



RETENTION PAYMENTS WITH HELD BY MAIN CONTRACTOR

Retention payments withheld by Main Contractor

A main contractor cannot simply refuse to release a subcontractor's retention purely because the employer has withheld retention from the main contractor unless the subcontract expressly makes the subcontract retention "back-to-back" and properly conditional.

The General Legal Position (UK)

Payment must follow the contractual mechanism.

- "Pay when paid" clauses are generally unenforceable (except in insolvency situations).
- Withholding must comply with proper notice provisions (Pay Less Notice).
- So a main contractor cannot withhold payment simply because they have not been paid, unless:
- The subcontract clearly makes payment conditional, and
- The clause is legally compliant.

Retention Is Usually a Separate Obligation

In most subcontracts Retention is released:

- 50% at Practical Completion
- 50% at expiry of Defects Liability Period (DLP)

The trigger is typically:

- Completion of subcontract works
- Expiry of subcontract defects period
- Making good defects

It is not normally conditional upon the main contractor being paid by the employer.

If the subcontract does not clearly say retention release is dependent on upstream payment, then:

The main contractor carries that commercial risk not the subcontractor.

When Could They Withhold

A main contractor may attempt to rely on:

Express Back-to-Back Clause

- If the subcontract states:
- "Retention shall be released only when received from the Employer"

Even then:

- Courts interpret these clauses strictly.
- Ambiguity usually favours the subcontractor.
- It must not breach the Construction Act.
- Genuine Outstanding Defects

Retention can still be withheld if:

- Defects are properly notified
- Within the contractual defects period
- A valid Pay Less Notice has been served

But withholding purely for:

- "Commercial reasons"
- Employer disputes
- Upstream cashflow issues

Is generally not lawful.

What the Courts Tend to Say

- UK adjudicators and courts typically take the view, a subcontractor's entitlement is governed by the subcontract not by disputes between employer and main contractor.
- Unless insolvency applies.

The Insolvency Exception

Under the Construction Act:

- "Pay when paid" becomes enforceable only if the employer is insolvent.
- If the employer is solvent but simply withholding that does not justify non-payment downstream.

Practical Commercial Reality (What Often Happens)

In practice (and you've clearly experienced this):

- Main contractors use retention as leverage.
- No technical defects are raised.
- Commercial issues are used as justification.
- Payment is delayed post-DLP expiry.

That is often challengeable via:

- Formal notice
- Notice of intention to adjudicate
- Adjudication under the Construction Act
- Retention disputes are one of the most common adjudication categories in the UK.

A main contractor cannot lawfully refuse to release retention solely because the employer has withheld it, unless:

- The subcontract expressly and clearly makes it conditional, and
- The clause complies with the Construction Act.
- Otherwise, the risk sits with the main contractor.