

**Supreme Court of Victoria - Court of Appeal****Mayfair Land Holdings Pty Ltd v Terafortis Ltd [2025]
VSCA 343 (22 December 2025)**

Last Updated: 22 December 2025

21 October

SUPREME COURT OF VICTORIA**COURT OF APPEAL**

S EAPCI 2025 0054

MAYFAIR LAND HOLDINGS PTY LTD (ACN 622 038 635)

Applicant

v

TERAFORTIS LTD (COMPANY NUMBER 2083063)

Respondent

JUDGES:

WALKER, ORR and KENNY JJA

WHERE HELD:

Melbourne

DATE OF HEARING:

29 July 2025

DATE OF JUDGMENT:

22 December 2025

MEDIUM NEUTRAL CITATION:

[2025] VSCA 343

JUDGMENT APPEALED FROM:*In the matter of Mayfair Land Holdings Pty Ltd*
(ACN 622 038 635) (Supreme Court of Victoria,

Steffensen AsJ, 16 April 2025

CORPORATIONS – Appeal – Statutory demand – Application to set aside demand – Whether plausible contention requiring further investigation as to genuine dispute – Whether plausible contention requiring further investigation as to debt amount – Whether plausible contention requiring further investigation that respondent acted unconscionably in recovering debt while negotiations were ongoing – No plausible contention established by applicant's evidence – Leave to appeal refused.

Malec Holdings Pty Ltd v Scotts Agencies Pty Ltd (in liq) [2015] VSCA 330; Coulton v Holcombe [1986] HCA 33; (1986) 162 CLR 1; Sambucco v Sambucco (2023) 72 VR 121; Water Board v Moustakas (1988) 180 CLR 491, applied. Ligon 158 Pty Ltd v Huber [2016] NSWCA 330; (2016) 117 ACSR 495; Eyota Pty Ltd v Hanave Pty Ltd (1994) 12 ACSR 785, considered.

Corporations Act 2001 (Cth), ss 459G, 459H, 459J.

Counsel

Applicant:

Mr HNG Austin KC
with Mr JA Penny

Respondent:

Ms CM Jones

Solicitors

Applicant:

Velocity Legal

Respondent:

Robert James
Lawyers

WALKER JA

ORR JA

KENNY JA:

1. This application for leave to appeal relates to a statutory demand served by Terafortis Ltd ('Terafortis') on Mayfair Land Holdings Pty Ltd ('Mayfair'). Terafortis is an investment company incorporated in the British Virgin Islands. It holds assets, investments and interests in other businesses. Mayfair is incorporated in Australia.
2. Chang Loong (Kenny) Lee is the Chief Executive Officer ('CEO') of Terafortis and has the day-to-day management of the company's investments and operations in Australia. Jiaheng Chan is the director of Mayfair. As will be seen, although doing business in Australia, both Mr Lee and Mr Chan have relevant business or personal relationships with others in Malaysia.
3. On 25 July 2023, Mayfair entered into a loan agreement with Terafortis pursuant to which Terafortis loaned \$10 million, at interest, to Mayfair, to be repaid within six months (the 'loan agreement'). In April 2024, the parties agreed to vary the loan agreement, including to extend the repayment date to 1 June 2024. Mayfair did not repay the loan or the accrued interest at this date.
4. On 7 June 2024, Terafortis served a notice of default on Mayfair pursuant to cl 8.2 of the loan agreement. There was no payment in response. On 23 October 2024, Terafortis sent a default reminder to Mayfair.
5. On 4 November 2024, Terafortis served a statutory demand on Mayfair for payment of around \$12.3 million, being the principal and interest claimed as due at that date under the loan agreement.^[1]
6. Before the judge, Mayfair sought to have the statutory demand set aside on the basis that, prior to the statutory demand, it had made an agreement with Terafortis that the loan and accrued interest would be repaid by the transfer and sale of two pieces of land in Malaysia and the liquidation of certain shares under the control of Mr Chan's father, Tan Sri Chan Kong Choy (the 'alleged agreement'). Mayfair advanced this argument in reliance on ss 459G, 459H and 459J of the *Corporations Act 2001* (Cth) ('*Corporations Act*'). As we explain in more detail below, s 459G permits a company served with a statutory demand to apply to the Court for an order setting the demand aside, including on the grounds set out in ss 459H and 459J.
7. The judge rejected Mayfair's submissions and dismissed its application on 16 April 2025.^[2] Mayfair seeks leave to appeal against the orders made by the judge on that date.
8. For the reasons that follow, we will refuse leave to appeal.

Whether Mayfair should have leave to rely on proposed grounds 1A and 3

9. Both before and at the hearing in this Court, Mayfair advanced two proposed grounds of appeal. They were proposed grounds 1 and 2 set out below. Both grounds were considered by the judge. Also at the hearing, Mayfair sought to advance submissions that did not arise from either of these grounds. The Court gave Mayfair leave to file a proposed amended

application for leave to appeal.^[3] The proposed amended application added proposed grounds 1A and 3. As a result, Mayfair's proposed grounds of appeal were as follows:

1. The learned primary judge erred in failing to find, and ought to have found, that there was a plausible contention requiring further investigation that the debt to which the statutory demand dated 31 October 2024 served by the Respondent on the Applicant (**Statutory Demand**) related had been compromised by the parties, and thus that a genuine dispute about the existence of the debt within the meaning **section 459H** of the *Corporations Act 2001* (Cth) (**Corporations Act**) existed, such that the Statutory Demand ought to be set aside.

1A. Alternatively to ground 1, the learned primary judge erred in failing to find, and ought to have found, that there was a plausible contention requiring further investigation that the debt to which the Statutory Demand related was not due and payable at the time the Statutory Demand was served, such that it should be set aside for 'some other reason' within the meaning of **section 459J(1)(b)** of the *Corporations Act*.

2. Alternatively to ground 1 and ground 1A, the learned primary judge erred in failing to find, and ought to have found, that there was a plausible contention requiring further investigation that the parties were engaged in negotiations to compromise the debt the subject of the Statutory Demand when the demand was served, and that it was therefore unconscionable of the Respondent to serve the Statutory Demand upon the Applicant as at 31 October 2025, such that it should be set aside for 'some other reason' within the meaning of **section 459J(1)(b)** of the *Corporations Act*.

3. Alternatively to grounds 1, 1A and 2, the learned primary judge erred in failing to find, and ought to have found, that there was a plausible contention requiring further investigation that:

(a) there was a genuine dispute about the amount of the debt within the meaning **section 459H(1)(a)** of the *Corporations Act*, such that the 'admitted amount' for the purposes of **section 459H(5)** of the said Act was \$7,793,366.13 (**Admitted Amount**); and

(b) the Statutory Demand ought to be varied by varying the amount of the Demand to the Admitted Amount pursuant to **section 459H(4)** of the said Act.^[4]

10. In relation to proposed ground 3, at the hearing, Mayfair accepted that it had not made submissions before the judge about reducing the debt pursuant to **s 459H(4)** of the *Corporations Act*, but contended that the respondent *had* made submissions about this topic. Terafortis accepted that it had in fact done so and did not oppose a grant of leave to allow Mayfair to add a proposed ground alleging that the statutory demand ought to have been reduced pursuant to **s 459H(4)**.

11. In written submissions filed after the hearing, Mayfair submitted that although it had not positively sought to have the debt reduced below, that 'outcome was plainly alive before the primary judge'. Mayfair referred to Terafortis' written submissions below and the judge's indication that she would have varied the demand had she been satisfied that there was a plausible contention that the debt had been partially satisfied by the transfer of a 12.5 per cent interest in land in Malaysia known as the 'Pahang land'.^[5]

12. In written submissions filed after the hearing, Terafortis confirmed that it did not oppose a grant of leave to permit Mayfair to rely on proposed ground 3. Terafortis accepted that the judge had been called on to consider whether the amount of the debt should be varied under s 459H(4). It had submitted to the judge that, if the Court were to accept that a genuine dispute arose in respect of part of the debt by reason of a plausible contention requiring investigation as to the alleged transfer of a 12.5 per cent interest in the Pahang land, then the amount of the debt should be varied pursuant to s 459H(4). Consistently with this, the judge stated in her Reasons that, even if she had been satisfied by Mayfair's evidence that there was a plausible contention warranting further investigation as to the alleged agreement regarding the interest in the Pahang land, she would not have made an order setting aside the statutory demand, since the remaining debt 'far exceeds the statutory minimum'. Rather, she would have exercised her discretion to vary the demand in conformity with s 459H(4) by reducing the demand by \$4.3 million to approximately \$8 million.

13. In these circumstances, we will grant Mayfair leave to amend its application for leave to appeal to add proposed ground 3.

14. The position is different with respect to proposed ground 1A. Terafortis opposed a grant of leave to permit Mayfair to rely on this proposed ground. As Terafortis contended and Mayfair conceded, the argument on which this ground depends was not raised before the judge. Mayfair sought to add this ground because, it said, the Court might consider that the statutory demand should be set aside in part on the basis of the alleged agreement in reliance on s 459J(1)(b), as opposed to under s 459H(4). Referring to *MNWA Pty Ltd v Deputy Commissioner of Taxation* ('MNWA')^[6] and *Longjing Pty Ltd v Hammer Brothers Pty Ltd* ('Longjing'),^[7] Mayfair submitted that:

there is a live question as to whether the argument that the Demand should be set aside on the basis of the [alleged agreement] is to be framed by reference to s 459J(1)(b) as an argument that the debt was due and payable at the date of the Demand, rather than a '*genuine dispute ... about the existence or amount of a debt to which the [Demand] relates*' within s 459H(1)(a).^[8]

15. It is well established that a point cannot be raised for the first time upon appeal when it could possibly have been met by calling evidence below. However, where the point is one of construction or of law, then a court of appeal may find it expedient and in the interests of justice to entertain the point.^[9]

16. Proposed ground 1A turns on whether there is a 'plausible contention requiring further investigation' that Terafortis agreed to vary the loan agreement prior to the service of the statutory demand so that the amount claimed in the demand was not due and payable when it was served. That is, in substance, the same inquiry required by proposed ground 1, which turns on whether there is a plausible contention requiring further investigation that Terafortis agreed to vary the loan agreement prior to the service of the statutory demand so that Mayfair was not obliged to pay the amount claimed in the demand when it was served, such that there was a genuine dispute about the existence of the debt.

