Arkansas Law Review

Volume 75 | Number 2 Article 4

June 2022

Construction Law: The English Route to Modern Construction Law

Vivian Ramsey
King's College, London

CONSTRUCTION LAW: THE ENGLISH ROUTE TO MODERN CONSTRUCTION LAW

Sir Vivian Ramsey*

I. INTRODUCTION: CONSTRUCTION LAW

"Construction Law" is not, in itself, a body of law which applies only to the construction industry. Instead, it derives from other areas of general law, particularly the law of contract and of torts and has been at the forefront of many of the developments in general law. It also takes in many other aspects of law, including insurance law, land law, landlord and tenant law, employment law, intellectual property law and public procurement law as well as regulatory law in the fields such as building regulations, environmental and health and safety law. Whilst it started as a field of law where the main endeavour related to buildings, it is now applied to every form of construction process and finds close parallels in the IT industry where the principles are now applied.

In this Article, I will look at the way that construction law has developed in the English common law[1] world from its roots in the law of England and Wales.[2] Whilst common law traditions

* Sir Vivian Ramsey studied engineering science and economics at Oxford before working and qualifying as a chartered civil engineer. He is now a Fellow of the Royal Academy of Engineering. He studied law at the City University and commenced practice as a barrister in 1981. He became a QC in 1992 and was head of Keating Chambers, London. He was appointed as a English High Court judge in 2005 and was judge in charge of the UK Technology and Construction Court in London. He was appointed as an International Judge in Singapore in 2015 and acts as an arbitrator and mediator worldwide. He is a Visiting Professor at King's College, London and edits Keating on Construction Contracts, now in its 11th Edition. He was awarded an honorary DSc degree by the University of Westminster in 2021.

1. Named because it was "common" to all the king's courts across England—originated in the practices of the courts of the English kings in the centuries following the Norman Conquest in 1066. *See The Common Law and Civil Law Traditions*, ROBBINS COLLECTION (2010), [https://perma.cc/25E3-UDGQ].

2. English law is correctly the law of England and Wales. The law of Northern Ireland is similar, but Scottish law is different being in part common law and in part civil law. The

are now applied to many jurisdictions,[3] the number of jurisdictions in which English precedents are binding is now small. But, in many common law jurisdictions decisions of the English courts are still treated as "persuasive."[4] English decisions in the field of construction law have an extensive reach in terms of their persuasiveness. First, having a long-established court system, including a specialist court for 150 years, has meant that the decisions of the English court have often been the only decisions on points of principle relating to construction. Secondly, forms of contract derived from English standard forms of contract have been and continue to be used worldwide, most commonly in the FIDIC forms of contract.[5] Today, therefore, contracts derived from these English standard forms are used in civil law countries, particularly in the Middle East, and questions of interpretation are very often based on decisions of the English courts, applied of course in the context of the local law.[6]

I will next look at some of the particular construction law concepts which have derived from the English common law. These include risk allocation in construction, the role of the

---

common feature of all these jurisdictions is that in the end the final appeal is to the United Kingdom Supreme Court. *See* William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 690-91 (2000); UK Parliament, *House of Lords, Practice Directions Applicable to Civil Appeals*, U.K. PARLIAMENT, [https://perma.cc/4Q27-UC2N] (last visited Apr. 19, 2022).

3. Common law jurisdictions or mixed common law systems include:

> Antigua and Barbuda, Australia, Bahamas, Bangladesh, Barbados, Belize, Botswana, Burma, Cameroon, Canada (both the federal system and all its provinces except Quebec), Cyprus, Dominica, Fiji, Ghana, Grenada, Guyana, Hong Kong, India, Ireland, Israel, Jamaica, Kenya, Liberia, Malaysia, Malta, Marshall Islands, Mauritius, Micronesia, Namibia, Nauru, New Zealand, Nigeria, Pakistan, Palau, Papua New Guinea, Philippines, Sierra Leone, Singapore, South Africa, Sri Lanka, Trinidad and Tobago, the United Kingdom (including its overseas territories such as Gibraltar), the United States (both the federal system and 49 of its 50 states), and Zimbabwe.

Common Law Countries 2022, WORLD POPULATION REV., [https://perma.cc/FP6X-KHMY] (last visited Apr. 19, 2022).

4. *See* D. Hoadley, et al., *A Global Community of Courts? Modelling the Use of Persuasive Authority as a Complex Network*, FRONTIERS IN PHYSICS 1, 2 (2021), [https://perma.cc/TGP8-RZPG].

5. Fédération Internationale Des Ingénieurs-Conseils or International Federation of Consulting Engineers, based in Geneva. *See* International Federation of Consulting Engineers, *History*, FIDIC, [https://perma.cc/9WRY-BJS2] (last visited Apr. 19, 2022).

6. *See Why English Law Governs Most International Commercial Contracts*, QLTS SCH. (Sept. 12, 2016), [https://perma.cc/BK8Z-ECNG].

Engineer and the applicability of liquidated damages, extensions of time and prevention by the employer. I have tried to choose topics where the cases have some historical interest.

By way of conclusion, I will then consider the way in which dispute resolution has developed over the years to ensure that disputes are avoided or dealt with efficiently. The most important development has been the introduction of "adjudication" which has now spread throughout the common law world and has changed traditional perceptions on the needs of the construction industry.

II. ENGLISH COURTS

Whilst many great construction projects have been carried out in the British Isles from at least 3100 BC,[7] little remains of the history of their construction or any disputes. The Romans, after their invasions in 55 and 54 BC, and until the end of Roman Britain in AD 409, were responsible for the construction of much infrastructure, remains of which can be seen today.[8] The best known are Hadrian's Wall[9] and the Roman baths at Bath.[10]

The earliest surviving arbitration award in Britain dates from AD 114,[11] and the resolution of disputes by arbitration has a long

7. The stone circle at Stonehenge, Wiltshire, has stones dated from 8000BC but the current structure of an outer ring of standing stones, topped with lintels and with an inner circle of bluestones, all orientated to the sunrise on the summer solstice is dated to 3100BC. *See History of Stonehenge*, ENGLISH HERITAGE, [https://perma.cc/ET6L-M3KL] (last visited Apr. 19, 2022).

8. *See* SIR RUPERT JACKSON, THE ROMAN OCCUPATION OF BRITAIN AND ITS LEGACY 3-6 (2020). Sir Rupert was a distinguished English judge and was judge in charge of the Technology and Construction Court until 2007. He is now an international arbitrator and sits in the International Commercial Court in Kazakhstan.

9. The Emperor Hadrian, in about AD 122 ordered the construction of a wall along the northern frontier of Britain from the North Sea at the East to the Solway Firth at the West. *History of Hadrian's Wall*, ENGLISH HERITAGE, [https://perma.cc/2QEU-P98P] (last visited Apr. 19, 2022).

10. Peta Stamper, *Roman Baths—Bath*, HISTORYHIT (May 17, 2021), [https://perma.cc/QH58-7TM3]. Bath or Aqua Sulis was a shrine to a Celtic god, Sulis, and the site of a hot spring discharging 250,000 gallons per day. In about AD 60 the Romans built baths which still function today including a great bath lined with lead sheets and smaller baths. *Id.*; *Roman Baths at Bath—Virtual Tour*, JOY OF MUSEUMS, [https://perma.cc/EHZ2-VMPF] (last visited Apr. 19, 2022); Steven Morris, *Bath Abbey to be Heated Using Water from City's Hot Springs*, GUARDIAN (Jan. 8, 2019), [https://perma.cc/G258-8MBY].

11. *See* DEREK ROEBUCK, EARLY ENGLISH ARBITRATION at pxviii, 50-51 (2008).

history. Many of the trade disputes were resolved by the guilds and livery companies in the City of London.[12] Those organisations, which still exist, regulated various trades including many in the construction industry.[13] The earliest such company dates from 1155.[14] Worshipful Companies associated with the Construction Industry include, in order of precedence: Carpenters, Painter-Stainers, Masons, Plumbers, Tylers & Bricklayers, Joiners & Ceilers, Plaisterers, and Glaziers, with Carpenters dating from 1271.[15]

The modern English justice system was started by King Henry II, who established a jury of twelve local knights to settle disputes over the ownership of land. In 1178 he set up a court of two clergy and three lay people, supervised by him, "to hear all the complaints of the realm and to do right."[16] This was the origin of the Court of Common Pleas. "Eventually, a new permanent court, the Court of the King's Bench, evolved[.]"[17] In 1166, Henry II set in train the system by which new national laws were made by the judges in Westminster. "These national laws applied to everyone and so were common to all."[18] This led to the phrase the "common law." "A third common law court of justice, the Court of Exchequer, eventually emerged . . . ."[19] On the restoration of the monarchy in 1660, there were just twelve judges, "four in each of the common law courts."[20]

Whilst the common law system improved on what had gone before, it was "slow" and "highly technical," and "those who felt they had been failed by the common law system could . . . petition

12. *Livery Companies*, CITY OF LONDON (Aug. 2, 2022), [https://perma.cc/2YV4-HXSK].

