Lads! Lads! Lads!: examining the interaction between the construction law "prevention principle" and liquidated damages.

CHRISTIE, D.

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"LADS! LADS! LADS!": Examining the interaction between the construction law "prevention principle" and liquidated damages

There is a legal principle used by those dealing in practice with construction contracts, that where a construction project is not completed by the agreed completion date, but as a result of something happening which was within the responsibility of the employer, then the contractor is not bound to complete by that date. They have been prevented from doing so.[1] Instead, the obligation becomes one to complete within a reasonable time; time is "at large".

There has been significant discussion of this "prevention principle" among construction lawyers.[2] Indeed, recent years have seen this idea move beyond construction terminology in English law and become more broadly used.[3] Scots law recognises this principle but there has been relatively little case law on the subject. For example, the key case embodying "time at large", *T&R Duncanson v Scottish County Investments*[4] is referred to in the leading contract law textbooks as authority for the rule, but has itself only been cited once in court[5] in the last 107 years.[6] As a result, the understanding of how the principle operates in Scots law is underdeveloped.

This paper will focus on one area of particular controversy in that respect which is the interaction of the construction prevention principle with liquidated and ascertained damages ("LADs") clauses. This paper will identify the nature of the controversy in English law and examine the Scots law in that area. Taking these together, it will suggest that Scots law suggests a better approach.

The construction prevention principle: current controversies

Delay is a common feature of construction projects – and a common source of disputes. The law around delay is therefore frequently tested in dispute resolution proceedings.[7] The prevention

[1] See *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No. 2)* [2007] EWHC 447 (TCC) and Lewison *The Interpretation of Contracts*, 7th Edition, 2022; Sweet and Maxwell) in Chapter 6, Section 14.

[2] The three principal recent discussions are as discussed by Lord Justice Coulson speaking extrajudicially in *Prevention or Cure? Delay Claims and the Rise of Concurrency Clauses*, June 2019 Society of Construction Law Paper No. 218 (available at: https://www.scl.org.uk/papers/prevention-or-cure-delay-claims-rise-concurrency-clauses (hereafter "Coulson paper") accessed 11 October 2023; Tony Marshall *The Prevention Principle and making the contractor pay: Is English law departing from its roots?* Part 1 and Part 2 at 2020 ICLR 325 and 2021 ICLR 89 and Max Twivy, *The Prevention Principle after North Midland v Cyden Homes: Time for change* Society of Construction Law Paper No. 215 (April 2019. These views are summarized in Trevor Thomas,"*The doctrine of prevention and the doctrine of penalties: uniformity and freedom of contract"* (2023) ICLR 43 There are many others – in particular Dado Hrustanpasic "Time-bars and the prevention principle: using fair extensions of time and common-sense causation" 2012 Const LJ 379; Doug Jones, "Can Prevention Be Cured By Time Bars?" (2009) 26 I.C.L. Rev. 57

[3] *Duval v 11 – 13 Randolph Crescent* [2020] UKSC 18 [2020] A.C. 845.

[4] 1915 S.C. 1106.

[5] *Coranta Corporation Limited v Morse Business Applications Limited,* unreported, Glasgow Sheriff Court 11 July 2007.

[6] It was otherwise referred to in *Halcroft v West End Playhouse Ltd* 1916 S.C. 182 when it is noted, at p. 185, as having been" referred to" in argument for the appellant in respect of a point on impossibility. The reference is not made in the note of arguments within the Scots Law Times report (1916 2 SLT 363).

[7] The most recent significant discussion being *North Midland v Cyden Homes* [2018] EWCA Civ 1744.

principle has been a particular focus, with the nuance of the prevention principle, its origins[8] and extent being increasingly discussed. Four major issues of discussion are discussed below to illustrate this point and provide context. Even while aspects of these discussions may be entering the realm of the more academic and theoretical there is a significant practical consequence to uncertainty in the prevention principle as Coulson LJ, speaking extrajudicially, has identified.[9] This is because the prevention principle – in construction cases at least – has the effect of removing the entitlement of the person employing the contract to claim liquidated damages from a contractor who has not completed works by the contractually agreed completion date..[10] The prize of knocking out liquidated damages means that there is a real benefit in a contractor raising what might otherwise be issues of only academic or theoretical interest in a dispute over delay in a construction project. This encourages disputes. This impact of the prevention principle will be termed the "liquidated damages effect" in this paper.

