Scholarly Paper/Case Study

Is Time Really of the Essence in Building Contracts?

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Abstract: This paper examines the doctrine of *time of the essence* and how the UK courts interpret it in the sphere of building contracts. In a wide sample of cases heard before the UK courts, this study shall explain the literal and legal meanings of *time of the essence*, especially when incorporating the phrase into a contract, and when a party can utilise it should their counterpart fail to honour their contractual obligations. Time of the essence is a doctrine with a long and interesting history. Yet, the doctrine either tends to be briefly covered in leading authorities on construction law or gets diluted alongside the doctrines of repudiation and time at large, ultimately muffling the doctrine without any apposite explanation of its full effect in a construction law context. The background of the paper rests on the need to enunciate the doctrine and expound on the viewpoint of UK legal practitioners regarding time as not being of the essence in building contracts. Instead, in practice, time tends to be essential only for particular contractual provisions, but not the entire contract. Thus, the aim of the paper is to solely focus on the doctrine of time of the essence in building contracts, explaining its meaning, why it has a limited scope under building contracts, discerning the situations in which its unwarranted stipulation under a building contract can lead to inadvertent outcomes, and showing why the UK courts render time as not being of the essence when posed with the question in this paper's title. The paper's methodology entailed electronically accessing the LexisNexis legal database to take out a chronological sample of cases heard before the UK courts, covering the doctrine of time of the essence in the context of building contracts. Given the lack of journal articles focusing on this topic, the research covers the leading legal

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authorities on construction and contract law. The paper's results show that time is generally not of the essence in building contracts. Conclusively, in theory, time may be rendered as being of the essence of any contract where it is expressly stipulated under the contract, implied, or where a notice is served rendering it as such. Yet, in the context of building contracts, the nature in which these conditions must be satisfied, and the practical dynamic of building arrangements as a whole are very peculiar, making it highly unlikely for a court to find time to be of the essence.

Practical Applications: This research investigated the importance and cruciality of time clauses in building contracts. It is accepted that meeting contractual deadlines is fundamental for the continuity of a contract. However, this is not the case in building contracts. It is generally understood that time is not crucial for the continuity of building contracts, and this has been mentioned by various leading legal authorities. Yet, there is an absence of a thorough explanation as to when, how, and why building contracts became unique among many, if not most, other types of contracts. Thus, this paper went back to early cases to chronologically expound on how time became less crucial for the continuity of building contracts. The paper, unlike the leading authorities aforesaid, provides different building-contract settings and demonstrates how the configuration of building contracts within or alongside other agreements may change the degree of time's cruciality. This paper will support project practitioners when they stipulate time clauses in their contracts, enabling them to have a well-rounded idea of what to expect, and what to do, should their time clauses be breached.

Author Keywords: Time of the essence; Building contracts; Delay; International construction law.

Introduction

In construction law, ‘time of the essence’ is a fickle doctrine, a phrase disloyal to the common law, equity, and its very own meaning. As Carter et al. (2017, p. 85) put it, the doctrine conflicts between common law and equity (i.e., the body of law [concerned] that was developed in the Court of Chancery alongside the common law in the common law courts). It has somewhat assimilated the positions of both branches of law but nonetheless remains “Delphic”. The phrase is often incorporated into building contracts to make time imperative to the contract’s continuity, even though, practically, it ends up being crucial to a particular contractual provision rather than the contract *in toto* (Beale 2021). Yet, retrospectively, making time critical to a contractual provision is another way to stipulate that any breach of time may principally enable the wronged party to end further performance of the agreement. In *Carr v. JA Berriman Pty Ltd.* [1953], the contractor was entitled to terminate the contract where time was of the essence, and the employer caused a disruption such as denying access to the construction site. In *Peak Construction Liverpool v. McKinney Foundations Ltd.* [1970], the parties’ contract expressly provided for time to be the essence. Nevertheless, time was held to not be of the essence given the availability of contractual compensations for delay (Furst 2021).

It is commonplace for parties to a building contract to interpolate a proviso stipulating that *time is of the essence*. It is perhaps equally commonplace for those interpolating such a proviso to be unaware of its legal propositions should they try enforcing it — whether that be the employer terminating their contract with the contractor or seeking relief from such a contract. Employers want a way out of their contract when things go wrong — i.e., terminating the agreement with the contractor and engaging someone else to finish the job. This standard is reciprocal, and it too can be held against the employer should they fail to perform their obligations timeously. To do this, time must be made of the essence of the agreement. A party to a contract may add a proviso or serve a notice making time of the essence to compel timely

performance of their contractual counterpart's obligation. Also, time can be made of the essence owing to the parties' intention in doing so and owing to the nature and context of the case facts and the contract. What happens when all the aforesaid are in the context of building contracts?

