SUPREME COURT OF QUEENSLAND

CITATION:	*Caltex Refineries (Qld) Pty Ltd & Anor v Allstate Access (Australia) Pty Ltd & Ors* [2014] QSC 223
PARTIES:	**CALTEX REFINERIES (QLD) PTY LTD** ACN 008 425 581 (first applicant) **CALTEX REFINERIES (NSW) PTY LTD** ACN 000 108 725 (second applicant) **v** **ALLSTATE ACCESS (AUSTRALIA) PTY LTD** ACN 081 758 965 (first respondent) **ABLE ADJUDICATION PTY LTD** ACN 134 663 933 (second respondent) **IAN HILLMAN** (third respondent)
FILE NO/S:	BS 882 of 2014
DIVISION:	Trial division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	15 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	4 June 2014; 5 June 2014
JUDGE:	Philip McMurdo J
ORDER:	**It is declared that each adjudication decision of the third respondent between the first respondent and the first or second applicants and dated 23 January 2014 is of no effect.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where the first respondent agreed to supply the applicants with scaffolding equipment – where the first respondent alleged the applicants damaged the equipment – where the first respondent made a payment claim pursuant to the *Building and Construction Industry Payments Act* 2004 (Qld) and the *Building and Construction Industry Security of Payment Act* 1999 (NSW) –

where the third respondent adjudicator ordered the applicants pay the first respondent for the replacement costs of the equipment – whether the amounts claimed were payments for the supply of goods or for damages for breach of contract – whether the adjudicator erred in the interpretation of the contract – whether such an error is a jurisdictional error.

ESTOPPEL – ESTOPPEL BY JUDGMENT – RES JUDICATA OR CAUSE OF ACTION ESTOPPEL – GENERALLY – where the first respondent agreed to supply the applicants with scaffolding equipment – where the first respondent alleged the applicants damaged the equipment – where the first respondent made a payment claim pursuant to the *Building and Construction Industry Payments Act* 2004 (Qld) and the *Building and Construction Industry Security of Payment Act* 1999 (NSW) – where the third respondent adjudicator ordered the applicants pay the first respondent for the replacement costs of the equipment – whether the adjudicator was bound by an issue estoppel – whether the parties to the adjudication were bound by a decision of a previous adjudicator.

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – GENERALLY – where the first respondent agreed to supply the applicants with scaffolding equipment – where the first respondent alleged the applicants damaged the equipment – where the first respondent made a payment claim pursuant to the *Building and Construction Industry Payments Act* 2004 (Qld) and the *Building and Construction Industry Security of Payment Act* 1999 (NSW) – where the third respondent adjudicator ordered the applicants pay the first respondent for the replacement costs of the equipment - whether the adjudicator decided the dispute on a basis for which neither party had contended – whether the applicants were denied natural justice.

Building and Construction Industry Payments Act 2004 (Qld), s 17(5), s 32, s 100
Building and Construction Industry Security of Payment Act 1999 (NSW), s 4, s 13(5), s 26, s 32
Jurisdiction of Courts (Cross-Vesting) Act 1987 (Qld), s 3, s 9

Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW), s 4
Blair v Curran (1939) 62 CLR 464, applied
BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd [2012] QSC 346, affirmed
BP Refinery (Westernport) Pty Ltd v Shire of Hasting (1977) 180 CLR 266, cited
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190, cited
Clyde Bergemann Senior Thermal Pty Ltd v Varley Power

Services Pty Ltd [2011] NSWSC 1039, applied
Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd (2005) 63 NSWLR 385; [2005] NSWCA 228, applied
D'orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1; [2005] HCA 12, applied
Dualcorp Pty Ltd v Remo Constructions Pty Ltd (2009) 74 NSWLR 190; [2009] NSWCA 69, distinguished
Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd (2005) 62 NSWLR 385; [2005] NSWCA 49, applied
John Holland Pty Ltd v TAC Pacific Pty Ltd [2010] 1 Qd R 302; [2009] QSC 205, applied
Kuligowski v Metrobus (2004) 220 CLR 363; [2004] HCA 34, cited
Martinek Holdings Pty Ltd v Reid Construction (Qld) Pty Ltd [2009] QCA 329, applied
Northbuild Construction Pty Ltd v *Central Interior Linings Pty Ltd* [2012] 1 Qd R 525; [2011] QCA 22, distinguished
Trysams Pty Ltd v Club Instructions (NSW) Pty Ltd [2008] NSWSC 399, applied

COUNSEL: D G Clothier QC, with M T Hickey, for the applicant

P Dunning QC SG, with G Beacham, for the respondent

SOLICITORS: Norton Rose Fullbright for the applicant

Marsdens Law Group for the respondent

[1] Each of the applicants owns and operates an oil refinery at which, from time to time, it carries out construction work. For that it needs scaffolding equipment which it hires from the first respondent ("Allstate"). The equipment is hired to the applicants under a written agreement made between them (and another Caltex company) and Allstate in 2007. The agreement was made for an initial term of three years but it is common ground that it has remained in force.

[2] Under this agreement, Allstate (described as "the Hirer") must keep 800 metric tonnes of equipment at the first applicant's refinery at Lytton in Queensland and 1,000 metric tonnes at the second applicant's refinery at Kurnell in New South Wales. From these stocks the applicants (described in the agreement as Caltex) select items as required for use at the time and pay a hire charge only for the equipment which they use. They provide information to Allstate about their use of the equipment from which Allstate prepares its invoices for hire charges.

[3] In November 2013 Allstate made claims for progress payments against each of the applicants. For the Queensland refinery, it claimed from the first applicant $3,278,524.90 under the *Building and Construction Industry Payments Act* 2004 (Qld) ("the Queensland Act"). For the New South Wales refinery, it claimed $4,004,850.22 from the second applicant under the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the New South Wales Act"). The Caltex parties served payment schedules, conceding that only relatively small amounts were owing.

