

# Can You Serve A Statutory Demand For Monies Payable Under An “On Demand” Guarantee?

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The recent case of *Martin v McLaren Construction* [2019] EWHC 2059 (Ch) reminds practitioners to make sure that the debt which forms the basis of a statutory demand pursuant to s268(1) of the Insolvency Act 1986, is due and payable.

You might assume that a statutory demand under s268(1) is a demand for payment and therefore monies payable under an “on demand” guarantee can be demand by a statutory demand. However, the Court in *Martin v McLaren* confirmed otherwise.

## The Facts

Mr Martin guaranteed the obligations of himself and a number of other companies (the “Companies”) to a third party (the “Guarantee”). The benefit of the Guarantee was subsequently assigned to McLaren Construction Limited (“McLaren”).

The key terms of the Guarantee were that:

1. Mr Martin’s liability to McLaren became due immediately on demand; and
2. Any demand under the Guarantee needed to be in writing and served either personally, by first class post or by fax.

In February 2018 McLaren sent an email to Mr Martin demanding payment under the Guarantee. This was followed by the service of a statutory demand on Mr Martin in or around June 2018, which was subsequently withdrawn.

In October 2018 a second statutory demand (for a different sum) was served on Mr Martin. The statutory demand was made on the basis that the debt was payable immediately pursuant to section 268 (1) (a) of the Insolvency Act 1986.

## The Hearing

Mr Martin sought to set aside the second statutory demand on various grounds, the main two being that:-

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1. the debt was not payable immediately as demand under the contractual terms of the Guarantee had not been made; and
  2. the Statutory Demand could not, of itself, qualify as a demand under the Guarantee as the debt claimed in the statutory demand must be due and payable when the statutory demand was made.

McLaren claimed that demand had been given by either the email in February 2018 or the first statutory demand. Further, McLaren submitted that the Court should not exercise its discretion to set the statutory demand aside as there was no 'injustice' caused by doing so.

McLaren argued that Mr Martin had been fully aware of the debt owed by the Companies (and of his personal liability for that debt) for some time and that service of a prior written demand in accordance with the terms of the Guarantee was a mere 'technicality'.

## Decision

The Court agreed with Mr Martin's submissions and set aside the statutory demand.

ICC Judge Barber found that the contractual terms of the Guarantee that rendered Mr Martin liable to pay the debt had not been met.

No demand had been made under the contractual terms of the Guarantee which required service personally or by first class post or by fax. Service by e-mail was not sufficient, nor were the subsequent statutory demands. Quoting an earlier case of *TS & S Global Ltd v Fithian-Franks [2007] EWHC 1401* he made it clear that:-

*"The purpose of a statutory demand is to establish the presumption that the debtor is unable to pay his debts and thereby entitle the creditor to present a bankruptcy petition. It is not intended as a means of fulfilling contractual pre-conditions to making a debt immediately payable"*

In respect of the exercise of the Court's discretionary power to set aside the statutory demand, Barber J held that McLaren's failings were failings of substance, not form and added that the Court should be slow to exercise its discretion against the setting aside of a statutory demand where the essential requirements to present a bankruptcy petition have not been met.

## Conclusion

### ***Check that the debt is due and payable***

This judgment should serve as a warning that failure to follow the contractual terms when claiming a debt could affect the validity of any subsequent statutory demand or petition.

Given the consequences of an adverse costs order in such circumstances, practitioners should always check that the pre-requisites for presenting a statutory demand and petition have been met before a statutory demand is served.

### ***Consider whether notice provisions in contracts reflect modern practice***

The case underlines the importance of ensuring that any acceleration terms and notice provisions in contractual documents are drafted to reflect changes in how people correspond. Nowadays people

are much more likely to send an email than a fax or letter.

If the service provisions under the Guarantee had allowed service by email, then the position would arguably have been different.

### ***Final thoughts***

When giving judgment Barber J made mention that there was no evidence of any other creditors looking to bankrupt Mr Martin and no explanation for why no formal demand under the Guarantee was ever made, even during the 8 month period after McLaren was put on express notice of its error.

One could ask the question whether the Court would have reached the same conclusion if a formal demand had been made prior to the hearing?

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