

Supreme Court
New South Wales

Case Name: A-Civil Aust Pty Ltd v Meso Solutions Pty Ltd

Medium Neutral Citation: [2023] NSWSC 372

Hearing Date(s): 5-6 December 2022, 8 February 2023

Date of Orders: 17 April 2023

Decision Date: 17 April 2023

Jurisdiction: Equity - Commercial List

Before: Richmond J

Decision: Application challenging the decision of the adjudicator dismissed. Claim for misleading or deceptive conduct under the ACL also dismissed, as no relevant misrepresentation was made.

Catchwords: BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) (“the Act”) – adjudication determination – whether s 17(2) notice valid – whether clause requiring certain documents to be attached to payment claim in contract is void pursuant to s 34 of the Act

CONSUMER LAW — misleading or deceptive conduct — whether representations were made

Legislation Cited: Building and Construction Industry Security of Payment Act 1999 (NSW), ss 8, 9, 11, 13, 17, 34
Competition and Consumer Act 2010 (Cth), Sch 2 (Australian Consumer Law), ss 18, 20, 21, 232, 236
Building and Construction Industry Security of Payment Amendment Bill 2013

Cases Cited: All Season Air Pty Ltd v Regal Consulting Services Pty Ltd [2017] NSWCA 289
Blue v Ashley [2017] EWHC 1928 (Comm)
Briginshaw v Briginshaw (1938) 60 CLR 336; [1938]

HCA 34

Clyne v Deputy Commissioner of Taxation (1981) 150 CLR 1; [1981] HCA 40

Edelbrand Pty Ltd v H M Australia Holdings Pty Ltd [2012] NSWCA 31

Et-China.com International Holdings Ltd v Cheung [2021] NSWCA 24; 388 ALR 128

Griffin Energy Group Pty Ltd v ICICI Bank Ltd [2015] NSWCA 29; 317 ALR 395

Helou v PD Mulligan Pty Ltd (2003) 57 NSWLR 74; [2003] NSWCA 92

John Holland Pty Ltd v Roads and Traffic Authority of New South Wales [2007] NSWCA 19; 23 BCL 205

Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8

Kallin Pty Ltd v ACN 107 851 847 Pty Ltd [2018] NSWSC 124

Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd [2008] NSWCA 279

Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 264 CLR 1; [2018] HCA 4

Quickway Constructions Pty Ltd v Electrical Energy Pty Ltd [2017] NSWSC 1140

Watson v Foxman (1995) 49 NSWLR 315

Category:

Principal judgment

Parties:

A-Civil Aust Pty Ltd (Plaintiff)

MESO Solutions Pty Ltd (First Defendant)

Navid King (Second Defendant)

Adjudicate Today Pty Ltd (Third Defendant)

Representation:

Counsel:

Mr J Foley (Plaintiff)

Mr D Weinberger (First Defendant)

Solicitors:

M&A Lawyers (Plaintiff)

HBA Legal (First Defendant)

IHS Law (Second Defendant and Third Defendant)

File Number(s):

2022/00251664

JUDGMENT

- 1 In these proceedings the plaintiff, A-Civil Aust Pty Ltd (**A-Civil**), challenges the validity of a payment claim issued by the first defendant, Meso Solutions Pty Ltd (**Meso**), under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the Act**) on 30 May 2022 (**Claim 16**) and an adjudication determination made by the second defendant on 12 August 2022 in respect of that payment claim (**Determination**).
- 2 A-Civil contends that Meso made representations to A-Civil to the effect that A-Civil could ignore Claim 16, A-Civil did not need to respond to it with a payment schedule and that Meso would not proceed to the adjudication of Claim 16 under the Act. A-Civil contends that by taking steps to proceed to an adjudication of Claim 16 contrary to those representations, Meso engaged in misleading and deceptive conduct in contravention of s 18 of the Australian Consumer Law (**ACL**), or alternatively, unconscionable conduct in contravention of s 20 and s 21 of the ACL. A-Civil seeks injunctive relief under s 232 of the ACL, or alternatively damages under s 236 of the ACL. A-Civil originally put an alternative claim in estoppel based on the making of the alleged representations but accepted at the final hearing (correctly in my view) that this claim did not add anything to its claim under the ACL and did not press it.
- 3 A-Civil's alternative case is that the Determination is affected by jurisdictional error because at the time of the notice purportedly issued by Meso under s 17(2) of the Act the amounts the subject of Claim 16 had not become due and payable under the construction contract and consequently the Determination is invalid and should be quashed.
- 4 The second defendant and third defendant did not take any active part in the proceedings.
- 5 Evidence was given on behalf of A-Civil by Nasser Matta, the chief executive officer of A-Civil (**Mr Matta**) and Chaudhury Mostafiz, the project manager of A-Civil (**Mr Mostafiz**), and on behalf of Meso by Timothy Orr, the managing director of Meso (**Mr Orr**) and Edward Bobek, the technical director of Meso (**Mr Bobek**). Each of them was cross examined.

Background

- 6 In 2020 A-Civil was engaged by Paynter Dixon Constructions Pty Ltd (**Paynter Dixon**) to undertake work for the construction of a car park for the Parramatta RSL Club located at 2 Macquarie Street, Parramatta (**the Site**), and they entered into a formal contract for this work on 20 November 2020.
- 7 On 24 March 2020, Meso sent a letter of offer to A-Civil containing the proposed terms on which Meso would undertake sheet piling, anchoring, dewatering and permanent basement wall works for A-Civil at the Site (**the Project**). Following this, there were discussions between A-Civil and Meso regarding pricing of the work to be undertaken by Meso. While the formal contract was not entered into until 28 June 2021, A-Civil and Meso had reached a broad consensus as to the pricing and nature of the work to be performed by Meso by December 2020 because Meso ordered sheet piles in November 2020 which were delivered to the Site on 1 December 2020 and Meso commenced works on the Site on 17 December 2020.
- 8 On 30 March 2021, A-Civil sent to Meso by email the proposed contract to be entered into by A-Civil and Meso for the Project. In late May 2021 Mr Bobek sent emails to A-Civil giving detailed comments on the draft contract. On 23 June 2021 Mr Orr and Mr Matta had a meeting at which they discussed the alterations to be made to the draft contract following which Mr Mostafiz sent by email a revised version of the contract to Mr Bobek for signature.
- 9 On 28 June 2021, A-Civil and Meso entered into the contract under which Meso undertook to perform foundation piling works at the Site for a lump sum of \$1,406,745 (ex GST) (**Contract**). The Contract contained an attachment entitled "General Conditions of Agreement" (**General Conditions**). Clause 8.3 of the General Conditions required that all payment claims should be accompanied by certain documents. Clause 8.3 is set out later in these reasons.
- 10 It is not in dispute that in none of the emails or discussions before the final version of the Contract was sent to A-Civil on around 23 June 2021 did Mr Bobek or Mr Orr raise any concern with A-Civil as to cl 8.3 of the General Conditions. However, Mr Bobek gave evidence that he had a telephone

conversation with Mr Mostafiz on 28 June 2021 before Meso executed the Contract during which he raised a concern that the requirements for payment claims under cl 8.3 were onerous or too hard to comply with and Mr Mostafiz said words to the effect that Meso could “just keep on doing what you are doing”. Mr Mostafiz accepts that he had a conversation with Mr Bobek that day in which he advised Mr Bobek that he had emailed him the Contract and requested that he sign the Contract, but he denies saying the words attributed to him by Mr Bobek.

- 11 Prior to entering into the Contract, between 23 November 2020 and 25 June 2021 (inclusive), Meso issued 9 payment claims to A-Civil. Payment Claim 9, issued on 25 June 2021, indicated that \$429,881.70 was outstanding prior to entering into the Contract. A further 6 payment claims were issued in the period from when the Contract was entered into and the issue of Claim 16 on 30 May 2022 in respect of which A-Civil did not issue any payment schedules, nor did Meso issue any s 17(2) notices or lodge any adjudication applications.
- 12 A-Civil made payments to Meso amounting to \$714,621.56 from 15 December 2020 to 23 December 2021 but no further payments after that time.
- 13 Between December 2021 and May 2022, Mr Orr and Mr Bobek made repeated attempts to follow up the outstanding amounts with A-Civil’s representatives Mr Matta, his son Mr George Matta and Mr Mostafiz. It is clear that Meso understood that A-Civil’s delay in making payments to Meso was due in large part to the failure of Paynter Dixon to pay amounts outstanding by it to A-Civil.
- 14 On 28 January 2022, Mr Bobek sent an email to Mr Matta, copying in Mr Orr, which stated:

Attached are our claim 14 for Parramatta. Do you require us to prepare any documents for any legal action or meeting with Paynter's to force them to pay the outstanding amount?