13. The Editors of Encyclopaedia Britannica, *Livery Company*, BRITANNICA, [https://perma.cc/85MB-D9AX] (last visited Apr. 19, 2022).

14. *Livery Companies*, *supra* note 12.

15. *Database of Companies and Guilds*, LIVERY COMM., [https://perma.cc/S4AB-MWNS] (last visited Apr. 19, 2022); *History*, CARPENTERS' COMPANY, [https://perma.cc/X9U8-8T9T] (last visited Apr. 19, 2022).

16. *History of the Judiciary: An Ancient System*, CTS. & TRIBUNALS JUDICIARY, [https://perma.cc/YMT2-EFHU] (last visited Apr. 19, 2022).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

the King with their grievances."[21] Gradually, these cases were delegated to the Lord Chancellor who began to preside over his own court, the Court of Chancery. "This dealt only with civil disputes, for example property and contract cases, and applied the law of equity—even-handedness or fairness."[22] By the time of Henry VIII, the Court of Chancery rivaled the common law courts.[23] But, over the years, that court suffered from the same problems of "expense and delay."[24]

Parliament passed the Judicature Act in 1873, "which merged common law and equity" so that all courts could administer "both equity and common law."[25] "The same Act established the High Court and the Court of Appeal and provided a right of appeal in civil cases to the Court of Appeal."[26]

In the course of that history, there have been specialist courts. The best known were the Fire Courts which were founded under the Fire of London Disputes Act 1666.[27] After the plague of 1665 there followed the Great Fire of London which destroyed many properties in London.[28] Parliament decided to establish a special court to settle all differences arising between landlords and tenants of burnt buildings.[29] The disputes involved liability for restoring buildings, payment of rent and other charges, and establishing new leases on different terms.[30] The courts were overseen by judges of the King's Bench, Court of Common Pleas and Court of Exchequer.[31] The courts sought solutions to

21. *History of the Judiciary: An Ancient System*, *supra* note 16.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *History of the Judiciary: An Ancient System*, *supra* note 16.

27. *See Fire of London Disputes Act 1666*, MORR & CO., [https://perma.cc/T2RR-F599] (last visited Apr. 17, 2022). It had the long title: "An Act for erecting a Judicature for Determination of Differences touching Houses burned or demolished by reason of the late Fire which happened in London."

28. Becky Little, *When London Faced a Pandemic—And a Devastating Fire*, HIST., (Mar. 25, 2020) [https://perma.cc/ZSP7-CW4N].

29. Jay Tidmarsh, *The English Fire Courts and the American Right to Civil Jury Trial*, 83 U. CHI. L. REV. 1893, 1921 (2016).

30. *See id.* at 1903.

31. John Noorthouck, *Book 1, Chapter 15: From the Great Fire in 1666, to the Death of King Charles II*, *in* A NEW HISTORY OF LONDON INCLUDING WESTMINSTER AND SOUTHWARK (1773), BRIT. HIST. ONLINE, [https://perma.cc/7L5M-M6D2] (last visited Apr. 25, 2022).

the intractable disputes caused in the aftermath of the Great Fire.[32] The Fire Courts are generally recognized as having helped to resolve disputes quickly and acceptably, allowing the City of London and the courts to get back to business within a surprisingly short time.[33]

The other specialist court which has its roots in the changes introduced at the time of the Judicature Act is the Technology and Construction Court ("TCC").[34] The work of the TCC was formerly known as Official Referees' Business, with the office of Official Referee being created in 1873.[35] It was formed "to hear cases involving technical and detailed issues that could not be tried satisfactorily by a judge and jury and, by the 1920s, the bulk of [its] work" was concerned with construction and engineering disputes.[36] "The Official Referees, the majority of whom had been in practice as King's or Queen's Counsel,"[37] sat in the High Court, but more as junior circuit judges rather than High Court judges.[38]

By the 1990's there were eight judges carrying out Official Referees' business in London with other judges designated to deal with Official Referees' Business in major regional court centres.[39] In 2004, it was resolved that substantial cases in the TCC in London would be heard by High Court judges, with a number of High Court judges being designated to sit in the TCC in London and, when needed, at regional centres in England and Wales.[40] "These judges also have an important jurisdiction in relation to arbitration, which is not just limited to the hearing of applications

32. *See id.*

33. *See* THE SELDEN SOC'Y & INST. OF CT., *The Fire Courts: Successfully Delivering Justice in a Time of Plague and Fire*, YOUTUBE, at 17:13 (Oct. 21, 2020). Video available at https://www.youtube.com/watch?v=7FdKzoQ9dyo [https://perma.cc/YC6N-YG3P] (lecture by Professor Jay Tidmarsh of Notre Dame Law School considering the genesis and impact of the Fire of London Disputes Act 1666).

34. The modern name of the TCC was introduced in October 1998. *History*, CTS. & TRIBUNALS JUDICIARY, [https://perma.cc/X56W-EZN3] (last visited Apr. 19, 2022).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id*.

39. *History*, *supra* note 34.

40. *Id.*

under the Arbitration Act 1996."[41] "As in the Commercial Court, there is a statutory jurisdiction enabling TCC judges to be appointed as arbitrators."[42] This cross-over jurisdiction is an important link to commercial parties involved in construction, engineering and technology disputes.

The TCC has established a global reputation for dealing with cases ranging from the usual types of construction disputes to professional negligence, public procurement, pollution and fire cases and IT disputes.[43] Parties to construction and engineering contracts from all over the world specify the TCC as the court to resolve their disputes. Under the English Arbitration Act 1996 there is also a special statutory jurisdiction provision, enabling TCC judges to be appointed as arbitrators.[44]

In terms of procedure the TCC have been in the forefront in pioneering ways in which cases can be dealt with efficiently. They introduced witness statements in place of evidence-in-chief,[45] lists of issues in complex cases,[46] the need for case management of cases by the judge who will ultimately try the case,[47] the use of "Scott Schedules" to enable all parties to set out their cases on multiple claims or issues to be set out in a single document,[48] the process for expert witnesses to meet on a "without prejudice" basis to discuss their views and seek to agree matters,[49] summarising the extent of their agreement and disagreement in a joint statement and calling expert witnesses concurrently and by discipline.[50]

In addition to trying cases without a jury, TCC judges are also able to assist parties by carrying out early neutral evaluations or by acting as mediators under a "Court Settlement Process."[51]

---

41. *Id.*

42. *Id.*

43. *Work*, CTS. & TRIBUNALS JUDICIARY, [https://perma.cc/6P9S-DNSS] (last visited Apr. 16, 2022).

44. *History*, *supra* note 34.

45. H.M. CTS. & TRIBUNALS SERVICE, THE TECHNOLOGY AND CONSTRUCTION COURT Guide §§ 12.1, 12.1.3, 12.2.5 (2nd ed. 2015).

46. *Id.* § 13.8.1.

47. *Id.* § 5.1.

48. *Id.* § 5.6.

49. *Id.* § 13.5.1.

50. H.M. CTS. & TRIBUNALS SERVICE, *supra* note 45 §§ 13.6, 13.8.2.

51. *Id.* § 7.6.

Since the introduction of adjudication in 1998,[52] discussed more fully below, the TCC judges have had a crucial role in enforcing decisions of adjudicators by a shortened summary judgment process, achieving enforcement typically in three to four weeks of the proceedings' start.[53]

III. DEVELOPMENT OF CONSTRUCTION LAW

The development of modern construction law has derived from the developments of society. This can be seen by the type of case which came before the courts in the years before the Industrial Revolution. For example, in 1611, in the *Case of Proclamations*, the court had to consider the division between the role of the monarchy in the context of construction.[54] James I had, by proclamation, prohibited among other things the construction of new buildings in and around London.[55] Coke CJ resisted this incursion stating that "the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm."[56] Those three categories were exhaustive of English law: "the law of England is divided into three parts, common law, statute law, and custom; but the King's proclamation is none of them."[57] It followed that "the King cannot create any offence by his prohibition or proclamation, which was not an offence before, for that was to change the law."[58]

A. The Imposition of Obligations on the Contractor

The expansion of the railway industry in the middle of the 19th century gave rise to a number of decisions in the English courts relating to risk and payment which can be traced as the beginning of principles still applied today.

---

52. Housing Grants, Construction and Regeneration Act 1996, c.53 § 108.

53. H.M. CTS. & TRIBUNALS SERVICE, *supra* note 45 § 9.2.

54. Case of Proclamations (1611) 12 Co. Rep. 75. Recently cited by Lord Reed in R v. Secretary of State for Exiting the European Union [2017] UKSC 5 at [165].

55. *Case of Proclamations*, 12 Co. Rep. 75, 75.

