



focus

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SUPPLEMENT ON RETENTIONS

This FOCUS is a supplement to the SEC GROUP FOCUS on retentions issued at the beginning of January 2011.

This dealt with sub-contract provisions that made the release of retentions dependent upon events under the main contract such as the issue of a Certificate of Practical Completion or Certificate of Making Good Defects. Such provisions fall foul of the Construction Act since they do not constitute an adequate mechanism for determining when the retentions are to be released. This is especially the case where the sub-contractor has no right to know **when** (or if) the relevant certificate has actually been issued under the main contract.

AMW PLUMBING AND HEATING LTD v ZOOM DEVELOPMENTS LTD

A recent Scottish case has re-inforced this advice. AMW Plumbing and Heating Ltd (AMW) entered into a contract with Zoom Developments Ltd (Zoom) to carry out plumbing and heating works on a development of 65 new build flats in Cumbernauld. The flats were to be built in three separate blocks. Blocks one and two were completed. There were no complaints about AMW's work. Then Zoom decided to put off commencing work on the third block. Zoom was entitled to do this under a clause in the contract which enabled them, at their discretion, to suspend further work or vary the amount of the work.

THE ISSUE TO BE DECIDED BY THE COURT

AMW had been paid for the work done on the two completed blocks save for a retention of 5%. The relevant contractual clause stated that the retention would be reduced to 2½% upon practical completion of the **whole** development. One year after such completion the final part of the retentions would be released provided that the works had been completed to Zoom's satisfaction and there were no outstanding defects. With no prospect of work commencing on the third block AMW demanded their retentions. Zoom refused to release any retention since, under the contract, this would only happen following completion of the whole development. AMW went to court to recover the 5% retention held by Zoom.



THE DECISION OF THE COURT

The Court decided that the provisions governing the release of retention did not constitute an **adequate mechanism for determining when the retentions became due for release**. Since Zoom had complete discretion over **when** (or if) work on the third block would start they could put off the release of retentions indefinitely.

THIS IS WHAT THE SHERIFF PRINCIPAL (THE JUDGE) SAID

“I fail to see how it can be deemed adequate for contractors to have to wait for their employers to take a particular step which they alone control before the contractors can receive payment for work properly carried out in conformity with the contract.... In the present contract [Zoom] alone control when Practical Completion can be achieved and thus when the retention falls to be paid”.

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CONSEQUENCE OF RETENTIONS PROVISIONS NOT BEING AN ADEQUATE MECHANISM FOR DETERMINING WHEN RETENTIONS ARE DUE FOR RELEASE

Since the Court found that the retention clause was not an adequate mechanism for payment, the contractual clause was supplanted by the Scheme for Construction Contracts. [The Scheme comprises fall-back provisions that apply in the event that the contract fails to conform to the requirements of the Construction Act.]

The Scheme states that progress payments should be calculated by taking the amount equal to the value of the work carried out from the commencement of the contract to the end of the relevant period; and **subtracting** from that amount the aggregate sums which have been paid or which are due for payment. This subtraction produced the 5% retention monies that were outstanding on the two built blocks.

Under the Scheme the monies became due for payment on the expiry of 7 days following the relevant period defined in the Scheme as 28 days. Since the blocks were satisfactorily completed on or before 17 October 2008 the retention monies fell due for payment on 21 November 2008 or on the making a claim by the payee whichever was later. AMW's claim for payment was, in effect, the court proceedings issued in 2009. Therefore payment became due within 7 days of the date of issue of the proceedings.

THE IMPORTANCE OF THIS DECISION

This decision is of direct and immediate relevance to most sub-contract retention provisions. Sub-contractors do not have any control or influence over the issue of the relevant main contractor certificates or, indeed, any other event under the main contract that ultimately leads to the release of sub-contract retentions. As we all know the issue of the relevant main contract certificates may be substantially delayed for reasons which have nothing to do with the work of the aggrieved sub-contractor waiting for his retention.

THE DECISION IN THIS CASE HAS NOW GIVEN FIRMS MUCH GREATER AMUNITION IN CHALLENGING SUB-CONTRACT RETENTION PROVISIONS THAT RESULT IN DELAYS TO THE RELEASE OF RETENTIONS. GENERALLY SUCH PROVISIONS DO NOT CONSTITUTE ADEQUATE MECHANISM FOR DETERMINING WHEN RETENTIONS WILL BE RELEASED. ON 1 OCTOBER 2011 THESE PROVISIONS WILL BE OUTLAWED BY STATUE WHEN AMENDMENTS TO THE CONSTRUCTION ACT COME INTO FORCE.