

SUPREME COURT OF QUEENSLAND

CITATION: *M Resources Trading Pty Ltd v Australian Pacific Coal Ltd (Receivers Appointed)* [2026] QCA 150

PARTIES: **M RESOURCES TRADING PTY LTD**
ACN 156 582 320
(appellant)
v
AUSTRALIAN PACIFIC COAL LTD (RECEIVERS APPOINTED)
ACN 089 206 986
(respondent)

FILE NO/S: Appeal No 5320 of 2025
SC No 3352 of 2025

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane – [2025] QSC 276 (Smith J)

DELIVERED ON: 18 August 2026

DELIVERED AT: Brisbane

HEARING DATE: 30 July 2026

JUDGES: Mullins P, Brown JA, Bradley JA

ORDERS: **1. Appeal allowed.**
2. The orders of Smith J made on 28 October 2025 be set aside.
3. The respondent’s originating application dated 31 July 2025 is dismissed.
4. The respondent pay the appellant’s costs of the proceeding.
5. The respondent pay the appellant’s costs of the appeal.

CATCHWORDS: CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – GENUINE DISPUTE AS TO INDEBTEDNESS – ASSESSING GENUINENESS – GENERALLY – where the appellant and respondent were parties to a joint venture for a coal mine – where, in accordance with the terms of the joint venture, a parent company of the appellant nominated a director to the board of the respondent – where the parties to the joint venture were in dispute – where a board meeting of the respondent voted as to whether to enter into agreements as part of

resolving the dispute – where the nominated director voted in favour of a resolution to enter a services agreement whereby a subsidiary of the respondent would pay a retainer fee to the appellant – where a financier required the assignment of obligations under the services agreement – where the services agreement was amended by a deed assigning the subsidiary's payment obligations to the respondent – where the appellant served the respondent with a statutory demand for a debt alleged to have accrued as a retainer under the services agreement – where the respondent successfully applied to set aside the demand – where the quantum of the debt was not disputed – where the respondent argued that the agreement under which the debt was claimed was the product of a breach of fiduciary duty by the nominated director – where the primary judge found there was a genuine dispute as the respondent raised an arguable case of breach of fiduciary duty – where the appellant contends the primary judge erred in finding that there existed a genuine dispute about the existence of the debt the subject of the demand – where the appellant contends that the primary judge's findings concerning the nominated director's breach of duty and the appellant's knowledge of the breach are in error – whether there is a genuine dispute about the existence of the debt the subject of the demand

CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – GENUINE DISPUTE AS TO INDEBTEDNESS – ASSESSING GENUINENESS – GENERALLY – where the respondent filed a second affidavit in support of its application outside the 21-day period prescribed by s 459G of the *Corporations Act 2001* (Cth) (*Corporations Act*) – where by the second affidavit the respondent attached a notice purporting to terminate the services agreement – where the appellant contended the debt remained owing while the services agreement was on foot – whether the primary judge erred in finding a genuine dispute on the basis there was a triable issue the respondent could rescind when it had not rescinded within the 21-day period

CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – GENUINE DISPUTE AS TO INDEBTEDNESS – ASSESSING GENUINENESS – GENERALLY – where the primary judge held there was an “other reason” to set aside the statutory demand under s 459J of the *Corporations Act* – where the respondent's second affidavit attached a notice of dispute under the services agreement – where the respondent contended that the demand be set aside due to the appellant's alleged non-compliance with the dispute resolution procedure under the services agreement (the dispute resolution argument)

– where the primary judge considered the dispute resolution argument to be an “other reason” to set aside the demand – whether the primary judge ought to have considered the dispute resolution argument where it was brought outside of the period prescribed by s 459G of the *Corporations Act* – whether there exists an “other reason” to set aside the demand

Corporations Act 2001 (Cth), s 191, s 192, s 459G, s 459H, s 459J

Agricultural Land Management Ltd v Jackson (No 2) (2014) 48 WAR 1; [2014] WASC 102, considered

Alati v Kruger (1955) 94 CLR 216; [1955] HCA 64, cited
Arris Investments Pty Ltd v Fahd [2010] NSWSC 309, considered

Australian Securities and Investments Commission v Adler (2002) 168 FLR 253; [2002] NSWSC 171, cited

Citation Resources Ltd v IBT Holdings Pty Ltd (2016) 116 ACSR 274; [2016] FCA 1265, cited

Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund (1996) 70 FCR 452; [1996] FCA 822, considered

Howard v Federal Commissioner of Taxation (2014) 253 CLR 83; [2014] HCA 21, considered

Hylepin Pty Ltd v Doshay Pty Ltd (2021) 288 FCR 104; [2021] FCAFC 201, considered

Kisimul Holdings Pty Ltd v Clear Position Pty Ltd [2014] NSWCA 262, considered

Meehan v Glazier Holdings Pty Ltd (2005) 53 ACSR 229; [2005] NSWCA 24, considered

Mills v Mills (1938) 60 CLR 150; [1938] HCA 4, cited
Re Australia Zhongfu Oil Gas Resources Pty Ltd [2012] NSWSC 1208, considered