56. *Id.*

57. *Id.*

58. *Id.*

In *Sharpe v. San Paulo Ry.*, the Engineer was involved in a scheme to build a railway in Brazil.[59] The Emperor of Brazil authorized the Engineer to form company for the construction of the railway, and the government of Brazil guaranteed the interest up to a limit of expenditure, with the company taking the risk on expenditure over that sum.[60] The contract with the contractors provided that the Engineer's certificate should be binding and conclusive.[61] A lump sum price (less than the limit of expenditure) was agreed to under the contract.[62] The extent to the obligation was, as follows:

> The contractors will execute and provide not only all the works and materials mentioned in the specification comprised in the first schedule to these presents, but also such other works and materials as in the judgment of the company's engineer-in-chief are necessarily or reasonably implied in and by or inferred from that specification, and the plans and sections of the railway and works, it being the true intent and meaning of this contract that the works and materials to be executed and provided respectively by the contractors under this contract shall comprise all works, buildings, materials, operations, and things whatsoever proper and sufficient in the judgment of the company's engineer-in-chief for the perfect execution and completion of the railway, and all the works and conveniences thereof and connected therewith, and the maintenances of every section of the railway for twelve calendar months after the completion and delivery to the company of each such section.[63]

In preparing the tender documents, the Engineer produced a detailed statement of the nature and quantities of the various works to be executed and the materials to be provided.[64] The contractors provided fixed prices for the items required.[65] The contract contained a recital stating that the Engineer had made a "comparative tabular statement of the cost of the several proposed

59. (1872-73) L.R. 8 Ch. App. 597.
60. *Id.*
61. *Id.* at 599.
62. *Id.* at 607.
63. *Id.* at 599.
64. *Sharpe*, L.R. 8 Ch. App. at 598.
65. *Id.*

sections of the railway, of which an abstract copy was given in the second schedule to the contract."[66]

The contractor had to carry out more work than was set out in the statement of quantities and contended that it had been assured that the Engineer had prepared those documents "with great care, and might be relied upon as entirely accurate" and that the contractor had "made a tender to the promoters, offering to form and complete the line of railway, and fixing prices to the different items of the statement."[67] There had been supplementary agreements and the contractor alleged that:

> [D]uring the progress of the works it became apparent that the actual quantities of earthwork being done by the contractors were greatly in excess of the quantities specified in the schedule. That the contractors objected and protested, and that [the Engineer], as engineer and agent of the company, agreed that if it should prove that the total quantity of earthwork was in excess the contractors should be compensated by savings in sidings, stations, and other things which [the Engineer] promised to make.[68]

The facts show that the allegations in construction claims have not altered much in the period of 150 years since this case. The court made some clear findings in rejecting the contractor's claim:

> (a) that the contractor undertook to make the railway, not to do certain works; but they undertook to complete the whole line, with everything that was requisite for the purpose of completion, from the beginning to the end; and they undertook to do it for a lump sum;
>
> (b) that the contractor could not, on mere verbal promises by the engineer, maintain against the company a claim to be paid sums beyond the sums specified in the contract under seal;
>
> (c) that, although the amount of the works to be executed might have been understated in the engineer's specification, the contractors could not, under the circumstances, maintain any claim against the company on that ground;

66. *Id.* at 598-99.
67. *Id.* at 598, 602.
68. *Id.* at 602-03.

> (d) that, in the absence of fraud on the part of the Engineer, and where the Engineer's certificate has been made a condition precedent to payment, that certificate must be conclusive between the parties. "The very object of leaving these things to be settled by an engineer is that you are to have the practical knowledge of the engineer applied to it, and that he, as an independent man, a surveyor, a valuer, an engineer, is to say what is the proper sum to be paid under all the circumstances."[69]

Ranger v. Great W. Ry. Co., concerned the construction of the railway from London to Bristol.[70] Again, there was a lump sum and a schedule of rates for any variations.[71] The contractor ran into financial difficulties, and the railway company took over and completed the works.[72] The Contractor alleged that there had been a fraudulent representation as to the nature of the soil he should have to cut into or through being sandstone whereas, in fact, it was much harder, and more difficult to work than sandstone.[73] The Contractor also alleged that the certificates for his work had not been duly allowed and that he had been delayed, by the acts of the railway company.[74] The claims were dismissed.[75]

The Engineer was impressively called Isambard Kingdom Brunel and was one of the great civil engineers of the era.[76] One particular allegation concerned his certification of sums due to the contractor.[77] It was said that Mr. Brunel, who was the principal engineer of the company, was incapacitated from acting in the discharge of the duties imposed on him, because he was himself a shareholder in the railway company.[78] In dismissing that ground the court stated that:

---

69. *Sharpe*, 8 Ch. App. at 608-09.
70. [1854] 5 Eng. Rep. (HLC) 824, 825.
71. *Id.* at 825-26.
72. *Id.* at 827.
73. *Id.*
74. *Id.*
75. *Ranger*, 5 Eng. Rep. (HLC) at 828.
76. *Id.* at 831; *Isambard Kingdom Brunel (1806-1859)*, BBC (2014) [https://perma.cc/7H2F-AYZD].
77. *Ranger*, 5 Eng. Rep. (HLC) at 827.
78. *Id.* at 828.

> It is not necessary to state the duties of the engineer in detail: he was, in truth, made the absolute judge, during the progress of the works, of the mode in which the Appellant was discharging his duties; he was to decide how much of the contract price . . . from time to time had become payable; and how much was due for extra works; and from his decision, so far, there was no appeal. After all the works should have been completed, the Appellant might call in a referee of his own as to any question as to the amount (if any) then due beyond what had been certified.[79]

It was contended by the contractor that:

> [T]he duties thus confided to the principal engineer were of a judicial nature; that Mr. Brunel was the principal engineer by whom those duties were to be performed, and that he was himself a shareholder in the Company; that he was thus made a judge, or arbitrator, in what was, in effect, his own cause.[80]

Dismissing that contention, the court stated that, when matters had to be decided by the engineer appointed by the railway company, that was in fact a decision by the company and:

> [T]here never was any intention of leaving to third persons the decision of questions arising during the progress of the works. The Company reserved the decision to itself, acting however, as from the nature of things it must act, by an agent, and that agent was, for this purpose, the engineer.[81]

In those circumstances there could be no complaint that Mr. Brunel held shares in the railway company.[82]

The extent of the risks undertaken by the contractor were considered in the case of *Thorn v. The Mayor and Commonalty of London*.[83] In 1864 tenders were sought for taking down and removing the Blackfriars Bridge in London, and erecting a new bridge, with plans of the new bridge and specification of the works being provided as part of the tender.[84] The specification included provisions that the contractors were "to take out their own quantities, no surveyor being authorized to act on the part of

79. *Id.* at 831.
80. *Id.*
81. *Id.*
82. *Ranger*, 5 Eng. Rep. (HLC) at 832.
83. (1876) 1 App. Cas. 120, 124.
84. *Id.* at 120-21.

the corporation;" that drawings of the existing bridge gave all the information possessed respecting the foundations; and "[t]hese plans are believed to be correct, but their accuracy is not guaranteed, and the contractor will not be entitled to charge any extra should the work to be removed prove more than indicated on these drawings."[85] For "coffer-dams," it was stated that "[t]he contractor must satisfy himself as to the nature of the ground through which the foundations have to be carried; all the information given on this subject is believed to be correct, but is not guaranteed."[86] For "[i]ron caissons," the specification stated that the "foundations of the piers will be put in by means of wrought iron caissons, as shewn on drawing No. 7."[87] And that:

> The casing of the lower part of which caissons will be left permanently in the work. The upper part, which is formed of buckle plates, is to be removed. The whole of the interior girder framing must be removed as the building proceeds, the work being made good close up to the underside of each girder before removal thereof.[88]

Finally, it stated that "all risk and responsibility involved in the sinking of these caissons will rest with the contractor, and he will be bound to employ divers or other efficient means for removing and overcoming any obstacles or difficulties that may arise in the execution of the works."[89] The engineer had the power to:

> [A]t any time or times, during the progress of the works to vary the dimensions or position of the various parts of the works to be executed under these presents, without the said contractors being entitled to any extra charge for such alteration, provided the total quantity of work be not increased or diminished thereby.[90]

After the caissons had been used as directed in the specifications, it was found that they were no fit for that purpose and the plan of the work was altered.[91] Time was thus lost and

85. *Id.* at 121.
86. *Id.*
87. *Id.*
88. *Thorn*, 1 App. Cas. at 121.
89. *Id.*
90. *Id.* at 122.
91. *Id.*

the labour executing the original design was wasted. The contractor claimed compensation for loss of time and labour caused by the attempt to execute the work to the original plans, alleging that the employer had guaranteed and warranted that Blackfriars Bridge could be built in accordance with the employer's plans and specification, without tide-work, and in a manner comparatively inexpensive, and that caissons shown on the said plans would resist the pressure of water during the construction of the bridge.[92]

The claim was dismissed on the basis that:

> [I]f it were to be held that there is, with regard to the specification itself, an implied warranty on the part of the person who invites tenders for the contract, that the work can be done in the way and under the conditions mentioned in the specification, so that he is to be liable in damages if it is found that it cannot be so done, the consequences . . . would be most alarming.[93]

