Neutral Citation Number: [2026] EWHC 2054 (TCC)

Case No: HT-2025-CDF-000009

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)
SHORTER TRIALS SCHEME

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 4 August 2026

Before:

HIS HONOUR JUDGE KEYSER KC
sitting as a Judge of the High Court

- -

Between:

E & TL JONES (CIVILS) LTD	**Claimant**
- and -	
VALE OF GLAMORGAN COUNCIL	**Defendant**

- -
- -

Luke Wygas (instructed by **Contract Answers Solicitors**) for the **Claimant**
Jess Connors (instructed by **Hugh James Solicitors**) for the **Defendant**

Hearing date: 7 July 2026

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 4 August 2026 by circulation to the parties or their representatives by email and by release to the National Archives.

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HIS HONOUR JUDGE KEYSER KC

Judge Keyser KC :

Introduction

1. The claimant is a civil engineering and groundworks contractor. The defendant is a local authority. On 23 August 2023, the defendant entered a contract ("the Main Contract") with ISG Construction Ltd ("ISG"). The claimant was ISG's groundworks subcontractor. ISG was indebted to the claimant under the subcontract. The Main Contract made provision for the establishment of a Project Bank Account ("PBA") for the protection of moneys owed to subcontractors. The claimant says that, in breach of the Main Contract, the defendant made payments, including sums for work done by the claimant, directly to ISG ("the Direct Payments"). ISG became insolvent and went into administration before paying to the claimant moneys owed under the subcontract, and the claimant has no realistic prospect of making any recovery in the administration. The claimant claims to be a member of a class upon which a benefit was conferred under the Main Contract and, pursuant to the Contracts (Rights of Third Parties) Act 1999 ("the 1999 Act"), now seeks to enforce the terms of the Main Contract by claiming from the defendant damages for breach of contract. The amount claimed is a little over £480,000.

2. There is no substantial issue of primary fact between the parties, but there are several legal issues, which have been argued in great detail and with much skill by Mr Luke Wygas on behalf of the claimant and Miss Jess Connors on behalf of the defendant. I am grateful to them both.

The Facts

3. The dispute arises out of a project to construct an extension to a school in Penarth. Implementation began with the issue of an Invitation to Tender ("ITT") in September 2021. In respect of contractual arrangements, the ITT said:

> "The contractor will initially be appointed to carry out pre-construction services via a NEC4 Professional Services Contract.
>
> Draft Contract Data Part One for the PSC is included within Section 2.
>
> Following the conclusion of pre-construction services, and subject to satisfactory performance by the Contractor, and achieving an agreeable cost and contract terms, the construction works contract will be awarded using the NEC Engineering and Construction Contract (fourth edition reprinted with amendments June 2017) Option A Priced Contract with Activity Schedule.
>
> Draft Contract Data Part One for the ECC Option A Contract is included within Section 3.

> The Employer will require under the ECC Option A Contract that the contractor uses a Project Bank Account as the primary method of payment to some or all of their works package sub-contractors. Refer to Welsh Government Policy and Guidance on the implementation of Project Bank Accounts and the information contained within Appendix J."

4. The defendant's Procurement Policy and Strategy adopts "WPPN 04/21: Guidelines for deploying Welsh Government project bank account policy", which states at paragraph 4.4:

> "As per PBA policy in all cases where a PBA is applied, tier 2 or lower tier suppliers should be engaged as follows: (a) Tier 2 or lower tier suppliers who account for at least 1% of the net contract award value must be invited to join the PBA."

5. Appendix J to the ITT, titled "Project Bank Account Information", contained a specimen Trust Deed ("the ITT Trust Deed"), which would govern the operation of the PBA, and a specimen Deed of Adherence ("the ITT Deed of Adherence"), which would be the means by which a newly appointed subcontractor would acquire rights and interests in the moneys held in the PBA.

6. On 23 August 2023 the defendant and ISG entered into the Main Contract for the extension. The Main Contract was an amended NEC4 Engineering and Construction Contract, June 2017 edition with January 2019 amendments (Option A). The total price of the Main Contract was £20,897,221.77.

7. The Main Contract incorporated thirteen of the secondary Options under the NEC4 Engineering and Construction Contract; of these, the significant one for present purposes is Clause Y(UK)1, relating to the establishment and operation of a PBA. Clause Y(UK)1 is discussed in some detail below.

8. The Main Contract also included Contract Data at Annex 1. Clause 1 of the Main Contract provided that, unless the context otherwise required, any italicised term had the meaning given to it in the Contract Data. The following definitions are relevant:

- The *Client* was the defendant.
- The *Contractor* was ISG.
- The *Project Manager* was AECOM.
- The *project bank* was Santander.
- "*named suppliers* are TBC".

9. I shall set out the text of Clause Y(UK)1 in full.

> "*Definitions*
>
> Y1.1 (1) The Authorisation is a document authorising the *project bank* to make payments to the *Contractor* and

Named Suppliers.

(2) Named Suppliers are *named suppliers* and other Suppliers who have signed the Joining Deed.

(3) Project Bank Account is the account used to receive payments from the *Client* and the *Contractor* and to make payments to the *Contractor* and Named Suppliers.

(4) A Supplier is a person or organisation who has a contract to

- construct or install part of the *works*,
- provide a service necessary to Provide the Works or
- supply Plant and Materials for the *works*.

(5) Trust Deed is an agreement in the form set out in the contract which contains provisions for administering the Project Bank Account.

(6) Joining Deed is an agreement in the form set out in the contract under which the Supplier joins the Trust Deed.

Project Bank Account

Y1.2 The *Contractor* establishes the Project Bank Account with the *project bank* within three weeks of the Contract Date.

Y1.3 Unless stated otherwise in the Contract Data, the *Contractor* pays any charges made and is paid any interest paid by the *project bank*. The charges and interest by the *project bank* are not included in Defined Cost.

Y1.4 The *Contractor* submits to the *Project Manager* for acceptance details of the banking arrangements for the Project Bank Account. A reason for not accepting the banking arrangements is that they do not provide for payments to be made in accordance with the contract. The *Contractor* provides to the *Project Manager* copies of communications with the *project bank* in connection with the Project Bank Account.

Named Suppliers

Y1.5 The *Contractor* includes in its contracts with Named Suppliers the arrangements in the contract for the operation of the Project Bank Account and Trust Deed. The *Contractor* informs the Named Suppliers of the details of the Project Bank Account and the arrangements for payment of amounts due under their contracts.

Y1.6 The *Contractor* submits proposals for adding a Supplier to the Named Suppliers to the *Project Manager* for acceptance. A reason for not accepting is that the addition of the Supplier does not comply with the Scope. The *Client,* the *Contractor* and the Supplier sign the Joining Deed after acceptance.

Payments

Y1.7 The *Contractor* shows in the application for payment the amounts due to Named Suppliers in accordance with their contracts.