As noted, there are four areas of doubt or lack of clarity which are significant. These are outlined below to demonstrate the breadth of the issue and provide context for an examination of the liquidated damages effect from the Scots law perspective. It may be that this examination can help develop the English position too.

The issues are as follows.

Firstly, there is some scope to question the depth in which the liquidated damages effect is embedded in English law. In the same talk as noted above, Coulson LJ highlighted a point previously made by Ramsey J,[11] that this liquidated damages effect appeared to emerge in case law in the 1970s[12] – relatively late compared with the broader principle which emerged (at the latest – it is somewhat primordial) in *Holme v Guppy*[13] in the 1830s.[14] A full examination of that underlying position is beyond the scope of this article but the very fact that the question is asked, supports the need for a wider evaluation of the point in a wider context. If the rule is on a 'shoogly peg' in England, is it on a firmer footing in Scotland?

Secondly, linked with the first point, there is a question about the underlying basis of the principle. The current view is to consider that the prevention principle emerged as a result of an implied term,[15] but there is some room to doubt the source of this implied term.[16] That said, the UK Supreme Court in *Duval v 11 – 12 Randolph Crescent*[17] examined a term which was – at least – similar to the construction law version of the principle (albeit without any issue of liquidated damages arising). The

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[8] in particular Rapid Building Group v Ealing Family Housing Association [1984] 1 WLUK 630; 29 B.L.R. 5 (as discussed by Lord Justice Coulson speaking extrajudicially in *Prevention or Cure? Delay Claims and the Rise of Concurrency Clauses*, June 2019).

[9] Coulson *Prevention or Cure? Delay Claims and the Rise of Concurrency Clauses*, June 2019 at para. 19.

[10] Sir Vivian Ramsey and Stephen Furst QC *Keating on Construction Contracts* (11th Ed.) (2020) at paras. 8.012 – 8.016

[11] Sir Vivian Ramsey's lecture: 'Prevention, Liquidated Damages and Time At Large', SCL lecture, 3rd April 2012. Referred to in para. 5 of Coulson *Prevention or Cure? Delay Claims and the Rise of Concurrency Clauses*, June 2019. The slides for that lecture are available to members or those with academic access at https://www.scl.org.uk/system/files/talks-reports/Vivian%2520Ramsey%2520Lecture%2520PreventionA%2520030412.pptx <accessed 3/1/2023>.

[12] In particular, *Trollope* & *Colls* Ltd *v North West Metropolitan Regional Hospital* [1973] 1 W.L.R. 601; *Rapid Building v Ealing Family Housing* [1984] 29 BLR 5.

[13] *Holme v Guppy* (1838) 3 M&W 387.

[14] Coulson *Prevention or Cure? Delay Claims and the Rise of Concurrency Clauses*, June 2019 at paras 12 – 19.

[15] *North Midland v Cyden Homes Cyden Home* [2018] EWCA Civ 1744 with Coulson J setting out five reasons for this in paras. 29 – 38.

[16] See the work of Twivy *The Prevention Principle after North Midland v Cyden Homes: Time for change* (2019) and Marshall *The Prevention Principle and making the contractor pay: Is English law departing from its roots?* Part 1 and Part 2 at 2020 ICLR 325 and 2021 ICLR 89.

[17] [2020] UKSC 18 [2020] A.C. 845.

court held that for such a term to be implied, it must be necessary and obvious, where the term fills a gap in the express terms of the contract and be capable of clear expression.[18] Given the weight of this authority, it is (at least) arguable that this would also be the basis for the term in construction law.

