SUPREME COURT OF QUEENSLAND

CITATION:	*Viva 4 Enterprises Pty Ltd v Octobay Pty Ltd* [2011] QSC 281
PARTIES:	**VIVA 4 ENTERPRISES PTY LTD ACN 115 421 380** (applicant) **v** **OCTOBAY PTY LTD ACN 010 838 516** (respondent)
FILE NO:	6936 of 2011
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	9 September 2011
JUDGE:	Applegarth J
ORDERS:	**1. The application is dismissed.** **2. The applicant pay the respondent's costs of and incidental to the application to be assessed on the standard basis.**
CATCHWORDS:	CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – GENUINE DISPUTE AS TO INDEBTEDNESS – ASSESSING GENUINENESS – GENERALLY – where respondent advanced mezzanine finance to applicant property developer – where respondent issued statutory demand – where applicant claimed that the relationship of debtor-creditor had been superseded by a joint venture relationship pursuant to oral agreement – whether assertion of joint venture implausible – whether genuine dispute as to indebtedness CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – GENUINE DISPUTE AS TO INDEBTEDNESS – OFFSETTING AND OTHER LIKE CLAIMS – GENERALLY – where respondent as trustee of different unit trusts advanced mezzanine finance to property developer on two occasions, the first as trustee of EM trust, the second as trustee of MM

trust – where respondent as trustee of EM trust became third mortgagee – where respondent as trustee of MM trust became fourth mortgagee – where respondent exercised power of sale as third mortgagee in its capacity as trustee of EM trust – where funds raised by sale insufficient to clear applicant's indebtedness to respondent – where respondent issued statutory demand in its capacity as trustee of MM trust – where applicant advances claim in respect of alleged sale at under-value by the respondent – whether claim against the respondent in its capacity as trustee of one trust is an off-setting claim in respect of statutory demand issued by respondent in its capacity as trustee of another trust – whether mutuality required between debt that is subject of statutory demand and off-setting claim – whether off-setting claim exists

Corporations Act 2001 (Cth), s 459G, s 459H, s 459J
Property Law Act 1974 (Qld), s 85

Australian Aloe Ltd v Export Growth Finance Pty Ltd [2003] NSWSC 252 discussed
Boutique Venues Pty Ltd v JACG Pty Ltd [2007] NTSC 5 discussed
C & E Pty Ltd v Corrigan [2006] 2 Qd R 399; [2006] QCA 47 cited
Chadwick Industries (South Coast) Pty Ltd v Condensing Vaporisers Pty Ltd (1994) 13 ACSR 37 cited
Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd (2008) 237 CLR 473; [2008] HCA 41 cited
Eyota Pty Ltd v Hanave Pty Ltd (1994) 12 ACSR 785 cited
Re Morris Catering (Australia) Pty Ltd (1993) 11 ACSR 601 cited
Neutral Bay Pty Ltd v Deputy Commissioner of Taxation (2007) 25 ACLC 1,341; [2007] QCA 312 cited
PCH Group Ltd v Hallbridge Pty Ltd (2002) 20 ACLC 1,298; [2002] WASC 88 discussed
Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd (1997) 76 FCR 452; [1997] FCA 681 cited
TR Administration Pty Ltd v Frank Marchetti & Sons Pty Ltd (2008) 66 ACSR 67; [2008] VSCA 70 cited
WEC Pty Ltd v Cypriot Community of Queensland Inc [2002] QCA 506 cited

COUNSEL: P D Tucker for the applicant
C Wilson for the respondent

SOLICITORS: Clarke Kann for the applicant
Mullins Lawyers for the respondent

[1] Octobay Pty Ltd as trustee of the Meadowbrook Mezz Trust advanced mezzanine finance to the applicant, a property developer. It became a fourth mortgagee, and

claims to be owed more than $1 million by the applicant. It issued a statutory demand dated 15 August 2001, which the applicant seeks to set aside on three grounds:

(a) The applicant entered into an oral agreement with the respondent for a joint venture, the effect of which is that no money is due and owing to the respondent;

(b) The applicant has an off-setting claim on account of the sale by Octobay Pty Ltd as trustee of the Ellerslie Mezz Trust of secured property at an undervalue;

(c) The funding agreement is unenforceable as a penalty.

Additionally, the alleged sale at an undervalue to a related party is said to give rise to a proper basis to set aside the statutory demand under subsection 459J(1)(b) of the *Corporations Act* 2001 (Cth).

[2] The respondent to the application is Octobay Pty Ltd, whereas the statutory demand was issued by Octobay Pty Ltd in its capacity as trustee of the Meadowbrook Mezz Trust. Octobay Pty Ltd as trustee of the Ellerslie Mezz Trust became the third registered mortgagee over the subject property (first and second mortgages having been granted to Westpac Banking Corporation). It was Octobay Pty Ltd in its capacity as trustee of the Ellerslie Mezz Trust that exercised its power of sale and sold lots that were the subject of its registered mortgage. After clearance of the debt owed to Westpac, there were insufficient surplus funds to clear the debt of the third mortgagee, Octobay Pty Ltd as trustee of the Ellerslie Mezz Trust. Octobay Pty Ltd in its capacity as trustee of the Meadowbrook Mezz Trust received no monies from the mortgagee sale. As a result, it served a statutory demand claiming $1,080,574.94, consisting of the amount owed as at 31 August 2009 pursuant to a loan facility agreement ($620,611) together with interest on that amount as at 15 July 2011 ($459,963.94). In response to the application to set aside the statutory demand, Octobay Pty Ltd (or, more precisely, Octobay Pty Ltd in its capacity as trustee of the Meadowbrook Mezz Trust, that being the capacity in which the statutory demand was issued) submits that:

(a) There is no genuine dispute as to the debt that is the subject of the statutory demand. In essence it submits that the assertion of a verbal agreement that replaced the relationship of borrower and lender by a joint venture arrangement is implausible.

(b) The alleged off-setting claim arising from a breach of duty in respect of the exercise of the mortgagee's power of sale cannot stand because the mortgagee sale was conducted by the third mortgagee, Octobay Pty Ltd as trustee of the Ellerslie Mezz Trust, and an off-setting claim against a creditor, in a different trustee capacity, does not have the required element of mutuality.

(c) The applicant's attempt to rely on the interest rate as a penalty is misconceived.

It also submits that the applicant has not established a proper basis to set aside the statutory demand under s 459J(1)(b).