More often than not, the UK courts have rendered time to not be of the essence in building contracts, or to have stopped being of the essence, where the acts or omissions of the parties suggested so, even where the phrase is provided (Badrinath 2021). The result of such a dynamic is one of dissatisfaction and unpredictability, all in an industry that is as unpredictable as the proviso itself. Thus, to a person not well versed in building contracts and the legal nomenclature, the phrase *time is of the essence* probably is nebulous and "sounds like something you'd find on a motivational poster" (Ammon 2005, p. 40). Others describe the phrase as a means to "overegg the pudding" (Dennys and Clay 2020). Even more, there has been a discussion over whether the phase should be rephrased (Johnson 2015). Thus, it comes as no surprise that the phrase is ornately inserted for the mere sake of doing so: either with or without knowing its true legal effect, especially in the sphere of building contracts.

Then again… is time really of the essence in building contracts? This is a tranche of contracts where time can be extended and a charge on time can be set for late performance. Fundamentally, these are contracts under which injured parties are seldom left without rights to compensation. For that, the short answer is no, time is not of the essence of building contracts *per se*. But this paper is not going to stop there; the paper shall undertake a holistic and well-rounded approach by looking at the evolution of the doctrine and its adaption to construction law over time. The paper shall attempt to present the doctrine and its legal effect under different contractual contexts to demonstrate why time is not of the essence of a building contract in its entirety, but potentially of the essence of a specific proviso in such contracts.

Context of the Construction Industry

The context of the UK's construction industry is relevant to understanding the nature of building projects, building contracts, and why the UK courts are reluctant to make a "time of the essence interpretation" to building contracts. The UK's construction industry is of a turbulent nature, often reflected by individualistic, transactional, and fragmented attitudes (Pryke 2020). Consequently, construction and building practitioners ("project practitioners") are often inclined towards hoarding their interests — whether that be monetary, contractual, or time-related interests. As such, the ability to harbour collaborative relationships, and get work done as per the time, budget, and quality requirements of a building contract have proven to be a challenging endeavour. Holyrood Parliament is a living testimony to this (Fraser 2004). This project was delivered late, over-cost, and just about the quality required; in principle, it was a project that failed before it ever started (El Daouk 2022).

With these characteristics becoming well-entrenched beneath the construction industry, the industry became impervious to progress. There was an innate problem within construction projects concerning their inability to quickly resolve disputes and complete work within a budget (Latham 1994). The consequence was an industry where it became an anomaly to find a construction project where cash flow was well-managed. It is maintained that sustaining cash flow is "the lifeblood of the construction industry" (*Bresco Electrical Services Ltd. (in liquidation) v. Michael J Lonsdale* [2020], para. 37; *Meadowside Building Developments Ltd. v. 12–18 Hill Street Management Co Ltd.* [2019]). Inevitably, the situation culminated with a statutory intervention seen by legal scholars and practitioners as the most radical intervention ever made in the history of construction law (Bailey 2021). This radical intervention is the enactment of the Housing, Grants, Construction and Regeneration Act 1996 (the "HGCRA 1996"), particularly the parts covering construction law. In a nutshell, the Act virtually made time even less of the essence in building contracts because it introduced statutory stipulations

that parties can make of avail — such as the right to suspend performance for non-payment, in so far as section 112, and the right to adjudicate, in so far as section 108. Unlike the time of the essence doctrine, which enables the party wronged to end the contract, the HGCRA 1996 promotes the project's continuity even where things go wrong — i.e., a section 112 suspension is temporary, unlike termination, which is not. Ultimately, the Act enshrines an *execute now, object later* mentality aimed at prioritising project completion and interim adjudication before resolving disputes *in toto* via the UK courts or arbitration.

Considering all the aforesaid and putting it into perspective, the construction project is a demanding setting. On-site, the contractor is expected to expend a lot of money, resources, labour, and time in fulfilling their obligations under the building contract. It is for that reason time is not deemed crucial to the continuity of building contracts. For example, imagine an employer being able to terminate a contractor nine years into a ten-year railway project for a meagre delay of a few days. It would make no commercial and logical sense because the loss borne by the employer ought to be negligible compared to what the contractor would have expended on the project before termination and compared to the profit to be made upon finishing the contract. From this ratiocination, the UK courts have attentively avoided interpreting the time of the essence doctrine to its full scope when ruling over delay matters arising out of building contracts. This position has even been honoured in cases where time has been expressly made of the essence of the contract.

Relevance of the Study

When researching the doctrine of time of the essence, several leading authorities come to mind, ranging from Andrews et al. (2017) to Beale (2021), Wylie and Woods (2020), and even McGhee (2021) in the case of equity. In the context of building contracts, Furst (2021) and Bailey (2021) suffice, and Dennys and Clay (2020) give a deeper analogy. Thus, unlike the

former batch, which spends significant time delving into the meaning of the *time of the essence* phrase, the latter batch seems to pause at the diving board. Even where Dennys and Clay (2020) focus on the doctrine, the focal point of time being of the essence gets diluted in other concepts such as *repudiation* and *time at large*. Obviously, all of these are closely intertwined, but this paper aims to solely shine a light on *time of the essence*. Textbooks and research papers tend to go no further than saying that time is not of the essence when the subject matter is a building contract, sometimes providing a few cases for a brief analysis. Quite frankly, this does not extract the legal history and case law that have ultimately led to the modern position. The doctrine in the context of building contracts is an interesting area of the law binding tenets inherited from equity and the common law courts in times past. Equally interesting is the modern case law, particularly where the UK courts must interpret multiple contracts in light of one another, such as a building contract and a lease agreement. How is the doctrine interpreted in such cases then?

