Neutral Citation Number: [2019] EWHC 2059 (Ch)

BR-2019-000188

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF RONALD MARTIN
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 29/07/2019

Before :

ICC JUDGE BARBER

- -

Between :

RONALD MARTIN

Applicant

- and –

McLAREN CONSTRUCTION LIMITED

Respondent

- -

Hilary Stonefrost (instructed by **Gowling WLG (UK) LLP**) for the Applicant
Matthew Weaver (instructed by **Osborne Clarke LLP)** for the Respondent

Hearing date: 19 July 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

ICC Judge Barber

1. This is the application of Mr Ronald Martin for an order that a statutory demand dated 25 October 2018, served on him by the Respondent on 30 October 2018 ('the Statutory Demand'), be set aside pursuant to rule 10.4 of the Insolvency (England and Wales) Rules 2016 ('IR 2016').

The Evidence

2. For the purposes of this hearing, I have read the following witness statements and their attendant exhibits:

   (1) The first and second witness statements of the Applicant, dated 15 November 2018 and 22 February 2019 respectively; and

   (2) the statement of Craig Robert Young, filed on behalf of the Respondent, dated 22 January 2019.

   I have also considered the other documents contained in a bundle agreed for use at the hearing.

Background

3. The Applicant is the Chairman of Southend United Football Club and the Chief Executive of Martin Dawn PLC.

4. On 9 December 2013, the Applicant provided a personal guarantee ('the Guarantee') to McLaren Construction Limited (now known as McLaren Construction (UK) Limited) ('McLaren') in respect of a number of deeds and agreements listed at paragraph 3 of the Applicant's first witness statement and together defined as "the Transaction Documents".

5. Under the terms of the Guarantee, the Applicant guaranteed the payment or discharge of his own liabilities and those of the following entities under the Transaction Documents: (1) Martin Dawn (Cheltenham) Limited (2) Martin Dawn PLC and (3) Martin Dawn (Leckhampton) Limited.

6. McLaren assigned its rights in the Transaction Documents to the Respondent (then known as Verve Construction Limited) in December 2015 ("the Assignment"). McLaren is now known as McLaren Construction (UK) Ltd ("McLaren UK") and Verve Construction Limited is now known as McLaren Construction Limited. By the time of the hearing before me, no issue was taken on the Assignment.

The Statutory Demand

7. The Statutory Demand is in the sum of £7,099,670.34, said to be owed by the Applicant under the terms of the Guarantee. The Statutory Demand is expressly made under section 268(1)(a) of the Insolvency Act 1986 (debt for liquidated sum payable immediately).

The Law

8. The principles governing an application to set aside a statutory demand were not in dispute. Pursuant to rule 10.5 (5) IR 2016, the Court may set aside a statutory demand if

(a) The debtor appears to have a counterclaim, set off or cross demand which equals or exceeds the amount of the debt specified in the statutory demand;

(b) The debt is disputed on grounds which appear to the Court to be substantial;

(c) It appears that the creditor holds some security in relation to the debt claimed by the demand, and either rule 10.1(9) is not complied with in relation to it, or the Court is satisfied that the value of the security equals or exceeds the full amount of the debt;

(d) The Court is satisfied, on other grounds, that the demand ought to be set aside.

The grounds for setting aside

9. By his first statement, the Applicant raised a number of grounds in support of his contention that the Statutory Demand should be set aside.

10. As argued before me, however, the principal ground relied upon (and in the event, the only ground upon which I heard argument) was that the debt was not 'payable immediately' as required by section 268(1) IA 1986.

11. Section 267 IA 1986 provides that a creditor's petition may only be presented if, (inter alia), "the debt, or each of the debts, is a debt which the debtor appears either to be **unable to pay** or have no reasonable prospect of being able to pay…" : Section 267(2)(c) IA 1986 (with emphasis added).

12. Section 268(1) (with emphasis added) sets out the definition of "inability to pay" and provides that for the purposes of section 267(2)(c),

> "the debtor appears to be unable to pay a debt **if, but only if**, **the debt is payable immediately and** either
>
> (a) the petitioning creditor to whom the debt is owed has served on the debtor a demand (known as "the statutory demand") … requiring him to pay the debt or to secure or compound for it to the satisfaction of the creditor, at least three weeks have elapsed since the demand was served and the demand has been neither complied with nor set aside in accordance with the rules, or
>
> (b) execution or other process issued in respect of the debt on a judgment or order of any Court in favour of the petitioning creditor, or one or more of the petitioning creditors to whom the debt is owed, has been returned unsatisfied in whole or in part".

