

### **SECURING PROPER PERFORMANCE OF CONTRACT WORKS: RELEASING SECURITIES PROVIDED UNDER BUILDING CONTRACTS**

John Grant  
Carter Newell

---

This is an extract from a paper delivered to a LAAMS Seminar 'Construction Defects Litigation' at the Canton Crest Hotel, Brisbane on 18 July 2000. It first appeared in Carter Newell's *Constructive Notes* bulletin (March 2001) and is reprinted with permission.

---

Building contracts should provide for release (or reduction) of any security provided once that security is no longer required. In the case of securities held against the builder's performance obligations, some form of security will usually be required until the end of the defects liability period.

Generally, the standard form building contracts provide for a staged release of securities. By the time of practical completion the major performance obligations under the building contract have been met and there only remain residual obligations by way of defects liability. These defect liability obligations do not require maintenance of security at the level necessary before practical completion.

For this reason, the contractual provisions relating to practical completion of the works frequently include a provision for reduction (usually by half) of the retention moneys or securities held by the Principal. Any remaining security is released at the expiration of the defects

liability period, usually as an adjunct to the issue of a final certificate under the contract.

Release takes the form of payment (if in the form of cash) or physical return of the security documents themselves (and any transfer documents provided with them). In order to facilitate this process, if security is in a form other than cash, often two undertakings (each for half the required amount) are provided by the builder at the outset.

If the Principal holds security after the date on which it should have been released, it is not permitted have recourse to it.

### **RELEASE PROVISIONS IN STANDARD FORM CONTRACTS**

#### **AS 2124-1992**

AS 2124 provides relatively standard provisions at clauses 42 and 5.7 & 5.8 relating to reduction and release of the securities. The contract follows the arrangement described above and reflects the fact that this form of contract seeks to adopt an even-handed approach between the parties.

#### **JCC**

The JCC (C-F) contracts provide unremarkable clauses relating to the release and reduction of securities held (see clause 10.22, 10.24 and 11.10). Again, the scheme is generally as outlined above.

#### **Defence**

The Defence contract also has relatively standard provisions for reduction and ultimate release of security and retention moneys. However, clause 5.7 permits the principal to allow a reduction in security provided or retention moneys by an amount, which **in its opinion**, is just and equitable (provided that the security is not reduced below 50%).

That qualification reflects the

philosophy behind the contract, namely that it is a client focussed contract for use in dealings with sophisticated contractors. Even so, the discretion would have to be exercised with some care. Exercise of the discretion in a way that is manifestly unjust or inequitable may lead to a finding that the builder has been penalised.

### **IN CONCLUSION**

Securities should not be held for longer than necessary, nor should they be maintained at an inappropriately high level. Such requirements could be struck down as a penalty.

Once the obligation to be secured has been performed, the security should be returned. In any event, the party's entitlement to recourse passes once the secured obligation is performed, whether or not the security remains physically in that party's possession.