Neutral Citation No: [2021] NICh 11	*Ref:*	**HUM11571**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**02/07/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION
(BANKRUPTCY)

_____

Between:

MICHAEL MAY

Applicant/Respondent

and

ULSTER BANK LIMITED

Respondent/Appellant

_____

William Gowdy QC and Robert McCausland (instructed by Napiers) for the Applicant/Respondent
David Dunlop QC and Keith Gibson (instructed by A&L Goodbody) for the Respondent/Appellant

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HUMPHREYS J

Introduction

[1] This is an appeal from an Order of Master Kelly dated 10 February 2021 whereby she set aside a statutory demand served by the appellant on 27 March 2019 pursuant to Rule 6.005(4) of the Insolvency Rules (Northern Ireland) 1991 ('the Rules').

[2] The appeal was conducted on a paperless basis, as part of the e-bundles pilot, which proved to be an efficient and effective way in which to hear a dispute of this nature. The court is very grateful to the Counsel and solicitors for each party for the preparation of the e-bundle and for the clarity and quality of the legal submissions.

Background

[3] The statutory demand was served under Article 242(1)(a) of the Insolvency (NI) Order 1989 ('the 1989 Order'). By it, the appellant claimed that the respondent owed the liquidated sum of £236,538.95 and demanded that it be paid or otherwise secured or compounded for.

[4] The particulars of the debt as set out in the statutory demand were as follows:

> *"3. The Debtor is liable to the Creditor on foot of loan facilities (the* ***"Facilities")*** *made available to, inter alia, the Debtor by the Creditor pursuant to a facility letter dated 10 January 2011 (as may have been amended from time to time) (the* ***"Facility Letter").***
>
> *4. As of 20 March 2019, the Debtor is indebted to the Creditor in the sum of* ***£236,538.95 (Two Hundred and Thirty Six Thousand, Five Hundred and Thirty Eight Pounds and Ninety Five Pence Sterling).***
>
> *5. By a letter of demand dated 24 January 2019, the Creditor formally demanded the sums of £234,866.93 (Two Hundred and Thirty Four Thousand, Eight Hundred and Sixty Six Pounds and Ninety Three Pence Sterling) from the Debtor, which were the sums then due and owing by the Debtor to the Creditor pursuant to the Facilities.*
>
> ***Amount Due and Owing***
>
> *6. As at the date of this Statutory Demand, the total unsecured amount due and owing by the Debtor to the Creditor pursuant to the Facilities is* ***£236,538.95 (Two Hundred and Thirty Six Thousand, Five Hundred and Thirty Eight Pounds and Ninety Five Pence Sterling).***
>
> ***Total amount due and owing is: £236,538.95 (Two Hundred and Thirty Six Thousand, Five Hundred and Thirty Eight Pounds and Ninety Five Pence Sterling."***

[5] On 21 January 2020 the respondent issued an application to set aside the statutory demand, well outside the 18 day period for such applications as prescribed by Rule 6.004(2) of the Rules. The Master exercised her discretion to extend the time for the making of the application by order dated 24 February 2020.

[6] The respondent filed an affidavit, on 21 January 2020, in purported compliance with the obligation under Rule 6.004(4)(b), setting out the grounds upon which he sought to have the statutory demand set aside. As a result of the

deficiencies which were evident in that affidavit, the Master ordered a further affidavit to be served by 23 March 2020.

[7] In the event, the respondent did not serve a further affidavit until 15 September 2020. He deposed:

> *"My primary and principle* [sic] *contention is that the debt asserted by the Respondent in the statutory demand is statute barred."*

[8] The case advanced in the affidavit was that the debt which was the subject matter of the statutory demand became statute barred on 7 December 2019.

[9] The Master gave a written judgment, dated 12 March 2021, in which she found:

(i) There was a triable issue on the question of limitation;

(ii) The appellant failed to comply with the requirements of the 1989 Order and the Rules and the statutory demand was therefore a nullity;

(iii) The appellant ought not to have relied upon the evidence of its solicitor;

(iv) The service of the statutory demand was an abuse of process.