As Coulson LJ picked up in his talk, if the principle were to be incorporated in express contractual terms, then it would be expansive.[19] This might impact on the liquidated damages effect since a new emphasis on the implied term as arising from necessity and obviousness (rather than as a rule of law[20]) might create pressure to define the term in more restrictive ways. Is the liquidated damages effect "necessary"? That must be at least tested.

Thirdly, as Twivy identifies, there has been a change in emphasis on the approach to take in interpreting liquidated damages provisions (without consideration of the impact on the prevention principle, thus far).[21] The original basis for the liquidated damages effect is unclear but is linked to ideas of their becoming a penalty when the contractor was prevented from completing in time and therefore becomes liable for them.[22] However, that characterisation arose when the test for whether liquidated damages were penalty or not was whether they represented a "genuine pre-estimate of damage"[23]. Now, however (as Twivy notes) the question is whether there is a "protection of a legitimate interest" which is not "extravagant, exorbitant or unconscionable."[24] This discussion also needs to recognise that the *contra proferentem* principle which is often given as the basis for the liquidated damages effect[25] is now considered to be weakening.[26] The penalty rule has changed, so there needs to be consideration of the impact of that change on the liquidated damages effect, as it applies in the case of the prevention principle. Thus there is a change in emphasis which might impact on the interpretation of the liquidated damages provision (albeit in ways which have yet to be explored).

Fourthly, the Scottish position on this may differ. While the law of liquidated damages in Scotland and England is largely aligned and (perhaps as pertinently) recognised to be so aligned in case law,[27] the key difference, which will be discussed below, is the possibility that the Scottish courts may be able to abate the damages.[28] Scottish case law might also help explain the approach to take to the liquidated damages effect, in general terms, and therefore be helpful in assessing the ways to develop the

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[18] Ibid. at para. 51.

[19] Coulson *Prevention or Cure? Delay Claims and the Rise of Concurrency Clauses*, June 2019 at paras 12 -14, discussing the underlying case law.

[20] See Marshall *The Prevention Principle and making the contractor pay: Is English law departing from its roots?* Part 1 and Part 2 at 2020 ICLR 325 and 2021 ICLR 89.

[21] Twivy *The Prevention Principle after North Midland v Cyden Homes: Time for change* (2019) at p.12

[22] Ibid. and see Atkin Chambers*, Hudson's Building and Engineering Contracts* 14th Edition (2020) at paras 6-026, and by reference to *Peak Construction (Liverpool) v McKinney Foundations Ltd* at *(1970) 1 B.L.R. 114 at 121*.

[23] *Dunlop Pneumatic Tyre Co v New Garage and Motor Co* [1915] A.C. 79 at p.87

[24] Twivy *The Prevention Principle after North Midland v Cyden Homes: Time for change* (2019) and referring to *Cavendish Square Holding BV v Makdessi; ParkingEye Limited v Beavis* [2015] UKSC 6,

[25] As noted in the reference to *Hudson's* Atkin Chambers*, Hudson's Building and Engineering Contracts* 14th Edition (2020 above.

[26] See e.g. *Triple Point Technology Inc v PTT Public Co Ltd* [2021] UKSC 29 at para 111.

[27] For example, in *Cavendish v Makdessi; ParkingEye v Beavis* [2015] UKSC 6, Lords Neuberger and Sumption (with whom Lord Toulson agreed) noted that the foundational cases on the subject were *Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6 and *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 – both Scottish appeals (see para. 19). The Scottish position is stated as being the same as the English one in para. 12 (with Lord Hodge's agreement). Lord Hodge notes features of alignment at the beginning of his judgement (see paras. 215 – 216)

[28] This will be discussed further, below. See e.g. Lord Hodge in para. 216 of *Makdessi* [2015] UKSC 6 and discussion by the Scottish Law Commission on two occasions in the last 25 years, see discussion in Scottish Law Commission *Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses* (2018) SLC No. 252.

understanding of the liquidated damages effect. The idea of abatement in these circumstances is of particular interest as they indicate an avenue to a more flexible approach.

