Neutral Citation Number: [2024] EWHC 1520 (Ch)

Case No: BR-2023-000891

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Rolls Building
Royal Courts of Justice
7 Rolls Buildings
London EC4A 1NL

Date: 18 June 2024

Before:

INSOLVENCY AND COMPANIES COURT JUDGE GREENWOOD

- -

IN THE MATTER OF CONRAD CLAUSON
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between:

CONRAD CLAUSON **Applicant**

- and -

KNOWLES CONSTRUCTION LIMITED **Respondent**

- -

Mr Simon Mills (instructed by **Mishcon de Reya LLP**) for the **Applicant**
Mr Robert Amey (instructed by **Butcher Andrews LLP**) for the **Respondent**

Hearing date 23 April 2024:

- -

This judgment was handed down remotely at 10.30am on 18 June 2024 by circulation to the parties or their representatives by e-mail.

JUDGMENT

ICC JUDGE GREENWOOD:

Introduction and Background

1. This is an application made by Mr Conrad Clauson ("**Mr Clauson**") by notice dated 30 October 2023 to set aside under rule 10.5 of the Insolvency Rules (England and Wales)

2016 ("**the IR 2016**") a statutory demand for payment of £3,335,962.99, dated 5 October 2023, and made by the Respondent, Knowles Construction Limited ("**Knowles**").

2. Knowles is a construction company specialising in ultra-prime residential property. On 28 January 2019, it entered into a JCT Standard Building Contract ("**the Original JCT Contract**") with a BVI registered company called Yarborough Management Limited ("**Yarborough**") under which Knowles agreed to carry out certain works at a property owned by Yarborough, at 55 Avenue Road, London.

3. In the course of that work, certain disputes arose, including as to payment. The parties agreed a compromise, contained in:

   3.1. a contract in writing dated 3 November 2021, headed "Agreement and Personal Guarantee and Indemnity" and made by Mr Clauson and Knowles ("**the Guarantee**");

   3.2. a "**Deed of Variation and Settlement**" made by Yarborough and Knowles, also dated 3 November 2021; and,

   3.3. a JCT Prime Cost Building Contract (2016) ("**the Prime Cost Contract**") made by Knowles with Mr Clauson, and his wife, Mrs Camilla Clauson, and also dated 3 November 2021; the Prime Cost Contract concerned and governed the terms on which Knowles was to undertake further works at 55 Avenue Road.

4. It was pursuant to the Guarantee that Knowles demanded payment by Mr Clauson. Mr Clauson's case was that the sum demanded is disputed on substantial grounds and/or that he has a counterclaim, set-off or cross-demand, and/or that the demand should be set aside "*for want of proper service*".

5. The Guarantee contained various Recitals, first that Knowles was owed money by Yarborough under the Original JCT Contract, and then as follows:

"*(B) It has been agreed that the Original JCT Contact will be settled upon payment by Yarborough to Knowles of £830,000.00, subject to Mr Clauson pursuant to this Deed agreeing to be personally liable for the balance of monies due and payable to Knowles as set out in this deed, provided always that Mr Clauson's liability will be subject always to Knowles fulfilling its obligations pursuant to the Original JCT (as varied on or about the date hereof).*

(C) In addition Knowles has made third party payments on behalf of Mr Clauson outside of the Original JCT Contract and this deed sets out the terms upon which Mr Clauson undertakes to guarantee such payments (subject to the limitations set out in this deed).

*(D) Knowles and Mr Clauson (together with his wife Camilla Clauson) intend to enter into a new JCT Prime Cost contract (2016 edition) relating to additional third party payments over and above the Original JCT Contract ("**the New JCT Contract**").*"

6. The reference to the "*New JCT Contract*" was a reference to the Prime Cost Contract.

7. Broadly therefore, the shape of the agreement was that:

   7.1. in relation to the Original JCT Contract, Yarborough would pay a settlement sum of £830,000;

   7.2. Mr Clauson would be personally liable for the balance of any sum due to Knowles under the Original JCT Contract;

   7.3. Mr Clauson would reimburse Knowles certain sums which it had paid on his behalf, outside the terms of the Original JCT Contract; and,

   7.4. the Prime Cost Contract would be entered into by Mr and Mrs Clauson, governing the work prospectively.

8. Accordingly, the terms of the Guarantee provided as follows.

9. First, at Clause 2, under the heading "*Agreement in respect of the Original JCT Contract and sums due to Knowles*":

> "*2.1 Knowles agrees and acknowledges that upon Mr Clauson entering into this Deed and the settlement of the Original JCT Contract Knowles' right of recourse against Yarborough, in respect of the Original JCT Contract shall be limited to the sum of ... £830,000.00 ... And payment of this amount by Yarborough (or by Mr Clauson pursuant to clause 3 of this Deed) to Knowles shall be in full and final settlement of the liabilities of Yarborough to Knowles pursuant to the Original JCT Contract and settlement thereof.*
>
> *2.2 Mr Clauson separately and additionally covenants to pay to Knowles during the Payment Period the sum of ... £1,918,767.85 ... in respect of works undertaken or costs incurred by Knowles at the Property pursuant to the Original JCT Contract (as varied).*
>
> *2.3 Mr Clauson further separately and additionally covenants to pay to Knowles during the Payment Period the sum of ... £587,195.14 ... in respect of monies expended by Knowles pursuant to personal lending arrangements between Mr Clauson and Knowles*."

10. Clause 2.2 therefore fixed Mr Clauson's personal liability for the balance due to Knowles under the Original JCT Contract at £1,918,767.85; Clause 2.3 fixed Mr Clauson's personal liability to reimburse sums paid by Knowles on his behalf at £587,195.14; in each case, payment to be made during "*the Payment Period*". In the context of this application, the definition of the "*Payment Period*" is important, because Mr Clauson's case was that there was no evidence to show when it had either begun or ended. That definition was as follows:

> "***Payment Period****: means the period starting on the date of Practical Completion to the date falling on the earlier of:*
>
> > *(a) six months from that relevant date; and*
> >
> > *(b)* ... (a provision irrelevant to the application)."

11. The date of "*Practical Completion*" was also defined:

> "***Practical Completion****: means the date of the final Section Completion Certificate or the Practical Completion Certificate (as the case may be and as both defined under the Original JCT) has been issued under the Original JCT, or where the Practical Completion Certificate for the final Sectional Completion Certificate (as the case may be) is issued subject to minor defects or omissions, the date on which such minor defects or omissions are completed*."