17. Terafortis did not contend that proposed ground 1A could have been met by evidence had it been raised below. Furthermore, it does not appear to us that any different evidence could have been called below in relation to the contention raised by proposed ground 1A — it will turn on the same evidence as proposed ground 1.

18. In those circumstances we might have been minded to grant Mayfair leave to amend to include proposed ground 1A. However, as we explain below, we do not consider that there is a plausible contention requiring further investigation that Terafortis agreed to vary the loan agreement prior to the service of the statutory demand. Thus a grant of leave to amend the application for leave to appeal to add proposed ground 1A would be futile. For that reason, we will refuse leave to amend the application for leave to appeal to add proposed ground 1A.

Statutory context

19. As noted above, s 459G of the *Corporations Act* permits a company served with a statutory demand to apply to the Court for an order setting the demand aside, including on the grounds set out in ss 459H and 459J of the *Corporations Act*.^[10]

20. The ground set out in s 459H will apply where the Court is satisfied that 'there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates'.^[11] Under proposed grounds 1 and 3, Mayfair contended that there was indeed a 'genuine dispute' between it and Terafortis about the existence (proposed ground 1) or the amount (proposed ground 3) of the alleged debt.

21. Where the substantiated amount of the demand^[12] is equal to or greater than the statutory minimum,^[13] s 459H(4) allows the demand to be varied rather than set aside altogether. The Court can make an order reducing the amount payable to the substantiated amount. Such an order has the same effect as if the demand had required payment of the substantiated amount from the time the original demand was served.

22. The Court may also set aside a statutory demand under s 459G if it is satisfied, in accordance with s 459J, that 'there is some other reason why the demand should be set aside'.^[14]

23. The judge rejected Mayfair's submission that either s 459H or s 459J applied in the circumstances set out before her. That is, her Honour held that Mayfair had failed to establish a genuine dispute as alleged, or another reason why the demand should be set aside. Mayfair's application to set aside the statutory demand therefore failed. We will refer to her Honour's Reasons in greater detail later.

The hearing before the judge

24. At the hearing before the judge, Mayfair relied on the affidavit of its director, Mr Chan, of 25 November 2024 and the affidavit of Ying Wang, a certified Chinese into English translator, dated 27 February 2025.

25. Terafortis relied on the affidavit of its CEO, Mr Lee, of 21 February 2025. Mr Lee deposed that in July 2024, he requested Tan Jit Chun ('Mr Chun') to engage in discussion with Mr Chan's father, Tan Sri Chan Kong Choy, to assist with the recovery of the loan from Mayfair.

Tan Sri Chan Kong Choy was a business associate of Mr Chun, both apparently being resident in Malaysia.

Applicant's submissions below

26. Before the judge, Mayfair submitted that the evidence on which it relied showed that there was a 'genuine dispute' within the meaning of s 459H(1)(a) of the *Corporations Act* because this evidence showed there was a plausible contention requiring further investigation that its debt to Terafortis had been compromised. In the alternative, Mayfair submitted that, having regard to that evidence, there was a plausible contention requiring further investigation that it was unconscionable for Terafortis to serve the demand while negotiations concerning the compromise were ongoing; and that this was 'some other reason' why the demand should be set aside under s 459J(1)(b) of the *Corporations Act*.

27. In his affidavit in opposition to the statutory demand, Mr Chan deposed that:

6. My understanding is that Terafortis is ultimately owned and controlled by [Mr Chun] ... who is a Malaysian national.

...

16. I am informed by [my father] and believe that [my father] ... had discussions with [Mr Chun] about settling the \$10M Loan on the basis of:

- (a) Transferring a 12.5% ownership interest in land situated in Pahang, Malaysia, at a valuation of RM 12.5 million,^[15] and
- (b) The remaining balance to be settled from the proceeds of a sale of development land in OUG (a suburb of Kuala Lumpur).

17. On 10 October 2024, Aaron Loh emailed me a loan statement in relation to the \$10M Loan showing a balance of \$12,051,604.69 as at 30 September 2024.

...

18. I am informed by [my father] and believe that, on 11 October 2024, he received a Whatsapp message from [Mr Chun] in the Chinese language stating as follows, translated into English:

Sorry to bother you. I would like to know if after deducting 12.5% of the 5000 acres of land (estimated to be about 12.5m) the remaining debt of 23+m can be processed within next Monday? This debt is too long and I need funds urgently.

...

19. As at 11 October 2024 ... the exchange rate from RM to AUD was approximately RM 2.89 to AUD \$1. Therefore, at this time, RM 12.5million was approximately AUD \$4.3million and RM 23million was approximately \$8.0million.

20. I am informed by [my father] and believe that, on 11 October 2024, he sent a voicemail message via Whatsapp to [Mr Chun] to the effect that he could not make a cash payment by the following Monday, and he then received a Whatsapp message in reply from [Mr Chun] in the Chinese language stating as follows, translated into English:

Okay, then I will quickly deal with the matter of cashing out Tan Sri's shares in the Kalimantan Land Labalab Company. Now I'm flying to Japan and will meet with a Hong Kong fund company tomorrow. I'll also take the opportunity to talk and see if there's any chance of closing a deal. I'm really sorry Tan Sri.

...

21. To give effect to transferring a 12.5% ownership interest in the land situated in Pahang, Malaysia, at a valuation of RM 12.5million, I am informed by [my father] and believe that he sent ... signed letters to [Mr Chun] ...

28. Mr Chan further deposed that when he received a default notice on 23 October 2024, under cover of an email from Chay Winstanley on behalf of Terafortis, he responded by email stating:

Re: the \$10m loan — I will get some feedback to you next few days, I am of the understanding that it is being discussed with the lender without my involvement.

29. After receiving the statutory demand, Mr Chan emailed Terafortis' lawyers, stating that 'we are actively in discussions with [Mr Lee] ... regarding the contents of this notice and potential next steps'.

30. On 20 November 2024 (almost three weeks after the service of the statutory demand), Mr Chan sent an email to Mr Lee at Terafortis, stating:

Dear Kenny,

I hope this email finds you well.

Referring to our discussions on the phone regarding the repayment of the \$10 million debt, I would like to outline the latest status and proposed settlement plan for the remaining for your consideration:

1. Partial Settlement via Pahang Land Transfer:

I understand that 12.5% ownership of a land in Pahang, Malaysia, has already been transferred to [Mr Chun] ... or his related entities.

This transfer was agreed between [Mr Chun] and my father, [Tan Sri] Chan Kong Choy ... at a valuation of RM12.5 million.

I am in the process of obtaining the necessary documentation to confirm the settlement of this portion of the debt.

2. Remaining Balance from OUG Land Sale:

As agreed between [Mr Chun] and [Tan Sri Chan Kong Choy] in the past, the remaining balance is to be settled from the proceeds of a land sale in OUG, which is currently in progress.

3. Proposal for Settlement via Labalab Sdn Bhd Shares:

However, to address the outstanding balance in a quicker manner, we propose transferring [Tan Sri Chan Kong Choy's] 1/3 shareholding in Labalab Sdn Bhd, the Malaysian company jointly owned by [Mr Chun] (2/3) and [Tan Sri Chan Kong Choy] (1/3).

Based on my understanding, the company's cost valuation is RM90 million, and for an external sale exercise, both parties agreed to a valuation of RM180 million. This places the value of the 1/3 ownership at RM30–RM60 million, which exceeds the remaining balance of the debt even at the minimum value.

In the event of a future sale to a third party yielding a higher valuation than the cost, any excess proceeds can be returned to us to manage the difference in value.

Next Steps:

I kindly request your feedback on this proposal. Should there be additional documentation or terms required, I am happy to discuss and expedite the necessary steps to finalize this arrangement.

Thank you for your time and understanding. I look forward to your response.^[16]

31. Both before the judge and before us, Mayfair relied on this email as evidence of an alleged compromise reached with Terafortis concerning the repayment of the loan under the loan agreement. Mayfair also relied on the translations of various WhatsApp messages to support its contention that such an agreement had been reached between Mr Chun, for Terafortis, and Tan Sri Chan Kong Choy, for Mayfair.

Respondent's submissions below

32. Before the judge, Terafortis denied that it had reached any agreement with Mayfair to compromise the debt payable by Mayfair under the loan agreement. In his affidavit of 21 February 2025, Mr Lee deposed that, in July 2024, he had asked Mr Chun to assist with the recovery of Mayfair's loan by engaging in discussions with Mr Chan's father, Tan Sri Chan Kong Choy. Mr Lee described Mr Chun as 'a personal acquaintance and also an existing client', as well as a business associate of Tan Sri Chan Kong Choy. Mr Lee added that Mr Chun had introduced him to Mayfair's director, Mr Chan, 'for the purpose of providing funding for a project in Melbourne known as "Belulah"'. Mr Lee further deposed that:

Up to that time Terafortis' attempts to recover the loan principal (and interest) had been unsuccessful and I believed that discussions with [Mr Chan] had stalled.

33. Mr Lee deposed that he was the sole director, secretary and shareholder of the ultimate shareholder company of Terafortis.^[17] He also deposed to the loan agreement and to Mayfair's failure to pay the monies due under that agreement. He referred to a meeting with Mr Chan on 5 September 2024, to discuss Mayfair's 'intentions with respect to repayment of the amounts owed to Terafortis under the Loan Agreement'. According to Mr Lee, Mr Chan had told him that Mayfair had 'assets/equity but that it needed time to access funds'. Mr Lee deposed that Terafortis had requested information to allow it to assess Mayfair's capacity to pay and that what it received was 'incomplete/inadequate'. He also deposed to the various requests for payment that culminated in the statutory demand. Mr Lee added:

Since the date of default I have regularly spoken with [Mr Chan] regarding [Mayfair's] liabilities to Terafortis, including repayment of the Principal Outstanding and accrued interest under the Loan Agreement. My discussions with [him] are generally about how [Mayfair] intends to repay the monie[s] owed to Terafortis and how much time it needs to do so. At no time during my discussions with [him] has he proposed a repayment offer to me that was acceptable to Terafortis.