Re Broadcasting Station 2GB Pty Ltd [1964-5] NSWLR 1648, cited

Re News Corporation Ltd (1987) 15 FCR 227; [1987] FCA 6, cited

Sceam Construction Pty Ltd v Clyne (2021) 64 VR 404; [2021] VSCA 270, considered

SGH Ltd v Commissioner of Taxation (2002) 210 CLR 51; [2002] HCA 18, considered

Southern British National Trust Ltd (in liq) v Pither (1937) 57 CLR 89; [1937] HCA 28, cited

Streeter v Western Areas Exploration Pty Ltd (No 2) (2011) 278 ALR 291; [2011] WASCA 17, cited

Thomson v Australia and New Zealand Banking Group Ltd [2024] QCA 73, cited

COUNSEL:

D G Clothier KC, with J R Hohl, for the appellant
J P Hastie for the respondent

SOLICITORS: Corrs Chambers Westgarth for the appellant
Mills Oakley for the respondent

- [1] **MULLINS P:** I agree with Brown JA.
- [2] **BROWN JA:** The appellant, M Resources Trading Pty Ltd (MRT), challenges a decision setting aside a statutory demand issued by it to the respondent, Australian Pacific Coal (Receivers Appointed) (APC), on the ground that the primary judge erred in finding that there was a genuine dispute or that there was another reason to set aside the statutory demand.

Factual Background

- [3] The following facts are uncontentious.
- [4] MRT is a subsidiary of M Resources Pty Ltd (M Resources).
- [5] In September 2022, M Resources, APC, Tetra Resources Pty Ltd (Tetra) and Trepang Services Pty Ltd (Trepang) entered into a term sheet for a proposed joint venture relating to a coal mine (2022 term sheet). Each party was to hold a joint venture equity interest if funds were raised, necessary approvals obtained and other specified requirements were met. Under that term sheet, there was provision for M Resources to appoint a director to APC for as long as certain conditions were met. Limitations were imposed upon this right if APC's shareholders did not re-elect the director appointed. Trepang also had the right, subject to certain terms being agreed between APC and Trepang, to nominate up to 2 directors to APC. The term sheet provided for MRT to be appointed to provide marketing services, logistics and to form a 50:50 jointly owned management company with Tetra.
- [6] Ms Saridas was subsequently appointed as a director of APC by M Resources in November 2022. Ms Saridas was not an employee of M Resources, on its board or otherwise paid by M Resources. According to the evidence of Mr Meka,¹ she was appointed because of her skillset and experience as a company executive. Ms Saridas was subsequently appointed as Executive Director, Interim Chief Executive Officer and Chief Executive Officer of APC. M Resources did not appoint her to those roles.
- [7] In 2023, a dispute arose between the parties, originally involving M Resources and Trepang but expanded to include all parties. The resolution of that dispute resulted in the parties entering into a revised term sheet on 1 May 2023, which was the subject of a market announcement on that same day. The 2022 term sheet was terminated. Under the revised term sheet, M Resources no longer had a right to appoint a director to APC. M Resources also gave up other rights it originally held under the 2022 term sheet in the revised term sheet. In connection with that revised term sheet, MRT, APC and AQC Dartbrook Pty Ltd (a subsidiary of APC) entered into a Technical Services Advisory Agreement on or about 18 April 2023 (original TSAA). On 20 April 2023, a Deed of Economic Interest was also entered into between M Resources (NSW) Pty Ltd as trustee for M Resources (NSW) Trust, AQC Dartbrook and APC.
- [8] Under the original TSAA, MRT agreed to provide consulting services to AQC Dartbrook. Clause 4.1(a)(ii) provided for a retainer to be paid to MRT by AQC

¹ The Chief Investment Officer of a group of companies, including MRT and M Resources: Affidavit of Aidan Meka affirmed 5 September 2025.

Dartbrook on a quarterly basis. No services had to be rendered by MRT as a precondition to that fee being payable. Under the original TSAA APC agreed to guarantee AQC Dartbrook's obligations to MRT under the agreement.

- [9] Prior to entry into the original TSAA and Deed of Economic Interest, a board meeting of APC's directors, which included Ms Saridas, occurred on 22 March 2023 in which the Board resolved to approve APC granting a 10% economic interest in the joint venture to M Resources and the entry into an agreement with M Resources for marketing and technical advisory services at a fee of 50 basis points for a rolling term of three years on market terms as part of the resolution of the dispute between the parties. The board further resolved to approve Ms Saridas and the Board's Chair to negotiate and bring into effect the long form documentation for the two agreements. Two directors voted against the resolution. In that meeting, the minutes record that Ms Saridas stated that she would vote in favour of the resolutions that the Chair had put forward because in her view APC would become insolvent otherwise. One of the directors who voted against the resolution asked whether independent advice had been obtained as to whether the 50 base points was market. Ms Saridas indicated that it did accord with the market in her experience. No request was made to obtain independent advice nor to adjourn the meeting to obtain further advice.