Research Scope and Methodology

The scope of this paper is to expound on the doctrine of *time of the essence* as found in the existing academic literature. The prime objective of this paper is to demonstrate why time is generally not of the essence in building contracts by providing clear evidence through the use of case law. The methodology for writing this paper is an integrative review and analysis of a sample of chosen case law, which covers both the time of the essence doctrine and building contracts. The LexisNexis legal database was accessed to obtain the sample. A two-staged search process was initiated whereby the first search entry inputted “time of the essence” or “time is of the essence”. The second search entry selected the “construction law” filter. Therefrom, a chronological selection of cases was chosen, which were used to carry out the case analysis section based on their citation in earlier and subsequent cases. Table 1 illustrates how these steps took place.

[insert table 1 here]

The cases are confirmed reports of incidents that have happened in the past. In this sample of case law, the UK courts directly or indirectly covered the time of the essence doctrine. The selection of cases is not contrived to support a specific viewpoint, but rather reflects the UK courts' position on the doctrine. Therefore, it is difficult to find construction law cases where the courts found time to be of the essence in a building contract. To achieve the paper's objective, the cases were analysed to propound why the doctrine is interpreted differently in the context of building contracts. The information taken from Bailey (2021), Furst et al. (2021), and Dennys and Clay (2020) was accessed using a combination of hard copies and the use of Westlaw's database by Thomas Reuters. These sources were used to compare their case sample with the sample used in this paper. Given the lack of journal articles focusing solely on this topic, the research covers the leading legal authorities on construction and contract law.

Definition, context, and history of the *time of the essence* doctrine

The first port of call is to identify what is meant when one says that *time is of the essence.* The phrase carries two effects: one relative to the contract itself and one relative to what happens following a delay in performance. The expression *of the essence* linguistically means *crucially important* or *imperative to the continuity of something*. In the context of contracts, the esoteric phrase means that failure to perform by a fixed date may give rise to damages for the loss or termination of the contract. Within the contract, time of the essence concerns one's contractual rights in the event of late performance. Where a party fails to exercise its right within the fixed timeframe, the right is lost — for example, see the section on *adjudication agreements under building contracts.* As this paper has already highlighted, time may be crucial to certain contractual rights, but not crucial to the building contract *in toto*. Here, there are two types of building contracts. There are building contracts that solely concern the building and

engineering of structures which are not subsidiary to a higher contract. Under these contracts, time is not of the essence, and seldom, if ever, would the case be otherwise. On the other hand, there are building contracts that come within or in conjunction with property development and transactional contracts. Where the building contract's substance succeeds the non-building contract's substance, time may be of the essence depending on the context at hand.

Before going further into the topic, since the paper isolates the time of the essence doctrine, one must understand where the doctrine falls within the sphere of construction law. The best way is to put it in a realistic scenario and elaborate on that using case law. Suppose an employer has just suffered severe delays in performance. They are prompted to eject the contractor and engage a new one. Most of the time, contractor delays are likely to amount to a breach of contract entitling the employer to damages. Naturally, a damage-awarding mechanism would imply time to not be of the essence. Where a breach is fundamentally onerous going to the root of the contract, the employer can treat the contract to have ended; however, this is peculiar and difficult to prove because it depends on the case facts showing that the breach is irreparable. At that stage, the law of repudiation (which is not the focal point of this paper) is brought to question and determines the employer's courses of action. One course of action entails whether time was of the essence of the building contract. Commonly, where the employer contributes to the breach or has prevented the contractor from timeously performing their obligation (the "prevention principle"), the fixed deadline becomes obsolete, and the contractor is said to be "left at large" or simply "time at large" (*Holme v. Guppy* (1831)). At this stage, completion would be required within a reasonable time. Where there is no completion date stipulated, then section 14 of the Supply of Goods and Services Act 1982 would apply, requiring the contractor to complete within a reasonable time. Thus, even where time is of the essence, subject to the building contract's terms, an employer obstructing the agreement from meeting timeous

completion is not entitled to terminate (*Multiplex Constructions (UK) Ltd. v. Honeywell Control Systems Ltd.* [2007]).

In *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978], the House of Lords defined "time of the essence" as the state in which a party to a contract is discharged from continuing performance of their obligations because of a breach of one or more contractual time stipulations. It has been established that time is of the essence in mercantile contracts but not building contracts. This can only compel one to ask: why are some contracts treated differently? Why are building contracts and others not treated analogously? To better understand this, one must delve into the deeds concerning the sale of land during early modern England, whence the doctrine had likely originated (Dennys and Clay 2020). Such conveyances sometimes required post-contractual cooperation regarding the transfer of title (*Stickney v. Keeble* [1915]). The contemporary doctrine of time of the essence is an amalgamation of concessions that had taken place between the common law and equity, in which time was to be of the essence in the former and not of the essence in the latter (Carter et al. 2017). Under the common law, time, in the words of Sir John Romilly, was "always of the essence […] when any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for breach of it" (*Parkin v. Tharold* (1852), at 65). The opposite was confirmed in the case of equity, and it was a matter of legal construction and interpretation.

