



# How to secure the return of your final retention

## Introduction

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Almost every construction contract will contain a retention clause to ensure that a contractor or subcontractor (as the case may be) properly completes their works by the date for practical completion, including by returning to site to rectify any defects during the defects liability period (**DLP**). In other words, it is a form of guarantee that the work will be completed to the standard contemplated by the contract.

It is common practice for developers or head contractors not to release retention monies unless the party seeking the retention (**Claimant**) actively requests them to return the retention or makes a formal demand. However, in some cases, those requests are ignored leaving the Claimant with no choice but to:

- walk away in the hope that good relations are maintained, and future work is offered;
- make a security of payment claim, which is not always available due to time limitations; or
- commence litigation which comes at a cost and uncertainty.

Further obstacles in recovering retention may arise if a certificate of practical completion has not been issued on the project even where that project has been handed over and occupied.

This article discusses the obstacles that a Claimant may face when commencing legal action to recover retention, the position at law and some tips to consider before any steps are taken

## The Legal position

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There is very limited NSW or Australian case law on whether contractors have an entitlement to retention monies where practical completion for the subcontract works has been met but there has not been a certificate of practical completion issued or a contractor has not formally determined that the works are complete.

In *Murphy Corporation Ltd v Acumen Design & Development (Queensland) P/L & Anor* (1995) 11 BCL 274, the Court held that although a certificate of practical completion has not been issued, practical completion can still have occurred. The Court stated that although a certificate of practical completion is the best evidence for practical completion occurring, 'that does not mean... that in the absence of a certification for practical completion the contractor can never prove in legal proceedings that such a stage had in fact been reached'.

Unfortunately for subcontractors, the decision of *Murphy* has been clouded by the Court of Appeal's decision of *Abergeldie Contractors Pty Ltd v Fairfield City Council* [2017] NSWCA 113. In that case, the Court of Appeal held that a contractor cannot know the date of practical completion until they have received the certificate of practical completion. Although this case was concerned with 'practical completion' in relation to establishing valid reference

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dates for payment claims, it is worth noting that the same reasoning could also apply to determining when retention is to be released under a construction contract. This means that if the principal or superintendent has not issued a certificate of practical completion, then there is an argument that retention may not be required to be released.

Considering the limited authority in Australia, Claimants will be left with no choice but to lean on English authorities when seeking to recovering retention through litigation. In fact, there is ample support in English law for a contractor to recover retention where no certificate of practical completion has been issued.

In *Henry Boot Construction Ltd v Alstrom Combined Cycles Ltd* [2005] 1 WLR 3850, a contractor's right to an interim payment arises when a certificate either was issued or ought to have been issued. Although the issue of a certificate by the certifying officer was a condition precedent to payment, the absence of this certificate was not a bar to recovery of the funds. If this right to recover is established, it enables the court to decide whether a certificate ought to have been issued when it has not.

*Relicipride Building Company Ltd v Cordara* [2013] EWCA Civ 158 states an employer cannot hold onto retention indefinitely. The purpose of retention monies is to act as security out of which the paying parties indemnifies themselves against loss or damage arising from the non-fulfillment of the payee's obligations against which the retention was made.

Finally, *Dr Jones Yeovil v Stepping Stones* [2020] EWHV 2308 states that "it is in the very nature of a 'retention' out of the contractual price that the parties anticipate it being released to the payee at some point during the performance of the contract (even if that at its end and subject to whatever deductions may properly be made by the payor under the terms of the contract)".

## Tips to Ensure Recovery of Your Retention

Despite the lack of case law in Australia, there is an arguable case to be made that retention monies is not to be held indefinitely if a Certificate of Practical Completion is not issued for the project. However, this position is not without risk given the decision of *Abergeldie Contractors Pty Ltd v Fairfield City Council*.

If any contractors or subcontractors are trying to recover retention under a construction contract, then the following steps might serve as a useful guide:

- when you reach practical completion, make sure you get a Certificate of Practical Completion from the Superintendent or Principal.
- review the contract to make sure all required notices with respect to claiming retention have been issued.
- issue a letter or a formal demand to the principal/head contractor requesting that the retention monies are due pursuant to the terms of the contract; and
- if the principal/head contractor fails to respond or release the retention, and you have carried out some defect rectification work within the last 12 months, lodge a security of payment claim to recovery the remaining retention; or
- commence proceedings in a competent court for the recovery of the retention.

Lastly, to avoid any uncertainty (or potential litigation) around the release of retention on future projects, it is important that contractors handle these issues preemptively by ensuring that the retention clauses in their contracts are drafted in a way that does not result in the release of retention being contingent upon a Certificate of Practical Completion.

The team at Construction Legal have extensive experience with drafting retention clauses and can assist contractors in the difficult process of recovering retention monies. If you require assistance or would like further information about any of the above, please feel free to contact **Logan Cavanagh** or **Jessica Rippon**.

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