- [10] In November 2023, APC announced to the market that the joint venture had received approval for a three year US\$60 million debt facility from Vitol, a leading global energy and commodities company. At that time Ms Saridas was the interim CEO of APC. That announcement included the statement that:

“In parallel with the funding package, the Dartbrook JV has agreed to enter into a Coal Sales and Marketing Agreement with Vitol for all Dartbrook coal production, including assigning coal Marketing Rights to Vitol for the life of the mine (including any extensions).”

- [11] In January 2024, the senior commercial manager of APC sent an email to Mr Meka attaching a Deed of Assignment and Release as a condition precedent that Vitol had placed on the facility.

- [12] On 9 February 2024, AQC Dartbrook as the assignor, APC as the assignee, M Resources (NSW) Pty Ltd and MRT entered into such a deed (the 2024 Deed). The 2024 Deed acknowledged that AQC Dartbrook had obligations to pay M Resources (NSW) Pty Ltd and MRT under the Economic Interest Deed and the original TSAA and wished to assign its right, title and interest in and benefit arising under the agreements to APC. The 2024 Deed further acknowledged that AQC Dartbrook wished to “novate and transfer all of the M Resources Obligations to [APC] on the terms and conditions contained in this Deed” and “M Resources and [APC] then wish to amend and restate the M Resources Agreement[sic] on the terms and conditions contained in this Deed”. Clause 4.1(3) of the 2024 Deed provided that the TSAA was “amended to, and restated in, the form of Annexure B” (the new TSAA or the TSAA).

- [13] The new TSAA contained the same clause 4 providing for a retainer fee of A\$1 million per contract year payable on a pro rata basis, quarterly in arrears, to MRT, albeit that it was now APC's obligation, following its entry into the 2024 Deed, to pay the fee.

- [14] On 2 July 2025, a letter of demand was sent by MRT to APC demanding payment of \$1,074,006.85 under the new TSAA and attaching an invoice for that amount. MRT also served a statutory demand in respect of the same monies on 10 July 2025.

- [15] The calculation of the amount was not in dispute.

Dispute raised

- [16] In response, APC filed an application to set aside the statutory demand on 31 July 2025 alongside an affidavit of Mr Robinson, a director of APC. Mr Robinson was not appointed director until 5 June 2024, after the events in question. His evidence is based on his review of the records and some opinion evidence (which was the subject of objection). He identified that Ms Saridas had not declared any conflict of interest in the 22 March 2023 board meeting and that had she not voted, the resolution would not have passed. APC sought to raise a genuine dispute to the statutory demand based on the fact that the TSAA was the product of a breach of fiduciary duty as it was procured by a director of APC who was the nominee of M Resources. Mr Robinson asserted that it was uncommercial for APC to have entered into the Economic Interest Deed and TSAA, asserting that the costs of the fees payable pursuant to clause 4.1(a)(ii) of the TSAA significantly outweighed any benefit APC stood to receive pursuant to those agreements. He further asserted that MRT did not provide any “Services” under the TSAA and APC received no benefit as a result of the TSAA. APC claimed that the agreement was, as a result, voidable.
- [17] APC’s contentions were rejected by MRT on a number of bases. According to Mr Meka at no time, as far as he was aware, had any representative of APC or its related companies communicated to him or any other representative of the M Group that it did not consider itself bound by the original or new TSAA or Economic Interest Deed or the 2024 Deed. Affidavits were filed in response outlining services that had been provided under the TSAA through Mr Caruso and Mr Bull. According to Mr Meka the retainer fee was the only means by which MRT received payment for those services. There was no challenge to that evidence by APC in a second affidavit of Mr Robinson filed in reply and relied upon by APC.
- [18] Mr Robinson’s second affidavit, filed outside the 21 day period prescribed by s 459G(2) of the *Corporations Act 2001* (Cth), attached a Notice of Dispute which included a purported termination of the new TSAA.

Findings by the primary judge

- [19] The learned primary judge found:
- (a) That there were sufficient facts raised by APC giving rise to an arguable case of breach of fiduciary duty arising from Ms Saridas’ alleged undeclared conflict of interest at the March 2023 APC Board meeting which raised a triable issue warranting further investigation.
 - (b) That it may be argued that MRT knew of the alleged conflict as it knew Ms Saridas was the nominee director and knew she was the one negotiating with it about the agreements.
 - (c) The fact that there was a new TSAA entered into in 2024 after the original TSAA, which was the subject of the directors’ vote in 2023, was not significant. His Honour appeared to consider that the new TSAA was in effect a continuation of the arrangement agreed to by Ms Saridas arguably in breach of her duties. His Honour considered that the payment obligations to MRT under the new TSAA giving rise to the statutory demand did not change between the original and new TSAA. His Honour further found that it was

arguable that the fact that the 2023 term sheet did not require a nominee director was not to the point.