The Nature of the Appeal

[10] An appeal to this court from an order of the Master is by way of re-hearing *de novo* although the court will, of course, give due regard to the particular expertise of the Master in line with the Court of Appeal decision in *H v H* [2015] NICA 77.

The Statutory Provisions

[11] Article 241 of the 1989 Order provides:

> *"(1) A creditor's petition must be in respect of one or more debts owed by the debtor, and the petitioning creditor or each of the petitioning creditors must be a person to whom the debt or (as the case may be) at least one of the debts is owed.*
>
> *(2) Subject to Articles 242 to 244, a creditor's petition may be presented to the High Court in respect of a debt or debts only if, at the time the petition is presented –*

(a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the bankruptcy level,

(b) the debt, or each of the debts, is for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain, future time, and is unsecured,

(c) the debt, or each of the debts, is a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay, and

(d) there is no outstanding application to set aside a statutory demand served (under Article 242) in respect of the debt or any of the debts."

[12] Article 241 therefore lays down a number of criteria which must be satisfied in relation to a creditor's petition:

(i) The debt in question must be equal to or exceed the 'bankruptcy level' (currently £5,000);

(ii) It must be for a liquidated sum;

(iii) The creditor must hold no security; and

(iv) The debtor must be unable to pay or have no reasonable prospect of paying the debt.

[13] The statutory demand procedure affords the creditor evidence of the 'inability to pay' criterion, as provided for in Article 242(1)(a) of the 1989 Order:

"(1) For the purposes of Article 241(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 written demand (known as "the statutory demand") in the prescribed form requiring him to pay the debt or to secure or compound for it to the satisfaction of the creditor, at least 3 weeks have elapsed since the demand was served and the demand has been neither complied with nor set aside in accordance with the rules"

[14] Rule 6.001 governs the form and content of a statutory demand:

"(1) A statutory demand under Article 242 must be dated, and be signed either by the creditor himself or by a person stating himself to be authorised to make the demand on the creditor's behalf;

(2) The statutory demand must specify whether it is made under Article 242(1) (debt payable immediately) or Article 242(2) (debt not so payable).

(3) The demand must state the amount of the debt, and the consideration for it (or, if there is no consideration, the way in which it arises) and –

(a) if made under Article 242(1) and founded on a judgment or order of a court, it must give details of the judgment or order, and

(b) if made under Article 242(2), it must state the grounds on which it is alleged that the debtor appears to have no reasonable prospect of paying the debt.

(4) If the amount claimed in the demand includes –

(a) any charge by way of interest not previously notified to the debtor as a liability of his, or

(b) any other charge accruing from time to time, the amount or rate of the charge must be separately identified, and the grounds on which payment of it is claimed must be stated.

(5) The amount claimed in respect of a charge mentioned in paragraph (4) must be limited to that which has accrued due at the date of the demand.

(6) If the creditor holds any security in respect of the debt, the full amount of the debt shall be specified, but –

(a) there shall in the demand be specified the nature of the security, and the value which the creditor puts upon it as at the date of the demand, and

(b) the amount of which payment is claimed by the demand shall be the full amount of the debt, less the amount specified as the value of the security."

[15] Rule 6.002 sets out the information which a creditor is obliged to give in the statutory demand:

> *"(1) The statutory demand must include an explanation to the debtor of the following matters –*
>
> *(a) the purpose of the demand, and the fact that, if the debtor does not comply with the demand, bankruptcy proceedings may be commenced against him;*
>
> *(b) the time within which the demand must be complied with, if that consequence is to be avoided;*
>
> *(c) the methods of compliance which are open to the debtor; and*
>
> *(d) his right to apply to the court for the statutory demand to be set aside.*
>
> *(2) The demand must specify one or more named individuals with whom the debtor may, if he wishes, enter into communication with a view to securing or compounding for the debt to the satisfaction of the creditor or (as the case may be) establishing to the creditor's satisfaction that there is a reasonable prospect that the debt will be paid when it falls due."*

