**RIGHT QUESTION, WRONG ANSWER**

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‘*As long as the answer is right, who cares if the question is wrong?*’

Norton Juster, *The Phantom Tollbooth*, Chapter 12, *Formulating Hypotheses*

**Introduction**

1. Cornwall House, constructed between 1912 and 1915, was originally intended to be [His Majesty's Stationery Office](https://en.wikipedia.org/wiki/Office_of_Public_Sector_Information), but was used from its completion as the King George Hospital due to the onset of the Great War. After 1920 it was used as government offices and was eventually purchased by King’s College London during the 1980s. It now forms part of that institution’s Waterloo campus, refurbishment having taken place between 1998 and 2000, when it was reopened as the Franklin-Wilkins Building, named after [Rosalind Franklin](https://en.wikipedia.org/wiki/Rosalind_Franklin) and [Maurice Wilkins](https://en.wikipedia.org/wiki/Maurice_Wilkins) for their roles in the discovery of the structure of deoxyribonucleic acid. The mechanical works were begun by a subcontractor, Dahl-Jensen (UK) Limited, who left the site after the main contractor, Bouygues (UK) Limited, had purported to determine Dahl-Jensen’s employment under the express terms of the subcontract. Dahl-Jensen claimed various sums from Bouygues and began an adjudication against it. Mr William Gard, a solicitor, was appointed adjudicator and made a decision in Dahl-Jensen’s favour of £207,741. In doing so, he deducted sums paid that excluded retention from a gross sum that included retention. The works had not been completed at the time of the adjudication, so no retention would in law have been due to Dahl-Jensen. Nevertheless, the effect of the adjudicator’s calculation was to release the retention to them, with the further consequence of the net balance between the parties being in favour of Dahl-Jensen instead of Bouygues.

***Bouygues* at First Instance**

1. Two expert valuation cases were cited to Dyson J upon Dahl-Jensen’s application for summary judgment to enforce the decision,[[1]](#footnote-1) *Jones v Sherwood Computer Services Plc* [[2]](#footnote-2) and *Nikko Hotels (UK) Ltd, v. MEPC plc*.[[3]](#footnote-3) Dyson J said at [23] that there was ‘a reasonably close analogy’ between those expert valuation cases and adjudication cases. Knox J had said in *Nikko* that if an expert ‘has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity.’ Dyson J said in *Bouygues* at [25]:

‘If the mistake was that [the adjudicator] decided a dispute that was not referred to him, then his decision on that dispute was outside his jurisdiction, and of no effect. It is analogous to the valuer departing from his instructions in a material respect or answering the wrong question. But if the adjudicator decided a dispute that was referred to him, but his decision was mistaken, then it was and remains a valid and binding decision, even if the mistake was of fundamental importance.’

1. He did not think that there was any dispute that this was the correct approach to be followed ([26]). He held there was not a mistaken decision to deal with or purport to deal with a dispute that was outside the adjudicator’s decision ([27] – [28]):

‘To use the language of the expert valuation cases, he was doing precisely what he had been asked to do, and was answering the right question, but he was doing so in the wrong way.’

As to the point that to enforce a decision which was plainly erroneous, Bouygues would suffer an injustice, and this would bring the adjudication scheme into disrepute, he said (at [35]):

 ‘It is inherent in the scheme that injustices will occur, because from time to time, adjudicators will make mistakes. Sometimes those mistakes will be glaringly obvious and disastrous in their consequences for the losing party. The victims of mistakes will usually be able to recoup their losses by subsequent arbitration or litigation, and possibly even by a subsequent adjudication. Sometimes, they will not be able to do so, where, for example, there is intervening insolvency, either of the victim or of the fortunate beneficiary of the mistake.’

***Bouygues* on Appeal**

1. On appeal a stay was granted of execution of the judgment given in Dahl-Jensen’s favour by Dyson J.[[4]](#footnote-4) This seems to have been because, although the point was not taken by Bouygues, Dahl –Jensen was in liquidation and judgment should not have been given at all, with the claim and counterclaim to be resolved in the liquidation. Nevertheless, both Buxton and Chadwick LJJ addressed the mistake point. Buxton LJ cited the dictum of Knox J in *Nikko*, saying that he did not understand that principle to be disputed ([13]) and that ([15]):

‘unfairness in a specific case cannot be determinative of the true construction or effect of the scheme in general.’

Chadwick LJ said that adjudication might be looked upon as a method of providing a summary procedure for the enforcement of payment provisionally due under a construction contract ([26]), referred to *Nikko* and stated that notwithstanding that the adjudicator appeared to have made an error that was manifest on the face of his calculations, it was binding on the parties ([28]).

**The *Nikko* Doctrine**

1. It will be noted that heavy reliance was placed by all of the judges involved in this case, both at first instance and on appeal, on the supposed analogy with expert valuation and the *Nikko* doctrine. These points will be returned to but, for the moment, I want to look at some of the decisions that came after *Bouygues* and the basis upon which they proceeded. First of all, so far as the Court of Appeal is concerned, in *C & B Scene Concept Design Ltd v. Isobars Ltd*, Stuart-Smith LJ said:[[5]](#footnote-5)

‘Errors of procedure, fact or law are not sufficient to prevent enforcement of an adjudicator’s decision by summary judgment. The case of *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 522 is a striking example of this. The Adjudicator had made an obvious and fundamental error, accepted by both sides to be such, which resulted in a balance being owed to the contractor, whereas in truth it had been overpaid. The Court of Appeal held that the Adjudicator had not exceeded his jurisdiction, he had merely given a wrong answer to the question which was referred to him. And, were it not for the special circumstances that the claimant in that case was in liquidation, so that there could be no fair assessment on the final determination between the parties, summary judgment without a stay of execution would have been ordered.’

He went on to refer to the approval by Buxton LJ of the *Nikko* test and said at [30]:

‘… the Adjudicator’s decision, albeit he may have made errors of law as to the relevant contractual provisions, is still binding and enforceable until the matter is corrected in the final determination.

1. In *Levolux AT Ltd v Ferson Contractors Ltd*[[6]](#footnote-6)Mantell LJ referred to *Bouygues* as follows:

‘The case of *Bouygues* is a good illustration of the scheme put into practice. The adjudicator had made what was acknowledged to be an obvious and fundamental error which resulted in the contractor recovering monies from the building owner whereas in truth the contractor had been overpaid. The Court of Appeal held that since the adjudicator had not exceeded his jurisdiction but had simply arrived at an erroneous conclusion, the provisional award should stand.’