If it helps force the issue, we can lodge an adjudication application and withdraw it before it is assigned to an adjudicator.

We are more than happy to attend a meeting with you and Paynter's to sort this out.

I tried calling you to discuss tactics Can you call me or Tim please Having this large amount of outstanding money is affecting our suppliers.

Also, the Monavale Surf Club Invoice still hasn't been paid. Our understanding as a favour to you we placed the sheets on short notice at a discounted rate, to be paid as soon as the job was completed.

15 On 4 February 2022, Mr Bobek sent the following email to Mr Matta:

I understand that Paynters have sent A-Civil a back charging document and that you advised Tim you would email it to us.

Could you arrange/instruct your accounts department to forward the documents thanks, to prepare the response for our scope thanks?

16 On 7 February 2022, Mr Mostafiz responded by email to Mr Orr as follows:

Please find the attached back charges related to RC wall works. We need your assistance to reply back to PDC by COB tomorrow. Please see below drop box link for details.

17 The drop box contained a large number of documents relating to Paynter Dixon's claim against A-Civil for back charges which apparently included work performed by Meso under the Contract. Mr Orr replied by email to Mr Mostafiz on the same day that it was not possible to respond by close of business on the following day, and instead a meeting was arranged with Paynter Dixon in early March to discuss the matter. This meeting took place but it appears that Meso's attendance was short and inconclusive (see [40(3)] below).

18 On 1 April 2022, Mr Bobek sent an email to Mr Matta seeking to progress further discussions on how to deal with the Paynter Dixon back charges claim which included the following:

A few weeks back I called George and he informed me you were away and would call when you were back.

I trust you are well and will call Tim to discuss. We need to get the ball rolling on this as the window for using the payments act is closing.

The payments act is a relatively cheap way to proceed. If we wait and are forced to use the credit act, it will run into a \$50,000.00 legal bill.

The longer we leave it, the more difficult it will become to prepare the adjudication application, as this will need to be very detailed in this situation.

19 Mr Orr later that day sent a follow up email to Mr Matta as follows:

Can you give me a call as soon as you are able so that we can progress this please? If you can provide us with the information that Eddie has requested I think we should be able to develop a reasonably strong argument for the payment of the remaining monies and we are fairly owed. We do need to bring this to a conclusion as it really has caused us some harm.

- 20 On 1 May 2022, Mr Bobek sent an email to Mr Matta attaching a further payment claim:

Attached are our claim 15 for Parramatta. Tim and I have made numerous attempts to first to arrive at a figure for Meso's outstanding monies and then to understand the strategy A-Civil is undertaking to recover our money from Paynter's.

Again, we can only ask what is Paynter's argument that they have not paid us at least the shoring scope immediately. They could not possibly have an argument that can stand up.

We have also calculated a fair price for the basement walls on past emails from Paynter's and their form worker. We would like to discuss this scope with you to understand Paynter's position on this scope.

If Paynter's does not come to a fair agreed amount during this payment period, we will be considering all our options.

The Monavale Surf Club Invoice still hasn't been paid, \$15,000.00 plus GST. As a favour to you, we placed the sheets on short notice at a discounted rate, to be paid as soon as the job was completed. Fair is fair Nasser, why are they not paying could you send me the contact number of the builder so that I can call them to discuss it.

Has there been any word about what is happening with the Camila job? There is \$77,719.93 plus GST outstanding for this job as well.

Again, we arranged for sheets on short notice as a favour to you. Why is the client not paying. Can you please provide their number to discuss thanks.

When you add these three jobs up A-Civil has a debt to Meso of \$566,000.00 plus GST. You as an intelligent businessman understand what that sort of unpaid debt does to a business's cash flow and means to keep up with payments to suppliers.

- 21 On 7 May 2022, Mr Bobek sent two emails to Mr Matta indicating need to progress the matter urgently, including the following:

Nasser I cannot emphasise enough, time is running out on using the payments act we need to get going on this, otherwise it will cost both of us a lot more to seek restitution under the credit act.

- 22 On 30 May 2022 Mr Bobek sent an email to Mr Matta attaching Claim 16 in the sum of \$366,813.79. It is undisputed that Claim 16 was not accompanied by the documents required by cl 8.3 of the General Conditions. Mr Bobek's email stated:

Attached is our claim 16 for the Parramatta RSL. Tim and I have made numerous attempts to first to arrive at a figure for Meso's outstanding monies and then to understand the strategy A-Civil is undertaking to recover our money from Paynter's. As always our door is open to discuss and work this out.

With that in mind, we have provided a claim that reflects our understanding and position of the situation.

...

As always our door is open for discussion and the formation of a strategy to obtain the outstanding amount from Paynter's.

23 A-Civil submitted that Claim 16 had several errors including that it understated the amount paid by A-Civil to Meso by approximately \$70,000 and overstated the amount owing by A-Civil to Meso by approximately \$70,000. This was conceded by Mr Orr in cross-examination. A-Civil also submitted that Claim 16 had an error as it misdescribed the construction contract as "Formal Instruction of Agreement dated 20 August 2018". However, it was not suggested that anything turned on this because the Project was correctly identified and the parties accepted that Claim 16 met the requirements of s 13(2) of the Act.

24 Mr Matta gave evidence that on or about 2 June 2022 he had the following telephone conversation with Mr Orr:

Matta: "Why are you still sending us (A-Civil) payment claims? You know Paynter Dixon are backcharging for your incomplete contract works and is charging for materials they had to supply for your contract works. You know supplies were paid for by A-Civil for Meso's contract works, and A-Civil hasn't been paid for your contract works. You sent payment claims 14, 15 and 16 but haven't sent the documents and ITPs and responses to the backcharges."

Orr: "Just disregard payment claim 16. Eddie will give you a response for A-Civil to send to Paynter Dixon so that A-Civil can get paid for any outstanding contract money, and also so that Paynter Dixon will not sue for the back charges. We won't be going to adjudication. I will prepare another claim and provide all of the backup documents to then have you submit to Paynter Dixon. Our relationship has been good for a long time. Eddie's father died and this is why the documents have not been provided. Don't worry about claim 16, you don't need to reply with a payment schedule."

Matta: "Then can you please retract payment claim 16?"

Orr: "I've told you, ignore payment claim 16 because Eddie will arrange to get that work done so that A-Civil can get paid from Paynter Dixon."

25 A-Civil alleges that this conversation amounted to a representation by Meso by its managing director that A-Civil should disregard Claim 16, Meso would not be proceeding with an adjudication of Claim 16 and A-Civil did not need to respond to Claim 16 by issuing a payment schedule (together, the **2 June Representation**).

26 Mr Orr denies that the conversation described at [24] above took place and denies that he ever said words to that effect to Mr Matta.

27 On 15 July 2022, Mr Bobek, sent an email to Mr Matta and also to his son, George, attaching a notice to A-Civil under s 17(2) of the Act, which stated:

Notice under Section 17(2) of the *Building and Construction Industry Security of Payment Act 1999 NSW*.

In response to this Company's payment claim dated 30 May 2021 for \$366,813.79 including GST your Company failed to provide a payment schedule within the time allowed by the *Building and Construction Industry Security of Payment Act 1999 NSW*.

As a consequence, your Company became liable to pay the whole amount of claim 16 on the due date. No amounts have been paid. Our Company has elected to apply for adjudication of the payment claim. Your Company has 5 business days in which to serve a payment schedule or pay payment claim 16 amount in full immediately.

If, within that time, your Company fails to pay these amounts, this company will proceed to adjudication. If your company also fails to serve a payment schedule, your Company will be barred from lodging an adjudication response [see Section 20(2A) of the Act].

28 Mr Matta gave evidence that on or about 18 July 2022 he had the following conversation by telephone with Mr Orr:

Matta: "Why are you sending this when you said not to provide a payment schedule? You said you were going to provide all the documents and get all the evidence and ITPs as discussed before."

Orr: "Don't worry about it, ignore it, I told you we're not going to adjudication, our relationship is strong. We will provide all the documents as discussed before."