Therefore, where plans and a specification are prepared for the use of tenderers, the person asking for the tenders does not enter into any implied warranty that the work can be successfully executed according to those plans and specification and the risk is therefore on the contractor.[94]

There was however some respite for contractors. In *Roberts v. Bury Improvement Comm'rs*, there was a contract to construct buildings in accordance with certain plans and drawings, with a provision for variations.[95] There were provisions for extensions of time and for termination if the contractor did not, "in the opinion and according to the determination of the architect, exercise due diligence and make such due progress as would enable the works to be effectually and efficiently completed at the time stipulated."[96] "[A]ll differences were to be referred to the architect, whose decision was to be final, without giving any reasons."[97]

---

92. *Id.* at 122-23.
93. *Thorn*, 1 App. Cas. at 128.
94. *Id.* at 120.
95. (1869-70) L.R. 5 C.P. 310, 310.
96. *Id.*
97. *Id.*

The employer terminated the contract on the basis that the contractor failed in the due performance of certain parts of the work, and did not in the opinion of the architect exercise due diligence and make such due progress as would have enabled the works to be efficiently and effectually completed at the time agreed.[98] The contractor contended that the alleged failure and lack of due diligence were caused by the default of the employer and the architect in supplying plans and drawings, and in setting out the land, and defining the roads, and giving information to enable the contractor to commence the works, and that the contractor was therefore entitled to an extension of time which the architect had not granted.[99]

In the course of giving the majority judgment, the court considered the implied obligations of the employer and the contractor, stating:

> The contractor also, from the nature of the works, could not begin his work until the commissioners and their architect had supplied plans and set out the land and given the necessary particulars; and therefore, in the absence of any express stipulation on the subject, there would be implied a contract on the part of the commissioners to do their part within a reasonable time; and, if they broke that implied contract, the contractor would have a cause of action against them for any damages he might sustain, and the commissioners would be precluded from taking advantage of any delay occasioned by their own breach of contract: for, it is a principle very well established at common law, that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself; and also that he cannot sue for a breach of contract occasioned by his own breach of contract, so that any damages he would otherwise have been entitled to for the breach of the contract to him would immediately be recoverable back as damages arising from his own breach of contract.[100]

The Court then noted that the contractor contended that its alleged default had been caused by the wrongful act or default of

98. *Id.* at 314.
99. *Id.*
100. *Roberts*, L.R. 5 C.P. at 325-26 (citations omitted).

the employer and the employer contended that the default had not, according to the determination of the architect, been caused by the employer's wrongful act or default.[101] They concluded that, the architect having no power under the contract to bind the contractor by any such determination, the employer could not take advantage of its own wrong and had consequently no power to terminate the contract.[102]

B. The Position of the Engineer or Architect as Certifier

The position of the Engineer or Architect as the certifier under a construction contract raises questions of the nature of that person's engagement. They are an agent of the employer in giving instructions and ordering changes. However, as was said in *Sutcliffe v. Thackrah*:

> The building owner and the contractor make their contract on the understanding that in all such matters the architect will act in a fair and unbiased manner and it must therefore be implicit in the owner's contract with the architect that he shall not only exercise due care and skill but also reach such decisions fairly, holding the balance between his client and the contractor.[103]

Whilst the need for a certificate could be dispensed with in cases where the architect had been "disqualified," as in *Hickman & Co. v. Roberts*,[104] there was a question whether the court could intervene to "open up, review and revise" certificates, which was a phrase commonly included in arbitration clauses.[105] After a period when the Court of Appeal held that the court did not have that power[106] the House of Lords in *Beaufort Developments (NI) Ltd. v. Gilbert-Ash (NI) Ltd.*, decided that the court did have that

101. *Id.* at 329-30.

102. *Id.* at 333.

103. [1974] A.C. 727, 737.

104. [1913] A.C. 229, 232-33 (holding that an architect allowed his judgment to be influenced by the building owners and improperly delayed issuing his certificates in accordance with their instructions).

105. N. Reg'l Health Auth. v. Derek Crouch Constr. Co. Ltd. [1984] Q.B. 644 [¶ 30], [¶ 32].

106. *Id.* [¶ 51].

power.[107] Lord Hoffmann made these observations on the role of the architect in giving certificates:

> If the certificates are not conclusive, what purpose do they serve? If one considers the practicalities of the construction of a building or other works, it seems to me that parties could reasonably have intended that they should have what might be called a provisional validity. Construction contracts may involve substantial work and expenditure over a lengthy period. It is important to have machinery by which the rights and duties of the parties at any given moment can be at least provisionally determined with some precision. This machinery is provided by architect's certificates. If they are not challenged as inconsistent with the contractual terms which the parties have agreed, they will determine such matters as when interim payments are due or completion must take place. This is something which the parties need to know. No doubt in most cases there will be no challenge.
>
> On the other hand, to make the certificate conclusive could easily cause injustice. It may have been given when the knowledge of the architect about the state of the work or the effect of external causes was incomplete. Furthermore, the architect is the agent of the employer. He is a professional man but can hardly be called independent. One would not readily assume that the contractor would submit himself to be bound by his decisions, subject only to a challenge on the grounds of bad faith or excess of power. It must be said that there are instances in the 19th century and the early part of this one in which contracts were construed as doing precisely this. There are also contracts which provided that in case of dispute, the architect was to be arbitrator. But the notion of what amounted to a conflict of interest was not then as well understood as it is now. And of course the inclusion of such clauses is a matter for negotiation between the parties or, in a standard form, the two sides of the industry, so that what is acceptable will to some extent depend upon the bargaining strength of one side or the other. At all events, I think that today one should

107. [1999] 1 A.C. 266.

> require very clear words before construing a contract as giving an architect such powers.[108]

However, the Engineer or Architect is not under a duty to hear both parties before coming to a decision and any conflict may not disqualify the engineer from acting.[109] In *AMEC Civ. Eng'g Ltd v. Sec. of State for Transp.*, an engineer was required by the employer to issue a decision on a dispute relating to liability for failed bridge bearings and to do so in circumstances where the engineer was also facing a similar claim for liability from the employer for the failure of the bridge bearings.[110] The Court of Appeals held that the engineer was not obliged to comply with the rules of natural justice applicable to those who acted judicially, but was required to act independently, honestly, and fairly, in so far as what was regarded as fair was flexible and tempered to the particular facts and occasion.[111] It was also held that the fact that the employer had made an equivalent claim against the engineer did not disqualify the engineer from giving a valid decision under clause 66(1), since such a conflict of interest was an unavoidable potential incidence of the contractual relationship.[112]

C. Prevention by the Employer[113] and its Consequences for Delay and Liquidated Damages

The use of Condition L6 in Comyns' Digest was also the basis for another legal development. An issue which also arose in many cases was the issue of delay caused by an employer and the ability to deduct liquidated damages.[114] In *Holme v. Guppy*, a contract for carpentry work at a brewery stipulated a time for completion of four and a half months with liquidated damages of £40 per week.[115] The contractor was delayed by four weeks in

108. *Id.*

109. AMEC Civ. Eng'g Ltd v. Sec. of State for Transp. [2005] EWCA Civ. 291 [¶40], [¶48].

110. *Id.* [¶1], [¶5].

111. *Id.* [¶47].

112. *Id.* [¶44].

113. Under English and International standard forms the "Owner" is known as the "Employer." AISHA NADAR, THE CONTRACT: THE FOUNDATION OF CONSTRUCTION PROJECTS (3d ed. 2019).

114. Holme v. Guppy, 150 E.R. 1195; (1838) 3 M. & W. 387.

115. *Id.* at 1196; 3 M. & W. at 388.

starting the work by not having possession and was then five weeks late finishing, having been delayed one week by the default of their own workmen.[116] It was held that the employer could not deduct any liquidated damages in respect of the delay, not even for one week.