34. In particular, Mr Lee deposed that 'no agreement involving Terafortis was reached, either as a result of discussions between [Mr Chun] and [Mr Chan's father] or by any other means'. He deposed that he did not respond to Mr Chan's 20 November 2024 email because he 'considered it to be merely another proposal which was of no interest to Terafortis'.

The WhatsApp messages

35. Mayfair's case before the judge and before us relied heavily on the WhatsApp messages between Mr Chun and Tan Sri Chan Kong Choy. They are therefore set out in full below.

36. Between 26 July 2024 and 11 October 2024, Mr Chun (identified as 'TJC') and Tan Sri Chan Kong Choy (identified as 'CKC' or 'Tan Sri') exchanged the following WhatsApp messages:^[18]

(1) On 26 July 2024:

TJC text message: Tan Sri I want to talk to you about the 10m loan from Beulah in Australia. My partner has tried to negotiate with Jia Heng^[19] several times, but has not been able to get the principal plus interest back as scheduled.

TJC text message: This has affected the progress of other projects. I hope Tan Sri can be generous and lend a helping hand. [Emoji: laughing face with tears]

CKC audio message: Brother, let me get things clarified first before I give you this information, thank you.

TJC audio message: Okay, okay, thank you, Tan Sri. I'm really sorry, I try to avoid bothering you until the last minute, so because of the funds, I have already previously entrusted an Australian Fund to fully manage. They have already agreed and signed for those upcoming

investments, which were supposed to start on 1 July. Now, the timeline has been extended, and I'm unsure how things will proceed, so it's become a bit tricky. So, thank you very much.

CKC audio message: It's alright, brother. I should be made aware of all of these. I'll try to find a way to handle these issues. Thank you, thank you.

(2) On 30 July 2024:

CKC audio message: Brother, I've asked Jia Heng to return to Kuala Lumpur. He will arrive tomorrow. I'll have him sort things out, and once it's clear, I'll contact you again. Thank you.

TJC text message: Okay, okay. Thank you, Tan Sri. Australia asked me about the progress today. Thank you, Tan Sri, for paying attention to the progress of this matter. [Emojis: praying hands (three)]

(3) On 3 August 2024:

TJC text message: Tan Sri I want to talk to you about the 10m loan from Beulah in Australia. My partner...

TJC text message: Tan Sri, Sorry to bother you. Is there any progress on this matter? I need to report to the project party in a few days ... it's already seriously delayed ...

CKC audio message: Brother, I'll talk to you on the phone tonight.

(4) On 9 August 2024:

TJC text message: Tan Sri, good evening. I talked to Fennie^[20] about the sale of your 2 acres of land in Kuala Lumpur and the return of the 10m + interest in Australian dollars. Her opinion is that she will also help find a buyer, but it will take at least 4–6 months at the fastest to complete the transaction. There is no time to deal with the urgent needs of the moment. I would also like to ask Tan Sri to see if there is any other way to prepare the relevant amount? I'm a little anxious.

CKC voice message: I've discussed it with Fennie, and I'll look for a buyer. I'm handling it, it won't take that long. After I discuss it with Fennie, I'll talk to a few friends. I think it will only take us less than half of the time, roughly. I'll handle it and we'll talk again tomorrow.

(5) On 30 August 2024:

TJC text message: Hello, Tan Sri! I would like to know the progress on the AUD 10m+ interest repayment. How do we move this forward? I am facing difficulties and need funds for capital turnover. [Emojis: praying hands (three)]

CKC audio message: Okay, okay, brother. I thought my company secretary was in touch with Fennie. I will check with him.

TJC text message: Okay, okay. I'll also inform Fennie. Thank you, Tan Sri. Sorry for the trouble.

CKC audio message: I initially told him to contact Fennie to resolve this issue, but I'll check with him, Mr. Tan Kok Ann.^[21]

TJC text message: [Emoji: praying hands]

(6) On 31 August 2024:

TJC text message: Hello Tan Sri, Fennie has contracted Tan Kok Ann to understand the 2.5 acres of OUG land. We currently have no interest in other products such as land, Holding land parcels will not help, mainly because I currently need cash to resolve this issue. Please ask Tan Sri if he can arrange other channels to process this loan as soon as possible. Thank you. [Emoji: praying hands]

TJC text message: Tan Sri, I will be back in Malaysia from 2–20 September. Would it be possible to arrange a time to meet?

CKC text message: [Emoji: thumbs up]

37. There is no further evidence of any communication between Mr Chun and Tan Sri Chan Kong Choy until a series of WhatsApp messages from 6 September 2024.^[22]

38. In the meantime, on 5 September 2024, Mr Lee met with Mr Chan to discuss repayment of the loan. At that meeting, Mr Chan advised Mr Lee that Mayfair required more time to access funds from assets and equity. Mr Lee requested further information regarding Mayfair's capacity to pay. These requests were reiterated in subsequent emails in September and October 2024; and Mr Chan responded that Mayfair needed more time to update their security calculations.

39. On 6 September 2024, Mr Chun again messaged Tan Sri Chan Kong Choy via WhatsApp, saying:

Tan Sri, I sincerely apologise. I would like to know approximately when the AUD 10m plus interest can be resolved. Is 2–4 weeks feasible? I am really in urgent need.

40. On 6 September 2024 and 10 October 2024, Terafortis emailed a loan summary statement and interest calculation to Mr Chan.

41. On 9 October 2024, Mr Chun messaged Tan Sri Chan Kong Choy, again via WhatsApp:

TJC text message: Tan sri, May I ask about the matter regarding the 5,000 acres of land? Has your friend Tan Sri Kong made a decision? Can the transaction be completed within two months? Even if I let other investment companies in Sydney or Singapore acquire the 5,000 acres, the 12.5% stake you hold would still be insufficient to cover the debt.

I also want to discuss the matter of the [AUD]^[23] 10 million plus interest with you. We had previously agreed to handle it by 6 October, but it has not been processed as scheduled. I am in a difficult position as I cannot provide an explanation to the Australian fund, and the commitment remains unfulfilled. This situation is causing significant embarrassment. Continuing to delay is not a solution, either.

CKC audio message: Brother, he said that if borrowing money can't solve the issue within two months, he still has a few options. One is not borrowing money and buying only part of it. If he borrows money to buy everything, that won't work. But all of this is still under discussion. I asked CK^[24] to follow up with him because I'm going overseas. So, I contacted CK to follow up, and there should be a definite answer in about one to three days. Then CK will liaise with you, and I will also stay in touch with you.

TJC text message: Alright, I will also arrange for the Singapore fund company to look into this land and see if they are interested.

TJC text message: Additionally, for the other amounts, we need Tan Sri to arrange. I urgently need funds to handle some issues. As for the Australian fund company, I tried contacting Jia Heng to obtain the relevant commitment documents, but I have not received any response. This way of handling matters is indeed unexpected.

CKC audio message: If it's not needed here, and CK agrees, or if the issue here can't be resolved within two months, then you can ... I think there's no issue on my end. You can go ahead and buy in Singapore or Australia. After the purchase, the remaining balance — that part — I'll figure out a way to cover the rest for you.

TJC text message: Selling to other fund companies in Singapore or Australia will definitely not be enough to cover the debt. The remaining 22–24 million MYR needs to be arranged by Tan Sri immediately.

42. On 11 October 2024, Mr Chun messaged Tan Sri Chan Kong Choy again:

TJC text message: Dear Tan Sri

TJC text message: Sorry to bother you. I'd like to check if the remaining debt of approximately 23+ million MYR (after deducting 12.5% for the 5,000 acres of land, estimated at around 12.5 million MYR) can be settled by next Monday? This debt has been outstanding for too long, and I urgently need funds. Even an off-the-record arrangement would be fine.

CKC audio message: Brother, if I could have it resolved yesterday, I would have. But with these real estate matters, I still need to wait until the OUG land is sold to address this issue.

TJC text message [Emoji: laughing face with tears]

TJC text message: I understand the difficulties Tan Sri is facing.

CKC voice call: ...^[25]

TJC text message: Alright, I will quickly handle the matter of liquidating Tan Sri's shares in the Labalab company in Kalimantan. I am flying to Japan now, and tomorrow I will meet with the Hong Kong fund company. I will also take the opportunity to discuss and see if there is a chance to close a deal. I sincerely apologise, Tan Sri. [Emojis: praying hands (three)]

CKC audio message: It's alright, brother. Go ahead and handle these matters, but don't dwell on them too much. Just do your best to resolve them if you can.

TJC text message: Then I'll inform Fennie first and see if she can help handle the documents. [Emojis: praying hands (three)] Thank you, Tan Sri, for your understanding. [Emojis: praying hands (three)]

Subsequent events

43. Mayfair also relied on some other matters that, in its submission, indicated that Mr Chan's father had set about implementing the alleged agreement with Mr Chun. In particular, it relied on a document that indicated that, on 14 October 2024, Mr Chan's father had signed a letter of resignation as a director of the Malaysian company, Labalab Venture Sdn Bhd ('Labalab').^[26] A week later, on 21 October 2024, he also apparently signed a letter addressed to Mr Chun, stating:

**RE: CONFIRMATION OF PARTIAL SETTLEMENT OF CASH LOAN UP TO
MYR12,500,000 OWING TO TAN JIT CHUN (NRIC NO. 760903-10-5383)**

I, the undersigned, confirm that I am the Beneficial Owner of Six Hundred and Fifty Thousand (650,000) shares in MY PR SDN. BHD. (Registration No. 202201029626 (1475323-T) that is valued at MYR12,500,000 (the 'Shares').

I, the undersigned, hereby assign and transfer all of my rights and interests in the Shares as partial settlement, up to the amount of MYR12,500,000 from the cash loans that I owe you to your designated parties as follows:

1. Transfer of Securities from Tan Sri Chan Kong Choy to Wee Ing Yong; and
2. Transfer of Securities from Tan Sri Chan Kong to Tan Siew Hong.^[27]

44. There is also some limited evidence that Mr Chan thought (it seems mistakenly) that discussions between his father and Mr Chun were ongoing. In response to the second notice of default sent by Terafortis to Mayfair on 23 October 2024, to the effect that the amount owing was \$12,298,622.65, Mr Chan replied by email the same day that:

Re: the \$10m loan — I will get some feedback to you next few days, I am of the understanding that it is being discussed with the lender without my involvement.