[4] Allstate made adjudication applications which were ultimately determined by the third respondent, Mr Hillman. By separate decisions, each dated 23 January 2014, he decided that the first applicant should pay $1,784,299.15 and the second applicant should pay $2,357,796.32. His reasoning was effectively the same across the two decisions.

The applicants' grounds

[5] By this proceeding the Caltex parties challenge each of those decisions upon several grounds which apply to both decisions. The first is that Mr Hillman was not validly appointed as the adjudicator and therefore had no power to make the decisions. This argument comes from the fact that prior to the purported appointment of Mr Hillman, the second respondent as the authorised nominating authority had appointed another adjudicator, a Mr Hick. He had been an adjudicator for previous claims by Allstate under this agreement, in which the Caltex parties' arguments had not prevailed. This time around, they objected to the appointment of Mr Hick, saying that he was apparently biased. Having accepted his appointments, Mr Hick then resigned in response to the applicants' objections, whereupon the second respondent appointed Mr Hillman. The applicants say that the second respondent had no power to do so, because upon the proper interpretation of the Queensland Act and the New South Wales Act, another adjudicator could be appointed only after Allstate had withdrawn the applications and made new ones.[1]

[6] The second ground is that an adjudicator did not have jurisdiction to award these amounts because, for the most, part they comprised claims for damages for breach of the agreement, rather than payments for the supply of goods under that agreement. As I will discuss, the adjudication applications advanced them as claims for compensation for the alleged failure of the applicants to properly maintain the stock of scaffolding and equipment which was stored at the applicants' premises. Allstate did not contend that there was an express term of the written agreement by which the applicants were to pay for damaged equipment.

[7] Mr Hillman concluded that there was such an express term of the written agreement and that Allstate's claims were for payments under that term and not for damages for breach of contract. The applicants' third ground is that this conclusion was one which is made in breach of the requirements of natural justice because the applicants should not have anticipated it and were denied an opportunity to address the point.

[8] The fourth ground is that the payment claims did not properly identify the particular goods to which they related and were therefore invalid.

[9] The fifth ground is that Mr Hillman did not apply himself to the performance of the statutory tasks and had no regard to a substantial body of evidence which had been provided to him.

[10] I have concluded that each application should succeed at least on the third ground and I go now to the facts and arguments which are relevant to it.

The agreement

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1 Under s 32 of the Queensland Act and s 26 of the New South Wales Act.

[11] By cl 4.1, Caltex was to pay to Allstate "the undisputed portion of the Fee" within 28 days from the end of the month in which it received from Allstate a tax invoice for any fees payable. The term "Fee" was defined to mean the fee or fees payable for Equipment in accordance with Schedule 2. The term "Equipment" was defined to mean the scaffolding equipment and services set out in Schedule 1 of the agreement.

[12] Schedule 2, headed "Contract fees (Clause 4)" provided in part as follows:

"● The hire rate for the Equipment shall be $12.00 per tonne per week.

…

- The Hirer will provide mobilisation and demobilisation of Equipment between the Site refineries at no charge to Caltex.
- The Hirer agrees that Equipment will be 'on hire' once erected and ready for use and 'off hire' when the Equipment is no longer required by Caltex."

[13] Schedule 1, headed "Equipment" was as follows:

"● The Hirer shall provide scaffolding equipment to Caltex, being the appropriate range of scaffolding components to facilitate the construction of complete frameworks and work platforms used to support people and material in the construction and repair of structures. The scaffolding equipment shall be compliant with all relevant Australian Standards.

- The Hirer shall permanently locate a fixed quantity of 800 metric tonne (mt) of scaffolding equipment at the Caltex Refinery, Lytton, Queensland and 1000 metric tonne (mt) of scaffolding equipment at the Caltex Refinery at Kurnell, NSW.
- The Hirer shall provide additional scaffolding equipment from time to time in line with forecasts/best estimates as requested by Caltex.
- The Hirer shall provide a scaffold design and drafting service.
- The Hirer shall provide a process/system to effectively manage and record the stocks of scaffolding equipment on hire and in the yards at the Site i.e. SDMS and supporting procedures and training.
- The Hirer shall provide a set of written guidelines to Caltex designated scaffolding yard management for quality control of scaffolding equipment. i.e. equipment inspection procedures and standards, equipment damage assessment, repair guidelines.
- The Hirer shall complete minor audits of scaffolding equipment stock at the Site at least quarterly.
- The Hirer shall complete a full scaffolding equipment stocktake at the Site at least annually.
- The Hirer shall invoice scaffolding equipment hire charges based on information provided by Caltex's designated scaffolding yard management.
- The Hirer agrees to provide scaffolding database administration/management as required by Caltex.
- The Hirer shall replace at its' own cost, all scaffolding equipment found to be defective or no longer fit for purpose.

> This shall not include scaffolding equipment where it is agreed that the defect results from the act or omission of Caltex.
>
> - The Hirer shall advise by email the monthly hire costs before despatching the invoice."

[14] The agreement made express provision for defects in the equipment upon delivery to Caltex. Clause 2.5 provided for an inspection by the Caltex parties upon delivery and required them to notify Allstate of any defective equipment. It permitted them to return defective equipment at Allstate's cost.

[15] However, apart from the penultimate term in Schedule 1, there was no express term which provided for equipment which became damaged or defective. That term contained two parts. The first was to require Allstate to replace, at its cost, equipment which was found to be defective or no longer fit for the purpose. The second qualified the first, by providing that Allstate was not obliged to replace equipment where the parties agreed that the defect had resulted from an act or omission of Caltex. There was no express provision for the contingency that there was a disagreement between the parties on that subject.

[16] The sixth of the terms in Schedule 1 required Allstate to provide guidelines for the management of the stock of equipment, including "repair guidelines". Allstate contended and Mr Hillman accepted that the Caltex parties were contractually bound to keep the stocks of equipment in good repair. For present purposes, the correctness of that interpretation may be accepted. But it did not follow that the contract contained a term by which the Caltex parties were to pay to Allstate amounts representing the costs of repairing or replacing defective equipment or amounts representing the value of equipment which had been damaged or inadequately maintained by them. Rather, the legal consequence of a breach of their promises to keep the equipment in good repair was that they would be liable for damages for breach of contract.