The explanation by Parke B, was as follows:

> It is clear, from the terms of the agreement, that the plaintiffs undertake that they will complete the work in a given four months and a half; and the particular time is extremely material, because they probably would not have entered into the contract unless they had had those four months and a half, within which they could work a greater number of hours a day. Then it appears that they were disabled by the act of the defendants from the performance of that contract; and there are clear authorities, that if the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default. It is clear, therefore, that the plaintiffs were excused from performing the agreement contained in the original contract; and there is nothing to shew that they entered into a new contract by which to perform the work in four months and a half, ending at a later period. The plaintiffs were therefore left at large; and consequently they are not to forfeit anything for the delay.[117]

The phrase "left at large" has caused a degree of debate in English construction law. Does it mean that time is "at large" so that the contractor is left without a time for completion or merely that the contractor's liability for damages is "at large" so that the contractor is not liable for the agreed liquidated damages. The statement was made that "the plaintiffs were excused from performing the agreement contained in the original contract" and that there was "nothing to shew that they entered into a new contract by which to perform the work in four months and a half, ending at a later period."[118]

In *Russell v. Viscount Sa Da Bandeira*, there was a contract to build a ship for the Portuguese navy.[119] One of the provisions

116. *Id.* at 1195; 3 M. & W. at 387.
117. *Id.* at 1196; 3 M. & W. at 388 (internal citations omitted).
118. Russell v. Viscount Sa Da Bandeira, 143 E.R. 59 (1862) at 76.
119. *Id.* at 59.

of the contract was that liquidated damages (called a "penalty") at a daily rate should be paid:

> [F]or each day the vessel should not be delivered finished, fitted, and completed after the day named: provided that, if the vessel should not be launched and delivered at the time appointed, by reason of any cause not under the control of the plaintiff, the same to be proved to the satisfaction of Admiral S., and to be certified by him in writing, then the said penalty should not be enforced for such number of days or for such a time as the said Admiral S. should in such certificate name.[120]

An arbitrator found that extra time was required for the execution of additional work and caused a delay of about six weeks in the progress of the shipbuilding.[121] Erle, C.J.[122] held that no liquidated damages were recoverable and said as follows:

> It turns out that those who were the agents representing the Portuguese government caused a delay of six weeks in the finishing of the vessel. Now, the case of Holme v. Guppy, decides that, where a contractor undertakes, under pain of a certain penalty or forfeiture, to perform a work within a given time, and the performance within the time is prevented by the act of the party with whom he contracts, the contractor is exonerated from the penalties.[123]

Byles, J. stated:

> The only remaining question is as to the penalties which the defendant seeks to set off. Holme v. Guppy, is substantially in point, though here the contract is under seal, and there not. It is founded upon an old and well-understood rule of law. The authorities will be found collected in Comyns's Digest, Condition (L. 6). Where the condition has become impossible of performance by the act of the grantee himself, the grantor is excused. So that Holme v. Guppy is not only in point, but it is consistent with the antient authorities, and is founded on the most invincible reason and good sense. The result is that the plaintiff is . . . that the defendant is not entitled to any set-off in respect of the penalties, the non-

120. *Id.*
121. *Id.* at 68.
122. *Id.* at 82.
123. *Russell*, 143 E.R. 59 at 82.

> delivery of the vessel by the day stipulated having been in part caused by delay for which he himself was responsible.[124]

In *Roberts v. Bury Improvement Comm'rs*, already discussed above, the court was divided four to two.[125] The majority held that the failure of the plaintiff to use due diligence and to make progress was caused by the failure of the defendant-employer and the architect to supply plans.[126] In those circumstances, the termination provisions in clause 27 did not confer a power upon the architect to determine and to bind the plaintiff-contractor by his determination that the defendants had not prevented the plaintiff from proceeding with the works, although they had in fact done so. As a result, the rule of law applied, which exonerates a party "from the performance of a contract, where the performance of it is prevented or rendered impossible by the wrongful act of the other contracting party."[127] The dissenting judges held that the architect was the final judge of the matter and "his certificate justified the defendants in putting an end to the contract, under clause 27."[128] In coming to its conclusion, the majority said:

> [T]he commissioners would be precluded from taking advantage of any delay occasioned by their own breach of contract: for, it is a principle very well established at common law, that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself; and also that he cannot sue for a breach of contract occasioned by his own breach of contract, so that any damages he would otherwise have been entitled to for the breach of the contract to him would immediately be recoverable back as damages arising from his own breach of contract. These principles have been applied to contracts very analogous to the present, in the cases of *Holme v. Guppy* (1), *Russell v. Da Bandeira* (2) . . . .[129]

In *Dodd v. Churton*, the plaintiff, a builder, claimed for the balance due for extra work under a building contract and the

---

124. *Id.* at 82-83 (internal citations omitted).
125. (1869-70) L.R. 5 C.P. 310, 329.
126. *Id.* at 311.
127. *Id.*
128. *Id.*
129. *Id.* at 326.

defendant counterclaimed for liquidated damages for non-completion.[130] The court held that:

> Additional works to the amount of 22*l*. 8*s*. 8*d*. were ordered under condition 4, which necessarily involved a delay in the completion of the works until after the specified date. . . . The contract provided for the performance by a certain date of works described in a specification in consideration of the payment of a fixed sum as the price of the works specified. It is admitted that extra work was ordered, and that the necessary result of the builder's having to do that work was that it took him more time to complete the works than if he had only had to do the work originally specified. It was, no doubt, part of the original contract that the building owner should have a right to call upon the builder to do that extra work, and, if he did give an order for it, the builder could not refuse to do it. The principle is laid down in Comyns' Digest, Condition L (6.), that, where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for that default; and, accordingly, a well recognised rule has been established in cases of this kind, beginning with *Holme v. Guppy* (1), to the effect that, if the building owner has ordered extra work beyond that specified by the original contract which has necessarily increased the time requisite for finishing the work, he is thereby disentitled to claim the penalties for non-completion provided for by the contract. The reason for that rule is that otherwise a most unreasonable burden would be imposed on the contractor.[131]

There was a line of argument in that case that, by agreeing to carry out the original work and any additional work, the contractor had agreed to carry out all of the work by the original date for completion and, in one case, *Jones v. St. John's Coll.*, that argument had succeeded.[132] It was rejected in this case as being limited to the terms of the contract in the *Jones* case.[133]

In *Wells v. Army & Navy Coop. Soc'y*, the contract included a completion date, a provision enabling the employer to extend the deadline for completion in specified circumstances, as well as

130. [1897] 1 Q.B. 562, 562-63.
131. *Id.* at 564, 566.
132. *Id.* at 564 (citing Jones v. St. John's Coll., L.R. 6 Q.B. 115).
133. *Id.* at 565.

a liquidated damages clause.[134] The contractor was fifteen months late in completing the contract and the employer purported to extend the completion date by three months, and then claimed liquidated damages for the remainder.[135] It was held that the extension clause did not apply, and that since the employer had contributed to the delay, thereby preventing the contractor from completing by the contractual completion date, he could not rely on the liquidated damages clause.[136]

In *Peak Constr. (Liverpool) Ltd. v. McKinney Founds. Ltd.*, contractors agreed to build a block of flats for a local authority within twenty-four months.[137] Under clause 22, the contractors had to pay liquidated damages in default.[138] Under clause 23, the time for completion might be extended by the architect, if unduly delayed in consequence of unavoidable circumstances.[139] The employer was responsible for delay by a contractor carrying out foundation piles, which caused a delay of fifty-eight weeks.[140] The Court of Appeal held that "if an employer wishes to recover liquidated damages for failure by contractors to complete on time despite the fact that some of the delay was due to the employer's own fault, the extension of time clause should provide," either "expressly or by necessary inference, for an extension on account of such a fault or breach on the part of the employer."[141] However, clause 22 only contemplated failure to complete on time due to the sole fault of the contractor, not where the failure was due to the fault of the employer as well; thus, the employer was not entitled to recover liquidated damages and was only entitled to such damages as he could prove flowed from the contractor's breach.[142] The Court of Appeal also held that there was no provision in clause 23 for an extension of time for delay due to the employer's own fault, and there was no date under the

134. McAlpine Humberoak Ltd. v. McDermott Int'l Inc. (1992) 58 B.L.R. 1 (citing Wells v. Army & Navy Coop. Soc'y (1902) 86 L.T. 764).
135. *Id.*
136. *Id.*
137. (1971) 1 B.L.R. 111.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Peak*, 1 B.L.R.

contract from which liability to pay liquidated damages could run and liquidated damages could not be recovered.[143] The court stated: "If the employer is in any way responsible for the failure to achieve the completion date, he can recover no liquidated damages at all and is left to prove such general damages as he may have suffered"[144] and the employer "is left to his ordinary remedy, that is to say to recover such damages as he can prove flow from the contractor's breach."[145]

In *Trollope & Colls Ltd v. Nw. Metro. Reg'l Hosp. Bd.*, a hospital was to be completed in three phases.[146] Phase III was to commence six months after completion of Phase I, but had a fixed completion date.[147] The House of Lords held that there was no express or implied ability to extend the completion date for Phase III if the employer delayed Phase I.[148] The Court of Appeal, by a majority, held that there was an implied term.[149] Their reasoning was that *Dodd v. Churton*, established that (using (1) and (2) inserted by the House of Lords):

> (1) 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 no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time.
>
> (2) The time becomes at large. The work must be done within a reasonable time—that is, as a rule, the stipulated

143. *Id.*

144. *See* BRIAN EGGLESTON, LIQUIDATED DAMAGES AND EXTENSIONS OF TIME IN CONSTRUCTION CONTRACTS 49, 134 (3d ed. 2009).

145. *See* JB Kim, *Concurrent Delay: Unliquidated Damages by Employer and Disruption Claim by Contractor*, INT'L BAR ASS'N (Dec. 2020), [https://perma.cc/6VSP-7Q3A]; City Inn Ltd. v. Shepherd Constr. Ltd. [2007] C.S.O.H. 190 [¶11] (quoting Peak Constr. (Liverpool) Ltd. v. McKinney Founds. Ltd. (1971) 1 B.L.R. 111).