Y1.8 Within the time set out in the banking arrangements to allow the *project bank* to make payment to the *Contractor* and Named Suppliers in accordance with the contract,

- the *Client* makes payment to the Project Bank Account of the amount which is due to be paid under the contract and

- the *Contractor* makes payment to the Project Bank Account of any amount which the *Client* has informed the *Contractor* it intends to withhold from the certified amount and which is required to make payment to Named Suppliers.

Y1.9 The *Contractor* prepares the Authorisation, setting out the sums due to Named Suppliers as assessed by the Contractor and to the Contractor for the balance of the payment due under the contract. After signing the Authorisation, the Contractor submits it to the *Project Manager* no later than four days before the final date for payment. The *Client* signs the Authorisation and submits it to the project bank no later than one day before the final date for payment.

Y1.10 The Contractor and Named Suppliers receive payment from the Project Bank Account of the sums set out in the Authorisation as soon as practicable after the Project Bank Account receives payment.

Y1.11 A payment which is due from the *Contractor* to the *Client* is not made through the Project Bank Account.

Effect of payment

Y1.12 Payments made from the Project Bank Account are treated as payments from the *Client* to the *Contractor* in accordance with the contract or from the *Contractor* or Subcontractor to Named Suppliers in accordance with their contracts as applicable. A delay in payment due to a failure of the *Contractor* to comply with the requirements of this clause is not treated as late payment under the contract.

Trust Deed

Y1.13 The *Client,* the *Contractor* and *named suppliers* sign the Trust Deed before the first assessment date.

Termination

Y1.14 If the *Project Manager* issues a termination certificate, no further payment is made into the Project Bank Account."

10. For some time after the Main Contract was made, the contract works were largely paused while ISG sought discharge of one of the conditions of the planning permission. It may be that, in consequence, the parties to the Main Contract did not initially regard establishing a PBA to be a priority. However, by mid-March 2024 the impediments to work starting on site had been overcome, and the defendant and ISG expected that work would start soon and that ISG would soon enter into the necessary subcontracts in respect of that work.

11. The trust deed for the operation of the PBA was executed by the defendant as Client and ISG as Contractor and was dated 2 April 2024 ("the 2024 Trust Deed"). It named the Parties as the Client, the Contractor and the Named Suppliers; however, Schedule 1, which named the respective Parties, stated: "Named Suppliers: To be confirmed". The 2024 Trust Deed was not in the standard form NEC4 Trust Deed but was bespoke. It corresponded for the most part to the ITT Trust Deed; the only difference (which is irrelevant for present purposes) was that, whereas the ITT Trust Deed was in a "dual authority" format, providing for both the defendant and ISG to be the account holders of the PBA, the 2024 Trust Deed was in a "single authority" format that provided for ISG to be the sole Account Holder. One point of note is that, whereas the standard form NEC4 Trust Deed recited, "The Contractor has established a Project Bank Account …", the ITT Trust Deed and the 2024 Trust Deed contained no such recital but instead (see below) an undertaking by the Contractor that it *would* open a PBA.

12. The provisions of the 2024 Trust Deed included these recitals:

"A. The Client has engaged the Contractor to carry out the Project (as defined below).

B. To assist in the development and performance of the Project, the Contractor has engaged the Named Suppliers to carry out certain parts of the work required in respect of the Project as set out in more detail in the Sub-Contracts (as defined below).

C. The Parties wish to adopt a payment mechanism which will (i) ensure the fair payment of both the Contractor and the Named Suppliers; and (ii) that the Named Suppliers receive payment entitlements in a timely fashion in accordance with the terms of the Sub-Contracts. To achieve this objective, the Parties have agreed to operate a bank account in accordance with the terms of this Deed."

The 2024 Trust Deed then contained the following clauses:

"2.1 The Account Holder [defined as the Contractor] undertakes to open a new interest bearing deposit bank account with the Bank [defined as Santander], such account to be opened and held in the name of the Account Holder.

2.2. The Client undertakes to pay all monies due to the Contractor and/or the Named Suppliers under the Contract and the Sub-Contracts into the Bank Account as and when such monies become due for payment in accordance with the terms of the Contract.

2.3. The Parties agree that any monies paid into the Bank Account shall, as from the date on which such monies are paid into the Bank Account, be kept separate and distinct and clearly identifiable and shall be held on trust for each of the Contractor and the Named Suppliers in the amounts owing to them and, subject to the terms of this Deed, as set out in the Account Holder's instructions to the Bank for the payment of monies to the Contractor and the Named Suppliers. The Contractor and the Named Suppliers acknowledge that they have no rights and/or interest in the monies held in the Bank Account other than as a beneficiary of the monies owing to them in accordance with the terms of the Contract and the Sub-Contracts respectively.

…

3.1.7. The Account Holder shall hold all monies in the Bank Account on trust for the full and exclusive benefit of the Contractor and the Named Suppliers in accordance with clauses 2.3 to 2.8 (inclusive) above.

3.2. Upon each payment assessment date under the Contract, the Account Holder shall identify any payments due under the Contract and the Sub-Contracts and shall promptly notify the

> project manager and the Client of the same. Following this notification;
>
> 3.2.1. The Client shall pay the monies due under the Contract into the Bank Account in accordance with the requirements under the Contract; and
>
> 3.2.2. As and when the monies have cleared, the Account Holder shall promptly authorise the Bank to make any payments due pursuant to the Contract and/or Sub-Contract to the Named Suppliers and/or the Contractor from the Bank Account.
>
> …
>
> 4.1. If the Contractor wishes to add any party that it has engaged for its performance of the Contract as a new Named Supplier for the purposes of this Deed, the Account Holder shall arrange for such party to sign a Deed of Adherence/Joining Deed in the form set out in Schedule 3 of this Deed and such party shall then be a Named Supplier for the purposes of this Deed.
>
> …
>
> 8.6. No party may assign its interest in this Deed (or any part) without the written consent of the other parties, such consent not to be unreasonably withheld or delayed.
>
> 8.7. None of the terms and conditions of this Deed shall be enforceable by any person who is not a party to it."

"Bank Account" was defined as "a bank account opened with the Bank which has no overdraft facility into which all monies due under the Contract will be paid by the Client in accordance with this Deed". "Contract" was defined to mean the Main Contract. "Sub-Contract" was defined as "a sub-contract agreement between a Named Supplier and the Contractor in respect of the Project".

13. On 24 April 2024 ISG informed the defendant that it had sent the 2024 Trust Deed to Santander on 12 April 2024, which was 10 days after the execution of the 2024 Trust Deed. The email to the defendant said, "I have been warned that Santander can take circa 3 months to complete."