These technical points and nuances are most relevant from a practical perspective because they provide avenues for arguments to be raised and disputes to be pursued. The less clear the law, the more complex legal advice must be (and the more expensive it will become).

A more flexible approach, where the question is not 'all or nothing' might disincentivise pursuit of these more technical points and hopefully allow the parties to focus on outcomes. It would allow the wider prevention principle to be considered in a more proportionate manner.

To develop and focus this discussion, the next step will be to focus on the Scottish position and highlight the basis for the liquidated damages effect in Scots law, (thereby addressing the first two points above); how it might respond to the changing emphasis identified by Twivy (taking point three) and then to identify how transferable the position might be to English law. This will be helpful in terms of providing secure arguments for the rule in Scots law and suggest how the liquidated damages effect could be developed in England.

"Liquidated damages effect" in Scots law

The first step is to consider the basis of the liquidated damages effect in Scots law. The 'prevention principle' *per se* has not been set out in a single Scottish decision but the general rule exists within Scots law in cases such as *T&R Duncanson v Scottish Investment Trust*[29] and *Scottish Power v Kvaerner.*[30] These cases recognised that a contractor could not be held to a specified contractual completion date if it was unable to complete its contractual obligations as a result of actions for which its employer under the contract was responsible.[31] Neither decision, however, specifically deals with liquidated damages. That aspect of the principle is found in the older decision of *M'Elroy v Tharsis*.[32]

In that case, the employer under the contract had not allowed the contractor onto site when required. This led to the work being delayed. At proof, there seems to have been discussion about some of that delay being related to slow progress of the works by the contractor. However, even accepting that (and this pre-dates discussions of the notion of concurrent delay),[33] it still left some period of delay within the responsibility of the Employer.

Liquidated damages had been agreed at £50 a week in this contract. At first instance, the Lord Ordinary allowed for the damages to be varied to take account of what was deemed to be the relevant completion date, saying:

> *"The defenders therefore cannot be allowed to claim penalties to the full extent in respect of the pursuers not completing the works within the specified time...But after making due allowance for all these circumstances the proof shews that there was still very considerable*

[29] *T&R Duncanson v Scottish County Investments* 1915 SC 1106.
[30] *Scottish Power plc v Kvaerner Construction (Regions) Ltd* 1999 SLT 721.
[31] A paper with more detailed analysis of these decisions is the subject of further work by the author.
[32] *M'Elroy & Sons v The Tharsis Sulphur and Copper Company Limited* (1877) 5 R. 161.
[33] That is, where there is delay to the work which can be attributed to different causes – a subject which it is assumed does not need to be explained to readers of this essay, but which is discussed by both Twivy and Coulson in their papers.

and inexcusable delay on the part of the pursuers and I think that all their work ought to have been completed by the end of December 1873"[34]

The work having only completed in March 1874, the Lord Ordinary ordered the pursuers to "pay the stipulated penalty of £50 a week – in all £600". That is, £50 for each week between the time the work "ought to have been completed" (the end of December 1873) and the actual completion in March 1874.[35]

This result would – of course – be different from the liquidated damages effect which the prevention principle has today. Rather than removing the Employer's entitlement: it was simply reduced. This reduction was anchored to an assessment of what the reasonable time for completion would be. Time being at large does not – of course - mean that the contractor has no obligation to complete the works; just that the assessment is more open. In those circumstances, it seems the Lord Ordinary was able to identify how much time should reasonably be added.

However, this is not the law today or indeed even at the conclusion of the proceedings in *M'Elroy*; the Lord Ordinary's decision on this point was overturned by the Inner House. In giving opinion in that appeal stage, the Lord Justice Clerk in fact criticised the Lord Ordinary on this point specifically, highlighting the lack of explanation given for the reasoning in being able to "fix" a new contractual completion date. The Inner House took a different approach and removed the entitlement to LADs.