12. Clause 3 of the Guarantee provided as follows, under the heading, "*Guarantee and Indemnity*".

> "*3.1 Subject to the guarantee limit in clause 3.2 and the Payment Period qualification set out in clause 3.3, Mr Clauson irrevocably and unconditionally guarantees to Knowles to pay on demand the Guaranteed Obligations.*
>
> *3.2 The maximum amount recoverable under this clause 3 in respect of the Guaranteed Obligations shall not exceed the principal sum of … £830,000. Any sum paid by Mr Clauson shall be applied against this maximum liability.*
>
> *3.3 Following a demand for payment of the Guaranteed Obligations being made pursuant to clause 3.1, Mr Clauson shall make a payment of the Guaranteed Obligations during the Payment Period.*
>
> *3.4 Notwithstanding any other provision of this Deed any amounts which may become payable by Knowles to Yarborough pursuant to the Original JCT (as varied) will reduce the liability of Mr Clauson pursuant to this Deed by an equivalent amount, unless set-off is prohibited pursuant to the Original JCT (as varied)*."

13. The "*Guaranteed Obligations*" were defined as:

"*… all monies, debts and liabilities of any nature from time to time due, owing or incurred by Yarborough to Knowles pursuant to the Original JCT Contract (as varied on or about the date of this Deed ...), now or in the future, whether alone or jointly with anyone else, subject always to the guarantee limits set out in clause 3 of this Deed*."

14. Essentially therefore, by clause 3.1-3.3, Mr Clauson guaranteed Yarborough's obligation to pay £830,000, on demand, during the Payment Period. In issue between the parties was whether, by virtue of clause 3.4, sums payable by Knowles to Yarborough were capable of reducing only Mr Clauson's secondary, guarantee obligation of Yarborough's obligation to pay (up to) £830,000, or of reducing both that obligation <u>and</u> his primary obligations to pay £1,918,767.85 and/or £587,195.14.

15. Finally, clause 7 of the Guarantee provided that Mr Clauson was liable to pay sums due under the Guarantee "*without any set-off, condition or counterclaim whatsoever*". That provision, which dealt with the position as between Mr Clauson and Knowles, was not inconsistent with clause 3.4, which as I shall explain, concerned the position as between Knowles and Yarborough, and the determination of the amount of Mr Clauson's liability, allowing him, in principle, to take the benefit of claims that Yarborough might have against Knowles.

16. The Deed of Variation and Settlement fixed the settlement sum due to Knowles at £830,000, and provided, amongst other things, for the variation of the Original JCT Contract including by the insertion of a new clause 4.2.7, as follows:

"*2. Notwithstanding any other provision of this Agreement the due date for payment of the Settlement Sum shall be the date falling 5 days after the date that the final Section Completion Certificate is issued. The final date for payment of the Settlement Sum shall be the earlier of:*

(a) the date falling 6 months after the date of the final Section Completion Certificate; or

(b) ... [this provision was irrelevant],

provided always that the Employer shall use its reasonable endeavours to make payment before such date.

3. Notwithstanding any other provision of the Contract, as from 1 July 2021 the Contractor shall under no circumstances be entitled to be paid any sums greater than the Settlement Sum regardless of whether the Contractor would have been entitled to its direct loss and/or expense as a result of a Relevant Matter or any other addition to the Contract Sum.

4. Provided always that:

.1 the final Section Completion Certificate or the Practical Completion Certificate (as the case may be) has been issued, or where the Practical Completion Certificate or the final Sectional Completion Certificate (as the case may be) is issued subject to minor defects or omissions, such minor defects or omissions are completed; and

.2 there are no defects shrinkages or other faults in the Works,

the Employer shall pay the Settlement Sum in full without any setoff, counterclaim, deduction or withholding (other than any deduction or withholding of any of the Agreed Amounts). The parties agree that any right of set-off under this Contract is independent of any right of set-off that the Employer may have against the Contractor in relation to any other contract entered into between the two of them including, without limitation, in respect of any other works carried out at the Property."

17. The sum claimed by the statutory demand (£3,335,962.99) comprised £830,000 under clause 3.1 of the Guarantee, £1,918,767.85 under clause 2.2 and £587,195.14 under clause 3.

18. On 15 December 2023, in addition to the threat of bankruptcy proceedings against Mr Clauson implicit in the statutory demand, Knowles began Part 7 proceedings against Yarborough in the TCC. By those proceedings, it claimed payment of the settlement sum, £830,000, under the Original JCT Contract as varied by the Deed of Variation and

Settlement. By its Defence and Counterclaim dated 26 February 2024, Yarborough, stated, amongst other things:

18.1. that there were "*defects, shrinkages or other faults*" in the works carried out by Knowles under the varied Original JCT Contract, such that under clause 4.2.7.4, either, payment of the settlement sum has not yet fallen due for payment or, if it has, Yarborough is entitled to set-off against the settlement sum any debt or damages to which it is entitled as a result of Knowles' alleged breaches;

18.2. that as a result of Knowles' failure to carry out certain works under the varied Original JCT Contract, Yarborough incurred recoverable costs of £379,779.50;

18.3. that as a result of defects in the works carried out by Knowles under a prior "*Shell & Core Contract*" made between the parties on 24 October 2017, also in respect of the property at 55 Avenue Road, Yarborough has suffered loss and damage in a sum estimated to be £320,000;

18.4. that as a result of defects in the works carried out under the Original JCT Contract, Yarborough has suffered further loss and damage estimated at £225,000 (the estimated cost of remedy), and "*anticipates*" the addition of a further claim (by amendment) to a sum "*in the region of £400,000*", being the sum required to rectify inadequate M&E systems installed at the property;

18.5. that in consequence of the defective works it has suffered further loss and damage estimated at £300,000 as part of the cost of rectification, £480,000 in lost rental receipts, and £400,000 for latent defects insurance;

18.6. on that basis, the total sum claimed by Yarborough (including the anticipated claim not yet made) is therefore £2,504,779.50 (or £2,104,779.50 excluding the anticipated claim) which is £831,183.49 less than the sum claimed by Knowles in the statutory demand, almost exactly the amount of the settlement sum, which Yarborough denies has fallen due.

19. In support of his application, Mr Clauson made two statements, dated 30 October 2023 and 4 March 2024; in opposition were the statements of Mr David Richards of Butcher

Andrews LLP (Knowles' solicitors), and of Mr Patrick Kilbane, Knowles' commercial director, both made on 15 January 2024.

20. In Mr Clauson's first statement, in brief summary, he said: (i) that the first he knew of the statutory demand was on receipt of an email from Knowles' solicitor on 12 October 2023, and although not therefore (or possibly not) "*validly served*" on him, he had decided in any event to apply under rule 10.4 of the IR in order to protect his position; and (ii) that on 27 September 2023, two "*pay less notices*" had been served on Knowles (in the total sum of £5,370,240.64) corresponding to the value of Yarborough's claims against Knowles "*in the light of* [Knowles'] *failure to carry out its obligations under the* [Original JCT Contract as varied] *in accordance with its terms*", such that the sums demanded by Knowles were disputed and/or subject to a counterclaim, set-off or cross demand.