He then noted that the Court had adopted the test formulated by Knox J in *Nikko*.

1. Finally, in *Carillion Construction Ltd. v. Devonport Royal Dockyard Ltd,*[[7]](#footnote-7) the judgment of the Court referred to a summary of relevant principles set out by Jackson J at first instance that included the proposition that the Court of Appeal had ‘repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law’. The Court did ‘not understand there to be any challenge’ to that general principle.
2. A significant point emerging from these decisions is that the impregnability of an adjudicator’s decision rested on two assumptions, namely:
	1. That the law relating to expert valuations was applicable, at least by analogy, and
	2. That the *Nikko* test constituted the correct approach to expert valuations.

**The TCC Jurisdiction on Enforcement**

1. Meanwhile, at first instance, the Technology and Construction Court began defining its jurisdiction in relation to enforcement proceedings generally. An early and important decision in this respect was *Alstom Signalling Ltd v Jarvis Facilities Ltd*.[[8]](#footnote-8) In that case On 18 March 2004 Alstom commenced an action against Jarvis (claim 85) asking for various declarations following an adjudicator’s decision against it. A week later, Jarvis started its action (claim 100) to enforce the adjudicator's decision that Jarvis was to be paid the amount claimed in its Application 32, i.e. £1,328,350 plus interest. On Jarvis' application the times were as usual shortened, so on 8 April 2004 Jarvis issued an application under Part 24 for summary judgment for the amount claimed. On 7 April 2004 Jarvis also issued an application to strike out certain paragraphs of Alstom's particulars of claim in action 85 and for an order that action 85 should be stayed until judgment was given and the determination of action 100. Both actions (85 and 100) came before the court. A Case Management Conference took place on 23 April 2004, adjourned to 4 May 2004. The hearing of Jarvis' application for summary judgment had by then been fixed for 28 May 2004. HHJ Humphrey LLoyd QC decided that as Alstom's case in action 85 constituted effectively its answer and defence (or its principal defence) to Jarvis' action 100 and the application for summary judgment, he should hear argument on it and on Jarvis' Part 24 application together.
2. In dealing with this point, Judge Lloyd said:

‘Once the court is seised of the case it has to take a course which saves expense and is expeditious. To proceed first to deal with the application for summary judgment, to allow it and then to track back and to determine the dispute that gave rise to it is not consistent with the principles of Part 1 of the CPR and it is not in the interests of both parties, when they can be satisfied in an expeditious and less expensive way. Similarly it may be prudent to defer an application to enforce or to stay a judgment if the point in dispute is to be decided soon. Transferring money for a limited period of time may not be sensible. Mr Bowdery suggested that to consider the point in question would effectively destroy the efficacy of adjudication. I disagree. Most adjudications are about issues of fact. In ordinary course of events, they will not be capable of being finally determined, even in this court or in a swift arbitration, before the application for summary judgment is normally heard. It is possible that, particularly where the point is one of law or otherwise capable of being tried early, a party might move with determination and speed and get in first, as it were (as Alstom has done). I do not believe that the court's powers are so circumscribed by the Act that, in an appropriate case, it cannot order that the dispute should be determined prior to or at the same time the application for enforcement is determined. It has happened before in this court. The interests of the parties are surely best served by such a determination and not by uncertainty. Alstom has a right to a determination of the points that it has raised, just as Jarvis has a right to have its application heard and to know if the decision is enforceable. The two can be decided at the same time.’

1. These observations were endorsed by Coulson J in *Walter Lilly & Co Ltd v DMW Developments Ltd*, where he said:[[9]](#footnote-9)

‘Subject to the nature and scope of the point in issue, and the amount of evidence or argument required to deal with it, the TCC endeavours to deal promptly with any dispute arising out of an adjudicator's decision. In that respect Mr. Lofthouse QC rightly drew my attention to the decision of His Honour Judge Humphrey Lloyd QC in *Jarvis Facilities Limited v. Alstom Signalling Limited* [2004] EWHC 1285 (TCC). That is the attraction of Part 8: it offers the means by which a dispute can be finally determined in a speedy and cost-effective way. But, of course, it is always necessary for a claimant who wants to avail himself of the possible short-cut of Part 8 to be able to demonstrate that the dispute in question fall within its relatively tight confines.’

1. The following year, Edwards-Stuart J had occasion to address *Bouygues* directly in *Geoffrey Osborne Ltd v Atkins Rail Ltd,*[[10]](#footnote-10) There were two applications before the court. Osborne sought to enforce an adjudication decision in its favour under Part 7 and Atkins sought declarations under Part 8 that the adjudicator had no jurisdiction to make the decision that he did and/or that the decision was plainly wrong and should be set aside and/or not enforced. The adjudicator had omitted to deduct amounts already included in respect of two items in Certificate No 35, with the result that he concluded that Osborne was owed £504,385 and ordered Atkins to pay that sum. In fact, it was common ground between the parties that since there had been included in the total sum certified in Certificate No 35 some £912,147 in respect of the two claims in issue, Osborne was not owed the sum that the adjudicator had ordered to be paid.
2. The position was complicated by the fact that Certificate No 35 showed a negative balance, namely that Osborne's work had been overvalued so that instead of further sums being owed to Osborne under the certificate, in fact Osborne was said to owe Atkins some £552,891. The upshot was that the correct result - on the adjudicator's own findings as to the value of the two claims and the other unchallenged figures in Certificate No 35 - was that Osborne had been overpaid by over £400,000, rather than being owed some £500,000 odd. The Court described the difference between the two positions as ‘both startling and stark’.
3. Strict application of the *Bouygues* doctrine as it was generally understood would seem to have demanded that summary judgment be entered for Atkins. But Edwards-Stuart J, by a careful analysis of *Bouygues* both at first instance and on appeal, was able to distinguish it on the following basis:
	1. Bouygues’s applications under Part 8 were just a vehicle for another way of attacking the adjudicator's award on the grounds of lack of jurisdiction.
	2. Bouygues was not seeking to obtain the court's ruling on a point of law or fact decided by the adjudicator, but was simply asserting - both in defence to the claim for summary judgment and in support of its own application for declarations - that the adjudicator had exceeded his jurisdiction because in effect he had decided a question that was not referred to him.
	3. There must have been an arbitration clause in the sub-contract (because Bouygues was applying for a stay under s 9 of the Arbitration Act 1996), with the result that any final determination of the issues decided by the adjudicator had to be by way of arbitration and not litigation. This could explain why the contractor could not and did not adopt the approach taken in the *Jarvis* case.
	4. The court was not prevented by the decision in *Bouygues* from entertaining an application that the court should reach a final decision on a question decided by the adjudicator, provided of course that it was a question that did not involve any substantial dispute of fact and was one that it could finally determine on the material before it.
4. It was held that Atkins was entitled to a declaration to the effect that the adjudicator was wrong to order payment of sums to Osborne in respect of his assessment of the value of its claims in payment application No 36 without taking into account and, if appropriate deducting from the amounts assessed, any sums that Atkins had paid or allowed to Osborne by the date of the Notice of Adjudication. Osborne's application for summary judgment was, however, granted in so far as it related to the adjudicator's award in respect of costs, together with interest in an amount to be assessed if not agreed, and the order for the payment of the adjudicator's fees. In *Pilon Ltd v Breyer Group PLC* [[11]](#footnote-11) Coulson J distinguished *Osborne* on the basis that the following ‘particular facts’ of *Osborne* were not present, namely:
	* + that the parties were expressly agreed that the issue that was the subject of the application under CPR Part 8 was a plain error by the adjudicator, and
		+ that there was no arbitration clause, and therefore the parties had agreed that the court could, if appropriate, give a final and binding decision on the matter that was the subject of the adjudicator's error.