Background

[3] The applicant has been involved in a number of property developments. One of them relates to the acquisition and development of two lots of land situated at Ellerslie Road, Meadowbrook. These lots were to be subdivided and have warehouses constructed on them. The subdivision and development of one lot ("Lot 23") was to be the first stage of the development, and involved the construction of 37 warehouses. A similar subdivision and development was to occur upon an adjoining lot ("Lot 22") as Stage 2 of the development. Feasibility costings for the development of both lots indicated that there would be no profit until 65 per cent of Stage 2 had been sold. The main funding for the Ellerslie Road project was from the Westpac Banking Corporation ("Westpac"). It provided finance of approximately $10 million for the acquisition, subdivision, building and marketing of the subdivided and developed lots.

[4] Octobay Pty Ltd is owned by Accumulus Capital Pty Ltd ("Accumulus"), which is an investment services business that operates under an Australian Financial Services Licence. Accumulus was created in about February 2006 by Mr Peter Marles, who is an accountant and financial planner. He is the sole director of Octobay and Accumulus. Accumulus has a range of clients who wish to make investments. Accumulus has been involved in mezzanine funding in the development industry. It has completed about 37 mezzanine funding projects since July 2007. In most of the "mezzanine finance deals" that Accumulus has arranged, Octobay has acted as the trustee of a unit trust. The investors in each matter tend to be different, and a unit trust is created, with each individual investor issued units that correspond in proportion to the amount invested by that investor. Since the time Accumulus became the sole shareholder of Octobay, Octobay has only ever acted as a trustee of a unit trust.

[5] Mr Matthew Thomas, who is presently the sole director of the applicant, was introduced to Mr Marles by a finance broker. The applicant was seeking mezzanine funding for the Ellerslie Road development. The applicant initially sought $2,850,000. This facility was approved in late 2007. A loan facility agreement was entered into between the applicant and Octobay Pty Ltd as trustee of the Ellerslie Mezz Trust, with the loan secured by, amongst other things, a mortgage granted to Octobay Pty Ltd as trustee of the Ellerslie Mezz Trust over Lots 22 and 23.

[6] In about April 2008 another approach was made to Mr Marles to provide further finance to the applicant. Further funds were sought to assist with financing a pre-sale marketing campaign and the payment of marketing commissions. This approach was approved. A Facility Agreement dated 19 May 2008 was entered into between the applicant and Octobay Pty Ltd as trustee of the Meadowbrook Mezz Trust. The monies advanced were secured by, among other things, a mortgage in favour of Octobay Pty Ltd as trustee of the Meadowbrook Mezz Trust.

The alleged oral agreement for a joint venture arrangement

[7] By early 2009 a number of problems had arisen in relation to the Ellerslie Road development. Mr Thomas says that in response to progress claims by a builder, a quantity surveyor had certified the construction as 90 per cent complete, when in fact only about 65 per cent was complete. This posed difficulties in relation to the budget for completion of Stage 1, and to the applicant's relationship with Westpac

and Octobay Pty Ltd. Discussions occurred between the applicant and Westpac about an extension of Westpac's funding. Mr Thomas also had discussions with Mr Marles, and they communicated by email as well. Mr Marles says that as soon as he became aware that the development was faltering he, as the representative of the third and fourth mortgagees, took an active interest in doing all that he could in an effort to protect the value of the security held by them. He says that he assisted and worked with Mr Thomas where he could to ensure a maximum return to the investors since it was in everyone's interests for the development to be completed and sold without delay. Apart from communicating with Mr Thomas in his capacity as a representative of the third and fourth registered mortgagees, he also communicated with Mr Thomas as a prospective purchaser of Lot 22. In due course he negotiated for an entity with which he is associated, Associated Equity Pty Ltd as trustee of the Motorway Unit Trust, to purchase Lot 22. Mr Marles says that he arranged for this entity to purchase Lot 22 so that the applicant's debt to Westpac could be reduced.

[8] In early 2009, discussion between Mr Marles and Mr Thomas was also concerned with the role of other individuals who were involved in the applicant and its projects, and the basis upon which they would relinquish their interest in the applicant.

[9] In his first affidavit filed 23 August 2011 Mr Thomas says that in about April 2009, and after a threat by Westpac to appoint receivers to the Ellerslie Road property, Mr Marles approached him on behalf of the applicant with an offer to enter into a joint venture agreement with respect to the development of Ellerslie Road. He says that Mr Marles proposed that:

(a) the other two directors of the applicant would be paid out so that Mr Thomas would be the sole director of the applicant;

(b) the applicant would sell Lot 22 (being the site of the proposed development of Stage 2) to Associated Equity for $2 million (that lot having previously been valued by Landmark White at $2,500,000); and

(c) the parties would enter into a "fully documented" joint venture to continue with the development of Stage 1 and Stage 2.

Mr Thomas says that, while a verbal agreement for the joint venture was reached between himself on behalf of the applicant and Mr Marles on behalf of Associated Equity and Octobay Pty Ltd, aside from a variation agreement dated 20 April 2009 which recognised the change in the applicant's directorship, no documentation to record these arrangements was forthcoming.

[10] In his affidavit sworn on 8 September and filed by leave on 9 September 2011, Mr Thomas says that Mr Marles spoke to him at a number of meetings from about February 2009 onwards and that Mr Marles had said that the Ellerslie Road development would move forward on the following basis:

"(a) Lot 22 would be sold to an entity associated with Marles for $2.0M;

(b) Stage 1 would be completed as quickly as possible, with financial assistance from Marles/Accumulus Capital as necessary, and sold down as quickly as possible so as to repay the balance of the Westpac debt;

(c) Stage 2 would be undertaken as a joint venture between Viva 4 Enterprises and Octobay/Accumulus Capital, with existing loan agreements between Viva 4 Enterprises and Octobay to be subsumed within formal joint venture documentation that Marles would prepare;

(d) any residual development costs in the Ellerslie Road development (including any monies loaned by Octobay in relation to those costs) would be paid from sales of lots in stage 2, but loan monies from Octobay would not be required to be repaid until those sale funds had been received; and

(e) once residual development costs had been paid, any profit on the sale of the balance of lots within stage 2 would be shared on a 50/50 basis by Viva 4 Enterprises and Octobay/Accumulus."