Despite this, it is inaccurate to generalise that the courts had adopted stark stances during those times. There have been cases prompting the courts to consider both the approach in common law and equity (*Peeters v. Opie* (1671)). The two legal branches made exceptions to their divergent rules — this can also be seen in *Martindale v. Smith* (1841) in so far the case of common law, and in *Lennon v. Napper* (1802) in so far the case of equity. The Judicature Act 1873, section 25 took a position close to equity's stance, and the Law of Property Act 1925,

section 41 effectively unified their positions, by mandating that: “Stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules.” Therefrom, English case law has provided the modern construction of the doctrine. What would have been deemed a construction in equity before the Judicature Act is now embedded under the law.

So here is the modern construction: in the absence of time being made of the essence, satisfying performance is presumed to take place within a reasonable time. What defines time as *reasonable* is a question of fact requiring all the circumstances to be considered at the time the question arises (*Shawton Engineering Ltd. v. DGP International Ltd.* [2005]). Should such reasonable time elapse, the principle is that the employer (or the party benefitting from the clause) may serve a notice establishing a new fixed time for performance; it too must be reasonable (*Merton LBC v. Stanley Hugh Leach Ltd*. (1985); *Behzadi v. Shaftesbury Hotels Ltd.* [1991]). Such a notice is to be served where a reasonable time for performance has already elapsed in the employer’s view, and the notice is a means of expressly establishing and conveying the situation to the defaulting party. Now the defaulting party is aware of the notice, and should they fail to perform by the new fixed date, the other party can regard such failure as a repudiatory breach. Only then is time said to be made of the essence, and the courts may still find that the notice was premature or that the new fixed date was unreasonable.

This was visibly put to practice in *Multi Veste 226 BV v. NI Summer Row Unitholder BV and others* [2011]. The court ruled that whether a time bar can be rendered of the essence of a contractual provision was a matter of interpretation. However, in the absence of time being made of the essence, an obligation had to be performed within a reasonable time, which was a question of fact to be determined according to the circumstances. After a reasonable time, the

injured party can serve a notice specifying a new time bar if failure to perform the obligation would deprive it of most of the benefit that was originally meant to be received (*Services plc v. Celtech International Ltd.* [2006]).

Having illustrated this, in theory, time is highly likely to be of the essence in three settings: [1] where parties to a contract expressly agreed on a fixed date to perform an obligation; [2] where the substance of the contract implies a date that needs to be complied with to achieve its subject matter; and [3] where time initially not of the essence is rendered as being of the essence by way of serving notice in response to a delay limiting the time to perform, and upon default, to terminate (Beale 2021). This, as Lord Fraser puts it, is the modern law in the case of all contracts. However, depending on the substance of the contract being undertaken, time may not be of the essence, as with the case of building contracts. In determining whether time is crucial, it is important to distinguish the importance of time to a contractual provision within the scope of interpreting the entire contract. From this construction, today's UK courts consider time to not be of the essence in building contracts. But then, what if the subject matter oddly makes it unclear whether one is dealing with a mercantile agreement or a building agreement? It suffices to say that the construction shall lie in substance as opposed to form. Should there be material building substance to an agreement, the agreement ought to be rendered a building contract under which time would not be of the essence even if the contract were titled as something else (*Giad Hamdo Pipes Complex Company Ltd. v. Wilson Byard Ltd. & Anor* [2003]).

Case Analysis

Early allusions to time not being of the essence in building contracts

An early amalgamation of common law and equity can be seen in the seventeenth-century case of *Peeters v. Opie* (1671). The contractor (Peeters) brought assumpsit (an action to enforce an

obligation) on a contract that required them to carry out the building of a malt-house and a dry-house, for which the employer (Opie) would pay £8. There was no day for payment stipulated. In pursuit of an arrest of judgment, the employer argued that, as a matter of provable truth, the contractor had not satisfied the performance of the works upon claiming payment. The court held in favour of the employer, stating that completion of the works was a condition precedent to payment based on the construction of the contract. However, Hale CJ also said that had the agreement stipulated a particular day by which payment was due; the ruling would have been different because both the contractor and employer's obligations would have had to mutually be satisfied on the same day — i.e., completion of the works and payment for carrying out the works timeously. Given that no time limitation on when money should be paid was made, payment would only be due upon completion of the building works and not before. Money could only be paid earlier when the employer prevented the works from being completed. As such, this case is noteworthy because its ruling does not strike as recondite to the contemporary reader despite it being an anomaly among its contemporary counterparts. The case implied that time would be of the essence had a mutual date for payment and completion been expressly provided. More importantly, although an odd case during its time, *Peeters* highlights how both common law and equity made exceptions to their divergent approaches.