[16] It is apparent therefore that the statutory demand procedure is intended to be a speedy but fair process, which may lead to the presentation of a bankruptcy petition, but which places certain requirements on a creditor. These provisions were the subject of scrutiny by Girvan J in *Re Moore* [2002] NI 26, at 31:

> *"To deprive an alleged debtor of an opportunity to litigate his dispute a fair statutory demand procedure requires that the creditor spells out clearly and accurately what his debt is, establishes that the debt is due and gives the debtor a full opportunity to show cause why in the interests of fairness and practice he should have the opportunity to defend the claim by litigation."*

[17] Applications to set aside statutory demands are the subject of Rule 6.004:

> *"(1) The debtor may, within the period allowed by this Rule, apply to the court for an order setting the statutory demand aside;*
>
> *(2) The period mentioned in paragraph (1) is 18 days from the date of the service on him of the statutory demand…*

(3) The debtor's application shall be supported by an affidavit –

(a) specifying the date on which the statutory demand came into his hands, and

(b) stating the grounds on which he claims that it should be set aside."

[17] The court's powers to set aside a statutory demand are found in Rule 6.005:

"(1) On receipt of an application under Rule 6.004, the court may, if satisfied that no sufficient cause is shown for it, dismiss it without giving notice to the creditor.

(4) The court may grant the application if -

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

(b) the debt is disputed on grounds which appear to the court to be substantial; or

(c) it appears that the creditor holds some security in respect of the debt claimed by the demand, and either Rule 6.001(6) is not complied with in respect of it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or

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

[18] In *Re Moore*, Girvan J assimilated the test for setting aside a statutory demand to that which pertains in the case of summary judgment:

"In summary judgment applications to the plaintiff must show that the defendant has no arguable case. In an application to set aside regularly obtained judgments the test appears to be whether the defendant in the interests of justice should be permitted to defend the action. In either set of proceedings it is clear that if a defendant has in reality no defence to the plaintiff's claim allowing the defendant to defend would be unjust to the plaintiff. Refusing leave to defend would not be unjust to the defendant since it would merely delay the enforcement of the plaintiff's indisputable right and send to

> *trial an indefensible case. Although at first sight the wording of r 6.005 and some decided cases may suggest that a debtor served with a statutory demand bears a heavier burden than is borne by a defendant in summary judgment applications or applications to set aside judgment and that an onus of proof is thrown on him, in reality the test applicable should be no different. This is particularly so in the light of art 6 and in the light of the severe consequences flowing from a decision not to set aside a statutory demand."* (at 31)

The Evidence

[19] The affidavit filed by the respondent in support of the application to set aside the statutory demand was manifestly non-compliant with the rules in that it failed to state any grounds upon which the court should set it aside. The Master could have invoked the power under Rule 6.005(1) to dismiss the application but instead afforded the respondent an opportunity to file further evidence.

[20] In his affidavit of 15 September 2020, the respondent deposes to the underlying facts behind the debt. He exhibits a facility letter of 10 January 2011 by virtue of which the appellant offered, and the respondent accepted, three demand loans as follows:

(i) Facility A - £135,016;
(ii) Facility B - £181,782; and
(iii) Facility C - £175,858.

[21] Facilities A and B were to be repaid by 1 April 2011 and Facility C by 2 April 2011, if not already demanded by that time.

[22] The respondent's own evidence is that the facilities were not repaid by those dates and that there was a breach of the terms of the facility letter. On 17 November 2011 the appellant demanded repayment of the sum of £498,969.37 and, on the respondent's case, "*crystallised the obligation to make repayment of the loan.*" The respondent admits that he did not pay the debt.

[23] The facilities were secured by way of charges held by the appellant over four properties owned by the respondent. He avers that on 18 April 2013 the appellant appointed Fixed Charge Receivers over each of the properties and that these were sold on dates between 18 October and 6 December 2013.