[11] Mr Thomas says that Mr Marles repeatedly assured him that the joint venture agreement would be documented, but this never occurred. He says that, in November 2009, Mr Marles demanded that the contract for Lot 22 be provided. Mr Thomas says further that, because Westpac were threatening to appoint receivers if a default in the Westpac facility was not remedied, he agreed to finalise the sale of Lot 22 to Associated Equity without having received any documentation relating to the joint venture. The sale to Associated Equity was completed on 1 December 2009.

[12] Mr Thomas says that notwithstanding that no formal documentation was entered into, he proceeded with the development of Ellerslie Road on the basis that the joint venture was on foot, and he thought that Mr Marles had the same intent.

[13] Mr Thomas says that the agreement between himself and Mr Marles was that the facility would only be repaid upon the completion and sale of Stage 2 at Ellerslie Road, and that the applicant's obligation to pay Octobay Pty Ltd "was therefore never triggered because stage 2 was never developed and sold." He says that there is no money due and owing to Octobay pursuant to the Facility Agreement (as amended) or at all.

[14] For reasons developed in affidavits sworn by him in these proceedings, Mr Marles emphatically denies the suggestion that finance provided by Octobay as trustee of the Ellerslie Mezz Trust and as trustee of the Meadowbrook Mezz Trust for the development would be subsumed within a formal joint venture. He says that he simply did not have the authority from the many investors in these separate units trusts to enter into such a joint venture arrangement and that it would have been a breach of the trustees' duties to do so. Octobay Pty Ltd had no authority as a trustee of the relevant unit trusts to enter "any speculative joint venture arrangement." He says that neither he nor any company with which he has been associated, has been a joint venture partner of Mr Thomas. He says that his communications with Mr Thomas were in his capacity as:

(a) a secured financier;

(b) a prospective purchaser of Lot 22, including investigations as to the feasibility of developing the site; or

(c) the owner of Lot 22 after it was purchased outright by Associated Equity, it being the property adjoining the existing development.

[15] Mr Marles says that at about the time of the purchase of Lot 22 he had a discussion of little consequence with Mr Thomas about a proposal that one of Mr Thomas' entities would be the builder of the development, and that Mr Marles advised him that if he wanted to he could tender for the building works. Mr Marles says that he did not entertain, and would not have entertained, any joint venture with Mr Thomas, as the applicant owed a significant sum of money on the adjacent development to Octobay Pty Ltd as trustee of the Ellerslie Mezz Trust and to Octobay Pty Ltd as trustee of the Meadowbrook Mezz Trust.

The test for deciding whether there is a genuine dispute as to the debt

[16] The expression "a genuine dispute" in the context of s 459H connotes a dispute that exists in fact, not a spurious one. Something more than "implausible assertion"[1] is required to demonstrate the genuineness of an applicant's claim. The Court is not expected "to attempt to weigh or resolve the merits of any such genuine dispute."[2] But it must be satisfied that there is a genuine dispute between the parties about the existence of the debt to which the notice relates, or its amount. The Court is not required to accept uncritically, as giving rise to a genuine dispute, every statement in an affidavit "however equivocal, lacking in precision, inconsistent with the undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be."[3]

[17] In *WEC Pty Ltd v Cypriot Community of Queensland Inc*, McMurdo P (with whom the other members of the Court agreed) stated:

> "...a mere assertion of an oral agreement deposed to in an affidavit will not necessarily suffice to set aside a statutory demand. Something beyond implausible assertion is required from an applicant to demonstrate the genuineness of its claim. A genuine dispute is one that really exists in fact and is not spurious, hypothetical, illusory or misconceived."[4]

[18] The legislation requires the Court to be satisfied as to whether or not there is a "genuine dispute" about the existence or amount of the debt to which the demand relates. The Court is not expected finally to determine the rights and obligations of the parties or to express a view on the ultimate question or to form an opinion on the likely outcome of the proceedings. It is not required to embark upon any extended

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1 *WEC Pty Ltd v Cypriot Community of Queensland Inc* [2002] QCA 506 at [11].

2 Ibid at [10].

3 *Eyota Pty Ltd v Hanave Pty Ltd* (1994) 12 ACSR 785 at 787 citing *Eng Mee Young v Letchumanan* [1980] AC 331 at 341.

4 [2002] QCA 506 at [11] (footnotes removed).

inquiry.[5] In *Re Morris Catering (Australia) Pty Ltd*,[6] Thomas J (as his Honour then was) stated that the Court is required to assess the position between the parties, and to preserve demands where it can be seen that there is no genuine dispute and no sufficient genuine off-setting claim. His Honour continued:

> "That is not to say that the court will examine the merits or settle the dispute. The specified limits of the court's examination are the ascertainment of whether there is a 'genuine dispute' and whether there is a 'genuine claim'.
>
> It is often possible to discern the spurious, and to identify mere bluster or assertion. But beyond a perception of genuineness (or the lack of it) the court has no function. It is not helpful to perceive that one party is more likely than the other to succeed, or that the eventual state of the account between the parties is more likely to be one result than another."

[19] As Keane JA stated in *C & E Pty Ltd v Corrigan*:[7]

> "While the bar set by s. 459G of the *Corporations Act* is not set very high, it is necessary to be able to show that there is a 'genuine' claim as opposed to a claim which is 'spurious' or 'misconceived'."

[20] In *Chadwick Industries (South Coast) Pty Ltd v Condensing Vaporisers Pty Ltd*,[8] Lockhart J observed:

> "Certainly the court will not examine the merits of the dispute other than to see if there is in fact a genuine dispute. The notion of a 'genuine dispute' in this context suggests to me that the court must be satisfied that there is a dispute that is not plainly vexatious or frivolous. It must be satisfied that there is a claim that may have some substance. On the other hand the court must be careful, because if all an applicant has to do is to assert both a claim and some basis for it, without more, it would mean in almost every case that the court would set aside statutory demands where application is made to that effect."

Is there a genuine dispute as to the debt?

[21] Octobay Pty Ltd points to a number of features that are said to support the conclusion that there is no genuine dispute as to the debt that is the subject of the statutory demand. These include:

(a) The lack of reference to the alleged joint venture agreement in correspondence between the parties over a period of more than two years after the agreement was allegedly concluded;

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5 *Spencer Constructions Pty Ltd v G & M Aldridge Pty Ltd* (1997) 76 FCR 452 at 462-466, [1997] FCA 681 per the Court; *TR Administration Pty Ltd v Marchetti* (2008) 66 ACSR 67 at 77, [2008] VSCA 70 at [57].

