

Contract Law – Review of Retention: consultation

March 2025

Contract Law – Review of Retention

Background

1. The Scottish Government consulted on the Scottish Law Commission (SLC) Report on Review of Contract Law in July 2024¹. The aim of the consultation was to establish whether the landscape around this area of the law has changed since the Report² was published in March 2018 and if so whether the changes are material to the recommendations contained in that Report. It also sought to confirm that the view of consultees received by the SLC are still broadly held.
2. One of the issues tested in the consultation was the need for reforms around the principle of mutuality and, particularly, retention. While retention is the legal term by which the remedy is known, it is the temporary withholding or suspending of performance of contractual obligations that are due to be performed. The relevant extract from the consultation is attached at Annex A.
3. In short, some of the responses indicated that in the light of case law subsequent to the SLC's Report, the law in relation to retention of performance is now *less* clear than when the SLC published its Report and that the law would benefit from clarification. This paper seeks further views on what any reform should look like.

Recent Case Law

4. The subsequent judicial opinions, which have been said to have contributed to the lack of clarity are: -

JH & W Lamont of Heathfield Farm v Chattisham Ltd [2018] CSIH 33

Whilst the 3 judges in this case all reached the same decision, their views on how retention operates were very different. For example: there were differing views on whether or not all obligations are counterparts of one another; whether the right to retain applies only in respect of substantive, as opposed to ancillary, obligations; whether the right to retain is only available to secure future performance by the other party to the contract, a position which conflicts with *Inveresk*³; and whether a breach needs to be material or not before retention is available. The case also demonstrates that the equitable control on the right to retain is underdeveloped.

¹ [The Scottish Government consultation paper on the Scottish Law Commission \(SLC\) Report on Review of Contract Law.](#)

² [The Scottish Law Commission Report on Review of Contract Law.](#)

³ *Inveresk plc v Tullis Russell Papermakers Ltd* [2010] UKSC 19. For a summary of this case see Annex B.

Jones v Craigton Holdings Ltd [2024] CSOH 33

In this case Lord Braid did not consider that retention as a matter of right could be exercised only to secure future performance of a substantial obligation owed by the other party, conflicting with the position taken by some members of the bench in *JH&W Lamont*.

Difficulties with the Law

5. Based on the views of the Scottish Law Commission, the more recent judgments and 2 reviews⁴ by Lorna Richardson of the law of retention, on which we've heavily drawn, we understand the main difficulties and criticisms of the existing law around the remedy of retention to be as follows:

Counterpart Obligations

6. The operation of the assumption that all of the obligations on Party A under a contract are the counterparts to Party B's obligations under the same contract, in relation to contracts performed in stages, is currently unclear (as can be seen in the differing treatments of *Bank of East Asia*⁵ in *Inveresk*). Furthermore, the suggestion⁶ that retention is only available in relation to a contract's 'substantive obligations' seems to unhelpfully narrow the utility of the remedy.

Material Breach

7. The current law is thought to be that the breach needs to be material but not so material as would justify rescission. It is unhelpful to have materiality used in these differing senses. It is also unclear how serious the breach has to be to allow retention, i.e., how far away from the materiality needed for rescission it can be.

Abuse of the Remedy and its Equitable Control

8. There is the potential for abuse where the obligation that Party B has failed to perform has a much lower value or is of much less significance than the counterpart obligation for which Party A seeks to withhold performance as a result of Party B's breach. An example of this is an obligation that has been substantially but not completely performed.

⁴ L Richardson, "The scope and limits of the right to retain contractual performance", 2018 (4) *Juridical Review*, pages 209-229 and "What do we know about retention now?" 2018 *Edinburgh Law Review*, vol. 22(3), pages 387-392.

⁵ *Bank of East Asia v Scottish Enterprise* 1997 SLT 1213.

⁶ *McNeill v Aberdeen City Council* [2013] CSIH 102. For a summary of this case see Annex B.