The payment claims

[17] The payment claim addressed to the first applicant contained three components. The first was for an amount of $4,295.59, for hire costs for the month of October 2013. The second, in an amount of $90,895.20, was for "hire costs … for Scaffolding Equipment erected but not previously reported". The third and presently relevant component was in an amount of $3,183,334.11 and was described in the claim as:

> "costs payable by Caltex Refineries (Qld) Pty Ltd for replacement of damaged scaffolding componentry …"

In the invoice which is relevant for this component, Allstate wrote that:

> "This Claim is for the replacement costs of the damaged Scaffolding Equipment identified during the audit carried out at your Lytton refinery site on 14, 15, 16 October 2013.
>
> The Scaffolding Equipment itemised below is damaged to the extent it is no longer in hireable condition and is beyond the cost of economical repair."

That invoice then contained a three page schedule which described different kinds of equipment with a quantity and dollar amount against each. Mr Hillman recorded

that Allstate claimed that there were 91,354 items which were there listed, constituting 83 per cent of all the stock of scaffolding equipment which Allstate had deposited at the Lytton refinery.

[18] The payment claim against the second applicant contained the same three components. Again the presently relevant component was a claim expressed in identical terms for the replacement of damaged scaffolding. The amount there claimed was $3,937,641.51 of the total payment claim of $4,004,850.22. The invoice for this component was in the same form as that for the Queensland claim. Mr Hillman found that Allstate had claimed for 115,069 items, constituting about two-thirds of the components at the Kurnell refinery.

The payment schedules

[19] In their payment schedules, the applicants disputed the claims for damaged equipment in relevantly the following terms:

> "(2) The claim for monies for damaged scaffolding is not a claim for a 'progress payment': it is a claim for damages for an alleged breach of contract. Therefore that part of the claim is not properly the subject of a payment claim and the provisions of the Act do not apply to it.
>
> …
>
> (4) Further, or in the alternative, there is no contractual entitlement to the monies claimed for damaged scaffolding: there is no express term requiring the claimant to pay for damaged scaffolding, no implied term is justified and there is no other reason that the respondent should be obliged to pay the monies claimed.
>
> …
>
> (6) Further, or in the alternative, the audit that the claimant conducted as a basis for the present claim is not reliable or accurate and the schedules produced based on that audit are not accurate or reliable.
>
> (7) Further, or in the alternative, the quantum claimed is excessive: inter alia, the proper quantum (even if the claim was valid, which the respondent disputes) is that replacement cost of 'like for like' items, need to take into account the fact that much of the equipment is at the end of its useful life and should reflect market rates.
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> …
>
> 4.4 The Act only applies to a payment claim if the progress payment sought is 'for' 'construction work' or 'related goods and services'. Claims for damages and other claims which are not for the carrying out of construction work or the provision of related goods and services are not caught by the operation of the Act.
>
> …
>
> 4.8 Notwithstanding that the respondent disputes the claimant's allegations regarding damaged equipment in their entirety (as to

> which, see below), this item of the claimant's claim is in the nature of a claim for damages for breach of contract (see discussion of contractual terms below) and not a claim for payment for undertaking 'construction work' or payment for supplying 'related goods and services' as defined by the Act.
>
> 4.9 Accordingly, the payment sought by the Payment Claim is not a progress payment to which the Act applies and in the circumstances, the Payment Claim is invalid, either wholly or partially invalid and/or the claimant is not entitled to recover a progress payment for the damaged equipment portion of its claim under the Act."

The adjudication applications

[20] Allstate submitted that Caltex was responsible "to ensure that all of the scaffolding equipment [was] maintained to the standard required in [a certain Australian Standard] so that the scaffolding equipment is hirable [sic] at all times".[2]

[21] Under a heading "Implied Term", Caltex submitted that:

> "… Although the Contract does not expressly state it, there is implied into the Contract that the Respondent would be 'responsible' for any damaged equipment."[3]

This term was to be implied according to *BP Refinery (Westernport) Pty Ltd v Shire of Hasting.*[4]

[22] Allstate's argument was then developed in this way:

> "88. From the context of the express terms of the Contract, the Claimant submits Respondent was required to service and maintain the Equipment for the duration of the Contract and it follows that a failure to do so would be a breach of Contract for which the Respondent is liable. Such an intention can be evidence by the fact the Respondent has paid many previous claims for damaged stock.
>
> 89. Whilst the previous adjudication determination noted an agreement between the parties as to the damaged goods, the Claimant submits that the determination did not find one is necessary for the issue of determining liability to pay. The issue of liability to pay is to be determined by reference to what the Respondent is obligated to do in accordance with the Contract: to service and maintain the Equipment for the duration of the Contract. …"[5]

[23] The case which was thereby advanced was that the contract obliged the applicants to service and maintain the equipment, that being an implied term, and that each of the Caltex companies had failed to do so in "breach of contract for which [it] is liable". There was no submission that the contract contained either an express or implied promise to pay to Allstate the cost of replacing equipment which was irreparable.

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2 Queensland application para 17; New South Wales application para 16.

3 Queensland application para 86; New South Wales application para 87.

4 (1977) 180 CLR 266.

5 New South Wales submission, paras 91 and 92.

In context, the submission that the Caltex companies would be "responsible for any damaged equipment" was a submission that they were liable for damages for breaching an implied term of the contract.

[24] An alternative submission made in the adjudication applications relied upon the law of bailment. It was submitted that as a bailee, each of the Caltex parties had been obliged to take reasonable care of the equipment in its possession which it had failed to do. This was not an argument based upon a contractual entitlement to a payment.

[25] Allstate further submitted that there had been a relevant course of dealing between the parties, under which they had come to accept that Allstate could claim from the Caltex parties, within a payment claim, the costs of replacing the equipment which had been damaged by them and that those claims would be paid. In that respect Allstate referred to the penultimate term of Schedule 1. However, it was not submitted that the parties had agreed that the equipment for which payment was now being sought was equipment which had been damaged by the Caltex parties.