6 (1993) 11 ACSR 601 at 605.

7 [2006] 2 Qd R 399 at 404, [2006] QCA 47 at [19] (footnotes removed).

8 (1994) 13 ACSR 37 at 39.

(b) Correspondence and dealings that are consistent with a continuing relationship of debtor and creditor;

(c) The absence of reference to the alleged joint venture relationship when it would be expected—for example, when Octobay Pty Ltd exercised its power of sale or after Westpac appointed receivers and managers over certain property of the applicant;

(d) Conduct which is inconsistent with a joint venture, such as a request by the applicant in December 2010 for a statement of the "actual debt to date"; and

(e) The signing by Mr Thomas in September 2010 of a document that confirmed the Ellerslie Road project had a balance owing of $2,372,667.09 as at 30 June 2010.

[22] The applicant exhibited to Mr Thomas' affidavits emails passing between Mr Thomas and Mr Marles with respect to the sale to Associated Equity, and many other documents. It is remarkable that during the course of these communications over a lengthy period, Mr Thomas did not record his understanding that a joint venture had been agreed, its essential terms or even a confirmation of the assurances with which he says he was "constantly" provided, to the effect that a joint venture agreement would be documented. The only apparent reference to a possible joint venture in the communications between the parties is in an email dated 15 November 2009 from Mr Thomas to Mr Marles. This email arose after Mr Marles told Mr Thomas that he needed the contract for the sale to Associated Equity Pty Ltd as soon as possible, otherwise he would not meet a deadline. Mr Thomas wrote:

> "Peter
>
> A copy is in the office now – however as stated by both Glenn and myself I would like finalisation of the following prior to proceeding:
>
> 1. Raschta's ownership and or entitlement moving forward;
> 2. Final debt numbers for Ellerslie Rd from Accumulus;
> 3. Raschta's ability to control construction; and
> 4. Finalised Smith St settlement numbers.
>
> As you can appreciate we would be left without any recourse needless to state that we have a finance offer which you have seen that provides us with the requisite funding and the ability to construct. I understand that a formal JV may take some time to create however a heads of agreement from your end would suffice at this point in time.
>
> I would like to have addressed these issues personally last week, but have been tied up onsite at MB.

> Also, as we are required to refinance Smith St and move the Mathieson's at 585 Ingham Rd, we need to ensure that our position has some overall benefit.
>
> Will be available on mobile from 6am tomorrow morning."

Mr Marles responded to this email in an email sent at 3.20 pm on 16 November 2009. In his response to Mr Thomas, Mr Marles clarified matters in relation to the other projects at Smith Street and 585 Ingham Road. In respect of Ellerslie Road, he simply stated: "I will follow up separately regarding Ellerslie Road." There is no evidence that this occurred. There certainly is no documentary evidence of any follow-up in relation to a heads of agreement, let alone a joint venture agreement. Mr Thomas' email of 15 November 2009, upon which counsel for the applicant placed particular reliance at the hearing, does not evidence that a joint venture arrangement had been made earlier in 2009 or at any other time, or even that such an agreement was promised. At its highest, the email floats the idea of a joint venture. There is no satisfactory evidence to support Mr Thomas' assertion that such a joint venture arrangement had earlier been entered into, or even that such an arrangement was subsequently struck.

[23] Mr Thomas' second affidavit exhibits additional documents commencing in March 2009. But none of them appear to contain a single reference to a joint venture. The words "joint venture" simply do not appear in any of these documents. Mr Marles, in an affidavit filed by leave on 9 September 2011, explains the contents of these documents. For example, email correspondence between Mr Thomas and Mr Marles on 24 March 2009 in relation to "Feasibility for Ellerslie Road Stage 2" is said by Mr Marles to have been provided to him as part of his due diligence in relation to a proposal to purchase and develop Lot 22. Other documents are of a kind that would be expected to be sent to Mr Marles in his capacity as a representative of a secured financier. They are not suggestive of a joint venture, and contain no reference to a joint venture. In September 2009, Mr Marles indicated in an email to Westpac that a $50,000 "shortfall" was to be contributed from the Meadowbrook Mezz Trust. As the email indicates, and as Mr Marles explains, the Meadowbrook Mezz Trust was prepared to advance a further $50,000 so that Westpac would provide bank guarantees to get the development to completion and settlement of the pre-sales, so as to reduce the debt.

[24] The applicant submits that the sale of Lot 22 for less than it had been valued to be worth (the lot is said to have been valued at $2,500,000 by Landmark White, but the valuation does not appear to be in evidence and the date of the valuation is not apparent) is "only explicable if there had been a substantial inducement by Marles." I do not accept this submission, and the applicant's preparedness to sell Lot 22 for less than an earlier valuation is not indicative of the alleged joint venture agreement. As Mr Thomas explains in his second affidavit (filed by leave on 9 September 2011), at the stage that Lot 22 was sold to Associated Equity, Westpac was pressing for some monies to pay down its debt. The sale of Lot 22 resulted in the release of security held by Westpac. Shortly prior to settlement of the sale of Lot 22, Mr Marles sought commission of $100,000 plus GST to be paid to an entity, Blue Commercial, with which he had an association. Mr Thomas was content with this arrangement at the time. The fact that the parties were content with this arrangement, including Westpac being prepared to receive the funds that were produced from the sale, is not probative of the alleged joint venture agreement. It

does not support the assertion that the parties had earlier entered into a joint venture agreement. It proves that as part of the sale of Lot 22, and in somewhat desperate circumstances, the applicant was prepared to pay a substantial commission.

[25] The documents in evidence do not show any demand for payment in late 2009 by Octobay after the mezzanine funding agreements expired. Rather than demand repayment, Mr Marles was:

(a) involved in direct dealings with the applicant and its solicitors in relation to the leasing and sales of units; and

(b) prepared, as previously noted, to provide an additional $50,000 for expenses relating to the Ellerslie Road development.

As to the former, it is unremarkable that a secured lender in Octobay's position became involved in communications about leasing and sales, the result of which would be to enhance its prospects of having its debt paid. Mr Marles explains that sales updates by the applicant's solicitors were provided to him in his capacity as the representative of the secured financiers. As previously noted, Octobay as trustee for the Meadowbrook Mezz Trust was prepared to provide an additional $50,000 so that, in turn, Westpac would provide bank guarantees to facilitate the completion and settlement of sales, and thereby reduce debt.