146. [1973] 1 W.L.R. 601, 601.

147. *Id.* at 601-02.

148. *Id.* at 602.

149. *Id.* at 607.

> time plus a reasonable extension for the delay caused by his conduct.[150]

The House of Lords said that:

> Now Dodd v. Churton does establish the first part of that passage, which I have marked "(1)," but does not establish, or afford any support to, the second part of the passage which I have marked "(2)."[151]

This authoritative statement by the highest court, now known as the Supreme Court, makes the position clear: where a party delays completion, that party can no longer insist upon strict adherence to the time stated and cannot claim any penalties or liquidated damages for non-completion in that time.[152] This, however, does not mean that time is "at large" so that the work must be done within a reasonable time.[153]

In *Rapid Bldg. Grp. Ltd. v. Ealing Fam. Hous. Ass'n Ltd.*, a contractor could not be given possession of a significant part of a site because people were occupying it as squatters.[154] The Court had to decide whether in such a case the employer could recover damages for delay. They applied *Peak v. McKinney*, and held that no liquidated damages were recoverable but the defendants were not precluded from pursuing unliquidated damages. Lloyd LJ said:

> Like Lord Justice Phillimore in Peak Construction (Liverpool) v. McKinney Foundations Ltd, at p.127 of the report, I was somewhat startled to be told in the course of the argument that if any part of the delay was caused by the employer, no matter how slight, then the liquidated damages clause in the contract, clause 22, becomes inoperative.
>
> I can well understand how that must necessarily be so in a case in which the delay is indivisible and there is a dispute as to the extent of the employer's responsibility for that delay. But where there are, as it were, two separate and distinct periods of delay with two separate causes, and where the dispute relates only to one of those two causes, then it would seem to me just and convenient that the employer

150. *Id.* (referencing Dodd v. Churton [1897] 1 Q.B. 562).
151. *Trollope*, 1 W.L.R. at 607.
152. *Id.*
153. *Id.*
154. (1985) 29 B.L.R. 5.

> should be able to claim liquidated damages in relation to the other period.
>
> In the present case the relevant dispute relates to the delay, if any, caused by the presence of squatters. At the most, that could not account for more than the period from 23rd June 1980 to 17th July 1980, a period of some 24 days. It ought to be possible for the employers to concede that there is a dispute as to that period, and then deduct the 24 days from the total delay from 22nd September 1982 (when, according to the architect's certificate, the work ought to have been completed) and 23rd July 1983, (that being the date of practical completion) and claim liquidated damages for the balance. But it was common ground before us that that is not a possible view of clause 22 of the contract in the light of the decision of the Court of Appeal in Peak's case, and therefore I say no more about it.[155]

That case and *Peak* treated delay by the employer as disallowing recovery of liquidated damages but preserving a right to unliquidated damages.[156] This would appear to preserve the original time for completion and allow unliquidated damages for the part of the delay in achieving completion by the time for completion. The case also raised, but did not answer, the question whether, in such circumstances, the employer could recover more as liquidated damages than as unliquidated damages.[157]

In *McAlpine Humberoak Ltd v. McDermott Int'l Inc*, in 1992 it was argued that where delay was caused to sub-contractor plaintiffs by main contractor defendants so that the plaintiffs were prevented from completing the work within the time stated in the contract, as time was of the essence of the contract and since the defendants had no power to fix a new completion date, time became "at large."[158] It was also contended that the matters which caused delay (drawing revisions, VOs, late replies to TQs) gave rise to a claim for damages for the sum they would have quoted

155. *Id.*

156. *Id.*; *see also* Peak Constr. (Liverpool) Ltd. v. McKinney Founds. Ltd. (1971) 1 B.L.R. 111.

157. *Ealing Fam. Hous. Ass'n Ltd.*, 29 B.L.R. 5.

158. (1992) 58 B.L.R. 1.

had they known of the delay.[159] As it was said in the Court of Appeal, this was equivalent to contending that:

> If, in a contract which provides for a lump sum price and a firm delivery date, the employer causes the contractor to miss the delivery date by one day, as he might, for example, by ordering extra work, both the lump sum and the delivery date are displaced.[160]

In support of this proposition, the only authority cited was *Wells v. Army & Navy Coop. Soc'y*.[161] As the Court of Appeal said, the principle in *that case* was not new but came from *Holme v. Guppy*, where Parke B used the phrase of the contractor being "left at large" and had been applied in such cases as *Peak v. McKinney*.[162] It was said that in all these cases the employer was claiming liquidated damages and that claim failed "since the employer could not rely on the original date of completion, nor on a power to extend the date of completion. In the absence of such a power, there could be no fixed date from which the liquidated damages could run."[163] The Court of Appeal pointed out that "[e]ven if time is 'at large' (whatever that may mean) there is nothing in the quoted line of authorities to suggest that the price is at large."[164]

More recently in 2007, in *Multiplex Consts. (UK) Ltd. v. Honeywell Control Sys. Ltd.*, the Court had to consider a case where a sub-contractor had been delayed due to variations,[165] but the extension of time clause did not include "variations" or "directions" as a cause of delay for which an extension of time could be granted.[166] It did, however, include "*delay caused by any act of prevention or default by the Contractor in performing its obligations under the Sub-Contract*."[167] The sub-contractor contended that the main contractor by its conduct had put "time

159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *McAlpine*, 58 B.L.R. 1.
164. *Id.*
165. [2007] EWHC 447 (TCC).
166. "Variations" are equivalent to "change orders." *See Variation to Work Pertaining to Construction Contracts*, 8 CT. UNCOURT 46, 46 (2021).
167. *Id.* (emphasis added).

at large" under the sub-contract, and an adjudicator[168] agreed because revised programmes had been issued by the main contractor's direction and the sub-contract conditions "did not contain any mechanism for extending time in respect of delay caused by a direction."[169] The main contractor therefore commenced proceedings in the Technology and Construction Court claiming that time had not been put at large.[170]

In summarizing the law, Mr. Justice Jackson (as he then was) said:

> The essence of the prevention principle is that the promisee cannot insist upon the performance of an obligation which he has prevented the promisor from performing.
>
> In the field of construction law, one consequence of the prevention principle is that the employer cannot hold the contractor to a specified completion date, if the employer has by act or omission prevented the contractor from completing by that date. Instead, time becomes at large and the obligation to complete by the specified date is replaced by an implied obligation to complete within a reasonable time. The same principle applies as between main contractor and sub-contractor.
>
> It is in order to avoid the operation of the prevention principle that many construction contracts and sub-contracts include provisions for extension of time. Thus, it can be seen that extension of time clauses exist for the protection of both parties to a construction contract or sub-contract.[171]

Concluding that time was not at large because the direction was an act of prevention, the judge said, "[t]he fact that such a direction is permitted by the contract does not prevent it being an act of prevention."[172]

In coming to his conclusion, the judge referred to *Trollope & Colls Limited v. Nw. Metro. Reg'l Hosp. Bd.*, and said, "[i]n the House of Lords, Lord Pearson agreed with that section of Lord

168. See below for the statutory right to adjudication in English law. *See infra* text of notes 197-98.

169. *Multiplex Constrs. (UK) Ltd.*, EWHC 447 (TCC).

170. *Id.*

171. *Id.*

172. *Id.* (internal citations omitted).

Denning's judgment."[173] That however was a reference to "(1)" identified by Lord Pearson and not to "(2)" where he disagreed with Lord Denning's statement "[t]he time becomes at large. The work must be done within a reasonable time."[174]

Finally, in *Adyard Abu Dhabi v. SD Marine Services*, Hamblen J. (as he then was) had to consider a claim by a shipyard in Abu Dhabi against a UK Government supplier over the termination of two shipbuilding contracts.[175] Adyard contended that the prevention principle applied as the contract did not provide for an extension of time in respect of delay caused by SDMS.[176] The judge said that a convenient summary of the prevention principle was to be found in the judgment of Mr. Justice Jackson in *Multiplex Constrs. Ltd. v. Honeywell Control Sys. Ltd.*, and cited the part included,[177] in which Mr. Justice Jackson said:

> In the field of construction law, one consequence of the prevention principle is that the employer cannot hold the contractor to a specified completion date, if the employer has by act or omission prevented the contractor from completing by that date. Instead, time becomes at large and the obligation to complete by the specified date is replaced by an implied obligation to complete within a reasonable time.[178]

However, when dealing with the principle Hamblen J. said:

> The authorities on the prevention principle show that: . . .
>
> (2) In the event that the Buyer interferes with the work so as to delay its completion in accordance with the agreed timetable, this amounts to an act of prevention and the Builder is no longer bound by the strict requirements of the contract as to time.[179]

The position has therefore been reached where, it is respectfully submitted, the principle derived from Comyns'

---

173. *Id.* (internal citations omitted).
174. Trollope & Colls Ltd. v. Nw. Metro. Reg'l Hosp. Bd. [1973] 1 W.L.R. 601, 607.
175. [2011] EWHC 848 (Comm).
176. *Id.* [¶ 5].
177. [2007] EWHC 477 (TCC) [¶48].
178. *Adyard Abu Dhabi*, EWHC 848 (Comm) at [¶240.48].
179. *Id.* [¶242].

