

## **EXPERT COMMENT:** **RECOVERY OF RETENTION –** **A THORNY ISSUE**

Recovery of retention has long been a thorny issue and one ignored by the Housing Grants Construction & Regeneration Act 1996 (“the Construction Act”) and the latest amendment to the Local Democracy Economic Development & Construction Act 2009 (“LDEDC”).

**Contractors and sub-contractors often have significant sums locked in retention and subsequently, locked out of cashflow – and given the current low margins in the industry, this can represent the profit on jobs undertaken by the business.**

Whilst I have heard the view expressed that retention is “outmoded” and “should be dispensed with,” I do not see this in practice; in fact, the industry standard documents make provision for a “minimum retention amount,” or “retention percentage,” which is usually 3% but often 5% of the contract sum.

The issue of who actually owns the retention has long caused problems for contractors and sub-contractors. However, as the retention money has already been earned by and is due to the contractor/sub contractor, it seems to me that it is their money. Wording in the JCT sub-contract implies it is sub-contractor money held back; whereas Eggleston commentary on NEC3 suggests the contract wording may mean the retention is held on trust.

He refers to the case of *Wates Construction London v Franthom Properties* 1991 but that relates to the JCT main contract providing the employer is a fiduciary as trustee; a clear statement that money is that of the contractor and held on trust. There is no like provision in the standard JCT sub -contract.



On insolvency of the payer, money not in trust will be lost to the intended recipient. That money, even if “held on trust”, is at risk if not held in a separate account.

However, down the supply chain, standard clauses do not provide help for sub-contractors who should also be aware of the provisions of section 113 of the Construction Act, which state that, in the event of insolvency of their payer and they don’t get paid, contractors do not have to pay the sub-contractor.

The most common issue for sub-contractors arises in relation to release of the retention. Provisions are still prevalent which means that “final account” and “payment of retention” are effected by reference to the Main Contract.

Often they are in terms of “pay when paid”, (so in contravention of section 113) of the Construction Act, or, despite the provision of section 110(1A) of the Construction Act (which states that it is inadequate to determine what payments are made and when by reference to performance of obligations under another contract, or a decision by a person of obligations under another contract have been performed), connected to PC or certificate issue under the Main Contract.

In the event such provisions appear in the sub-contract, they are ineffective and the provisions of the Construction Act / Scheme are used instead, which often result in a shorter payment period for retention (e.g. 17 days after the due date). However, that would entail an application for retention being made and it would not apply to contracts that came into effect before 1 October 2011.

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## Further information

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