O & M Manuals

RETENTION – A LEGAL OBLIGATION EXPLAINED

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Retention - A legal Obligation Explained

Explanation of a Pay Less Notice

A Pay Less Notice is a formal contractual notice issued stating the intention to pay less than the amount applied for or previously notified as due.

The notice must:

- Be issued within the contractual timeframes.
- Clearly specify the sum considered due at the date of the notice.
- Provide a detailed basis of calculation.
- Identify the contractual or technical grounds for any deduction.

A Pay Less Notice must not be used as a mechanism to withhold certified monies for:

- Commercial leverage,
- Matters unrelated to the specific payment cycle,
- Issues not previously notified within the defect's liability period,
- Incomplete third-party actions outside the Contractor's control (unless contractually attributable).

Failure to issue a valid Pay Less Notice within the prescribed timeframe may result in the notified sum becoming payable in full, regardless of any subsequent dispute, subject to adjudication.

This is not solely related to installed works but to the publication and payment of final documentation

Storing up issues

In UK construction contracts, defects must be notified within the Defects Liability Period (DLP) (often 12 months). They cannot be deliberately "stored up" and then issued after the liability period expires simply to justify withholding retention.

UK Construction Contracts

In UK construction contracts, retention is security against defects**,** not a cash-flow management tool. If the 12-month defects liability period (DLP) has expired and:

- No valid defects remain outstanding
- No defect notices were issued within the liability period
- No contractual mechanism allows further deduction
- The works are not subject to unresolved technical non-compliance

Then withholding retention for "commercial reasons" is generally improper and potentially unlawful.

Legal Position (UK Construction Context)

Payment must follow the contractual mechanism

- Pay Less Notices must be valid and properly issued
- Sums become due on the contractual final date for payment

Non-payment may entitle the contractor to:

- Statutory interest
- Suspension of performance
- Adjudication

Retention is not discretionary once contractual conditions are satisfied.

- If the DLP has expired and no valid notices were issued during that period, the employer generally loses the right to rely on defects as justification later.

Common Improper Commercial Justifications

- Closing the final account.
- Ongoing commercial discussions.
- Agreed variations.
- The client hasn't released funds.

Retention cannot be used as:

- Negotiation leverage
- Pressure tactic
- Set-off for unrelated commercial disputes
- Cash-flow buffer

When Withholding May Be Lawful

Retention may be lawfully withheld if:

- A valid Pay Less Notice was issued
- Specific defects were formally notified within the DLP

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- The contract links retention release to defined deliverables
- There is a legitimate cross-claim properly notified
- But "commercial reasons" alone is not sufficient.

Retention is normally held to secure:
- Proper completion of the Works
- Remedy of defects during the defect's liability period
- Compliance with contract requirements

Payments
- Any withholding requires a valid Pay Less Notice
- Reasons must be clearly stated and properly valued

When Incomplete Third-Party Testing Could Justify Withholding

Retention may be lawfully withheld if:
- The contract expressly requires the test for completion
- The testing is a contractor obligation (not employer-appointed third party)
- Completion or Practical Completion is conditional on it
- A compliant Pay Less Notice has been served

Example:

Commissioning certificates required under contract
- BMS witnessing required before PC
- Fire alarm cause & effect not demonstrated
- If testing forms part of contractual completion deliverables, retention can be affected.

Retention should not be withheld where

Testing is outside contractor control
- The works are otherwise complete and operational
- No contractual clause links that testing to release of retention
- No valid Pay Less Notice was served
- The issue is being used as commercial leverage
- Retention is not meant to punish or coerce.

Key Legal Principle

If:
- No defects exist
- No incomplete work remains
- The system is operational
- O&M information has been issued

Then withholding retention simply because a third party has not completed their scope is often:
- Potentially a breach of contract
- Possibly a smash-and-grab adjudication risk

Important Distinction
- There is a big difference between: Incomplete Work versus Incomplete Evidence of Testing

Courts and adjudicators look at substance.
- If the system works and is safe lack of paperwork alone rarely justifies indefinite retention withholding.

What Adjudicators Commonly Ask
- Was Practical Completion certified?
- Were defects identified?
- Was a Pay Less Notice validly served?
- Is the test a contractual precondition?
- Who was responsible for arranging the third-party test?

If PC has already been certified, it becomes even harder to justify continued withholding.

Strategic Reality (Commercial World)

Used as a pressure tactic where:
- No technical defects exist
- Only commercial issues remain
- Retention becomes leverage

That becomes dangerous for the payer if challenged formally.

Practical Position
- If commissioning sheets are complete

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- If systems are operational
- If third-party witnessing delay is outside your control
- If no defects exist
- Then withholding retention is usually weak unless clearly contractually supported.