Matta: "Tell me if I need to reply with a payment schedule because I'm not going to leave my business vulnerable or exposed because I am responsible to Paynter Dixon. Paynter Dixon is asking for a deed of release to be signed, which I haven't committed to because I'm waiting for your documents. Meso must sign a deed of release at the same time for the project, I am not leaving A-Civil exposed to backcharges. Do you want me to respond to this 17(2) notice with a payment schedule? You told me not to provide a payment schedule. You owe A-Civil money, you have not provided documents to defend any claims and to back up your claims. Do you want A-Civil to provide a payment schedule?"

Orr: "No, I'll get Eddie to get all documents, I promise we won't be going to adjudication, and we will work together to get the money from Paynter Dixon. Our relationship goes back a long way. Eddie will prepare all the documents that you've ask [sic] for and sit with Mostafiz to prepare the claim."

29 A-Civil alleges that this conversation amounted to a representation by Meso to A-Civil that A-Civil should ignore Claim 16, that Meso would not be proceeding

with an adjudication of Claim 16, and that A-Civil did not need to respond to Claim 16 by issuing a payment schedule (together, the **18 July Representation**).

- 30 Mr Orr denies that the conversation described at [28] above took place and denies that he ever said words to that effect to Mr Matta.
- 31 Mr Bobek advised Mr Matta by email on 4 August 2022 at 2:04pm that Meso had lodged an adjudication application (**Application**) with the third defendant, Adjudicate Today, in respect of Claim 16.
- 32 On 5 August 2022, Mr Bobek sent an email to Paynter Dixon serving a payment withholding request on it under s 26A of the Act, requiring Paynter Dixon to withhold the amount of \$366,813.79 (incl GST) from moneys owed to A-Civil.
- 33 Mr Matta and Mr Orr gave evidence that they had one telephone conversation regarding the Application after it was lodged by Meso but disagreed as to what was said.
- 34 Mr Matta's evidence was that on or about 5 August 2022 he had the following conversation by telephone with Mr Orr regarding the Application:

Matta: "You said you were not going to adjudication, and I did not need to provide a payment schedule. You said Eddie was going to give me documents and backup to claims to defend against Paynter Dixon. You've done nothing, now you're going to adjudication to play the game, and your [sic] being sneaky. Why did you only send the payment claim to me and why didn't you cc in Mostafiz, George and everyone else? You knew that my mother passed away. You told me that you would never go to adjudication and I didn't need to put on a payment schedule."

Orr: "I'll speak to Eddie and make sure he withdraws the adjudication application. I promised you that I would not go to adjudication, and that Eddie would provide the documents. I promise you that we are not trying to be sneaky. We are not like that."

- 35 Mr Orr's version of the conversation (which he said occurred shortly after the Application was served and resulted from a call made to him by Mr Matta) is as follows:

Matta: "Are you going to withdraw the adjudication application?"

Orr: "No. We have not been paid by A-Civil since the end of last year. We have given you enough time and have tried to work with you to come to an agreement but you have not provided us with a payment schedule and you

refuse to provide evidence of the payment schedules sent by A-Civil by Paynter Dixon.”

Matta: “I am not going to show you those. I am directing you not to make any contact with Paynter Dixon in relation to this matter. Are you going to withdraw the application?”

Orr: “No. We needed to take this step in order to protect ourselves because we are not getting paid and nothing else has worked.”

Matta: “If you maintain this application, I'll file an injunction in the Supreme Court.”

- 36 On 8 August 2022, the third defendant, Adjudicate Today, accepted the Application and nominated the second defendant, Mr Navid King (**Adjudicator**), to adjudicate the Application. On the same day Mr Bobek telephoned Adjudicate Today and asked what was required to withdraw the Application and what costs would be involved in doing so, and a representative from Adjudicate Today emailed Mr Bobek (with a copy to A-Civil) stating:

Dear Mr Bobek,

As per our phone discussion if you want to withdraw the matter you have to put this in writing and include the Respondent.

- 37 Mr Matta also gave evidence that on 9 August 2022 he had the following conversation by telephone with Mr Bobek regarding the Application:

Matta: "Tim agreed to withdraw the adjudication and also said for us not to put a payment schedule in. He said that you would provide all of the documents and ITPs and everything needed to defend the backcharges from Paynter Dixon and to make the claim to Paynter Dixon.

Bobek: "Yeah, Tim advised me to do this, the lawyers are not in the office today, they will be withdrawing the application either late this afternoon or tomorrow morning."

- 38 Mr Bobek's version of the conversation is as follows:

Matta: “What are you doing with this adjudication application? Tim has already agreed to withdraw it.”

Bobek: “No he hasn't. We have not been paid by A-Civil since last year. You keep saying the reason for this is because Paynter Dixon is backcharging you but you refuse to show me their payment schedules and you don't want me to help you go back to them. Nor did you ever want to come to an amicable resolution of the moneys owing to Meso.”

Matta: “Ok, so you will withdraw the application, yes?”

Bobek: “No. We have lawyers retained and they have given us strong advice not to withdraw the application, so we won't be doing that. But again, I want to try to help you deal with Paynter Dixon so that you can get paid and then we can try to resolve our dispute. I will come to your office at 8:30am tomorrow to

go through the Paynter Dixon material and assist you with formulating a response.”

Matta: “If you don’t withdraw it, we will sue you in the Supreme Court.”

39 A-Civil alleges that the conversations Mr Matta had with Mr Orr and Mr Bobek on 5 and 9 August respectively amounted to a representation by Meso that it would withdraw the Application (**Withdrawal Representation**).

40 The conflict in the evidence as to the conversations which Mr Matta says he had with each of Mr Orr and Mr Bobek in August 2022 needs to be considered in light of the emails which passed between them on 8, 9 and 10 August 2022 regarding the withdrawal of the adjudication application, which are as follows:

(1) At 12:42pm on Monday, 8 August 2022, Mr Bobek sent the following email to Mr Mostafiz (emphasis added):

Following our conversation on 5 August, 2022 at 12:40pm as advised, I will speak to Nasser anytime between 6am-10pm any day, including weekends.

We have never had an issue with helping A-Civil. There must be at least a dozen emails where Tim and I have made representations to help A-Civil with their claim against Paynter’s, which A-Civil never took up.

As well as countless calls that Tim and I have made to various people within A-Civil, including Nasser, to have this matter resolved.

We were always directed to deal with Nasser. **To date, we haven’t received a call or email.**

If I don’t answer Nasser’s call immediately, I’ll be in a meeting and call within 1-2 hours.

The bold words suggest that Mr Bobek and Mr Orr did not speak to Mr Matta in the previous week.

(2) At 12:59pm that day, Mr Matta responded to Mr Bobek by email as follows:

I have personally tried calling you and Tim, even in the last 10min, and in your email below you say you were helping A-Civil, that is incorrect as you know Paynter’s are back charging for Meso incomplete work from your contract works on the job at Parramatta RSL. Meso have all the information as Tim was at the meeting with A-Civil and Paynter’s, they stated all Back Charges and were not paying A-Civil for Meso incomplete works.

You state you were helping A-Civil, that’s not the case as we had to purchase all materials that are in Meso contract to purchase, so I state A-Civil was helping Meso as we didn’t have to pay for the material as you have all receipts for the material.

Significantly, in this email Mr Matta makes no reference to having spoken to Mr Orr on 5 August or to Mr Orr's agreement to withdraw the Application. The words "you state you were helping A-Civil" in Mr Matta's email pick up a comment in the second paragraph of Mr Bobek's email of 12:42pm.

- (3) At 4:39pm, Mr Bobek responded by email to Mr Matta, including the following (emphasis added):

Up until your call at 1:58pm today, I haven't missed a call from you. Even though Tim is extremely busy, I was surprised he was able to take your call. Besides, I'm the one dealing with this matter, have a better understanding of the Adjudication Application process, and have complete authority to act on behalf of Meso. Tim has explained our model to you on many occasions. Each of us has our areas of responsibility, and part of mine is matter such as this.

...

You missed the meeting mentioned in your earlier email and sent Mostafiz. Tim attended as you had requested him to. Paynter's questioned what Tim was doing there, as the issues were much larger than the "minor issue of Meso's scope". Paynter's words, not ours. As you know, under those circumstances, he left as it was inappropriate for him to be in attendance, leaving Mostafiz to deal with Paynter's.

In your conversation with Tim, you mentioned it was sneaky that I only sent emails to you. I was merely following your instruction; you rang me one day and directed me that I was not to include others in emails. I was merely following your instructions. I did include George for the 17.2 notice and added info@a-civil for the adjudication emails, as I felt it warranted it.