21. Mr Clauson's application was also dated 30 October 2023. By that application he sought an order that:

> 1. *The Statutory Demand dated 5.10.23 (which was served on me by email at 17.17 on 12.10.23) ... be set aside pursuant to 10.4 of the Insolvency Rules 2016.*
>
> 2. *This application is made on the bases that (a) the alleged debt to which the Statutory Demand relates is disputed on substantial grounds, (b) I have a counterclaim, set off or cross demand which exceeds the value of the alleged debt, and all and/or (c) in the circumstances of the matters complained of, the Statutory Demand ought to be set aside in the interests of justice.*

22. In his second statement (by which time he had instructed different solicitors) Mr Clauson said, at paragraph 8:

> "*Before I turn to address the substance of the matter, I wish to clarify one point. In* [my first witness statement] *I stated that I had not paid the sum claimed in the Statutory Demand (£3,335,962.99) (the "Alleged Debt") for two reasons, namely: (a) because the Alleged Debt was disputed on substantial grounds; and (b) because I had a counterclaim, set-off or cross-claim against*

[Knowles]. *After the Application was filed, I instructed different solicitors. Without waiving privilege, I have been advised by my new solicitors that I do not have a direct counterclaim, set-off or cross-claim against* [Knowles]. *Rather, as I explain below, I have a contractual entitlement to set-off sums owed by* [Knowles] *to Yarborough against the Alleged Debt. To be clear, I am disputing the Statutory Demand on the basis that the Alleged Debt is disputed on grounds which are substantial*."

23. In brief summary, he then explained ("*the implications of this are twofold*") that because of defects in the works carried out by Knowles, the "*Guaranteed Amount*" (in other words, the settlement sum of £830,000) had not yet fallen due for payment by Yarborough (or therefore, by him) and in any event, that sums owed to Yarborough as a result, reduced that which could be claimed against him by Knowles under the Guarantee.

24. At paragraph 18, in respect of Yarborough's right to set-off against the settlement sum the sums claimed against Knowles he said,

> "*As noted above, Mr Richards states in his witness statement that there is no right of set-off under clause 3.4 of the Guarantee on the because Practical Completion has been certified and because there are no defects, shrinkages or other defects in the Works. As regards the second point, Mr Richards seems to suggest that the right to set-off is excluded because the contract administrator, Keith Meikle, sent an email on 10 January 2024 in which he stated that the "minor items" he had previously flagged as outstanding had been completed. There are three points to make in relation to this:*
>
> *(a) Firstly, paragraph 15 of Mr Kilbane's statement makes it clear that these "minor items" did not, in fact, relate to the Original JCT Contract. They related to the JCT Prime.*
>
> *(b) Secondly, Mr Meikle's email was only concerned with minor defects. I would stress that he does not state in his email that there were no defects; simply that the minor items previously identified in relation to the JCT Prime (not the Original JCT Contract) had been completed.*

(c) Even if Mr Meikle had confirmed that there were no minor defects in relation to the Original JCT Contract, this does not mean that there were no defects. Indeed, it is often the case that defects are not immediately apparent. As I explain below, Yarborough has in fact made a counterclaim against KCL in respect of various (major) defects in the Works. By its counterclaim, Yarborough currently seeks damages for breach of contract in the sum of c. £2.1m."

25. As to what he called the "*Additional Claims*" (to payment of £1,918,767.85 and £587,195.14, together equal to £2,505,962.99), at paragraphs 20-25, Mr Clauson said that his application was based on the effect of the counterclaim stated (and to some extent intimated) by Yarborough in the TCC, in the sum of £2,504,779.50. In conclusion, he said that the demand ought to be set aside because the settlement sum had not yet fallen due for payment, and the remainder was to be reduced by reference to Yarborough's claim, to a sum less than £5,000.

26. At the hearing, relief was said by Mr Mills to be justified under three separate heads ("*want of service*", substantial dispute and counterclaim, set-off or cross demand) albeit for reasons to some extent not explicitly stated as such in Mr Clauson's evidence.

Rule 10.5: the Legal Principles

27. Rule 10.5(5) of the IR 2016 provides:

"*The court may grant the application* [to 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 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 …*

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

28. Mr Clauson relied on grounds (a), (b) and (d). The law and principles were not in dispute; I will not rehearse them in unnecessary detail.

29. Under both (a) and (b), an essential question is whether there is a "*genuine triable issue*" (whether in respect of the creditor's claim or the alleged counterclaim) - an issue which needs to be decided at a trial rather than being capable of determination at the hearing as having no real prospect of success; the test equates to the summary judgment test in CPR 24.2(a) of whether there is a "*real prospect of succeeding on the claim/successfully defending the claim*"; there is no substantive difference between the two tests; accordingly, the court must not conduct a "*mini-trial*": Swain v Hillman [2001] 2 All E.R. 91, at [95].

30. Having said that, the court will "*be alive to the possibility that a debtor is seeking to raise a smokescreen*": Re Kerkar [2021] EWHC 3255 (Ch) at [21]. As Megarry V-C observed in Lady Anne Tennant v. Associated Newspapers Group Ltd [1979] FSR 298:

> "*A desire to investigate alleged obscurities and a hope that something will turn up on the investigation cannot, separately or together, amount to sufficient reason for refusing to enter judgment for the plaintiff. You do not get leave to defend by putting forward a case that is all surmise and Micawberism*."

31. As Neuberger J noted to similar effect in Re Richbell Strategic Holdings Ltd [1997] 2 B.C.L.C. 429:

> "*a judge, whether sitting in the Companies Court or elsewhere, should be astute to ensure that, however complicated and extensive the evidence might appear to be, the very extensiveness and complexity is not being invoked to mask the fact that there is, on proper analysis, no arguable defence to a claim, whether on the facts or the law*."

32. Where the debt demanded in a statutory demand has been overstated, that fact alone will not be a ground for setting aside (Re a Debtor [1992] 1 W.L.R. 507) and that is so even if the undisputed portion of the debt would be below the bankruptcy limit (Howell v Lerwick Commercial Mortgage Corpn Ltd [2015] 1 W.L.R. 3554).

33. As to (d) - that the court is satisfied, on other grounds, that the demand ought to be set aside) - as was observed by the Court of Appeal in Octagon Assets Ltd. v. Remblance [2010] Bus. L.R. 119:

> "*The discretion to set aside a statutory demand under rule 6.5(4)(d*) [of the 1986 Insolvency Rules, the predecessor of rule 10.5(5)(d)] *is a residual discretion which will normally be exercised in 'circumstances which would make it unjust for the statutory demand to give rise to* [bankruptcy] *consequences in the particular case. The court's intervention is called for to prevent that injustice': see per Nicholls LJ in In re A Debtor (No 1 of 1987) [1989] 1 WLR 271, 276D. Nicholls LJ went on to say that this approach to sub-paragraph (d) is in line with the particular grounds specified in sub-paragraphs (a) to (c) of rule 6.5(4).*"

The First Ground: "Want of Service"

34. Mr Mills argued that the statutory demand should be set aside under rule 10.5(5)(d), for "*want of service*".

Service of the Statutory Demand: the Law

35. Section 267(2) of the IA 1986, so far as material, is in these terms:

> "*Subject to the next three sections, a creditor's petition may be presented to the court in respect of a debt or debts only if, at the time the petition is presented—*
>
> ...
>
> > *(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 …*"

36. Section 268(1) of the Act provides:

> "*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") 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, …*"

37. Concerning the method of service of a statutory demand, rule 10.2 of the IR 2016 provides:

> "*A creditor must do all that is reasonable to bring the statutory demand to the debtor's attention and, if practicable in the particular circumstances, serve the demand personally*."