[26] The applicant placed particular reliance upon one email chain that occurred in May 2010. A subsequent email dated 17 May 2010 from Mr Marles to Mr Thomas notes that one of Accumulus' capacities was property management and that it had been appointed to manage certain units. An earlier email chain which commenced on 13 May 2010 in relation to Ellerslie Road included an email from a commercial leasing agent (Mr Levi Maxwell of Colliers International) to a party named Steve Parr. The email advised that the deadline to vacate the premises or execute leases for two units was the following Friday, and that the "joint venture would like to know your position." There were further email exchanges between Mr Parr and Mr Maxwell. These emails were forwarded to Mr Thomas on 13 May 2010, and Mr Marles was copied into that forwarding email. By email that day, Mr Marles commented that "this bloke has had five months free rent and he wants an extension!" The fact that Mr Marles was copied into email correspondence about the leasing of units is unremarkable, given the active role that he played in seeking to protect the value of the security held by the third and fourth registered mortgagees. He explains that, where he could, he assisted and worked with Mr Thomas to ensure a maximum return to the investors. Incidentally, he had an additional interest in the success of the development by reason of his association with the owner of an adjoining lot, the value of which might be enhanced by a similar development on Lot 23. As to the particular email, the fact that a non-party made a passing reference to a joint venture (between unnamed parties) in May 2010 in an email chain that was subsequently forwarded to Mr Thomas and copied to Mr Marles provides very little, if any, support to the existence of the joint venture alleged by the applicant. There is no evidence concerning the source of Mr Maxwell's understanding about a joint venture or the parties to it.

[27] The fact that Octobay as trustee for the unit trusts that held third and fourth mortgages did not make a demand for repayment on behalf of those trusts in late 2009 does not suggest that at some earlier and uncertain stage it had ceased to be a

lender and had become a joint venturer. There would have been no apparent purpose in making a demand for payment, since Octobay's prospects of being paid seemingly depended upon the successful completion of the development and the leasing and sale of units in it.

[28] In September 2010, Mr Marles wrote to Mr Thomas and attached a letter seeking confirmation of the amount owing as at 30 June 2010. The email noted that the attached letter was not a demand for payment but was sought for the purpose of an audit. Mr Thomas acknowledged that there was a balance owing of $2,372,667.09 as at 30 June 2010. Mr Marles explains that he expressly stated that the letter was not a demand for payment as so to demand would, in his belief, have made the applicant insolvent. He notes that Mr Thomas willingly provided the signed confirmation.

[29] This is a significant document. In it Mr Thomas confirmed that there was an amount owing as at 30 June 2010. Such a confirmation is inconsistent with the debt being subsumed into a joint venture arrangement. It confirms the existence of the debt.

[30] Mr Thomas does not explain why he confirmed the amount of the balance as at 30 June 2010, rather than respond to the effect that no such debt existed. On his account, in September 2010 he could have responded that no sum was owing, or had been owed as at 30 June 2010, because, the loan agreements had been superseded by a joint venture arrangement. Yet Mr Thomas confirmed that monies were owing.

[31] Other material which supports the continuation of a debtor/creditor relationship, and which is inconsistent with the asserted joint venture arrangement, is a series of email exchanges between the parties in December 2010. It commences with an email sent from Mr Thomas' email address to Mr Marles, and it asks for one of Mr Marles' staff to forward to Mr Thomas "the latest statements for Ellerslie rd, 585 and smith street". The email explains that Mr Thomas is trying to do reconciliations "with regards to our facility accounts currently." It says that a statement as at 30 November 2010 would be "very handy". There is a follow-up email on 13 December 2010 again seeking the requested information. Mr Marles responded that day and sought clarification. His email states:

> "In regard to Ellerslie Road do you want the actual debt to date?
> It will obviously greatly exceed the equity left."

At 10.31 am on 13 December 2010, an email in response says "Yes". Following this email is a document headed "Ellerslie Road interest calculation", which Mr Marles says was provided to Mr Thomas in response to his request.

[32] On its face, this email exchange is clear evidence of the continuation of a debtor/creditor relationship and a recognition on the part of the applicant that there was a substantial debt in respect of the Ellerslie Road facility accounts. Mr Thomas, in his second affidavit, says that the email correspondence apparently from him was sent by his bookkeeper who, he understands, was seeking to reconcile amounts loaned across a number of developments. I note in passing that the emails did not purport to come from a bookkeeper and that they were initiated with an email that ended "Kind regards, Matt". In any event, if the emails were sent by

Mr Thomas' bookkeeper, rather than by him personally, they nonetheless support the conclusion that the applicant's own records in December 2010 recorded amounts owing on the relevant facility accounts. Mr Thomas does not explain what use was made of the statements of account that were sent by Mr Marles in response to the requests to send details of the "actual debt". Nor does his bookkeeper. Mr Thomas does not explain whether he saw the statement of debt and, if he did, why he did not query it.

[33] Another remarkable feature is the absence of any reference to a joint venture arrangement when Octobay Pty Ltd as trustee of the Ellerslie Mezz Trust made demands and proceeded to exercise its power of sale. Octobay Pty Ltd as trustee of the Ellerslie Mezz Trust purported to exercise its power of sale over numerous lots on 29 March 2011 in reliance on a default under the third mortgage. Mr Thomas does not explain why he did not raise the joint venture arrangement in response when Octobay demanded repayment of its debt and proceeded to exercise the power of sale. It is implausible that he would not have done so if the relevant debt had been subsumed by the joint venture agreement.

[34] On 18 March 2011 Westpac appointed receivers and managers over certain property of the applicant. At the time of their appointment the relevant lots were subject to first and second registered mortgages in favour of Westpac, a third registered mortgage in favour of Octobay Pty Ltd as trustee of the Ellerslie Mezz Trust and a fourth registered mortgage in favour of Octobay Pty Ltd as trustee of the Meadowbrook Mezz Trust. One of the receivers and managers subsequently met with Mr Marles as representative of the third and fourth mortgagee, who made no mention of any joint venture arrangement with the applicant. According to the joint receiver and manager, Mr Marles only ever represented that he was acting on behalf of the mortgagees and was doing all that he could to protect their interests as mortgagees in obtaining a return. More importantly, the receiver and manager had email communications with Mr Thomas and sought a report as to the company's affairs. At no time did Mr Thomas advise the receiver and manager that the applicant was in a joint venture with Mr Marles or the third or fourth mortgagees. The receiver and manager did not find any evidence during the receivership of such a joint venture.