The Lord Justice Clerk said:

"If the party in right of the contract chooses at his own hand to prevent the fulfilment of the contract he must be held to have abandoned his claim for a penalty under the contract and betaken himself to his common law right of damages in case of delay by the contractor...The cases which have been quoted bear out the view which I have stated.[36] *The proposition in law which is deducible from them is that where the work has not been finished within the time specified through fault of the employer, he cannot recover the penalty under any circumstances, the question of damages at common law remaining. The Lord Ordinary has in effect made a new contract between the parties...We cannot tell what the effect of the previous delay may have been as regards the completion of the contract."*[37]

His Lordship prefaced these remarks by saying that *"I do not stop to inquire whether the court in the exercise of its equitable power might be inclined to find such a remedy in such a case."*[38]Thus, the basic position in Scotland is aligned with that in England, on this authority: where time is set at large, there is no right to claim liquidated damages.

There are a number of relevant propositions arising from this.

Firstly, and most fundamentally, the Scottish authority – which refers to the English "prevention principle" case of *Holme v Guppy*, and so aligned with the wider common law tradition, clearly supports the liquidated damages effect. The argument to the contrary (that there was no such effect)

[34] *M'Elroy v Tharsis* (1877) 5 R. 161. The Lord Ordinary's opinion is a lengthy footnote from pp. 164 to 166 and the section quoted from 165 – 166.

[35] Ibid. The footnote on p.166

[36] This included *Holme v Guppy* indicating the common lineage into English law.

[37] *M'Elroy v Tharsis* (1877) 5 R. 161 at p. 167.

[38] Ibid.

was rejected. The effect is said, in the 1872, case to occur when there is a "prevent[ion of] the fulfilment of the contract" [39] this fits the law of the present day, too. Thus there can be seen to be alignment of the liquidated damages point between Scotland and England. For all that Coulson and Ramsey have suggested the liquidated damages effect is relatively novel,[40] the Scottish authority goes back some way.

Secondly, the basis for the decision and for the effect is set out and clear. The Employer party was "held to have abandoned" his right. While waiver, personal bar and (in England) estoppel do not feature heavily in the subsequent case law, there is a philosophical fit with the prevention principle. It aligns within the scope of the parties' mutual obligations: the quid pro quo idea of a contract.

This is not merely a philosophical alignment in those terms but one which is recognised in the case law. The act of abandonment mentioned in *M'Elroy* derives from the Employer's failure to have the site or works ready for the contractor to deliver and execute their obligations at the agreed time.[41] In prevention principle terms, in the leading modern case of *Multiplex v Honeywell,* Jackson J explained that 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."*[42]

This also captures something of the idea of mutuality which is even more to the fore in Scottish contract law (a party cannot enforce a contract when they are themselves in breach).[43] This is important because it places the question of the application of liquidated damages within the conduct of the parties and their discharge of underlying contractual provisions, in a particular situation rather than on the technical question of interpretation *contra proferentem*. It leaves that underlying term unimpacted. Thus the loss of the claim for liquidated damages is underpinned by the parties' actions than a formal rule. It is part of the parties' internal relationship of the contract than something assessed by reference to external rules of construction or legal policy.

Taking the point made by Twivy, this would mean that the shift in judicial attitude towards penalties following *Makdessi* would not necessarily alter the position here. Thus we have a Scottish decision which appears to confirm the liquidated damages effect applies and with an underlying rationale that would be secure, even taking account of possible scope for doubt arising from the changing emphasis on interpretation of liquidated damages emerging post-*Makdessi*.

All of that said, it is worth reflecting on the Lord Ordinary's position for a moment. In *M'Elroy,* the Lord Ordinary did not seem to have particular difficulty in simply altering the amount of liquidated damages to reflect an assessment of a "reasonable time" rather than removing the entitlement.[44] This does not seem to have been conceptually difficult, whatever the Inner House decided. It should also be noted that the alteration to the damages made by the Lord Ordinary is done without any reference or argument (as far as can be seen) to any case law on the court's power or jurisdiction to change the level of damages.[45]

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[39] M'Elroy (1877) 5 R. 161 at p.167.

[40] See Coulson *Prevention or Cure? Delay Claims and the Rise of Concurrency Clauses*, June 2019 at para. 5ff.