[26] Allstate's adjudication submissions further relied upon the outcome of earlier adjudications made by Mr Hick. It was said that Mr Hillman was obliged to decide these applications in the same way. In this proceeding, Allstate argues that Mr Hick's adjudications gave rise to issue estoppels, by which the Caltex parties are precluded from disputing that the contract obliged them to make progress payments for equipment which they had damaged or not maintained. I will return to this estoppel argument.

Adjudication responses

[27] Again the two documents were relevantly identical. On the claims for damaged equipment, the Caltex parties submitted that Allstate had "not referred to any specific provisions of the Contract in support of its assertions" and nor had it said "that the obligations it alleges the respondent has are founded in the Contract".[6] And they submitted that were the adjudicator to find that there was "a contractual basis for the claimant's assertions", then such a decision would involve a breach to the rules in natural justice as the adjudicator would have found for the claimant "on a basis not contended for by either party".[7]

[28] Their submissions referred to the need for a claim to be for a progress payment which was "for" the supply of "related goods and services", in apparent reliance upon the definitions of "progress payment" in the legislation.[8] They submitted that Allstate had conceded in its submissions "that the amounts sought are in the nature of damages for breach of contract".

[29] Somewhat repetitively, they contended that at no point in Allstate's submissions had it said that "there is an implied (or express) term to the effect that [Allstate] was entitled *to be paid* for the cost of replacing damaged equipment *as a progress payment*"[9] so that the adjudicator should not decide that there was such a term.[10]

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6 First applicant's response, para 82, second applicant's response, para 81.
7 Ibid.
8 Queensland Act, Schedule 2, New South Wales Act, s 4.
9 Original emphasis.
10 Paragraph 201 of each adjudication response.

The adjudicator's decisions

[30] As already noted, Mr Hillman's reasoning was identical in the two decisions. He concluded that there was an express term of the contract under which Allstate was entitled to a payment or payments as it had claimed. He rejected the submission that Allstate's claim in this respect was one for damages for breach of contract.

[31] Mr Hillman's reasoning in this respect appeared in three parts of each decision. The first part was that under the heading "Payment Schedule – Damaged Equipment", in which Mr Hillman wrote as follows:

> "Both parties have made significant submissions on this issue and both have been repetitive in various areas of the submissions. I have reviewed all submissions however I shall not make reference to the detail in all the various areas contained in documentation. The Respondent asserts a claim for costs associated with rectification/replacement of defective scaffolding is a claim for damages for an alleged breach of contract and or a claim relying on an alleged contractual indemnity or guarantee therefore the provisions of the Act do not apply to that part of the claim. The Respondent agrees there is an express term in the Contract which makes provision for the costs associated with the rectification/replacement of defective scaffolding (refer Payment Schedule – 5.4). The Contract at Schedule 1 – first page – last dot point states:
>
> > 'The Hirer shall replace at its' own cost, all scaffolding equipment found to be defective or no longer fit for purpose. This shall not include scaffolding equipment where it is agreed that the defect results from the act or omission of Caltex.'
>
> In my opinion as an express term exists in the contract (as above) in relation to the cost of the rectification/replacement of defective scaffolding equipment.
>
> I am therefore satisfied the claim for costs associated with replacement of defective scaffolding is an express entitlement under the construction contract and not a claim for damages or a claim for payment for an indemnity/guarantee."

[32] In that passage Mr Hillman may have misunderstood the case for the Caltex parties when he said that they agreed that there was an express term in the contract which made provision for costs associated with the rectification/replacement of defective scaffolding. The Caltex parties had denied that there was an express term which required them to pay for any defective scaffolding, although of course they conceded that there was a term under which Allstate was not required to replace items which, they had agreed, had been damaged by them.

[33] Secondly, under the heading "Payment Schedule – Not for 'construction work' or 'related goods and services'", Mr Hillman wrote:

> "As detailed elsewhere in this decision I am satisfied the claim for costs associated with replacement of defective scaffolding is an express entitlement under the construction contract and not a claim for damages …"

[34] Thirdly, there was this passage under the heading "Payment Schedule – Damaged Equipment – Contractual Entitlement":

> "The contract terms and conditions are reasonably specific however I have not been guided to nor have I located an express term that convinces me the Claimant was responsible for the servicing and maintenance of the scaffolding equipment.
> The Respondent hired 800 tonne of scaffolding equipment at $12.00 per tonne per week from the Claimant for use by the Respondent's on-site personnel.
> The parties agree the Respondent has performed servicing and maintenance of scaffolding equipment under this contract and has previously paid for scaffolding equipment that has been found to be either sufficiently damaged or has suffered from sufficient lack of service and maintenance to be replaced.
> I am satisfied the Respondent had a responsibility to adopt a program where regular servicing and maintenance is performed and reasonable care is taken of the Claimant's scaffolding equipment.
> I am also satisfied the defective scaffold equipment was the result of an act or omission of the Respondent therefore under Schedule 1 – eleventh dot point of the contract the costs associated with the rectification/replacement of the scaffold equipment in question is the responsibility of the Respondent."

[35] In essence, Mr Hillman concluded that the Caltex parties had promised to pay the replacement cost of any equipment which had become irreparable as a result of some default by them, by this part of the Final Schedule to the contract:

> "The hirer shall replace at its own cost, all scaffolding equipment found to be defective or no longer fit for purpose. This shall not include scaffolding equipment where it is agreed that the defect results from the act or omission of Caltex."

This was an erroneous interpretation of the contract and, in particular, that clause, which made no provision for any payment by Caltex to the hirer. It provided an exception to the promise by Allstate to replace defective or unfit equipment. And that exception applied only where the parties agreed that the defect resulted from an act or omission of Caltex. In these cases there was no such agreement. The only payments which, by the agreement, the Caltex parties promised to pay were the hire charges of $12 per tonne for the equipment which they used.