In *TSG Building Services PLC v South Anglia Housing Ltd*[[12]](#footnote-12) the parties did not agree that there had been an error and Akenhead J granted a declaration was granted that the adjudicator had reached the wrong conclusion, although (as in *Osborne*) the adjudicator had had jurisdiction to decide what he did, so the successful applicant for the declaration still had to pay the adjudicator's fee.

1. Three recent decisions concerning the timing of payment have demonstrated the TCC’s willingness to exercise its jurisdiction to deal with decisions that are demonstrably wrong. The first is *Leeds CC v Waco UK Ltd*,[[13]](#footnote-13) where an adjudicator decided that Leeds should pay £484,759.50 on Waco’s Application 21, which it did as a condition of leave to defend on enforcement. In proceedings under CPR Part 8, Leeds sought declarations that Applications 21 and 22 were not valid, together with repayment. Edwards-Stuart J granted declarations that the applications were not valid and ordered repayment of the £484,759.50 with interest. The second is *Caledonian Modular Ltd v Mar City Developments Ltd*,[[14]](#footnote-14) in which Mar resisted enforcement, arguing that the court could grant a declaration as to the status of documents as part of the enforcement proceedings. Coulson J granted declarations that the documents were not a valid application for an interim payment, or a valid payee's notice, and that no sums were due in consequence of the adjudication. Finally, in *Henia Investments Inc v Beck Interiors Ltd*[[15]](#footnote-15) the adjudicator issued his decision on 3 August 2015 which was overall in the Employer's favour albeit on one issue he was in favour of the Contractor. Meanwhile Part 8 proceedings were issued by the Employer on 25 July 2015. The parties were ready to have the issues argued only 16 days later before the TCC. Akenhead J made declarations, including one that the Contractor's Application was not an effective or valid interim payment notice in respect of a later payment due date. This seems to be a rare example of a successful party seeking to reinforce its position by going to Court.
2. *Caledonian* is particularly noteworthy because Mar had not issued Part 8 proceedings. Coulson J pointed out that it is envisaged at paragraph 9.4.3 of the TCC Guide that separate Part 8 proceedings will not always be required in order for an issue to be decided at the enforcement hearing. It says:

‘It sometimes happens that one party to an adjudication commences enforcement proceedings, whilst the other commences proceedings under Part 8, in order to challenge the validity of the adjudicator’s award. This duplication of effort is unnecessary and it involves the parties in extra costs, especially if the two actions are commenced at different court centres. Accordingly there should be sensible discussions between the parties or their lawyers, in order to agree the appropriate venue and also to agree who shall be claimant and who defendant.  All the issues raised by each party can and should be raised in a single action. However, in cases where an adjudicator has made a clear error (but has acted within his jurisdiction), it may on occasions be appropriate to bring proceedings under Part 8 of the Civil Procedure Rules for a declaration as a pre-emptive response to an anticipated application to enforce the decision.’

1. Coulson J accepted that *Bouygues* represented the general rule and which would apply ‘in 99 cases out of 100’, but went on to say there was an exception if the issue was a short and self-contained point, which required no oral evidence or any other elaboration than that which was capable of being provided during a relatively short interlocutory hearing. In those circumstances the defendant might be entitled to have the point decided by way of a claim for a declaration.
2. There are two further points to be noted. The first is that oral evidence is sometimes received in enforcement proceedings. In *Able Construction (UK) Ltd v Forest Pty Development Ltd* the question arose as to the terms on which a payment had been made after the adjudication but before enforcement and Coulson J said:[[16]](#footnote-16)

‘It seems to me that, in enforcement proceedings such as this, the court's procedures ought to be flexible enough to ensure that the raising of a point of this kind can be addressed, if at all possible, straightaway. It is not generally acceptable for a party seeking to avoid judgment arising out of an adjudicator's decision to raise an issue which requires oral evidence, in the hope and expectation that this would mean that the determination of the enforcement claim would have to be adjourned. In my judgment, the right way to resolve such a short and self-contained point is to deal with it by way of oral evidence at the enforcement hearing.’

1. The second point is that the TCC has considered the correctness of an adjudication decision where there is an allegation of breach of natural justice. The development of the concept of the ‘non-material’ or ‘peripheral’ breach to accommodate the unrealistically tight timetable imposed by the legislation requires the courts to decide whether the decision is correct. Thus in *KNN Coburn LLP v. GD City Holdings Ltd*[[17]](#footnote-17) Stuart-Smith J held that an adjudicator’s failure to address a limitation of liability clause had not been material because on its correct interpretation it was inapplicable on the facts.

**Applicability of Expert Cases**

1. The recognition (or development) of the TCC’s jurisdiction to deal with short points is surely to be welcomed as a sensible and effective way of ensuring that justice is done between parties to an adjudication that has gone obviously wrong. It is, however, only necessary because of the adoption of the *Nikko* doctrine in *Bouygues*. But was the adoption of that doctrine the correct or even desirable approach? There has been support for this approach in other jurisdictions, such as that of New South Wales, where the Court of Appeal has said of an adjudicator’s role:[[18]](#footnote-18)

‘The position is, in my view, closely analogous to that of an expert by whose determination the parties have agreed to be bound (see, for example, *A Hudson Pty Ltd v Legal & General Life of Aust Ltd* (1985) 1 NSWLR 701). This approach was confirmed by the English Court of Appeal in *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] EWCA Civ 507; [2000] BLR 522 (although, for the reasons given in para [41] above, care needs to be taken in seeking to apply decisions on a different legislative scheme).