[41] See Lord Ordinary's judgment in (1877) 5 R. 161 at the note on page. 165 and the reference in the Inner House judgment at p. 167.

[42] *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No. 2)* [2007] EWHC 447 (TCC) at para. 47.

[43] Full discussion in Lorna Richardson *The scope and limits of the right to retain contractual performance* 2018 Jur. Rev. 209.

[44] Referring to the section quoted above at n.34

[45] Ibid.

It does not even engage with the question of the level of damages agreed. That is, the Lord Ordinary's focus was not on the level of agreed periodic loss (£50 a week), rather it was based on an assessment of the time in which the liquidated damages could be claimed (which was set at 12 weeks)[46]. These ideas are linked but are distinct. One (the periodic "loss") is part of the contract; the other (the time it is claimed for) is a consequence of the parties conduct in performing the contract. That assessment however was not agreed upon by the Inner House but may point to an alternative approach to damages.

Resolving issues with the liquidated damages effect

The decision in *M'Elroy* therefore addresses some of the issues with the liquidated damages effect which have been identified in English law. Firstly, it shows that the rule in Scotland at least is not novel but longstanding and closely linked with the early English authority. Secondly, it links the rule to the abandonment of the right rather than an issue of contractual interpretation, or an assessment of penalties. This addresses the first three issues discussed above. The other major point is that it shows that Scots and English law are aligned on this effect both in terms of the present position and reaching back to the foundational decision in *Holme v Guppy*.[47] It could therefore be useful to include this decision within the wider discussion of the LAD effect in the future.

While this would further embed the liquidated damages effect, it would however still leave the problem it causes: the "all or nothing" nature of the effect. At the same time, this case provides other lessons as to how this effect could be managed. These will be discussed below.

A more flexible approach

In *M'Elroy*, the Inner House criticised the Lord Ordinary's more flexible approach by suggesting that he was changing the terms of the parties' contract. This aligns with current approaches in Scots law. Recent authority from the UK Supreme Court in a Scottish appeal ruled out a general remedy of "equitable adjustment" in *Lloyds TSB Foundation for Scotland v Lloyds Banking Group PLC*[48] on the grounds *pacta sunt servanda*.[49]

However, there are a number of points which suggest that this decision is not conclusive or binding on the liquidated damages question.

- The court in *M'Elroy* expressly left to one side any issues of equitable considerations. The rejection of equitable grounds in *Lloyds TSB Foundation* might suggest that even if such grounds were raised, they would not change the result. Moreover, it is also the case that there are other remedies in Scots law which have a similar effect, and which *do* have an equitable or "good faith" type justification, as MacQueen has set out.[50] Therefore, it can be argued that *Lloyds TSB Foundation* went too far in ruling out an equitable approach. [51]

[46] Ibid. The Lord Ordinary assessed damages of £600 at £50 a week from January to March 1974

[47] (1838) 3 M&W 387

[48] [2013] UKSC 3.

[49] Ibid. at para. 47.

[50] See Hector MacQueen "The Covid-19 Pandemic, Contracts, and Change of Circumstance: still room for equitable adjustment?" Edinburgh Private Law Blog, published 24 June 2020, available at < https://blogs.ed.ac.uk/private-law/2020/06/24/the-covid-19-pandemic-contracts-and-change-of-circumstance-still-room-for-equitable-adjustment/> (Accessed 11 October 2023).

[51] Ibid.