[35] Mr Thomas points to an email that was written to Mr Marles about headworks charges. Mr Marles explains that this email was inquiring about the work the owner of Lot 22 was completing. The sender of the email wanted that work completed so that the applicant, as the previous owner, could have its bank guarantees returned from the Council.

[36] Despite the volume of documents exhibited to the two affidavits of Mr Thomas that have been filed in support of this application, there is a remarkable absence of reference in them to the alleged joint venture arrangement. The documents span a period of approximately of two years. If a joint venture arrangement had been reached and not documented, despite constant assurances that it would be, one would have expected Mr Thomas to refer to the joint venture and complain about the lack of documentation, despite assurances. Instead, apart from the email of 15 November 2009, which I have earlier quoted, there is an absence of reference to a joint venture arrangement. The email of 15 November 2009 does not refer to a joint venture arrangement that had been entered into some months earlier. At its highest, the email indicates there had been some discussion about a joint venture.

Passing reference is made to Mr Thomas' understanding that "a formal JV may take some time to create" and that a heads of agreement would suffice at that point in time. Mr Marles says that he would follow up in relation to Ellerslie Road, but there is no satisfactory evidence that he ever did. There was no further reference in the email exchanges to a heads of agreement, let alone a joint venture arrangement.

[37] Instead, the course of correspondence is indicative of the continuation of the debtor/creditor relationship established by each of the facility agreements. In December 2010 the applicant sought a statement from Mr Marles concerning the actual debt owing. Earlier in September 2010 Mr Thomas confirmed in writing the balance that had been owing as at 30 June 2010. Octobay subsequently demanded payment and exercised its power of sale.

[38] The assertion by Mr Thomas that a joint venture arrangement was formed in early 2009 is implausible. It is unsupported by documents. It is contradicted by documents. It is inherently improbable that a trustee with responsibility towards investors would enter such an arrangement. Instead, the documents show a continuing debtor/creditor relationship and acknowledgments by the applicant of the debt's existence.

[39] The foregoing consideration of the evidence (and the absence of certain evidence) has not been undertaken to assess the applicant's prospects of proving that the alleged joint venture agreement was concluded and was effective to replace the debt so that the claimed debt was never due and owing. The foregoing has been undertaken to decide whether there is a "genuine dispute" about the debt's existence. Mr Thomas' assertion of an oral agreement is not sufficient to show such a genuine dispute in circumstances in which his assertion is:

- inconsistent with documents;
- unsupported by the kind of references to a joint venture that would be expected over a period of two years during which the parties were in frequent contact and communicated by email; and
- inherently improbable.

[40] I conclude that the assertion of a concluded joint venture agreement by which the debt was superseded is spurious. The applicant has failed to show a genuine dispute as to the debt that is the subject of the statutory demand.

Alleged off-setting claim

[41] By March 2011, 15 lots in Stage 1 remained for sale. The slow rate of sales resulted in the appointment by Westpac of receivers and managers to the applicant on 18 March 2011. On 29 March 2011 Octobay Pty Ltd as trustee of the Ellerslie Mezz Trust issued a notice of exercise of power of sale to the applicant in relation to default under the facility granted by it and in respect of the registered mortgage granted to it. The default related to the failure to pay principal and interest in an amount of $4,426,073 which was said to have been due and owing as at 31 August 2009, together with interest that had accrued at the rate of $3,637.87 per day from 1 September 2009. On 29 March 2011 Octobay Pty Ltd as trustee of the Meadowbrook Mezz Trust also issued a notice of exercise of power of sale. This

was in respect of default under the mortgage granted to it by the applicant and relied upon the default in payment of monies that were due and owing to Octobay Pty Ltd as trustee of the Meadowbrook Mezz Trust in the amount of $688,878 as at 31 August 2009, together with interest at the rate of $566.20 per day from 1 September 2009.

[42] Octobay as trustee of the Ellerslie Mezz Trust proceeded to sell the remaining 15 lots in Stage 1 pursuant to its exercise of power of sale. It sold:

(a) Lot 1 for $572,000;

(b) Lot 25 for $341,000;

(c) the remaining 13 lots for $3,597,000.

The documents in evidence show that the sales were made by Octobay Pty Ltd as trustee of the Ellerslie Mezz Trust pursuant to the registered mortgage granted to it.

[43] Before these events Mr Thomas in an email dated 10 March 2011 had asserted to Mr Marles that the remaining lots had a value of $1,900 per square metre. Mr Marles says that he did not accept this valuation. The sale of Lot 1 by private contract for $572,000 equated to $1,751 per square metre. The sale of Lot 25 by private contract for $341,000 equated to $1,830.50 per square metre. The remaining 13 lots were sold to F T B Pty Ltd (an entity incorporated on 11 May 2011 and related to Mr Marles), Accumulus Capital and Octobay. The price paid by F T B Pty Ltd equated to a rate of $1,283 per square metre. The applicant contends that the sale to F T B Pty Ltd was at an undervalue, and it relies upon the absence of evidence concerning:

(a) any pre-sale valuation arranged by Octobay Pty Ltd or its associates;

(b) the undertaking of any marketing campaign; or

(c) the involvement of a real estate agent.

[44] Mr Marles asserts that Octobay Pty Ltd as trustee of the Ellerslie Mezz Trust properly discharged its duties in exercising its power of sale. But he provides no evidence in relation to the circumstances under which the sale of the remaining 13 lots to F T B Pty Ltd was undertaken. In the circumstances, the applicant submits that there is evidence to support a prima facie case of sale at an undervalue, in contravention of the duty imposed by s 85 of the *Property Law Act* 1974 (Qld).

[45] Rather than contest that such a claim exists, Mr Marles and Octobay Pty Ltd rely upon the fact that the sale of the lots was by Octobay Pty Ltd in its capacity as trustee of the Ellerslie Mezz Trust, and that such sales have nothing to do with the debt which is the subject of the statutory demand, being a debt owed to Octobay Pty Ltd as trustee of the Meadowbrook Mezz Trust.