38. Paragraph 11.2 of the Practice Direction: Insolvency Proceedings [2020] B.C.C. 698 ("**the PDIP**"), states as follows:

> "*Rule 10.2 applies to service of a statutory demand whether within or out of the jurisdiction. If personal service is not practicable in the particular circumstances, a creditor must do all that is reasonable to bring the statutory demand to the debtor's attention. This could include taking those steps set out at para.12.7 below which justify the court making an order for service of a bankruptcy petition other than by personal service. It may also include any other form of physical or electronic communication which will bring the statutory demand to the notice of the debtor*."

39. Paragraph 12.7 of the PDIP states: "*Where personal service of the bankruptcy petition is not practicable, service by other means may be permitted. In most cases, evidence that the steps set out in the following paragraphs have been taken will suffice to justify an order for service of a bankruptcy petition other than by personal service*". The usual requirements justifying an order for substituted service are well known:

39.1. One personal call at the residence and place of business of the debtor. Where it is known that the debtor has more than one residential or business addresses, personal calls should be made at all the addresses (para.12.7.1(1)).

39.2. Should the creditor fail to effect personal service, an "appointment letter" containing specific details and suggesting a further call on at least two business days' notice, should be sent by first class prepaid post or left at the debtor's address (with copies to all known addresses) (para.12.7.1(2)).

39.3. The purpose of the letter is to give the debtor notice of a suggesting meeting, or the opportunity to arrange a convenient time and place for the same (para.12.7.1(2)).

39.4. If the debtor is represented by a solicitor, an attempt should be made to arrange an appointment for personal service through such solicitor (para.12.7.1(4)).

40. The consequences of failing to comply with rule 10.2 are serious. PDIP paragraph 11.4.6 provides "*Attention is drawn to the power of the court to decline to file a petition if there has been a failure to comply with the requirement of r.10.2*."

41. Rule 10.3(1) of the IR 2016 provides "*Where section 268 requires a statutory demand to be served before the petition, a certificate of service of the demand must be filed with the court with the petition*". The certificate must be verified by a statement of truth (r.10.3(2)). Where the demand is served personally, the statement of truth must be made by the person who served the demand unless service has been acknowledged in writing by the debtor or a person authorised to accept service (r.10.3(3)). Rule 10.3 continues:

> "*(4) If service has been acknowledged in writing either by–*
>
> *(a) the debtor; or*
>
> *(b) a person who is authorised to accept service on the debtor's behalf and who has stated that this is the case in the acknowledgement of service;*
>
> *then the certificate of service must be authenticated either by the creditor or by a person acting on the creditor's behalf, and the acknowledgement of service must accompany the certificate.*

(5) If the demand has been served other than personally and there is no acknowledgement of service, the certificate must be authenticated by a person or persons having direct personal knowledge of the means adopted for serving the statutory demand, and must contain the following information—

(a) the steps taken to serve the demand; and

(b) a date by which, to the best of the knowledge, information and belief of the person authenticating the certificate, the demand will have come to the debtor's attention."

42. In summary therefore, on the language of these provisions, and insofar as relevant in this case:

    42.1. as to the need for service, under section 267(2)(c), the debtor appears to be unable to pay a debt if, but only if, the debt is payable immediately and the petitioning creditor to whom the debt is owed has served on the debtor a statutory demand requiring him to pay the debt or to secure or compound for it, 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; service is stated to be a mandatory requirement;

    42.2. as to the method of service, under rule 10.2, the creditor must do all that is reasonable to bring the demand to the debtor's attention and must, if practicable in the particular circumstances, serve the demand personally; I note that the PDIP reverses the order of the methods referred to - it states that if personal service is not practicable in the particular circumstances, a creditor must (otherwise) do all that is reasonable to bring the statutory demand to the debtor's attention; if personal service is practicable, it is what the court ordinarily, if not invariably expects; it might be regarded as an invariable component of "all that is reasonable";

    42.3. and as to date of service, under rule 10.3(5) and (6), again insofar as relevant in this case, if the demand is <u>not</u> served personally, and if service is <u>not</u> acknowledged in writing either by the debtor or someone authorised to accept service on his behalf, then unless the court determines otherwise, the date of service is deemed to be the date by which, to the best of the knowledge,

information and belief of the person authenticating the certificate of service (which is to be filed with the petition) the demand will have come to the debtor's attention;

42.4. if the demand is not served personally, but is acknowledged in writing under rule 10.4, then in terms, rule 10.5 is inapplicable as therefore, in terms, is rule 10.6; in that case, the rule is silent as to the date of service, but would be for the court to determine.

43. In Regional Collection Services Ltd v Heald [2000] BPIR 666, in which the Court of Appeal proceeded on the basis that a debtor had neither seen nor been told about a statutory demand before the presentation of a bankruptcy petition, and where it was accepted that personal service was not practicable, Nourse LJ (at [15]) described the test entailed by the provision that a creditor must do all that is reasonable for the purpose of bringing the statutory demand to the debtor's attention, as a "*high one*": "*The creditor is under an obligation to do all that is reasonable for the purpose of bringing the statutory demand to the debtor's attention. ... In substance, the test is that the creditor must take all such steps as are reasonable in the circumstances for the purpose of bringing the statutory demand to the creditor's attention.*"

44. Under rule 10.4, the debtor may apply to set aside the demand, and the application "*must be made within 18 days from the date of service of the ... demand*", although the court has power to extend time under section 376 of the IA 1986: Rankin v Distington Lending Company Ltd [2021] EWHC 172 (Ch).

