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Applications to set aside a statutory demand

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UK BAR AWARDS 2022

Statutory Demands

- Requirement for statutory demand – IA 1986 s.268(1)(a)
 - D will be found to be unable to pay debts where demand has been served and not complied with/application made to set aside within 21 days (unless served outside of the jurisdiction – IR 2016 r.10.1(10))
- Contents of a statutory demand – set out IR 2016 r. 10.1
- Service requirements for statutory demands – IR 2016 r.10.2 – must serve the demand personally “*if practicable in the particular circumstances*”

Set Aside Applications - procedure

- IR 2016 – r.10.4 – sets out the requirements
 - Must be made within 18 days of service (r.10.4(2)) (unless served outside of the jurisdiction – IR 2016 r.10.1(10))
 - Must include the information at r.10.4(3))
 - Time for compliance with demand ceases to run on date application is made (r.10.4(5))
 - Application must be supported by a witness statement, setting out information at r.10.4(6)
- No bankruptcy petition can be presented where application to set aside SD is outstanding (IA 1986 s.267(2)(d))
- Practice Direction: Insolvency Proceedings – paragraphs 11.4.2 – debtor can apply after the 18 days deadline for an extension of time to apply

Extensions of time

- PDIP – para 11.4.2
 - Where seeking an extension of time WS in support should address reasons why extension sought
 - Confirm D's belief that no bankruptcy petition has been presented
 - Also include information at IR 2016 r.10.4(6) in support of the application to set aside
- Various factors at play in such an application – some set out in *Rankin v Dissington Lending Co Ltd* [2021] EWHC 172 (Ch)
 - Purpose of the time limit – providing certainty
 - Underlying merits of the set aside application
 - Reason for the extension being needed
 - Prejudice that may be caused to D if no extension granted
 - Prejudice that may be caused to C if extension is granted



Set Aside Applications - Hearings

- IR 2016 r.10.5 – sets out provisions for the hearing
 - Court may dismiss application without a hearing “*if satisfied that no sufficient cause is shown for it*” (IR 2016 r.10.5(1))
 - Application dismissed – time for compliance runs again (IR 2016 r.10.5(2))
 - Court will give 5 days’ notice of hearing to D and C (IR 2016 r.10.5(3))
 - On first hearing – court may decide application, or adjourn with further directions (IR 2016 r.10.5(4))

Grounds for Set Aside

- IR 2016 r.10.5(5) – sets out four grounds on which the court may grant SA application:
 - *“D appears to have counterclaim, set-off or cross demand which equals or exceeds the amount of the debt specified in the statutory demand”* (a);
 - *“the debt is disputed on grounds which appear to the court to be substantial”* (b);
 - it appears that C holds security that would satisfy the debt (c); and
 - *“the court is satisfied, on other grounds, that the demand ought to be set aside”*



10.5(5)(a) – counterclaim, set-off or cross demand

- Relatively straightforward concept – two points to note
 - Provision is only engaged where the value of potential counterclaim equals or exceeds the debt in the SD – court therefore should not set aside SD if cross-claim is less than the undisputed element of the SD debt, even if the difference between the two is less than the bankruptcy level (per Nugee J in *Howell v Lerwick Commercial Mortgage Corp Ltd* [2015] EWHC 1177 (Ch)); and
 - Previously had been suggested that a counterclaim or cross-demand would have to have “*mutuality*” with the debt in the SD – the extent of this link has now been clarified (*King v Bar Mutual Indemnity Fund* [2023] EWHC 1408 (Ch))

10.5(5)(b) – debt genuinely disputed on substantial grounds

- Well established threshold – “*genuine triable issue*”
 - Per e.g. *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329 – this is the same threshold as applies to applications for summary judgment under CPR Part 24
- Approach to evidence
 - Court should not conduct a mini-trial – BUT not bound to accept any assertion that is made – can reject evidence if it is inherently implausible or contradicted by contemporary documentation
 - Dispute must give rise to a defence to the debt claimed – simple fact of there being a dispute on the evidence does not necessarily mean it must go to trial (*Macpherson v Wise* [2011] BPIR 472)

10.5(5)(c) – C holds security for the debt

- Where C holds security – must provide the information required by IR 2016 r.10.1(9)
- Court may set aside if
 - C fails to provide the required information in respect of any security held; or
 - Court is satisfied that the value of the security equals or exceeds the full amount of the debt – valuation evidence in respect of the security will need to be filed
- C has an alternative means of enforcing the debt – ought not therefore rely on the insolvency mechanisms

10.5(5)(d) –satisfied on other grounds

- Not a freestanding mechanism – must be read in the context of the other grounds
- Broad provision – general principle is “*whether there are circumstances which would make it unjust for the statutory demand to give rise to insolvency consequences in the particular case*” (*Chan Sui v Appasamy* [2005] EWHC 3519 (Ch))
- Examples where provision may be applicable:
 - SD is considered an abuse of process
 - Improper purpose – C does not really want to pursue a BO, or where BO will be disadvantage of creditors (*Maud v Aabar Block Sarl and Edgeworth Capital (Luxembourg) Sarl* [2015] EWHC 1626 (Ch), at [29])

Practical Points

- Not just provisions of the IR 2016 to consider – PDIP has various relevant requirements for applications to set aside a SD
- If an application to set aside a SD is unsuccessful, the order dismissing will include a provision allowing C to issue a bankruptcy petition
- Different threshold applies in setting aside a SD as to making a BO
- When making an application – advisable to provide as much detail as possible