14. On 15 May 2024 the claimant and ISG entered into the groundworks subcontract ("the Subcontract"). The total price in the Subcontract was £2,950,574.69, which was 14% of the total price in the Main Contract. The Subcontract was an amended NEC4 Engineering and Construction Subcontract, June 2017, Option A ("ECS"), which is stated to be for use for the appointment of a subcontractor for engineering and construction work where the contractor has been appointed under an NEC4 Main Contract. The Subcontract incorporated Clause Y(UK)1 in its standard form for the ECS; I shall say a little more about that below.

15. By the end of April 2024 the defendant had already made three payments directly to ISG, though these were in modest amounts in the context of the Main Contract as a whole and did not, so far as I am aware, include any moneys that would have been due from ISG to any subcontractor. (Details of all payments are set out below.) However, as significant works were getting underway, the establishment of the PBA became of more pressing significance. On 17 June 2024 AECOM sent an email to ISG:

> "I am concerned regarding the lack of confirmation on the completion of the Project Bank Account. It is imperative that we receive this confirmation as soon as possible to ensure the smooth progression of future valuations, in accordance with Welsh Government requirements.
>
> The timely confirmation of the Project Bank Account is not only a critical administrative step but also a contractual necessity. If we do not receive confirmation before next month's valuation, we will likely be asked by the Vale of Glamorgan's finance team to withhold payment. This is a scenario we are keen to avoid.
>
> Please can you confirm what the hold up is?"

16. The only available information as to the reason for the delay to this point comes from internal emails within ISG. From these, it appears that in July 2024 the setting up of the PBA was still being delayed on account of mislaid paperwork within Santander and the bank's appointment of a new regional director. The emails evidence a degree of frustration within ISG. On 29 July 2024 ISG's Head of Treasury, Darren Teasdale, wrote to its Commercial Director, Paul Jones: "I have emailed Santander and decided to start the process again." However, on 1 August 2024 Mr Teasdale wrote again to Mr Jones: "Santander have advised today—no PBAs until KYC comp[l]etes post sale." Mr Jones replied: "Ok thanks Darren—once post sale what would be the timescale to set up PBA? Just need to manage client." Mr Teasdale replied: "I would expect 8 weeks max as we have done a lot of ground work. I will push for shorte[ne]d timeline."

17. ISG had, in fact, faced financial difficulties since the Covid pandemic in 2020. These difficulties and the need for recapitalisation had become general knowledge by the end of 2023. Since the spring of 2024 ISG had been in discussions with a prospective buyer. Those discussions broke down suddenly in September 2024. On 20 September 2024 ISG entered administration.

18. ISG had not completed the process of setting up the PBA before it entered administration. It had never proposed to AECOM that any Supplier be added as a Named Supplier, as contemplated by Clause Y1.6 of the Main Contract. Accordingly, neither the claimant nor any other party ever became a Named Supplier or executed the Joining Deed (what the ITT called a Deed of Adherence) so as to become privy to the 2024 Trust Deed.

19. Under the Main Contract, ISG applied for the following payments ("the Direct Payments"), which AECOM certified and the defendant paid directly to ISG:

Payment no.	Date of ISG's Application	Date of certification	Amount certified	Date of payment
1	15/11/2023	22/11/2023	£95,934.26	29/11/2023
2	15/12/2023	19/12/2023	£40,680.04	20/12/2023
3	10/04/2024	19/04/2024	£96,753.42	26/04/2024
4	15/05/2024	20/05/2024	£775,858.34	31/05/2024
5	15/06/2024	19/06/2024	£1,380,858.37	05/07/2024
6	15/07/2024	19/07/2024	£1,446,266.27	02/08/2024
7	15/08/2024	22/08/2024	£1,121,427.30	05/09/2024

20. Payments nos. 1, 2 and 3 were requested and paid before the date of the Subcontract. The work to which those applications and payments related did not include any moneys claimed by reference to work done by the claimant under the Subcontract.

21. Payment no. 4 was requested on the date of the Subcontract and was certified and paid after the Subcontract had been executed. Payments nos. 5, 6 and 7 were requested, certified and paid after the Subcontract had been executed. Payments nos. 4, 5, 6 and 7 all included sums which ISG claimed by reference to work done by the claimant and for which the claimant had made the following Subcontract applications:

Application No.	Date of application	Amount certified
1	15/05/2024	£428,371.40
2	15/06/2024	£653,612.17
3	05/07/2024	£206,292.37
4	05/08/2024	£486,017.67
5	07/09/2024	£249,632.14

22. ISG paid the amounts certified under Subcontract applications nos. 1, 2 and 3 directly to the claimant.

23. On 15 August 2024 ISG certified that Subcontract application no. 4 was payable. On the same day, ISG made application no. 7 under the Main Contract, which included the net sum of £486,017.67 it owed to the claimant under the Subcontract. On 5 September 2024 the defendant paid directly to ISG £1,121,427.30 in respect of application no. 7. However, ISG did not pay to the claimant the amounts certified under Subcontract applications nos. 4 and 5 before it entered into administration, and no recovery in the administration is expected. The claimant's claim in these proceedings relates only to the amount certified under Subcontract application no. 4. No relief is sought in respect of Subcontract application no. 5, in respect of which there was no corresponding payment to ISG.

The Claim

24. The claimant sues the defendant for breach of Clause Y1.8 of the Main Contract. The breach alleged is making Direct Payments; the claimant says that any payment other than into the PBA was contrary to Clause Y1.8.

25. The claimant sues in reliance on section 1 of the 1999 Act, which provides:

> "(1) Subject to the provisions of this Act, a person who is not a party to a contract (a 'third party') may in his own right enforce a term of the contract if—
>
> (a) the contract expressly provides that he may, or
>
> (b) subject to subsection (2), the term purports to confer a benefit on him.
>
> (2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.
>
> (3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.
>
> (4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract.
>
> (5) For the purpose of exercising his right to enforce a term of the contract, there shall be available to the third party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other relief shall apply accordingly).

> (6) Where a term of a contract excludes or limits liability in relation to any matter references in this Act to the third party enforcing the term shall be construed as references to his availing himself of the exclusion or limitation.
>
> (7) In this Act, in relation to a term of a contract which is enforceable by a third party—
>
> > 'the promisor' means the party to the contract against whom the term is enforceable by the third party, and
> >
> > 'the promisee' means the party to the contract by whom the term is enforceable against the promisor."