45. Perhaps Mr Chan was of the same mind in his email responding to Terafortis' lawyers on 13 November 2024 regarding the service of the statutory demand on Mayfair on 4 November 2024, when he said that 'we are actively in discussions with Kenny Lee ... regarding the contents of this notice and potential next steps'. Some days later, Mr Chan sent Mr Lee the email of 20 November 2024,^[28] this time '[r]eferring to our discussions on the phone regarding the repayment of the \$10 million debt'.

The Judge's Reasons

46. The judge summarised Mayfair's case as follows:

[Mayfair] alleges that between 9 and 11 October 2024, the parties reached an agreement whereby [Mayfair] would satisfy its obligations to repay the loan through the transfer of a 12.5 per cent shareholding in a Malaysian company that owned land. The value of that 12.5 per cent shareholding in Australian dollars is said to be in the order of \$4.3 million. [Mayfair] says that agreement was that the balance owing to [Terafortis] would be repaid through the sale of what has been referred to by the parties as the 'OUG land'.

47. Referring to the alleged agreement as the 'variation agreement', her Honour added that:

[Mayfair] says that the variation agreement was reached as between [Mr Chun], on behalf of [Terafortis], and Tan Sri Chan Kong Choy, or CKC, who is referred to in some of [Terafortis'] evidence as Tan Sri, on behalf of [Mayfair].

48. Her Honour noted Mayfair's alternative case under s 459J, namely, that there was 'a plausible contention warranting further investigation that it was unconscionable for [Terafortis] to serve the demand in light of the negotiations as between the parties at that time'.

49. The judge commenced her analysis by finding that there was sufficient evidence to support a plausible contention requiring further investigation as to whether Mr Chun could bind Terafortis as its agent; and also as to whether Tan Sri Chan Kong Choy had authority to act on Mayfair's behalf in his dealings with Mr Chun.

50. Her Honour did not accept, however, that Mayfair's evidence gave rise to a plausible contention requiring further investigation 'as to the existence of the asserted variation agreement'. Her Honour explained that:

This is because the evidence of [Mayfair] does not demonstrate, other than by way of assertion from Mr Chan, that [Terafortis] agreed to the asserted variation agreement, whether through [Mr Chun] or otherwise. In my view, the more fulsome chain of communications between [Tan Sri Chan Kong Choy] and [Mr Chun] exhibited to Mr Lee's affidavit appear to reveal no more than discussions and proposals without any agreements reached.

The key evidence relied on by [Mayfair] is the email of Mr Chan sent on 20 November 2024, which was well after the statutory demand was served. Mr Chan says that this email is for the purpose of outlining the latest status and proposed settlement plan for the remaining amount due for [Terafortis'] consideration.

51. Besides the email sent by Mr Chan on 20 November 2024,^[29] the judge also specifically considered the WhatsApp messages on 11 October 2024 from Mr Chun to Tan Sri Chan Kong Choy,^[30] some earlier WhatsApp exchanges, and the letter from Tan Sri Chan Kong Choy to Mr Chun dated 21 October 2024.^[31] As to that letter, her Honour observed that there was no evidence as to the landowning entity mentioned in that letter or as to the people said to be receiving the securities, 'other than the reference in the 20 November 2024 email to them being associated with [Mr Chun]'.

52. The judge observed that:

none of this evidence addresses [Mr Chun's] agreement to the proposal to receive the 12.5 interest in land as partial repayment of the debt owing to [Terafortis].^[32] The letter is a unilateral act by [Tan Sri Chan Kong Choy]. ...

The WhatsApp exchanges on 11 October 2024 are equivocal. They might indicate an agreement to receive the 12.5 per cent land interest in partial settlement, or perhaps that this will only be agreed to if the balance is paid for on Monday. [Mr Chun's] reference to handling the matter by liquidating the shares in Labalab do not assist in demonstrating that there was an agreement to receive partial payment by the land transfer.

This may equally demonstrate that the proposal that was then being discussed is that the entire debt was to be repaid by the liquidation of the Labalab shares. If there was a change in title of the shares and the relevant landowning entity, one would expect there to be formal documentation evidencing the share transfer. In his email of 20 November 2024, Mr Chan says that he is in the process of obtaining the necessary documentation confirming that this has occurred, but none has been adduced into evidence.

53. Her Honour concluded that the evidence '[made] it very difficult to understand what it is said that [Terafortis] agrees'. The judge accepted:

that if there is a plausible contention requiring further investigation of an oral or partly oral, partly written agreement, that could be inferred from the parties' conduct, and would have been sufficient to set aside the statutory demand.

However, her Honour could not 'see it' 'on the evidence'.

54. Her Honour noted that the 'asserted variation agreement' did not accord with the obligations of the parties under the loan agreement. Her Honour concluded that Mayfair's evidence was 'equivocal, lacking in precision, and inconsistent with the undisputed contemporary documents' and that it had failed to show 'an objective basis for the alleged variation agreement'.

55. Accordingly, the judge rejected Mayfair's submission that there was a genuine dispute, within the meaning of s 459H of the *Corporations Act*, as to the existence of the debt that required further investigation.

Findings as to the land issues

56. Regarding the Pahang land, the judge affirmed that, even if satisfied that:

there was a plausible contention warranting further investigation as to the alleged agreement regarding the 12.5 per cent land interest, this would not have led to an order under s 459H setting the demand aside, because the remaining debt owing

far exceeds the statutory minimum and I would have exercised my discretion to vary the demand, reducing it by \$4.3 million to approximately \$8 million.

57. As to the OUG land, her Honour held that, apart from Mr Chan's 20 November 2024 email, there was no evidence to show a plausible contention requiring investigation as to whether there was an agreement reached between Mr Chun and Tan Sri Chan Kong Choy that the payment of the loan be deferred until the OUG land had been sold, or that the proceeds of that sale would settle the debt.

Findings as to significance of share transfer

58. The judge rejected Mayfair's assertion that steps had already been taken to execute the transfer of Tan Sri Chan Kong Choy's one-third shareholding in Labalab, as the letters of 14 and 21 October 2024 were said to show.^[33] On the basis of the evidence, the judge concluded that there was no plausible contention warranting further investigation that the parties agreed that the loan would be repaid by liquidating the shares in Labalab.

59. In rejecting Mayfair's 'genuine dispute' contention, the judge also had regard to the fact that, notwithstanding ongoing discussions, including the WhatsApp exchanges, the evidence showed that Terafortis had continued to pursue its debt, including by sending default notices. Her Honour also rejected Mayfair's submissions on 'the other reason' ground, because, in her Honour's view, Mayfair had failed to identify any evidence that would support a finding of unconscionability 'other than the mere fact of negotiations'. Her Honour found that there was no evidence to show 'an agreement between the parties to defer or put enforcement on hold pending negotiations between them', or that Terafortis made any representation to that effect. Rather, she found that Terafortis' conduct 'contradict[ed]' such an agreement. In these circumstances, the judge rejected Mayfair's contention that service of the statutory demand was unconscionable. Mayfair's attempt to rely on s 459J of the *Corporations Act* to set aside the statutory demand therefore failed.

Submissions on the leave to appeal application

Applicant's submissions

60. In written submissions, referring to a number of authorities, including *Eyota Pty Ltd v Hanave Pty Ltd*,^[34] Mayfair submitted that it would fail on proposed ground 1 only if its contention that the alleged agreement gave rise to a genuine dispute as to the existence of the debt was so devoid of substance that no further investigation was warranted. Mayfair submitted that in order for it to succeed:

the dispute should have a sufficient objective existence and *prima facie* plausibility to distinguish it from a merely spurious claim, bluster or assertion, and sufficient factual particularity to exclude the merely fanciful or futile.^[35]

61. In Mayfair's submission, proposed ground 1 required this Court to conduct a 'real review' of the evidence before the judge to determine whether, having regard to her Reasons, the

judge erred in fact or law in concluding that the evidence did not give rise to a genuine dispute.^[36] Mayfair submitted that the judge had erred 'by seeking to weigh the merits of the dispute, and not confining her inquiry to an assessment of its "genuineness"'.^[37] At the hearing, Mayfair argued that her Honour had erred by setting the bar too high; and that had the bar been set correctly, Mayfair would have met it.

62. Mayfair submitted that there was a 'plausible contention giving rise to investigation' that the parties agreed to 'vary the loan agreement so that it would be satisfied by something other than strict performance of the provision of cleared funds'. Mayfair also argued that, in effect, the parties had agreed to vary the loan agreement to displace the immediate obligation to pay. Mayfair contended that this '[created] a situation where [the debt] was not due and payable immediately'. To demonstrate that such an agreement had been made, it relied on the contemporaneous communications between the parties' representatives, especially the WhatsApp messages and the 20 November 2024 email.^[38]

63. At the hearing, Mayfair acknowledged that, before the judge, it had relied on **ss 459G** and **459H** in advancing this contention, but submitted that, in the circumstances on which it relied, the same result might be reached under **ss 459G** and **459J**. Relying on **s 459J**, Mayfair contended that there was a plausible contention requiring further investigation as to whether the amount of the debt was due and payable in cleared funds as opposed to some other way. Somewhat inconsistently perhaps, Mayfair acknowledged that, with respect to its land sale proposal, it was seeking a particular time-frame to allow it to sell the relevant land, 'to get the clear[ed] funds'.

64. Mayfair contended that the judge failed to appreciate that it was required to show no more than there was a plausible contention requiring further investigation that the parties had agreed to vary the loan agreement as alleged. In this context, Mayfair acknowledged that Mr Chan's email of 20 November 2024^[39] was generated after the statutory demand had been served, and that it was not 'contemporary' with the alleged agreement. Nonetheless, Mayfair contended that the email was not 'insignificant in the flow of the communications'. As indicated already, Mayfair relied on it as representing something that had been agreed.

65. Mayfair also relied on the dissenting reasons of Rares J in *MNWA*^[40] in support of the proposition that where there is a genuine dispute about whether a debt was due and payable at the time of service of the statutory demand, then this is capable of amounting to 'some other reason' to set the demand aside under **s 459J(1)(b)**. Mayfair submitted that, in such a case, the appropriate inquiry is whether there is a plausible contention requiring investigation that the debt was not due and payable when the statutory demand was served.

