SOFT LANDINGS OR A BUMPY TOUCH DOWN?

Steve Donohoe¹ and Jeremy K Coggins²

¹School of Architecture, Design and Environment, University of Plymouth, Plymouth, UK
²School of Natural and Built Environments, University of South Australia, Adelaide, Australia

Most standard forms of construction contract contain provisions whereby a small value of the Works is retained by an employer known as “retention money”. The idea of retention money is to provide funds for Employers to remedy defective work should the contractor refuse or fail to carry out remedial works on a construction project. Most standard forms of construction contract contain requirements that an employer holds retention money on trust for contractors through the opening of a separate bank account for this purpose. Despite specific conditions imposed on employers there are instances where conditions have been ignored which have resulted in complex technical legal issues to be decided in the courts involving the law of equity and trusts. Until relatively recently in spite of the controversies surrounding retention money, the construction industry had to reluctantly accept the situation due to a lack of alternatives. Now, the UK based Building Services Research and Information Association (BSRIA), encouraged by Government, have developed a new technique known as “Soft Landings” (SL) which can be used as an alternative to retention. This paper explores the concept of SL in construction through a legal lens which could provide an important future strategic direction for clients and others involved in the modern construction industry. Initial findings are that whilst SL has not been greeted with universal acclaim within the construction industry there is sufficient interest to justify the use of SL as an alternative to the use of retention.

Keywords: construction contracts, procurement, retention, soft landing.

INTRODUCTION

Most standard forms of construction contracts since their inception in the nineteenth century have included payment systems whereby contractors and sub-contractors are paid for their work through instalments. Although no one can accurately trace when this practice began it is understood that the standard form of building contract published by the Royal Institution of British Architects in 1909 included a mechanism whereby contractors were paid following the issue of an architect's certificate which set out in some detail the contractor's entitlement (Dunn, 2011). It is thought that the inclusion of a mechanism for payment by instalments incorporated in the 1909 RIBA was not a new invention but a manifestation of a practice that had developed over a number of years and was accepted by all parts of the construction industry. Allied to the idea of building works being paid for through a system of instalments came the notion that some part of the instalment ought not to be paid immediately but be held back as a protection against defective work or the contractor's failure to complete the project. The part of the instalment not paid over immediately by the employer was, and is, called “retention money”. Though building contracts have evolved over the

¹ sdonohoe@plymouth.ac.uk

intervening years the system of paying by instalments subject to a deduction of retention money has remained unchanged to the present day.

This seemingly simple concept of temporary withholding of monies otherwise due to contractors and subcontractors until such time as retention is released has produced controversy and some complex technical legal arguments.

Senior (1991, p241) observed that “[the] objectives of the client, the design team and building contractor are similar in principle and that they differ only in degrees of emphasis and intensity”. Senior (ibid.) maintained that “selfish endeavours” encourage “tactical distribution methods of payment”. It is clear that the use of retention money is one of those methods of payment that might be included within the term “selfish endeavours” when used in context of the construction industry. It is self-evident that the use of retention money causes a loss of working capital to contractors and thus acts a restriction to the contractor’s cash flow. The consequence for the contractor is that the shortfall in cash flow has to be financed usually by overdraft or other borrowing. The consequence to the client is that the cost of overdraft or other borrowing by the contractor is passed on indirectly resulting in a more expensive project than would otherwise be the case. However, as Hackett et al. (2007, p32) observed “a balance has to be struck between the maintenance of a reasonable retention fund and easing of the contractor’s cash flow”.

Adriaanse (2007) noted that it is common practice in construction contracts for a small percentage usually around 5 per cent of the value of a certificate to be deducted as retention money and often kept for a period of two years or more. This creates a fund to rectify defects or to persuade the contractor to return to site to remedy defects.