13. Section 268(2) sets out the definition of 'no reasonable prospect of being able to pay' and (with emphasis added) provides that for the purpose of section 267(1)(c),

> "the debtor appears to have no reasonable prospect of being able to pay a debt **if, but only if, the debt is not immediately payable and**
>
> (a) the petitioning creditor to whom it is owed has served on the debtor a demand (also known as 'the statutory demand') …. requiring him to establish to the satisfaction of the creditor that there is a reasonable prospect that the debtor will be able to pay the debt when it falls due,
>
> (b) at least 3 weeks have elapsed since the demand was sent, and
>
> (c) the demand has been neither complied with nor set aside in accordance with the rules".

14. It will be seen that the Act provides two separate deeming processes for establishing by statutory demand (a) that a debtor is *unable* to pay a debt (section 268(1)) and (b) that a debtor *appears to have no reasonable prospect of being able to pay a debt* (section 268(2)). The first, under s.268(1), is *only* available when a debt is payable *immediately*. The second, under s.268(2), is *only* available when a debt is *not* payable immediately. The difference is a matter of substance and not simply one of form; complying with a statutory demand made under section 268(1) requires the debtor within the prescribed period to *pay* the debt or to *secure* or *compound* it to the satisfaction of the creditor: whilst complying with a statutory demand made under section 268(2) requires the debtor within the prescribed period *to establish to the satisfaction of the creditor* that there is a reasonable prospect that the debtor *will* be able to pay the debt *when* it falls due.

15. In the present case, the Statutory Demand was made pursuant to section 268(1) IA 1986. A key issue before me was whether the debt claimed in the demand was "payable immediately" as required by s 268(1).

16. The debt forming the subject matter of the Statutory Demand is claimed pursuant to clause 1.1 of the Guarantee. Clause 1.1 (read together with clause 9) provides that the Guarantor (the Applicant) is only liable to make payment when he has been served with a written demand for payment in accordance with the terms of the Guarantee. The material parts of clause 1.1 of the Guarantee provide as follows (with emphasis added):

> "1.1 In consideration of the Lender granting time, credit and accommodation to the Company, the Guarantor:
>
> … (b) undertakes that whenever an Obligor does not punctually pay or discharge any amount of the Guaranteed Liabilities when due under or in connection with any Transaction

> Document, the Guarantor shall **immediately on demand** pay that amount as if he were the principal obligor".

17. Clause 9 of the Guarantee requires the demand to be in writing. It provides as follows:

> "9 Notices
>
> 9.1 Every notice, demand or other communication under this Agreement shall be in writing delivered personally, by first class prepaid post or fax and shall be sent to the address or fax number of the party concerned as set out on the signature page or to such other address or fax number as has been notified by it to the other party to this Agreement.
>
> 9.2 Any such demand or notice:
>
> (a) delivered personally shall be deemed to have been received immediately upon delivery;
>
> (b) sent by post shall be deemed to have been received at the opening of business on the first working day following the day on which it was posted, even if returned and delivered;
>
> (c) sent by fax shall be deemed to have been received upon transmission".

18. The signature pages of the Guarantee contain the address and fax number of each party to the deed. There is no provision for service of a demand by email.

19. On behalf of the Applicant, Ms Stonefrost submitted that the terms of cl.1.1 and cl.9 of the Guarantee clearly require a demand in writing to be served on the Guarantor in accordance with cl.9 before any actual (as opposed to contingent) liability arises on the part of the Guarantor to make payment under cl.1.1. The service of a prior written demand under the Guarantee, she argued, is therefore a contractual pre-requisite of a debt claimed under cl.1.1 of the same becoming 'payable immediately' for the purposes of s.268 IA 1986.

20. I accept Ms Stonefrost's submissions on this issue. The legal principles applicable to 'on demand' guarantees are well established. Where a guarantee requires that a demand be made in writing before liability arises on the part of the guarantor, no cause of action arises until the demand is made and there is nothing due from the guarantor to the lender unless and until such demand is made: In re J Brown's Estate; Brown v Brown [1893] 2 Ch 300 and Bradford Old Bank Ltd v Sutcliffe [1918] 2 KB 833 (cited in MS Fashions Ltd v BCCI [1993] Ch 425 at 447).