9. In respect of both the materiality of the breach and the abuse of the remedy, the SLC thought that the solution may lie in international models such as the European Principles and the UNIDROIT Principles which contain an overriding principle that rights must be exercised in good faith. The view that such a proportionality or reasonableness requirement would be of benefit was shared in the reviews referred to in footnote 4.
10. The court has equitable control of the right to retain performance but there is a lack of clarity both around when the court should exercise its discretion and how it should do so. The operation of the discretion is underdeveloped in the case law. In order to improve how this control operates, and so that it is better understood, it has been suggested that the remedy be subjected to an additional requirement - that the value of the performance being retained should not be clearly disproportionate to the effect of the breach. The onus of proving the clear disproportion would be on the party considered to have breached the contract and against whom the remedy was being used. In addition, and to avoid retention being used abusively, partial retention would be possible rather than the current position in terms of which a party retaining performance can retain all of his unperformed counterpart obligations when faced with a breach.
11. It is important to make it clear that retention is a remedy which is ordinarily available subject to the court's discretion to refuse it rather than the court permitting retention, in much the same way that a party has the right to specific implement, with the court having a discretion to refuse it in exceptional circumstances. A parallel may also be drawn with the remedy of lien, which is closely related to retention: there the court is empowered to prevent use of the remedy to prevent abuse and unfair oppression of the debtor (see Steven, *Pledge and Lien*, para 15.05).
12. Lorna Richardson's review examined all of the controls on the right to retain, of which the court's equitable control is one. For completeness those current controls have been analysed as:

Control	Requirement
1	The obligations must be counterparts of one another. The guiding principle is that this operates across the contract or transaction as a whole, unless there is clear indication to the contrary.
2	The breach must be material but need not be so material as would justify rescission.
3	The court has equitable control of the right to retain and may refuse to allow a party to retain where it is being used inequitably.
4	The claims must be contemporaneous, that is, each in existence at the same time as the other.
5	The contract must be ongoing, which has been suggested as a control in some of the more recent cases.

Anticipatory Breach

13. While not being a particular difficulty, for completeness we discuss anticipatory breach. The remedy of retention doesn't appear to be available in relation to an anticipatory breach even if it is clearly going to happen and would be a material breach. The Vienna Convention and European principles recognise this issue.

14. The SLC suggested that the law could be reformed by:

- Recognising that a creditor may withhold performance in response to an anticipatory breach, and
- Enabling a creditor to seek clarification of the debtor's position where the creditor has reasonable doubts about the debtor's intention to perform.

Reforming the Law

15. To address the deficiencies described above and to bring the necessary clarity to the law, it is proposed that the following provisions could be placed on a statutory footing. Some are a restatement of the current law, others reform and innovate the law. The provisions would be default in nature and would not preclude parties' ability to contract out of them.

- a) Retention is the temporary withholding or suspending of performance of contractual obligations that are due to be performed.
- b) A party (A) who is to perform a contractual obligation(s) after the time at which the other party to the contract (B) is due to perform an obligation(s) has a right to

retain her performance until B has performed his obligation(s) or has paid damages to A in lieu of such performance, subject to the following provisions.

- c) The performance retained by A must be a counterpart obligation to that which B has failed to perform or performed defectively.
- d) There is a rebuttable presumption that all of the obligations in a contract undertaken by A are counterparts of the obligations undertaken by B. This presumption can be rebutted where the terms of the contract or its structure indicate that the parties do not intend all of A's obligations to be the counterparts of all of B's obligations.⁷
- e) Despite being in different contracts, obligations may be counterparts where they form part of one transaction.
- f) For A to have the right to retain there is no need for B's breach of contract to be material. The breach by B must have non-trivial adverse effects for A.
- g) A's retention of her performance must not be clearly disproportionate to the effects of B's breach of contract. Where the retention would be clearly disproportionate, A may still retain such part of her performance as is not so disproportionate. The courts have a discretion to refuse to allow A to exercise her right to retain performance should they consider that the right is being used inequitably.
- h) These are default provisions and the parties can contract out of the right to retain performance.
- i) Retention can be, but is not limited to, securing future performance and can be used even if the contract has come to an end in respect of obligations subsisting when it ends.
- j) Retention can be pled as a defence to an action on the contract, to justify why the defender has not yet performed her obligations.
- k) Nothing in the rules set out here affects the remedy of special retention, that is retention which can be permitted by the court, in the exercise of its equitable discretion, and which does not depend on the principle of mutuality of contract. The court can allow a liquid debt to be retained pending the making liquid of an illiquid claim and in respect of which there need be no connection between the claims⁸.
- l) Should A have obligations to perform before B performs, but before A has performed her obligations B makes clear that he will not perform his obligations when the time comes to perform or will do so in such a manner that he will be in material breach of the contract, then A has the right to retain her performance notwithstanding that her obligations are due to be performed before B's

⁷ See the discussion in MacQueen and Thomson on Contract Law in Scotland, paras 6.9 and 6.16.