45. Canning v Irwin Mitchell LLP [2017] EWHC was a decision of Mr Jeremy Cousins QC (as he then was, sitting as Deputy High Court Judge). It was an appeal, which succeeded, against the decision of a District Judge to adjourn a bankruptcy petition and permit its amendment, rather than dismiss it on grounds that the petitioner had not served a statutory demand. Amongst other things, the judge said, at [29], having considered various authorities:

> "*A critical distinction between Andrews, Mandiri, Gate Gourmet, Anderson Owen, and the present case, is that the document required to be served actually reached, or at least came within the dominion of, the intended*

recipient. In the present case, there was a fundamental failure to effect service; in no meaningful sense, could Mr Canning be said to have been served with the statutory demand, which never reached him, or came within his dominion. In these circumstances, I consider that the deficiencies relating to service in this case cannot be categorised as a "formal defect" or "irregularity", with the result that there is no scope for the application of Rule 7.55 [the predecessor of rule 12.64 of the IR 2016]. *Further, I consider that it is not possible for considerations of the absence of prejudice, or proportionality, to enable so fundamental a defect as to service to be cured. To the extent that Mandiri suggests otherwise, I must respectfully disagree with that decision. Moreover, the importance of service in this case is not confined to ensuring that "a party has proper notice of proceedings brought and a fair opportunity to deal with them", in the words of Norris J in Anderson Owen. For the purposes of ss 267 and 268 of the 1986 Act, service of a statutory demand is a requirement to found the jurisdiction to proceed to the making of a bankruptcy order. This case falls, therefore, within what Norris J contemplated in the second sentence of the passage cited from his judgment above. I observe that in Mandiri, it does not appear that the provisions of ss267 and 268 were cited to the court, nor was the court reminded of the principle identified in Debtor (Nos 49 and 50 of 1992) that the demand should not be allowed to remain extant if a petition could not be founded upon it. In Mann J's judgment in Andrews, it was the fact that the method of service accorded with what was reasonable to bring the statutory demand to the attention of Mr Andrews that saved the statutory demand, not the absence of prejudice, or considerations of proportionality*."

46. In Mandiri, on an application to set aside a statutory demand under the predecessor of rule 10.5 of the IR 2016, Ms Registrar Barber (as she then was) held, amongst other things, (i) that although the court had the power, in principle, to set aside a demand under the predecessor of rule 10.5(5)(d) for want of service (see [31]); and (ii) that although the creditor/respondent had failed to take all such steps as were reasonable in the circumstances for the purpose of bringing the demand to the debtor's attention (see [29]), (iii) the demand would not be set aside on that ground.

47. At [33]-[34], she concluded:

> "*[33] The requirements of the Rules and the Practice Direction as regards service of statutory demands are there for good reason. A debtor served with such a demand has a very limited period of time within which either to pay the sum demanded or to apply to have the demand set aside. Failure to take either step within the strict time limits set will in the absence of a successful extension application trigger a deemed insolvency which in turn entitles a creditor to present a petition. In such circumstances the service requirements applicable to statutory demands should be strictly observed.*
>
> *[34] On the facts of the present case however I do not consider that the respondent's failure to comply with such requirements warrant a setting aside of the demand under r 6.5(4)(d) of the Rules. Whilst it is regrettable and a matter of some concern to the court that a highly resourced respondent such as the present should adopt such a lax approach to service of the demand, it is clear that Mr Bush did have known links with the service address used. It is also clear that he did receive the demand, did secure an extension of time within which to apply to set aside the demand, and was able to make that application before a petition was presented. The main head of prejudice claimed to have been suffered by Mr Bush in receiving the demand indirectly as he did was that he was 'rushed into' the application to set it aside. That prejudice however was met by the extension of time he was granted by order of this court on 13 November 2009. In the circumstances, though the conduct of the respondent in the mode of service adopted is highly unsatisfactory, it would in my judgment be disproportionate to set aside the demand on that ground.*"

48. In respect of Mandiri, the extent of the reservation tentatively expressed in Canning, was that in cases where there has been a fundamental failure to serve a demand, the court has no power to entertain a petition purportedly based on that demand (which should therefore be set aside). Although that issue was not in terms addressed in Mandiri (because that is not how the argument appears to have proceeded) the outcome in Mandiri is consistent with the decision in Canning. In any event, I would observe that whilst Canning concerned a petition, Mandiri concerned a demand; the court has a

discretion under rule 10.5(5), and a further discretion, under rule 10.5(8) to specify a date not before which a petition might be presented, thus allowing a debtor time in which to pay or secure his debt, if that is, for example, what he has been deprived of by short or inadequate service.

49. On these authorities therefore:

49.1. service of a statutory demand is a jurisdictional pre-requisite of a bankruptcy petition and must (if the petition is not to be dismissed) either be achieved in strict conformity with rule 10.2 of the IR 2016, or, if circumstances permit, achieved in sufficient conformity to allow for any irregularity or defect to be cured under rule 12.64;

49.2. a statutory demand is in principle capable of being set aside under rule 10.5(5)(d), although under rule 10.5, the court has a discretion and has powers, which are capable of meeting or addressing certain issues of prejudice that might otherwise be suffered by a debtor.

<u>*The Present Case*</u>

50. In this case, the statutory demand was not served personally, and Mr Clauson has not, as such, "*acknowledged service*" – albeit that he is, of course, the applicant. His evidence, unchallenged, was that he first became aware of it on 12 October 2023, when it was emailed to him by Mr Richards. The covering email said:

> "*Please see attached document, which is a Statutory Demand. It is a demand for payment of £3,335,962.99. It represents only a part of the debt that you owe to Knowles Construction Limited, all of which I have written to you about already.*
>
> *If you disagree with the demand, you have 18 days to apply to Court to set it aside. Please read the contents of the statutory demand in full, and seek your own independent legal advice. You or your appointed representative should liaise with me in relation to the demand. If the demand is not set aside, and you do not pay, we intend to rely on it in support of a bankruptcy petition after 21 days from today.*

Attempts have been made to serve this on you in person already. I understand that you have an appointment with our service agent on 18 October at 2.30pm. You should continue to make that appointment, but our position is that the attached statutory demand is hereby served on you today by email."

51. Mr Clauson's evidence was that he then "*acted as quickly as possible in instructing*" his (then) solicitors, Teacher Stern LLP, who assisted in the preparation of his witness statement, and whose address was given for service in the Application made subsequently, on 30 October 2023. The Application states that the order sought is to set aside "*The Statutory Demand dated 5.10.23 (which was served on me by email at 17.17 on 12.10.23) ….*"

52. On 19 October 2023, having been telephoned by and having spoken to Ms Emerson at Teacher Stern on 18 October 2023, the previous day, Mr Richards sent an email (to Ms Emerson) in which he said, amongst other things, that the statutory demand "*has also been hand-delivered by my client to your client's letterbox, and additionally a service agent has hand-delivered it to your client's letterbox. They made an appointment to meet with him last Wednesday (and delivered a further copy them too), which he rearranged to yesterday at 2:30 pm. Our agent attended that appointment, and your client's maid told our agent via the intercom system that your client was not at the property at that time, but he had been there that morning. The demand was posted again there and then. It remains our position that the statutory demand was effectively served on your client on 12 October 2023 when it was sent by email. We have taken all reasonable steps to bring it to your client's attention.*" Amongst other things, attached to Mr Richards' email were the statutory demand and the email sent to Mr Clauson on 12 October 2023 (in respect of which Mr Richards also exhibited a "delivery" notification (timed at 17:17 on 12 October) and a "read" notification (timed at 17:18)).