[46] Section 459H of the *Corporations Act* defines "offsetting claim":

> "'***offsetting claim***' means a genuine claim that the company has against the respondent by way of counterclaim, set-off or cross-

> demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates)."

[47] The applicant submits that nothing turns on the fact that the power of sale was exercised by Octobay Pty Ltd as trustee of the Ellerslie Mezz Trust, whereas the statutory demand was issued by Octobay Pty Ltd as trustee of the Meadowbrook Mezz Trust. Octobay Pty Ltd is said to be the relevant legal entity, and the applicant submits that it cannot avoid an off-setting claim under s 459H of the *Corporations Act* by reference to these different capacities. It submits that the only relevance of the fact that Octobay Pty Ltd exercised the power of sale as trustee of the Ellerslie Mezz Trust relates to the assets against which it may have recourse in relation to any liability if it is found to have contravened s 85 of the *Property Law Act*.

[48] In its written submissions in response, Octobay Pty Ltd as trustee of the Meadowbrook Mezz Trust submits that the allegation of an off-setting claim arising from the mortgagee sale cannot be sustained because the mortgagee sale was conducted by the third mortgagee, Octobay Pty Ltd as trustee of the Ellerslie Mezz Trust. It submits that an off-setting claim against a creditor in a different trustee capacity, does not have the requisite element of mutuality. It relies upon two authorities in support of that proposition: *PCH Group Ltd v Hallbridge Pty Ltd*[9] and *Boutique Venues Pty Ltd v JACG Pty Ltd*.[10] In response to these authorities, the applicant relies upon the decision of Master McLaughlin in *Australian Aloe Ltd v Export Growth Finance Pty Ltd*.[11]

[49] In *PCH Group Ltd v Hallbridge Pty Ltd*, Master Sanderson considered a submission by the defendant that there was a lack of mutuality between the claim made by it against the plaintiff and the offsetting claim. The claim made in the statutory demand was made in the defendant's capacity as the trustee of a trust, whereas the alleged offsetting claim was against the defendant in its own capacity. Master Sanderson addressed the requirement of mutuality in the following paragraphs:

> "15. Counsel for the defendant referred to a number of authorities, including the decision of the Full Court of the Federal Court in *Stec v Orfanos* [1999] FCA 457. This case concerned a bankruptcy notice but the principle is the same. The Court said (at para24):
>
> > '... Where a debtor seeks to set aside a bankruptcy notice on the ground that the debtor has a cross demand which equals or exceeds the amount of the judgment or order on which the bankruptcy notice is founded, the judgment on the one hand and the cross demand on the other must be mutual and due in the same right: *Re Anderson; Ex parte Alexander* (1927) 27 SR (NSW) 296; *James v Abrahams* (1981) 51 FLR 16 at 27. The requirement that the two claims be "in the same right" is directed to the capacities in which the claimants claim. Thus a claim by a judgment creditor personally cannot be answered by a claim against the

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9 (2002) 20 ACLC 1,298, [2002] WASC 88.
10 [2007] NTSC 5.
11 [2003] NSWSC 252.

> creditor as a member of a partnership or as an executor or trustee. See *Re Wedd; Ex parte Wedd* (1961) 19 ABC 36; *Re Molesworth* (1907) 51 Sol J 653; *Vogwell v Vogwell* (1939) 11 ABC 83 at 89. But the requirement relevant to the present case is that the claims be mutual; that is that they be of the same kind or nature. Thus joint debts cannot be set off against several debts: *Middleton v Pollock* (1875) LR 20 Eq 515 at 518. ...'
>
> 16. There appears to be no good reason why this requirement of mutuality should not apply in relation to applications brought under s 459G as it undoubtedly applies in applications made under the *Bankruptcy Act*. Counsel for the plaintiff suggested nothing to the contrary. However, there appears to be no direct authority on the point. The decision of the Full Court of the Federal Court in *John Shearer Ltd v GEHL Co* (1996) 14 ACLC 147, which was cited by counsel for the defendant, dealt with a different question. The issue in that case was whether when a statutory demand was based on a dishonoured bill of exchange, a claim brought under the *Trade Practices Act* could amount to an 'offsetting claim'. The Full Court held that it could, giving a wide interpretation to the term 'cross-demand' found in the definition of 'offsetting claim' to be found in s 459H(5). But the question of mutuality did not arise.
>
> 17. It is worthy of note that the definition of 'offsetting claim' in s 459H(5) is defined to include a counterclaim, set-off or cross-demand 'even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates'. This expansion of the definition of off-setting claim sets it apart from s 40(1)(g) of the *Bankruptcy Act*, although given the wide definition given to the term 'cross-demand' in the *John Shearer* decision, it may still be that the two Acts postulate the same test. Be that as it may, the extension found in the *Corporations Act* does not deal with the issue of mutuality. In my view it leaves the principle intact."[12]

Because there was no mutuality between the amount claimed in the statutory demand and any claim the plaintiff had against the defendant for breach of the consultancy agreement, there was no mutuality, and no basis upon which the statutory demand could be set aside.

[50] In *Australian Aloe Ltd v Export Growth Finance Pty Ltd*, the defendant submitted that the offsetting claim must be in the same right as the demand, so that where a demand is made against a company as trustee, the company cannot offset a claim for an amount owed to it in its personal capacity. Master McLaughlin considered the authority of *PCH Group Ltd v Hallbridge Pty Ltd* in relation to the requirement of mutuality and continued:

> "34. It is arguable that such mutuality may be required for an offsetting claim of the nature recognised by the *Corporations Act*. Nevertheless, in the absence of direct authority to that effect

12 (2002) 20 ACLC 1,298 at 1,300-1,301, [2002] WASC 88 at [15]-[17].

