

Construction Law Update

No Signature, No Safety Net: PBA Protection Dies on the Vine Without a Joining Deed

In *E & TL Jones (Civils) Ltd v Vale of Glamorgan Council* [2026] EWHC 2054 (TCC), the Technology and Construction Court considered the limits of Project Bank Accounts as cash-flow protection for subcontractors. It shows how quickly the mechanism can unravel if the PBA is not properly established, operated and joined from the outset.

Key takeaways:

- **A subcontractor can't rely on a Project Bank Account for protection unless it has formally joined that account.**
- **Being part of the class a contract was meant to benefit isn't enough to establish third-party rights; a subcontractor still has to meet the specific steps the contract sets for acquiring those rights.**
- **An employer isn't automatically at fault for paying the main contractor directly if the Project Bank Account was never set up through no fault of its own.**
- **A subcontractor's rights under the Contracts (Rights of Third Parties) Act 1999 Act are only as strong as the main contractor's own rights, so a waiver by the main contractor limits the subcontractor too.**

Factual Background

The Vale of Glamorgan Council ("**VOG**") engaged ISG Construction Ltd ("**ISG**") to extend a school in Penarth under an amended NEC4 contract, Option A (the "**Main Contract**"). E&TL Jones Ltd ("**ETJ**") was ISG's groundworks subcontractor on the project.

VOG's contract with ISG, worth almost £21 million, included provision for ISG to establish a Project Bank Account ("**PBA**") with Santander, intended to protect subcontractors against the insolvency of contractors by providing them with secure funds in a ring-fenced account. VOG was to make payments to ISG through the PBA, which ISG could then use to pay any "Named Suppliers," defined as entities named in the Main Contract or parties who had signed a Joining Deed.

The PBA machinery required ISG to establish the account shortly after the Main Contract started, but—because of ISG's worsening financial position and delays on the banking side—the PBA was never opened, and VOG instead continued paying ISG directly.

In August 2024, ISG submitted an application for payment which included the sum of c£486k certified as due to ETJ. VOG paid the sum claimed to ISG; however, ISG went into administration before paying the money to ETJ.

ETJ sought to recover that sum directly from VOG. It argued that paying ISG outside the PBA was a breach of the Main Contract, and that ETJ was entitled to enforce the PBA provisions as a third-party beneficiary under the Contracts (Rights of Third Parties) Act 1999 ("**the 1999 Act**"), since the PBA was expressly there for subcontractors' protection.

Held

The Judge, HHJ Keyser KC, held that in the circumstances, ETJ's claim could not succeed and was dismissed.

Did ETJ have enforceable third-party rights under the 1999 Act?

Section 1 of the 1999 Act allows a person who is not a party to a contract to enforce a term if the contract expressly provides that they may, or if the term purports to confer a benefit on them. The third party must be expressly identified by name, as a member of a class, or by description.

The Judge determined that Clause Y1.8 of the Main Contract did confer a benefit to third-party subcontractors, but ETJ did not qualify because it had

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never been formally added to the PBA arrangement as a “Named Supplier.” Critically, it had never signed the Joining Deed that the contractual mechanism required. Being a “PBA-eligible” subcontractor in principle was not enough, and without taking the formal step of joining the PBA, ETJ fell outside the class the 1999 Act was designed to protect.

Anticipating this line of reasoning, ETJ argued that VOG could not rely on a state of affairs caused by VOG’s own breach, namely, that it had paid ISG directly instead of using the PBA, thus removing any incentive for ISG to establish a PBA in the first place. If set up, the PBA would have allowed ETJ to sign the Joining Deed.

The Judge rejected this argument as circular reasoning—you can’t bootstrap your way into having a legal right to sue on a clause just by pointing to the fact that you were injured by its breach. Whether ETJ was allowed to enforce a clause under the 1999 Act was a separate, prior question, decided by whether it met the Act’s own tests, not by how much it lost when things went wrong. Since ETJ had already failed that prior test (it was never properly joined into the PBA), it couldn’t use the harm it suffered as a backdoor way to get standing.

Did VOG breach the Main Contract by paying ISG directly instead of through the PBA?

The Judge held there was no breach. Because the PBA had never actually been established—a consequence of ISG’s financial difficulties and delays on the banking side, not any default by the employer—there was no operative account through which payments could have been routed.

In those circumstances, it was commercially sensible, and not a breach of contract, for VOG to continue paying its contractor directly.

Causation and waiver: two further reasons the claim would have failed

Even if the VOG had been in breach of the Main Contract, the Judge held that ETJ’s claim would still have failed on two further, independent grounds.

No causation. ETJ argued that VOG’s direct payments to ISG removed any pressure to get the PBA up and running; in other words, if VOG had refused to pay until

the PBA existed, the PBA would have been set up and ETJ would have been protected. The Judge rejected this. The contemporaneous evidence showed the delay had nothing to do with VOGs conduct: Santander lost paperwork, went through a change in personnel, and then froze the process altogether once ISG was being lined up for sale, pending security checks on the prospective buyer. On this evidence, even if VOG had withheld payment, it would have made no real difference. The hold-up was the bank’s, not VOG’s.

Waiver. The Judge found that VOG had a complete defence under the 1999 Act in any event: ISG had accepted the direct payments without objection, which amounted to a waiver of any breach of Clause Y1.8. Because ETJ’s rights under the 1999 Act can be no greater than ISG’s own rights under the Main Contract, and ISG itself could no longer have sued VOG over payments it had accepted without complaint, ETJ could not do so either.

All limbs of ETJ’s claim failed, and the claim for c.£486,000 was dismissed.

Comment

A Project Bank Account only protects a subcontractor once two things have happened:

- (i) the PBA must be up and running, and;
- (ii) the subcontractor must have formally joined it (typically by signing a Joining Deed). Simply being intended as a beneficiary in the Main Contract isn’t enough. And if a PBA never gets set up for whatever reason, the employer isn’t automatically in breach for continuing to pay its contractor directly in the normal way.

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