[36] An adjudicator must identify the terms of the relevant contract and interpret them. Therefore, ordinarily an error in the interpretation of a contract is not a jurisdictional error for which an adjudicator's decisions can be challenged: *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd*;[11] *Clyde Bergemann Senior Thermal Pty Ltd v Varley Power Services Pty Ltd*;[12] *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd*.[13] In effect, Mr Hillman reasoned that there were two types of payments which the Caltex parties promised to make

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11 (2005) 63 NSWLR 385 at 399, [52] per Hodgson JA.

12 [2011] NSWSC 1039 at [44].

13 [2012] QSC 346 at [8] per Applegarth J, whose reasons on this point were not criticised on appeal: *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2013] QCA 394; see also *Watpac Construction (Qld) Pty Ltd v KLM Group Ltd* [2013] QSC 236 at [21] to [24] and *Northbuild Construction Sunshine Coast Pty Ltd v Beyfield Pty Ltd* [2014] QSC 80 at [29].

for the supply of this equipment. The first was the hire charge of $12 per tonne (which he incorrectly described as applicable to the whole of the stock of items at a refinery, rather than the items actually used by Caltex). The second was for the replacement of defective items within the stock of equipment. On that interpretation of the contract, a payment of that second kind could be a "progress payment". In *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd*,[14] Hodgson JA (with whom Ipp JA and Basten JA agreed) discussed the requisite connection between an amount claimed as a progress payment and the carrying out of construction work for the supply of related goods and services. Hodgson JA said:[15]

> "In my opinion, the circumstance that a particular amount may be characterised by a contract as 'damages' or 'interest' cannot be conclusive as to whether or not such an amount is for construction work carried out or for related goods and services supplied. Rather, any amount that a construction contract requires to be paid as part of the total price of construction work is generally, in my opinion, an amount due for that construction work, even if the contract labels it as 'damages' or 'interest'; while on the other hand, any amount which is truly payable as damages for breach of contract is generally not an amount due for that construction work."

Upon its proper interpretation of the agreement, the amounts sought for damaged equipment were not payments which the Caltex parties promised to pay as the price of the supply of the equipment. Therefore, they could not be claimed or allowed as progress payments under this legislation.

[37] Mr Hillman's mistake was as to the interpretation of the contract rather than the scope of his jurisdiction. It is not demonstrated that he misunderstood the latter; rather he meant to apply the contract and to award progress payments which in his view were required to be paid by an express term. I am not persuaded that his error in the interpretation of the contract constitutes a jurisdictional error for which the decisions should be set aside[16] and therefore the second ground for these applications is not established. But the third ground involves a different point, which is that the Caltex parties were denied natural justice because the decisions were reached upon a basis which neither of the parties argued.

[38] There is a substantial denial of natural justice where an adjudicator decides a dispute on a basis for which neither party has contended, unless it can be said that no submission could have been made to the adjudicator which might have produced a different result.[17] In *John Holland Pty Ltd v TAC Pacific Pty Ltd*, Applegarth J put the matter in this way:[18]

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14 (2005) 63 NSWLR 385.

15 Ibid 397 [41].

16 cf *Northbuild Construction Pty Ltd* v *Central Interior Linings Pty Ltd* [2012] 1 Qd R 525; *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393.

17 *Musico v Davenport* [2003] NSWSC 977; *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302 at 313 [32]; *Spankie v James Trowse Constructions Pty Ltd (No 2)* [2010] QSC 166 at [10]; *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd* [2012] 2 Qd R 90 at 101 [60]; and *Northbuild Constructions Sunshine Coast Pty Ltd v Beyfield Pty Ltd* [2014] QSC 80 at [35].

18 [2010] 1 Qd R 302 at 321[57].

> "The issue of natural justice relates to the condition upon which the adjudicator exercised his powers, as distinct from the result he reached and the insulation of that result from review for error of law. John Holland was not given an opportunity to make submissions to the adjudicator that the view he proposed to take about the law was wrong, and to thereby avoid legal error. The statutory scheme may permit an adjudicator to make unreviewable errors of law in quickly deciding complex legal issues in adjudications of the present kind after considering the parties' submissions. The statutory scheme does not permit an adjudicator to determine an adjudication on the basis of a view of the law for which neither party has contended. An adjudicator may be free, as it were, to make an unreviewable error of law based on the submissions of one of the parties. He should not be so free where the error is all his own work and might have been avoided by affording natural justice."

[39] As I have set out, the submissions of the Caltex parties in their adjudication responses seemed to anticipate a risk that the adjudicator would reach a view on this part of the claims which was favourable to Allstate but different from Allstate's own argument. Their submissions warned the adjudicator that he should not do so for that would deny the Caltex parties natural justice. This suggests that the Caltex parties were alert to the possibility of reasoning of this kind. But it is another thing to say that they had a proper opportunity to address the particular reasoning which was employed by Mr Hillman. In my conclusion, this reasoning could not have been reasonably anticipated by the Caltex parties as the basis for the adjudicator's decisions. Not only was it different from the submissions made by Allstate, it was inconsistent with those submissions because the implied term for which Allstate argued was premised on the absence of an express term. Moreover it was inconsistent with the reasoning in earlier adjudications to which Mr Hillman was directed by the submissions for Allstate. I will describe that reasoning below when discussing the argument by Allstate that the parties were bound by an issue estoppel.

[40] It is unnecessary for the Caltex parties to demonstrate that, if given the opportunity to address the adjudicator's proposed reasoning, they would have persuaded him otherwise. It is sufficient that there by "something to be put that might well persuade the adjudicator to change his or her mind".[19] Subject to the question of estoppel, there was at least a real prospect that this adjudicator might have been persuaded by a submission which specifically addressed the proposition that Schedule 1 of the contract contained a promise to make a payment to Allstate for damaged equipment.

