

In demand

*A party must ensure a debt has in fact fallen due before taking legal steps to recover the money, says **Thomas Bond***



Thomas Bond

Thomas Bond is an associate at Russell-Cooke
russell-cooke.co.uk



Any contractual provisions that trigger liability under a guarantee must be complied with before the guarantor can be pursued

The recent case of *Martin v McLaren Construction Ltd* [2019] EWHC 2059 (Ch) is a reminder that before taking recovery action, steps should always be taken to ensure monies have fallen due.

The case also addresses whether a debt is immediately due and can, therefore, form the basis of a statutory demand.

THE BACKGROUND

In this High Court case, insolvency and companies court Judge Barber considered whether a statutory demand ought to be set aside in circumstances where the underlying debt had not previously been formally demanded.

Martin (the debtor) had guaranteed the obligations of three companies. After an assignment, McLaren Construction (the creditor) held the benefit of the guarantee. Under the terms of the guarantee, the guarantor was obliged to pay sums due immediately on demand. The guarantee included provisions specifying that all notices and demands had to be in writing and personally delivered or sent by post or fax.

The creditor served a statutory demand on the debtor in relation to a liability under the guarantee. The statutory demand was in relation to a liquidated sum payable immediately. The debtor applied to set aside the statutory demand. The issue in dispute was whether the liability had ever been demanded in accordance with the terms of the guarantee and, therefore, whether it was a liquidated sum payable immediately or payable on demand (whenever that demand came).

There was no substantive dispute that the underlying liability was owed.

The creditor argued that the debt demanded was immediately due and payable on the basis that the debtor had been served with the present (and an earlier) statutory demand; and that correspondence had been entered into in connection with the liability and a timetable for its repayment. So it came as no surprise to the debtor that he was being pursued for the liability.

The creditor also argued that having served a prior written demand in line with the guarantee would make no difference to the debtor's knowledge of the liability or his ability to pay.

SET ASIDE

The court exercised its discretion to set aside the statutory demand on the basis that the debt was not "payable immediately" under section 268(1) of the Insolvency Act 1986.

By the date of the hearing, the creditor had still not served a written demand under the guarantee. The court found that the creditor could not demonstrate that the debtor appeared to be unable to pay or have no reasonable prospect of being able to pay a debt (section 267(c) of the 1986 Act); or that the debt was for a liquidated sum payable either immediately or at some certain future time (section 267(2)(b)).

The court held that the creditor's failings were of substance not simply of form. It did not produce any evidence:

- that any other creditors were pressing for bankruptcy proceedings; or
- to explain why, notwithstanding the specific notice requirements laid down in the guarantee, the creditor had thought it appropriate to simply serve the statutory demand without first giving formal notice under the guarantee; and
- to explain why, even by the time of the hearing (eight months after notice of the error), the creditor had not served a formal demand under the guarantee.

The statutory demand was therefore set aside. Though that was the end of the statutory demand in question, it would appear that the creditor was then free to serve a formal demand under the guarantee and restart the process of seeking to recover payment of the debt.

WIDE DISCRETION

Serving a statutory demand is an initial step towards bankruptcy proceedings. The prescribed form of document requires a debtor to pay, secure or compound for a debt within 21 days. If a debtor does not pay up or apply to set the statutory demand aside, then the demand can be relied upon as evidence that a debtor is unable to pay its debts as they fall due; and therefore ought to be made bankrupt.

Under rule 10.5(5) of the Insolvency (England and Wales) Rules 2016, the court has



discretion whether to set aside a statutory demand served on an individual. A demand may be set aside on the basis that the debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt in the demand; the debt is disputed on substantial grounds; the creditor holds some security for the debt; or the court is otherwise satisfied that the demand ought to be set aside.

That provides a wide discretion and where the essential pre-requisites to issuing a bankruptcy petition have not been met by a creditor, the court will be reluctant to let a statutory demand stand.

A creditor cannot petition for an individual's bankruptcy on the back of a statutory demand if an application to set aside the statutory demand has been issued. So applying to set aside the statutory demand halts the bankruptcy process, at least temporarily.

There is no similar provision to set aside a statutory demand served on a company. This means a company in receipt of a statutory demand must apply to court for an injunction preventing the advertisement of a winding up petition, if they can't agree terms with the creditor to withdraw the demand.

LIQUIDATED SUMS

A statutory demand and a subsequent bankruptcy petition must be based upon a debt for a liquidated sum – a specific amount which has been fully and finally ascertained.

A liquidated sum can include a contractual liability where the amount due is ascertained in accordance with a contractual formula or

contractual machinery which, when operated, produces a figure.


If there is no underlying debt, a statutory demand cannot be appropriate.

PAYMENT DUE

The *Martin v McLaren Construction* case is a reminder that any contractual provisions that trigger liability under a guarantee must be complied with before the guarantor can be pursued.

In all cases, the terms between the parties and the practicalities of the situation need to be considered carefully before any legal proceedings are pursued. For example:

- A service provider that has incurred substantial work in progress but has never raised an invoice, is not entitled to be paid (and, therefore, not entitled to take any legal action) until an invoice has been raised in line with the agreed terms;
- An unpaid invoice is not due until the agreed payment period has elapsed.
- If there is a conflict between the due date specified on an invoice and the agreed contractual terms, the contractual terms will prevail because the due date on the invoice does not have the effect of ousting the agreed terms.
- If the parties have agreed terms that have the effect of delaying payment or agreeing instalments, the debt is not likely to be due and payable immediately.

Care should be taken when drafting commercial terms. Thought should be given to those terms and to complying with them before any steps are taken to recover payment. 



The court held that the creditor's failings were of substance not simply of form