- (d) That it was arguable at a trial that APC is entitled to rescind the agreements, notwithstanding APC did not purport to do so until just prior to hearing.
 - (e) That in relation to a contention by MRT that the right of rescission had been lost due to delay and intervention, MRT did not deliver the invoices until July 2025, after Ms Saridas had left APC. The primary judge considered that there was an argument available to APC that it only gained an appreciation of the conflict issue when Mr Robinson, who joined the board mid-2024, looked through APC's records after the statutory demand had been served. The primary judge considered the question of whether the right to rescind had been lost was also a triable issue.
 - (f) The right to rescind a contract on the grounds of breach of fiduciary duty was affected by s 191 or s 192 of the *Corporations Act*.
- [20] The trial judge therefore concluded that there was a genuine dispute between the parties on the question of whether there was a breach of fiduciary duty sufficient to set aside the statutory demand.
- [21] The primary judge further found that APC was entitled to argue that the dispute should be dealt with by the resolution procedure in the TSAA, clause 15, which mandated the dispute being resolved through a meeting and expert determination. He considered there was a real argument that the dispute should be dealt with under clause 15 and that was circumvented by the statutory demand process.
- [22] The primary judge rejected an argument that this ground could not be relied upon to set aside the statutory demand because it was not raised in Mr Robinson's first affidavit in support of the application to set aside the statutory demand. The primary judge considered that given the first affidavit of Mr Robinson attached the TSAA, which included clause 15, and stated that there were no invoices delivered under the TSAA before July 2025 and no services were provided by MRT, APC was entitled to argue that it was a dispute which should be dealt with under clause 15 of the TSAA. The primary judge considered that was supported by the decision of the Victorian Court of Appeal in *Sceam Construction Pty Ltd v Clyne*.²
- [23] Notwithstanding conflicting authorities, the primary judge found that there was an argument that APC in ordinary civil proceedings could have argued as a point of stay that the dispute clause had been circumvented by issuing the statutory demand and that there was a real argument that a dispute has arisen such that matters should be dealt with under clause 15 of the TSAA.
- [24] The primary judge found that the failure to comply with the dispute resolution clause was another reason to set aside the statutory demand.

What is the threshold that must be met for a genuine dispute

- [25] The legal principles as to what is required to establish a genuine dispute are uncontroversial and were largely summarised in *Thomson v Australia and New Zealand Banking Group Ltd*³ at [40].

² [2021] VSCA 270 at [39].

³ [2024] QCA 73.

- [26] Establishing a genuine dispute under s 459H of the *Corporations Act* is not a high bar. A genuine dispute means there must be a plausible contention requiring investigation.⁴ It is only if the contention is so devoid of substance that no further investigation is warranted that the application will fail. It does not fall on the Court, in determining whether there is a genuine dispute, to conduct a mini trial.
- [27] While there is a relatively low threshold that must be met, an applicant seeking to set aside a statutory demand must establish that the dispute is bona fide and exists in fact, as opposed to a merely spurious claim, bluster or assertion.
- [28] Section 459J of the *Corporations Act*, which provides for “some other reason” as a ground for setting aside of a statutory demand, applies in cases where it is necessary to preserve the undistorted operation of Pt 5.4 and to promote the objectives it is intended to serve.⁵ There must be some sound or positive ground or good reason to set aside a statutory demand.⁶ It will rarely be employed but when it is employed it will be for the purpose of meeting the demands of justice.⁷

Genuine dispute of debt on the basis of a breach of fiduciary claim?

- [29] The appellant argued that there were a number of errors by the Court in setting aside the demand under s 459G and s 459H of the *Corporations Act*, including because:
- (a) first, the contention that the agreement underpinning the debt was voidable on the basis that a director nominated by M Resources cast her vote in favour of APC entering into various agreements with M Resources had both serious factual and legal problems;
 - (b) secondly, the imprecision of the scope of the relevant duty said to have been breached and how it was breached in effect accepted an argument by APC that a nominee director was necessarily in a position of conflict when considering dealings between the company and their nominator, which as a matter of law was wrong;
 - (c) thirdly, APC had no evidence that when the nominee director voted she was actuated by a motive other than a bona fide concern for the benefit of APC; and
 - (d) fourthly, the primary judge erred by making various factual findings not open on the evidence which underpinned the conclusion that a genuine dispute existed.
- [30] I am satisfied that MRT has identified errors in the primary judge’s otherwise careful reasoning which demonstrate that there is no genuine dispute and that the orders of the primary judge should be set aside.
- [31] First, the primary judge erred in finding the new TSAA “was in effect a continuation of the arrangements agreed to by Ms Saridas, arguably in breach of her duty.” The effect of the 2024 Deed was to assign the benefit of the original TSAA from AQC

⁴ *Citation Resources Ltd v IBT Holdings Pty Ltd* [2016] FCA 1265 referred to by Bowskill J (as she then was) in *SGR Pastoral Pty Ltd v Christensen* [2019] QSC 229.

⁵ *Kisimul Holdings Pty Ltd v Clear Position Pty Ltd* [2014] NSWCA 262 at [21] (*Kisimul Holdings*).