[24] At paragraph 25 of his affidavit the respondent states:

> *"As the properties were sold by the Fixed-Charge Receivers, I have limited knowledge of how they were sold, the price obtained or the precise circumstances of the sales. I require that*

> *the Respondent provide a full breakdown of the sale proceeds and how they were applied. In the absence of such documentation I simply cannot understand how the figures claimed for and asserted by the Respondent are calculated. Before this matter can proceed to hearing I must be told of these essential facts used to ground the debt asserted by the Respondent."*

[25] The appellant replied by way of affidavit sworn on 26 October 2020, the deponent of which was Ms Hughes of A&L Goodbody, the solicitors instructed on behalf of the appellant. She exhibited the relevant Land Certificates and deeds of charge in relation to the appellant's security over 3 of the 4 properties and the Memorial to the Registrar of Deeds in respect of the 4th property where title was unregistered.

[26] In respect of the respondent's averment that he could not understand how the figures were calculated, she stated:

> *"The Applicant would, in the normal course of events, receive bank statements setting out the state of each of the loan accounts"*

The Issues

[27] From the various arguments put forward by the parties, four issues can be distilled:

(i) The compliance of the statutory demand with the statutory requirements ('the compliance issue');

(ii) Whether the debt the subject matter of the statutory demand was statute barred ('the limitation issue');

(iii) Whether the appellant was guilty of abuse of process ('the abuse of process issue');

(iv) Whether the appellant was the correct legal entity to pursue the debt ('the true creditor issue').

The Compliance Issue

[28] The requirements of Article 242 of the 1989 Order and Rule 6.001 of the Rules are mandatory in nature. A creditor must state in a statutory demand the amount of the debt and the consideration for it or, if there is no consideration, the 'way in which it arises'.

[29] The statutory demand in the instant case refers to loan facilities on foot of the facility letter dated 10 January 2011 and demands payment of the sum of £236,538.95. No breakdown is given of this sum and, in particular, there is no attempt to distinguish between the principal sum owing and that which is due in respect of interest.

[30] The respondent's case is that there has been a failure on the part of the appellant to comply with the obligation described by Girvan J in *Re Moore* to spell out clearly and accurately what the debt is, and to give the debtor full opportunity to show cause as to why he should have the opportunity to defend the claim by litigation.

[31] The appellant's reply to this is that the respondent's own evidence reveals he was aware that he had not repaid the facilities and that a substantial sum was due and owing to the bank. An analogy is drawn with the factual circumstances of *Re Moore* where the demand was originally for a sum of over £194,000. The debtor raised issues regarding interest and overcharging and ultimately an agreement was reached to pay an undisputed sum of some £44,000. The appellant therefore says that the court has a discretion to set aside a statutory demand but should not do so where there is clearly a sum owing well in excess of the bankruptcy level.

[32] I do not find the appellant's arguments on this issue attractive. The *Moore* requirement to set out a debt clearly and accurately must entail, in a case such as this, some breakdown of how it is said the sum due and owing has come about. This should include the total principal sums, the amounts realised through the sale of property and a calculation of the interest claimed. Only then could the respondent have been in a position to understand the debt and make representations as to why he should be entitled to defend the claim.

[33] The position may be different if the evidence revealed that the debtor has suffered no prejudice as a result of some defect in the demand. If, for instance, the evidence established that the debtor had received a full breakdown of the sums claimed to be owing by some other means, such as bank statements, then this evidence could counter any claim of inability to understand the debt – see the judgment of Nicholls LJ in *Re A Debtor (no. 1 of 1987)* [1989] 1 WLR 271. However, there was no such evidence in the instant case.

[34] I am fortified in this conclusion by the specific requirements of Rule 6.001(4) in relation to interest. There was no evidence before the Court that the respondent was previously notified of the interest claim and calculation and therefore there was a failure on the part of the appellant to comply with this mandatory obligation.

[35] This finding is also consonant with the information requirements of Rule 6.002 which focus on the ability of the debtor to understand the consequences of the demand and communicate with the creditor. If the particulars required by Rule 6.001 have not been provided, this exercise of engagement becomes more difficult.

[36] I have therefore determined, on this ground, that the statutory demand should be set aside under Rule 6.005(4)(d).