21. The Applicant's first witness statement confirmed (at paragraph 13) that no written demand had been made of him as Guarantor under the terms of the Guarantee prior to service upon him of the Statutory Demand. Until the hearing before me, this did not appear to be in issue. The Statutory Demand itself made no reference to a prior written demand for payment or any failure to make payment in accordance with such

a demand. Moreover, Mr Young's statement dated 22 January 2019, filed on behalf of the Respondent in response to Mr Martin's first witness statement, appeared to concede that no prior written demand for payment was made under the Guarantee. Under the heading 'No Prior Demand', Mr Young stated (at para 28 of his statement):

> '28. Mr Martin's assertion at paragraph 13 of his statement is that the lack of a prior written demand for the sums due and owing by Mr Martin and claimed under the [Statutory] Demand is "highly unusual". With all due respect to Mr Martin, the mere fact that he, or more accurately his current solicitors, consider it "highly unusual" that there was no prior written demand is not a ground for setting aside the [Statutory] Demand.'

22. Ms Stonefrost submitted that the Statutory Demand forming the subject matter of this application could not, of itself, qualify as a demand under the Guarantee. She maintained that a statutory demand is not a formal demand under a demand guarantee; it is a document with prescribed contents designed for the purposes of bankruptcy proceedings. The debt claimed in the statutory demand must be due and payable when the statutory demand was made: TS & S Global Ltd v Fithian-Franks [2007] EWHC 1401 and Wallace LLP v Yates [2010] BPIR 1041.

23. In these circumstances, Ms Stonefrost maintained that the Court should set aside the Statutory Demand pursuant to rule 10.5(5)(d) IR 2016. She submitted that the Statutory Demand should be set aside because the Respondent was not entitled to serve a statutory demand under section 268(1) on the basis of a debt "payable immediately".

24. On behalf of the Respondent, Mr Weaver did not seek to argue that no written demand was required under the Guarantee.

25. He first argued that the Applicant had not raised the Respondent's failure to serve written demand under the Guarantee as a ground for setting aside the statutory demand until exchange of skeleton arguments. This submission, however, flew in the face of paragraph 13 of the Applicant's first witness statement which, (in a section of the witness statement headed: "reasons the demand should be set aside"), stated, in terms, that the Applicant had "received no formal demand for repayment of the Demanded Sum prior to being served with the [Statutory] Demand on 30 October 2018.".

26. Mr Weaver next maintained that a written demand under the terms of the Guarantee *had been served* by the Respondent on the Applicant prior to service of the Statutory Demand. This did not sit at all easily with the evidence which his client had filed in response to this application; in particular, paragraph 28 of Mr Young's statement, quoted at paragraph 21 above. Read in the context of the witness statement as a whole, Paragraph 28 of Mr Young's statement was, in my judgment, a clear admission that no prior written demand had been served under the Guarantee.

27. Even if I am wrong in construing paragraph 28 of Mr Young's statement as an *admission* to that effect, however (and I should say Mr Weaver was quick to stress, on instruction, that Mr Young had not intended to make any such admission), it remains

the case that nowhere in his statement did Mr Young seek to *controvert*, or even put in issue, the clear factual assertion at paragraph 13 of the Applicant's first witness statement that he received no formal demand under the Guarantee prior to service of the Statutory Demand. The Applicant's evidence on this issue is therefore, at the very least uncontroverted, if not admitted.

28. Against the backdrop of such evidence, it was something of a volte-face for the Respondent to be contending, by Counsel at the hearing before me, that a prior written demand *had* been made under the Guarantee.

29. In the event, even assuming in favour of the Respondent that it remained open to the Respondent to argue the point in the light of its evidence, the document then relied upon by Mr Weaver during the course of his submissions as a prior written demand served under the Guarantee did not, in my judgment, qualify as such.

30. The document relied upon by Mr Weaver for these purposes was an earlier statutory demand in a different sum, served by the Respondent upon the Applicant in or about June 2018 and subsequently withdrawn. As made clear by David Richards J (as he then was) in TS & S Global Limited:

> 'Section 268 of the Insolvency Act, the Insolvency Rules and the terms of the prescribed form [now the 'content requirements' of r.10.1 IR 2016] proceed on the basis that the debt in question is already immediately payable by the time that the statutory demand is served. 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.'

31. Mr Weaver accepted that the Statutory Demand sought to be set aside in *this* application could not, of itself, qualify as a written demand under the Guarantee. He submitted, however, that the *earlier* statutory demand, which had been served in June 2018 and then withdrawn, *could* qualify, arguing that written demands for such purposes can take many forms, referring me to a decision of the Privy Council in Financial Institutions Services Limited v Negril Negril Holdings Ltd and Others.