⁶ *Meehan v Glazier Holdings Pty Ltd* [2005] NSWCA 24 at [35] per Santow J referred to by Barrett J in *Kisimul Holdings* at [21].

⁷ *Kisimul Holdings* at [24] referring to *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd* [2014] WASCA 91.

Dartbrook to APC and to give effect to the TSAA attached to the 2024 Deed. By virtue of the 2024 Deed, APC was liable to pay the retainer not AQC Dartmoor. The statutory demand was issued in relation to monies owing under the new TSAA, not the original TSAA. Significantly, the circumstances in which the 2024 Deed was entered into were quite different from the original TSAA such that any alleged breach of fiduciary duty in relation to the original TSAA cannot be said to continue to apply to the new TSAA. Those circumstances were not addressed by the primary judge.

- [32] The new TSAA was given operative effect by the 2024 Deed. The parties to the new TSAA were different and it was only under the new TSAA that APC became obliged to pay the retainer to MRT. Further, the only evidence before the Court showed that the 2024 Deed was entered into at the request of APC as a result of a condition imposed by the financier, Vitol. There was no evidence addressing the circumstances of entry into the 2024 Deed and in particular there was no evidence suggesting a factual basis for any breach of fiduciary duty by Ms Saridas in relation to entry into the 2024 Deed.
- [33] By the time of entry into the 2024 Deed, Ms Saridas was the interim CEO of APC. She was not nor had she been an employee of M Resources or MRT at the time of her appointment, was not being paid by M Resources or MRT at the time of her appointment nor subsequently, nor did she hold any position with either of them. By the time of the 2024 Deed, M Resources no longer had a right to nominate a director pursuant to the revised term sheet. There was no evidence to suggest that by the time of the 2024 Deed she was in any way beholden to M Resources for her appointment as a director, nor to suggest that she had any ongoing loyalty to act in M Resources' interests. There was no evidence that her holding senior positions in APC was as the result of any involvement of M Resources or MRT.
- [34] Mr Robinson's affidavit only addressed the entry into the original TSAA. He did not address the circumstances of entry into the 2024 Deed by which the new TSAA had operative effect. He did not raise any arguable basis to infer Ms Saridas breached her fiduciary duty to APC in entering the 2024 Deed. His evidence did not address Ms Saridas' conduct in relation to entry into the 2024 Deed nor suggest its entry was not authorised by APC.
- [35] APC contends that the scope of the fiduciary duty must "...accommodate itself to the particulars of the underlying relationship which give rise to the duty...".⁸ While the majority in *SGH Ltd v Commissioner of Taxation*⁹ did not seek to resolve all of the issues surrounding the position of nominee directors, it did state that "It is enough to say that the fact that a director of a body corporate is nominated to office by another does not permit the director to act in disregard of the interests of the corporation as a whole".¹⁰
- [36] According to APC, the fact that Ms Saridas had been nominated by M Resources to the APC Board was enough to raise an arguable case that she had a potential conflict of interest on the basis that the commercial purpose of Ms Saridas' nomination was that she would look after their interests on the APC Board. Further, APC alleges that the nature of Ms Saridas' relationship with APC altered when M Resources' interests

⁸ *Howard v Federal Commissioner of Taxation* (2014) 253 CLR 83 at [34] per French CJ and Kiefel J; see also [60] and [61] per Hayne and Crennan JJ.

⁹ (2002) 210 CLR 51.

¹⁰ (2002) 210 CLR 51 at [30].

and APC's interests came into conflict when the dispute arose in relation to the 2022 term sheet. Once there was a dispute, APC contend it could not have been contemplated she would participate in a vote in which M Resources, or its subsidiary, MRT, was a counterparty to the transaction and where the agreement was part of the transaction to resolve a dispute.

- [37] According to APC, Ms Saridas arguably breached her fiduciary duty in not declaring her conflict of interest at the APC March 2023 Board meeting and in voting in favour of APC entering the agreements to which companies part of the M Resources group were counterparties, which resulted in the proposal being passed. The submission by APC that the authorisation of Ms Saridas to bring into effect the original TSAA at the March 2023 Board meeting "was, presumably, the same authorisation which enabled Ms Saridas to cause APC to agree to amend the terms of the Original TSAA and, thereby, bind itself to the second TSAA" was unsupported by any evidence of Mr Robinson and is nothing more than supposition.
- [38] The primary judge did not identify the basis upon which Ms Saridas was in a position of conflict other than the fact that she had been nominated by M Resources, save that at paragraph 122 of his reasons he found that there was a valid question concerning the impartiality of Ms Saridas in entering the "various contracts" and that was a question which warranted further investigation.
- [39] The primary judge placed some reliance on the statement of Edelman J in *Agricultural Land Management Ltd v Jackson (No 2)*¹¹ that the conflict rule "when concerned with conflicts between duty and personal interest is not limited merely to situations in which a fiduciary actually prefers personal interest. It includes also situations involving a *potential* for personal interest to be preferred or a *potential* for breach of duty to one principal where conflicting duties are owed to different principals."
- [40] The statement in *Agricultural Land Management* was found by the Full Court of the Federal Court in *Hylepin Pty Ltd v Doshay Pty Ltd*,¹² after a detailed analysis, not to call for a different approach to established authority such as *Mills v Mills*,¹³ *Re Broadcasting Station 2GB Pty Ltd*,¹⁴ *Re News Corporation Ltd*¹⁵ and *Streeter v Western Areas Exploration Pty Ltd (No 2)*.¹⁶ The Full Court in *Hylepin* recognised that "a person being a non-executive director even of competing companies will not necessarily breach the conflict rule"¹⁷ and accepted that the relevant analysis is context specific.¹⁸ As the Full Court explained, the reference to potential conflict, regardless of whether actual advantage is taken, is consistent with authorities referring to "a real or substantial possibility", "a sensible, real or substantial possibility" or "a significant possibility" of conflict.¹⁹
- [41] As the Full Court noted, it is artificial to place emphasis only upon Edelman J's reference to the sufficiency of the "potential" for personal interest to be preferred to disclose a conflict, in contrast to actually preferring personal interests, without an