How can we help you when you have rejected all our attempts to help? On many occasions, I've offered to come to your offices to help and go through the situation with Mostafiz or send me the documents Paynter has provided, namely payment schedules and emails stating why they are not paying. Then I can review and work out how to respond. This is my domain of responsibility within Meso, not Tim's and remains the offer I have been making for months. The offer still stands. I'm more than happy to come to your offices this week and go through it all with Mostafiz.

Regarding the current and in-play Adjudication Application and Withholding Notice to Paynter's. Paynter's not having paid you means that you currently haven't been put out of pocket apart from the non-payment by Paynters. This means they are legally bound to hold the amount we have stated in our notice. Once we go through the process and if the amount requires adjusting, we will have a lawyer issue a Deed stating the adjusted amount's parameters. In don't see why Paynter should be let off the hook; both of us should apply maximum pressure. Why should they get away with the back charging wall when you weren't notified in time and other items we can find in the process? Nasser, as I've told you before I'm good at this. Let me help you. But I can't do without knowing the complete picture.

The first paragraph suggests that Mr Matta and Mr Orr had a telephone conversation on 8 August 2022 between the time these two emails were sent. The emphasised statement in the third paragraph (“in your conversation with Tim you mentioned it was sneaky that I only sent emails to you”) is consistent with part of the conversation which Mr Matta says he had with Mr Orr set out at [34] above, but the remainder of the email is not consistent with Mr Orr having said that the Application would be withdrawn.

- (4) At 1:21pm on 9 August 2022 Mr Bobek sent the following email to Mr Matta and Mr Mostafiz (with a copy to Mr Orr):

Attached is the email you were referring to in our phone conversation.

Unfortunately, this doesn't tell me much.

All companies, Paynter Dixon included, will inflate their back-charging to give themselves negotiating room. We based our claim on the information contained in it and emails on rates from Paynter's.

I need to see the payment schedules Paynter Dixon sent A-Civil and their backup documents justifying the amount of back charging.

Also, you have seen our last claim. What is A-Civil's assessment of that claim? You don't have to send a payment schedule. I've prepared a spreadsheet which is attached. Just fill in the column marked A-Civil assessment. We may not be as far apart as perceived and arguing about nothing. It may not be worth going to war with Paynter's, and it becomes a commercial decision. Also, please confirm that we are on the same page with payments received.

Tim has agreed to withdraw the Adjudication Application once we review their position and formulate a response to Paynter Dixon, accepting the abovementioned paragraph.

The email referred to in the first paragraph is the email of 7 February 2022 referred to at [16] above which attached material concerning Paynter Dixon's position on backcharges for work done by A-Civil which A-Civil was disputing (and had in that earlier email sought Meso's assistance in framing its response to Paynter Dixon).

The last paragraph appears to be a summary of Mr Bobek's understanding of what Mr Orr “agreed” to do in his conversation with Mr Matta which is not consistent with Mr Matta's version of the conversation.

- (5) At 1:46pm that day, Mr Orr sent the following email to Mr Bobek with a copy to Mr Matta and Mr Mostafiz:

It sounds like PD are holding onto a lot of money including for earthworks, and piling as well as the RC walls from what Nasser tells

me. We can reconstruct what they are arguing about by simply reviewing each of their payment schedules for the series of months. That way we can determine exactly what the argument is about between A-Civil and Meso on one side and PD on the other.

I think we have calculated pretty closely the value of the works we did and deducted supply costs etc.

- (6) At 4:25pm that day, Mr Bobek sent an email to Mr Matta and Mr Mostafiz (with a copy to Mr Orr) stating:

I'm tied up in meetings for the next couple of hours. I can be at your office at 8:30am in the morning to start going through this.

- (7) At 4:29pm that day, Mr Matta responded by an email to Mr Bobek stating:

As agreed, Meso will be withdrawing the Adjudication today, I haven't received anything as yet and as to the withdrawing from the Adjudication.

Can you confirm this will be done today by 5pm thanks.

- (8) At 5:03pm that day, Mr Bobek replied stating:

I called our lawyer's office and advised what we wanted to do.

He was tied up with another matter and his assistant has advised him.

He will get to it when he can either today or tomorrow.

In any case, the adjudicator has ten days to respond.

If you feel you must get your lawyers to place the start the legal action, that's fine I'll still work with you guys to work this out.

I cancelled meetings to be at your offices at 8.30 tomorrow and working late to fit you guys in.

- (9) At 5:23pm that day, Mr Matta replied stating:

Ok Eddie,

Thanks for the commitment for the withdrawing the Adjudication and will see you soon.

- (10) On 10 August 2022 at 1:17pm, Mr Bobek sent an email to Mr Matta stating:

Our lawyer finally got back to us a few moments ago.

He has strongly recommended we not withdraw the adjudication application until we have a better idea of the information that A Civil is willing to share with us in order to pursue a successful joint claim against Paynter Dixon.

He also advised we have 10 days from yesterday to come to a resolution, in any case, it won't be realised until we pay for it.

I came to your offices this morning as I said I would establish the baseline of what PD has agreed with each of our claims which will then formulate the response to their back charging claims.

After Mostafiz's no-show this morning and A-Civil reluctance to share PD information we will not be withdrawing the adjudication application. As always, we are open to willing to work together to come to a resolution but require the PD information.

- 41 Mr Bobek sent further emails to Mr Matta on 16 and 17 August 2022 stating that Meso needed to see Paynter Dixon's payment schedules and other specified documents before it would withdraw the adjudication application. It is clear that A-Civil did not respond.
- 42 On 17 August 2022 at 4:38pm, Adjudicate Today sent an email to A-Civil and Meso attaching the Determination which determined the adjudicated amount to be \$366,813.76.
- 43 On 24 August 2022, these proceedings were commenced by A-Civil by way of summons.

Clause 8.3 of the General Conditions

- 44 Clause 8.3 of the General Conditions provides relevantly:

8.3 Payment Claim & Payment Certificate

...

(b) At the times stated in Annexure A, item 11, and upon the times set out in Clauses 8.15 and 8.17, the Subcontractor may submit a Payment Claim to A-Civil, or as directed in writing by A-Civil. Notwithstanding the formalities of Clauses 8.15 and 8.17, a Payment Claim must include the value, quantities and description of work carried out by the Subcontractor in the performance of this Agreement to the permissible Reference Date together with the information set out in Clause 8.3(c), (g), (h) and (i) ("**Payment Claim**").

(c) A Payment Claim must contain and show the Subcontractor's assessment of:

- (i) the value of the Works completed (excluding Variations, but allowing for Variation omissions) since any earlier, if any, Payment Claim, pursuant to this Agreement and valued (as shown in Annexure A, item 8) in accordance with Clause 8.3(b) and Clauses 8.5, and/or 8.6 and/or 8.7 at the Reference Date;
- (ii) the value of work completed for Variations at the Reference Date, valued in accordance with Clause 7;
- (iii) the total amount determined under Clauses 8.3(c)(i) and 8.3(c)(ii), less the amount previously paid to the Subcontractor;
- (iv) the deduction of any Retention Moneys to be retained by A-Civil pursuant to this Agreement;
- (v) any other amounts to which the Subcontractor is then entitled under this Agreement at the Reference Date;

- (vi) GST in the form of a tax invoice; and
- (vii) plans, drawings, schedules marked and containing accurate and current information to support the quantities or weight claimed in the Payment Claim.

...

(g) A-Civil is not obliged to make a Progress Payment referred to in Clause 8.8 to the Subcontractor unless each Payment Claim made for each Reference Date to the satisfaction of A-Civil:

- (i) complies with Clauses 8.3(c) and (d);
- (ii) complies with Clause 8.3(g);
- (iii) complies with Clause 9;
- (iv) is accompanied with a "Subcontractor's Statement" in the form as provided in Annexure C of this Agreement regarding workers compensation, payroll tax and remuneration, which is to be signed by the Subcontractor or its authorised representative as required under the Relevant Legislation and any other relevant laws;
- (v) is accompanied with a Statutory Declaration in the form as provided in Annexure F of this Agreement which is to be signed by the Subcontractor or its authorised representative and duly witnessed by a person legally authorised to administer an oath under the *Oaths Act 1900* (NSW), or as required under the Relevant Legislation and any other relevant laws;
- (vi) is accompanied with accurate and current documentary evidence in the form of itemised reports and receipts showing comprehensive details about the Subcontractor's employees and/or Persons' names and amounts due, payable and paid for the period referable to the Payment Claim showing that the Subcontractor's obligations for:

- (A)** Superannuation;
- (B)** Redundancy;
- (C)** Accident insurance cover;
- (D)** Long Service Leave; and
- (E)** EHS,

have been fulfilled (including paid) by the Subcontractor in accordance this Agreement (see Annexure K), with Relevant Legislation, any other applicable law, awards, industrial requirements and instruments.