- This exclusion leaves to one side the fact that, in Scots law and as set out above, time becomes at large when there is an act of prevention (on the basis of other authority). Time becoming 'at large' is also a change of the terms of the contract: the originally agreed completion date is departed from. The greater flexibility on the liquidated damages effect would not happen in isolation. The strict, agreed contractual position has already been departed from.
- There is in any event a question over whether what the Lord Ordinary decided did amount to a change in the contract since the agreed level of liquidated damages was not itself changed. The Lord Ordinary was only assessing when the contractual performance – as a matter of fact – might be deemed to be completed. This last question might sound difficult to establish but it is to be noted that modern construction practice – at site level – does not have particular difficulty in assessing the length of delays, although it is a complex technical task it is a routine one. Moreover, even in the *M'Elroy* case, the Lord Ordinary made such an assessment without feeling that his reasoning required explanation.[52] It would have been worth the Inner House explaining its contrary view on that exercise.
- More generally, it is notable that a more flexible approach also chimes with the apportionment approach in cases of concurrent delay (that is delays where both contractual parties share responsibility) and which was accepted by the Scottish Court in *City Inn v Shepherd*[53] but which has been rejected in England and Wales.[54] This might also fit the characterisation of Scots law as having a more civilian "performance" focus, when compared with England and Wales, where the adequacy of damages as the primary remedy is said to be more to the fore.[55]
- While a discussion of the civil law position is beyond the scope of this paper, it is noted that a commentator on these issues in English law has highlighted that the proposed outcome of fixing a new completion date and allowing damages to flow from that is in line with the general civilian approach[56] (although those jurisdictions are generally more flexible on liquidated damages).

Taken together, therefore, the approach of the Lord Ordinary would seem to be in line with established judicial powers in analogous cases.

In addition, the Lord Ordinary might have been entitled to reduce the agreed level of liquidated damages to reduce the penal effect of the agreed sum. The Inner House in *M'Elroy* did not address this fact but it is a further useful aspect of the law of liquidated damages to reflect upon in analysing the particular effect in construction delays.

The authority on the potential power of a Scottish court to reduce the parties' agreed levels of liquidated damages isi limited. However, it is notable that when the power has been considered by

[52] See n. 34 above
[53] 2010 CSIH 68.
[54] But not elsewhere see Matthew Cocklin, 'International approaches to the legal analysis of concurrent solution for English law?' (2014) 16(10) Const LJ, 30(1).
[55] See e.g. David Hope, *Specific implement, and specific performance, much the same?* in S Degeling, J Edelman and J Goudkamp (eds), Contracts in Commercial Law (Thomson Reuters 2016).
[56] Marshall, T "*The Prevention Principle and making the contractor pay: Is English law departing from its roots?"* 2020 ICLR 325 and 2021 ICLR 89, in part 2 at 116.

the Scottish Law Commission, it was not rejected as an option[57] and the ongoing existence of the power in Scots law was affirmed by Lord Hodge in *Makdessi*.[58] It would align Scots law with the approach in some civil law jurisdictions[59] – where the court can modify liquidated damages which are deemed to be too high, and thus acknowledge civilian elements within the "mixed" jurisdiction of Scotland.

The power to change is said to be wide and to allow the court to "modify exorbitant penalties" as part of its broad discretionary role.[60] The parameters of this discretion are unclear, and Lord Hodge highlighted the point only in passing in *Makdessi.*[61] Against this, there are concerns about the court overcoming the parties' agreement (echoing the points made in *M'Elroy* and *Lloyds TSB Trust).* Moreover, any adjustment must be done on the basis of proof of the actual, reasonable loss. In that case, it is often considered that it might be better to simply render the penalty clause (as it would be held to be) unenforceable and look to proof of the reasonable "common law" losses.[62] The same result would be reached.

The desire to maintain broad alignment of commercial law between Scotland and England in this area also mitigates against any specific ambition to develop the existing rules (albeit at the expense of less alignment with some other international jurisdictions). However, if it is acknowledged that the Lord Ordinary's decision would be consistent with broad trends in Scots law and that there is scope to consider that the Inner House were wrong to overturn it, it is important to consider the way in which the abatement rule could inform the approach to liquidated damage in prevention principle cases, in Scots law. So, while the abatement rule is distinct from the position of the Lord Ordinary in *M'Elroy*, and perhaps not one which would be easy to apply outside of Scotland (given it is difficult to apply, even within Scotland), the idea that the court should pay attention and attempt to control the level of liquidated damages is more mundane. This is for the following reasons:

1. The impact on the parties' underlying agreement would be limited: their agreed level of damages is unaffected. That would thereby anchor the assessment of liquidated damages in fact, rather than subjective opinion. It would be (in effect) abatement of the time for which the damages were claimed, rather than of the level of damages.