66. Mayfair contended that there were three elements to the alleged agreement, and that they were set out in Mr Chan's email of 20 November 2024 to Mr Lee. These were, first, the transfer of the 12.5 per cent interest in the Pahang land from Tan Sri Chan Kong Choy to Mr Chun or his related entities. Second, there was the sale of the OUG land, the proceeds of which were to be applied to settle the remaining balance. Mayfair acknowledged that, at the time of Mr Chan's email, this sale was 'currently in progress'. The third element, which was, so Mayfair submitted, viewed as an alternative to the second, was the transfer of Tan Sri Chan Kong Choy's shareholding in Labalab to Terafortis (or its nominee). At the hearing,

Mayfair referred to this element as an alternative ‘proposal’ to the use of the proceeds of sale of the OUG land.

67. Regarding the 12.5 per cent interest in the Pahang land, Mayfair submitted that, read in the context of the other WhatsApp messages, the 9 October 2024 message indicated that the interest in the Pahang land was to be sold to raise funds to cover the debt, a conclusion supported by paragraph 16 of Mr Chan’s affidavit.^[41] Further, there was a reference to the Pahang land in the WhatsApp messages of 11 October 2024, as well as the need to address the balance owing, which was acknowledged in Tan Sri Chan Kong Choy’s response the same day.

68. Mayfair submitted that the Court should infer that ownership of that interest had been transferred from Tan Sri Chan Kong Choy, for Mayfair, to Mr Chun, for Terafortis. This was because the Court should infer from the share transfer, which it said was evidenced by the letter of 21 October 2024,^[42] that Labalab owned the land and that Tan Sri Chan Kong Choy’s interest had been transferred by the share transfer as agreed with Mr Chun.^[43] Mayfair further submitted that the WhatsApp messages, read in the context of the 20 November 2024 email,^[44] supported this conclusion.

69. Mayfair submitted, in effect, that the inference that ownership of the interest in the Pahang land had been transferred meant that it crossed the low bar entitling it to have the statutory demand set aside. It submitted that, in adopting this approach, the Court would be discharging the task required of it in such a case as this.^[45]

70. Regarding the OUG land, after Mr Chun referred to the need to address the balance owing in his WhatsApp message of 11 October 2024, Tan Sri Chan Kong Choy responded that he would ‘still need to wait until the OUG land is sold to address this issue’, the need to sell the OUG land having been mentioned earlier in a message on 31 August 2024. In Mayfair’s submission, the laughing emoji added by Mr Chun following this message indicated Mr Chun’s assent to the fact that the OUG land was part of the deal; alternatively, the significance of the emoji and like matters was appropriate for a subsequent trial. Mayfair drew further support from the subsequent message on the same day, in which Mr Chun is recorded as saying, ‘Alright, I will quickly handle the matter’. The ‘matter’, in senior counsel’s submission, was the liquidation of Tan Sri Chan Kong Choy’s shares in Labalab, said to have been discussed in the preceding voice call.

71. Mayfair acknowledged that the WhatsApp messages were in translation ‘and there are nuances in written communications and … matters of that like’, but submitted that the effect of the WhatsApp messages was clear enough for the purposes of its application to set aside the statutory demand.

72. Mayfair contended that none of the arrangements discussed in the messages would have been sufficient by themselves to meet the debt to Terafortis, but taken together, they would have covered it all. In its submission, the messages showed that there were negotiations on foot, and that there was a plausible contention that there was ‘an agreement struck’. Acknowledging the evidence was not ‘perfect’, it submitted that, when the messages were considered as a whole, they supported the existence of an arrangement as described by Mr Chan in his email of 20 November 2024. Mayfair further submitted that Mr Lee had not denied these events, although he had deposed that they concerned other business dealings. In

Mayfair's submission, this was not the occasion to decide between the differing accounts and it was sufficient that it had advanced a plausible contention.

73. Relying on the entirety of the correspondence and activity preceding the service of the demand, Mayfair also submitted that the judge had mistaken the facts, failed to take the evidence of the discussions between Mr Chun and Tan Sri Chan Kong Choy into account or applied too high a standard, when rejecting Mayfair's argument that the demand should be set aside under **s 459J** because it had been unconscionable to serve the demand while there were negotiations on foot concerning the compromise.^[46] It submitted that in the last communication between the parties prior to the service of the demand on 31 October 2024, Mr Chan had conveyed his understanding that the negotiations to resolve the debt were still on foot, and this had not been met with dispute or denial by Terafortis. Terafortis, Mayfair submitted, had represented by its conduct that 'matters were on hold' while the dialogue was ongoing.

74. At the hearing, Mayfair submitted that its principal case was to have the statutory demand set aside in its entirety (proposed grounds 1 and 2); and that, in the alternative, the demand should be varied under **s 459H(4)** of the *Corporations Act* (proposed ground 3). Mayfair contended that the genuine dispute in relation to proposed ground 3 was as to the amount of debt payable, and that this dispute arose on account of Mayfair's claim that the 12.5 per cent interest in the Pahang land (valued at MYR 12.5 million) formerly held by Tan Sri Chan Kong Choy had been transferred to Mr Chun or his related entities in reduction of Mayfair's debt. Mayfair contended that an order should be made under **s 459H(4)** varying the statutory demand, and declaring the demand have effect as so varied from the date the demand was served on Mayfair.^[47] Relying on the exchange rate deposited to by Mr Chan in his affidavit, Mayfair submitted that this partial satisfaction of its debt to Terafortis would reduce the amount of the demand to \$7,973,366.

Respondent's submissions

75. In written submissions, Terafortis began by referring to the principles concerning the existence of a genuine dispute set out in *Malec Holdings Pty Ltd v Scotts Agencies Pty Ltd (in liq)* ('Malec'),^[48] and to the statement in *Central City Pty Ltd v Montevento Holdings Pty Ltd*^[49] concerning the evidentiary threshold for determining whether a dispute is genuine.

76. At the hearing, Terafortis submitted that Mayfair's case was fatally undermined by the fact that its evidence of the alleged agreement 'rises no higher than mere assertion'. Terafortis submitted that there was no plausible contention as to the existence of the alleged agreement for the purposes of Mayfair's proposed grounds 1 and 2.

77. With respect to proposed ground 1, Terafortis submitted that the judge identified and applied the correct principles, and undertook a careful examination of the evidence before concluding that there was no plausible contention requiring further investigation. Terafortis contended that the judge had not sought to weigh the merits of the dispute as Mayfair submitted; and that her Honour's Reasons did not indicate that she had made any determination in respect of competing evidence. Terafortis submitted that the judge had carefully examined the evidence and had made a number of findings in support of her

conclusion that Mayfair's case was premised on assertion and inconsistent with the contemporaneous documentary records. These findings included that:

- (a) Mayfair's evidence was no more than assertion that Terafortis had made the alleged agreement;
- (b) there needed to be more than just assertion that Terafortis had agreed to vary the debt repayment;
- (c) the WhatsApp messages clearly referred to matters other than the loan agreement, and even if they did relate to the alleged agreement, it was questionable whether they rose beyond the realm of mere discussions; and
- (d) Terafortis had made repeated requests for the debt to be repaid.

78. Terafortis submitted that, on the evidence, her Honour's findings were correct.

79. While Terafortis accepted that the evidence gave rise to a plausible contention that the parties had entered into negotiations, it contended that those negotiations never went beyond 'the realms of merely discussions'. Terafortis submitted that, when regard was had to the evidence as a whole, there was no plausible contention as to the existence of the alleged agreement.

80. Turning to the WhatsApp messages relied upon by Mayfair, Terafortis highlighted the inconsistencies between Mayfair's assertion of the alleged agreement and the contemporaneous evidence in those messages that Terafortis made consistent and repeated requests for the urgent repayment of the loan, as agreed under the loan agreement. In this connection, counsel for Terafortis relied specifically on the WhatsApp messages of 26 July, 9 August, 30 August and 6 September 2024.

81. Terafortis noted the lack of any contemporaneous evidence as to any objection on Mayfair's part to Terafortis' repeated demands for payment (as would be expected if, consistent with Mayfair's assertion and Mr Chan's position in the 20 November 2024 email, the parties had reached an agreement).

82. Terafortis further submitted that the emojis used in the WhatsApp messages were of little significance and specifically that the laughing emoji could only suggest, at its highest, a humorous response. It provided no basis on which to suggest an agreement existed. While Terafortis conceded that the Court could have regard to the 20 November 2024 email on which Mayfair relied, Terafortis emphasised that it was an after-the-fact record, and only 'mere assertion' by Mr Chan of a 'variation agreement'.

83. In relation to proposed ground 2, Terafortis submitted that the judge had not acted on any wrong principle and there was no error in the judge's evaluation of the facts or evidence. The judge had given careful consideration to the evidence and correctly found that there was no plausible contention that required investigation that it would be unconscionable for Terafortis to enforce the debt in light of the discussions. The judge had correctly found that there was no evidence from which that conclusion could be reached other than the mere fact of negotiations.

84. Terafortis submitted that, as the judge held, Mayfair's situation could be distinguished from cases Mayfair sought to rely on such as *MNWA*^[50] and *Longjing*^[51] because those

cases involved evidence of an agreement or a representation that had been relied upon by the other party. Terafortis submitted that Mayfair was put on notice by the judge of the need to identify evidence that Terafortis had made the alleged agreement with Mayfair or evidence of a representation by Terafortis that it would not pursue its claim. Terafortis submitted that Mayfair had not established any agreement or representation that could make Terafortis' conduct unconscionable. Terafortis further submitted that its conduct was not inequitable as Mayfair had not changed its position in reliance on any alleged representation or agreement.

85. In relation to proposed ground 3, Terafortis submitted that not all the discussions in the WhatsApp messages related to Mayfair's repayment of its debt to Terafortis.^[52] In its submission, the reference to the Pahang land had nothing to do with Mayfair's outstanding debt.^[53] In this connection, counsel for Terafortis initially contended that any arrangement that might have been agreed regarding the Pahang land was unrelated to Mayfair's debt under the loan agreement. Counsel subsequently said, however, that even if there was a plausible contention as to an agreement to reduce the debt by the sale of an interest in the Pahang land and, therefore, a plausible contention of a genuine dispute over at least some portion of the debt, the remaining value of the statutory demand would nonetheless be enforceable. Counsel submitted that, if the Court were satisfied of this, the appropriate course would be to exercise its discretion to vary the amount of the demand.