(vii) is accompanied with accurate and current documentary evidence in the form of certificates of currency for current, paid and compliant insurance policies having regard to Clause 10 for the period referable to the Payment Claim showing that the Subcontractor's obligations for:

- (A)** Contract Works;
- (B)** Public and Products Liability;
- (C)** Workers Compensation or Workcover NSW;
- (D)** Professional Indemnity;

- (E) Motor Vehicle Third Party;
- (F) Asbestos Liability; and
- (G) All-Risk Liability,

have been fulfilled (including premiums paid) by the Subcontractor in accordance with this Agreement, Relevant Legislation, any other applicable law, awards, industrial requirements and instruments.

(viii) is accompanied with accurate and current documentary evidence in the form of itemised reports, statements (including for integrated client accounts, income and activity statements (BASs)), returns and receipts showing comprehensive details about the Subcontractor's employees and/or Persons' names and amounts due, payable and paid for the period referable to the Payment Claim showing that the Subcontractor's obligations for:

- (A) PAYG Tax;
- (B) Income Tax;
- (C) Fringe Benefits;
- (D) GST;
- (E) Payroll Tax; and
- (F) Duty,

have been fulfilled (including paid) by the Subcontractor in accordance with this Agreement, Relevant Legislation, any other applicable law, awards, industrial requirements and instruments.

(ix) have returned to A-Civil two copies of this Agreement duly executed on behalf of the Subcontractor, unless, without affecting any of A-Civil's rights under this Agreement, this Agreement has been accepted pursuant to the Formal Instrument of Agreement and/or Clause 2.2(hh) of this Agreement.

(h) Without limiting the effect of Clause 8.3(g), A-Civil is also not obliged to make a Progress Payment referred to in Clause 8.8 to the Subcontractor until the Subcontractor has delivered, to the satisfaction of A-Civil, the following:

- (i) completed Director(s) Guarantee and Parent Company Guarantee;
- (ii) details of the Subcontractor's quality, industrial, environmental, health and safety systems, policies and agreements;
- (iii) a list of all Secondary Subcontractors, labour hire firms and suppliers engaged by the Subcontractor in connection with the Works; and
- (iv) if the Payment Claim is the Substantial Completion Payment Claim under Clause 8.15, an executed deed of settlement and release substantially in the form of the deed in Annexure E,

as requested by A-Civil or in accordance with this Agreement, Relevant Legislation, any other applicable law, awards, industrial requirements and instruments.

...

(k) If the Subcontractor fails to comply with some or all of the requirements of Clauses 8.3(b), (c) and (d), 8.3(g), (h) and (i) within the time by which A-Civil is obliged to provide a Payment Certificate, either, at A-Civil's sole discretion, the relevant Payment Claim is void, or if not void, A-Civil is entitled to issue a Payment Certificate for either \$Nil or for the Certified Amount, but A-Civil is not obliged to make any Progress Payment until 20 Days after A-Civil is satisfied that the Subcontractor has complied with the totality of Clauses 8.3(b), (c) and (d), and 8.3(g), (h) and (i).

Issues

45 The issues in dispute are:

- (1) Whether A-Civil has established that Meso made representations on 2 June 2022, 18 July 2022 or in early August 2022 that Meso would withdraw the Application and, thus, that A-Civil was not required to issue a payment schedule.
- (2) Whether non-compliance with cl 8.3 of the General Conditions by Meso ousted the jurisdiction of the Adjudicator.
- (3) Whether A-Civil waived compliance with cl 8.3 of the General Conditions.

Claims under sections 18, 20 and 21 of the ACL

46 Section 18(1) of the ACL provides:

A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

47 Section 20 of the ACL provides:

- (1) A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.
- (2) This section does not apply to conduct that is prohibited by section 21.

48 Section 21 of the ACL provides:

- (1) A person must not, in trade or commerce, in connection with:
 - (a) lease or supply or possible supply of goods or services to a person; or
 - (b) the acquisition or possible acquisition of goods or services from a person;

engage in conduct that is, in all the circumstances, unconscionable.

49 A-Civil's primary case was that each of the 2 June Representation and 18 July Representation contravened s 18 of the ACL. It also submitted that Meso would engage in unconscionable conduct within the meaning of s 20 of the ACL or in the alternative s 21 of the ACL if it was permitted to obtain and

enforce an adjudication certificate and judgment with respect to the Determination as this would be conduct contrary to the representations.

50 The parties were in agreement that the central issue on which the application of s 18, 20 or 21 of the ACL turned was whether A-Civil had established, as a matter of fact, that Meso made each of the alleged representations.

51 In *Kallin Pty Ltd v ACN 107 851 847 Pty Ltd* [2018] NSWSC 124 at [42], Hammerschlag J (as his Honour then was) said:

Where a party seeks to rely upon spoken words as a foundation for a cause of action, including a cause of action based on a contract, the conversation must be proved to the reasonable satisfaction of the Court, which means that the Court must feel an actual persuasion of its occurrence or its existence. In the absence of some reliable contemporaneous record or other satisfactory corroboration, a party may face serious difficulties of proof. Such reasonable satisfaction is not a state of mind that is obtained or established independently of the nature and consequences of the fact or facts to be proved. The seriousness of an allegation made, inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question of whether the issue has been proved to the reasonable satisfaction of the Court. Reasonable satisfaction should not be produced by inexact proofs, indefinite testimony, or indirect inferences: see *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362, [1938] HCA 34; *Helton v Allen* (1940) 63 CLR 691 at 712; *Rejtek v McElroy* (1965) 112 CLR 517 at 521; *Watson v Foxman* (1995) 49 NSWLR 315 at 319.

52 In *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34, Dixon J emphasised that when the law requires the proof of any fact the Court must feel an actual persuasion of its occurrence or existence before it can be found, and “it cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality”.

53 In *Watson v Foxman* (1995) 49 NSWLR 315, McLelland CJ in Eq made the following well known observations regarding the fallibility of human memory (at 319):

... human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.

54 See also the observations of Leggatt J (as his Honour then was) as to the fallibility of human memory to similar effect in *Blue v Ashley* [2017] EWHC 1928 (Comm) at [66]-[69].

55 Hence, in commercial disputes the contemporaneous documents, objectively established facts and the apparent logic of events are likely to be the most reliable sources of evidence: *Et-China.com International Holdings Ltd v Cheung* [2021] NSWCA 24; 388 ALR 128 at [25]-[29] (and cases there cited).

Whether the 2 June and 18 July Representations were made

56 Based on all the evidence I do not have an actual persuasion that Mr Orr made either the 2 June Representation or the 18 July Representation, for the following reasons.

57 First, A-Civil has not proved that any conversation occurred between Mr Matta and Mr Orr on or about either 2 June 2022 or 18 July 2022. Mr Matta was aware at the time he prepared his second affidavit of 23 November 2022 that Mr Orr disputed that he spoke to Mr Matta on or around either of those dates. Mr Matta could have but did not put on evidence as to his mobile phone records to show that he either made or received a call from Mr Orr on each of those days. It is significant that in his second affidavit of 23 November 2022 he included his mobile telephone log for 9 August 2022 to establish the calls he made to Mr Bobek on that day. That telephone log shows that he made three calls to Mr Orr's mobile phone on 9 August 2022. There is no explanation as to why Mr Matta did not address the question of whether he made a call to or received a call from Mr Orr on 2 June 2022 or 18 July 2022 in the same way. In these circumstances I draw the inference that Mr Matta's telephone log would not have assisted in establishing that telephone conversations between them occurred on or around 2 June 2022 and 18 July 2022: *Jones v Dunkel* (1959) 101 CLR 298 at 320-321; [1959] HCA 8.

58 Second, Meso tendered Mr Orr's telephone log for his mobile phone for the period from 31 May to 4 August 2022. This showed that no call was made by Mr Orr on that mobile phone to Mr Matta or vice versa at any time during that period. Mr Orr's evidence was that he makes and receives all his business calls on his mobile phone. Further, it is clear from Mr Matta's mobile phone log

for 9 August 2022 that he telephoned Mr Orr on his mobile phone 3 times on that day and it may be inferred that this is the likely telephone number he would have used had he called Mr Orr on 2 June or 18 July 2022.