Digest under "condition" at rule L(6) has been misapplied in a number of cases. The starting principle is that, if an employer delays a contractor and there is no ability to extend the completion date to allow for that delay, then the employer cannot recover liquidated damages for that period of delay. That is a sensible principle of law as set out in Comyns' Digest: one party cannot both prevent a party from performing and also hold that party to its performance.[180] That principle would equally apply to prevent an employer from recovering unliquidated damages. The difference between liquidated damages and unliquidated damages is that liquidated damages apply under a contractual mechanism when a contractor fails to complete by the agreed date.[181] When that happens, liquidated damages are automatically due for the period of delay at the rate specified. To recover unliquidated damages, the employer would have to prove damages for the period of delay. In doing so and applying the universal rule that a party is entitled to damages to put it into the position it would have been in but for the contractor's breach of contract in causing delay,[182] the employer would have to show that it suffered loss for the period of delay. But if the employer caused the delay, then it would not be able to prove such loss as it would have suffered that loss because of its prevention.

On that basis the issue is limited to the ability of the employer to recover liquidated or unliquidated damages for delay. The reference in *Holme v. Guppy*, to the contractor being "left at large" not having to "forfeit anything for the delay" was interpreted in *Dodd v. Churton*.[183] In that case the court held that the principle established in cases beginning with *Holme v. Guppy* was, if the building owner ordered extra work which increased the time required to finish the work, the building owner was "thereby disentitled to claim the penalties for non-completion provided for by the contract."[184] As Lord Pearson said in *Trollope & Colls*,

180. 3 SIR JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND, 116-17 (4th ed. 1793).

181. *See Damages*, BLACK'S LAW DICTIONARY (11th ed. 2019).

182. *See, e.g.*, Livingstone v. Rawyards Coal Co. (1880) 5 App. Cas. 25 CA at 39.

183. Holme v. Guppy, 150 E.R. 1195; (1838) 3 M. & W. 387; Dodd v. Churton [1897] 1 Q.B. 562, 566.

184. *Id.* (referencing Holme v. Guppy, 150 E.R. 1195; (1838) 3 M. & W. 387).

Dodd v. Churton "does not establish, or afford any support" that "time becomes at large" so that "the work must be done within a reasonable time."[185]

Therefore, the principle that "time becomes at large" when there is an act of prevention which prevents the contractor completing the work and there is no provision for an extension of time, finds no apparent support from the line of authorities starting from *Holme v. Guppy*. Despite that, more recent cases have supported the "time at large" principle,[186] and clarity will only come when the challenge to that principle is dealt with in a fully argued case in the Supreme Court.

IV. DEVELOPMENTS IN RESOLUTION OF CONSTRUCTION DISPUTES

The complexity of construction disputes has led to such cases becoming the most difficult to resolve. Added to this complexity is the involvement of those whose endeavour on the project causes attitudes to become polarised and personalised. In 1993 the UK government set up a review of procurement and contractual arrangements in the construction industry.[187] The government appointed Sir Michael Latham as sole "Reviewer," assisted by six assessors.[188] His final report was published in July 1994 and included a number of solutions to try to avoid the types of dispute that have become endemic in the construction industry.[189] It made thirteen recommendations as to provisions that should be inserted in construction contracts, including separation of the role of contract administrator, project or lead manager and adjudicator, periods within which interim payments must be made, taking all steps to avoid conflict and providing for

185. Trollope & Colls Ltd. v. Nw. Metro. Reg'l Hosp. Bd. [1973] 1 W.L.R. 601, 607-08.

186. *Id.*

187. SIR MICHAEL LATHAM, CONSTRUCTING THE TEAM: JOINT REVIEW OF PROCUREMENT AND CONTRACTUAL ARRANGEMENTS IN THE UNITED KINGDOM CONSTRUCTION INDUSTRY 1 (1994).

188. *Id.* at v, 1, 2.

189. *Id.* at v.

speedy resolution of disputes by adjudication.[190] That report led to adjudication being introduced by statute.[191]

There has been an increasing awareness that early involvement of an independent person or panel may assist the parties in seeking a solution to those issues. This has led to setting up an "Independent Dispute Avoidance Panel" or a "Conflict Avoidance Panel" on large infrastructure projects to help the parties resolve the disagreements at a stage before they have matured into disputes requiring a more formal dispute resolution process.[192] Standard forms of contract now include provisions by which the dispute boards are expressly given a dispute avoidance role, separate from the adjudication role.[193] These processes are now widely applied and have been shown to be very effective in projects, including the London Olympics.[194]

Dispute avoidance can vary from a process where discussions take place between the person in the dispute avoidance role and the parties to find a solution to a procedure, similar to mediation, and even the preparation of a preliminary view on how the parties resolve matters. Where there is a panel, then a particular issue may require a solution which requires engineering, project management, financial, legal or other specialist input and the panel often includes that expertise, or a procedure to obtain that expertise.[195] The resolution may involve a solution where the parties share the risks, for instance a change in the design and in construction methods to save time, with shared costs.[196] Ultimately, the resolution of the issue depends on the co-operation of the parties, the expertise of the neutral person, and the flexibility of the process.

---

190. *Id.* at 37.

191. Housing Grants, Construction and Regeneration Act 1996, c.53 § 108. The Act applies to "construction contracts" entered into after 1 May 1998.

192. *Independent Dispute Avoidance Panel set up to Smooth London 2012 Construction,* NEW CIV. ENG'R, [https://perma.cc/XFA7-QDQ5] (last visited Apr. 20, 2022).

193. These boards are known as Dispute Avoidance and Adjudication Boards or "DAABs." CONFLICT AVOIDANCE AND DISPUTE RESOLUTION IN CONSTR. 6-7 (1st ed. 2012).

194. *See* Peter H.J. Chapman, *The Use of Dispute Boards on Major Infrastructure Projects*, 1 TURKISH COM. L. REV. 219, 228 (2015).

195. *See id.* at 225.

196. *See id.* at 227.

The ability to resolve disputes at an early stage avoids the situation where the longer a disagreement remains unresolved, the harder it is to resolve it and the more serious the consequences in terms of time and cost to the project. Otherwise, the advantages of the process vary from assisted discussion to something closer to mediation or conciliation.

Some disputes do require a decision at an early stage. This led to the concept of adjudication being promoted by the Latham Report.[197] The statutory provision by which adjudication was introduced was a single section, section 108 of the Housing Grants, Construction and Regeneration Act 1996 (the "Act"). That provides:

> (1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section. For this purpose "dispute" includes any difference.[198]
>
> The following provisions in section 108 state:
>
> (2) The contract shall include provision in writing so as to—
>
> (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;
>
> (b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;
>
> (c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;
>
> (d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;
>
> (e) impose a duty on the adjudicator to act impartially; and
>
> (f) enable the adjudicator to take the initiative in ascertaining the facts and the law.
>
> (3) The contract shall provide in writing that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the

197. SIR MICHAEL LATHAM, *supra* note 186, at 91.

198. Housing Grants, Construction and Regeneration Act 1996, c.53 § 108(1).

> contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement. The parties may agree to accept the decision of the adjudicator as finally determining the dispute. . . .
>
> (4) The contract shall also provide in writing that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.
>
> (5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.[199]

How, then, does this apply to a particular contract? First, there has to be a "Construction contract." Section 104(1) provides that a "construction contract" means:

> [A]n agreement with a person for any of the following—
>
> (a) the carrying out of construction operations;
>
> (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;
>
> (c) providing his own labour, or the labour of others, for the carrying out of construction operations.[200]

There are provisions as to what agreements are included and are not included in the definition. There is then a complex set of provisions in section 105 which defines what "construction operations" are. They include, for instance, at section 105(1)(b):

> [C]onstruction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, electronic communications apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations

199. Housing Grants, Construction and Regeneration Act 1996, c.53 § 108(2)-(5) (footnotes omitted).

200. Housing Grants, Construction and Regeneration Act 1996, c.53 § 104(1).

> for purposes of land drainage, coast protection or defence. . . .[201]

They exclude, for instance, at section 105(2)(c):

> [A]ssembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is—(i) nuclear processing, power generation, or water or effluent treatment. . . .[202]

Once there is a construction contract, then either the express terms of that contract comply with the statute and include adjudication, or the "Scheme for Construction Contracts" applies as an implied term of the contract.[203]

Having established the contract is a construction contract that includes, expressly or impliedly, adjudication, the process starts with a notice of dispute and, if an adjudicator is not agreed, then an application to an adjudication nominating body, the appointment of an adjudicator and the "referral" of the dispute to him.[204] There is then a process leading up to the adjudicator's decision, which is typically delivered within twenty-eight days. Most decisions lead to payment, but as always, if payment is not made, a party may apply to the courts, even if there is an arbitration clause.

