



Smash and grab – the Marmite adjudication?

NICOLA HUXTABLE – OPERATIONAL DIRECTOR, DRIVER TRETT, UK EXPLORES THE 'NICETIES' OF SMASH AND GRAB ADJUDICATIONS AND REMINDS US THAT THOSE INITIATING THESE RAIDS NEED TO BE SURE THEY ARE STRICTLY ADHERING TO THEIR CONTRACT'S RULES.

Love them or hate them, it looks like adjudications arising as a result of the strict payment scheme introduced by the local Democracy, Construction and Regeneration Act 2009 are here to stay, at least for a while.

Although contractors, subcontractors, and occasionally employers are happy to run them when it works in their benefit, it is the ultimate ambush adjudication and can result in relationships turning very sour very quickly.

The payment scheme requires a valid payment notice to be issued by the paying party followed by the payment of the sum due. Where a payment notice is not issued, the payee can issue a notice in default which will become the sum due and, unless the paying party is on the ball and issues a valid pay less notice, the full sum in the default notice will become the sum due; whether or not this accurately reflects the value to which the payee would otherwise be entitled [See Fig. 1].

Under the strict payment regime, there is no defence for failing to issue a notice, be it a payment notice or pay less notice.

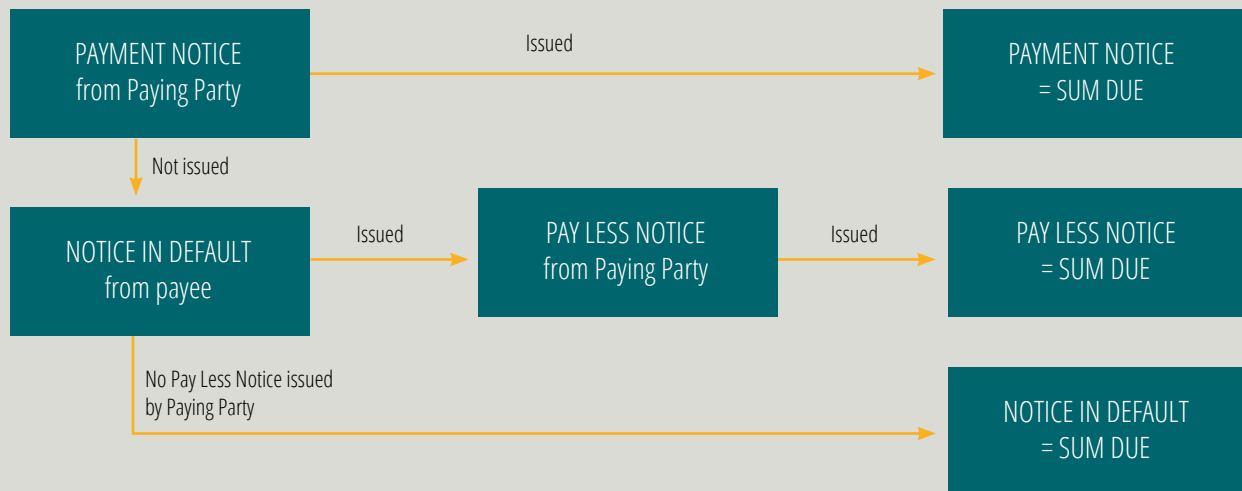
A bit of research on Google and Wikipedia shows the three ingredients needed for a smash and grab:

1. The element of speed and surprise.
2. The grabbing of valuables.
3. Making a quick getaway.

1. Speed and Surprise

As there is no defence to the failure to

FIG. 1 PAYMENT SCHEME REQUIREMENTS



issue a notice, it is quick and simple to put together the documents needed to start an adjudication and the dispute will have already crystallised. If the paying party have failed to realise that the relevant notices have not been issued, the Notice of Adjudication may well come as an unwelcome surprise; particularly if it is wrapped with a bow and attached to a box of mince pies on Christmas Eve – more common than you would like to think!

2. The Grabbing of Valuables

What is more clearly valuable on a project than cash? Reputation perhaps? Either way, a smash and grab adjudication is a threat to both. It is rare that an adjudication is completed within the required 28 days, but in this case, where there is no defence, it is very possible that a party who would otherwise not be entitled to payment can run away with a large amount of cash.

3. Making a Quick Getaway

Following the ISG case¹, the courts are happy to uphold a decision on a smash and grab provided it is on an interim application. After all, isn't that what adjudication was set up for in the first place? Pay now, argue later? Although painful at the time, the financial position can always be corrected in the next payment cycle. But, what about under JCT where payments can only flow one way until the

final account? The payee may have to live with the injustice of a smash and grab adjudicator's decision for the duration of the project, and then for a further six to nine months afterwards.

The argument is different on a final account, where the situation cannot be corrected. In this case the courts are reluctant to enforce a smash and grab decision (Harding and Paice²). But, what happens under NEC where there is no final account mechanism? Under the judgment in ISG, it appears that even if all work is complete and no further payments will be due, it is possible for an application for payment to be submitted many months down the line. If the job is finished, this application may well be missed and the opportunity for a smash and grab will arise. This can then be corrected with another interim payment, but theoretically it can go on forever.

The lack of final account provision in the NEC is probably something that needs to be corrected; but for now it must be the sensible thing to sign a full and final settlement agreement at the end of the project to avoid these sticky payment issues.

So, although the smash and grab is a loaded gun option for some, what do the adjudicators themselves think about it? Again, it appears that some love them and some (possibly most) hate them. Most adjudicators are loath to make an unjust decision purely on the basis that one party failed to issue a valid notice. But, as there

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is no defence, adjudicators will look for a way to find that the documents in play fall foul of the payment mechanism in some way.

A fairly recent example arose when a contractor, working under an amended JCT contract, issued an application for payment within the correct timescales and in the same format as all previous applications, against which he had been paid.

Relationships deteriorated on site and he was told that he was not entitled to further payment. The employer failed to issue a payment notice or a withholding notice against the application, the latest date for payment came and went and no payment was received.

The contractor's application did contain an element of loss and expense to which he may or may not have been entitled. In any event, the employer was in breach and the contractor commenced a smash

and grab adjudication on the basis that his payment application became the default notice and the sum contained within the application became the certified sum. This all seems fairly straight forward and the employer had no excuse for failing to issue the notices.

However, the adjudicator decided that the application for payment was not issued strictly in accordance with the contract, which stated that the application had to be issued in hard copy to a named person along with an electronic copy, issued to the project mail box. In addition, six further copies of the application had to be issued to the registered office of the employer.

Regardless of the fact that this process had never previously been followed and the contractor had always been paid, the adjudicator made this decision on the basis that if you want to adjudicate on a technicality, then you have to have followed the contract to the letter.

This seems to be a common approach to smash and grab adjudications. Adjudicators would much rather make a decision on a payment dispute based on the actual value of the account rather than a technicality. Be aware, if you are going to throw a big snowball at the other party, there cannot be any yellow snow included. ■

¹ ISG Construction Ltd v Seewic College [2014] EWHC 4007

² Matthew Harding (t/a MJ Harding Contractors) v Paice and another [2015] EWCA Civ 1231