DISPUTE INSIGHT LTD

RETAIN OR RELEASE?

IS THIS THE BEGINNING OF THE END FOR CONSTRUCTION RETENTIONS?

The UK Government has signaled a major shift in construction payment practices, announcing proposals to ban retention payments as part of a wider crackdown on late payments and unfair treatment of small businesses.

The proposed reforms, described as the toughest action on payment practices in a generation, include measures to prevent the abuse of retentions and improve cash flow across supply chains.

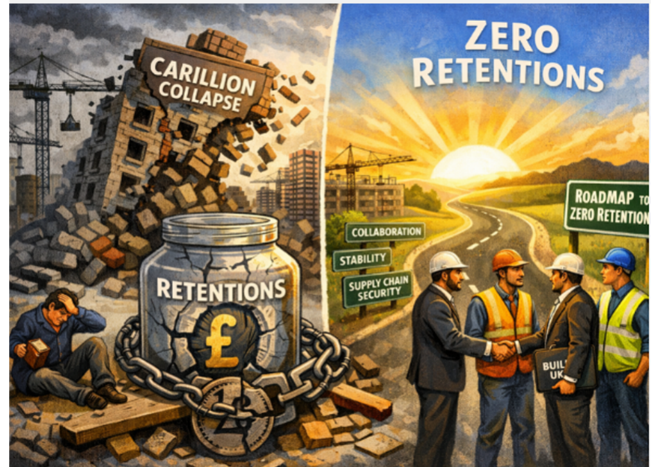
For an industry where retentions have long been standard practice, this is not a minor adjustment. It is a direct challenge to a system that has been relied upon for decades to manage performance risk and defects.

But the question is not simply whether retentions should remain.

It is whether they have ever truly worked as intended or have been used to withhold payments and cashflow projects. (1)

A SYSTEM UNDER PRESSURE

The proposed ban in the UK follows years of growing concern across the construction sector. Retentions, typically 3–5% of contract value, are intended to provide security against defective work. In reality, they have increasingly become a source of cash flow



pressure, dispute, and financial risk, particularly for subcontractors.

The collapse of Carillion in 2018 brought these issues into sharp focus.

When the company entered liquidation, substantial retention monies were effectively trapped within the business, with little prospect of recovery for many suppliers due to the lack of ring-fencing and their treatment within general company funds.

In practice, this means that contractors further down the supply chain are often financing projects with money they may never receive.

INDUSTRY ALREADY MOVING TOWARD ZERO RETENTIONS

While the UK Government's proposed ban may feel like a decisive shift, the reality is that the industry has been moving in this direction for some time.

Organisations such as Build UK, working alongside NEC and the wider Construction Leadership Council, have been actively promoting a "roadmap to zero retentions",

encouraging a gradual move away from the practice altogether. (2)

Likewise, guidance on NEC contracts reinforces this approach, positioning retentions as optional rather than standard, and encouraging their removal where appropriate. This reflects a broader shift toward managing risk through process, performance, and collaboration, rather than withholding cash.

Following the collapse of Carillion, industry bodies had already called for the abolition of retentions, recognising their impact on supply chain stability and long-term productivity. (3)

RISK THAT HASN'T GONE AWAY

While the UK now appears ready to move away from retentions entirely, similar risks continue to play out elsewhere.

In Australia, a dispute involving McNab and the Ignite Projects group highlighted ongoing uncertainty around $1.3 million in retention funds following a developer's collapse. The main issue on how to deal with retentions in insolvency is familiar. (4)

Although the final judgement supported the contractor's entitlement to retentions, the case reinforces a broader point. Even where legal protections exist, recovery is often dependent on post-collapse legal action rather than upfront certainty for contractors and sub-contractors.

Australia has responded more aggressively than most jurisdictions, introducing mandatory retention trust account regimes on certain projects. This reflects a recognition that legal principles alone are not enough, and that physical separation of funds is critical to protection. (5)(6)

NEW ZEALAND: REFORM DRIVEN BY FAILURE

New Zealand also has clear examples of how reform is preceded by the collapse of construction companies and legal action by others. One being the failure of Mainzeal in 2013 which exposed widespread vulnerability across the construction supply chain. Creditors, including subcontractors, were left facing significant losses, highlighting the risks of unsecured positions in contractor insolvency. (7) (8)

That collapse ultimately led to the introduction of retention trust provisions under the Construction Contracts Act, requiring retention money to be held on trust rather than treated as working capital. However, subsequent events have shown that legislation alone does not eliminate risk.

Recently, the High Court decision in Burt v Grant reinforced that retention monies are held on trust and cannot be treated as general assets in liquidation. While this clarified the legal position, it also highlighted a recurring issue:

Protection often only becomes effective after failure, not before it. (9)

Amendments to the Construction Contracts Act have sought to improve compliance and transparency:

NZ Construction Contracts Act:
https://www.legislation.govt.nz/act/public/2002/0046/latest/DLM163400.html

Retentions guidance:
https://www.building.govt.nz/projects-and-consents/payment-and-qa/retentions/

Earlier failures, including Ebert Construction, played a key role in shaping these reforms and reinforcing the need for stronger protection mechanisms.

WHERE DOES THE RISK SIT NOW?

Across the UK, Australia, and New Zealand, the direction of travel is clear.

The UK is poised to eliminate retentions altogether.
Australia is advancing towards stringent trust and ring-fencing regulations.
New Zealand has enacted trust-based protections but is continually enhancing their enforcement.
Despite these variations, the core issue remains the same. The burden of risk still lies with subcontractors.

Subcontractors are often:

Last in line to receive payment.
Most vulnerable to insolvency.
Frequently forced to finance projects using withheld funds.

Even when legal safeguards are in place, they are typically only enforced after a failure has already occurred.

THE BEGINNING OF THE END?

The UK's proposed ban on retentions may prove to be more than just another reform. It may represent a fundamental shift in how risk is allocated across the construction industry.

The question is no longer whether the current system has flaws. That has been demonstrated repeatedly, from Carillion to Stanley.

The real question is what replaces it.

If retentions are removed, the industry will need to rely more heavily on:

Performance-based management
Bonds and guarantees

Project bank accounts and trust structures
Each of these comes with its own cost and complexity. But they also offer something retentions often fail to deliver:

Certainty.

FINAL THOUGHT

Retentions were intended to provide security. In practice, they have too often created uncertainty.

If the UK follows through with its proposed ban, it may finally force the industry to confront a long-standing issue:

A system designed to manage risk has, for many, become the risk itself.

Moreover, this shift reflects something deeper within construction and commercial law. From the early doctrines of equity and the intervention of the Chancery courts, through to modern statutory regimes, the law has always evolved in response to imbalance, exploitation, and unintended consequences. Retentions are no different.

They were introduced as a practical solution to manage performance risk. Over time, they have been adapted, stretched, and in some cases, misused. The current wave of reform is simply the next step in that evolution. But change rarely removes problems entirely. It reshapes them.

If retentions are phased out, the industry will not eliminate disputes; it will redistribute them. New mechanisms, whether bonds, trust structures, or alternative security arrangements, will bring their own challenges, costs, and points of contention. So the question may not be whether this is the end of retentions. It may be that this is the beginning of a new system, with a different set of risks and a new generation of disputes to resolv

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