

## More haste less speed. How failing to make an initial demand under a personal guarantee could render a later statutory demand as defective



The process and delay in enforcing a Personal Guarantee (“PGs”) can be frustrating. However, as the decision in *Martin v McLaren Construction Ltd* [2019] EWHC 2059 (Ch) goes to show, it is vital to get the preliminary steps right, by ensuring you issue a written demand to the guarantor for payment under the PG. If you miss this initial step, a later statutory demand to recover payment from a guarantor could be defective and be set-aside by the Court with an order to pay the guarantor’s costs.

In *Martin v McLaren Construction Ltd* [2019], the Guarantor (Mr Martin) had given a PG to the creditor McLaren. The terms of this Guarantee were standard. The Guarantor secured the payment obligations of his companies and agreed to, **upon written demand**, pay as principal obligor, the companies’ financial obligations to the creditor. The provisions governing service of any written demand were included in the Guarantee.

The creditor had previously served the Guarantor with a statutory demand and incorrectly believed that this triggered the liabilities under the Guarantee. The Creditor should have made demand in accordance with the form prescribed in the Guarantee. However, the Creditor moved straight to issuing a new statutory demand under **Section 268(1)(a) of the Insolvency Act 1986** (“IA86”).

Why was this wrong? It is a long-established legal principle that no monies are due from a Guarantor, until such time as the obligations have been triggered by a creditor making written demand for payment. If there is no demand, there is no debt which is immediately payable. Thus, the basis for issuing a Statutory Demand pursuant to Section 268(1)(a) IA86; that the debtor appears to be unable to pay a debt which is payable immediately, will



not have been met.

As the Creditor had failed to make a written demand in accordance with the terms of the Guarantee, there was no liquidated debt immediately payable at the point when they issued their later Statutory Demand pursuant to S268(1)(a) IA86. Consequently, the Guarantor was successful in his application to have that Statutory Demand set-aside.

The salutary lesson from *Martin v McLaren Construction Ltd* is to be sure to send an initial written demand, that is fully compliant with any notice provisions and service methods set out in the PG, before considering issuing a statutory demand.

If you are experiencing difficulties with enforcing personal guarantees and are considering issuing a statutory demand, please contact our [commercial disputes team](#).



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