⁸ For discussion of special retention see L Richardson, "Examining 'equitable' retention" 2016 20(1) Edinburgh Law Review 18.

obligations. With the exception of permitting retention of performance in response to an anticipatory refusal to perform, as set out in this rule, nothing in these rules affects the law in relation to anticipatory breach of contract.

m) Nothing in the rules set out above affects the law in relation to lien.

Questions

1. Would the statutory scheme set out above address the concerns about the law of retention? Please give your reasons.
2. Do you think there are any components missing from the scheme? Please give your reasons.
3. Do you think any of the components listed should not feature in the scheme? Please give your reasons.
4. Do you have any general comments on the proposed scheme?
5. In relation to provision 15(f) above do you consider that the non-trivial adverse effect requirement is necessary? Please give your reasons.
6. Do you have any concerns about a statutory statement of the law of retention given the general approach of the SLC not to recommend a general statutory statement of the law of remedies for breach of contract? Please give your reasons.
7. Do you have any views on whether retention should be available in response to an anticipatory refusal to perform?
8. Do you have any views on whether these provisions should be made in primary or secondary legislation? If you think these provisions should be made by way of secondary legislation, do you have a view on which piece of primary legislation may enable Ministers to make such changes?

How to respond to this consultation

Responding to this Consultation

We are inviting responses to this consultation by **05 May 2025**.

Please respond to this consultation using the [Scottish Government's consultation hub, Citizen Space](#). [Access and respond to this consultation online here](#). You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of **05 May 2025**.

If you are unable to respond using our consultation hub, please complete the Respondent Information Form and send along with your response to ContractLaw2024@gov.scot or by post to:

Private Law Unit
Scottish Government
Area GW 15
St Andrews House
Edinburgh
EH13DG

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

To find out how we handle your personal data, please see our [privacy policy](#).

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at [Citizen Space](#). If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above.

Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find [all our consultations online here](#). Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

**Scottish Government Consultation on
Strategic Lawsuits Against Public Participation**

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our [privacy policy](#).

Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email Address

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
 Publish response only (without name)
 Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No

Annex A

Extract from the Scottish Government Consultation on the Scottish Law Commission Report on Review of Contract Law.

Remedies for Breach of Contract

The Scottish Law Commission (SLC) had considered prior to their Report that a comprehensive statutory restatement of the law could be of benefit in respect of remedies for breach of contract but as this proposal was not widely supported and indeed there was some significant opposition, no such recommendation has been made.

In the main there was a lack of support for many of the reforms. For example, a number of technical reforms were considered. There was little support for general reform in this area and it was concluded that the law as it stands is fit for purpose. The SLC consulted on three further possible reforms which were characterised as “self-help remedies⁹.” The first (price reduction) was not supported by the majority. Similarly, most respondents were against a debtor's right to cure defective performance. Finally, there was limited support for the remedy of a creditor's right to have non-conforming performance remedied. As a result, and in the light of stakeholder views, no recommendations were made on these aspects.

Whilst there was some consensus around some potential reforms relating to the enforcement of performance, recommendations were not proposed on the basis that it would create an undesirable divergence between remedies for breach of contract and the general law of remedies.

The SLC consulted again on the topic of damages for non-patrimonial loss as there had previously been support for reform in this area¹⁰. Views had changed, however, and the level of support had fallen and with consultees taking the view that the courts were now developing the law on a case-by-case basis. The SLC were content to leave things both to the courts and further academic research and no recommendations were made.

The SLC did however recommend 3 individual reforms all of which are intended by way of default rules. These recommendations are discussed in more detail below and your views on aspects of these are welcome.

⁹ See Chapter 14 of the Report.

¹⁰ See Chapters 16 and 17 of the Report.

Principle of mutuality

The first of these reforms relates to "mutuality." It is intended to clarify that when two parties (A and B) to a contract are each in breach of the contract, A may exercise any right or pursue any remedy arising from B's breach, provided B's breach occurs before B rescinds the contract for A's breach (if it can)¹¹. It is qualified in so far as the party in breach is not entitled to claim performance of any duties which have been retained lawfully.

