19.3.1] after the **contractor's notice** [19.2.2] and the inspection period [19.1.3] or the updated list [19.3.2] within five (5) **working days** after the **contractor's notice** requesting a follow up inspection, the **contractor** shall give a further **notice** to the **employer** and the **principal agent** referring specifically to the previous **notice**. Should the **principal agent** not issue such list within five (5) **working days** of receipt of such further **notice**, **practical completion** shall be deemed to have been achieved on the anticipated **date of practical completion** as notified in the previous **notice** referred to and the **principal agent** shall issue the **certificate of practical completion** forthwith

19.6 Where the **employer** takes possession of the whole or a portion of the **works** by agreement with the **contractor**, **practical completion** shall be deemed to have occurred. The **principal agent**, after inspection of the **works**, [19.3.3] shall issue a certificate of **practical completion** to the **contractor** with a copy to the **employer** within five (5) **working days** certifying the date of possession of the works by the **employer** and the **list for completion** of items to be rectified and work to be completed within thirty (30) **working days**, or such additional period as the **principal agent** may allow		19.6* Where the **employer** takes possession of the whole or a portion of the **works** by agreement the **agreement** will be amended to provide for the **works** to be completed in **sections** [20.0] and to include all the necessary contractual implications, *inter alia*, the definition of each **section**, the **date for practical completion** of each **section** and the **penalty** applicable for each **section**.
		19.8* Where the **works** or a part thereof includes mechanical and/or electrical systems that are put to use for the convenience of the **employer** with the permission of the **contractor**, the guarantee period for such systems shall commence on the **date of practical completion** [19.0]. The aforesaid actions shall not constitute the taking of possession [19.6; 8.1] and the risk and responsibility shall accordingly not pass to the **employer**
23.2 "The **contractor** is entitled to a revision of the date for **practical completion** by the **principal agent** with an		23.2* The contractor is entitled to a revision of the **date for practical completion** by the **principal agent** with an

adjustment to the **contract value** [26.0], for a delay to **practical completion** caused by one or more of the following events:		adjustment to the **contract value** [26.0], for a delay to **practical completion** caused by one or more of the events listed below. Such entitlement shall be subject to the entitlement provided [23.1]. Therefore if a concurrent delay to **practical completion** is caused by both a [23.1] and [23.2] event, then [23.1] shall apply and the **contractor** shall be entitled to a revision of the **date for practical completion** by the **principal agent** without an adjustment of the **contract value**.
23.2.1 Delayed possession of the **site** [12.1.6]"		23.2.1* Delayed possession of the **site** [sic 12.1.7] and/or access to any part of the **site** or **works** in terms of the **programme**
23.2.3 **contract instructions** [17.1-2] not occasioned by the **contractor**'s default"		23.2.3*: **contract instructions** [17.1-2; 17.1.13] not occasioned by the **contractor**'s default
23.2.5 Late or incorrect issue of **construction information** [5.5; 6.4; 13.2.3; 17.1.1-2]		23.2.5* Incorrect issue of **construction information** and the late issue of outstanding **construction information** in terms of the **programme** [12.2.8; 13.2.3; 17.1.1-2; 17.1.13].
23.2.6 Late supply of **free issue**, **materials** and **goods** for which the **employer** is responsible [12.1.11]		23.2.6* Late supply of **free issue** in terms of the agreed **programme** [12.1.12]

23.2.8 Late acceptance by the principal **agent** and/or **agent**s of a design undertaken by a selected **subcontractor** where the **contractor**'s obligations have been met [7.3] 23.2.13 **Suspension** of the **works** [28.0]		23.2.8* Late acceptance in terms of the agreed **programme** by the **principal agent** and/or **agents** of a design undertaken by a selected **subcontractor** where the **contractor**'s obligations have been met 23.2.13* Any delay, impediment or prevention caused by or attributable to the **employer**, the **principal agent** and/or **agents**, or other **direct contractors** on the **site**
23.3 Further circumstances for which the **contractor** may be entitled to a revision of the date for **practical completion** and an adjustment of the **contract value** are delays to **practical completion** due to any other cause beyond the **contractor**'s reasonable control that could not have reasonably been anticipated and provided for. The **principal agent** shall adjust the **contract value** where such delay is due to the **employer** and/or **agents**…		23.3* Further circumstances for which the **contractor** may be entitled to a revision of the date for **practical completion** are delays to **practical completion** due to any other cause beyond the **contractor**'s reasonable control that could not have reasonably been anticipated and provided for. The **contractor** is entitled to an adjustment to the **contract value** [26.9.4] where such delay is caused by the default or prevention act of the **employer** and/or **agents**
23.4 Should a listed circumstance occur [23.1-3] which could cause a delay to the date for practical completion, the contractor shall:		23.4* Should a listed event or circumstance occur [23.1-3] which could cause a delay to the date of practical completion, the contractor shall:

23.4.1 Take reasonable steps to avoid or reduce such delay 23.4.2 Within twenty (20) working days of becoming aware of such delay, give notice to the principal agent of the intention to submit a claim for revision to the date of practical completion, failing which the contractor shall forfeit such claim		23.4.1*Give the principal agent reasonable and timeous notice of such event or circumstance and take reasonable steps to avoid or reduce such delay 23.4.2*Within ten (10) working days of becoming aware, or ought reasonably to have become aware of such event or circumstances, give notice to the principal agent of the intention to submit a claim for a revision to the date for practical completion, failing which the contractor shall forfeit such claim
23.5 The contractor shall submit a claim for the revision of the date of practical completion to the principal agent within forty (40) working days, or such extended period the principal agent may allow, from when the contractor is able to quantify the delay in terms of the programme		23.5* The contractor shall submit a claim for the revision of the date for practical completion to the principal agent within twenty (20) working days, or such extended period the principal agent may allow, from the end of the event or circumstance, failing which the contractor shall forfeit such claim
23.6 Where the contractor requests a revision of the date for practical completion the claim shall in respect of each circumstance separately state: 23.6.1 The relevant clause [23.1-3] on which the contractor relies 23.6.2 The cause and effect of the delay on the current date		23.6. *Where the contractor requests a revision of the date for practical completion the claim shall in respect of each event or circumstance separately state: 23.6.1* Particulars of such event or circumstance and the relevant clause [23.1-3] on which the contractor relies 23.6.2* The cause and effect of the delaying event or

for practical completion, where appropriate, illustrated by a change to the critical path on the current programme 23.6.3 The extension period claimed in working days and the calculation thereof		circumstance on the date of practical completion, illustrated by the impact and/or a change to the critical path on the programme by performing a time impact analysis 23.6.3*The extension period claimed in working days and the calculation thereof and the revised date for practical completion based on the extension of time period
24.1 Where the **contractor** fails to bring the **works** or a **section** thereof [CD] to **practical completion** by the date for **practical completion** [CD], or the revised date for **practical completion**, the **contractor** shall be liable to the **employer** for the **penalty** [CD]		24.1* Where the **contractor** fails to bring the **works** or a **section** thereof [CD] to **practical completion** by the **date for practical completion** [CD], or the revised **date for practical completion**, the **contractor** shall be liable to the **employer** for the **penalty** [CD]