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Retention Sums in Construction Law

Construction Practice Series

Author's Details:-

Wilbur Lim

- Joint Managing Director
- Head of Private Client Dispute Resolution Practice
- Head of Construction and Arbitration Practice

HP: (+65) [9838 2910](tel:98382910)

Office: (+65) [6514 6351](tel:65146351)

Email: wilbur.lim@wmhlaw.com.sg

www.wmhlaw.com.sg

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1. The concept of retention sum is prevalent in many construction projects. Very often, it is a mechanism that is taken for granted in practice. The nature of retention sum is seldom explored but is pertinent in disputes involving final accounts of project.
2. At the outset, we would first explore what is commonly understood to be retention monies and its immediate practical effect.
3. A retention sum, by definition, is money retained by the employer and is released when the works are certified complete in accordance with the terms of contract as stated in Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at page 423 paragraph 7.44.
4. It was also clarified that *“on the second release of retention, one view is that, since the second instalment is clearly retained only as security to cover the making good of defects and insufficiencies not immediately apparent at the practical completion...”*.
5. In other words, the retention sums could serve, *inter alia*, as a form of security for the making good of defects. One pertinent issue to consider is the legal status of this manner of security.

6. A retention sum could be deemed to be earned by a contractor when it carries out its work.
7. In *BBX v BBY* [2019] SCA 673 (“*BBX v BBY*”), at [76]-[77], the dispute revolved around a payment certificate for payment of work done under the contract between the claimant, who is the subcontractor employed by the respondent, and the respondent. In particular, the claimant's employment was terminated and one of the issues was whether the retention sum should be released to the Claimant. It was held that there has been an account for the Retention Sum as the sum was earned progressively by the Claimant as it carries out its work.
8. It is no uncommon for certain jurisdictions to take the concept of retention sum one step further in order to better protect the interest of contractors.
9. In New Zealand, on 1 June 2021, the Construction Contracts (Retention Money) Amendment Bill (“the Bill”) was introduced with a view to better protect contractors' retention monies. One of the key proposals was that a statutory trust would arise as soon as monies become retention money. It also proposes that retention money is trust property, regardless of whether the payer has adhered to the retention regime under the Act or not. This goes to show that other developed jurisdictions such as New Zealand are moving towards greater protection of retention monies in favour of contractors.



10. In Malaysia, the Federal Court had held that a trust could be created over the retention sums if (i) there are clear terms in relation to the formation of the trust; and (ii) when the retention sums were placed in a separate account.
11. In our views, it is therefore important for parties to clarify the ambit of retention sums in contractual documents. Should there be an early release of retention sums for commercial reasons, the scope of such early release ought to be also properly documented to prevent future disputes from arising.





For more information on the article, or if you wish to learn more about the topics discussed, please contact:-

Wilbur LIM

Joint Managing Director
Head of Private Client
Dispute Resolution Practice
Head of Construction and
Arbitration Practice

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Office: (+65) 6514 6351

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