59 Third, the email correspondence in the period from 2 June to 17 August 2022 (when the parties were notified by Adjudicate Today that the Determination had been made) contains no reference to the making of any representation in the nature of the 2 June Representation or the 18 July Representation. In particular, the evidence clearly establishes that there were discussions on 8 to 10 August 2022 regarding the withdrawal of the Application, including several emails by Mr Matta to Mr Bobek and Mr Orr on that subject. In none of these emails does Mr Matta refer to the 2 June or 18 July Representations. Had the 2 June or 18 July Representations been made, one would expect Mr Matta to have reminded Mr Orr of this fact and to have pressed him to act consistently with them.

60 Fourth, it is inherently improbable that Mr Orr would have made the 2 June or 18 July Representations given the large amount owing by A-Civil to Meso at that time, and the fact that Mr Orr and Mr Bobek had been chasing A-Civil for payment of Meso's outstanding payment claims for the Project since the last payment was received from A-Civil on 23 December 2021.

61 Fifth, Mr Matta's evidence in cross-examination was that at the time A-Civil received all payment claims made after the Contract was entered into (including Claim 16) he was of the view that they were not valid payment claims under the Act due to non-compliance with cl 8.3 of the General Conditions:

Q. When you received, for example, payment claims 11 to 15, it was obvious to you that MESO had not complied with general condition 8.3; correct?

A. Correct.

Q. And when you received payment claim 16, it was obvious to you that MESO had not complied with general condition 8.3; correct?

A. Correct.

Q. And when you received those claims, that is, 10 to 15 and 16, it was your view that those payment claims are invalid; correct, because they did not comply with general condition 8.3?

A. Well, payment claim 16 was only sent to me. I was – I was not--

Q. When it was sent to you, upon receiving payment claims 10 to 16, you formed the view that they were invalid because they did not comply with general condition 8.3; correct?

A. Correct.

62 Later he was asked further questions about payment claim 9 at page 917 of the Court Book, and the following exchange occurred:

Q. The document at 917, did you, at the time when you received it, understand it to be a claim under the Security of Payment Act or not?

A. Yes.

Q. Did you think in order for it to be a valid payment claim under the Security of Payment Act MESO had to comply with general condition 8.3?

A. Yes.

Q. And you formed the view in June 2021 that it wasn't a valid payment claim under the Act because the document at 917 did not comply with general condition 8.3; correct?

A. Yes.

Q. And the same can be said about payment claims 10 to 15; correct?

A. Yes.

Q. And the same can be said about payment claim 16; correct?

A. Yes.

63 Mr Matta's view that Claim 16 was invalid is the likely explanation for why no payment schedule was issued for Claim 16 and makes it highly unlikely that Mr Matta saw any need to obtain an undertaking from Meso that A-Civil did not need to put on a payment schedule or that it would not proceed to adjudication. This is because if Claim 16 was invalid, the adjudication would be unsuccessful. Whether this view is correct is the subject of the jurisdiction claim dealt with later in these reasons.

64 Sixth, having observed both Mr Matta and Mr Orr give evidence in cross-examination, I am not persuaded that Mr Matta's recollection of the alleged conversations with Mr Orr is reliable.

65 Seventh, none of the matters raised by counsel for A-Civil as reasons why I should accept Mr Matta's evidence are persuasive.

(a) It was submitted that Mr Orr and Mr Bobek had given false evidence regarding conversations relating to the inclusion of cl 8.3 and the Withdrawal Representation. I put to one side Mr Bobek's evidence regarding cl 8.3 and the Withdrawal

Representation because he is not the person said to have made the 2 June or 18 July Representations. In so far as Mr Orr is concerned, I do not accept that he gave false evidence regarding cl 8.3 or the Withdrawal Representation.

- (b) It was submitted that because Meso had offered to A-Civil on 28 January 2022 to lodge an adjudication application against A-Civil and then to subsequently withdraw it, to enable A-Civil to press for payment of monies owed to A-Civil by Paynter Dixon, this made it “entirely believable” that Meso would lodge an adjudication application with no intention of pursuing it to an adjudication and would say as much to A-Civil. I do not regard the email of 28 January 2022 as having any bearing on the question whether the 2 June or 18 July Representations were made. There is no suggestion in the evidence that A-Civil ever took up the suggestion in the email of 28 January 2022 that this was a worthwhile strategy to adopt.
- (c) It was submitted that the Withdrawal Representation was consistent with the 2 June and 18 July Representations. For reasons explained below, I do not accept that the Withdrawal Representation was made but in any event of more significance is the fact that in the email correspondence occurring in August 2022 regarding the Application, Mr Matta made no reference to the fact that Mr Orr had made the 2 June and 18 July Representations.
- (d) It was submitted that the contemporaneous emails indicate that Claim 16 and the subsequent adjudication application were assisting A-Civil to obtain payment from Paynter Dixon and to put pressure on Paynter Dixon. In my view, this is not correct. Rather, the contemporaneous emails from Meso indicate that the purpose of Claim 16 was to recover the amount which Meso claimed it was owed by A-Civil. The repeated statements by Meso that it wished to assist A-Civil to obtain payment from Paynter Dixon which is found in the email attaching Claim 16 (as well as emails before and after that time) are clearly explicable on the basis that Meso was offering to assist A-Civil to recover amounts owing to it by Paynter Dixon as this would make it easier for A-Civil to fund the payment to be made by it to Meso for the large amount outstanding since 23 December 2021.
- (e) It was submitted that the email correspondence on 9 and 10 August 2022 indicated that Meso only decided to pursue the adjudication after it received advice from its lawyers on 10 August 2022. I reject this submission. The emails of 8, 9 and 10 August 2022 indicate that Meso had decided on the strategy of pursuing adjudication in order to recover the amounts which it considered to be owing by A-Civil and while it considered A-Civil’s request that it withdraw the Application, ultimately it decided not to do so.

- (f) It was submitted that there was no rational explanation as to why A-Civil would not have issued a payment schedule with respect to Claim 16, particularly upon receiving the s 17(2) notice on 15 July 2022. Rather, it was said that the most plausible explanation as to why A-Civil did not issue a payment schedule regarding Claim 16 is because Mr Matta was told that he did not have to worry about it. I reject this submission. It is clear that A-Civil had not issued a payment schedule for any of the other 15 payment claims which preceded Claim 16. While the giving of the s 17(2) notice on 15 July 2022 exposed A-Civil to the risk that it would lose its entitlement to lodge an adjudication response unless it served a payment schedule within 5 business days after receipt of the notice, this was drawn to the attention of A-Civil by Mr Bobek. Had the 2 June and 18 July 2022 Representations been made, one would expect that Mr Matta would have sent an email to Mr Bobek reminding him that Mr Orr had made the representations and requiring the s 17(2) notice to be withdrawn. Mr Matta did not do so and indeed there were no written communications from A-Civil to Meso regarding Claim 16 until 8 August 2022, after the Application had been lodged. The more plausible explanation in my view is that A-Civil took the view that Claim 16 had no legal effect due to non-compliance with cl 8.3 of the General Conditions.
- (g) It was submitted that the errors on the face of Claim 16 indicate that Meso was less concerned with correctly calculating the amount owing to it and more concerned with issuing a payment claim to assist A-Civil in pursuing Paynter Dixon. I reject this submission as it is contradicted by the email correspondence from Mr Bobek to A-Civil at the time Claim 16 was issued.

Whether the Withdrawal Representation was made

- 66 I do not accept Mr Matta's evidence regarding the conversations he had with Mr Orr and Mr Bobek after the Application was lodged.
- 67 The starting point is Mr Matta's telephone log for 9 August 2022 (which he put into evidence) which establishes two important matters. The first is that Mr Matta had a telephone conversation with Mr Bobek at 11:18am on that day which lasted for 9 minutes and 41 seconds. The telephone log records no other call to Mr Bobek's mobile phone lasting more than a few seconds that day except for one he made to Mr Bobek's mobile phone at 4:02pm which lasted for 7 seconds. There is a text message which Mr Bobek left on Mr Matta's mobile phone at 4:02pm which states: "Sorry, I can't talk right now." I infer from this that the 7 second call at 4:02pm most likely involved Mr Matta leaving a short voicemail message for Mr Bobek and that they did not actually speak at

that time. Hence, the conversation between Mr Matta and Mr Bobek referred to at [37] and [38] above most likely occurred at 11:18am on 9 August 2022, ie, before the email Mr Bobek sent to Mr Matta at 1:21pm set out at [40(4)] above. This is confirmed by the opening paragraph of the email which says: “Attached is the email you were referring to in our phone conversation”. The “phone conversation” is most likely the one he has just had at 11:18am that morning. The significance of this timing is that Mr Bobek’s email sent at 1:21pm concludes with the statement “Tim has agreed to withdraw the adjudication application once we review their position and formulate a response to Paynter Dixon, ...”. The tenor of the email, including particularly the last paragraph, is more consistent with Mr Bobek’s version of the conversation set out at [38] above rather than Mr Matta’s version.