Consideration — Proposed grounds 1 and 3

86. Ultimately, the question for this Court, on an appeal of this kind, is whether the judge reached the correct outcome.^[54] Proposed ground 1 thus requires this Court, having conducted a real review of the evidence, to determine whether the judge correctly held that there was no plausible contention requiring further investigation that there was a genuine dispute (within the meaning of s 459H(1)(a) of the *Corporations Act*) about the existence of the debt claimed in the statutory demand.

87. Proposed ground 3 was directed to ss 459H(1)(a) and (4) and requires the Court to determine whether there was a plausible contention requiring further investigation that there was a genuine dispute about the amount of the debt because of a partial compromise of the debt by the transfer to Mr Chun (or entities related to him) of Tan Sri Chan Kong Choy's 12.5 per cent interest in the Pahang land.

88. There was no dispute about the applicable principles governing the Court's inquiry as to whether there was a genuine dispute about the existence or the amount of a debt within the meaning of s 459H(1)(a). On an application to set aside a statutory demand in reliance on s 459H(1), Mayfair is required to show only that there is a genuine dispute about the existence or the amount of the debt claimed in the statutory demand (or that it has an offsetting claim, which is not asserted here). As the Court said in *Malec*:

The terms of s 459H of the *Corporations Act* and the authorities make clear that, on an application to set aside a statutory demand, the applicant is required only to establish a genuine dispute or offsetting claim. The applicant is required to evidence the assertions relevant to the alleged dispute or offsetting claim only to the extent necessary for that primary task. It is not necessary for the applicant to

advance a fully evidenced claim. Therefore, the task faced by an applicant is by no means at all a difficult or demanding one.

In determining such an application, it is not necessary or appropriate for a court to engage in an in-depth examination or determination of the merits of the alleged dispute. This is because an application alleging a genuine dispute or offsetting claim is akin to one for an interlocutory injunction and requires the applicant to establish that there is a 'plausible contention requiring investigation' of the existence of either a dispute as to the debt or an offsetting claim.^[55]

89. At the same time, the Court in *Malec* also observed that:

The court is required to determine whether the dispute or offsetting claim is 'genuine'. It has been said that the criterion of a 'genuine' dispute requires that the dispute be bona fide and truly exist in fact and that the grounds for alleging the existence of a dispute be real and not spurious, hypothetical, illusory or misconceived. It has also been observed that the dispute or offsetting claim should have a sufficient objective existence and *prima facie* plausibility to distinguish it from a merely spurious claim, bluster or assertion. It must also have sufficient factual particularity to exclude the merely fanciful or futile. A rigorous curial approach is essential to the effective operation of the statutory scheme.^[56]

90. Having examined the evidence on which the parties relied, we agree with the judge that Mayfair has not established a plausible contention requiring further investigation that Terafortis agreed to vary the loan agreement prior to the service of the statutory demand so that Mayfair was not obliged to pay the amount claimed in the demand when it was served. We therefore reject Mayfair's submission that there is a genuine dispute as to the existence or the amount of the debt claimed in the statutory demand at the time it was served.

91. Mayfair does not dispute that it entered into the loan agreement with Terafortis on 25 July 2023 and that, pursuant to that agreement, Terafortis lent Mayfair \$10 million. The agreement made provision for interest and, in the event of default, provision for default interest. Clause 15.4 required that '[a] variation of any term' of the agreement 'be in writing and signed by the parties'. Terafortis and Mayfair accepted that, in accordance with this requirement, in April 2024, the term of the loan to Mayfair had been extended by a second written agreement to 1 June 2024. Terafortis disputed Mayfair's contention that the loan agreement was varied again later the same year, with the consequence that the debt the subject of the statutory demand was not due and payable at the time the demand was served.

92. Pursuant to cl 8.2 of the loan agreement, if there was an 'Event of Default', it was open to Terafortis to declare by notice to Mayfair that 'the Principal Outstanding, all accrued interest and all other Secured Moneys due and payable but not paid are immediately due and payable'. As noted above, Terafortis issued a default notice to Mayfair on 7 June 2024 and a default reminder on 23 October 2024.

93. Also as already indicated, to make good its claim that the loan agreement had been varied by agreement, so that its debt to Terafortis was not payable as at 4 November 2024 when the statutory demand was served, Mayfair relied on the affidavits of Mr Chan dated 25

November 2024 and of the certified Chinese into English translator, Ying Wang, dated 27 February 2025. Mr Chan did not claim to be directly involved in negotiating the claimed outcome. Rather, to make good its submission that there was a plausible contention requiring further investigation that, notwithstanding cl 15.4 of the loan agreement, there was a further agreed variation to the loan agreement of the kind Mayfair alleged, Mayfair relied on the 20 November 2024 email sent by Mr Chan to Mr Lee (which was exhibited to Mr Chan's affidavit) and the translations of the WhatsApp messages. As we have seen, these messages recorded discussions between Mr Chan's father, Tan Sri Chan Kong Choy, and Mr Chun. Before us, neither party challenged the judge's finding that there was at least a plausible contention that the former had authority to bind Mayfair and the latter the authority to bind Terafortis.

94. We are not persuaded, however, that the evidence on which Mayfair relied showed that there was a plausible contention requiring further investigation that Terafortis had in fact agreed to vary the loan agreement prior to 4 November 2024. The exchanges via WhatsApp fall well short of evidence of an agreement between Mayfair and Terafortis. Rather, the exchanges amounted to no more than discussions about when and how the outstanding debt under the loan agreement could be paid (along with the accruing interest), without any agreement being reached.

95. On Mayfair's case, the evidence of the alleged agreement mostly consisted of the WhatsApp messages exchanged between Mr Chun and Mr Chan's father. The other evidence on which it relied was Mr Chan's 20 November 2024 email. The latter was clearly not direct evidence of the alleged agreement, however. Rather, the email was, at best, evidence of what it expressly referred to as a *proposed* arrangement for Mr Lee's consideration. It was apparently based on some information Mr Chan had received about his father's WhatsApp exchanges with Mr Chun between 26 July and 9 October 2024. In terms and effect, the email did no more than set out Mayfair's proposal for the settlement of its payment obligations to Terafortis. The email was sent some weeks after the service of the statutory demand. It cannot reasonably be inferred from this email that Terafortis had in fact accepted the proposal outlined in the email. Indeed, the email made no claim that Terafortis had previously made any agreement to this effect. In this respect, Mr Chan's email was consistent with Mr Lee's affidavit evidence.

96. Further, as we seek to explain, it is not open to infer from the WhatsApp messages on which Mayfair relied that Mr Chun agreed on behalf of Terafortis to the 'proposed settlement plan' set out in the 20 November 2024 email; that he agreed to postpone Mayfair's obligation to repay its debt to Terafortis under the loan agreement; or that he agreed to a reduction in the monetary amount that Mayfair was to pay.

97. Mayfair relied on the WhatsApp messages as a contemporaneous record of the exchanges between Mr Chun and Tan Sri Chan Kong Choy about when and how Mayfair was to meet its payment obligations under the loan agreement. The messages indeed show that the two men discussed the repayment of Mayfair's loan in a number of their exchanges. This was not, however, the only topic they discussed in their exchanges. The messages evidently also concerned some other unrelated business matters.

98. Before looking more closely at the messages, we also observe that there are inherent difficulties with evidence of this kind. First, the individual communications between the parties are short and uncontextualized. Second, they represent a relatively informal series of

communications. Third, they assume the parties' familiarity with the matters mentioned in their exchanges, with the consequence that much is apparently left unsaid.

99. Moreover, the messages have been translated for court use from spoken and written Chinese into the English language. Nuances in meaning may well have been lost in translation, especially between businessmen who share a common cultural and business knowledge.^[57] Perhaps as consequence of this, we cannot discern any sound basis to attribute any significance to the emojis that accompanied some of the WhatsApp messages that might add to or detract from that which appears in the accompanying text.

100. As set out below, notwithstanding the relatively low threshold required of Mayfair to show 'a genuine dispute', and allowing for the difficulties to which we have referred, we are unable to discern in these messages, either considered by themselves or with the other evidence before the Court (including Mr Chan's 20 November 2024 email to Mr Lee), a plausible contention warranting further investigation that Mr Chun and Tan Sri Chan Kong Choy reached an agreement postponing Mayfair's obligation to pay or reducing the amount due and payable to Terafortis under the loan agreement as at 4 November 2024.^[58]

101. The WhatsApp messages showed that Mr Chun and Tan Sri Chan Kong Choy were in communication between 26 July 2024 and 31 August 2024; and again between 9 and 11 October 2024. Mr Chun's first message of 26 July 2024 clarified that the purpose of his communication with Tan Sri Chan Kong Choy on that date was to recover the monies owed by Mayfair to Terafortis under the loan agreement, since 'his partner' had not been able to secure payment from Mr Chan (that is, Tan Sri Chan Kong Choy's son). This much is consistent with Mayfair's case.

102. The messages also provided some support for the proposition that Tan Sri Chan Kong Choy proposed at different times that Mayfair's debt be repaid through proceeds from the sale of the OUG land and the transfer of the interest in the Pahang land. The difficulty we see with Mayfair's case in this regard is that the messages do not give rise to a plausible contention requiring further investigation that Mr Chun (and therefore Terafortis) agreed to any proposal respecting either the proceeds of sale from the OUG land or the interest in the Pahang land.

103. In a WhatsApp message on 9 August 2024, Mr Chun indicated that the sale of two acres in Kuala Lumpur (presumably the OUG land) was not acceptable because it would not meet 'the urgent needs of the moment'.^[59] Although Tan Sri Chan Kong Choy indicated that he thought the sale could be effected more quickly than Mr Chun had indicated, there is nothing in the messages thereafter to show that Mr Chun agreed to the OUG land sale proposal. To the contrary, Mr Chun's response on 31 August 2024 was that '[w]e currently have no interest in other products such as land' and he informed Tan Sri Chan Kong Choy that he needed 'cash to resolve this issue'.^[60] His message concluded with the statement 'Please ask Tan Sri if he can arrange other channels to process this loan as soon as possible'.