2. The parties' 'legitimate expectations' (to refer to *Makdessi*) [63] would be affirmed. Indeed, it would strengthen them. At present, the prevention principle applying means that all claims

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57 The fullest discussion and a tracker of evolving analysis is the Scottish Law Commissions' Discussion Paper on Penalties DP No.103 (1997) ("1997 Discussion Paper") at paras 5.41 to 5.47 and Scottish Law Commission's Report on Penalty Clauses (No.171) (1999) from paras. 6.4 – 6.18 and subsequent reports continue to recognise it. See the Scottish Law Commission *Discussion Paper on Penalty Clauses* (DP No. 162) (2016) paras. 5.63 – 5.72 and confirmation of its continued existence in Scottish Law Commission *Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses* (2018) SLC No. 252 at para. 19.37.

58 *Makdessi* [2015] UKSC 6 at para. 216 (216 (It is of interest that Patrick Hodge QC (as he then was) was one of the commissioners who responsible for the 1999 report).

59 see e.g. Salwa A. Fawzy; Islam H. El-adaway, and Tarek H. Hamed, Contracting in a Global World: Application of the "Time at Large" Principle (2015) J. Leg. Aff. Dispute Resolut. Eng. Constr. Vol.7 Issue 3. Available at < https://shar.es/abcNRX>

60 See 1997 Discussion Paper at paragraph 2.2 which traces this rule back to Viscount Stair, a key early author of Scots law.

61 Hector MacQueen "The Covid-19 Pandemic, Contracts, and Change of Circumstance: still room for equitable adjustment?" Edinburgh Private Law Blog, published 24 June 2020.

62 See discussion in the 1997 Discussion Paper section already cited.

63 *Makdessi* [2015] UKSC 6.

for liquidated damages are lost – even if the prevention only leads to a short delay. The parties' agreement on that point is ignored.

Moreover, if there is a prospect of the liquidated damages being retained, then there is an incentive for pragmatic parties to agree a period of additional time and a new completion date The backstop of a court assessment ought to act as an encouragement towards that (rather than engage in the more "lottery" like decision of a judge, arbitrator or construction adjudicator).

3. Finally, the circumstances in which liquidated damages would apply without an extension of time clause would in any event be unusual and, it is submitted, sufficiently unusual as to justify intervention by the courts or other dispute resolver to unpick the issues where it is appropriate.

The question then is whether this approach might translate into English law as well as developing in Scots law. As noted, there are differences in approach but there must be scope to recognise the benefits of the more flexible approach and lowering the stakes of the prevention principle overall. The flexible approach can apply without importing abatement. It follows an application of the facts of the case. The change in emphasis in *Makdessi* could be a vehicle for that. For example, it could be said that the reasonable expectations of the parties that delayed work would be compensated for would be maintained – and that would have the benefit of preserving the relationship. It would bring with it the more flexible and collaborative approach, which is also encouraged at the policy level by, for example, the Construction Playbook.[64]

Conclusion

The liquidated damages effect is currently a core part of the construction prevention principle. In English law, it has been questioned in terms of its novelty, changes in the law of liquidated damages and its very basis. The decision in *M'Elroy* answers these by demonstrating that the rule has longstanding authority, a clear basis and a means of being interpreted or reinterpreted within the wider law of liquidated damages changes. Moreover, reading the Inner and Outer House decisions together shows a way in which the effect can be understood more flexibly. That flexibility would allow the court to assess the length of time at large and calculate the damages on the basis of that assessment. By being more open to allowing damages to be assessed by the court (or other decision maker), this identifies a pragmatic approach to develop. As a less strict approach to liquidated damages law in general emerges, this pragmatic approach could be a useful one to consider.

[64] Cabinet Office *The Construction Playbook*: Government Guidance on sourcing and contracting public works projects and programs (Version 1.1, September 2022).