32. I reject the submission that the earlier statutory demand served in June 2018 qualified as a written demand under the Guarantee. The statutory demand served in June 2018 states, in terms, that the sum demanded is 'payable immediately'. Whilst it goes on to demand payment of the sum in question, the document must be construed as a whole. In the words of David Richards J, the document was 'clearly not intended as a means of fulfilling contractual preconditions to making a debt immediately payable'.

33. Moreover, the statutory demand served in June 2018 was *later withdrawn*. Mr Weaver's attempts to persuade me that the June 2018 statutory demand could still qualify as a demand under the Guarantee, notwithstanding having been withdrawn as a statutory demand, were valiant but entirely unsuccessful.

34. An attempt to rely, in the alternative, on an email dated 27 February 2018 as a prior written demand under the Guarantee, was similarly unsuccessful; under clause 9 of the Guarantee, service of written demands by email was not permitted. In my judgment, the email in question did not qualify as a written demand under the Guarantee.

35. I was taken to no other documents relied upon by the Respondent as a written demand served under the Guarantee. I therefore proceed on the basis that no written demand was served under the Guarantee prior to service of the Statutory Demand.

36. Mr Weaver submitted that even if the Court concluded that no written demand had been served under the Guarantee prior to service of the Statutory Demand, the Court should not set aside the Statutory Demand.

37. In this regard he relied upon the comments of David Richards J in TS & S Global Ltd v Fithian-Franks [2007] EWHC 1401 at paragraph 33. It was common ground before me that the comments in question were obiter; David Richards J already having concluded that the guarantor in the case before him was liable as primary obligor under the guarantee in question and that no written demand was required. Having so concluded, however, David Richards J went on to consider the approach that he would have adopted had he found that a written demand had been required. At paragraph 33 he put the position thus:

> "33. It does not necessarily follow that the statutory demand should be set aside. Mr Robbins' second alternative submission was that, even if he had failed on his previous submissions, the facts of this case made it inappropriate to set aside the demand. Rule 6.5(4) provides that the Court may grant the application to set aside the demand on one of four grounds. The first three are the existence of a cross claim or set off in excess of the demand, the dispute of the liability on substantial grounds, and security held for the debt by the creditor. None of these is applicable on this point. The last ground is if "the Court is satisfied, on other grounds, that the demand ought to be set aside". This was considered by the Court of Appeal in In re a Debtor (No 1 of 1987) [1989] 1 WLR 271. A statutory demand was made using the wrong form, for an amount which was greater than actually due and supported by calculations which were confusing and wrong. The Court of Appeal, affirming the decisions below, refused to set aside the demand. Nicholls LJ stated that, as the statutory effect of an unsatisfied demand was to create a presumption of insolvency and entitled the creditor to present a bankruptcy petition, the correct approach to the exercise of the residual discretion under rule 6.5(4)(d) was as follows (p.276):
>
> "… the circumstances which normally will be required before a Court can be satisfied that the demand "ought" to be set aside, are circumstances which would make it unjust for the statutory demand to give rise to those consequences in the particular

case. The Court's intervention is called for to prevent that injustice"

34. At page 279, Nicholls LJ expanded further on this approach:

"The Court will exercise its discretion on whether or not to set aside a statutory demand having regard to all the circumstances. That must require the Court to have regard to all the circumstances as they are at the time of the hearing before the Court. There may be cases where the terms of the statutory demand are so confusing or misleading that, having regard to all the circumstances, justice requires that the demand should not be allowed to stand. There will be other cases where, despite such defects in the contents of the statutory demand, those defects have not prejudiced and will not prejudice the debtor in any way, and to set aside the demand in such a case would serve no useful purpose. For example, a debtor may be wholly unable to pay a debt which is immediately payable, either out of his own resources or with financial assistance from others. In such a case the only practical consequence of setting aside a statutory demand would be that the creditor would promptly serve a revised statutory demand, which also end inevitably would not be complied with. In such a case the need for a further statutory demand would serve only to increase costs. Such a course would not be in the interests of anyone."

In the case before the Court, Nicholls LJ found that the errors in the demand had not resulted in any prejudice to the debtor. There was nothing to suggest that if it had been correct the debtor would have paid or secured the debts.