26. The claimant does not contend that section 1(1)(a) is satisfied. Rather, it relies on section 1(1)(b) and (3). It must therefore show that Clause Y1.8 purports to confer a benefit on it, and that it is expressly identified in the Main Contract as a member of a class or as answering a particular description (it does not claim to be identified by name). If it satisfies these requirements, there is a presumption that it can enforce Clause Y1.8. The defendant can rebut that presumption if, on a proper construction of the Main Contract, it appears that the defendant and ISG did not intend the term to be enforceable by the claimant: section 1(2). If Clause Y1.8 is enforceable by the claimant, the claimant's right to enforce it is subject to and in accordance with any other relevant terms of the Main Contract: section 1(4). Further, any enforcement by the claimant will be subject to section 3, which provides:

> "(1) Subsections (2) to (5) apply where, in reliance on section 1, proceedings for the enforcement of a term of a contract are brought by a third party.
>
> (2) The promisor shall have available to him by way of defence or set-off any matter that—
>
> > (a) arises from or in connection with the contract and is relevant to the term, and
> >
> > (b) would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee.
>
> (3) The promisor shall also have available to him by way of defence or set-off any matter if—
>
> > (a) an express term of the contract provides for it to be available to him in proceedings brought by the third party, and
> >
> > (b) it would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee.
>
> (4) The promisor shall also have available to him—

> (a) by way of defence or set-off any matter, and
>
> (b) by way of counterclaim any matter not arising from the contract,
>
> that would have been available to him by way of defence or set-off or, as the case may be, by way of counterclaim against the third party if the third party had been a party to the contract.
>
> (5) Subsections (2) and (4) are subject to any express term of the contract as to the matters that are not to be available to the promisor by way of defence, set-off or counterclaim.
>
> (6) Where in any proceedings brought against him a third party seeks in reliance on section 1 to enforce a term of a contract (including, in particular, a term purporting to exclude or limit liability), he may not do so if he could not have done so (whether by reason of any particular circumstances relating to him or otherwise) had he been a party to the contract."

27. The claimant's case is that the defendant was in breach of Clause Y1.8 of the Main Contract by making the Direct Payments; as the PBA had not been set up, no payment ought to have been made until it were set up. Although the claimant was not formally a Named Supplier, as a subcontractor to ISG it was a Supplier and within the class of persons that was intended to have the benefit of the PBA and of Clause Y1.8 and, as such, is entitled to enforce that clause. If the defendant had not breached Clause Y1.8 by making the Direct Payments, it would have had to withhold payments, and this would have incentivised ISG to procure the setting up of the PBA or make equivalent provision.

28. The parties have agreed a list of issues, which identifies fourteen main issues, several of which are themselves subdivided. At a higher level of generality, the issues seem to me to be as follows:

    1) Does the Main Contract confer on the claimant the right to sue for breach of Clause Y1.8?

    2) Was the defendant in breach of Clause Y1.8 of the Main Contract by making the Direct Payments?

    3) If the first and second questions are answered affirmatively, did the defendant's breach of contract cause the claimant's loss complained of?

    4) If so, does the defendant have a defence to any claim by the claimant under section 3(2) or section 3(4) of the 1999 Act?

    The reason why I order the first and second questions as I do will, I hope, become apparent from what follows.

Discussion

(1) Does Clause Y1.8 confer enforceable rights on the claimant?

29. I address this issue by reference to three further questions:

1) Does Clause Y1.8 purport to confer a benefit on third parties who are members of a certain class or who answer a particular description? (section 1(1)(b) and section 1(3)

2) If so, is the claimant such a third party?

3) If so, does it appear on a proper construction of the Main Contract that the defendant and ISG did not intend the term to be enforceable by the claimant as such a third party?

30. In broad terms, the answer to the first question is clearly affirmative. Clause Y1.8 is the specific payment provision within an interlocking suite of provisions, which includes Clause Y(UK)1 as a whole, the Trust Deed and any Joining Deed. The purpose of the provisions, generally stated, is to protect subcontractors against the insolvency of the Contractor by impressing with a trust the component of the moneys due from the Client to the Contractor that is referable to the moneys due from the Contractor to the subcontractor. In *Prudential Assurance Co Ltd v Ayres* [2007] EWHC 775 (Ch), (reversed on other grounds, [2008] EWCA Civ 52), Lindsay J said at [28]:

> "It thus seems to me that section 1(1)(b) is satisfied if on a true construction of the term in question its sense has the effect of conferring a benefit on the third party in question. There is within section 1(1)(b) no requirement that the benefit on the third party shall be the predominant purpose or intent behind the term or that it denies the applicability of section 1(1)(b) if a benefit is conferred on someone other than the third party. The 1999 Act has no such additional requirement and *Laemthong International Lines Company Limited v Abdullah Mohammed Fahem & Co*, unreported, [2005] EWCA Civ 519, a decision of the Court of Appeal of the 5th May 2005, illustrates that there is no such additional requirement."

So far, the parties in this case are in agreement.

31. The disputed question that determines whether the claimant satisfies the requirement in section 1(1)(b) concerns the class or description of third parties on whom Clause Y1.8 purports to confer a benefit.

32. The claimant relies on Clause Y1.8 because it says that that was the provision mandating that payments be made by the defendant only into the PBA. The PBA was the account for making payments to Named Suppliers: Clause Y1.1(3). The way a person would become a Named Supplier is explained in Clauses Y1.5 and Y1.6. The Contractor and the subcontractor would enter into a subcontract on terms that provided for the PBA and the Trust Deed. (In practice, this was the NEC4 ECS, though it would have been possible, if less convenient, to use a different form.) At this point, the subcontractor is not yet a Named Supplier, albeit that Clause Y1.5 describes it as such proleptically (proleptically, at least, for Suppliers who are not *named suppliers*). Then

the Contractor submits to the Project Manager a proposal for adding that subcontractor to the Named Suppliers. If the Project Manager accepts the proposal, the subcontractor, the Client and the Contractor all sign the Joining Deed, whereby the subcontractor becomes a party to the Trust Deed. At that point, the subcontractor ceases to be merely a Supplier and becomes a Named Supplier. Clauses Y1.7 to Y1.12 deal with the arrangements for payment via the PBA. It is unnecessary to paraphrase them. With the exception of Clause Y1.11, they are all concerned only with the way in which payments are made to the Contractor and to Named Suppliers. Persons who were neither the Contractor nor Named Suppliers could not be included, because they would by definition not be interested in the trust attaching to the credit balance in the PBA.

33. It is common ground that the claimant was a Supplier, within the definition in Clause Y1.1(4), from 15 May 2024. The claimant accepts that it was never a Named Supplier, within the definition in Clause Y1.1(2), because (i) the class of *named suppliers* was empty and (ii) the claimant never signed the Joining Deed.

34. In those circumstances, it is in my judgment impossible for the claimant to bring itself within section 1(1), because it cannot satisfy the requirement in section 1(3). The relevant class of third party is Named Suppliers. The claimant was never a Named Supplier.

35. Mr Wygas proposed two answers to this difficulty, both of them presaged, if rather vaguely, in paragraph 36 of the Reply. The first was that, contrary to what I have so far stated, the relevant class was Suppliers. I regard that as plainly wrong, for reasons I have tried to explain. The third parties on whom Clause Y1.8 purports to confer a benefit are Named Suppliers.