¹¹ (2014) 48 WAR 1 at [266].

¹² (2021) 288 FCR 104.

¹³ (1938) 60 CLR 150.

¹⁴ [1964-5] NSWLR 1648.

¹⁵ (1987) 15 FCR 227.

¹⁶ (2011) 278 ALR 291.

¹⁷ (2021) 288 FCR 104 at [38].

¹⁸ (2021) 288 FCR 104 at [38]-[39].

¹⁹ (2021) 288 FCR 104 at [47].

analysis of the authorities to which his Honour referred and the situation in which the conflict is said to arise.²⁰

- [42] The fact Ms Saridas was nominated to be a director by M Resources does not, of itself, give rise to a conflict. In *Hylepin* the Full Court referred with approval to the statement of principles of the primary judge including that “even where directors may have been nominated by particular shareholders with interests that may compete with the interests of the company, such separate interests do not lead to an inference that the directors will vote contrary to the interests of the company”.²¹
- [43] There was no evidence to demonstrate that Ms Saridas’ alleged personal loyalty to M Resources was an actuating motive in entering the 2024 Deed or that M Resources had appointed her to represent their interests on the APC Board.²² Although it was noted in the 12 December 2022 Board meeting under “Conflict of Interest Declarations” that Ms Saridas had been appointed to the Board as a nominee for M Resources, that merely stated that fact rather than being an acknowledgment that she would have a conflict of interest.
- [44] Nor did the evidence support a somewhat contentious view of the authorities put forward by APC that it did not have to demonstrate a plausible or arguable case that it could be inferred that Ms Saridas would have acted in the interests of M Resources even if she was of the view that was not in the best interests of APC as discussed in *Re Broadcasting Station 2GB Pty Ltd*.²³ APC contends that the law did not require it to show that the alleged conflict of interest was her actuating motive as MRT contends, based on *2GB*.
- [45] There is considerable merit in MRT’s contention that in order to demonstrate a conflict of interest there would need to be some evidence to suggest the actuating motive for the nominated director’s decision was the competing interest or duty to the nominating company and not the best interests of the company as discussed by Jacobs J in *2GB*. It is unnecessary to resolve the conflicting contentions as to the application of *2GB* and the basis of a conflict of interest of a nominated director. This is because even on the broader view of conflict of interest propounded by APC, there is no evidence to suggest an arguable basis for inferring Ms Saridas was nominated by M Resources to represent their interests, let alone evidence which suggests that by the time of APC’s entry into the 2024 Deed she had an ongoing loyalty to M Resources which could give rise to any conflict of interest, given M Resources ceased to have the right to nominate a director under the revised term sheet.
- [46] Nor is there any evidential basis for suggesting that there were any competing interests and arguable breach of fiduciary duty by Ms Saridas in circumstances where entry into the 2024 Deed was at APC’s request to meet the requirements of a financier for APC to obtain a finance facility. The announcement to the market after entry into the 2024 Deed outlined the benefits of the finance facility. None of the evidence of Mr Robinson suggested that Ms Saridas was somehow responsible for the authorisation of the 2024 Deed. None of the facts set out in paragraph 119 of the

²⁰ (2021) 288 FCR 104 at [51].

²¹ (2021) 288 FCR 104 at [37].

²² *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253 per Santow J referring to *Mills v Mills* (1938) 60 CLR 150 at 164-165; approved by the Full Court of the Federal Court in *Hylepin Pty Ltd v Doshay Pty Ltd* (2021) 288 FCR 104 at [36] and see also relevantly [37]-[39].

²³ [1964-5] NSW 1648.

primary judge's reasons supported a breach of fiduciary duty in relation to the 2024 Deed.