35. Those observations are applicable to the present case. If the statutory demand had been preceded by a demand under the guarantee, there can be no suggestion that the guarantor would have paid or secured the debt or behaved in any way differently from their actual reaction. They would still have refused to pay, on the grounds originally given to them. There is no injustice to them which requires to be cured by setting aside the demand.

36. There is this difference from the facts of In re a Debtor. While the contents of the demand were correct in this case, it was served prematurely, in the absence of an earlier demand under the guarantee. In that sense, it was a demand which ought not to have been served. But the consequence is not that it is void as a statutory demand but that the Court has a discretion to set it aside under rule 6.5(4). Applying the approach stated by Nicholls LJ, I would have held that the facts of this case made it inappropriate to set aside the demand".

38. David Richards J did not go on to specify which facts in particular he had in mind in concluding that he would have considered it 'inappropriate' to set aside the statutory demand.

39. On behalf of the Applicant, Ms Stonefrost maintains that the obiter comments of David Richards J in TS & S Global on this issue are inconsistent with the later decision of Morgan J in Wallace LLP v Yates [2010] EWHC 1098. Morgan J was not taken to the obiter comments of David Richards J in TS & S Global. He was, however, taken to the Court of Appeal's decision in In re a Debtor (No 1 of 1987) and was clearly familiar with the principles explored in that case.

40. Wallace LLP v Yates was an appeal from an order setting aside a statutory demand on the ground (inter alia) that the sums which were the subject of the statutory demand were not liquidated sums. As explained by Morgan J (at paragraph 23, with emphasis added):

> "just as one cannot present a bankruptcy petition for a sum which is not liquidated, one cannot serve a statutory demand for a sum which is not liquidated. Although s268 does not in terms refer to a sum being liquidated, s268(1) does refer to a debt which is *payable immediately*. Mr Alliott submits, *and I accept*, that *for a debt to be payable immediately*, it must be, first, liquidated and, secondly, payable immediately as distinct from payable at a later date. Indeed, I have drawn attention to the form of statutory demand where the heading includes the words "debt for a liquidated sum payable immediately".

41. Having concluded that the judge below was essentially correct when she found that there was no agreement and no estoppel which turned the otherwise unliquidated sums claimed by the statutory demand into liquidated sums in the way contended for by the creditor, Morgan J held that the judge below was right to set aside the statutory demand and dismissed the appeal.

42. Mr Weaver sought to distinguish Wallace LLP v Yates on the ground that it concerned a debt which was not a liquidated debt. Whilst Wallace LLP v Yates undoubtedly concerned an unliquidated debt, however, it is clear from paragraph 23 of Morgan J's judgment that his ultimate focus was on the requirement of s.268(1) that the debt forming the basis of the statutory demand must be 'payable immediately'. In the context of s.268(1), an unliquidated debt is simply one example of a debt which is not 'payable immediately' and thereby falls short of the requirements of the subsection. For these reasons I do not accept that Wallace LLP v Yates is distinguishable on the basis contended for by Mr Weaver. That said, I accept that in Wallace LLP v Yates, Morgan J did not, in terms, address the issue of discretion.

43. On the exercise of the Court's discretionary powers to set aside a demand under r.10.5(5)(d), Mr Weaver relied upon the guidance given by Nicholls LJ in Re a Debtor (No 1 of 1987) [1989] 1 WLR 271 at 276:

> "… the circumstances which normally will be required before a Court can be satisfied that the demand "ought" to be set aside,

> are circumstances which would make it unjust for the statutory demand to give rise to those consequences in the particular case. The Court's intervention is called for to prevent that injustice."

44. Mr Weaver went on to submit that on present facts, there was no 'injustice' which needed to be cured by the setting aside of the Statutory Demand. He argued that the Applicant had already been served with an earlier statutory demand (albeit admittedly in a different, higher, sum) in June 2018, and so was on notice that he was being pursued under the Guarantee. Whilst there was no correspondence in evidence regarding the circumstances surrounding, or terms of, the withdrawal of the June 2018 statutory demand, there was in evidence correspondence between the parties, (albeit, save for one email dated 1 July 2018, limited to a period *prior to* service of the June 2018 demand), regarding the debt and timetabling for repayment of the same. The Applicant, Mr Weaver argued, had been fully aware for some time that sums were owed by his companies and that he was personally liable for those sums under the Guarantee. It could not be said, he argued, that service of a prior written demand under the Guarantee would have made any difference. It was, he submitted, a 'technicality'. Setting aside the Statutory Demand, he argued, would simply be wasting time. The Applicant, he submitted, had suffered no prejudice and there was no 'injustice' to be cured.