Although a retention money level of around 5 per cent might seem reasonable, contracting parties are under no compulsion to use this percentage and often will amend standard contracts in order to impose retention percentages far in excess of 5 per cent. In the case of Rayack Co. Ltd v Lampeter Meat Co. Ltd (1979) a retention percentage of 50 percent was included in the contract documents. The contractor argued that the retention percentage was excessive and therefore illegal yet the percentage was upheld by the court. Though Murdoch and Hughes (2008, p220) described this as an “unusual case” it shows that parties may use “selfish endeavours” to trap the unwary into agreeing to oppressive levels of retention which can a catastrophic effect on cash flow.

The decision in Rayack establishes the legal precedent that the parties are free to impose whatever retention money percentages they wish. Very high and oppressive retention percentages will not be declared illegal by the Courts if that is what the parties agreed. Strathorn et al., (2014) have characterised construction as an industry which is well known for distrust, cost over runs and conniving intentions as normal manifestations of behaviour. It is submitted that the use of large and oppressive retention percentages does not help to foster trust between members of the construction industry and remains problematic. It has long been acknowledged that the holding of retention money for longer periods than necessary is a major contributor to the high incidence of insolvency in the construction industry (Newman, 1992)

**DIFFICULTIES WITH RETENTION MONEY**

One of the most basic problems with retention money is the timing of its release. This problem occurs with all stakeholders in the construction contractual chain but it is particularly serious between main contractors and sub-contractors. In the case of sub-
contractors this is particularly acute. For example, a piling sub-contractor who would carry out their work at the beginning of a project may have to wait several months or even years for the release of their retention. Sub-contractors may suffer undue hardship because release of retention may be conditional on matters outside their control, for example the remediying of defects under the main contract between the employer and main contractor.

This problem can be further exacerbated when the release of retention is dependent on the issue of a certificate.

In Pitchmastic v Birse [2000] (19981 TCC 159Q) the terms of the sub-contract contained a provision that the retention money be released to the sub-contractor on the issue of a certificate of making good defects of the main contract. However the certificate of making good defects in respect of the main contract was never issued. The question for the court to decide was whether Pitchmastic was entitled to the release of retention in the absence of a certificate?

The Hon. Mr Justice Dyson (as he then was) held that unless Pitchmastic could show that Birse had “prevented the issue” of the certificate then on the evidence Pitchmastic's claim (for the release of retention money) must fail.

However it must be observed that Pitchmastic occurred before the passing of the Local Democracy Economic Development and Construction Act 2009 (henceforth “Construction Act 2009”) which came into force in October 2011 in England and Wales.

Section 110 (1A) of the Construction Act attempts to prohibit the use of conditional payments dependent on performance of another contract. Whether the wording of Section 110(1A) is sufficient to cover retention money is not entirely clear. What is very clear is that parties may find themselves in a similar position to Pitchmastic who fought a time consuming and very expensive legal battle and still could not secure the quick release of retention money. Furthermore, even if “retention money” is caught by the rule against conditional payments dependent on performance of another contract, it can be easily circumvented by inserting in the relevant contract or sub-contract a date far in the future so that retention can be held (legally) for a very long time. For example, referring back to Rayack in that particular case the defects liability period was six years in that case. This means that retention money can be legally withheld for very long periods of time seriously affecting cash flow of all participants in the construction supply chain.

After the passing of the Construction Act 2009 there is a risk that a main contractor might be compelled to pay retention money to a sub-contractor before being in receipt of retention money from an employer. However, this ignores the unequal bargaining power of stakeholders in the construction industry, identified by Newcombe (2003), and is unlikely. Although it can be argued that the concept of retention money is simple, it is fraught with legal and technical difficulties.

A further problem arises when one asks the question “who actually owns the retention money?” In Henry Boot Construction Ltd v Croydon Hotel and Leisure Co Ltd 1986 36 BLR 41 a main contractor (Henry Boot) attempted to protect the retention money through the grant of an injunction against the employer (Croydon Hotel). The court refused to grant an injunction because the amount (allegedly) owed in liquidated damages to the hotel exceeded the amount of retention money. This causes a difficulty because if the case was decided correctly then it would suggest that the retention
money is owned by the employer, but if this is the case, then how can a contractor have recourse to the retention money if there is no ownership?