Retention should be released for the elements that are complete, compliant, and operational it is not lawful or reasonable to withhold the entire sum for unrelated commercial leverage.

<u>Partial Release of Retention</u>

It is unreasonable and contrary to standard contractual principles to withhold the entirety of retention where identifiable elements of the works are complete, operational, and free from defect.

Retention is a security mechanism linked to performance risk not a commercial bargaining tool.

<u>Where systems have:</u>
- Been fully installed,
- Been tested and commissioned,
- Are operating in accordance with the specification,
- Have no notified defects within the liability period,

There is no contractual or legal basis to withhold the retention associated with those elements.

If any specific defects exist, they must be clearly identified and evidenced. In the absence of technical non-compliance, withholding retention for unrelated commercial matters amounts to improper leverage.

<u>Accordingly,</u>
- Immediate release of retention relating to systems that are complete and defect-free.
- Written clarification of any specific technical grounds (if any) for sums being withheld.
- Confirmation that retention is not being used as a mechanism to exert commercial pressure.

Failure to release undisputed retention may constitute a breach of contract and may give rise to formal recovery proceedings, including adjudication if necessary.

<u>The works have been completed in accordance with the contract.</u>
- No technical defects or non-compliances have been raised.
- The only issue preventing payment is a commercial or leverage position**,** not performance.
- Withholding the entire amount when only a minor issue (if any) exists is disproportionate.

<u>In UK construction contracts, payment cannot lawfully be withheld unless:</u>
- A valid Pay Less Notice has been issued
- The withholding relates to a genuine contractual entitlement not leverage.
- If no valid notice exists, the notified sum becomes payable even if there is a dispute.

<u>The works have been completed in accordance with the contract requirements.</u>
- No technical defects, non-compliances, or outstanding performance issues have been identified or formally notified.
- The continued withholding of the full certified sum appears to be for commercial leverage rather than any contractual entitlement.
- It is neither proportionate nor contractually justified to withhold the entire amount where no substantiated defect or valuation dispute has been raised.

<u>Where Leverage Is Obvious</u>

<u>It is evident that payment is being withheld for commercial reasons unrelated to the quality, completion status, or compliance of the works.</u>
- The use of certified sums as leverage is inconsistent with the contractual payment mechanism and contrary to the principles of fair payment under the Construction Act.
- In the absence of a valid Pay Less Notice, the notified sum is due and payable in full.

<u>Strategic Positioning</u>

<u>If this relates to retention or final account</u>:
- State clearly that no defects have been issued during the liability period.
- Confirm that no schedule of defects has been provided.
- Confirm that O&M manuals / documentation have been delivered (if relevant).
- Confirm that withholding for unrelated commercial matters is improper.

From a UK construction / M&E contractual perspective, fabricated exaggerated or commercially-motivated issues raised post-handover do not lawfully justify withholding retention monies.

But the position depends on contract wording and whether a genuine defect exists within the defect's liability period

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What Retention Is Actually For

Retention is security against defective or incomplete works, not:
- Commercial leverage
- Cash-flow management
- Punishment
- Renegotiation tool
- Payment bargaining chip

Under standard forms (e.g. JCT), half is released at Practical Completion and the remainder at expiry of the Rectification Period, provided defects are made good.

When Retention Can Be Lawfully Withheld

Retention may legitimately be withheld only if:
- A genuine defect exists.
- The defect is notified within the Rectification Period.
- The defect relates to work within your contractual scope.
- The Employer/CA follows the contract procedure.
- The value withheld is reasonable and proportionate.

Fabricated or Unrealistic Issues

If issues raised are:
- Vague
- Non-specific
- Outside scope
- Not technical defects
- Purely commercial complaints
- Raised after the rectification period
- Previously signed off
- Already certified
- Related to third-party alterations
- Due to misuse or tampering
- Based on changed expectations rather than defects

Then withholding retention is likely unlawful.

In UK case law and adjudication practice, adjudicators look at:
- Evidence
- Contract procedure compliance
- Proportionality
- Good faith conduct
- Using retention as leverage is frequently criticised in adjudication decisions.

Important Distinction

There is a legal difference between:

Genuine Defect	Commercial Dispute
Non-compliant installation	Fee dispute
Equipment failure	Contract negotiation
Omitted works	Budget pressure
Non-operational system	Late variations disagreement

Only the left column justifies retention withholding.

Abuse of Retention

If retention is being withheld purely for commercial reasons, you may have grounds for:
- Immediate payment claim
- Adjudication
- Interest claim under Late Payment legislation
- Potential breach of statutory payment provisions
- Recovery of adjudication costs (depending on contract)

The key question is:
- Has a properly notified, evidenced, in-scope defect been identified?
- If not, retention should not be withheld.

In conclusion
- No technical issues raised
- Only commercial reasons cited
- Retention being used as leverage

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