45. The issue of 'injustice' must, however, be considered in context. Unless a statutory presumption of insolvency is established in accordance with sections 267 and 268 IA 1986, ordinarily, subject to rare exceptions such as s270 not material for present purposes, a creditor will not be entitled to present a bankruptcy petition. Any residual discretion conferred upon the Court under r.10.5(5)(d) IR 2016 must be considered and exercised in a manner consistent with the requirements of primary legislation.

46. Whilst not a case cited to me in submissions, I note that in White v Davenport Trust Ltd [2011] BPIR 1187, Lloyd LJ (Elias and Maurice Kay LJJ concurring) reflected similarly upon the 'injustice' threshold espoused by Nicholls LJ in the case of In re a Debtor (No 1 of 1987). Having (at paragraph 12 of his judgment) quoted a passage from Nicholls LJ's judgement in In re a Debtor at page 276B-D, Lloyd LJ (at para 41) reasoned thus (with emphasis added):

> "In the passage quoted at [para 12] above, Nicholls LJ mentioned r.6.5(4)(c) [now r.10.5(5)(c) IR 2016] as being an example of it being *unjust* for a creditor to be able to proceed by way of bankruptcy against a debtor over whose assets the creditor is fully secured. It seems to me that the point can be put in a different way. Since the fully secured creditor is not entitled to present a bankruptcy petition against a debtor over whose assets he has his full security, it is not merely because of *injustice* that he should not be able to serve a statutory demand, but because there is *no justification at all for allowing such a creditor to take a preliminary step towards insolvency proceedings which the creditor would not be allowed to invoke*. *If it is to be seen as an example of injustice, the creditor's lack of any right to present a bankruptcy petition if the statutory demand is not complied with is what makes it unjust*."

47. It seems to me that similar considerations apply in the present case. The Respondent has not established the statutory presumption of insolvency required by sections 267 and 268 IA 1986 as a precondition of presentation of a bankruptcy petition. The Respondent chose to serve a statutory demand upon the Applicant under s.268(1)(a) IA 1986 as its gateway through to presentation of a petition, but the requirement of s.268(1), couched, I note, in '*if but only if*' terms, that the debt forming the subject of the statutory demand should be '*payable immediately*', was not met. Even by the date of the hearing, the Respondent had not served formal demand under the Guarantee or filed evidence stating whether and if so when it proposed to do so, meaning that, as at the date of the hearing, it fell foul, not only of s.267(2)(c)/s.268, but also s.267(2)(b) IA 1986. To echo the words of Lloyd LJ in White v Davenport Trust Ltd: "*If it is to be seen as an example of injustice, the creditor's lack of any right to present a bankruptcy petition if the statutory demand is not complied with is what makes it unjust*."

48. To the extent necessary for the purposes of this judgment, therefore, I respectfully decline to adopt the obiter approach indicated by David Richards J in TS & S Global Limited.

49. Any residual discretion conferred upon the Court under r.10.5(5)(d) IR 2016 must be considered and exercised in a manner consistent with primary legislation. The Respondent's failings in this case were failings of substance and not simply of form. The Court should be slow to exercise its discretion against the setting aside of a statutory demand under r.10.5(5)(d) IR 1986 when essential pre-requisites of ss 267 and 268 have not been met. Whilst Morgan J did not expressly address the question of discretion in Wallace LLP v Yates, the outcome of the appeal in Wallace is in my judgment consistent with this approach.

50. In reaching these conclusions I am also fortified by the reasoning of Lloyd LJ in White v Davenport Trust Ltd at paragraph 41 of his judgment.

51. I would add that I was taken to no evidence (a) to suggest that any other creditors of the Applicant were pressing for bankruptcy proceedings to be brought against him; (b) to explain why, notwithstanding the specific notice requirements laid down in clauses 1.1 and 9 of the Guarantee, the Respondent had thought fit simply to serve the Statutory Demand without first giving formal notice under the Guarantee, a document which its own lawyers had drafted; or (c) to explain why, even by the time of the hearing, some 8 months after being put on express notice of its error, the Respondent had still failed to serve formal notice under the Guarantee.

52. For all of these reasons, I shall set aside the Statutory Demand.

53. I shall hear submissions on costs and any other applications on the handing down of this judgment.

ICC Judge Barber

29 July 2019