68 The second important matter established by Mr Matta’s mobile phone log is that he called Mr Orr’s mobile phone at 1:48pm on 9 August 2022 and had a conversation which lasted for just over 13 minutes. It may be that the last paragraph of Mr Bobek’s email sent at 1:21pm that day prompted Mr Matta to call Mr Orr. But there is no evidence as to what was said in the conversation at 1:48pm and given the length of the call, the Court can have no confidence that either version of the conversation at [34] and [35] above reflects what was said by them in a call on 9 August 2022.

69 The email correspondence on 8 August 2022 suggests that the conversation between Mr Matta and Mr Orr above about which they each gave evidence at [34] and [35] above occurred on 8 August 2022. Importantly, this is before Mr Bobek’s email of 9 August 2022 at 1:21pm which records what Mr Orr had “agreed” regarding withdrawal of the adjudication application.

70 Having placed the conversation between Mr Matta and Mr Orr in context, I think it is more likely that Mr Orr’s version of the conversation is correct. Mr Orr and Mr Bobek had consistently maintained the position that they needed to see the payment schedules and other documents provided by Paynter Dixon to A-Civil to understand the nature of Paynter Dixon’s claim against A-Civil. Having not received that information, Meso had now proceeded to the next stage of enforcing its rights under the Act to recover the significant sum which it

regarded as owing by A-Civil to it and was in a position of strength. It makes no sense for Mr Orr to have changed his approach in the conversation with Mr Matta on either 8 or 9 August 2022 when Mr Matta was clearly not offering to change his approach regarding the provision of the Paynter Dixon payment schedules or to provide any benefit to Meso for giving up its position of strength. The two emails sent by Mr Matta to Mr Bobek in the afternoon of 9 August 2022 (the first at 4:29pm and the second at 5:23pm) have the flavour of Mr Matta seeking to put pressure on Mr Bobek to withdraw the adjudication application.

- 71 In addition to the documentary record, I have also taken into account the evidence given by each of Mr Matta, Mr Orr and Mr Bobek in cross-examination in concluding that Mr Matta's version of each conversation with Mr Orr and Mr Bobek is not reliable.

Conclusion

- 72 For the above reasons, I do not accept that any of the alleged representations were made by Meso to A-Civil and accordingly the claims under s 18, s 20 and s 21 of the ACL cannot succeed.

Jurisdictional claim

- 73 A-Civil's pleaded case is that the s 17(2) notice was invalid because Claim 16 was not accompanied by the documents required by cl 8.3 of the General Conditions (in particular those referred to in cl 8.3(g)(iv), (v), (vi), (vii) and (viii)) with the result that A-Civil had no obligation to pay the amount stated in Claim 16. By virtue of cl 8.3(k) of the General Conditions, Claim 16 was void and only fell due for payment 20 days after Meso had complied with the totality of the obligations in cl 8.3(g) of the General Conditions (which never occurred).

Relevant provisions of the Act

- 74 The following are the provisions of the Act relevant to this issue.

8 Right to progress payments

A person who, under a construction contract, has undertaken to carry out construction work or to supply related goods and services is entitled to receive a progress payment.

9 Amount of progress payment

The amount of a progress payment to which a person is entitled in respect of a construction contract is to be—

- (a) the amount calculated in accordance with the terms of the contract, or
- (b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract.

...

11 Due date for payment

(1) Subject to this section and any other law, a progress payment to be made under a construction contract is payable in accordance with the applicable terms of the contract.

...

(1B) A progress payment to be made to a subcontractor under a construction contract (other than an exempt residential construction contract) becomes due and payable on

- (a) the date occurring 20 business days after a payment claim is made under Part 3 in relation to the payment, except to the extent paragraph (b) applies, or
- (b) an earlier date as provided in accordance with the terms of the contract.

...

(8) A provision in a construction contract has no effect to the extent it allows for payment of a progress payment later than the relevant date it becomes due and payable under subsection (1A) or (1B).

...

13 Payment claims

(1) A person referred to in section 8 who is or who claims to be entitled to a progress payment (the **claimant**) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

(1A) A payment claim may be served on and from the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and on and from the last day of each subsequent named month.

(1B) However, if the construction contract concerned makes provision for an earlier date for the serving of a payment claim in any particular named month, the claim may be served on and from that date instead of on and from the last day of that month.

(1C) In the case of a construction contract that has been terminated, a payment claim may be served on and from the date of termination.

(2) A payment claim -

- (a) must identify the construction work (or related goods and services) to which the progress payment relates, and
 - (b) must indicate the amount of the progress payment that the claimant claims to be due (the **claimed amount**), and
 - (c) must state that it is made under this Act.
- (3) The claimed amount may include any amount -
- (a) that the respondent is liable to pay the claimant under section 27(2A), or
 - (b) that is held under the construction contract by the respondent and that the claimant claims is due for release.
- (4) A payment claim may be served only within -
- (a) the period determined by or in accordance with the terms of the construction contract, or
 - (b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),

whichever is the later.

...

17 Adjudication applications

- (1) A claimant may apply for adjudication of a payment claim (an **adjudication application**) if -
- (a) the respondent provides a payment schedule under Division 1 but
 - (i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or
 - (ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or
 - (b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.
- (2) An adjudication application to which subsection (1)(b) applies cannot be made unless -
- (a) the claimant has served written notice on the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and
 - (b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.

...

34 No contracting out

- (1) The provisions of this Act have effect despite any provision to the contrary in any contract.
- (2) A provision of any agreement (whether in writing or not)
 - (a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or
 - (b) that may reasonably be construed as an attempt to deter a person from taking action under this Act,is void.

A-Civil's contentions

- 75 In the present case, the Application was made by Meso in reliance on s 17(1)(b) of the Act. A-Civil contends that the s 17(2) notice which Meso served on A-Civil on 15 July 2022 did not comply with s 17(1)(b) because Meso did not supply with Claim 16 the documents required by cl 8.3(g) of the General Conditions, and consequently by the operation of cl 8.3(k) of the General Conditions, no amount ever fell due for payment under Claim 16.
- 76 The correctness of this contention turns on two questions: first, whether the due date for payment of the amount claimed under a payment claim is determined by the provision of the contract such as cl 8.3 which makes the payment obligation contingent on the provision of certain documents; and second, if so, whether the provision of the contract which has that effect is void under s 34 of the Act.

Consideration

- 77 The scheme of ss 8, 9, 11 and 13 of the Act is as follows:
- (a) Sections 8 and 9 confer a statutory entitlement on a person who under a construction contract has undertaken to carry out construction work or supply related goods and services to receive a "progress payment" in an amount "calculated in accordance with the terms of the contract" (where, as here, the contract makes express provision as to the amount payable).
 - (b) Section 11(1) states that the amount of the progress payment is payable in accordance with the applicable terms of the contract subject to the operation of the succeeding provisions of s 11.
 - (c) In the present case, the operation of s 11(1) is qualified by s 11(1B) which states, relevantly, that a progress payment "becomes due and payable" on the date 20 business days after the payment claim was made under s 13.

- (d) The primacy of the date for payment stated in s 11(1B) is indicated by s 11(8) which states that a provision of a contract which allows for payment of a progress payment at a later time than provided under s 11(1B) has “no effect”.
- (e) Section 13 sets out the procedure for making a claim for a progress payment (referred to as a “payment claim”) and sets out certain matters which must be set out in the payment claim in s 13(2).

78 It is clear that while the statutory entitlement under s 8 is predicated on the existence of a construction contract, the entitlement and the means available for its enforcement stand apart from the parties’ rights under the Contract: *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4 at [38]; *All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd* [2017] NSWCA 289 at [8].