Standard forms of building contracts have attempted to address the question of who owns the retention money by invoking the law of equity and trusts. Most standard forms contain provisions whereby retention money is held by an employer “on trust” for the contractor. Similar provisions can be “stepped down” so that a main contractors hold money “on trust” for sub-contractors.

Many standard forms such as those issued by the Joint Contracts Tribunal (JCT) include wording that the employer's ownership is “fiduciary” which makes the employer a trustee of the retention money. The consequence of this is to separate the retention money from the employer's other money. However it is common practice in the construction industry for amendments to made to the standard forms (Potts. 2008) In Wates Construction v Franthom Property (1991) 53 BLR 23 a provision requiring the retention money to be held separately was deleted from the contract. Nevertheless the Court of Appeal decided that the retention money was fiduciary in nature and ordered the retention money to be set aside. However a further legal issue arose in Wates in which the judges had to exercise their minds; namely whether the trustees were under a general duty under the Law (of Trusts) to invest and attempt to increase the value of the retention fund. In the Court of Appeal Bedlam LJ held that the trustee's duty was to “safeguard the money” but [the trustee] has no duty to increase fund for the contractor’s benefit. Whilst the Court of Appeal's decision is to be welcomed in this case, there is still some uncertainty that a Court of Appeal decision could be overturned by a House of Lords (or possibly European Court) decision.

The publishers of standard forms have tried to strengthen the position of contractors and sub-contractors in the construction by a requirement for retention money to be deposited in a separate bank account. This can be particularly important especially in the case of insolvency.

If an employer refuses to open a separate bank account for the retention money then since at least 1979 (Rayack) it is possible to apply for a court injunction to force the employer to open a separate bank account. However this requirement is often deleted, amended or simply ignored. The consequences can be devastating for contractors or those further down the contractual chain. In British Eagle International Airlines Limited v Compagnie Nationale Air France [1975] 2 All ER 390 it was held by the House of Lords that parties could not circumvent insolvency laws as this was contrary to public policy.

Although British Eagle is not a construction case the authority of the House of Lords means that it is applicable to contracts generally, including construction contracts. In terms of retention money, what this means is that unless separate trust accounts can be proven to exist then any money irrespective of its nature or purpose will be considered part of the assets of the insolvent party and will be shared amongst unsecured creditors. This emphasises the importance of establishing separate accounts or obtaining injunctions quickly. An example of the difficulty that can happen can be seen in MacJordan Construction v Brookmount Erostin Ltd 1991 56 BLR1 CA. In this case the employer, Brookmount Erostin, experienced financial difficulties and went into Administration. The contractor, MacJordan, worried that it might not be able to access retention money sought an injunction compelling the employer to set up a separate bank account. It was held that the contractor was too late and that an
injunction could not be issued on the grounds that insolvency proceedings had commenced.

The circumstances in MacJordan might be regarded as a technicality, as the issue involved one of timing rather than a legal issue. However, once again it reinforces the idea that the concept of retention money is difficult. It is cumbersome for contractors (and/or sub-contractors) to have to apply to the courts for an injunction on every single project they undertake in order to protect their entitlement to retention money.

In summary the problems with retention money in construction contracts are identified as:

- Length of time retention is held and unjustifiable reasons for withholding
- Unsettled questions arising from operation of the Construction Act 2009
- Unsettled questions of ownership and control of retention money
- Legal complexities of Trust Law
- Complications due to Insolvency Law
- The need to obtain injunctions to protect retention money
- The timing of the application (for injunctions)

According to a UK Government report about £3 billion of retention money is held across the construction industry at any one time (H.M. Government, 2008)

**SOFT LANDINGS**

Until recently there was an unofficial consensus in the construction industry that whilst there were problems with retention as a concept, nothing much could be done about it. More recently The Building Services Research Information Association (BSRIA) encouraged by the UK Government has developed a new approach to assist the construction industry and help its clients to deliver better buildings. This new approach is called “Soft Landings” (SL).