36. Mr Wygas's second answer was that the cause of the claimant not being a Named Supplier was the breach of the Main Contract by the defendant, and that the defendant cannot take advantage of its own breach of contract. The premise of the argument is as follows: the defendant was in breach of Clause Y1.8 by making the Direct Payments; the making of the Direct Payments removed the incentive for ISG to establish the PBA and thereafter to take the steps necessary to make the claimant a Named Supplier; therefore the defendant's breach of Clause Y1.8 is the cause of the claimant being unable to satisfy section 1(3). For the sake of the argument, I shall assume, at this point, that the factual premise is correct. (See below as to my views on whether it is in fact correct.) However, the argument cannot succeed. The claimant was not a party to the Main Contract. Therefore it can only sue on the Main Contract if it qualifies under section 1 of the 1999 Act. The claimant does not qualify under section 1. To say that the claimant can circumvent section 1 in reliance on a breach of the clause sought to be enforced under section 1 is tantamount to saying that the claimant can enforce a contractual term without satisfying the requirements of the 1999 Act.

37. Therefore, as regards Clause Y1.8, the claimant was not a person within the scope of section 1(1) of the 1999 Act.

38. In view of that conclusion, the third question (whether the defendant has shown that, on a proper construction of the Main Contract, the defendant and ISG did not intend Clause Y1.8 to be enforceable by the claimant) does not arise for determination. However, I shall explain briefly why I consider that a party within section 1(3) would

be entitled to enforce clause Y1.8, but also why I think that this is of little practical importance.

39. If a contractual clause purports to confer a benefit on a third party who satisfies section 1(1)(b) and section 1(3), there is a rebuttable presumption that the clause is intended by the parties to the contract to be enforceable by that third party. A party to the contract can rebut the presumption in accordance with section 1(2). In view of the words "on a proper construction of the contract" in section 1(2), the parties' intentions are to be construed as an objective matter of construction, not by reference to any different subjective intention that either or both of the parties might have had.

40. Section 1 of the 1999 Act has its origins in the Law Commission's Report, *Privity of Contract: Contracts for the Benefit of Third Parties* (1996) (Law Com No 242), and the accompanying draft bill. Paragraph 7.18(iii) of the Report explained:

> "The presumption of enforceability is rebutted where the proper objective construction of the contract is that the parties did not intend the third party to have the right of enforceability. The onus of proof will be on the contracting parties (usually in practice the promisor), so that doubts as to the parties' intentions will be resolved in the third party's favour. A promisor who wishes to put the position beyond doubt can exclude any liability to the third party which he might otherwise have had. But to allay the fears of the construction industry we should clarify that, even if there is no express contracting out of our proposed reform, we do not see our second limb as cutting across the chain of sub-contracts that have traditionally been a feature of that industry. For example, we do not think that in normal circumstances an owner would be able to sue a sub-contractor for breach of the latter's contract with the head-contractor. This is because, even if the sub-contractor has promised to confer a benefit on the expressly designated owner, the parties have deliberately set up a chain of contracts which are well understood in the construction industry as ensuring that a party's remedies lie against the other contracting party only. In other words, for breach of the promisor's obligation, the owners' remedies lie against the head-contractor who in turn has the right to sue the sub-contractor. On the assumption that that deliberately created chain of liability continues to thrive subsequent to our reform, our reform would not cut across it because on a proper construction of the contract - construed in the light of the surrounding circumstances (that is, the existence of the connected head-contract and the background practice and understanding of the construction industry) - the contracting parties (for example, the sub-contractor and the head-contractor) did not intend the third party to have the right of enforceability. Rather the third party's rights of enforcement in relation to the promised benefit were intended to lie against the head-contractor only and not against the promisor. For similar reasons we consider that the second limb of our test would not normally give

> a purchaser of goods from a retailer a right to sue the manufacturer (rather than the retailer) for breach of contract as regards the quality of the goods."

41. In *Public and Commercial Services Union v Secretary of State for the Department for Environment, Food and Rural Affairs* [2024] UKSC 41, [2025] AC 1392, ("*PCSU v DEFRA*") the Supreme Court considered the 1999 Act in an employment context that is very different from the circumstances of the present case. The principal judgment, with which Lord Reed and Lady Simler agreed (Lord Burrows gave a concurring judgment), was given by Lord Sales and Lady Rose. They said:

> "48. Professor Andrew Burrows (now Lord Burrows) was the Law Commissioner with primary responsibility for the Report. In 1996 he published an article, 'Reforming Privity of Contract: Law Commission Report No 242' [1996] LMCLQ 467, to explain the main features of the reform proposed in the Report. In relation to the second limb of the test for enforceability by third parties he commented (p 473) that the Law Commission had concluded that the preferable way to proceed was through a presumption of intention to create legal rights enforceable by an identified third party, and said:
>
> > 'Although this was not spelt out in the Report, it is my view that that presumption is a strong one. I would anticipate that it would not normally be rebutted unless there is a term in the contract expressly negating the third party's legal rights, or unless the parties have entered into a chain of contracts which gives the third party a contractual right against another party for breach of the promisor's obligations under the alleged 'third party' contract (as for example is presently the position in the construction industry).'
>
> 49. We prefer to leave open the question raised there as to whether it would be sufficient to satisfy the test in section 1(2) of the 1999 Act for there simply to be a chain of contracts in which the third party has a contractual right against another party in respect of the dispute. As we explain below, the question under section 1(2) is whether it appears 'on a proper construction of the contract' that the parties did not intend to create rights which the third party could enforce and that will depend on whether a term to that effect can be implied. It is a feature of the contractual context in the present case that there is no relevant chain of contracts arrangement which confers on the Union a contractual right against another party for breach by the respondent departments of the check-off term.
>
> 50. Professor Burrows published another article on this topic in 2000: 'The Contracts (Rights of Third Parties) Act 1999 and its implications for commercial contracts' [2000] LMCLQ 540. In that article Professor Burrows explained (p 544) how section

> 1(1)(b), read with section 1(3), creates a rebuttable presumption that the term conferring a benefit on a third party should be enforceable by that party '[b]ut the presumption can be rebutted if, as a matter of ordinary contractual interpretation, there is something else indicating that the parties did not intend such a right to be given'. He explained further how section 1(2) could operate to rebut that presumption by incorporation in the contract of an express provision to that effect or 'because of other inconsistent terms'. For example, in a contract between A and B providing for payment to C, the contract might prohibit assignment to C of B's right to enforce the payment term without A's written consent and '[t]hat would indicate that the parties did not intend to confer on C an immediate right of enforceability'. In this discussion, the focus for the operation of section 1(2) is rightly on what appears as a matter of construction of the contract."