> (especially authority of an appellate court), I do not consider that such a qualification should be imported into the clear and unambiguous words of the statute, to have the consequence that what on its face appears to be a genuine offsetting claim by the Plaintiff should be disregarded.
>
> 35. But, in any event, it is disputed by the Plaintiff that there exists such a lack of mutuality, the Plaintiff disputing that the character in which the offsetting claim is asserted is otherwise than against the Defendant in its personal capacity, and in particular disputing that the offsetting claim is asserted against the Defendant in its capacity as disclosed agent on behalf of the licensees. In this latter regard the Plaintiff points to the express terms of the Management Agreement (Exhibit A, Plaintiff's Tender Bundle, Tab 6), clause 9.2 whereof, concerning the character of the Manager (AAM), provides,
>
> > 'The Manager is an independent contractor to the Licensee and nothing herein contained shall establish or create a relationship of partnership, master and servant or principal and agent between the Licensee and the Manager, other than that contemplated by this clause.'
>
> 36. In these circumstances I am not persuaded, firstly, that there is such an absence of mutuality as the Defendant submits; further, that, even if there be such an absence of mutuality in the character of the Plaintiff as debtor and in its character as claimant, that absence of mutuality necessarily deprives the Plaintiff of the right recognised by section 459H to have the statutory demand set aside, where, as here, the offsetting claim is not other than a genuine claim and there is some evidence to support the amount thereof. In consequence, the statutory demand should be set aside."[13]

I note that the first basis for the decision was that an absence of mutuality had not been demonstrated and that it was strictly unnecessary to decide whether a requirement of mutuality exists in respect of an offsetting claim.

[51] The requirement of mutuality again arose for consideration in *Boutique Venues Pty Ltd v JACG Pty Ltd*.[14] The decision in *Australian Aloe Ltd* apparently was not cited in argument, and was not considered by Southwood J in deciding whether the plaintiff in that case had an offsetting claim in respect of workmen's liens claims that had been brought. Justice Southwood concluded that under the relevant provisions of the *Corporations Act* there is a requirement of mutuality. His Honour followed *PCH Group Ltd v Hallbridge Pty Ltd* in concluding that the offsetting claim must be a claim by the plaintiff in its own capacity against the defendant. In addition, the claims by the subcontractors did not constitute other reasons why the statutory demand should be set aside under s 459J(1)(b) of the *Corporations Act*.

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13 [2003] NSWSC 252 at [34]-[36].

14 [2007] NTSC 5.

[52] In this matter I am not persuaded that *PCH Group Ltd v Hallbridge Pty Ltd* or *Boutique Venues Pty Ltd v JACG Pty Ltd* were wrongly decided, or that I should not follow them.

[53] The applicant has advanced a prima facie claim against Octobay Pty Ltd for breach of the duty that it was required to observe in exercising its power of sale as registered mortgagee. It exercised this power of sale in its capacity as trustee of the Ellerslie Mezz Trust. The fact that the respondent might be sued simply as Octobay Pty Ltd and only have recourse in relation to any liability established against it to the assets of the Ellerslie Mezz Trust does not, in my view, permit the applicant to rely upon this claim as an offsetting claim in respect of a debt claimed by Octobay Pty Ltd in a different capacity, namely as trustee of the Meadowbrook Mezz Trust. In this case there is no mutuality between the debt claimed in the statutory demand and any claim the applicant may have against Octobay Pty Ltd in a different capacity, namely, for breach of its duty of care in exercising its power of sale as trustee of the Ellerslie Mezz Trust.

[54] The applicant has not established the second ground upon which it seeks to set aside the statutory demand.

The loan facility: unconscionability

[55] The applicant's written submissions asserted that the interest rate that applied in relation to the relevant facility was exorbitant and was "indicative of a contract that is both an unconscionable bargain and a penalty." However, in oral submissions it acknowledged that this contention did not provide a separate ground to set aside the statutory demand since, if it were successful, it would result in a different amount being recoverable, and there would remain a substantial debt. It is therefore unnecessary to dwell upon the amount of interest that was provided for in the agreement, or the additional arrangement and exit fees that were payable in respect of the Facility. They equated to a high effective interest rate per annum on the principal sum. However, Mr Marles contends that it was a reasonable rate for mezzanine funding secured behind the primary development funder where, in a case such as this, the mezzanine funder is faced with a possible total loss, depending upon what can be recovered from the applicant and guarantors of the relevant facility.

Is there "some other reason" why the demand should be set aside?

[56] Section 459J(1)(b) provides that on an application under s 459G, the Court may by order set aside the demand if it is satisfied that "there is some other reason why the demand should be set aside." The applicant submits that if it does not succeed in its contention that there is an offsetting claim in relation to sale at an undervalue because of the different capacity in which the statutory demand was made, then these matters constitute "some other reason" within the meaning of s 459J(1)(b) of the Act to set aside the statutory demand.

[57] Section 459J(1)(b) is said to provide a broad discretion to set aside a statutory demand where substantial injustice may otherwise occur if the company were to be permitted to be wound up. The circumstances in which the discretion has been exercised were said to include circumstances in which it would be unconscionable, oppressive or an abuse of process to permit the statutory demand procedure to be invoked. Octobay Pty Ltd did not contest these submissions concerning the scope

of the discretion under s 459J(1)(b).[15] It is sufficient for present purposes to proceed on the basis that the section may be invoked in a case in which it would be unconscionable, oppressive or an abuse of process to rely upon a statutory demand. It is not appropriate to categorise the reasons that may exist for setting aside a statutory demand under s 459J(1)(b). Whether such a reason exists falls to be determined by the subject matter in issue and the purposes of Part 5.4 of the *Corporations Act*.

[58] The applicant has a claim against Octobay Pty Ltd arising out of the exercise of a mortgagee's power of sale in its capacity as trustee of the Ellerslie Mezz Trust. However, that fact and the additional fact that the sale was made to an entity associated with Mr Marles do not provide a sufficient basis to conclude that the demand should be set aside for "some other reason" pursuant to s 459J(1)(b). There is no sufficient basis to conclude that the demand by Octobay Pty Ltd as trustee of the Meadowbrook Mezz Trust was not for the legitimate purpose of seeking to recover money owed to it in that capacity. I am not satisfied that the demand was made for some purpose foreign to the purposes for which a statutory demand may be made. The applicant has not satisfied me that the demand was made for a collateral purpose. If the demand remains unsatisfied, and application is brought to wind up the applicant, then it can seek to persuade the Court that a winding up order should not be made. The material before me, however, does not satisfy me that there is "some other reason" why the demand should be set aside.

Conclusion

[59] The applicant has not established the grounds relied upon by it to set aside the statutory demand. The orders will be:

1. The application is dismissed.

2. The applicant pay the respondent's costs of and incidental to the application to be assessed on the standard basis.

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15 As to which see *Neutral Bay Pty Ltd v Deputy Commissioner of Taxation* (2007) 25 ACLC 1,341 at 1,359-1,362, [2007] QCA 312 at [76]-[84]; reversed on appeal in *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473, [2008] HCA 41.