53. Mr Richards' evidence was that before these communications, there had been three unsuccessful attempts to serve the demand personally on Mr Clauson at his home, at 34 Woronzow Rd, London, on 5, 6 and 10 October 2023. The first two of those attempts were made by a process server employed, said Mr Richards, because "*the directors of Knowles and I believed that Mr Clauson would attempt to evade service, given previous dealings with him*"; the third, on 10 October, was made by an employee of

Knowles, a Mr Viktor Nyeste, who reported to Mr Richards that he had failed, "*partly because the gates were always locked. He told me that there was a letter-box available for use*."

54. On 10 October 2023, Mr Clauson telephoned the service agent, and changed the proposed appointment date (which had been stated in an appointment letter left at 34 Woronzow Rd, on 6 October, which itself referred to the agent's instruction to serve a statutory demand) to 2.30pm on 18 October 2023 – by that date, Mr Clauson plainly understood the purpose of the agent's wish to meet him. Subsequently, on 18 October 2023, Mr Cesar Sepulveda, the service agent, attended at 34 Woronzow Rd, but again failed to meet Mr Clauson. Mr Sepulveda's evidence was that he had spoken to a maid at the property via the intercom and been told that Mr Clauson was not there, having left "*earlier that morning to attend meetings*"; he put the demand, in a sealed envelope, through the letter-box, between about 2.30pm and 4.30pm. At about 5pm, Ms Emerson telephoned Mr Richards, as I have described. In his witness statement made on 26 October 2023, Mr Sepulveda said that "*the date of service of the Statutory Demand so served aforesaid is the 18th day of October 2023*" and that "*to the best of my knowledge, information and belief, the Statutory Demand will have come to the attention of* [Mr Clauson] *by the 19th day of October 2023*."

55. In those circumstances, Mr Mills submitted that the demand had not been served, and should be set aside:

    55.1. first, because it was practicable to serve Mr Clauson personally, but Knowles had not done so; it had not sought to serve Mr Clauson at his place of business, or sought an appointment through Teacher Stern; he said that Mr Clauson "*cannot be criticised for not being at home on*" 18 October 2023, because "*according to Mr Richards such a meeting would have served no useful purpose*" (which was a reference to Mr Richards's email of 12 October);

    55.2. second, that in any event, Knowles has "*manifestly conducted itself so as to cause confusion*", relying on both service by email on 12 October, and by the service agent on 18 October 2023; and that although Knowles was aware of the rules, it "*preferred to act with haste*" and maintain the position that service

by email on 12 October was effective, ignoring its obligation to serve personally, where practicable.

56. I reject this submission, for the following reasons.

57. First, as to the evidence:

57.1. Mr Clauson received the demand on 12 October 2023; he instructed solicitors and made the Application supported by evidence, since supplemented by a second statement; he did not seek any extension of time in which to do so; it was accepted by Mr Mills that Mr Clauson had not been caused any prejudice in the issue or prosecution of the Application;

57.2. Mr Clauson himself made an appointment to meet the process server on 18 October, only six days after his receipt of the email of 12 October, and then deliberately failed to attend it, without pre-warning or notice, or excuse; had he attached any importance at all to the notion of personal service he would have met the service agent; in substance, he thereby deliberately prevented and avoided personal service; in substance, he waived any need to be served personally;

57.3. the difference between the position taken by Mr Richards in correspondence (that the demand was served on 12 October) and by Mr Sepulveda in his statement (that service was effected on 19 October) was wholly unimportant; it had no consequences; as I have said, Mr Mills did not assert (and had no evidential basis upon which to assert) that Mr Clauson had suffered any variety of prejudice; even now, had there been any (which there was not) any prejudice could be met, as I have said, by providing for a period during which Knowles would be unable to present a petition.

58. Second, in those circumstances - circumstances in which he deliberately avoided personal service - whilst I accept (it was common ground) that ultimately, Mr Clauson was not served personally, I cannot accept the submission that it was "*practicable*" to do so. Moreover, whether or not Knowles otherwise did "*all that was reasonable for the purpose of bringing the statutory demand to the debtor's attention*", is irrelevant in

circumstances where, as he accepts, Mr Clauson came to receive and know of the demand in fact; it follows that whether or not one might conceive of other steps not taken, the steps in fact taken were successful and were therefore necessarily sufficient. In my judgment the demand was therefore served on 12 October 2023, and if not, on 18 October 2023.

59. Third, in any event, even if I am wrong about that, the deficiencies relating to service in the circumstances of this case were, at most, "*formal defects*" or "*irregularities*", eminently curable by the court under rule 12.64 of the IR 2016; this is not a case in which in some fundamental sense, Mr Clauson was not served. In common with Ms Registrar Barber in Mandiri, on the assumption that want of service is capable of comprising a ground to set aside under rule 10.5(5)(d) and in circumstances not dissimilar, I would decline to exercise my discretion to do so; apart from anything, to set the demand aside on this ground alone would be completely pointless – as I have said, were it necessary to do so, I could provide for a period to elapse before presentation, under rule 10.5(8) .

The Second Ground: Substantial Dispute

60. Mr Mills argued:

60.1. that the sums of £1,918,767.85 and £587,195.14 were not payable at the date of the statutory demand, because there was no evidence to show that by that date, the 6 month "*Payment Period*" had ended;

60.2. more specifically, he said that the Practical Completion Certificate dated 20 March 2023 had been issued subject to "*Minor defective items currently being remedied …*", and that the only relevant evidence was that those items had been remedied by 10 January 2024, which was after the date of the statutory demand (and certainly not more than six months beforehand);

60.3. that for the same reason, the settlement sum of £830,000 was not (or could not be shown to be) due as at the date of the statutory demand, or, additionally, as at the date of the preceding written demands for payment;

60.4. that as at the date of the statutory demand, Yarborough itself was not liable to pay the settlement sum (in respect of which Mr Clauson's liability was secondary) which had not fallen due for payment on the grounds stated in its Defence in the TCC (explained above at paragraph 18) because the works under the Original JCT Contract were defective, and in any event, had not fallen due because the Completion Certificate had been issued subject to minor defects or omissions in respect of which again, there was not the evidence to show when they had been remedied;

60.5. that Yarborough's liability is contested in the TCC proceedings and that by virtue of clause 3.4 of the Guarantee, Mr Clauson's liabilities (whether primary or secondary) were to be reduced by the amount of Yarborough's counterclaim.

The "Payment Period"

61. For the following reasons, I reject the argument that the demand should be set aside on the grounds that there is not the evidence to show that the Payment Period had ended when the statutory demand (and indeed, any preceding demands) were made by Knowles.

62. The Payment Period began on either the date of the Practical Completion Certificate or, "*if issued subject to minor defects or omissions, the date on which such minor or omissions are completed*". In the present case however, the Certificate, dated 20 March 2023, was *not* issued subject to any sort of condition, or the fulfilment of any further step. The evidence was as follows.