SL is a radical new idea which eliminates the need for retention in construction contracts.

SL attempts to solve the performance gap between the intention of designers and the experiences of users. BSRIA observed that a performance gap can emerge at any stage of a building project including inception and briefing; design and specification; construction; hand over and commissioning and occupation.

BSRIA see SL as a “culture change” and can apply to both new build and retrofit projects. It is a step by step process for clients and their consultants and contractors to avoid the pitfalls associated with most building projects. The SL philosophy requires a “buy in” from all participants in the construction supply chain and expects participants to be involved and stay involved far beyond the traditional hand over at practical completion.

SL uses a five stage process which is shown below:

**Soft Landings Five Stage Process**

Stage 1: Inception and briefing

The time for constructive dialogue between the client, the designers and the potential constructors about intentions, performance requirements and stakeholder expectations. Embedding specific SL activities in the client’s requirements and tender
documentation and setting aside budget for aftercare and post-occupancy evaluation. Effort should be made to get key specialist advice earlier than would be the norm: controls specialists, commissioning engineers, facilities managers, key sub-contractors- catering, ICT, lighting and controls integrators; nomination of SL Champions to drive the process forward; and reviewing past experience to inform design. [Emphasis added]

Stage 2: Design development and review

Brings the entire project team together to review insights from comparable projects and detail how the building will work from the point of view of the manager and individual user. Agreeing the energy strategy – and the metering and monitoring strategy and the approach to commissioning and ensuring they are regular items for discussion and covered in relevant tenders. Review the proposed systems for usability and maintainability and reality-check as systems turn into actual installed products.

Stage 3: Pre-handover

Graduated hand over enables operators to spend more time on understanding interfaces and systems before occupation. Revisit the outputs from earlier reality-checking decisions and ensure the suggest actions are in place. Ensure Building Management System (BMS) is set up the way the client intended- energy data reconciliation and data storage, and the energy monitoring software. Also ensure the metering is working properly and will deliver real insights into energy use.

Stage 4: Initial aftercare

The project team to be resident on site between six and eight weeks to spot emerging issues. Go walkabout regularly and chat to people, find out how systems are operating and whether they meet occupants’ expectations and actual requirements. Adjust where necessary and report back. Help the asset managers understand what they have inherited. Measure and monitor but don’t rush to make a judgement.

Stage 5: Years 1 -3 extended aftercare and Post Occupancy Evaluation (POE)

The period of longer-term less intensive monitoring and support. Involves a series of aftercare review meetings, monthly to begin with but could quickly become quarterly. Ensure that the energy monitoring is set up and working well. Conduct systematic POE no sooner than 12 months post-handover, repeated at 12 month intervals and culminating in a final project review at month 36. (After BSRIA, 2014)

This change is an attempt to alter traditional practice after practical completion where most of the contractor's personnel leave the project with perhaps a small number returning to site to rectify defects on occasions to a situation where all or most of the contractor's personnel remain on site after practical completion for the purpose of assisting the employer's staff in the smooth running of the building.

It is proposed that an important part of the SL approach is the use of Post Occupancy Evaluation (POE). Where POE has been done on past projects this has normally been carried out by the employers own staff or by consultants engaged by the employer. It has been relatively rare for contractors and/ or sub-contractors to be involved in POE. An SL approach seems to suggest a much more prominent role in POE for contractors and subcontractors to play in the future.

It is acknowledged by BSRIA that the inclusion of a budget to cover aftercare and POE might be seen as a significant extra cost for construction clients. It is also conceded by BSRIA that the calculation of an allowance is difficult as it will vary
from project to project. Nevertheless BSRIA maintain that the inclusion of money in the client's budget represents value for money when set against the cost of complex litigation involving retention money. BSRIA are aware of the need for flexibility and have developed a strategy known as Government Soft Landings (GSL) for use in public sector construction projects. BSRIA explain the difference between SL and GSL in the following terms.