42. Explaining their disagreement with the decision of the majority in the Court of Appeal in that case, Lord Sales and Lady Rose said:

> "96. We consider that Lewis LJ and Underhill LJ fell into error in their interpretation and application of section 1(2). As identified in the commentaries referred to in paras 48-50 above, where the criteria in section 1(1)(b) and (3) of the 1999 Act are satisfied, a presumption arises that the relevant term in favour of the identified third party is enforceable. We agree with the view expressed in those commentaries that the presumption is a strong one. That is because, *ex hypothesi*, there is no express term stating the contrary, so in order to conclude as a matter of proper construction of the individual contracts of employment that the parties did not intend that the check-off term should be enforceable by the Union, it would be necessary to find that there was an implied term to that effect. As stated above, the test to imply a term where the contract is silent is a demanding one.
>
> 97. Where the statutory presumption of enforceability by the third party arises pursuant to section 1(1)(b), that is the starting point for analysis pursuant to section 1(2). In order for the presumption to come into play, it does not have to be shown that the parties positively intended that the relevant contract term should be enforceable by the third party. This is where the solution eventually adopted by the Law Commission in the Report and the draft Bill departs from the double intention approach which it originally proposed in the Consultation Paper. Under that abandoned approach, the difficulty of implying a term where the contract is silent would have meant that it was correspondingly difficult to find that the requisite positive objective common intention in favour of third party enforceability was made out. However, that impediment is

> removed by the application of the statutory presumption where the criteria in section 1(1)(b) and (3) are satisfied.
>
> 98. The statutory presumption is only rebutted under section 1(2) 'if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party'. This means that it has to be shown that, on the usual objective approach to interpretation of contracts, the parties had a positive common intention that the obligation should not be enforceable by the third party. That is a different question from that which would have been posed under the double intention test approach. Under the 1999 Act the usual difficulty involved in implying a contractual term means that it is correspondingly difficult to find that the presumption of third party enforceability is rebutted."

43. On behalf of the defendant, Miss Connors submitted that, if the presumption of enforceability by the claimant arose in the present case, it was rebutted because, on a proper construction of the Main Contract, ISG and the defendant did not intend Clause Y1.8 in the Main Contract to be enforceable by the claimant. This was because the Main Contract expressly contemplated a chain of contracts, which included not only a subcontract that itself provided for the PBA but also the Trust Deed (to be given effect, for Suppliers proposed and accepted for addition as Named Suppliers, by a Joining Deed), under both of which the claimant would have direct contractual rights against ISG.

44. For reasons that I have explained, the third parties on whom Clause Y1.8 purports to confer a benefit are Named Suppliers. Named Suppliers are "*named suppliers* and other Suppliers who have signed the Joining Deed": Clause Y1.1(2). The clear intention was that *named suppliers* would be original signatories to the Trust Deed (see Clause Y1.13) and that other subcontractors/Suppliers would become party to the Trust Deed by the procedure of proposal, acceptance and execution of the Joining Deed set out in Clause Y1.6. Thus all Named Suppliers would be parties to the Trust Deed. Any subcontractor that was not a party to the Trust Deed would by definition not be a Named Supplier and would not be a party on whom Clause Y1.8 purported to confer a benefit. Any Named Supplier would, as a party to the Trust Deed (whether originally or by later joinder), have direct contractual rights under the Trust Deed against the Client and the Contractor in respect of their obligations. These obligations arose *inter alia* from the Contractor's undertaking to open the PBA (clause 2.1), the Client's undertaking to make payments into the PBA (clause 2.2), and the trust of the balances in the PBA (clauses 2.3 and 3.1.7).

45. The foregoing analysis does seem to me to show that third-party reliance on Clause Y1.8 in the Main Contract is of little practical importance: any third party that might have a right to enforce the Clause is *ex hypothesi* privy to the Trust Deed and has direct contractual rights; any third party that is not privy to the Trust Deed is not one on whom Clause Y1.8 purports to confer a benefit.

46. However, as the Supreme Court made clear in *PCSU v DEFRA,* what is required by section 1(2) of the 1999 Act is a demonstration that the parties to the contract had a positive intention that the clause in question should not be enforceable by the third

party. Such an intention might be demonstrated by an express provision, or by other inconsistent terms, or by the necessary implication of a term: see *PCSU v DEFRA* at [50], [96] and [98]. (I note that the approach taken in *PCSU v DEFRA,* especially at [96], seems to equate the exercises of contractual interpretation and implication of terms: in the absence of an express term or an inconsistent term, the presumption of enforceability will only be rebutted if a contrary term can be implied. This appears to be contrary to the prevalent view that interpretation and implication are different exercises. See Lewison, *The Interpretation of Contracts,* 8th edition, chapter 6, section 3, where the point is discussed in detail.)

47. In my view, the existence of direct rights under the Trust Deed is insufficient to demonstrate a positive intention that the relevant clauses of the Main Contract should not be enforceable by third parties on whom they purported to confer a benefit. There is no inconsistency in the existence of enforceable obligations both in the Main Contract and in the Trust Deed to which it refers. Further, there might be some advantage in the ability to enforce certain provisions of Clause Y(UK)1: for example, Clause Y1.2, which imposes an obligation on the Contractor to establish the PBA within three weeks of the Contract Date.

48. The circumstances under consideration do not involve the kind of chain of primary obligations of client-contractor-subcontractor typical in construction cases; ISG was solely responsible to the defendant in respect of the execution of the works, and the claimant was solely responsible to ISG for the execution of the subcontract works (whether or not it used sub-subcontractors). I was referred relatively briefly to Option Y(UK)1 in the claimant's subcontract and do not think it necessary to examine it here in detail. What is to be noted, however, is that its primary purpose is not to confer on the claimant rights under the PBA (that would have been achieved by execution of a Joining Deed and, of course, by establishing the PBA) but to give any sub-subcontractors rights under the PBA.

49. Despite my views on section 1(2) of the 1999 Act in its potential application, for the reasons set out above I hold that the claimant had no enforceable rights under Clause Y1.8.

50. I mention, briefly, that Mr Wygas sought to rely on the decision of the Court of Appeal in *Chudley v Clydesdale Bank Plc* [2019] EWCA Civ 344, which he said concerned a situation analogous to that of the present case. I did not gain any assistance from the case. The Court of Appeal held that there was a contract between A and B and (in agreement with the judge) that C was entitled to enforce provisions of the contract pursuant to section 1 of the 1999 Act. The conclusion that the provision in that contract for the opening of a segregated client account was intended to benefit a specified class of investors is well and good, but the question whom Clause Y(UK)1 was intended to benefit is a matter of the construction of the Main Contract, not of appeals to generalities and to high-level similarities between features of the present case and another case. The other thing for which the case was cited to me was the remark in Flaux LJ's judgment at [84] to the effect that the bank could not take advantage of its breach of contract in one regard to negate causation for another breach. This was specifically in the context of a consideration of causation of loss by reason of breach of contract that the claimant had been held entitled to enforce. It does not enable the claimant in the present case to evade the need to demonstrate that it qualifies under section 1 of the 1999 Act.

(2) Was the defendant in breach of Clause Y1.8

51. This issue is one of contractual construction. It is, in short, whether Clause Y1.8 requires payments under the Main Contract to be made only to the PBA, so that for the Contractor (the defendant) to make any payment other than into the PBA *ipso facto* constitutes a breach of contract.

