

# Do payment claims for retention money 'fit' with the standard terms of contract in New Zealand?

By Maria Cole

The New Zealand Construction Contracts Act 2002 (**CCA**) does not explicitly state that payment claims can be used to recover retention money. That said, it is clear the 2015 amendments to the definition of a 'payment' under the CCA are broad enough to include retention money to which a contractor is entitled. In contrast, the Supreme Court of Victoria in Australia has recently said that payment claims under that state's equivalent legislation should not be brought for retention money. Why? And could the reasoning apply to the CCA in New Zealand?

## Interaction between the CCA and standard conditions of contract

Amounts withheld as retention money are set in construction contracts, and typically range between five and ten per cent of the contract value. Retention money is usually paid 12 months after the completion of a contract.

The authors of *Kennedy-Grant and Weatherall on Construction Law* note that the standard conditions of construction contracts referred to in that commentary<sup>1</sup> all provide for the withholding from progress payments of retentions, and explain:<sup>2</sup>

The sums retained are returned to the contractor in the proportions provided in the various conditions over the period between practical completion/taking over and final payment. Whether such provisions will continue to be accepted in light of the retention money provisions ... and particularly s 18l, which requires retention

money to be paid upon fulfilment of all obligations under the contract and no later, remains to be seen.

What is being referred to is section 18l(1)(b) of the CCA, which renders void any term of a contract which attempts to *make the date on which payment of retention money is payable later than the date on which party B has performed all of its obligations under the contract to the standard agreed under the contract.*

## The Victorian Supreme Court's analysis

The right to seek a progress payment in Victoria is established under section 9(1) of the Building and Construction Industry Security of Payment Act 2002 (**SoP Act**), which provides:

On and from each reference date under a construction contract, a person—  
(a) who has undertaken to carry out construction work under the contract; or  
(b) who has undertaken to supply related goods and services under the contract—is entitled to a progress payment under this Act, calculated by reference to that date.

In *Punton's Shoes v Citi-Con*, Punton's had served a payment claim for 50% of the retention money being held by Citi-Con.<sup>3</sup> The Victorian Supreme Court found the terms of the contract made no provision for a payment claim by Punton's for retention moneys and that the claim was not in the nature of a payment claim under the SoP Act. It held:

[110] ...any implied right or entitlement

<sup>1</sup> The NZS 2013 Contracts and NZS 3915:2005, cl 12.3; NZS 3902:2004, cl 14.2 and Box H; NZIA SCC 2018 and SCC SF 2016, cl 14.9 and NBC 2018 and NBC SF 2016, cl 14.8; FIDIC Red, Yellow and Silver Books, cl 14.3(c); FIDIC Green Book, cl 11.3.

<sup>2</sup> T Kennedy-Grant and B Weatherall, *Kennedy-Grant and Weatherall on Construction Law* [221,660] Retentions, LexisNexis NZ Ltd.

<sup>3</sup> [Punton's Shoes v Citi-Con \[2020\] VSC 514](#).



there may be in the Contractor to return of a portion of retention moneys is different in character and distinct from either a claim under the Contract for the value of work carried out or an entitlement under the SoP Act for the value of construction work carried out and related goods and services.

[111] In distinction to a payment claim entitlement, the Contract does provide a mechanism to adjust the parties' entitlements in relation to moneys deducted by way of retention. Any sum held by way of retention is to [be] taken into account in the Final certification process under ...the Contract and thereby accounted for in the amount ultimately payable as between the Contractor and the Principal on the final reconciliation of each [party's] entitlements under the Contract. The retention deduction, reduction, recourse and security related provisions of the Contract do not contemplate or accommodate payment claims by the Contractor for contract work undertaken or related goods and services supplied.

[112] ...any implied entitlement to return of retention moneys upon the issue of the Certificate of Practical Completion under the Contract, or adjustment under [the Contract], is not in the nature of a progress payment entitlement in relation to work carried out by the Contractor in the performance of the Contract.

The decision makes the security of payment regime in Victoria inconsistent with other states and territories in Australia including NSW, Queensland, ACT, Tasmania, and South Australia in which retentions constitute a 'claimed amount' and are expressly allowed to be included in a payment claim. And, the WA and NT Acts both imply a term to the effect that an adjudicator may *decide if retention money ceases to be payable to the contractor* indicating that such sums may be claimed in a payment claim.

## The CCA and 'payments' in New Zealand

A fact sheet prepared by MBIE explaining the 2015 amendments to the CCA states:<sup>4</sup>

The definition of 'claimed amount' has been reworked to make it clear a payment claim can specify any payment amount the payee believes to be due under the contract.

Additionally, a new definition for 'payment' has been inserted to make it clear that a payment means a progress payment for construction work<sup>5</sup> or any other type of payment a party to a construction contract is entitled to,<sup>6</sup> i.e.: a payment claim can specify amounts claimed for interest, retention money or other amounts due under the contract.

However, in *Rintoul Group Ltd v Far North District Council*,<sup>7</sup> Moore J made the following observation:

There are indications elsewhere in the CCA that Parliament did not intend funds held on retention to be treated as progress payments capable of being claimed under s 20. For example retentions may be held on trust and invested in accordance with the Trustee Act 1956. They may also be intermingled with other monies.

While merely an observation, it does indicate that the issue is perhaps not as clear cut as it at first appears. We have seen this before in relation to amendments to the CCA where those proposing the amendments understood they would create a 'deemed' trust situation for retention money being held. When this question came before the High Court in *Bennett v Ebert Construction Ltd*, Churchman J found otherwise:<sup>8</sup>

Although, at the committee stage, the then Minister for Building and Housing, the Hon Dr Nick Smith, said that the effect of the intended legislation was that the retention funds "... are deemed to be held in trust ...", it does not seem that the provisions in the legislation actually created a deemed trust.

4 Ministry of Business Innovation & Employment *Building Performance* website: <https://www.building.govt.nz/assets/Uploads/projects-and-consents/cca2002-changes-adjudication-enforcement.pdf>

5 Section 19(a) CCA.

6 Section 19(b) CCA.

7 *Rintoul Group Ltd v Far North District Council* [2019] NZHC 2577.

8 *Bennett v Ebert Construction Ltd (in rec and liq)* [2018] NZHC 2934.



## Conclusion

There is an argument that the strict 'pay now/argue later' payment claim regime is conceptually and practically at odds with the standard terms of construction contracts for recovery of retention moneys when they prescribe for such recovery to be linked to practical completion/taking over/completion and final payment on construction projects.

However, it would seem clear that, by operation of sections 19(b) and 20 of the CCA, the payment claim regime under the CCA is suited (and intended) for the recovery of retention moneys by way of payment claims and related procedures, including default liability and the right to suspend work under sections 22-24A of the CCA, and adjudication. Such interpretation is consistent with the purpose of the CCA,<sup>9</sup> the insertion of the retention money regime provisions in March 2015,<sup>10</sup> and the legislative provisions and practices in other Australian jurisdictions with legislation more closely resembling the CCA than the SoP Act in Victoria.

As the CCA regime recognises, cashflow is the life blood of the construction sector and there are strong public policy reasons to ensure that there is cashflow at the end of a construction project when most building disputes tend to manifest and suppliers and subcontractors will depend on payment flowing downstream in the contractual chain.



## ABOUT THE AUTHOR



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Maria was previously a civil litigation barrister for over a decade, where she gained experience in arbitration and mediation.

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<sup>9</sup> Section 3 CCA.

<sup>10</sup> Inserted on 31 March 2015 by section 18 of the Construction Contracts Amendment Act 2015.