Issue estoppel

[41] To discuss this argument, it is necessary to detail the course of the previous adjudications. They were decisions given by Mr Hick in May 2013 in respect of payment claims by Allstate which included claims for damaged equipment. The reasoning of Mr Hick was identical and the two decisions are relevantly identical.

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19 *Trysams Pty Ltd v Club Instructions (NSW) Pty Ltd* [2008] NSWSC 399 at [45].

[42] As in the present cases, the Caltex parties there argued that the claims for damaged equipment were not for payments which the contract required the Caltex parties to make, but were instead claims for damages for breach of contract. Mr Hick rejected that submission but by different reasoning from that of Mr Hillman. In each of his decisions, Mr Hick's critical reasoning was within these paragraphs of his decision:

> "61. The Respondent argues[20]:
>
> (a) there is no contractual obligation to pay the Claimant for damaged Equipment; and
>
> (b) if there is an entitlement, the Claimant has not established that the damaged Equipment the subject of the Claim was damaged by the Respondent.
>
> 62. I do not accept the Respondent's submission in respect to the contractual obligation to pay the Claimant for damaged Equipment. There has been a course of dealing such that the parties have accepted that the Claimant may claim from the Respondent, in a progress claim, the cost of replacing the Equipment damaged by the Respondent and the Respondent will pay those claims[21].
>
> 63. I note also the penultimate paragraph in Schedule 1 of the Contract referred to above and which I extract again below for convenience:
>
> > The Hirer shall replace at its' own cost, all scaffolding equipment found to be defective or no longer fit for purpose. This shall not include scaffolding equipment where it is agreed that the defect results from the act or omission of Caltex.
>
> 64. The Respondent places weight on the term "*where it is agreed that the defect results from the act or omission of Caltex"*.[22] Even if that is the case, it is clear to me from the Condemned Scaffold List and the correspondence between the parties[23] and past invoices[24] that the Respondent has accepted that damage for which the Respondent is responsible has occurred and had been paid for by the Respondent."

[43] Mr Hick's reasons reveal two bases for rejecting the Caltex submission. The first, which was expressed in paras 61 and 62, was that there had been a post-contractual course of dealing under which the parties had accepted that such a claim could be made as a progress claim under this legislation. The second, expressed within paras 63 and 64, was that Allstate was entitled to payment according to that term in Schedule 1 if in fact the Caltex parties had agreed in terms of the second sentence of that clause. In those adjudications, the Caltex parties disputed the fact of such an agreement. But in para 64 of each decision, Mr Hick apparently concluded that there was an agreement. On that basis, he apparently concluded that this clause of Schedule 1 required the Caltex parties to pay for the equipment which was the subject of those payment claims.

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20 Paragraph 7.4 in the Payment Schedule.

21 Paragraph 7(3) in the Wilson Declaration. The course of dealing is also evidenced by for example the email from Bart Edwards of 11 October 2010 in Appendix 5 to the Wilson Declaration and paragraph 18(b) of the Respondent's Submissions.

22 Paragraph 57 in the Respondent's Submissions.

23 See for example appendix 5 to the Wilson Declaration and Tab 24 in the Application.

24 Tab 23 in the Application.

[44] Neither of those bases was employed by Mr Hillman. He did not find an obligation to pay which had derived from a subsequent course of conduct. He did find an express promise to pay within that clause of Schedule 1, but upon an interpretation which entitled Allstate to a payment regardless of whether there was an agreement as to the subject equipment in terms of the second sentence of that clause. As to the second basis of Mr Hick's decision, there was no allegation by Allstate or finding by Mr Hillman that, in terms of that clause of Schedule 1, the Caltex parties had agreed that they had damaged the subject equipment.

[45] If the doctrine of issue estoppel is to be applied in this context, it is necessary to identify the issue which has been decided by a previous adjudication and to characterise that as an issue which was essential to that decision. In *Blair v Curran,*[25] Sir Owen Dixon said:

> "A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties of their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion …"

His Honour there emphasised the need to distinguish between "the matters fundamental or cardinal to the prior decision … from matters which even though actually raised and decided as being in the circumstances of the case the determining considerations, yet are not in point of law the essential foundation or groundwork of the judgment decree or order".[26]

[46] In the present cases, absent a finding that the Caltex parties agreed that they had damaged the equipment, the second of the bases expressed by Mr Hick for his decisions could not have been applied here. As for the other ground, namely that there had been an agreement made by a course of post-contractual dealings, that conclusion could not have founded an issue estoppel because, being but one of several grounds for the decisions of Mr Hick, it was not fundamental to them.[27]

[47] It follows that there was no presently relevant issue estoppel from the decisions of Mr Hicks, if the doctrine of issue estoppel does apply. But further, it is in my view questionable whether the doctrine does apply in this context as counsel for Allstate contended.

[48] Their argument relied upon the judgment of Macfarlan JA (with whom Handley AJA agreed) in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd*.[28] In that case the appellant had made a claim for a progress payment under the New South Wales Act which was upheld only in part by an adjudicator. The appellant had entered judgment in the District Court based on the certificate of that adjudicator. Subsequently the appellant served a second payment claim which was in substance a repetition of the first payment claim. The respondent did not serve a payment schedule in response and the appellant applied for judgment for the entire amount

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25 (1939) 62 CLR 464 at 531.

26 Ibid 533.

27 See Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata,* (Butterworths, 3rd ed, 1996) 205.

28 (2009) 74 NSWLR 190.

claimed. That judgment was refused by a judge in the District Court whose decision was unanimously upheld on appeal.

[49] Allsop P held that the second payment claim was served contrary to s 13(5) of the New South Wales Act,[29] which provides that a claimant cannot serve more than one payment claim in respect of each reference date. He held that a claim lodged contrary to the prohibition in s 13(5) is not a payment claim under the New South Wales Act and does not attract that statutory regime.[30] As that conclusion was sufficient to dispose of the appeal, Allsop P said that he would leave to another occasion the consideration of principles of estoppel in this context.