104. There was a further exchange about different land (presumably the Pahang land) on 9 October 2024. In this WhatsApp exchange, Mr Chun notified Tan Sri Chan Kong Choy that 'even if' he 'let other investment companies' acquire the land, there would still be monies outstanding.^[61] Mr Chun's comment at the end of that exchange that '[t]he remaining 22–24 million MYR needs to be arranged by Tan Sri immediately' might be thought to indicate that

the proposed dealing regarding the Pahang land created some potential for agreement about the payment of Mayfair's outstanding debt to Terafortis.^[62] This may also be inferred from Mr Chun's subsequent message on 11 October 2024, in which he asked Tan Sri Chan Kong Choy to confirm 'if the remaining debt ... (after deducting 12.5% for the 5,000 acres of land, estimated at around 12.5 million MYR) can be settled by next Monday'.^[63] It seems, however, that any potential for agreement between the two men (and in consequence Terafortis and Mayfair) evaporated with Tan Sri Chan Kong Choy's negative response, to the effect that he would 'need to wait until the OUG land is sold to address this issue'.

105. Leaving aside for the moment Mr Chun's reference to the liquidation of 'Tan Sri's shares in the Labalab company in Kalimantan', his reference to meeting with 'the Hong Kong fund company', where he would 'take the opportunity to discuss and see if there is a chance to close a deal' also tells against any negotiated agreement as at 11 October 2024.^[64] We return to the Labalab matter below.

106. It is clear from the WhatsApp messages that Mr Chun emphasised that Terafortis required 'urgent' payment of the monies owed to it, in monetary currency. This is evident at the beginning of the exchange on 26 July 2024; and from the exchanges on 3, 9, 30 and 31 August 2024; 6 September 2024; and 9 and 11 October 2024. For example, on 30 August 2024, Mr Chun messaged 'I am facing difficulties and need funds for capital turnover'.^[65] In the message of 31 August 2024, Mr Chun indicated that Terafortis required 'cash to resolve this issue'.^[66] On 9 October 2024, he specifically notified Tan Sri Chan Kong Choy that Mayfair's failure to pay was 'causing significant embarrassment' and that '[c]ontinuing to delay is not a solution, either'.^[67] Likewise, on 11 October 2024, he messaged 'I urgently need funds'.^[68] In these circumstances, there ought to have been no doubt on Mayfair's part that Terafortis was actively pursuing the repayment of its loan and that it was seeking to be repaid in money, as Mr Chun's reference to cash in his message of 31 August 2024 made clear.

107. The WhatsApp messages indicated that Tan Sri Chan Kong Choy sought to repay Mayfair's debt by proceeds from the sale of land or transferring an interest in land but that Mr Chun was unwilling to accept this form of payment to discharge Mayfair's debt to Terafortis.

108. The significance of Mr Chun's subsequent reference on 11 October 2024 to Tan Sri Chan Kong Choy's shares in the Labalab company in Kalimantan is uncertain. It may well be that, as Mr Lee deposed, this related to a topic other than the recovery of Mayfair's debt. But this uncertainty does not mean that there is a plausible contention requiring further investigation. That is because even if the discussion of the Labalab shares related to the debt, Mr Chun's reference to seeing 'if there is a chance to close a deal' with the Hong Kong fund company confirmed that no deal had been struck at that time between Mr Chun and Tan Sri Chan Kong Choy on the subject of Mayfair's debt. There is simply nothing in the WhatsApp exchanges to permit the conclusion that there is a plausible contention requiring further investigation that any relevant agreement had been made between Mayfair and Terafortis at this time.

109. We acknowledge at this point that Mayfair relied on the letters^[69] of 14 and 21 October 2024 as evidence that, after the WhatsApp messages discussed above, Tan Sri Chan Kong Choy, on behalf of Mayfair, gave effect to the alleged agreement with Mr Chun, on behalf of Terafortis, to accept his 12.5 per cent interest in the Pahang land to meet some of Mayfair's

debt. Mayfair's case was that he did this by taking steps to transfer his shares in Labalab, which was said to be the Pahang land-owning company, to Mr Chun.^[70]

110. We are not persuaded, however, that the WhatsApp messages, in combination with these two letters and the other evidence on which Mayfair relied, admit of a plausible contention requiring further investigation that Terafortis *agreed* to accept the interest in the Pahang land by way of part payment of Mayfair's debt; and that Mayfair transferred the interest in the land to Terafortis as agreed by Tan Sri Chan Kong Choy transferring his shares in Labalab (or at all).

111. This is principally because there is nothing in the evidence before us, including the WhatsApp messages, to support the proposition that Mr Chun ultimately agreed to accept an interest in the Pahang land by way of part payment, notwithstanding Mr Chun's earlier insistence that Terafortis was not interested in land and was in urgent need of cash. Further, the letters of 14 and 21 October 2024 do not show that Mayfair or any entity on its behalf accepted the performance of any relevant dealing, as, for example, might have been evidenced by a relevant share transfer,^[71] or by evidence about Mr Chun's relationship to the individuals named in the letter of 21 October 2024. Indeed, there is little, if any evidence, about the activities of Labalab, including as to whether it was in fact a land-holding company, as suggested at the hearing. There was no simply no evidence as to why Tan Sri Chan Kong Choy would write to advise Mr Chun that he was transferring his shares in Labalab to two individuals whose association with Terafortis or Mr Chun, if any, was not disclosed (other than from what may be inferred by the letter itself). We agree with the judge that there was no plausible contention requiring further investigation as to a partial compromise of the debt owed to Terafortis by the transfer to Mr Chun or entities related to him of Tan Sri Chan Kong Choy's 12.5 per cent interest in the Pahang land.

112. In summary, we conclude that the judge was correct to find that there was no plausible contention requiring further investigation that:

- (a) there was a genuine dispute requiring further investigation (within the meaning of s 459H(1)(a) of the *Corporations Act*) about the existence of the debt claimed in the statutory demand at the time the demand was served; or
- (b) there was a genuine dispute requiring further investigation (within the meaning of s 459H(1)(a) of the *Corporations Act*) about the amount of debt claimed in the statutory demand at the time the demand was served, on the basis of a partial compromise of the debt by the transfer to Mr Chun or entities related to him of Tan Sri Chan Kong Choy's 12.5 per cent interest in the Pahang land.

113. For these reasons, we would refuse leave to appeal on proposed grounds 1 and 3.

Consideration — Proposed ground 2

114. Proposed ground 2 challenged the judge's finding that there was no plausible contention requiring further investigation that the parties were engaged in negotiations to compromise

the debt at the time the demand was served, and it was therefore unconscionable for the demand to be served at this time.

115. Mayfair contends that the judge mistook the facts and failed to take material evidence into account, because Terafortis had represented by its conduct that 'matters were on hold' while these negotiations were ongoing.

116. Proposed ground 2 therefore requires the Court to consider whether Terafortis had represented (or agreed) that it would not take steps to recover the monies due and owing to it (including by service of a statutory demand) while it was in discussions with Mayfair about the repayment of Mayfair's debt to it.

117. As the facts set out in the discussion of proposed grounds 1 and 3 show, there is nothing in the evidence before the Court to admit of a plausible contention requiring further investigation that Terafortis agreed or represented that it would not take steps to require Mayfair to pay its debt under the loan agreement while it was in discussions with Mayfair about how and when its debt would be repaid.

118. On the contrary, the WhatsApp messages showed that Mr Chun was pressing for immediate payment of the monies Mayfair owed, as per the WhatsApp messages of 26 July 2024; 3, 9, 30 and 31 August 2024; 6 September 2024; and 9 and 11 October 2024. As already stated, these messages should have left Mayfair in no doubt that Terafortis was actively seeking the immediate recovery of Mayfair's debt. The evidence also showed that Mr Lee was actively pursuing Mr Chan for the payment of Mayfair's debt, including at a meeting with him on 5 September 2024. Furthermore, Mayfair had received a notice of default under the loan agreement from Terafortis on 7 June 2024. This was prior to the discussions represented by the WhatsApp exchanges; and Mayfair received a default notice reminder on 23 October 2024, shortly after the exchanges ended.

119. In its written submissions, Mayfair sought to rely on Mr Chan's email of 23 October 2024 to Chay Winstanley, after service of the notice of default that same day, in which he stated:

Re: the \$10m loan — I will get some feedback to you next few days, I am of the understanding that it is being discussed with the lender without my involvement.

120. Mayfair contended that this 'clearly conveyed' Mr Chan's understanding that 'the negotiations to resolve the AU\$10m debt were still on foot'. It contended that this 'understanding' was not met with any 'dispute or denial by Terafortis'. This, it said, was 'evidence of, at least, a representation by conduct that matters were on hold whilst this was occurring and a belief to that effect honestly held by Chan'. It contended that the genuineness of that position was supported by Mr Chan's emails of 13 and 20 November 2024, which were sent after the statutory demand was served.

121. We do not accept that Mr Chan's email of 23 October 2024 clearly conveyed that negotiations concerning the debt were still on foot. Furthermore, even had it done so, we do not consider that Terafortis' failure to respond to that email by denying or disputing the proposition could have amounted to a representation by conduct that it would not take steps to recover the monies owing to it while such discussions were ongoing. It was under no obligation to dispute or deny Mr Chan's short and somewhat cryptic email. That is even more so given that Mr Chan said that he would 'get some feedback to you next few days' — that is,

the email conveyed that the next communication concerning the debt would be from Mr Chan, not from Terafortis. However, no such further communication was forthcoming until after the statutory demand had been served. The later communications do not support the proposition that Terafortis had, by its conduct, made the representation alleged by Mayfair.

122. We were not taken to any other contemporaneous evidence that might support the possibility that Terafortis represented or agreed that it would not take steps to enforce payment of the debt, whether while discussions with Mayfair were ongoing or otherwise. Indeed, this would have been contrary to Terafortis' clear indication, especially through Mr Chun, that it required 'urgent' repayment of the monies it was owed.

123. In any event, even if there were some such unidentified representation by Terafortis, it would appear that negotiations between the parties had effectively ended by 4 November 2024 when Mayfair received the statutory demand.