62.1. On 15 March 2023, under section 51 of the Building Act 1984, Mr James Andrijasevic of Thames Building Control Limited signed a Final Certificate (Form 5) addressed to Mr Keith Meikle, the contract administrator named under both the Original JCT Contract, and the Prime Cost Contract. That Certificate related to work described as, "*Demolition of existing building for the erection of a two storey detached seven bedrooms (all ensuite bath/shower rooms) dwelling house with two storey basement, front side and rear lightwells, car lift, leisure suite with swimming pool and viewing gallery, including all ancillary rooms/areas, front portico, rooflights/lantern, 2No*

chimney stacks, controlled services / fittings and all associated works to the above."

62.2. On 21 March 2023, at 1:07pm, Mr Meikle emailed Mr Kilbane (and cc'd Mr Robin Knowles and Mr Clauson). He said:

> "*Please can you write back to confirm that you will issue the following warranties:*
>
> *- building integrity warranty 10 years*
>
> *- waterproofing warranty 10 years*
>
> *Please acknowledge that you will issue these warranties satisfactorily to reflect the high standard a building of this class merits; and that within the warranties you will undertake to remedy defects if they were to occur, or absorb costs related to cover the same.*
>
> *Following your confirmation I issue the PC Certificate*."

62.3. At 16:50 on the same day, Mr Kilbane replied (and again, Mr Knowles and Mr Clauson were cc'd). He said:

> "*As per our call earlier today.*
>
> *Yes, of course we will get these bits sorted and will warrant any works under our remit/contract – as we always do.*
>
> *As discussed though, anything outside of our realm (ie elements that either yourself or Conrad may have managed/arranged) then this would fall outside of that remit.*
>
> *Trust this is ok and look forward to receiving the PC shortly*".

62.4. In response, at 17:01, Mr Meikle emailed (and again, Mr Knowles and Mr Clauson were cc'd) and attached two documents, a Practical Completion

Certificate dated 20 March 2023, and a "*55AR – works ongoing to complete*". The Certificate said:

> "*To whom it may concern,*
>
> *Following inspection, this document hereby states that the works as per the contract for the following property are complete. Minor defective items currently being remedied are considered ongoing separately*."

62.5. Mr Kilbane's evidence was that he had been involved in projects where the Practical Completion Certificate had itself specified or identified minor works to be completed, "*but Practical Completion* [was] *being certified anyway*", but that "*was not the case here; everything had been done pursuant to the Original JCT. The Practical Completion Certificate was not issued subject to anything.*" In any event, he said, the works listed in the document referred to as "*55AR – works ongoing to complete*", were to be done under the subsequent Prime Cost Contract, rather than the Original JCT Contract, with the possible exception (he was not sure) of there certificates relating to waterproofing, gas safety and the fireplace, which had been provided subsequently. He added that for "*the sake of completeness*" he had emailed Mr Meikle on 10 January 2024, who had replied that day confirming that "*The minor items referenced in the certificate including the removal of the hoarding and the fixing of the pedestrian pavement have been completed*".

62.6. In Mr Clauson's second statement, in response, he did not contradict or take issue with Mr Kilbane's evidence that the Practical Completion Certificate was *not* issued subject to minor defects or omissions. Moreover, he positively agreed and asserted that the minor defects previously said to have been outstanding, "*did not, in fact, relate to the Original JCT Contract. They related to the JCT Prime*". Mr Clauson's point was quite different: the purpose of his evidence (and of the other points at paragraph 18 of his second statement) was to defeat an anticipated argument that there were no <u>substantial</u> defects in the work under the Original JCT Contract (no "*defects shrinkages or other faults*") capable of supporting the arguments that Yarborough has

counterclaims under that contract and/or that (as a result of its variation, and because of those defects) the settlement sum has not fallen due. However, the plain effect of his evidence was to undermine the submission that the Completion Certificate <u>under the Original JCT Contract</u> was issued subject to minor defects or omissions; Mr Clauson's own evidence was that it was not.

63. Mr Mills submitted that the only evidence of completion of the various minor defects was to the effect that they had been completed by 10 January 2024, when Mr Meikle emailed Mr Kilbane in response to his enquiry. However, the reason that there was no evidence to show precisely when those defects were remedied was that Knowles was not put on notice that the point was in issue; this was not a point or argument raised by Mr Clauson in either of his two statements. I have summarised above the basis of the application stated in Mr Clauson's statements; this argument was not part of it; it would be unfair to Knowles to allow it to be advanced now, 6 months after the application was made, without proper, prior notice.

64. Finally, this was not a point raised by Yarborough in the TCC proceedings; it was *not* pleaded that the Certificate was conditional, or issued subject to any further act. On the contrary, it was, in this respect, admitted that the date of the final Section Completion Certificate was 20 March 2023 but denied that the final date for payment of the settlement sum was 20 September 2023, not because the Certificate was issued subject to "*minor defects or omissions*", but because there were "*defects shrinkages or other faults*" within the scope of clause 4.2.7.4 of the varied Contract.

65. In the circumstances, my conclusion is that the Payment Period began on 20 or 21 March 2023, and ended six months later, on 20 or 21 September 2023; in any event, it ended before the date of the statutory demand, and before the date of the prior written demands sent on 27 and 28 September 2023.

<u>Yarborough's Counterclaim & its Liability to Pay the Settlement Sum</u>

66. For the following reasons, I reject the submission that as a matter of construction, the effect of clause 4.2.7.4(.2) of the Original JCT Contract, as varied, is that in the event of "*defects shrinkages or other faults*" in the works, the settlement sum is not due and payable by Yarborough under clause 4.2.7.2, notwithstanding that an unconditional Practical Completion Certificate has been issued.

66.1. First, clause 4.2.7.2 is plain and explicit: payment of the settlement sum falls due - "*notwithstanding any other provision*" of the contract - in the period beginning 5 days after the date of the Completion Certificate, and ending ("*the final date for payment*") on the date falling 6 months after the date of the Certificate.

66.2. Second, clause 4.2.7.4 is equally plain. It is a provision which governs the availability of set-off; it neither says nor purports to say anything at all about the due date for payment, which is governed by clause 4.2.7.2; it provides that unless either the Certificate is issued subject to the completion of minor defects or omissions (which in this case, it was not) or there are "*defects shrinkages or other faults*", the settlement sum must be paid in full without set-off, counterclaim deduction or other withholding. Accordingly, if there *are* such "*defects shrinkages or other faults*" (as Yarborough asserts in the TCC proceedings) then although the settlement sum falls due, its payment is, in principle, subject to Yarborough's rights of set-off.