Government Soft Landings (often called GSL) is not an integrated and collaborative client/delivery team process like BSRIA Soft Landings, but more a set of facilities management-driven requirements for a well-performing building. Although there is a debate as to the precise demarcation of SL and GSL, what is clear is that all participants in the UK construction supply chain involved in public sector projects will be affected by "Soft Landings" in one form or another. Although this paper is confined to the exploration of SL from a UK industry perspective, Bunn (2015) reported that an Australian and New Zealand version of SL (termed "ANZ Soft Landings") has recently been launched for use in those countries. This means that SL may become a significant feature in the international construction scene in future.

**METHODOLOGY**

According to Gomm (2008, p15) the idea of doing research is "to provide readers with vicarious experience of other people's lives". Thus in the context of Soft Landings the research adopts an interpretivist stance following the view of Seymour et al's who felt that it is not necessary to critique the use of causal relationships in findings in every piece of construction management research (Seymour et al., 1997). People are reflexive and make choices and decisions continuously which determine outcomes (Brown and Phua, 2011). In this research the aim is not to deliver a fully worked out, prescriptive agenda for SL which the author would argue is neither desirable nor practicable. Rather the research is of an exploratory nature which attempts to provide insights into authenticity and aspirations of those involved or likely to become involved in SL. This approach is grounded in the idea formulated by Burr (1995) who explained that the research process is a co-production between themselves (the researchers) and the people they are researching. Rossman and Rallis (2003) advocated that the typology is one which can "go to the people".

In carrying out this research the human dimension is at the forefront of this work indeed the dimension is regarded as a central tenet of the work Winter (1996) felt that our working lives are a never ending sequence of judgements and stressed the importance of the human dimension. As such the work must include treatment of the legal and technical framework which underpin the examination of SL in the context of construction projects whilst understand that emotions, feelings, attitudes and experiences have a part to play. It must be acknowledged that for some members of the construction supply chain the adoption of SL is not a matter of choice as it will become mandatory from 2016 in public sector contracts. Naturally those who find the entire idea of SL to be abhorrent may seek to "opt out" through withdrawal from the public sector market, however given the composition of the construction industry (i.e. majority of firms are small) it is unlikely that mass withdrawal will actually happen. It is against the backdrop of the above that the research procedure was adopted. The researchers used an approach proposed by van Manen who investigated linking knowledge with ways of being practical (van Manen 1977). The investigation was carried out by a series of interviews with stakeholders. The use of interviews is a commonly recognised research method (Mason, 1966) whose strengths arise due to a
“richness and vividness of material (Gillham, 2000) Patton (2002) concurs with these views and opines that the strength [of interviews] lies in their ability to yield responses about experiences, opinions, feelings and knowledge. Keats (2000) felt that interviews gave more dynamic responses to static questionnaires.”

A total of twenty one interviews were carried out. The interviewees comprised three representatives from different sectors of the construction industry including clients; architects; surveyors; engineering; main contractors; specialist sub-contractors and general sub-contractors. For reasons of time and economy of resources all interviewees were chosen from the South West of England.

Transcripts were collected and the contents analysed on the basis of contextual themes.

**DISCUSSION**

“It became apparent from the analysis that whilst the concept of retention money was universally understood, some interviewees (more than one third) admitted that they had never even heard of “Soft Landings”. (Interviewee 20 – General Subcontractor) “Soft Landings? - Never heard of it but anything that gets rid of retention is a good idea in my book”. This is an interesting claim because although the interviewee said that he knew nothing about SL, he knew sufficient to understand that an SL scheme replaced retention. Other sub-contractors appeared to give tacit approval to SL but were wary of the attitude of main contractors towards SL. (Interviewee 17 – Specialist Sub-contractor) “Look unless it’s a legal requirement [main] contractors are not going to play ball. It’s too much in their interest to hold the money for as long as they can. We [sub-contractors] are financing their business and at the end of the day they [main contractors] are going to find a way round it”. This concurs with the view stated by another sub-contractor (Interviewee 16 – Specialist Sub-contractor) who felt that the process had to be “client driven”. When probed as to the meaning of this phrase he said that the success or otherwise of SL depended on a spirit of cooperation between clients, consultants, contractors and sub-contractors. He predicted a situation whereby clients and contractors might use SL but main contractors would not relinquish their right to withhold retention from sub-contractors and this in the opinion of Interviewee 16 “sows the seeds of its own destruction”. Despite the dramatic language expressed by this interviewee it is tolerably clear that the issue of trust between members of the construction supply chain plays an important part in the successful launch of SL.