[50] The appellant had argued that no res judicata could apply because the decision of the adjudicator was not "final" in the relevant sense. Macfarlan JA rejected that submission. He cited what was said by the High Court in *Kuligowski v Metrobus*[31] in this passage:

> "A 'final' decision, then, is one which is not of an interlocutory character, but is completely effective unless and until rescinded, altered or amended. The fact that an appeal lies from a decision does not make it any less final. It must be 'final and conclusive on the merits': 'the cause of action must be extinguished by the decision which is said to create the estoppel'." (footnotes omitted).

Macfarlan JA considered this question of finality by reference to several provisions of the New South Wales Act. One was s 32 of the Act (s 100 of the Queensland Act) which provides as follows:

> "**32 Effect of Part 3 on civil proceedings**
>
> (1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:
>
> (a) may have under the contract; or
>
> (b) may have under Part 2 in respect of the contract; or
>
> (c) may have apart from this Act in respect of anything done or omitted to be done under the contract.
>
> (2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).
>
> (3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:
>
> (a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and
>
> (b) may make such orders it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in the proceedings."

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29 s 17(5) of the Queensland Act.

30 *Dualcorp Pty Ltd v Remo Construction Pty Ltd* (2009) 74 NSWLR 190 at 194 [14].

31 (2004) 220 CLR 363 at 375 [25].

As to s 32, Macfarlan JA said:[32]

> "The argument in favour of inferring that adjudication determinations were intended to be conclusive is in my view strengthened when one has regard to the fact that they determine rights in relation to progress claims only and, by reason of s 32 of the Act, do not affect contractual rights. *Thus, any inability of the claimant to reagitate the issues is confined to its rights as to progress payments.* Its rights to put its case as fully and completely as it wishes in pursuit of a contractual claim are preserved." (emphasis added)

[51] The effect of s 32 (and s 100 of the Queensland Act) has been described as making an adjudication decision "provisional only", as Handley JA said in *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd.*[33] Similarly, in *Martinek Holdings Pty Ltd v Reid Construction (Qld) Pty Ltd*[34] Keane JA said that s 100 of the Queensland Act:[35]

> "… ensures that the adjudication of progress claims does not prevent the parties from finally resolving their entitlements inter se under the contract in a court or otherwise in accordance with law."

Recognising this effect of s 32, Macfarlan JA confined the inability of a claimant to reagitate issues determined by a previous adjudication to a context of a further claim for a progress payment.

[52] Section 32 was one of the features of the New South Wales Act which Macfarlan JA said were relevant "to the *degree* of finality intended to be attached by the Act to adjudicators' determinations".[36] Many of the other features indicated the particular undesirability of a claimant being able to repeat a payment claim, having had the original disallowed by an adjudicator. The first was s 3 and its definition of the objects of the Act, with which it would be inconsistent "to allow a claimant who was dissatisfied with an adjudication of its claim to obtain a reconsideration of the claim simply by serving another which was identical to, or included, the previous claim …"[37] The second was s 13(5), which is an expressed impediment upon claimants. Another was s 26 of the New South Wales Act (s 32 of the Queensland Act) which permits a claimant to make a new application for adjudication in respect of a payment claim only in certain circumstances. And in the passage set out above in relation to s 32, Macfarlan JA referred to the inability of the claimant to reagitate the issues. It is true that some other features of the Act, as Macfarlan JA discussed, could be said to indicate that both sides should be restricted from reagitating issues which had been determined by a previous adjudication. But it is apparent that his Honour's analysis of these various features of the Act was focussed upon whether an adjudication was final in the sense that it could preclude a claimant from repeating a claim which the adjudicator had not accepted. His Honour was not concerned with whether, as Allstate suggests, this legislation commits the parties and adjudicators to an erroneous decision by a previous adjudicator about the terms of the contract.

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32 *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190 at 203 [59].
33 (2005) 62 NSWLR 385 at 389 [21].
34 [2009] QCA 329.
35 *Martinek Holdings Pty Ltd v Reid Construction (Qld) Pty Ltd* [2009] QCA 329 at [8].
36 *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190 at 202 [51].
37 Ibid 202 [52].

[53] The primary judge in *Dualcorp* had held that the subsequent claim was precluded by "principles akin to res judicata" or "abuse of process". Macfarlane JA said that her Honour was correct in that description and continued as follows:[38]

> "Consistent with that broad description, I conclude that the principles of issue estoppel were applicable. Primarily because temporal considerations are of particular significance in relation to progress claims, the analogy between an adjudicator's determination and a completed cause of action which the principles of res judicata would require is an incomplete one. It is best that the applicable principles be recognised to be those of issue estoppel. The more general principle of abuse of process is probably also applicable but it is unnecessary to reach a final view about this. This principle involves a broad concept 'insusceptible of a formulation comprising closed categories' (*Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at 265 [9]) but certainly including within its ambit an attempt to 'litigate anew a case which has formerly been disposed of by earlier proceedings' (*Walton v Gardiner* (1993) 177 CLR 378 at 393)"

[54] Although Macfarlan JA described the outcome as a result of an issue estoppel, it is clear that his Honour had in mind something less than the operation of the common law doctrine of issue estoppel as it is usually understood. The doctrine of issue estoppel has been said to reflect "a central and pervading tenet of the judicial system [which] is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances".[39] Where the doctrine does apply, then subject to any qualification by legislation or agreement, it precludes the reagitation in any forum of the same issue. Yet, the estoppel for which Allstate contends, in attempted reliance upon *Dualcorp,* at its highest is one in which the issue could be reagitated in some forums but not others. It is a remarkable species of issue estoppel where, having regard to s 32 of the New South Wales Act, the "entitlements inter se under the contract"[40] are unaffected by it. The source of this more limited estoppel must be found, if at all, within the legislation. In my view, the legislation does not provide it. A contrary indication is that such an estoppel would be problematical in many ways. Take, for example, a case where a court declares the effect of the parties' contract, inconsistent with an adjudicator's decision. Is a future adjudicator, dealing with another claim under that contract, bound by the decision of the earlier adjudication (if not set aside) or that of the court?