124. Having regard to the foregoing, we can discern no plausible contention requiring further investigation that Terafortis acted unconscionably in seeking to enforce repayment of its loan when it did. We reject Mayfair's submission that the judge acted on a wrong principle by imposing an impermissibly high standard or evidentiary bar. Accordingly, we would refuse leave to appeal on proposed ground 2.

[1] The time for compliance with the statutory demand was extended by order at the hearing of the application for leave to appeal to 7 calendar days after the determination of the application, or if the application is granted, of the appeal.

[2] Her Honour provided oral reasons for her decision ('Reasons').

[3] The Court also gave the parties leave to file written submissions concerning the additional proposed grounds.

[4] Emphasis in original.

[5] The matter of the Pahang land is discussed below.

[6] [2016] FCAFC 154; (2016) 250 FCR 381, 406–7 [109], [112] (Rares J); [2016] FCAFC 154 ('MNWA').

[7] [2017] NSWSC 1534; (2017) 123 ACSR 456, 464–5 [44]–[50] (Gleeson JA); [2017] NSWSC 1534 ('*Longing*').

[8] Emphasis in original.

[9] *Water Board v Moustakas* (1988) 180 CLR 491, 497 (Mason CJ, Wilson, Brennan and Dawson JJ); [1988] HCA 12; *Coulton v Holcombe* [1986] HCA 33; (1986) 162 CLR 1, 7–11 (Gibbs CJ, Wilson, Brennan and Dawson JJ); [1986] HCA 33; *Sambucco v Sambucco* (2023) 72 VR 121, 127–9 [23]–[35] (McLeish and Walker JJA and Gorton AJA); [2023] VSCA 199.

[10] *Corporations Act 2001* (Cth) ss 459G, 459H, 459J.

[11] Ibid s 459H(1)(a). There are other circumstances in which s 459H will apply, but Mayfair does not rely on them here.

[12] Calculated in accordance with the formula in s 459H(2) of the *Corporations Act 2001* (Cth).

[13] The statutory minimum is currently prescribed as \$4,000: *Corporations Act 2001* (Cth) s 9 (definition of 'statutory minimum'); *Corporations Regulations 2001* (Cth) reg 5.4.01AAA(1)(b).

[14] *Corporations Act 2001* (Cth) s 459J(1)(b).

[15] In these reasons, 'RM' signifies Ringgit Malaysia.

[16] Emphasis in original.

[17] Mr Lee deposed, and provided an ASIC report showing, that he is the sole director, secretary and shareholder of AD Corporate Solutions Pty Ltd ('ADCS'), and he deposed that ADCS is the ultimate shareholder of Terafortis.

[18] The messages were transmitted in Chinese, and certified English translations were supplied to the Court. We note that certified English translations of a selection of the messages were included in the affidavit of Ying Wang, dated 27 February 2025. A complete copy of the WhatsApp messages translated by Ying Wang was exhibited to Mr Lee's affidavit.

[19] That is, Mr Jiaheng Chan, the director of Mayfair.

[20] The identity of this person is not disclosed in the evidence before the Court.

[21] The identity of this person is not disclosed in the evidence before the Court.

[22] See [39], [41]–[42] below.

[23] The translation provided to the Court says 'AIJD' but the original Chinese text clearly says 'AUD'.

[24] 'CK' is not otherwise identified.

[25] No information was provided to the court regarding the content of this one minute voice call.

[26] The company was also apparently described as Labalab Sdn Bhd, with no party drawing any distinction between it and Labalab Venture Sdn Bhd.

[27] Mr Lee deposed, however, that Tan Sri Chan Kong Choy had specifically informed him that the share transfer related to other commercial dealings, not the loan agreement between Mayfair and Terafortis (emphasis in original).

[28] See [30] above.

[29] See [30] above.

[30] See [42] above.

[31] See [43] above.

[32] The Reasons refer to ‘the plaintiff’ but this is plainly intended to be a reference to the defendant below, Terafortis.

[33] See [43], [51] above.

[34] (1994) 12 ACSR 785, 787–8 (McLelland CJ in EQ) (‘*Eyota*’). Mayfair also referred to *Ligon 158 Pty Ltd v Huber* [2016] NSWCA 330; (2016) 117 ACSR 495, 497–8 [8] (Barrett AJA, McColl JA agreeing at 496 [1], Meagher JA agreeing at 496 [2]); [2016] NSWCA 330 (‘*Ligon*’); *Bendigo and Adelaide Bank Ltd v Pekell Delaire Holdings Pty Ltd* [2017] VSCA 51; (2017) 118 ACSR 592, 605–6 [47] (Santamaria, Ferguson and McLeish JJA); [2017] VSCA 51.

[35] Citing *TR Administration Pty Ltd v Frank Marchetti & Sons Pty Ltd* [2008] VSCA 70; (2008) 66 ACSR 67, 79 [71] (Dodds-Streeton JA, Neave JA agreeing at 68 [1], Kellam JA agreeing at 68 [2]); [2008] VSCA 70.

[36] Citing *Fox v Percy* (2003) 214 CLR 118, 126–7 [25] (Gleeson CJ, Gummow and Kirby JJ); [2003] HCA 22; *Robinson Helicopter Co Inc v McDermott* [2016] HCA 22; (2016) 331 ALR 550, 558–9 (French CJ, Bell, Keane, Nettle and Gordon JJ); [2016] HCA 22; *Australian Securities and Investments Commission v Geary* [2018] VSCA 103; (2018) 332 FLR 201, 230–4 [214]–[224] (Ferguson CJ, Weinberg JA and Sifris AJA); [2018] VSCA 103.

[37] Emphasis in original.

[38] See [30] above.

[39] See [30] above.

[40] MNWA [2016] FCAFC 154; (2016) 250 FCR 381, 406–7 [108]–[109], [112]; [2016] FCAFC 154, noting that the same approach had been taken in *Longjing* [2017] NSWSC 1534; (2017) 123 ACSR 456, 464–5 [45]–[50] (Gleeson JA); [2017] NSWSC 1534.

[41] See [27] above.

[42] See [43] above.

[43] According to Mr Chan’s 20 November 2024 email, the land was valued at RM12.5 million; and the transfer of the Labalab shares was seen as a ‘quicker’ way ‘to address the outstanding balance’ than the sale of the OUG land.

[44] See [30] above.

[45] Referring in oral submissions to *Britten-Norman Pty Ltd v Analysis & Technology Australia Pty Ltd* (2013) 85 NSWLR 601; [2013] NSWCA 344. In written submissions, Mayfair also

referred to *Ligon* [2016] NSWCA 330; (2016) 117 ACSR 495, 497–8 [8]–[9] (Barrett AJA, McColl JA agreeing at 496 [1], Meagher JA agreeing at 496 [2]); [2016] NSWCA 330.

[46] Mayfair submitted that proposed ground 2, which challenged the judge's rejection of this argument, was an attack on a discretionary judgment, which required it to demonstrate error in one of the senses identified in *House v The King* (1936) 55 CLR 499; [1936] HCA 40.

[47] Mayfair did not seek to rely in s 459J in support of this part of its case.

[48] [2015] VSCA 330, [47]–[51] (Kyrou, Ferguson and Kaye JJA) ('*Malec*').

[49] [2011] WASCA 5, [9]–[11] (Murphy JA, Buss JA agreeing at [1]).

[50] (2016) 250 FCR 381; [2016] FCAFC 154.

[51] (2017) 123 ACSR 456; [2017] NSWSC 1534.

[52] For example, Terafortis submitted that the WhatsApp message of 9 October 2024 referred to another matter altogether.

[53] Terafortis accepted at the hearing that the Court would need to be positively satisfied that the two matters were separate because if the Court were not so satisfied, there was a plausible contention that they were related.

[54] *Entertainment Group Pty Ltd v Curtis Family Developments Pty Ltd* [2025] VSCA 193, [56] (Kennedy, Walker and Orr JJA).

[55] *Malec* [2015] VSCA 330, [47]–[48] (Kyrou, Ferguson and Kaye JJA) (citations omitted). See also *Ligon* [2016] NSWCA 330; (2016) 117 ACSR 495, 497–8 [8] (Barrett AJA, McColl JA agreeing at 496 [1], Meagher JA agreeing at 496 [2]); [2016] NSWCA 330; *Eyota* (1994) 12 ACSR 785, 787–8 (McLelland CJ In EQ).

[56] *Malec* [2015] VSCA 330, [49] (Kyrou, Ferguson and Kaye JJA) (citations omitted).

[57] See generally *Deng v Zheng* [2022] NZSC 76; [2022] 1 NZLR 151, 171–4 [75]–[84] (William Young J for the Court); [2022] NZSC 76; *Li v Chen* [2018] NZHC 2843; Mai Chen, 'Culturally and Linguistically Diverse Parties in the Courts: A Chinese Case Study' (Report, Superdiversity Institute for Law, Policy and Business, November 2019) 82–3 [363]–[371], 144 [700]; Mai Chen and Andrew Godwin, 'Culturally and Linguistically Diverse Parties in Australian Courts: Insights from New Zealand' (Issues Paper, September 2022) 3, 8–9, 11–17, 21–2; Andrew Godwin, 'Cross-Cultural Communications' [2014] (November) *China Business Law Journal* 89; Andrew Godwin 'Alternative Dispute Resolution: Mediation or Conciliation?' [2011] (October) *China Business Law Journal* 73; Andrew Godwin, 'Negotiate', *China Business Law Journal* (Web Page, 29 May 2013).

[58] That is, as at the date the statutory demand was served on Mayfair.

[59] See [36(4)] above.

[60] See [36(6)] above.

[61] For present purposes, it may be assumed that the WhatsApp message of 9 October 2024 related to the recovery of Mayfair's debt, rather than another matter, although this is not entirely clear: see [41] above.

[62] See [41] above.

[63] See [42] above.

[64] Ibid.

[65] See [36(5)] above.

[66] See [36(6)] above.

[67] See [41] above.

[68] See [42] above.

[69] The substance of these letters is set out at [43] above.

[70] There was no evidence about the activities of Labalab 'in Kalimantan' or about its connection with the Pahang land. Pahang is a state in Malaysia. Kalimantan is in Indonesia.

[71] Counsel for Mayfair conceded at the hearing that there was no evidence before the Court that Tan Sri Chan Kong Choy's shares in Labalab had been transferred as the letter of 21 October 2024 apparently contemplated.