[37] This is sufficient to dispose of the appeal but the other points raised in the hearing were fully argued and it may be of benefit to practitioners if I give judgment on those also.

The Limitation Issue

[38] Article 15 of the Limitation (NI) Order 1989 provides:

> *"The following actions may not be brought after the expiration of twelve years from the date on which the cause of action accrued –*
>
> *(a) an action upon an instrument under seal other than an action upon an instrument under seal to recover –*
>
> *(ii) any principal sum of money secured by a mortgage or other charge."*

[39] Article 36:

> *"No action may be brought to recover any principal sum of money secured by a mortgage or charge on land or personal property after the expiration of twelve years from the date when the right to receive the money accrued."*

[40] Article 37:

> *"No action may be brought to recover arrears of interest payable in respect of any principal sum of money secured by a mortgage or charge on land or personal property to recover damages in respect of such arrears after the expiration of six years from the date on which the interest became due."*

[41] In *Bristol & West plc v Bartlett* [2002] 4 All ER 544 the Court of Appeal, in considering the equivalent statutory provisions in England & Wales held that the general provision yielded to the specific and that the relevant time limits were 12 years from principal and 6 years for interest. Furthermore, per Longmore LJ:

> *"Claims for a mortgage debt will be governed by s 20 of the 1980 Act even if the mortgagee has exercised his power of sale before he issues proceedings. That means that he has twelve years from the accrual of the cause of action to sue for the principal of the debt but only six years to sue for interest."*

[42] In *West Bromwich BS v Wilkinson* [2005] 4 All ER 97, the House of Lords affirmed the reasoning in *Bartlett*. The question also arose as to the meaning of the

words *"when the right to receive the moneys accrued."* This turned on the construction of the relevant provisions of the mortgage deed in question. In that case, the deed provided that the mortgagee's power of sale became exercisable in the event of default but it did not say that the whole advance would become repayable in such circumstances. The Law Lords were prepared to read the clause in question as giving rise to a right to seek payment of the money once default occurred. The analysis of Mummery LJ in the Court of Appeal was approved:

> *"plain from the terms of the legal charge and the surrounding circumstances that a covenant to repay the balance of the advance is to be implied into the legal charge, along with a term that the [mortgagee Society] would not enforce its rights and remedies against the Wilkinsons in respect of the balance of the advance so long as they paid the agreed instalments, but, if they defaulted in the payment of instalments, then the whole of the balance of the advance would become immediately repayable …"*

[43] It was also argued in that case that the right to receive the moneys arose even before any cause of action accrued. Lord Hoffmann commented at paragraph [21]:

> *"Clause 5(d)(i) gave the lender the right to demand payment at any time after one month from the date of the mortgage and the moneys were therefore receivable as from that date, even if a demand was necessary to complete the cause of action (see Hornsey Local Board v Monarch Investment Building Society (1889) 24 QBD 1, [1886–90] All ER Rep 992). I do not find it necessary to decide this question. It is sufficient to say that the moneys had certainly become receivable when the event of default occurred*."

[44] Each of the charges over registered land in this case were in identical terms and were variously executed in December 2006, January 2007 and March 2007. Each of the deeds provided, at clause 1 that the mortgagor covenanted to discharge on demand the mortgagor's obligations, defined as all the mortgagor's liabilities to the bank. Clause 4.2 provided:

> *"Section 20 of the Conveyancing Act 1881 shall not apply and the Bank may exercise its power of sale and other powers under that or any other Act or this deed at any time after the date of this deed"*

[45] Counsel for the respondent argued that this clause was to be interpreted as giving the bank the right to receive the moneys secured by way of the charge at any time after execution of the deed and therefore the 12 year period prescribed by article 36 began to run from that date. In *Hornsey Local Board v Monarch Building*

Society (1889) 24 QBD 1, time began to run as soon as a charge came into existence under the provisions of a local government statute.