In *Lucas v. Godwin* (1837), the plaintiff contractor was a bricklayer who agreed to undertake stone and roof works to six cottages erected on the defendant's estate. Work was due on the 10th of October but was completed on the 15th. As a result, the employer took the position that the contractor, in being late, should not be reimbursed. The contractor took legal action to obtain payment from the employer. It was held that although the agreement provided for a completion date, the need to achieve completion by the stipulated date did not delve into the root of the contract due to the employer's ability to avail himself of the compensatory means available should delay arise. Additionally, the court highlighted that in no reasonable mind

could have it been the parties' understanding for the contractor to be left unpaid should they deliver late. If that was the case, the terms should have been expressed "[…] with a precision which could not be mistaken" (*Lucas v. Godwin* (1837), p. 597).

A similar approach followed in *Lamprell v. Guardians of the Poor of the Billericay Union* (1849), where the court held that time was not of the essence because time itself was not an essential component of the contract. The contract had expressly provided for a weekly sum to be compensated each week the contractor is late — i.e., what is now call liquidated and ascertained damages (Lim 2009). The court also ruled that the deed exempted the contractor from their time obligation should they be prevented by causes falling outside of their remit. In *Felton v. Wharrie* (1906), the contractor failed to clear and vacate the construction site by the stipulated date and did not give the employer an answer after being asked when they would achieve completion. As a result, the employer took possession of the site without serving a notice to the contractor and replaced them with another contractor. The contract did not provide an express right for such measures. Therefore, the court held that the employer should have expressly notified the contractor that their silence amounted to a refusal. In serving a notice, they intended to have made time of the essence. Yet, even where such a notice had been served, it would have operated in so far as the employer did not contribute to the delay, all in light of the context of the case facts at hand. Thus, although in theory, time could be made of the essence in a very peculiar setting, it is very hard and unlikely that such an ability can be relayed in practice. The old case law presented here identifies the principles encapsulating the time of the essence doctrine. The following section will examine the doctrine and compare it when applied to the building contract and to such contract's provisions.

Conditions making time of the essence: building contracts and provisions

A party asserting the proposition that time is of the essence of a particular provision, let alone a building contract, needs to prove it evidently beyond reasonable doubt. In *Gibbs v. Tomlinson* (1992), the JCT agreement's mere stipulation of a completion date and the stressing of such a date's importance could not render time to be of the contract's essence. Instead, especially where there are numerous deadlines, each deadline must explicitly indicate its individual importance to the contract, and the parties must identify which delays ought to give way to termination (*British and Commonwealth Holdings plc v. Quadrex Holdings Inc* [1989]). The contract's lack of an express proviso making time of the essence pegged with a clause enabling the contractor to continue with the work and pay pre-set liquidated damages, during the delayed period, effectively rendered time not to be of the essence. Lastly, clause 7.1 of the agreement entitled the employer to review the contractor's employment for specified defaults of which late completion/failure was not one.

In *Timberbrook Ltd. (in liquidation) v. Grant Leisure Group Ltd.* [2021], the employer engaged the contractor to demolish and reinstall an orangutan facility at their zoo; however, the contract was terminated prior to completion following a series of delays and variations. Following liquidation, the contractor sought to obtain the cost for their completed work prior to the termination, and subsequently, claim for the variations and additional work done. The employer refused because the damages resulted from incidents falling on the contractor's remit. The contract between the employer and contractor gave the employer two routes through which they can pursue a right to terminate. Clause 4.2 stipulated that:

> "[The Claimant] shall meet (and time is of the essence) any performance dates or Project Milestones specified in the Project Plan … If [the Claimant] fails to do so, [the Defendant] may (without prejudice to any rights it may have) at its own discretion terminate the contract."

Clause 10.1 stipulated that:

> "Without prejudice to any other rights or remedies which [the Defendant] may have, [the Defendant] may terminate this agreement without liability to [the Claimant] on giving [the Claimant] not less than four weeks written notice to [the Claimant] if:
>
> a) the performance of the Services is delayed, hindered, or prevented by circumstances beyond [the Claimant's] reasonable control […]"

Eyre QC found that the employer terminated the contract under clause 10.1 (a) meaning that they were not entitled to recovering damages because performance was hindered by reasons beyond the control (and liability) of the contractor. More importantly, for the purposes of this paper, Eyre QC stated that clause 10.1 was more advantageous than clause 4.2 because there was no burden of proof on the employer (in proving that delay had occurred, and time was of the essence) owing to the breach of the notice period. By now, it should be clear that time is not of the essence in building contracts… but what if the building contract only forms part of a greater agreement? In the next few sections, the paper shall critically investigate building contracts that fall underneath or in conjunction with other contracts.