…

I therefore conclude that, where the determination of a dispute submitted to an adjudicator under the Act requires the adjudicator to consider issues of law, the adjudicator will not fall into jurisdictional error simply because he or she makes an error of law in the consideration and determination of those issues.’

1. The first point to be made is that an expert valuation is not the same thing as an adjudication. The nearest equivalent to an expert valuation is that of a certification under a construction contract. Thus in *Ackerman v Ackerman*[[19]](#footnote-19) Vos J said that it was well established that an expert is not bound to observe all the rules of natural justice, though he does have an implied obligation of fairness, relying on the dictum of Megarry J in *Hounslow LBC v. Twickenham Garden Developments Ltd* in relation to an architect acting as certifier: ‘*[h]e must throughout retain his independence in exercising that judgment; but provided he does this, I do not think that, unless the contract so provides, he need go further and observe the rules of natural justice; giving due notice of all complaints and affording both parties a hearing*’.[[20]](#footnote-20)
2. Vos J also pointed out[[21]](#footnote-21) that in *Amec Civil Engineering Ltd v. Secretary of State for Transport*,[[22]](#footnote-22) having discussed the line of authority leading up to and following the dictum of Megarry J in *Hounslow*, May LJ (with whom Hooper LJ agreed) said this at [48]:

‘*There will be circumstances in which an engineer, using his knowledge of the course of the contract and its progress and incidence, can properly make a decision under clause 66 on request from one of the parties without formal reference to the other. There will be other occasions when he needs information from one or both of the parties.* ***If he entertains representations from one party over and above those inherent in making the request for a decision in the first place, fairness may require him to invite representations from the other party. But I would not go so far as to say that this is a straitjacket requirement in all circumstances. He may be well aware, as in the present case, what the other party's position is****. I do not consider that the letter of 6 December should be seen as containing representations which obliged the engineer to invite balancing representations from Amec*" (emphasis added).

1. Another significant difference, which I deal with in more detail below, is that immunity from suit in the absence of bad faith is conferred on an adjudicator but not on an expert. As I hope to demonstrate, the removal of expert’s and valuer’s immunity was the basis of what became the *Nikko* doctrine.
2. So expert valuation is not a ‘good fit’ with adjudication. The former deals with function very similar to that of the valuation of construction works by a certifier, whereas the latter usually (but not always) deals with the determination of a dispute arising from such a valuation and such disputes will often require the determination of points of law. Different considerations apply because of an adjudicator’s immunity. In addition, although natural justice is tempered by the procedural requirements of adjudication, it is nevertheless there at all times.

**The Meme**

1. The second point is the nature of the *Nikko* doctrine itself. A meme is an idea or element of social behaviour passed on through generations in a culture, especially by imitation and I wonder whether the doctrine falls into that category. Like many shorthand phrases, ‘right question, wrong answer’ promises more than it delivers and may not actually make much sense. When I first heard it, I was reminded of the title of a song, first recorded by Douglas Finnell and his Royal Stompers in 1929, but made more famous the following year by Speckled Red (Rufus Perryman) and again in1950 by his younger brother Piano Red (Willie Perryman) who also recorded yet another successful version in 1960 under the name Dr Feelgood and the Interns: *You Got the Right String, Baby, But the Wrong Yo-yo*.[[23]](#footnote-23) Here is a sample of the lyrics:

Went on down to the doctor
To get this string put on
He turned around
And put the string on wrong
No need a-knockin' on nobody's do'
You got the right string, baby
But the wrong yo-yo

1. It sounds slightly risqué, but it isn’t really and it makes little sense. It is said to be based on Virginia Liston’s hit of 1924, *You’ve Got the Right Key But the Wrong Keyhole*, which is a bit more straight to the point.[[24]](#footnote-24) This in turn seems to have been based on another song *You’re in the Right Church But the Wrong* Pew from 1908. The line ‘You're in the right church, brother, but the wrong pew’ occurs in Bessie Smith’s *Sam Jones* Blues (1923).These titles all sound good, but do they mean anything and, if so, what?

**Is *Nikko* Right?**

1. I raise this question because *Nikko* has been doubted and is difficult to reconcile with the leading House of Lords authority on expert determination. Knox J relied in *Nikko* on *Jones v Sherwood Computer Services Ltd*,[[25]](#footnote-25) a case decided in 1989, arising out of an expert determination by an accountant of the amount of sales for the purpose of the valuation of shares. The accountant had made his determination in the form of a non speaking certificate. Dillon LJ giving the leading judgment took as ‘the starting point for the modern statement of the law’ the judgment of Lord Denning MR in *Campbell v Edwards*[[26]](#footnote-26). In that case Lord Denning MR had said:

 ‘In former times (when it was thought that the valuer was not liable for negligence) the courts used to look for some way of upsetting a valuation which was shown to be wholly erroneous. They used to say that it could be upset, not only for fraud or collusion, but also on the ground of mistake: see for instance what I said in *Dean v. Prince* [1954] Ch. 409, 427. But those cases have to be reconsidered now. I did reconsider them in the *Arenson* case in this Court: [1973] Ch. 346, 363. I stand by what I there said. It is simply a matter of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives a valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything.’

 What Denning LJ had said in *Dean v Prince* was:

 ‘In considering this matter we ought, I think, to put on one side the cases about the personal liability of a valuer. They show that he is not liable to an action unless he is dishonest, see *Pappa V Rose*[[27]](#footnote-27) and *Finnegan v Allen*.[[28]](#footnote-28) But those cases have no application where we are considering the validity of the valuation itself. It can be impeached not only for fraud but also for mistake or miscarriage. That was made clear by Sir John Romilly MR in *Collier v Mason*.[[29]](#footnote-29) For instance, if the expert added up his figures wrongly; or took something into account which he ought not to have taken into account, or conversely: ***interpreted the agreement wrongly***: or proceeded on some erroneous principle. In all those cases the court will interfere. Even if the court cannot point to the actual error, nevertheless, if the figure itself is so extravagantly large or so inadequately small that the only conclusion is that he must have gone wrong somewhere, then the court will interfere in much the same way as the Court of Appeal will interfere with an award of damages if it is a wholly erroneous estimate. These cases about valuers bear some analogy with the cases on domestic tribunals, except of course that there need not be a hearing. On matters of opinion, the courts will not interfere; but for mistake of jurisdiction or of principle, ***and mistake of law, including interpretation of documents***, and for miscarriage of justice, the courts will interfere: see *Lee v Showmen’s Guild of Great Britain*’[[30]](#footnote-30) (emphases added).