Closely aligned to the principle of mutuality is the remedy of retention. Retention is a "self-help" remedy which is based on the idea of obligations in a contract being interdependent or reciprocal, so if one party does not perform then the other party need not perform. Before its Report, the SLC considered that the remedy of retention was generally functioning reasonably well and that clarification of certain issues was required more than reform, but the extent of the clarification needed was not clear. In its Report the SLC considered it best to leave further clarification of the law on mutuality and retention to the courts and practitioners.

Since the Report was published there has been further case law which has raised questions about how and when retention can be used. Some of the issues raised by *J H & W Lamont of Heathfield Farm v Chattisham Ltd*¹² were highlighted in an article¹³ which noted that while the 3 judges of the Inner House reached the same decision they did so by contradictory routes. For instance, taking as an example the judges' approach to Lord Jauncey's comments in *Bank of East Asia*¹⁴, Lord Drummond Young suggested that they should not be construed as suggesting that in instalment contracts the presumption of interdependence is in some way reduced. Lord Malcolm, however, relied on Lord Jauncey's comments in finding that the parties' obligations were not counterparts.

Furthermore, in a novel development, Lord Drummond Young suggested that retention only operates in relation to substantive, as opposed to ancillary obligations in a contract. The Lord President noted that the right to retain is generally only available to secure future performance, not for past breaches that are unlikely to be repeated. Yet this is in conflict with the decision of the Supreme Court in *Inveresk v Tullis Russell*¹⁵. The decision in *J H & W Lamont* also emphasised the lack of clarity regarding the court's

¹¹ The relevant (default) provision can be found at section 17 of the draft SLC Bill.

¹² [2018] CSIH 33, 2018 SC 440.

¹³ "What do we know about retention now?", Lorna Richardson, *Edinburgh Law Review*, 2018, 22(3), pp. 387-39.

¹⁴ 1997 SLT 1213. (Cited in footnote 5, page 102 of Report). "I do not consider that the authorities warrant so broad a proposition as that any material breach by one party to a contract necessarily disentitles him from enforcing any and every obligation due by the other party."

¹⁵ [2010] UKSC 19, 2010 SC (UKSC) 106. For a summary of this case see **Annex B**.

equitable control of the right to retain and the factors that may be taken into account in finding that retention had been used inequitably.

It may therefore be said that the law in relation to retention of performance is less clear than when the SLC issued its Report. Without further clarification it is likely to be difficult for legal professionals to definitively advise their clients about the state of the law in Scotland. This may be especially unsatisfactory given that retention can operate as a self-help remedy, that is, one a party may exercise on its own behalf and without seeking professional advice or obtaining an order from the court.

Annex B

Summary of *Inveresk plc v Tullis Russell Papermakers Ltd* ([2010] UKSC 19 and *McNeill v Aberdeen City Council* [2013] CSIH 102

Inveresk plc v Tullis Russell Papermakers Ltd ([2010] UKSC 19

“... the analysis should start from the position that all the obligations that it embraces are to be regarded as counterparts of each other unless there is a clear indication to the contrary.”

Prior to this case, the general rule which was established in *Bank of East Asia v Scottish Enterprise* [1997] SLT 1213, was that “the law does not regard each and every obligation by one party as being necessarily and invariably the counterpart of every obligation by the other.” *Inveresk* therefore creates uncertainty around whether, in any particular case, the general rule or the exception would apply.

Also, *Inveresk* involved a situation where more than one contract made up the transaction between the parties. When responding to the SLC’s Report, practitioners were unanimous in their support for mutuality to “remain capable of stretching across more than one contract” particularly as framework contracts are quite common.¹⁶

McNeill v Aberdeen City Council [2013] CSIH 102

This is a judgement which introduced a distinction between substantive obligations - in other words the fundamental obligations that define what the contract is intended to achieve – and ancillary obligations. Thus for example in an employment contract the employee’s substantive obligation is to perform services and the employer’s to pay a salary or wages. Accordingly the employer could not withhold its obligation to the employee of mutual trust and confidence while investigating whether the employee’s conduct merited dismissal.

¹⁶ Review of Contract Law: Formation, Interpretation, Remedies for Breach and Penalty Clauses (Scot Law Com No 252, 2018) - Para 11.26, Page 124.



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