[46] In this case, the terms of the bargain between the appellant and the respondent are set out in the deeds of charge and the facility letter. It is clear from these that the loans were 'due for repayment' on 1 and 2 April 2011. On these dates, the respondent became liable to repay the monies and the appellant was entitled to receive them, even if a demand was necessary to crystallise the cause of action. On any analysis, the January 2011 created new legal relations between the appellant and the respondent, albeit ones which relied on pre-existing security. It simply could not be the case that time began to run prior to the new facilities being agreed.

[47] Clause 4.2 has to be read in conjunction with ss. 19 & 20 of the Conveyancing Act 1881. Section 19 creates a statutory power of sale for a mortgagee by deed. Section 20 places certain restrictions on the exercise of that power which are disapplied by clause 4.2. Importantly, however, the power of sale which the mortagee could exercise under the deed was the statutory power. Section 19 states that the statutory power of sale is only exercisable "*when the mortgage money has become due*" (s. 19(1)(i)).

[48] Accordingly, the power of sale only arises when the money has become due which did not occur until 1 & 2 April 2011. The limitation period for an action to recover the principal sums advanced therefore expires in April 2023.

[49] The position in relation to any claim in respect of interest is less clear since the relevant time limit under article 37 is 6 years from the date the interest became due. This only serves to emphasise the issue created by the lack of particularity in the sum stated to be owing in the statutory demand. It is not possible to ascertain which part of the claim is in respect of interest and when any such amount fell due.

[50] There is no arguable case that the claim in respect of the principal sum is statute barred. It may be that some part of the claim for interest is statute barred.

The Abuse of Process Issue

[51] The Master found that in the circumstances of this case, the service of the statutory demand was an *"act of aggressive debt collection"* and was therefore an abuse of the process.

[52] There was no evidence before the Master or this court on appeal to justify this finding. On the respondent's own evidence, he borrowed a substantial amount of money from the appellant and failed to pay it back when it fell due in 2011. The respondent was also aware that there was a sale of the secured properties in 2013. His complaints were that the debt was now statute barred and he could not understand how the figures claimed were calculated. There was no evidential basis to categorise the conduct of the appellant as an abuse of process. If, for instance, the

respondent had set out some basis for a genuine dispute as to the liability to meet the debt, and the appellant had served a statutory demand regardless, then this could be an abuse – see *Re Lagan Holdings* [2019] NICh. 10. No such case was made by the respondent in advance of the service of the statutory demand. In fact, no case was made at all by him in his first affidavit grounding the application to set aside.

[53] I therefore find that the appellant was entitled to serve the statutory demand and by seeking to invoke the statutory procedure it was not guilty of any abuse of process.

[54] Both before the Master and in this court, criticism was levelled at the fact the appellant's evidence emanated from its solicitor rather than a duly authorised officer of the bank. Such criticism was misplaced in this case. Whilst it is always best practice for the deponent of an affidavit to be the person with the most direct knowledge of the facts asserted, in this case the solicitor was only giving evidence of the relevant charge documentation and land certificates. There is nothing objectionable about a solicitor deposing to such an affidavit particularly in a case where the sole issue raised by the debtor was the question of limitation. The particular concerns expressed by McCloskey LJ at paragraph [59] of *Herron v Bank of Scotland* [2018] NICA 11 do not arise in this case.

The True Creditor Issue

[55] Counsel for the respondent argued, somewhat tentatively, that there had been "*some form of dealing*" by the appellant with the loans which were the subject matter of the statutory demand. It was suggested that there had been some sort of portfolio sale and therefore the appellant may not have been the legal entity entitled to seek payment of the sums claimed.

[56] As Counsel readily admitted, there was no evidence whatsoever before the court on this issue. The affidavit evidence for both parties was to the effect that the creditor/debtor relationship was formed between the appellant and the respondent. I therefore reject the argument that the appellant was not the true creditor.

Conclusion

[57] For the reasons set out herein, I dismiss the appeal and affirm the Order of the Master, albeit on somewhat different grounds. I find that the failure to comply with the statutory requirements entitles the respondent to set aside the statutory demand on "*other grounds*", as set out in Rule 6.005(4)(d).

[58] I will hear the parties on the question of costs.