1. In his dissenting judgment in *Arenson* Lord Denning MR had drawn a distinction between the position at common law and that in equity. He said that in the former case, even if a valuer made a mistake in his calculations or makes the valuation on the wrong basis, the parties were bound, although he confessed to not being sure of the position where the valuer gave reasons. He went on to say that the position might be different in equity. The principle underpinning *Campbell v Edwards*, therefore, seems to have been that the removal of a valuer’s immunity as a result of the decision in *Arenson* in the House of Lords meant that there was no reason for the courts to continue to exercise such a wide jurisdiction to correct errors.
2. Nevertheless, it has always been accepted that the courts would intervene. The difficulty has been in identifying the ambit of that jurisdiction. In *Jones v Sherwood* Dillon LJ said:

‘On principle, the first step must be to see what the parties have agreed to remit to the expert, this being, as Lord Denning M.R. said in *Campbell v Edwards*, a matter of contract. The next step must be to see what the nature of the mistake was, if there is evidence to show that. If the mistake made was that the expert departed from his instructions in a material respect – e.g., if he valued the wrong number of shares, or valued shares in the wrong company, or if, as in *Jones (M) v Jones (RR)* [1971] 1 WLR 840, the expert had valued machinery himself whereas his instructions were to employ an expert valuer of his choice to do that – either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do.’

1. The House of Lords case *Mercury Communications Ltd v The Director General of Telecommunications*[[31]](#footnote-31) concerned a licence to run telecommunications systems under the Telecommunications Act 1984, which provided that the Director General of Telecommunications, if requested by the parties, could make a determination where the parties were unable to agree in negotiations for a new agreement. It was held that the courts had power to determine the proper interpretation of the phrases ‘fully allocated costs’ and ‘relevant overheads’ because the parties had intended that the Director’s determination was to deal with matters and principles as correctly interpreted. This was because the relevant clause limited the determination to matters which the Director could have determined under a two specified conditions and on the principles set out in those conditions. Lord Slynn, who gave the leading speech in the House of Lords, referred to *Jones v Sherwood* and said:

‘What has to be done in the present case under condition 13, as incorporated in clause 29 of the agreement, depends upon the proper interpretation of the words "fully allocated costs" which the Respondents agree raises a question of construction and therefore of law, and "relevant overheads" which may raise analogous questions. If the Director General misinterprets these phrases and makes a Determination on the basis of an incorrect interpretation, he does not do what he was asked to do. If he interprets the words correctly then the application of those words to the facts may in the absence of fraud be beyond challenge. In my view when the parties agreed in clause 29.5 that the Director General's Determination should be limited to such matters as the Director General would have power to determine under condition 13 of the British Telecommunication's licence and that the principles to be applied by him should be "those set out in those conditions" they intended him to deal with such matters and such principles as correctly interpreted. They did not intend him simply to apply such meaning as he himself thought they should bear. His interpretation could therefore be reviewed by the Court.’

1. This echoed the dissenting judgment of Hoffman LJ in the Court of Appeal,[[32]](#footnote-32) where he said:

‘Where the decision-maker is asked to decide in accordance with certain principles, he must obviously inform himself of those principles and this may mean having, in a trivial sense, to “decide” what they mean. It does not follow that the question of what the principles mean is a matter within his decision-making authority in the sense that the parties have agreed to be bound by his views. Even if the language used by the parties is ambiguous, it must (unless void for uncertainty) have a meaning. The parties have agreed to a decision in accordance with this meaning and no other. Accordingly, if the decision-maker has acted upon what in the court's view was the wrong meaning, he has gone outside his decision-making authority. Ambiguity in this sense is different from conceptual imprecision which leaves to the judgment of the decision-maker the question of whether given facts fall within the specified criterion.’[[33]](#footnote-33)

1. *Mercury* is clear authority, then, for the proposition that an error of law in the form of misconstruction of a document by an expert in the course of his determination may be reviewed by the court. This sits very uneasily with the analysis by Stuart-Smith LJ in *C & B Design*, relying on the *Nikko* test, that errors of law as to the relevant contractual provisions did not prevent a decision being binding and unenforceable. Lord Neuberger MR referred to mistakes of law in *Barclays Bank Plc v Nylon Capital LLP*,[[34]](#footnote-34) where he said that an expert’s contractually agreed instructions could, in the absence of a provision or indication to the contrary, be said to be to value shares ***in accordance with the legal rights and obligations they carry with them***. To value shares on the assumption that they could not be freely sold, when, as a matter of law, they could be, would not, it could be said with force, result in a valuation of the shares according to the contractual arrangement between the parties. He continued:

‘Accordingly, despite the fact that it has, as Thomas LJ says, been frequently cited, I do not consider that Knox J's observation in *Nikko Hotels v MEPC plc* [1991] 2 EGLR 103, 108, as quoted above in para 31, can safely be relied on. Of course, the parties may expressly or impliedly agree, either in their original contract or thereafter, that, if the valuation exercise entrusted to an expert "necessarily involves the solution of a question of construction, the expert's decision will be final and conclusive and, therefore, not open to review or treatment by the courts", but I do not consider that this by any means necessarily represents the general rule. After all, if there is a dispute between the parties as to the number of shares owned by the party whose shares are to be valued, a mistaken conclusion on the point by the expert would, according to Dillon LJ, render the valuation assailable in court, whereas, according to Knox J's approach, the conclusion would appear to be unassailable as being one which "necessarily" had to be decided in order to effect the valuation.’

1. A little further on in his judgment at [69], the Master of the Rolls said:

‘[I]t seems to me that, where a contract requires an expert to effect a valuation which is to be binding as between the parties, and there is an issue of law which divides the parties and needs to be resolved by the expert, it by no means follows that his resolution of the issue is incapable of being challenged in court by the party whose argument on the issue is rejected. As Hoffmann LJ said in *Mercury v The Director General* [1994] CLC 1125, 1140, "The parties have agreed to a decision in accordance with this meaning and no other. Accordingly, if the decision-maker has acted upon what in the court's view was the wrong meaning, he has gone outside his decision-making authority", and, it seems to me to follow that the court can review, and, if appropriate, set aside or amend his decision. While certainty and clarity are highly desirable, it is, regrettably, inappropriate to consider that issue further in this case.’

