

Should the Client pay directly to a Sub-Contractor?

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More often than not, we hear or come across the scenario of a sub-contractor facing difficulties in securing payment for works carried out on a particular project. This could be due to a number of reasons such as an inactive client, a main contractor on the verge of insolvency, the fault of the sub-contractor himself by carrying out defective work etc. But in the situation where a sub-contractor has performed according to the terms and conditions of the contract and is entitled to stage payments as specified in Section 8(1) of the Construction Contracts (Amendment) Act (Northern Ireland) 2011, what options does a sub-contractor have to obtain payment for the works done if the main contractor is avoiding to provide such payment? Should the client pay directly to the Sub-Contractor?

Generally, the client is neither obliged nor entitled to remedy the failure of payments between the main contractor and sub-contractors unless the contract expressly permits it to do so or collateral warranties are signed between the two parties i.e. the sub-contractor and the client. Although some clients such as John Lewis have considered introducing direct payment to sub-contractor clauses into its contracts to avoid potential disputes, other clients are reluctant to insert such clauses as it could be seen as interference from the main contractor's perspective. The main contractor may have had valid reasons for not paying its subcontractor, such as valuation issues, and the employer essentially could have swapped one dispute for another and find itself on the receiving end of an adjudication from its contractor.

Whilst some countries, such as France, have the 1975 French Law of Sub-Contracting which introduces an obligation upon public and private sector clients to make direct payments to sub-contractors, and other countries like the United States legislating the Miller Acts which require lead contractors working on public sector projects to provide bonds to their subcontractors to guarantee payments, Northern Ireland has no such legislation which ensures that sub-contractors will be paid in the event of an uninterested or insolvent main contractor. One may argue that Article 71 of the Procurement and Public Contracts Regulations 2015 allows Contracting Authorities (the client) the opportunity to pay the sub-contractor directly but whilst this is only applicable for public works projects, it is also a discretionary clause, rather than a mandatory clause which enforces contracting authorities to make such payments.

So what can a sub-contractor do if there is an actual breach of the contract from the main contractor's perspective, such as payment? Can the sub-contractor directly obtain payment from the client despite there being no direct contractual relationship between the two parties?

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In the case of *A.J. Building and Plastering Limited v Turner, Munday and Dalling* (2013) EWHC 484 (QB), A.J. Building were sub-contractors hired by Rok, the Main Contractor, to complete insurance repairs on behalf of Zurich, a world-renowned insurance company. Problems arose when Rok went into administration and had failed to pay A.J. Building for the works completed, leaving A.J. Building without any prospect of recovering payment from Rok. A “*Work Authority Mandate*” signed by the three defendant householders, Turner, Munday and Daling, which A.J. Building did the works for, stated that the householders were liable “*for payment for any monies due for additional work authorised by me which is not paid by my insurer*”. A.J. Building asserted that the mandate created a direct contractual relationship between the two parties and thus was entitled to make payment in full to it.

The Judge however, rejected the claims on the premise that all parties involved understood that Zurich would pay for the repairs done, and the householders had no input into the price of the works. The Mandate made it clear that Zurich would be responsible for covering the insured losses whilst the householders would be responsible for any payment over and above that of the insurance repairs. This particular case confirmed that sub-contractors cannot recover costs from a client where they do not have a direct contractual relationship between the two parties or any other express right to be paid directly.

To further support the above statement where direct payment from the client would not be possible after a main contractor has gone into liquidation, the *British Eagle International Air Lines Ltd v Cie Nationale Air France* (1975) 1 WLR 758 should be considered. Although the case is not construction related, it has been widely assumed to be applicable to construction. The court held that payment from a client to a sub-contractor in circumstances where a main contractor has become insolvent could appear to be seen as an attempt to provide a benefit to a creditor (the subcontractor in this case) over other parties, thus breaching the *pari passu* principle (“*equal footing*” in Latin). As a result, the liquidated party (the main contractor) could still claim money from the client, resulting in an awkward position for the client as they would have to pay twice for the same work done.

So what should a sub-contractor do to avoid this situation? First and quite obviously, know the financial strength of the main contractor whom you wish to work with in the project. Secondly, set up a project bank account (PBA) which is applicable in contracts such as NEC3 and JCT as it provides security and certainty of payment to supply chain members such as sub-contractors and suppliers. They have been successfully used by major public sector employers such as Highways England and Crossrail and would provide an effective remedy in such a situation, benefiting both the client and the sub-contractor. Finally, work with main contractors whom have signed the Construction Supply Chain Payment Charter which ensures that a main contractor would make correct full payment to a sub-contractor as and when due for all work properly carried out as specified in the contract. Main contractors whom have signed the Charter include renowned companies such as Mace Ltd and Skanska Construction UK.

To summarise, a client is not obliged or entitled to directly pay a sub-contractor for works carried out on a project as there is no direct contractual relationship between the two parties (unless a collateral warranty between the two parties is present). Paying such amounts could result in disputes between the client and the main contractor and would prove to be disadvantageous from the client’s perspective. Northern Ireland legislation does not directly enforce such payments to be made as seen in other countries, and ideally, the sub-contractor should try avoiding the situation as a whole by identifying the financial strength of the main contractor, setting up PBA at project inception and working with main contractors whom have signed the Construction Supply Chain Payment Charter.