Development contracts consisting of a building contract and an option to purchase

In *Peacock and another v. Imagine Property Developments Ltd.* [2018], the employer engaged the contractor to develop five plots of land. The contract provided that the contractor can exercise an option to purchase plot two from the employer and construct a house on it — provided that written notice is given within the designated option period and that on the exercise of the option, the contractor would pay a 10% deposit (of the purchase price). The

parties had agreed to waive the 10% deposit as per the relevant clauses. Upon the contractor submitting a notice to exercise the option (briefly before the deadline), the employer refused and subsequently denied access to the construction site alleging that the option not validly being exercised. The court held that payment of the deposit was not a condition precedent to the exercise of the option. However, it was a condition of the development contract because a breach would entitle the injured party to terminate, and time was of the essence. Stuart-Smith J held that the employer breached the contract, and their termination was repudiatory. The contractor was entitled to recover damages for the loss suffered from the profits that could have been made from completing the contract and subsequently selling the property with the house on it. This case highlights the critical consequences of disrupting the contractor and commencing with the termination of the contract without being able to gauge whether time was of the essence or not of that agreement. In these types of cases, the court will accommodate a holistic approach, but the extent to which a court can contextualise the contract is likely to rest on how the parties are pursuing their claims before the court.

Development contracts consisting of a building contract and an agreement to let

In *Anglia Commercial Properties Ltd. v. North East Essex Building Co Ltd.* [1983], the property owners engaged a developer to develop a site according to approved planning permissions. The development was set to be completed within four years. The works were not completed in the four years, raising questions as to whether the four-year time limit was of the essence of the contract. The project's cash flow rested on the built warehouses being let to prospective tenants. However, due to the depressed property market during the 1970s, difficulties were experienced in letting these properties. Considering this, the developers suspended operations until a substantial proportion of warehouses already let had been sold. The owners refused to extend the time limit, prompting the developers to contend that time was not of the essence and that they should be allowed to resume the construction and letting of the

remaining units. The owners contended that although the time provision was not a condition in which time was made of the essence, it was an innominate term. The court rejected the owner's argument and held that the development agreement stayed fully effective due to the case facts and the poor cash flow that prompted the temporary suspension; thus, emphasising the continuation of the contract rather than terminating it.

Building contracts in concurrence with a purchase agreement

In the Northern Irish case *Holloway and another v. Sarcon (No 177) Ltd.* [2010], the defendant invited the public to buy apartments that were to be built. The plaintiffs entered into two agreements concurrently. The first agreement rendered the plaintiffs as the purchasers, and the defendant as the vendor of apartment no. 65 under a lease. The second agreement was a building contract priced at £245,000 that rendered the plaintiffs as the employers, and the plaintiff as the developer. The completion date was 31 May 2009 in the latter agreement, or such an earlier date notified by the developer or their solicitor no less than twenty working days' notice to the employer or their solicitor. During the course of the works, both contractor and neutral delays prompted the developer's agents and solicitors to notify the employer's solicitors of the change in the completion date to October/November 2009. Nine days before the original completion date, the employer's solicitor wrote to the developer's solicitors that their client did not agree to defer completion and expressed their right to seek remedies under the two agreements. One day following the original completion date, the employer's solicitor notified their counterpart that they were rescinding the building contract on the grounds of the developer failing to complete it on time, and given that time was of the essence, as per clause 23 of the building agreement. The developer's solicitors denied the contention stressing that both contracts were still valid and enforceable. Ultimately, the employers sought summary judgment over whether time was imperative.

The building contract was interpreted in conjunction with the purchase agreement. Deeny J highlighted that the issue as to whether time was of the essence to complete by the original completion date lay in its consequence in law as presaged in the parties' correspondence. If the parties expressly made time of the essence, before the completion date, as a contractual condition, then any infringement of that date ought to be treated as going to the root of the contract (*Lombard North Central plc v. Butterworth* [1986]) irrespective of the "magnitude of the breach" — i.e., ten minutes late (*Union Eagle Ltd. v. Golden Achievement Ltd.* [1997]). However, the core issue stemmed from the building contract, not the purchase agreement. Thus, the court reemphasised that time is generally not of the essence in building contracts, especially in the absence of express words making it such (Lloyd et al. 2011). The judge noted that the contract did not expressly state that the time for completion would be of the essence despite the wording under clause 23. Also, in ruling that time was not of the essence, a key point the court highlighted was the fact that the injured party, as per the contract, would not be left without any rights should they suffer from a breach — thus, substance prevails over form, particularly when interpreting multiple contracts. Similar to the position under the law in England and Wales, Northern Irish law has taken the position that a stipulation for payment of interest, or a form of liquidated damages, in the event of a delay, advances a presumption that time is not of the essence (Wylie and Woods 2020). This case shows how the UK courts attempt to separating the building contract from the purchase agreement. It also highlights that the same standard applied to building contracts ought to be applied to concurrent contracts where the subject matter of the issue at hand derives from the building agreement. Should the issue lie in the purchase agreement, the courts may take a different approach.