1. It must be acknowledged has been expressed about these remarks. In *Premier Telecom Communications Group Ltd v Webb*,[[35]](#footnote-35) HHJ Havelock-Allen QC had said as part of a summary of the law at first instance:

‘Where the expert has made an error on a point of law which is not delegated to him, the error means that the determination will be set aside. (It has yet to be decided whether an error by the expert on *any* point of law arising in the course of implementing his instructions will also justify setting aside the determination – see Lord Neuberger MR in *Barclays Bank v Nylon Capital*).’

In the Court of Appeal, Moore-Bick LJ (with whom McFarlane and Floyd LJJ agreed) was ‘content to accept’ the learned judge’s summary but entered this caveat:

‘My only reservation concerns the suggestion that an error by the expert on *any* point of law arising in the course of implementing his instructions might justify setting aside the determination. The judge treated this as an open question on the basis of certain comments made by Lord Neuberger MR in *Barclays Bank v Nylon Capital*. It is necessary to remember, however, that those comments were obiter and that neither of the other members of the court expressed agreement with them. It is possible that the parties might by their agreement define the terms of the expert's mandate in such a way that any error of law on his part rendered his decision invalid, but in many cases to do so would risk undermining the whole purpose of the reference. Ultimately, however, as Lord Denning observed in *Campbell v Edwards* [1976] 1 W.L.R. 403, 407 (and as Lord Neuberger himself was at pains to emphasise in *Barclays Bank v Nylon Capital*), it all comes down to the construction of the contract under which the expert was appointed to act. Only by construing the contract can one identify the matters that were referred for his decision, the meaning and effect of any special instructions and the extent to which his decisions on questions of law or mixed fact and law were intended to bind the parties.’

1. The decision went against the challenge to the expert’s valuation and it is worth highlighting the following part of the judgment of Moore-Bick LJ at [11] and [12]:

’11. In the present case the appellants have identified four respects in which they say that Grant Thornton went wrong so that their valuation does not bind the parties. I shall in due course deal with each of them individually, but before doing so it is convenient to consider one submission that to a greater or lesser degree underpinned the whole of their case, namely, that the parties intended that the court should decide all questions of law bearing on the valuation, with the result that on none of them was the valuers' decision intended to be binding. The references in the letter of enquiry to proceedings under section 994 of the Companies Act 2006 were said to support that conclusion.

12. I am unable to accept that submission, which in my view states the position far too broadly. Questions of law pervade many of the issues that are likely to arise on a valuation of this kind and it is inherently unlikely that the parties intended that on none of them should the valuer's view be binding. Parties who refer a matter to an expert for decision usually do so in order to obtain a quick and relatively inexpensive decision of a binding nature on a matter that calls for informed judgment. Often that involves the application of principles and expressions that are familiar and well understood in the particular field of endeavour, whatever that may be. In such cases it would be surprising if they had intended the expert's decision to be of no effect if it could be shown that he had made a mistake in the application of some well recognised principle. Parties who refer a dispute to an expert must be taken to have recognised that mistakes may be made, both of fact and law, but they are prepared to take that risk because they place a high degree of confidence in their chosen expert.

1. This approach is quite difficult to reconcile with *Barclays*. We gain little assistance from the more recent case of *Begum v Hossain*,[[36]](#footnote-36) which concerned a valuation made pursuant to a compromise, Roth J, who delivered the leading judgment, said that there was no dispute as to the law concerning the circumstances in which an expert’s determination could be challenged and cited *Jones* and *Veba*.[[37]](#footnote-37) The case proceeded on the basis of an alleged departure from instructions. It was held that the expert had failed to consider some of the documents which he was required to look at by the terms of the settlement.

**Summary Thus Far**

1. Let me draw the yo-yo strings together (as it were), and make the following points:
	1. The equation of or analogy between expert valuation (or determination) and adjudication does not stand serious scrutiny.
	2. Even if that equation or analogy were appropriate, the ‘right question, wrong answer’ test does not adequately describe the ambit of the inquiry needed to be made.
	3. If an expert misinterprets a document, his determination can be reviewed by the court unless the construction of the document forms part of his mandate.
	4. In any event, the court has jurisdiction in many cases to review adjudication decisions before or upon enforcement.

**Disadvantages of Current Approach**

1. What is wrong with to the present arrangements for dealing with errors in adjudication decisions? Agreed, the practice of the court intervening to determine a short and self-contained issue requiring no oral evidence during a short interlocutory hearing, is a sensible and pragmatic solution to the problems raised by the *Bouygues* principle. It does, however, have the following unsatisfactory features:
* It cannot be invoked where the parties have agreed to final determination of their disputes by arbitration.
* Its adoption depends on the exercise of the court’s discretion in the unsuccessful party’s favour.
* The unsuccessful party, even if it prevails before the court, will often end up paying the adjudicator’s fees.[[38]](#footnote-38)
* The exclusion of oral evidence is illogical where it could be short and the costs involved are proportionate to the amount at stake.
* It is inconsistent with the court’s approach to natural justice challenges.

 **A New Test?**

1. These difficulties suggest that the continued application of the *Nikko* test is inappropriate for adjudication enforcement proceedings. Given the various different formulations of the ‘departure from instructions or mandate’ point, devising a new test may be no easy task. Nevertheless, it should be attempted, because adjudication is sui generis: it is neither expert determination nor is it arbitration. One test could be that of manifest error. I recognize that the source of ‘manifest error’ in relation to expert determinations is that of express contractual provision and that there is no such provision in the HGCRA 1996. I also acknowledge that *Garner’s Legal Dictionary* states that ‘manifest’ is one of those vague terms by which lawyers ‘create an appearance of continuity, uniformity and definiteness [that does] not in fact exist’. What I am suggesting is that adjudication has special features that require special treatment. Particular features are the ‘pay now, argue later’ dogma and the ‘temporary finality’ concept, combined with the necessity to retain confidence in the system.
2. So far as the pay now and temporary finality features are concerned, it will be readily accepted that adjudication is a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement.[[39]](#footnote-39) There is, of course, a parallel to be drawn with expert determination. But consider the following passage from the judgment of Rix LJ in *AIC Ltd v ITS Testing Services (UK) Ltd ‘The Kriti Palm’*:[[40]](#footnote-40)