52. In the light of the foregoing analysis, this issue does not arise for determination. As there were never any Named Suppliers, there were never either (i) any third parties who might have enforceable rights under the Main Contract or (ii) any third parties who were privy to the 2024 Trust Deed and entitled to contractual or proprietary rights under it. This in turn means that, if both the defendant and ISG wanted to make and accept payments other than in strict conformity with the terms of the Main Contract, there was nothing and no-one to stop them doing so. The short answer, accordingly, is that, as the defendant was content to make and ISG was content to receive Direct Payments, there was no breach of contract.

53. The counter-factual assumption that the claimant had enforceable rights under the Main Contract is problematic, because the claimant was not privy to the 2024 Trust Deed and was not able to enforce any provisions of the 2024 Trust Deed. If the claimant *had* been a Named Supplier, it would *ex hypothesi* have been privy to the 2024 Trust Deed and entitled to enforce its provisions.

54. Two features of the claimant's case on breach of contract are worth noting. The first is that the particular provision of which the defendant is said to have been in breach is Clause Y1.8. This reflects the fact that the obligations to set up the PBA and to propose the addition of a Supplier as a Named Supplier were obligations on ISG, not the defendant: the non-establishment of the PBA and the non-addition of the claimant as a Named Supplier simply are not breaches of contract by the defendant. The claimant is not on any possible basis entitled to sue the defendant for either (i) breach of ISG's contractual obligations or (ii) any omission by the defendant to enforce ISG's contractual obligations. What in fact the claimant is doing is seeking to turn Clause Y1.8 into a thinly veiled obligation on the defendant to apply pressure on ISG to comply with its obligation in Clause Y1.2: see the claimant's reply, paragraphs 10.7.2 and 40.2.

55. In passing, I note that Mr Wygas was wrong to submit—skeleton argument, paragraph 15—that the "formalities" of adding the claimant as a Named Supplier "could not be completed until the PBA was established": those "formalities" are achieved by the process of proposal, acceptance and execution of the Joining Deed—see Clauses Y1.1 and Y1.6—that does not require the prior establishing of the PBA. Mr Wygas submitted, to the contrary, that the statement in the Joining Deed, "The Contractor has established a Project Bank Account", precluded joining until the PBA had been established. This is doubly wrong: first, if the standard form had contained those words, Clause Y(UK)1 could not sensibly have precluded their amendment to "The Contractor will establish …" or similar; second, the words relied on by Mr Wygas are in the NEC4 standard form, but they are not in the ITT Deed of Adherence. (I observe that paragraph 14.5 of the claimant's reply avers that "there was no point in Jones signing any Joining Deed until the PBA had been established" because without a PBA the moneys paid would not have been subject to the trust. The difficulty, of course, is that, unless it signed the Joining Deed, the claimant would not be a Named Supplier.)

56. The second notable feature of the claimant's case is that it does not rely on Clause Y1.8 in a positive sense ("the defendant ought to have made the payments into the PBA") but in a negative sense ("the defendant ought not to have made payments elsewhere"). The reason for that is, of course, that it was impossible to make payments into a non-existent PBA. But the obligation in Clause Y1.8 was a positive one, not a negative one, and it was impossible of performance, because it was premised on the existence of a PBA. The condition precedent to performance of the obligation in Clause Y1.8 had failed. Therefore the failure to pay into a PBA was not a breach of contract.

57. The effort to get around this second point leads the claimant's case into incoherence. In its Part 18 response dated 14 January 2026, the claimant states:

> "In relation to request 2.1, it is Jones' case that by paying ISG direct, The Vale was in breach of the Main Contract (and particularly Clause Y1.8). Furthermore, paying Jones direct was a voluntary payment, as it was not a payment under the Main Contract and so could not be taken to be a payment to satisfy any obligation for payment under the Main Contract.
>
> In relation to requests 2.2 and 2.3, ISG could have sued The Vale for making payment which was not into the PBA. Jones relies on the fact that a payment which was not made in accordance with the Main Contract is a voluntary payment and so would not satisfy any obligation for payment under the Main Contract."

If the Direct Payments were merely voluntary payments and not payments under the Main Contract, they cannot have been made in breach of contract.

58. The claimant's contention that ISG could have sued the defendant for making Direct Payments is impossible to maintain. ISG made applications for the Direct Payments and accepted them, in circumstances where the PBA had not been established. Contrary to Mr Wygas's submission, the point does not go merely to remedy (that is, whether ISG would only be precluded from recovering its own loss but not that of third parties). It means that the promisee, ISG, could not assert a cause of action in breach of contract. (This may strictly be relevant to what I have identified as the fourth main issue—defences under section 3(2) of the 1999 Act—but is conveniently mentioned here.) In my judgment, where the cause of action relied on is under the Main Contract, to which the claimant was not privy and in which it was not the promisee), that is by itself fatal to the claim.

59. Where there is a PBA, a Named Supplier (with rights to enforce the Main Contract under the 1999 Act and to enforce the Trust Deed as a party to it) and a payment application in accordance with Clause Y1.7, there will be a positive obligation on the Client to pay into the PBA. But in circumstances where any relevant third party will have rights to enforce positive obligations of both the Contractor and the Client under the Main Contract and the Trust Deed, there is in my view no justification for importing a negative obligation to address a situation falling outside the ambit of the positive obligations.

60. Although it is not necessary for me to express a view, I consider that, as there was no PBA and there were no Named Suppliers, the defendant was obliged to make Direct

Payments. Clause Y(UK)1 has to be read in the context of the Main Contract as a whole. In the Core Clauses of the NEC4 Engineering and Construction Contract, payment is dealt with in clause 51, which provides in relevant part:

> "51.1 The Project Manager certifies a payment within one week of each assessment date. The Project Manager's certificate includes details of how the amount due has been assessed. The first payment is the amount due. Other payments are the change in the amount due since the previous assessment. A payment is made by the Contractor to the Client if the change reduces the amount due. Other payments are made by the Client to the Contractor. Payments are in the currency of the contract unless otherwise stated in the contract.
>
> 51.2 Each certified payment is made within three weeks of the assessment date or, if a different period is stated in the Contract Data, within the period stated. If a certified payment is late, or if a payment is late because the Project Manager has not issued a certificate which should be issued, interest is paid on the late payment. Interest is assessed from the date by which the late payment should have been made until the date when the late payment is made, and is included in the first assessment after the late payment is made."

