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January 07, 2026

Termination, Payment & the Limits of "Smash and Grab" – Core Authorities on Certification, Contractual Interpretation and Post-Termination Payment Regimes

DDA Curated Series

Key Words:

NEC contracts, termination, interim payments, final payment, certification, conditions precedent, contractual interpretation, smash and grab adjudication, notices, ambiguity

Summary:

Termination is not merely an event. It is a **legal switch**.

Once triggered, termination often **displaces entire contractual regimes**—particularly those governing payment and certification. This article distils a coherent line of authority reflecting a consistent judicial theme: **payment entitlement is contractual, conditional and structured**. Interim payment regimes under standard forms do not survive termination **unless the contract clearly says so**, and "smash and grab" arguments will fail where certification remains an **unsatisfied condition precedent**.

For adjudicators, practitioners, and drafters working under the NEC and other standard forms, these cases provide a disciplined framework for analysing post-termination payment disputes—and for resisting attempts to bypass contractual machinery through technical ambush.

1. **Payment Entitlement & Certification as a Condition Precedent**
    1. ***Henry Boot Construction Ltd v Alstom Combined Cycles Ltd*** **[2005] EWCA Civ 814** [9, 13, 16-18, 27-29, 32-35, 55-58] – Where a contract makes **certification** the operative mechanism for payment, **no entitlement arises** until certification occurs (or ought to have occurred). Completion of work does not, of itself, generate a right to payment. The right accrues only upon certification, which may operate as a **condition precedent**.
    2. **Practical significance:** in post-termination scenarios—where interim payments are replaced by a final, certified assessment—contractors cannot sidestep that machinery by issuing interim applications dressed up as payment notices.

2. **Contractual Interpretation – The Modern, Objective Approach**

The courts apply a unitary, objective method: **text first, context alongside it, commercial common sense as a cross-check**—but never to override clear wording.

1. ***Inland Revenue Commissioners v Raphael*** **[1935] A.C. 96 HL** [142] –Effect must be given to the **words actually used**, not what the parties might later wish they had agreed.
2. ***Wood v Capita Insurance Services Ltd*** ***[2017] UKSC 24*** [10-13] – *The Supreme Court confirmed the now-settled unitary approach: text and context operate together; neither dominates. Clear drafting will usually decide the point.*
3. ***Eco World-Ballymore Embassy Gardens Company Ltd v Dobler UK Ltd*** **[2021] EWHC 2207 (TCC)** [54] – The court asks what a reasonable person, with the relevant background knowledge at the time, would have understood the parties to mean. Mrs Justice O'Farrell summarised the modern approach, requiring consideration of:
   (i) the natural and ordinary meaning of the clause;
   (ii) other relevant provisions;
   (iii) the purpose of the clause and the contract;
   (iv) the facts and circumstances known or assumed at the time; and
   (v) commercial common sense;
   whilst (vi) excluding any subjective intentions (commercial common sense cannot be used to rewrite an unambiguous bargain)—consistent with ***Arnold v Britton*** [2015] UKSC 36 per Lord Neuberger [15-23], ***Rainy Sky*** [2011] UKSC 50 per Lord Clarke [21-30], and ***Chartbrook*** [2009] UKHL 38 per Lord Hoffmann [14-15, 20-25].
4. ***EE v Mundio*** ***[2016] EWHC 531 (TCC)*** [29, 30, 46, 67] – The contract must be read as a coherent whole, not clause-by-clause in isolation.
5. ***A & V Building Solutions Ltd v J & B Hopkins Ltd*** **[2023] EWCA Civ 54** [46, 56, 57] – Interpretation should give meaning and work to all provisions; none should be treated as redundant. If interim payment provisions were permitted to continue post-termination regardless of express limits, the final payment machinery common to standard forms would become surplusage—an outcome the courts will resist.
6. ***ICE Architects Ltd v Empowering People Inspiring Communities*** **(Rev1) [2018] EWHC 281 (QB)** [12-13, 15, 19, 21-23] – The court seeks the **objective intention** of the parties as expressed in the contract, not subjective expectations.

3. **Interim Payments Do Not Continue Beyond Their Express Life**
   1. ***Balfour Beatty Regional Construction Ltd v Grove Developments Ltd*** **[2016] EWCA Civ 990** [39]– *"the court will not, indeed cannot, use the canons of construction to rescue one party from the consequences of what that party has clearly agreed*".
   2. Where a contract defines the duration or limits of interim payments, **no implied right exists to extend them**. This decisively undermines arguments that interim payment regimes continue merely because works—or disputes—continue after the contractual trigger has passed.

4. **The High Threshold for Valid "Smash and Grab" Applications**

The "smash and grab" phenomenon is a product of the post-2011 statutory notice regime and the severe consequences of technical non-compliance. Once parties appreciated that the absence of a valid payment notice or payless notice could entitle a contractor to the full amount applied for—irrespective of true value—disputes increasingly shifted away from valuation and towards formal validity, timing and content.

