

ENSURING THE FLOW OF CASH RETENTIONS – THE SECOND READING OF THE "ALDOUS BILL"

- ▶ Significant industry support for review of current retention system
- ▶ Private Member's Bill to have Second Reading in Parliament – delayed until October
- ▶ Indication of Government support before committee stage

What's it about?

As previously reported on in Constructive Comments ([link here](#)), there is now momentum in the construction industry for changes to the current system of cash retentions.

With several major insolvencies in recent years highlighting the sheer scale of the value of retentions held – often in relation to projects long since completed – industry bodies such as the BESA (Building Engineering Services Association), the Electrical Contractors' Association, and the Specialist Engineering Contractors' Group have co-ordinated an industry-wide movement for reform.

Following the introduction of a similar Bill by SNP MP Alan Brown in mid-2017, Conservative MP Peter Aldous introduced the Construction (Retention Deposit Schemes) Bill last Autumn. The first reading of the Aldous Bill in the House of Commons in January 2108 was followed, six days later, by the sudden collapse of Carillion.

What is happening now?

A Private Member's Bill, introduced by Peter Aldous MP, is now at Second Reading stage in the House of Commons, despite delays in actually being debated on the floor of the House. Detailed scrutiny of the proposed legislation will follow if the Bill reaches committee stage. The Government has not clearly expressed support, but the Bill is understood to have broad support amongst MPs.

The date for the Second Reading has recently been deferred from 15th June to 26th October, which it is felt will allow supporters of the Bill to rally further support amidst pressure from the industry to reform retentions.

Although technical review of the legislation in Parliament is awaited, the draft bill has been published. Several salient points can be made at this stage.

What will the new regime look like?

The proposed solution set out in the Bill is for retentions under construction contracts to be deposited with a third party, rather than held by the payer. It is the payer's responsibility to notify both the payee and the retention holder of the others' identity on depositing the retention in a central scheme – otherwise the payment clause in the relevant construction contract entitling one party to withhold the retention shall be of no effect, and any retention withheld must be repaid within seven working days.

The Bill as drafted relates to all construction contracts (i.e. it will affect both main and sub-contracts). This will require the main contractor to pay the retention under the sub-contracts to a deposit holder, where it has not itself been paid its retention by the client.

However, this result arguably takes money out of the construction cash flow system at the very point when it is required - for wages, materials, overheads and so on. A construction project uses money as fuel; any new reforms which withhold fuel from the fire may be counter-productive.

It could be argued that it may sit better with the ethos of the Bill (and, arguably, the ethos of Latham payment reforms in the first place), for a single "project" retention to be held, with the main contractor and its sub-contractors and supply chain each entitled to separate and presumably diminishing percentages. However, this may require a degree of transparency in pricing

which may prove difficult for main contractors to support. Additionally a single "project" retention could expose sub-contractors to main contract disputes outwith their area of responsibility.

The draft legislation is framed in the context of additional clauses to be incorporated into the 1996 Housing Grants, Construction and Regeneration Act. The additional clauses therefore fit into well-understood definitions of "construction operations" and "construction contract". However, additional wording is added to the draft Bill, intending to make "...any contract created to have a similar effect to a construction contract for the purposes of withholding monies which would otherwise be due under the contract" subject to its provisions (proposed section 111A(2)(c) of the 1996 Act). The draftsmen appear mindful that side letters or other devices may be used to permit the withholding of retentions under a construction contract without being subject to the requirements of the deposit scheme.

Is there any evidence that it will work?

Alan Brown MP's initial 2017 Private Member's Bill drew heavily on experience in the private rental sector. Perceived abuse of rental deposits by private landlords resulted in the enactment of legislation requiring deposits to be held centrally. Uptake of the scheme has reportedly been high, and reviews of the legislation seem positive. The mandatory dispute resolution scheme between landlord and tenant is not financially prohibitive, meaning tenants can avail themselves of the scheme without a financial burden. Use of the dispute resolution scheme has been low, suggesting the scheme is working as intended.

However, there is a clear divergence between the private rented sector (essentially a bi-lateral relationship between landlord and tenant), and the construction sector, where there are multiple overlapping areas of contractual responsibility. Comparing the two sectors is not comparing like with like. The available dispute resolution mechanism – adjudication – is not ideally suited to multi-party disputes. Adjudication can be expensive, with preparation and research aided by allocation of financial resource. Repeat business up and down a supply chain is clearly not equivalent to the one-off contractual relationship between landlord and tenant. Sub-contractors may remain disincentivised to bring formal dispute proceedings.

What now?

Detailed review and assessment of the proposed legislation is required.

While the main thrust of the Bill appears to have broad support across Parliament, further work is still required on several details and practicalities before the industry should start planning for implementation.

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