’44. Two further points may be made about *Veba Oil*.[[41]](#footnote-41) One is that, although it is unnecessary to find a further reason for the invalidity of the certificate, I would have thought it reasonably obvious that the statement on the certificate that D323 had been the RVP test method employed rendered this also a case of "manifest error". Secondly, it is relevant to refer to what Simon Brown LJ said by way of background to the specific problem in that case:

 "15. Before turning to the authorities most closely in point, it is convenient first to recognize two principles which inevitably touch on the issue. The first, and that on which Mr. Nolan understandably places reliance, is to be found in Lord Justice Cairns' judgment in *Toepfer v. Continental Grain Co.*, [1974] 1 Lloyd's Rep. 11 at p. 14:

 When parties enter into a contract on terms that the certificate of some independent person is to be binding as between them, it is important that the Court should not lightly relieve one of them from being bound by a certificate which was honestly obtained and not vitiated by fraud or fundamental mistake on the part of the certifier. When, for instance, as in this case, the certificate called for by the contract is one relating to the quality of the goods sold, the business purpose is to avoid disputes about quality, and that purpose is defeated unless it is made difficult for a party to go behind a valid certificate.

 16. The second, clearly countervailing, principle is surely this: inspectors should be astute to comply with their instructions and, if they depart from them, there should not then be much scope for dispute and litigation as to whether their determination is nevertheless binding. In short, the interests of finality cut both ways although, of course, one bears in mind that if a determination is set aside the underlying dispute is left unresolved."’

The countervailing principle applicable to adjudication is similar: the interests of temporary finality cut both ways.

1. This last point is of particular importance and is the reason why the courts have felt it necessary to intervene in cases of breach of natural justice and the engineered appointment or exclusion of a particular adjudicator. There can be little confidence in a system that permits a party to enforce a decision where that party acknowledges that ‘[t]he Adjudicator had made an obvious and fundamental error’ to use the description of *Bouygues* by Stuart-Smith LJ in *C & B Design*.
2. What would the application of a manifest error test involve? In *Veba[[42]](#footnote-42)* Simon Browne LJ referred to the fact that Morison J had previously considered the meaning of "manifest error" in *Conoco (UK) Ltd v Phillips Petroleum*,[[43]](#footnote-43) where, following *dicta* in earlier cases, he held that manifest error referred to: ‘oversights and blunders so obvious *and obviously capable of affecting the determination* as to admit of no difference of opinion’. In *Axa Sun Life Services Plc v Campbell Martin Ltd* at [72][[44]](#footnote-44) Stanley Burnton LJ said that ‘manifest’ might mean ‘apparent on the face of the document’, as where the document was a certificate required under the contract. He continued:

‘If so, it may be difficult to see how any error could be manifest in that sense. I think, therefore, that "manifest" in this context has the wider meaning of "obvious".’

1. This echoes the formulation by Lewison J, approved on appeal in *IIG Capital LLC v Van Der Merwe*:[[45]](#footnote-45)

‘52. Mr Collings fastened on the phrase in clause 4.2 "save in the case of manifest error". A "manifest error" is one that is obvious or easily demonstrable without extensive investigation. Mr Collings referred to the decision of Thomas J in *Invensys plc v Automotive Sealing Systems Ltd* (8 November 2001). That was a case in which a certificate made by an expert was to be conclusive save in the case of manifest error. Thomas J held that the expert's reasons could be examined in order to determine whether he had made a manifest error. But since the contract in that case provided for the expert to give reasons, Thomas J was undoubtedly right to say that the parties must have contemplated that those reasons could be examined to see whether any manifest error had been made. By contrast, in the present case the certificate was not required to contain any reasons. I did not derive any assistance from the *Invensys* case.’

1. The test I am proposing, therefore, is that of the obvious or easily demonstrable error, whether the adoption of such a test would need to achieved by judicial development of the law or statutory intervention (which would seem more likely). Such a development would considerably improve the administration of justice in relation to adjudication, as well as the reputation of adjudication itself. The current situation, whereby the court is supposed to enforce an admittedly wrong decision yet can be willing to open up the decision provided the unsuccessful party is quick enough of the mark, is paradoxical and can lead to injustice. If the suggested approach were adopted, the court to do justice between the parties without undermining the identified purpose of the HGCRA 1996, namely that of a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement.[[46]](#footnote-46)

**Another Solution: Review**

1. Another way of dealing with obvious errors would be to introduce a speedy review system. Other jurisdictions have not shied away from this solution. Thus in Victoria a claimant may apply for a review of an adjudication determination, although an application may only be made on the ground that the adjudicator failed to take into account a relevant amount in making an adjudication determination because it was wrongly determined to be an excluded amount. A review adjudicator may correct a determination made by him or her if the review determination contains a clerical mistake, an error arising from an accidental slip or omission, a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the review determination, or a defect of form. The correction may be made on the adjudicator's own initiative or on the application of the claimant or the respondent. The review adjudicator must complete the review within 5 business days after appointment or within any further time not exceeding 10 business days after that appointment to which the applicant for review agrees.[[47]](#footnote-47)
2. In Western Australia a person who is aggrieved by an adjudicator’s decision may apply to the State Administrative Tribunal for a review of the decision. If, on a review, a decision is set aside and is reversed, the adjudicator is to make a determination within 14 days after the date on which the decision was reversed, or any extension of that time consented to by the parties.[[48]](#footnote-48)
3. In Singapore, a review adjudicator or panel of review adjudicators, can determine an adjudication review application within 14 days after the commencement of the adjudication review or within such longer period as may have been requested by the review adjudicator or the panel of review adjudicators, as the case may be, and agreed to by the claimant and the respondent.[[49]](#footnote-49) The court does not review the merits of an adjudicator’s decision, but has the power to decide whether the adjudicator was validly appointed. In the absence of a payment claim or service of such a claim, the appointment will be invalid, and the determination null and void. The court may also set aside the adjudication determination on the ground that the claimant, in the course of making an adjudication application, has not complied with one (or more) of the important provisions under the legislation.[[50]](#footnote-50)
4. These review provisions have similarities to the ‘third umpire’ review procedure in Test matches, which does not hold up the flow of the endeavour to any significant extent and provides a way of weeding our obviously wrong decisions. The practice adopted in the UK, on the other hand, requires the parties to jump to final determination at the enforcement stage but only where the dispute fits into a restricted category and, of course, the parties are not bound by an arbitration clause.

