

Legal Briefing

Ted Lowery considers an unsuccessful call on a personal guarantee **Case in focus: statutory demands**

Martin v McLaren Construction Ltd [2019] EWHC 2059 (Ch)

Before ICC Judge Barber

In the Insolvency and Companies List

Judgement delivered 29 July 2019

The facts

On 9 December 2013 Mr Martin provided a personal guarantee to McLaren whereby he undertook to discharge to McLaren his own liabilities together with the liabilities of three companies in which he had a controlling interest. Clause 1 of the guarantee provided that if any of the companies failed to pay an amount when due, Mr Martin would immediately on demand pay the relevant amount as if he were the principal obligor. Clause 9.1 required that every notice or demand under the guarantee was to be in writing and delivered personally by first class post or fax to the addresses and/or fax numbers appearing on the signature pages of the guarantee. Clause 9.2 concerned the timing of service of any demand or notice which would be immediately if delivered personally or by fax or on the first working day following the day on which it was posted.

On 27 February 2018 McLaren issued an email to Mr Martin demanding payment under the guarantee. This was followed in June 2018 by a statutory demand that claimed immediate payment but was subsequently withdrawn by McLaren.

On 30 October 2018 McLaren served on Mr Martin a statutory demand which claimed that a sum of £7,099,670.34 was owed by him under the terms of the guarantee. The statutory demand expressly referred to section 268(1)(a) of the Insolvency Act 1986 which concerns debts for liquidated sums that were immediately payable.

Mr Martin responded with a witness statement challenging the validity of the statutory demand and during 2019 commenced proceedings pursuant to rule 10.4 of the Insolvency Rules 2016 seeking an order that the statutory demand be set aside. Rule

10.5 of the Insolvency Rules entitles the court to set aside a statutory demand if the debtor appears to have a counter claim which equalled or exceeded the amount specified in the statutory demand, if the debt is disputed on substantive grounds, if the creditor holds adequate security or if the court is satisfied on other grounds that the demand ought to be set aside.

The principal argument advanced by Mr Martin was that the sum of £7,099,670.34 was not payable immediately as required by section 268(1)(a) of the Insolvency Act where prior to 30 October 2018, McLaren had not issued a written demand claiming payment of this amount. McLaren contended that this argument had been raised too late, alternatively that its February 2018 email and/or the June 2018 statutory demand amounted to prior written notice.

The issue

Should the statutory demand served on 30 October 2018 be set aside?

The decision

The judge found that clauses 1 and 9 of the guarantee required a demand in writing to be served on Mr Martin before any actual liability could arise under the guarantee and noted that McLaren appeared to have previously conceded that no prior written demand for payment had been issued. The judge nevertheless considered the two documents relied upon by McLaren as constituting prior written notice and found that neither were valid. As regards the email then notice by email was not provided for under the terms of the guarantee. Turning to the statutory demand served in June 2018, the judge noted that this demand also did not rely on any prior written payment notice, was for a different amount and had anyway been withdrawn.

The judge also rejected McLaren's submission that absent prior written notice, the court need not exercise its discretion by setting aside the statutory demand since this outcome would not cure any injustice. The judge observed that McLaren's failure to issue a demand was substantive (and he noted that McLaren had still failed to serve a formal notice under the guarantee by the time of the hearing). Thus, the court should be slow to exercise its discretion against setting aside a statutory demand where the essential pre-requisites of sections 267 and 268 of the Insolvency Act had not been satisfied.

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Commentary

Statutory demands are often used aggressively in construction payment disputes. This judgment reminds parties not to forget the basics. It remains a well-established principle that nothing is due from a guarantor unless and until a demand is made. Furthermore, a statutory demand can only be issued if the debt is validly claimed under the terms of the contract and the relevant Insolvency Act criteria must also be satisfied.

Having issued a statutory demand that expressly referenced section 268(1)(a) of the Insolvency Act, McLaren were unable to show that the debt claimed was immediately payable, and the judge therefore concluded that the demand should be set aside.

Ted Lowery
September 2019