66.3. Moreover, in that circumstance, by virtue of clause 3.4 of the Guarantee, Mr Clauson is entitled to take the benefit of Yarborough's counterclaim or set-off: "*any amounts which may become payable by Knowles to Yarborough pursuant to the Original JCT (as varied) will reduce the liability of Mr Clauson pursuant to* [the Guarantee] *by an equivalent amount ...*". On its face, that provision relates to "*any amounts*" payable under the Guarantee; certainly for present purposes, I am not willing to limit its potential effect to a reduction of Mr Clauson's secondary liability in respect of the settlement sum only, rather than in respect of that sum and the additional sums of £1,918,767.85 and £587,195.14 due under clauses 2.3 and 2.4 of the Guarantee. There is at least some obvious commercial sense in that construction, since (at least) the sum of £1,918,767.85 was in respect of works done under the Original JCT Contract.

66.4. Overall therefore, if the Certificate is issued (as in the present case) not subject to minor defects, then the period for payment by Yarborough under clause 4.2.7.2 of the Original JCT Contract, as varied, will begin, as will the "*Payment Period*" under the Guarantee, albeit that in each case, if there are "*defects shrinkages or other faults*", within the meaning of clause 4.2.7.4(.2),

liability is subject to the possibility of any amounts to be set-off by Yarborough. If issued subject to the completion of minor works, then the Guarantee Payment Period does not begin, even if Yarborough is liable under clause 4.2.7.2; in any event, in that case, both Mr Clauson and Yarborough are permitted to take account of Yarborough's rights of set-off.

67. I am aware that my conclusion in this respect is contrary to the case stated by Yarborough in the TCC proceedings in its Defence and Counterclaim. However, I am not bound to conclude that there is an issue of substance in a point merely because it is raised in proceedings, and where, as here, the point is one of construction, I see no reason not to determine it, if sufficiently free of doubt.

68. The position is different in respect of Yarborough's counterclaim in the TCC proceedings, explained above. Although perhaps in various respects broad and unparticularised (as stated in Knowles' Reply and Defence to Counterclaim) I am not willing on this application to find that it is without substance, for the following reasons:

    68.1. Yarborough's statement of case was drafted and signed by counsel, acting subject to his professional duties; on its face, it discloses, in terms, a real and substantial claim;

    68.2. Knowles has neither said nor filed evidence in the present proceedings to show that it would be entitled to summary judgment against Yarborough in respect of its counterclaim or any part of it;

    68.3. I was not told that the TCC proceedings have yet reached the stage of disclosure or witness evidence; they are at a comparatively preliminary stage;

    68.4. I therefore do not have the evidential material on which simply to disregard the counterclaim as insubstantial.

69. I shall therefore proceed on the basis that Yarborough has an arguable counterclaim against Knowles in the total sum of £2,104,779.50. I have excluded from the calculation of that sum, the "*anticipated claim*", not yet made, in "*the region of £400,000*", for the very reason that it has not yet been made, and was not otherwise evidenced. Albeit there was no real argument in this respect, I have included the sum

said to be due to Yarborough from Knowles under the prior "*Shell & Core Contract*" made on 24 October 2017, also in respect of the property at 55 Avenue Road, also pleaded by Yarborough as capable of being set-off against the settlement sum. I have done so on the basis, sufficiently arguable for present purposes, that notwithstanding the terms of clause 3.4 of the Guarantee (which refers to sums payable to Yarborough under the Original JCT Contract) Mr Clauson's liability in respect of the settlement sum cannot exceed that of Yarborough itself.

Conclusion on Substantial Dispute

70. The position is that therefore, in my judgment:

    70.1. the final date for payment of the settlement sum by Yarborough under clause 4.2.7.2 of the Original JCT Contract, as varied, was 6 months after the date on which the Certificate of Practical Completion was issued by Mr Meikle on 20/21 March 2023;

    70.2. the obligation to pay was not suspended or postponed because of Yarborough's alleged claim that there were defects, shrinkages or other defects in the work;

    70.3. similarly, the Payment Period under the Guarantee, including in respect of the settlement sum, began on 20/21 March 2023, and ended 6 months later;

    70.4. Yarborough has an arguable counterclaim against Knowles in the sum of £2,104,779.50, the whole of which is capable of reducing the whole sum (of £3,335,962.99) otherwise payable by Mr Clauson under the Guarantee;

    70.5. nonetheless, in the event, £1,231,183.49 of the sum claimed in the statutory demand is not, on this basis, subject to a substantial dispute.

The Third Ground: "Counterclaim, Set-off or Cross Demand"

71. In this regard, Mr Mills submitted that Mr Clauson has and is entitled to rely upon a claim against Knowles arising under the Prime Cost Contract made on 3 November 2021. I reject that argument for the following reasons.

72. First, it is contrary to Mr Clauson's evidence in his second statement at paragraph 8, recited above at paragraph 22, and contrary to the basis upon which in that evidence he chose to advance his case: "*Without waiving privilege, I have been advised by my new solicitors that I do not have a direct counterclaim, set-off or cross-claim against* [Knowles]. *Rather, as I explain below, I have a contractual entitlement to set-off sums owed by* [Knowles] *to Yarborough against the Alleged Debt. To be clear, I am disputing the Statutory Demand on the basis that the Alleged Debt is disputed on grounds which are substantial*." It would be unfair to Knowles in those circumstances to allow Mr Clauson, without proper notice, to advance a different case based on an alleged personal counterclaim.

73. Second, as stated in Mr Mills' skeleton argument, this part of the case is based on Mr Clauson's email of 27 September 2023, and the two alleged "*pay less notices*" referred to above at paragraph 20. However, as he said his first statement (and acknowledged in his second) those notices corresponded to "*to the value of <u>Yarborough's claims against Knowles</u> in the light of* [Knowles'] *failure to carry out its obligations under the* [Original JCT Contract as varied] *in accordance with its terms*" (the emphasis is mine); they did not concern (or at least, if and to the extent that they did, they did not specify or separately quantify) defects in work under the subsequent Prime Cost Contract. Insofar as they concerned complaints about work under the Original JCT Contract, their effect was, presumably, subsumed within the counterclaim in the TCC proceedings.

74. Third, in any event, the email contains merely a series of brief and unparticularised statements of complaint, for example, "*Work under original works JCT and the variations has not been carried out as they should have been done. Examples are such as the swimming pool, drainage, rendering of walls etc, to name a few examples*", and "*Addition of Prime Costs sums that are under the "instructed list 6" does also contain some payments that are Knowles own costs and should not be part of the list*", and "*Further the gross miss management on site is not our responsibility as it is being presented here to be*."

75. Moreover, Mr Clauson's email was sent in response to a spreadsheet sent by Knowles, and summarised in a document comprising 8 sections, each stating a component of the aggregate sum claimed. At least to some extent, Mr Clauson's email was to the effect that such sums were not owed, because for example, caused by Knowles' own fault,

rather than that work had been conducted defectively, and that Yarborough had a counterclaim.

76. In the circumstances, there is not evidence of sufficient detail or weight to support the allegation that Mr Clauson has a real and substantial counterclaim.

77. In conclusion, for the reasons stated, the Application is dismissed, albeit Mr Clauson has, for present purposes, established an arguable dispute as to payment of £2,104,779.50.

Dated 18 June 2024