**Conclusion**

1. The use of either the ‘obvious error’ test or a review system would introduce an element of common sense and reality to enforcement proceedings, particularly where it is accepted that an error has been made. I accept that care would be needed in introducing such changes: after all, fitting a new string to an old yo-yo is no easy task.

**DARRYL ROYCE**

1. *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 49. [↑](#footnote-ref-1)
2. [1992] 1 WLR 277. [↑](#footnote-ref-2)
3. [1991] 2 EGLR 103. [↑](#footnote-ref-3)
4. *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 522. [↑](#footnote-ref-4)
5. [2002] EWCA Civ 46, [2002] BLR 93, 98 [26] - [27] (Stewart-Smith LJ). [↑](#footnote-ref-5)
6. [2003] EWCA Civ 11, [2003] BLR 118, 120 [8] – [10] (Mantell LJ). [↑](#footnote-ref-6)
7. [2005] EWCA Civ 1358, [2006] BLR 15, 28 [52]. [↑](#footnote-ref-7)
8. [2004] EWHC 1285 (TCC) [20] (HHJ LLoyd QC). [↑](#footnote-ref-8)
9. [2008] EWHC 3139 (TCC), [2009] TCLR 3 [7]. [↑](#footnote-ref-9)
10. [2009] EWHC 2425 (TCC), [2010] BLR 363 (Edwards-Stuart J). [↑](#footnote-ref-10)
11. [2010] EWHC 837 (TCC). [↑](#footnote-ref-11)
12. [2013] EWHC 1151(TCC), [2013] BLR 484. [↑](#footnote-ref-12)
13. [2015] EWHC 1400 (TCC). [↑](#footnote-ref-13)
14. [2015] EWHC 1855 (TCC). [↑](#footnote-ref-14)
15. [2015] EWHC 2433 (TCC). [↑](#footnote-ref-15)
16. [2009] EWHC 159 (TCC) [15]. [↑](#footnote-ref-16)
17. [2013] EWHC 2879 (TCC). [↑](#footnote-ref-17)
18. *Brodyn Pty Ltd trading as Time Cost and Quality v Davenport* [[2004] NSWCA 394](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2004/394.html) [51] (Hodgson JA). [↑](#footnote-ref-18)
19. [2011] EWHC 3428 (Ch) [264]. [↑](#footnote-ref-19)
20. [1971] Ch 233 at 259G. [↑](#footnote-ref-20)
21. [2011] EWHC 3428 (Ch) [266]. [↑](#footnote-ref-21)
22. *Amec Civil Engineering Ltd v. Secretary of State for Transport* [[2005] WLR 2339](http://www.bailii.org/cgi-bin/redirect.cgi?path=/ew/cases/EWCA/Civ/2005/291.html) [↑](#footnote-ref-22)
23. There are also versions by Carl Perkins, Johnny Kidd and the Pirates, the Beatles and, inevitably, Chas & Dave. Dr John’s *Right Place, Wrong Time* could be included as part of this meme. [↑](#footnote-ref-23)
24. She was also famous for *You Can Dip Your Bread in my Gravy, But You Can’t Have None of my Chops*. [↑](#footnote-ref-24)
25. [1992] 1 WLR 277. [↑](#footnote-ref-25)
26. [1976] 1 WLR 403 at 407. [↑](#footnote-ref-26)
27. (1871) LR 7 CP 32. [↑](#footnote-ref-27)
28. [1943] KB 425; [1943] 1 All ER 493. [↑](#footnote-ref-28)
29. 25 Beav 200, 204. [↑](#footnote-ref-29)
30. [1952] 2 QB 329; [1952] 1 TLR 1115; [1952] 1 All ER 1175. [↑](#footnote-ref-30)
31. [1996] 1 WLR 48 (HL). [↑](#footnote-ref-31)
32. [1994] CLC 1125 (CA). [↑](#footnote-ref-32)
33. This analysis was also specifically agreed with by the Court of Appeal in *National Grid Co. plc v. M25 Group Ltd* [1998] EWCA Civ1968; [1999] 1 EGLR. 65. [↑](#footnote-ref-33)
34. [2011] EWCA Civ 826, [2011] BLR 614. [↑](#footnote-ref-34)
35. [2014] EWCA Civ 994. [↑](#footnote-ref-35)
36. [2015] EWCA Civ 717. [↑](#footnote-ref-36)
37. [2001] EWCA Civ 1832, [2002] 1 All ER 703. [↑](#footnote-ref-37)
38. See the *Osborne* and *Building Services* cases referred to above. [↑](#footnote-ref-38)
39. *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93, 97 (Dyson J); approved in *Bouygues (UK) Ltd v Dahl-Jensen Ltd* [2000] BLR 522, 524 [3], CA (Buxton LJ), and *Pegram Shopfitters Ltd v Tully Weijl (UK) Ltd* [2003] EWCA Civ 1750, [2004] BLR 65, 68 [8] (May LJ). [↑](#footnote-ref-39)
40. [2006] EWCA Civ 1601, [2007] 1 All ER 667. [↑](#footnote-ref-40)
41. *Veba Oil Supply and Trading GmbH v. Petrotrade Inc* [2001] EWCA Civ 1832, [2002] 1 All ER 703. [↑](#footnote-ref-41)
42. *Veba Oil Supply and Trading GmbH v. Petrotrade Inc* [2001] EWCA Civ 1832, [2002] 1 All ER 703. [↑](#footnote-ref-42)
43. Unreported, 19 August 1996. [↑](#footnote-ref-43)
44. [2011] EWCA Civ 133, 138 Con LR 104. [↑](#footnote-ref-44)
45. [2008] EWCA Civ 542, [2008] 1 FCR 633. [↑](#footnote-ref-45)
46. *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93, 97 (Dyson J); approved in *Bouygues (UK) Ltd v Dahl-Jensen Ltd* [2000] BLR 522, 524 [3], CA (Buxton LJ), and *Pegram Shopfitters Ltd v Tully Weijl (UK) Ltd* [2003] EWCA Civ 1750, [2004] BLR 65, 68 [8] (May LJ). [↑](#footnote-ref-46)
47. Building and Construction Industry Security of Payment Act 2002 (V), as amended, s 28L. [↑](#footnote-ref-47)
48. Construction Contracts Act 2004, s 31(2)(b). [↑](#footnote-ref-48)
49. Building and Construction Industry Security of Payment Act 2004, (Sing) s 19(3). [↑](#footnote-ref-49)
50. *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering)* [2012] SGCA 63, [2013] 1 SLR 401 [66]–[67]. [↑](#footnote-ref-50)