- [47] The primary judge's conclusion in paragraph 121 that the new TSAA was not a matter of significance and that there "was in effect a continuation of the arrangements agreed to by Ms Saridas, arguably in breach of her duty", failed to have regard to the fact that the only evidence before the Court as to the circumstances surrounding the entry into the 2024 Deed did not support any arguable breach of fiduciary duty by Ms Saridas and was unsupported by any evidence from Mr Robinson, which was directed to the original TSAA. The debt the subject of the statutory demand arose out of the new TSAA, given effect by the 2024 Deed. It was only the new TSAA that obliged APC to pay the retainer. There was no arguable basis that the 2024 Deed was the result of a breach of fiduciary duty by Ms Saridas that warranted further investigation. The primary judge therefore erred in finding that there was a genuine dispute. It is unnecessary to address the allegations of an alleged breach of fiduciary duty in relation to the original TSAA arising out of the March 2023 APC Board meeting.
- [48] There are however further respects in which the primary judge erred which also lead to the conclusion that there was no genuine dispute warranting the setting aside of the statutory demand.
- [49] The second error by the primary judge is that there was no evidence to support the conclusion that MRT may have known of any alleged conflict identified in relation to the 2023 Board meeting or the 2024 Deed. Unless knowledge of the material facts giving rise to such a breach could be established neither the original TSAA, the new TSAA or the 2024 Deed could be rescinded.²⁴ Nothing before his Honour suggested any arguable basis for inferring that MRT had any knowledge of the internal processes discussed at the meeting. While the primary judge appeared to rely on two 2024 emails attached to Mr Robinson's affidavit that were missing their attachments, they did not demonstrate a close relationship between Ms Saridas and MRT, nor any basis for inferring knowledge of the material facts said to give rise to the breach of fiduciary duty by Ms Saridas. The emails demonstrated nothing more than the CEO of APC informing one of APC's shareholders of her pending resignation and asking whether they had considered a replacement director. Mr Meka's affidavit, which was unchallenged, deposed to not being aware of the March 2023 meeting minutes until after APC commenced its application. The fact that APC's Board resolved that Ms Saridas be involved in negotiating the original TSAA and Economic Interest Deed does not provide any basis for suggesting MRT had knowledge of any breach of a fiduciary duty on the part of Ms Saridas, in the absence of any evidence that she did in fact negotiate the agreements and what she did in that regard. Insofar as APC seeks to rely on MRT's knowledge that she signed the agreements in question, signing the agreements does not suggest any knowledge of any breach of fiduciary duty. There was therefore no plausible contention warranting further investigation that MRT had knowledge of the alleged breach of fiduciary duty.
- [50] The third error was the determination by the primary judge that the failure by APC to rescind the new TSAA (or original TSAA) before the date the statutory demand was issued or the expiry of the 21 day statutory period under s 459G(2) of the *Corporations Act* was no bar to there being a genuine dispute. Assuming there was

²⁴ *Southern British National Trust Ltd (in liq) v Pither* (1937) 57 CLR 89 at 112 per Dixon J (with whom Rich J agreed).

an arguable breach of fiduciary duty by Ms Saridas and an arguable basis upon which knowledge of that breach of fiduciary duty could be inferred by MRT, the new TSAA was voidable, not void. Any right to rescind on the part of APC would rely on rescission in equity, not at common law.²⁵ Putting to one side the question how it was open to rescind the 2024 Deed given there was an innocent third party, AQC Dartbrook, who was a party to the 2024 Deed, Mr Robinson in his first affidavit purported to identify the apparent basis for alleging Ms Saridas had breached her fiduciary duty, which if established would result in the affected agreement being voidable, but did not assert that APC had or intended to terminate the 2024 Deed or the new TSAA. His second affidavit attached a notice purporting to terminate the TSAA (not the 2024 Deed). That notice was outside the 21 day period prescribed by s 459G of the *Corporations Act* and had not been raised as a ground in Mr Robinson's first affidavit.

- [51] The statutory demand was issued at a time when the debt was owing and remained owing for the 21 day period in which APC could seek to set it aside. As set out above, the quantum of the debt was not in dispute nor the fact that it was payable under the TSAA as a retainer. While it was originally asserted by Mr Robinson that no services had been provided by MRT under either TSAA, the evidence of Mr Meka and Mr Bull that services were provided by MRT was not challenged. The quantification of the debt did not however depend on proof of the value of services delivered.
- [52] There could therefore be no genuine dispute as to the validity of the debt owed to MRT while the new TSAA remained on foot, even if it was owed under a voidable agreement. Until set aside, the new TSAA remained of full effect. There was no evidence of any purported rescission within the 21 day period or any foreshadowed termination within the 21 day period. Termination of the TSAA is a material fact to demonstrate a genuine dispute as to the debt. Asserting that the TSAA is voidable, without foreshadowing that APC were intending or even considering terminating the new TSAA on that basis, is not sufficient to raise a matter from which it may be inferred there is a genuine dispute, particularly where the new TSAA was given force and effect by the 2024 Deed. *Sceam* does not suggest otherwise. Although there has been some relaxation of the strict view of Sundberg J in *Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund*²⁶ that the affidavit must as a minimum contain a statement of the material facts on which the applicant intends to rely to show a genuine dispute, the affidavit must at least convey some fair notice to the respondent of the case that is to be made, even if explicit reference to the ground or necessary implication may not be necessary.²⁷
- [53] Allegations about breach of fiduciary duty in relation to the original or new TSAA raising a dispute that the relevant agreements are voidable are not sufficient to establish that there was a genuine dispute as to the debt under the 2024 Deed or the new TSAA would be terminated. Until the 2024 Deed or new TSAA was set aside, they remained of full effect.²⁸ As was stated in *Sceam*: "It is clear from the authorities that an affidavit filed within time that does not identify the dispute later sought to be relied upon is not a 'supporting affidavit' in so far as the different genuine dispute is concerned, and that the party concerned is not permitted to rely on that different genuine dispute if it was not identified in the supporting affidavit filed within the