When the first case came before the courts to enforce an adjudication decision, Dyson J. said in *Macob Civil Eng'g Ltd v. Morrison Constr. Ltd*:

> The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes and construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement. . . . The timetable for [adjudication]

---

201. Housing Grants, Construction and Regeneration Act 1996, c.53 § 105(1)(b) (footnote omitted).

202. Housing Grants, Construction and Regeneration Act 1996, c.53 § 105(2)(c).

203. Under section 114(4), "Where any provisions of the Scheme for Construction Contracts apply by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned." Housing Grants, Construction and Regeneration Act 1996, c.53 § 114(4).

204. Housing Grants, Construction and Regulation Act 1996, c.53, pt. II § 108(1), (2)(a)-(b).

> is very tight. Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this. . . . It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved.[205]

It was necessary to decide whether the adjudicator's decision was enforceable and how it was enforceable.[206] The TCC used the summary judgment procedure ("no real prospect of successfully defending the claim"[207]) to decide whether to enforce the claim and give judgment for the sum awarded in the adjudicator's decision.[208] In doing so, it treated the adjudicator's decision as binding on matters of fact and law. The alternative would have been to treat it as a temporarily binding certificate which could be challenged on matters of fact and law. This would have deprived adjudication of any practical benefit. A party can defend the enforcement of an adjudication decision on a number of grounds—including arguments that there is no contract or no "construction contract";[209] there was no "dispute" capable of

---

205. Macob Civ. Eng'g Ltd. v. Morrison Constr. Ltd. [1999] EWHC 254 (TCC) [¶14].

206. *Id.* [¶2]-[¶3], [¶12].

207. CPR 24.2(a)(ii).

208. *Macob Civ. Eng'g Ltd.*, EWHC 254 (TCC) [¶15].

209. Housing Grants, Construction and Regulation Act 1996, c.53, pt. II § 108(1). A detailed definition of "construction contract" is provided in § 104:

> (1) In this Part a "construction contract" means an agreement with a person for any of the following—
>
> (a) the carrying out of construction operations;
>
> (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;
>
> (c) providing his own labour, or the labour of others, for the carrying out of construction operations.
>
> (2) References in this Part to a construction contract include an agreement—
>
> (a) to do architectural, design, or surveying work, or

being referred to adjudication;[210] the adjudicator did not have jurisdiction over an issue or question or has gone outside of their terms of reference;[211] the adjudicator has conducted the adjudication so as to breach the principles of natural justice so seriously that the purported decision ought not to be enforced;[212] or the adjudicator had not been properly appointed under the terms of the contract.[213] The narrow grounds on which enforcement can be resisted has meant that the courts have generally enforced adjudicators' decisions.

The TCC has been called upon to decide several practical issues, such as timing of referrals and decisions,[214] correcting mistakes in a decision,[215] the effect of the statute of limitation,[216] cost recovery,[217] and enforcement of decisions.[218] In order to do so, it has also implemented a procedure where a party can start proceedings and immediately apply for summary judgment with the normal time limits being abridged.[219] This generally leads to a hearing taking place three to four weeks after court proceedings have commenced.

(b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape, in relation to construction operations.

(3) References in this Part to a construction contract do not include a contract of employment (within the meaning of the M1Employment Rights Act 1996).

Housing Grants, Construction and Regulation Act 1996, c.53, pt. II § 104(1)-(3).

210. Housing Grants, Construction and Regulation Act 1996, c.53, pt. II § 108(1).

211. H.M. CTS. & TRIBUNALS SERVICE, *supra* note 45 §§ 9.4, 9.4.1.

212. LexisPSL, *Breach of Natural Justice in Adjudication: Practice Notes*, LEXISNEXIS, [https://perma.cc/VH5M-GFRB] (last visited Apr. 21, 2022).

213. Housing Grants, Construction and Regulation Act 1996, c.53, pt. II § 108(2)-(5).

214. *See, e.g.*, Hart Invs. Ltd. v. Fidler [2006] EWHC 2857 (TCC) [¶39]; Aveat Heating Ltd. v. Jerram Falkus Constr. Ltd. (2007) 113 Con. L.R. 13.

215. *Hart Inv. Ltd.*, EWHC 2857 (TCC) [¶76]-[¶77]; Bloor Constr. (UK) Ltd. v. Bowmer & Kirkland (London) Ltd. [2000] B.L.R. 314; YCMS Ltd. v. Grabiner [2009] EWHC 127 (TCC).

216. Martlet Homes Ltd. v. Mullaley & Co. Ltd. [2021] EWHC 296 (TCC) [¶ 25]-[¶27], [¶51], [¶53]; Aspect Contracts (Asbestos) Ltd. v Higgins Constr. Plc [2015] UKSC 38 [¶22], [¶30].

217. Betchel Ltd. v. High Speed Two (HS2) Ltd. [2021] EWHC 640 (TCC) [¶17]-[¶18], [¶25], [¶46]; N. Dev. (Cumbria) Ltd. v. J & J Nichol [2000] B.L.R. 158.

218. AC Yule & Son Ltd. v. Speedwell Roofing & Cladding Ltd. [2007] EWHC 1360 (TCC) [¶1], [¶3], [¶31].

219. Macob Civ. Eng'g Ltd. v. Morrison Constr. Ltd. [1999] EWHC 254 (TCC) [¶37]; H.M. CTS. & TRIBUNALS SERVICE, *supra* note 45 § 9.2.

The TCC, therefore, has developed a single section of the statute into a robust system by which it can make and enforce decisions. Most cases (around 90%) lead to an adjudication decision being the final decision of the dispute, and the TCC has erred in favour of a "pay now, argue later" policy.[220] There is no costs recovery. The process has shown that the construction industry needs and will live with quick decisions. Although adjudication originated in the UK, the statutory process has been mirrored in many other jurisdictions, including Australia, New Zealand, Singapore, Malaysia, Ireland, and more recently in Ontario.[221] It has also been included in standard forms of contract, including those used in South Africa and Hong Kong where legislation has been considered but not yet implemented.[222] There is now a proposal before UNCITRAL for adjudication to be given further and wider consideration.[223]

V. CONCLUSION

The nature of construction is global, and it contributes to a significant percentage of the GDP in every country.[224] As a human endeavour, construction involves the coordination of many complex processes and historically has led to the most complicated and intractable of disputes. The development of modern English construction law shows that the construction industry, including those involved as construction lawyers, have adopted processes to reduce the extent of friction when disputes arise. The example of the TCC as a dedicated court within a

220. Emily Leonard & Hannah Gardiner, *Statutory Adjudication of Construction Contracts in the UK*, WOMBLE BOND DICKINSON (Feb. 22, 2017), [https://perma.cc/78SZ-CTNQ]; *see also Macob Civ. Eng'g Ltd.*, [1999] EWHC 254 (TCC); Bresco Elec. Services Ltd. v. Michael J Lonsdale [2020] UKSC 25.

221. *See* Steve Baldini & Hamish Lal, *The Rise and Rise of Statutory Adjudication: Is the U.S. Ready?*, 264 N.Y. L.J. 1, 1 (2020); *see also* Sir Vivian Ramsey, *A View from the Bench*, 13 CONSTR. L. INT'L 71, 71 (2018).

222. *See* Lawrence Davies & Tom Heading, *Construction Disputes: Global Markets Embrace Adjudication*, PINSENT MASONS (Jan. 28, 2022), [https://perma.cc/82YQ-GHGY].

223. *See* Peter E. O'Malley, *A New 'UNCITRAL Model Law on International Commercial Adjudication': How Beneficial Could It Really Be?*, 88 THE INT'L J. OF ARB., MEDIATION, AND DISP. MGMT. 34, 34 (2022).

224. *See* Niyazi Berk & Sabriye Biçen, *Causality Between the Construction Sector and GDP Growth in Emerging Countries: The Case of Turkey*, 4 ATHENS J. OF MEDITERRANEAN STUDS. 19, 19-20 (2018).

national court system has been followed in other countries such as Australia and Malaysia and is now being reproduced by the international reach of International Commercial Courts, including the Singapore ICC with its TIC List.[225] Given the need for a specialist court to deal with construction disputes and the cross-border nature of international construction projects, there exists an unresolved question about whether we should attempt to institute an International Construction Court which provides international coverage and is served by experienced construction law judges sitting in multiple jurisdictions. I suggest that this is the real challenge for the future of construction law.

225. *See* Jon Gilbert & Gabriel Wang, *Singapore's Technology, Infrastructure and Construction List—A New Global Forum for the Resolution of Major Project Disputes?*, FRESHFIELDS BRUCKHAUS DERINGER (Dec. 17, 2021), [https://perma.cc/6YCK-72E8].