79 Section 9 provides that the amount of a progress payment to which a person is entitled under s 8 is to be “calculated in accordance with the terms of the contract”. In *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* [2007] NSWCA 19; 23 BCL 205 at [38], Hodgson JA (with whom Beazley JA agreed) said that “calculated in accordance with the terms of the contract” means calculated on the criteria established by the contract, and does not mean reached according to mechanisms provided by the contract. This observation was referred to with evident approval by Bathurst CJ in *Edelbrand Pty Ltd v H M Australia Holdings Pty Ltd* [2012] NSWCA 31 at [79]. Later, in *Plaza West Pty Ltd v Simon’s Earthworks (NSW) Pty Ltd* [2008] NSWCA 279, Hodgson JA explained what he meant by his earlier observation in *John Holland* when he said at [54]:

This means that contractors are not deprived of entitlement to payment under the Act because a condition precedent, such as the obtaining of a superintendent’s certificate, has not been satisfied; and it means equally that contractors are not ipso facto entitled to payment because of the operation of a deeming provision such as cl 37(2) of the contract in this case.

80 Section 11 deals with the time at which the progress payment is payable. The relevant provision of s 11 in the present case is s 11(1B) which makes the progress payment “due and payable” on the date which is the earlier of the two dates specified in paragraphs (a) and (b) of the sub-section (which in this case is 20 business days after the payment claim was made). The expression “due

and payable” in its ordinary meaning denotes an amount which is presently payable as opposed to an amount due but not yet payable. The word “due” used on its own is ambiguous as it can mean owing although not payable until a future date or it can mean presently payable; the compound phrase “due and payable” makes it clear that the relevant amount is required to be immediately or presently paid: *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1 at 8 and 15, [1981] HCA 40; *Helou v PD Mulligan Pty Ltd* (2003) 57 NSWLR 74; [2003] NSWCA 92 at [26(3)]; *Griffin Energy Group Pty Ltd v ICICI Bank Ltd* [2015] NSWCA 29; 317 ALR 395 at [53]-[54].

- 81 The reference in s 11(1B) to a progress payment is to the statutory entitlement conferred by s 8 of the Act. While the statutory entitlement under s 8 is calculated in accordance with the terms of the contract (s 9(c)), the date on which it becomes due and payable is determined by s 11(1B) and not the terms of the contract (such as a provision like cl 8.3(g) of the General Conditions). While s 11(1B) describes the progress payment as being one made “under a construction contract”, all this does is identify the construction contract which is the precondition for the statutory right to progress payments: *Quickway Constructions Pty Ltd v Electrical Energy Pty Ltd* [2017] NSWSC 1140 at [27].
- 82 The method of enforcement of a progress payment as a debt due to the claimant turns on whether a payment schedule is served, whether there is an adjudication application and, if so, whether it goes to adjudication: see s 14, 15, 16 and 25 of the Act. However, these provisions all proceed on the basis that the statutory entitlement under s 8 is an obligation which is immediately due for payment on the date specified in s 11(1B) (where that provision applies).
- 83 It is clear from the Second Reading Speech for the Building and Construction Industry Security of Payment Amendment Bill 2013 which introduced s 11(1B) into the Act that this is how s 11(1B) is intended to operate. The Minister said:

I turn now to the prompt payment provisions set out in section 11 of the Act. New section 11(1) of the bill provides that subject to this section and any other law, a progress payment to be made under a construction contract is payable in accordance with the application terms of the contract. This ensures that parties to a contract may continue to negotiate terms that apply to the process of assessing a payment claim made under a construction contract. New section 11(1A) of the bill stipulates that a progress payment to be made by a principal to a head contractor becomes due and payable on the date occurring

15 business days after a payment claim is made under part 3 of the Act. New section 11(1B) of the bill stipulates that a progress payment to be made to a subcontractor becomes due and payable on the date occurring 30 business days after a payment claim is made under part 3 of the Act. This provision applies to contracts between a head contractor and subcontractor as well as contracts between subcontractors, and subcontractors and suppliers.

These maximum payment periods are the safety net for both head contractors and subcontractors. A construction contract may of course provide for payment on an earlier date than these maximum payment periods. These prompt payment provisions are designed to start the faster flow of cash from the top of the contracting chain. Consistent with the exemption I have already described, new section 11(1C) of the bill retains the existing due and payable provisions for construction contracts connected to an exempt residential contract. There are no changes in this bill to part 3 of the Act, which sets out the procedure for recovering progress payments, including how a payment claim is to be made. New section 11(8) of the bill voids any provision in a construction contract that provides for payment of a progress payment later than the maximum payment periods set out in subsections (1A) and (1B).

- 84 In my opinion, s 11(1B) has the effect that the progress payment claimed by Meso under Claim 16 became due and payable 20 business days after that payment claim was made (30 May 2022) notwithstanding that the documents required under cl 8.3(g) of the General Conditions did not accompany Claim 16. Clause 8.3(g) allows A-Civil to make a progress payment at a later time than provided under s 11(1B) because it permits A-Civil to defer making the payment until such time as the documents listed in cl 8.3(g) are provided by Meso, and hence is to be disregarded for the purposes of s 11(1B) by s 11(8).
- 85 If I am wrong in the conclusion that cl 8.3(g) is inapplicable, then I would find that it is void under s 34(2)(a) of the Act. Clause 8.3(g) would, if it applied to a progress payment under s 8, operate to exclude, modify or restrict the operation of s 11(1B) because it would prevent the progress payment from being due and payable unless certain documents are provided to A-Civil.
- 86 A-Civil submitted that cl 8.3(g) does not offend s 11 because it does not extend the time for payment of a claim under the Contract beyond the period of 20 business days after the payment claim is made, but rather makes the payment obligation conditional on the provision of certain documents. It was submitted that s 11 is directed only at provisions which attempt to defer the time for payment and not provisions such as cl 8.3(g) which make the payment obligation conditional or contingent on some matter or event. It was submitted that this contention is supported by s 12 which treats a “pay when paid”

provision as of no effect. A “pay when paid” provision is one which, essentially, makes the liability to pay money owing or the time for payment contingent on a payment being made under, or the operation of, another contract.

- 87 In my view, this submission overlooks the words “progress payment ... becomes due and payable” in s 11(1B) which indicate that, by force of that subsection, the statutory entitlement to a progress payment arising under s 8 is both owing and payable on the specified date. It is irrelevant that under the construction contract the obligation may be contingent on certain documents being provided with the progress claim: see the observation of Hodgson JA set out at [79] above. Nor is it relevant to the construction of s 11 that s 12 renders ineffective provisions in a construction contract making the obligation to make a payment for construction work contingent or conditional on certain matters. Section 12 was present in the Act when enacted to deal with a particular kind of term in a construction contract (referred to as a “pay when paid” provision) and s 11(1B) was introduced in 2013 to deal with a different mischief.

Whether A-Civil waived compliance with cl 8.3

- 88 Meso raised in its defence a contention that in a conversation between Mr Mostafiz and Mr Bobek on 28 June 2022, Mr Mostafiz told Mr Bobek that Meso need not comply with cl 8.3. Meso accepted that if it was successful on the first two issues, it was not necessary to deal with this waiver issue.
- 89 While this issue does not arise given my conclusions on the first two issues, I will make the following brief observations about it. It is clear from the evidence that Mr Mostafiz and Mr Bobek did have a conversation on 28 June 2021 regarding the Contract. Mr Mostafiz could not recall in cross-examination whether he discussed cl 8.3 of the General Conditions with Mr Bobek during that conversation. Mr Bobek said in cross-examination that he recalls saying to Mr Mostafiz that cl 8.3 was onerous and that Mr Mostafiz said to him words to the effect “Don’t worry about [it], just keep on doing what [Meso] are doing”. Accepting for the moment that words to this effect were said, it falls short of a waiver of cl 8.3 for a number of reasons.
- 90 First, the claim of waiver or estoppel was based on Mr Mostafiz having made a representation that Meso was not required to strictly comply with the provisions

of cl 8.3(g). However, the conversation relied on is not sufficiently precise to form the basis of any meaningful representation by Meso as clearly a number of the subparagraphs of cl 8.3 apart from cl 8.3(g) were necessary for the operation of the progress payment regime under the Contract. Second, it is not clear how the alleged representation sits with the very extensive “entire agreement” clause contained in the Contract which was signed later that day. Third, it is not clear that Mr Mostafiz had authority to bind A-Civil as he was not a director of A-Civil but merely an employee.

91 None of these matters was dealt with in submissions, reflecting the fact that this issue was touched on only briefly by the parties.

Conclusion

92 For the above reasons, the proceedings should be dismissed with costs.

93 I direct the parties within 7 days to bring in Short Minutes of Order to give effect to these reasons.