Dependent and trade contracts

Where an employer contracts with multiple project practitioners (known as "trade contracts") to carry out related works on the same site, the general approach is that the coordination of the

contractors ought to fall on their employer (that may be a contractor), or the works' owner, or their agent (Goldberg 1979). In *T & R Duncanson v. Scottish County Investment Co Ltd.* (1915), the employer engaged a firm of joiners to carry out joiner work on buildings that were to be constructed by a specific date. The joiners (the 'contractor') were informed of similar contracts being concomitantly created between the employer and other project practitioners, including a plasterer, mason, and a plumber; however, no time was specified there. Delays caused by the other project practitioners made it impossible for the contractor to satisfy timely completion. The employer contended that the contractor was barred from recovering outstanding sums for breach of contract because the obligation to finish the joiner work was fixed, and time was of the essence.

The employer alleged that the time obligation was calculatingly undertaken by the contractor, making it binding on two grounds: [1] save in exceptional circumstances, the impossibility of performance would not release the contractor; and [2] such exceptional circumstances might arise from a waiver by the employer, supervenient legislation, or the act or default of the employer. The contractor maintained that the time limit in the contract was a relative obligation, not an absolute one, on the grounds of there being an implied condition precedent to the performance of work by the contractor. The condition precedent relied on the other work being completed timeously to render it possible for the contractor to complete their contract within the specified timeframe. The court held that where a contract's completion by a specific date is dependent on the anticipated completion of work by other project practitioners engaged on the same project (e.g., a building), that anticipated completion shall be a condition precedent to the implementation of the time bar over the project (*Clifford v. Watts* (1870)). The site shall be passed to the contractor in a condition that would reasonably enable them to satisfy contractual performance within the stipulated completion date (*Howell v. Coupland* (1876)). In addition, time cannot be taken to be of the essence, when time becomes at large, as was

arguable in this case owing to the nature of the plumber's contract never being executed, and the onus of miscoordination of dependent contractors falling on the employer's remit. Again, this argumentation falls within the theoretical scope outlined earlier in this paper, that being: where an employer fetters with the contractor's ability to perform their obligation, time is at large, and time ceases to be of the essence.

Adjudication agreement under a building contract

In *Simons Construction Limited v. Aardevarch Developments Limited* [2003], the parties were carrying out a redevelopment project. Upon a dispute crystallising, the parties referred the matter to adjudication. Due to unforeseeable family matters, the adjudicator issued an interim draft decision by the contractual date and a final decision seven days later. The court held the draft decision incapable of being binding. As for the late decision, clauses 5.1 and 5.2 of the JCT Adjudicator Agreement provided that the parties can mutually end the agreement at any time, subject to written notice, should the adjudicator issue their decision late. Should termination result from the adjudicator's failure to perform timeously, they shall not be entitled to recovering their fees and expenses. Also, the court viewed time to be of the essence in the JCT Adjudicator Agreement, making it possible for the parties to treat the adjudicator's breach as a discharge and terminate the agreement by acknowledging the repudiatory breach. However, the parties had failed exercising their right to terminate following the adjudicator's interim draft decision. Therefore, upon receiving the adjudicator's late decision, the parties had become bound by it. Thus, time can be of the essence for an adjudication agreement under a building contract, but a breach of the time limit will not by itself render the adjudicator's decision invalid (Coulson 2018). However, time will also not be *prima facie* of the essence under an adjudicator agreement, especially where the agreement or context surrounding is inconsistent with any time-of-the-essence-making stipulation (*Westdawn Refurbishments Ltd. v. Roselodge Ltd.* [2006]). Although this does not directly deal with the building contract *per*

se, the case reinforces the notion of separability of contract. This means that time may be held to be of the essence of a building contract's provision, subcontract, and dispute resolution agreement, irrespective of the fact that time would most probably not be of the essence in the main building contract or the hierarchy of contracts *in toto*.

Critical analysis

Having presented the cases above, is time really of the essence in building contracts? The answer is still no, time is unlikely to be rendered of the essence in a building contract. Although it is a commonplace for parties to stipulate that time is of the essence, the phrase carries a more protreptic function than a legal one, and prospective project practitioners should be aware of this. Nevertheless, it is important to understand the legal implications when one stipulates that "time is of the essence" because relying on such a phrase or simply incorporating it can carry limitations resulting with impractical and incalculable consequences rather than added surety. Suffice to say, time of the essence is a mendacious means to deter and dissuade the occurrence of delay. There are far more outreaching and practical means in contemporary practice to prevent and manage delay, ranging from liquidated damages to extension of time to bespoke construction warranties. As well as this, the context of building contracts makes it less favourable for time being rendered of the essence. Only in a hypothetical situation could time be of the essence of a building contract where: the building contract inseparably falls within or alongside another contract, under which time is of the essence, and the relevant issue at hand is not one stemming from the building contract *per se*, and there are no compensatory means whatsoever to avail oneself. Thus, given the reality in which building contracts on the whole provide for extension of time, liquidated damages, and other compensatory means, there will be an innate presumption that the parties have never intended essentialising time.