61. If Clause Y1.8 had the effect of prohibiting any payment before a PBA were established, it would appear to be in conflict with clause 51.2. Mr Wygas's response was that Clause Y1.12 means that, where the PBA has not been established in accordance with Clause Y(UK)1, the failure of the Client to pay in accordance with clause 51.2 is not treated as late payment. However, it is necessary to identify the scope of what is being addressed in Clause Y1.12: what "delay in payment" is being referred to? In my judgment, Clause Y1.12 is concerned with the effect of payments *out of* the PBA: the first sentence makes this clear. To take the second sentence as addressing the situation where payments are delayed because the Contractor has failed to establish the PBA would be to broaden significantly the range of reference of the clause. Further, if the second sentence of Clause Y1.12 were intended to address the delay in establishing the PBA, it would hardly have done so in such an oblique manner and without a specific prohibition on making payment other than through the PBA. The reference in Clause Y1.12 to "the requirements of this clause" can be adequately interpreted in terms of the requirements in Clauses Y1.3, Y1.4, Y1.5, Y1.6, Y1.7 and Y1.9; these are all premised on the existence of the PBA, and failure to comply with any of them would be liable to delay a payment.

62. Even if the conclusion that direct payments were obligatory where there was no PBA and no Named Suppliers were wrong, I should consider that direct payments were permissible.

63. The focus on the entitlement of non-parties to the Main Contract to enforce its provisions should not distract attention from the fact that the sole relevant promisee under the Main Contract is the Contractor; it is not the subcontractors or any of them. I consider this to be relevant to the question—which, in substance, is the question under this present issue—whether the Client is contractually prohibited from making a direct

payment when the PBA has not been established in accordance with the Contractor's obligations. The claimant's case rests on giving an affirmative answer to that question. This is to go far beyond saying that in such circumstances the Client is not obliged to make a payment. It is clearly an impossible contention in circumstances where the only persons with rights under the Main Contract are the Contractor and the Client. I consider it also to be wrong, even if there are Named Suppliers.

64. A consequence of the claimant's construction is that even payments solely for the benefit of the Contractor (i.e. which do not include any component referable to work by subcontractors) will be contractually prohibited until the PBA is established. Although this consequence may not be a practical difficulty, in the absence of the involvement of third-party interests in the moneys, it is striking nonetheless. Again, to construe Clause Y1.8 in the manner proposed by the claimant would be contrary to commercial sense. Thus it might be that the Contractor's failure to establish the PBA is due to factors beyond its control (whether or not that is so in this case is a different matter). The contractual prohibition of any payment other than into a not-yet-existing PBA might be commercially disadvantageous or even disastrous to the Contractor or the subcontractors. Again, the response might be that it would be in the interests of all to make a pragmatic agreement for good commercial reasons. But I do not think that an entirely satisfactory answer to a problem arising from an unnecessary construction of the contract.

65. The fact that the October 2020 amendments to Clause Y(UK)1 expressly provided for payments to be made directly to the Contractor where there was not yet a PBA does not indicate anything about the proper construction of the prior version of Clause Y(UK)1. The later amendments may have been intended to alter the previous position, or to make express what was believed to be implicit in the previous version, or simply to fill a perceived lacuna.

66. Accordingly, I do not consider that the defendant was in breach of the Main Contract as alleged.

<u>(3) If the defendant was in breach, did the breach cause the claimant's loss?</u>

67. This question, too, does not arise for consideration. However, I shall address it on the assumption that, contrary to my foregoing conclusions, the Direct Payments were made in breach of contract and the claimant is entitled to sue for that breach of contract.

68. The claimant's case on causation is stated succinctly in paragraph 36 of the Reply:

> "If The Vale had not paid ISG, ISG would have established the PBA before September 2024. When The Vale then paid the sums relevant to Application 4 into the PBA (which it would have done on 27 August 2024), those sums would have been paid, not long after, to Jones, and in any event by the final date for payment for Application 4 under the Subcontract. Furthermore, until the sums were paid out of the PBA, they would have been held in the PBA on trust for Jones."

The argument is that, by making the Direct Payments, the defendant took the pressure off ISG, causing it to be dilatory in establishing the PBA.

69. In my view, the claimant's case on causation is unsupported by evidence. Such documentation as there is tends to show that ISG was not dragging its feet. The problem lay with Santander: first, in what seems to have been internal inefficiency; thereafter, in an unwillingness to proceed before the negotiations for ISG's sale were concluded and the bank was in a position to satisfy its KYC requirements. This means that the PBA could not have been set up in accordance with the Main Contract, because the proposed sale fell through and ISG went into administration shortly afterwards. Accordingly, the claimant would not have been assisted by the defendant not making the Direct Payments.

70. Mr Wygas gave two responses to this analysis. First, he submitted that the probability was that, if the defendant had acted properly from the time the Main Contract was made, the likelihood was that the PBA would have been established by the end of 2023 at the latest: ISG had undertaken an obligation to set up the PBA by 13 September 2023 (see Clause Y1.2); there was no evidence that this could not have been achieved if ISG had been incentivised to achieve it; and it is a reasonable inference that ISG would not have undertaken an obligation that it could not perform. In my view there are several reasons for rejecting this response. (1) The defendant did not have an obligation to enforce performance by ISG of the latter's obligations—and certainly no such obligation that the claimant might have been entitled to enforce in turn. (2) The breach of contract relied on is limited to Direct Payments said to have been made contrary to Clause Y1.8. Nothing prior to late November 2023—when the first payment application under the Main Contract was certified and paid—could be relevant. (3) Even on the claimant's case, the earliest date when it became a Supplier and therefore eligible to be proposed for addition as a Named Supplier was 15 May 2024 (or, at a stretch, 20 April 2024, when it commenced work); that is, therefore, the earliest date on which it could even be argued that it satisfied the requirements of section 1(1)(b). And the earliest relevant breach could only be the Direct Payment on 31 May 2024. The evidence shows that ISG was not dragging its feet by this stage and that the problems lay with Santander. Further, by late May 2024 ISG's financial problems were in the public domain, as was the fact that it was looking for recapitalisation. Discussions with a proposed purchaser had started in March 2024, and the identity of the proposed purchaser was public knowledge in early July 2024. It is wholly implausible to suppose that the Direct Payment on 31 May 2024 caused the PBA not to have been established and the claimant not to have executed the Joining Deed before ISG went into administration. As Miss Connors submitted, as Santander had not established the PBA by March 2024, it was never going to establish it before ISG went into administration.

71. Mr Wygas's second response was that, if Santander would not open a PBA, other banks might have been willing to do so. Of this, there is no evidence at all. Further, the Main Contract provided expressly that the PBA was to be established with the project bank, which was defined as Santander.

<u>(4) Would the defendant have defences to claims by the claimant?</u>

72. Although it can be useful to cover all alternative bases, I think that by this stage of the enquiry one would have to proceed on too many hypothetical assumptions. Therefore, I shall deal with this issue simply by opining that, by requesting and accepting Direct Payments in circumstances where there was no PBA, ISG waived any breach of Clause Y1.8 and would therefore not have been able to sue for breach of the (supposed)

contractual obligation; and the defendant would be entitled to set this up as a defence to the present claim pursuant to section 3(2) of the 1999 Act.

Conclusion

73. The claim is dismissed.