²⁵ See *Alati v Kruger* (1955) 94 CLR 216 at 223-224.

²⁶ (1996) 70 FCR 452.

²⁷ *Re Australia Zhongfu Oil Gas Resources Pty Ltd* [2012] NSWSC 1208 at [31].

²⁸ *Northern Land Council v Commonwealth* (1986) 161 CLR 1 at 8.

statutory time period.”²⁹ The primary judge erred in finding that APC could raise the rescission of the original and/or new TSAA given that the purported rescission did not occur until after the 21 day period under s 459G(2) of the *Corporations Act*. Given there was no evidence of a purported rescission within the 21 day period there was no genuine dispute as to the validity of the debt owing that was the subject of the statutory demand.

- [54] The conclusions in paragraphs 120 to 123 were in error. For the reasons stated above, there was no genuine dispute established by APC justifying the setting aside of the demand.
- [55] Grounds 2(b) and 3(a)(ii), 3(b)(ii) and 3(c)(ii) of the grounds of appeal are established. It is not necessary to consider ground 4 of the grounds of appeal, save that ground 4(a)(iii), 4(e), 4(g) and 4(h) are established for the reasons set out above.

Were there “other reasons” to set aside the statutory demand

- [56] The appellant contends that there was not “some other reason” under s 459J of the *Corporations Act* for setting aside the demand given that:
- (a) the notice invoking the dispute mechanism under the agreement was not raised in the affidavit filed in support of the application and should not have been considered; and
 - (b) the mere existence of a dispute-resolution mechanism did not constitute a basis for setting aside the demand given it was a matter of substance and not a matter of consideration.
- [57] The primary judge found that MRT’s failure to follow the alternate dispute resolution process in clause 15 of the TSAA was a further reason the statutory demand should be set aside and the parties held to their bargain. In so doing, he found it was sufficient for the affidavit of Mr Robinson to have attached the TSAA containing clause 15 to raise the matter as a ground on which a dispute was raised within time, albeit the dispute notice was not served until after the 21 day period. His Honour was in error in finding that the ground based on non-compliance with clause 15 of the new TSAA could be raised as it was not a ground raised by the application and affidavit filed within the 21 day statutory period and in any event mere non-compliance with clause 15, absent a genuine dispute could not itself give rise to a genuine dispute.
- [58] The decision of *Sceam* does not support this ground having been raised by the attachment of the TSAA to Mr Robinson’s first affidavit. The issue is not a matter in respect of the construction of clause 15 but rather whether there was a dispute and whether the alternate dispute resolution process under the TSAA was enlivened. APC’s notice of dispute post-dated Mr Robinson’s first affidavit.
- [59] Further, given that I have found there is no genuine dispute, there is no “other reason” to set aside the statutory demand under s 459J(1)(b) of the *Corporations Act*. The dispute resolution process was not required to be followed because there was no dispute to be resolved. The retainer was payable on a quarterly basis under clause 4(a)(ii) of the TSAA. No proof of any services had to be provided in order for the retainer to be payable. The quantum of the retainer the subject of the demand was not disputed.

²⁹ [2021] VSCA 270 at [43].

- [60] Without a genuine dispute there is nothing to resolve which would enliven the clause. The authorities which have been followed by this Court support the view that the dispute resolution mechanism could only provide some other reason if a genuine dispute existed.³⁰
- [61] Ground 5 of the grounds of appeal is therefore established.

Conclusion

- [62] In the circumstances no genuine dispute was established by the application and first affidavit of Mr Robinson nor is there any other reason for setting aside the statutory demand. The appeal should be allowed and the orders of the primary judge should be set aside. Costs of the proceeding before the primary judge and the appeal should follow the event.

Orders

- [63] The orders of the Court should be:
1. Appeal allowed.
 2. The orders of Smith J made on 28 October 2025 be set aside.
 3. The respondent's originating application dated 31 July 2025 is dismissed.
 4. The respondent pay the appellant's costs of the proceeding.
 5. The respondent pay the appellant's costs of the appeal.
- [64] **BRADLEY JA:** I agree with the reasons of Brown JA and with the orders proposed by her Honour.

³⁰ See *Arris Investments Pty Ltd v Fahd* [2010] NSWSC 309, approved in *QNI Resources Pty Ltd v North Queensland Pipeline No 1 Pty Ltd* [2017] QCA 297 at [45]-[46].