Time of the essence in the context of building contracts is also mendacious in a practical sense. An employer cannot exercise their right to terminate a building contract until the lapse

of the originally agreed completion date. That may be in a very long time, and the employer is better off recovering their losses through quicker alternative means. Additionally, by the time the completion date elapses, the contractor would have invested a lot of time, work, and money into the project. Any compensation the employer recovers from termination ought to be incomparable to the losses that the contractor would suffer from not completing the contract, and from any forthcoming transactions, if applicable. This is something the UK courts will always look after and bear in mind. Even if there are highly reasonable grounds to terminate a building contract, one must not forget the HGCRA 1996 and the general dispute resolution culture of the construction industry. As imperative as *time of the essence* may be, what this mendacious phrase does not tell you is that a party who has their contract terminated — be it the employer or the contractor — is bound to dispute the termination. The receiving party can avail of their statutory right to adjudicate in so far as the subject constitutes a "construction contract" as per section 104(1) of the HGCRA 1996. If the subject is outside the scope of section 104, the receiving party can utilise other dispute resolution mechanisms notwithstanding contractual adjudication, litigation, and arbitration to dispute the termination. After all, claims in construction law tend to be of significant value, making it worthwhile to pursue them. However, this is a double-edged sword because losing will not only cost the pursuing party the losses from the termination but also from paying the fees for resolving the dispute. Even where the pursuing party succeeds, resolving construction disputes can cost more time and money than the time and cost the disputed project would have ever costed had the parties been constructively acquiescent in finishing the building contract. Hence, time is not of the essence in building contracts. In other words, project practitioners should not insert the phrase into a building contract for the mere sake of ornamenting their contract with resplendent wording; or, what the author likes to call, an *esoteric "euphemism"* (*Rothenberg v. Follman*,

at 850 (1969)) — that being a phrase that would be better off if it were tersely explained in its real legal words.

Conclusion

In conclusion, the case law analysed in this paper illustrated why time is unlikely to be of the essence in building contracts. Legally, the UK courts' decisions in the cases analysed highlight their position, which is to maintain the contract rather than terminating it. This is owed to the various alternative means in which a damaged party can be compensated and to the difficulty in proving that a party's breach of time goes to the root of the contract. Practically, building contracts require high input, time, and resources, making it highly onerous and unfair for a party to be terminated for a mere delay in time. It is important to restate that this paper did not cover other doctrines that go in hand with time of the essence when pursuing delay claims (i.e., repudiation). Nevertheless, the UK courts, as seen in the case law, leave room for reinterpreting the doctrine. Substance prevails over form, and should a forthcoming case present the right conditions, or should there be compelling reasons to detract from the current approach, the UK courts have left an open door, by presenting the doctrine's theoretical framework, and the particularities that need to be satisfied for any forthcoming reinterpretation to take place.

Theoretically, the general time of the essence doctrine enables contracting parties to make time imperative. This would require the phrase 'time is of the essence' being expressly provided, or contractually implied, or served via notice following a defaulting party's failure to perform by a deadline. However, this is true mainly for contracts that are not building contracts. As far as building contracts (which include standard building and engineering contracts) are concerned, time is not of the essence. A mere expression making time of the essence or specifying a completion date for performance does not suffice. The UK courts can invalidate stipulations making time imperative, especially where the building contract provides

compensatory means that are practically more feasible than terminating the contract. The same stipulations can also be disregarded where the substance of a contract alludes to what one would perceive as a building contract because by default, time is not of the essence in building contracts.

Although an injured party can give notice rendering time of the essence in the event of delay, time is likely to be of the essence only to the extent of the provision or section concerned, not the entire building contract. Even in this case, the notice is subject to the injured party being innocent and to granting the defaulting party reasonable time. Should the proviso remain breached, the injured party can resort to compensatory means, such as liquidated and ascertained damages, before any prospect of termination. Although in theory time can be of the essence in a building contract, the party must enter unfathomed waters to satisfy the conditions that may enable a court to overturn its longstanding position. What does all this mean? In a nutshell, theoretically, seldom will time be of the essence in a building contract. There will always be a possibility where time could be of the essence of the entire building contract. However, time is more likely to solely be of the essence of a contractual provision. In practical reality, most legal practitioners and academics would agree that they have not and probably never will see a building contract where time is of the essence of the entire agreement. Having provided the case analysis and extrapolated the doctrine from different angles, one can safely reach the conclusions above.

But… how about taking a step back? Imagine for once that time could be made of the essence of a building contract by serving a notice the same way one would do in a mercantile contract, and that the injured party has indeed served this notice, satisfying all legal requirements. The notice would outline all the conditions to be met and would have clarified with precise wording that failure to comply will render the contract terminated. For the proponents of the perfidious euphemism, making time of the essence can be a brutal double-

edged sword, a *pis aller* defeating its whole purpose. Serving the notice would become legally binding on both parties. Sure, the originally injured party would become entitled to terminate… but the originally defaulting party too would become entitled to end the agreement, should the originally injured party fail to honour their duties, disrupt the works, or should the originally defaulting party prove that the originally injured party was not so innocent after all… now isn't that fickle?

Data Availability Statement

All data, models, and code generated or used during the study appear in the published article.

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