[55] The limited finality described by Macfarlan JA was founded, as his Honour explained, upon the combined effect of several provisions within this statute. Contrary to the submission for Allstate, the judgment of Macfarlan JA did not hold that the doctrine of issue estoppel applies in this context in all respects. The judgment identifies a finality of an adjudicator's decision in the sense of precluding a claimant from pursuing a progress payment inconsistently with determination of an issue by an adjudicator which was fundamental to that decision.

Outcome on third ground

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38 *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190 at 203 [68].

39 *D'orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 17 [34].

40 *Martinek Holdings Pty Ltd v Reid Construction (Qld) Pty Ltd* [2009] QCA 329 at [8].

[56] It follows that the Caltex parties were not estopped from contending to Mr Hillman that the agreement contained no promise by them to make a payment for damaged goods. As I have held, they were denied natural justice by Mr Hillman's interpreting the contract in a way which neither side argued and which ought not to have been anticipated by them. Consequently they are entitled to have each of these decisions set aside.

[57] The relief sought by the first applicant is available under this Court's supervisory jurisdiction over an adjudicator's decision under the Queensland Act.[41] The relief sought by the second applicant is to invoke the supervisory jurisdiction of the Supreme Court of New South Wales over an adjudicator's decision under the New South Wales Act.[42] As Allstate apparently concedes, that jurisdiction of the Supreme Court of New South Wales is a "State matter" within s 3 of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (NSW) for which this Court thereby has jurisdiction.[43]

[58] It will be declared that each adjudication decision of the third respondent between the first respondent and the first or second applicants and dated 23 January 2014 is of no effect.

The grounds

[59] That conclusion makes it unnecessary to consider grounds 1, 3 and 5. But should it become relevant, I will say something of the facts which are relevant to them.

[60] The relevant facts and circumstances of the first ground are as follows. Upon receipt of each of these adjudication applications, the second respondent referred them to Mr Hick who accepted them by serving a notice of acceptance in accordance with s 23 of the Queensland Act and s 19 of the New South Wales Act. Mr Hick did so on 4 December 2013. Two days later, the Caltex parties provided adjudication responses, in which they objected to the appointment of Mr Hick on the ground of apprehended bias. In essence their complaint was that the views which he had expressed in his earlier decisions as to the contractual position between the parties gave rise to an apprehended bias for the determination of these applications. Mr Hick invited the Caltex parties and Allstate to make submissions on that objection before, on 11 December 2013, the second respondent advised that Mr Hick had "withdrawn" his acceptance of the appointments. Without the concurrence of the Caltex parties, the second respondent then purportedly referred the adjudication applications to Mr Hillman, who accepted them on 17 December 2013. The Caltex parties submitted that the second respondent was not empowered to appoint a second adjudicator in these circumstances.

[61] The fourth ground argued by the applicants was that neither payment claim identified the "related goods and services to which the progress payment relates", so that it did not comply with s 17(2)(a) of the Queensland Act or s 13(2)(a) of the New South Wales Act. I have described above at [17] the description of the equipment which was said to have been damaged. The essential complaint was that

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41 *Northbuild Constructions Pty Ltd v Central Interior Linings* [2012] 1 Qd R 525 at 537 [6].

42 *Chase Oyster Bar v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at 407 [58], 418 [108], 449 [285].

43 s 4 of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (NSW) and s 9 of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Qld).

Allstate did not identify the particular items amongst the stock which was at each of the refineries. Instead it claimed that amongst that stock there was a certain number of items within each of the various descriptions for which the claim was made. The Caltex parties adduced evidence to the effect that the accuracy of these claims could have been assessed only by an inspection involving, at each refinery, more than 200 working days. Even then the Caltex parties would not know which particular items were the subject of the claims. That evidence was apparently unchallenged. Ultimately the resolution of this ground would have turned upon the application of those provisions of the legislation to the facts as presented by that evidence. The submissions agreed that the relevant authorities for those questions were *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*,[44] *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd*[45] and *T & M Buckley Pty Ltd v 57 Moss Road Pty Ltd.*[46] Should it mattered, it was not established by the applicants that they were able to formulate and present submissions to the adjudicator as to whether there was damaged equipment of the kind and to the extent alleged by Allstate.

[62] A submission made for Allstate upon this fourth ground was that the difficulties of the Caltex parties in identifying the relevant items were the result of their own failure to take care of the scaffolding and to take proper records of scaffolding which had been damaged or destroyed. This Court is in no position to assess whether, if such a duty was owed by the Caltex parties, they breached it and further that their difficulty, if any, in responding to the payment claims was a consequence of their breach. In any case that argument hardly seemed to be a persuasive answer to a complaint, if otherwise valid, of a non compliance with the requirements of the legislation for an insufficient identification of the equipment which Allstate had in mind in making its payment claims.

[63] The fifth and remaining ground was that Mr Hillman did not consider much of the evidence which the Caltex parties had provided on the factual questions of the condition of the allegedly damaged equipment. The suggested basis for this ground was the reason in each case of Mr Hillman, where he referred to some but not other relevant evidence. From this it was said that the Court should infer that Mr Hillman had not considered, in particular, the so-called Addendum Report by a Mr Topolinsky and other evidence going to the reliability of Allstate's "audit" of the stocks of equipment.

[64] Allstate conceded here that the adjudicator's reasons had not referred expressly to this further report or the evidence of a Mr Edwards about the audit. But Allstate contended that this did not found an inference that the evidence was not considered. In his decisions, Mr Hillman stated that he had considered, amongst other things, "all submissions (including any relevant documentation) that have been duly made by the respondent".

[65] The amount of material was very extensive and it was a daunting task for the adjudicator to come to terms with it within the very short period of time which was allowed to him. Mr Hillman may not have comprehended the material but I was not persuaded that, contrary to the statements in his decisions, he had not considered it.

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44 [2005] NSWCA 229.
45 (2005) 64 NSWLR 462, 477 [48].
46 [2010] QCA 381.