All three representatives gave a “cautious welcome” to the idea of SL. Two of the three expressed concern about the potential perceived extra cost of the “aftercare” service. Interviewee 1 (Company Director) said that SL set off “alarm bells” and added “It’s [SL] a great idea in theory but we can’t just be seen to be issuing a blank cheque. At least with retention we have a cushion, but I as understand it, we pay upfront (for SL) but how do we know the bloke [contractor] will not just disappear and we get taken for a ride?”. Although one cannot generalise the sentiments would accord with Sandelowski’s idea of a credible study which are “faithful descriptions of human experience that people living that experience would immediately recognise it from their descriptions” (Sandelowski, 1989. p30). Once again it would seem that the issue of trust is important in the SL arena.

Of the three contractors who were interviewed one was very enthusiastic about SL (interviewee 15) but it later transpired that the particular contractor was a member of
the BSRIA Soft Landings membership group. The other two interviewees claimed to have heard of SL but stated that their knowledge of the scheme was limited. A similar narrative was offered by the consultants with some enthusiastic and others openly hostile. It would appear that from this small scale study that SL polarises opinion. One worrying finding was that two of the engineers (Interviewees 10 and 11 respectively) claimed not to have heard of SL. This is strange as most members of BSRIA are engineers. It is likely that as SL is rolled out to the public sector then all consultants, not only engineers, will become familiar with SL. This is not to downplay the potential legal difficulties especially where the parties are not in a bi-partite contract. For example, it is entirely foreseeable that the “aftercare and POE” functions which are central to the SL arrangement are outsourced or carried out by third parties. The “standard” legal position since the decisions in D&F Estates v The Church Commissioners (1989) AC177 and Murphy v Brentwood District Council (1991) AC398 is that a contractor or sub-contractor does not owe a duty of care in respect of economic loss. In contrast designers and (possibly) other consultants have been treated differently following precedents derived from Hedley Byrne v Heller and Partners (1964) AC465 based on “special relationships” between parties. Clearly this has implications for SL and wider questions of liability and insurance cover.

CONCLUSIONS

The foregoing has revealed extensive practical, technical and legal problems concerning the concept of deduction of retention money from members of the construction supply chain. Soft Landings represent an imitative that has been launched in order to promote better buildings and is immediately at odds with the traditional use of retention in contracts. The Soft Landings approach has not found universal approval from all within the construction supply chain however it is a major part of the UK Governments strategy for construction. There are some difficult issues concerning legal liability to be addressed however it is conceivable that Soft Landings will play a major role in the UK construction industry in the years ahead.

REFERENCES


LIST OF CASES

British Eagle International Airlines Limited v Compagnie Nationale Air France [1975] 2 All ER 390

D and F Estates v Church Commissioners for England and Wales [1989] AC177

Hedley Byrne v Heller and Partners [1964] AC465

Henry Boot Building Ltd v Croydon Hotel and Leisure Company Ltd (1986) 36 BLR 41

MacJordan Construction v Brookmount Erostin Ltd 1991 56 BLR1 CA

Murphy v Brentwood District Council [1991] AC 398

Pitchmastic v Birse Construction Ltd [2000] 19981 TCC 159Q

Rayack Co. Ltd v Lampeter Meat Co. Ltd (1979) 12 BLR 30