That shift explains the courts' repeated insistence on clarity. This is not formalism for its own

sake: it is a response to the potentially draconian consequences of the regime. If a failure to serve a compliant notice can trigger immediate liability for the full applied sum, then the document said to trigger that regime must unmistakably communicate that it is doing so.

1. ***Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd*** **[2017] EWHC 17 (TCC)** [37]– A **high threshold** applies before an employer is exposed to automatic payment liability.
2. ***Henia Investments Inc v Beck Interiors Limited*** **[2015] EWHC 2433 (TCC)** [17]– An application must clearly state **what it is, what is claimed, and when it is due**, so the recipient knows how to respond.
3. ***Jawaby Property Investment Limited v The Interiors Group Limited*** **[2016] EWHC 557 (TCC)** [59]– Validity depends on **form, substance and intent**, all free from ambiguity.
4. ***Caledonian Modular Ltd v Mar City Developments Ltd*** **[2015] EWHC 1855 (TCC)** [37] – *"If the employer is to be put at risk that a failure to serve a payless notice at the appropriate time during the payment period will render him liable in full for the amount claimed, he must be given reasonable notice that the payment period has been triggered in the first place."*

Synthesis: the harsher the automatic consequences, the higher the bar for clarity and certainty in the document said to trigger them. The courts are not hostile to the statutory payment regime, but they are plainly hostile to ambush. A party seeking to rely on the notice machinery must make it obvious—on the face of the document and in its context—that the payment regime has been engaged.

5. How this plays out under NEC3 and NEC4

Under NEC3 and NEC4 ECC, termination does not merely interrupt the assessment cycle: it **formally switches the contract from the interim payment regime in clauses 50–51 to a termination and final assessment regime under clauses 90–94 and clause 53**.

Under clause **50.1**, the Project Manager assesses the amount due at each assessment date only until either (a) the Defects Certificate is issued or (b) a **termination certificate** is issued. Termination therefore **automatically brings the interim assessment cycle to an end**. Clause **51** then provides only for certification and payment of what has been assessed under that regime — it does not create any free-standing right to payment divorced from the assessment machinery.

Once termination occurs under clause **90**, the contract moves into the termination code in clauses **90–94**. The Project Manager is required to issue a **termination certificate**, and the financial consequences are dealt with by a **termination assessment**, which is based on the contractual valuation rules (including Defined Cost and the Price for Work Done to Date, depending on the termination ground and main option). That termination assessment then feeds directly into the **final assessment** mechanism under clause 53.1, which must be carried out **within 13 weeks of the termination certificate** (or 4 weeks after the Defects Certificate, if later).

Crucially, clause **53** is not a continuation of the interim regime: it is a **replacement, final accounting code**. The final amount due is assessed and certified once, and (subject to the dispute resolution machinery in clause 53.3) becomes **conclusive**.

The structural consequence is decisive. After termination:

- The **clause 50/51 interim payment machinery is switched off** by clause 50.1.

- **Entitlement flows through the termination certificate and the clause 53 final assessment**, not through interim-style applications.
- Any attempt to advance a post-termination "smash and grab" claim by repackaging an interim assessment as a payment notice runs straight into the same problem identified in *Henry Boot*: **certification and assessment remain the contractual gateway to entitlement**.

In NEC terms, therefore, termination operates exactly as the case law suggests it should: it **displaces the periodic payment regime and replaces it with a bespoke, self-contained final accounting mechanism**. Unless the contract is amended in an unusually explicit way, notice-based ambush arguments are structurally inconsistent with the NEC termination architecture itself.

Why NEC is even more hostile to post-termination smash & grab than JCT
Under JCT, termination contractually switches off the interim payment regime and replaces it with a party-prepared termination account under clause 8.12: "no further sums shall become due… otherwise than in accordance with this clause". That alone prevents any post-termination interim application from founding a "smash and grab".
NEC goes further. Under NEC4 ECC, assessment dates stop when a termination certificate is issued (cl 50.1), and payment is thereafter governed exclusively by the Project Manager's termination assessment under clauses 90–94 and 93, based on Defined Cost. There is no surviving contractor-driven application or notice cycle at all. The statutory payment notice regime has nothing left to attach to.
In short: JCT replaces interim payments with a different accounting mechanism; NEC replaces them with a different decision-maker. Both extinguish smash & grab. NEC does so more completely.

Key Takeaway

Across these authorities, several consistent themes emerge:

1. ***Payment is contractual, not automatic**.*
2. ***Certification can be a condition precedent** to entitlement.*
3. ***Termination commonly displaces interim payment regimes**, replacing them with final assessment machinery.*
4. ***No implied rights arise** where the contract is silent or has defined endpoints.*
5. ***"Smash and grab" claims demand precision:** clarity, compliance and unambiguous triggering of the notice regime.*

Taken together, these cases reinforce a fundamental proposition:

Termination is not a procedural inconvenience. It is a legal reset.

For adjudicators and practitioners, the authorities above provide a disciplined framework for analysing post-termination payment disputes—particularly under NEC contracts. They reward careful drafting, structured analysis and respect for contractual machinery, while limiting attempts to convert technical failures into windfall entitlements.

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