Neutral Citation Number: [2019] EWHC 456 (Ch)

Case No: CH-2018-000152

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BANKRUPTCY COURT

Royal Courts of Justice
Rolls Building, London, EC4A 1NL

Date: 01/03/2019

Before :

THE HONOURABLE MR JUSTICE ROTH

- -

Between :

SURJIT SINGH ARDAWA	**Appellant**
- and -	
(1) RAJVINDER KAUR UPPAL **(2) ADAM JORDAN (as Trustee in Bankruptcy of the Appellant)**	**Respondents**

- -
- -

Alan Tunkel (instructed as direct access counsel) for the **Appellant**
Oberon Kwok (instructed by **Sydney Mitchell LLP**) for the **First Respondent**
Katie Longstaff (instructed by **Morgan Phelps Solicitors)** for the **Second Respondent**

Hearing dates: 1 February and 5 February 2019

- -

Approved Judgment

....

MR JUSTICE ROTH

Mr Justice Roth :

1. This is an appeal, brought with permission granted by Arnold J, from the decision of District Judge Thorpe of 19 April 2018 dismissing the amended application by the Appellant to set aside the order authorising substituted service on him of the bankruptcy petition issued by the 1st Respondent, annul the bankruptcy order made against him and dismiss the bankruptcy petition. The District Judge delivered a reserved judgment setting out the reasons for her decision, of which I have a transcript incorporating corrections agreed by Counsel as the judge had resigned before a transcription of her oral judgment was received.

2. The appeal has been argued by Mr Tunkel for the Appellant and Mr Kwok for the 1st Respondent, and each has raised every argument that could be made on behalf of their respective clients. The 2nd Respondent is the Appellant's trustee in bankruptcy ("the Trustee"), appointed on 23 May 2016 by the Secretary of State. The Trustee has stated that he is neutral on the substantive issues as between the other parties, and he has therefore taken no part in the argument on the hearing of the appeal other than to make written submissions regarding recovery of his costs and expenses. In this judgment, I shall therefore refer to the 1st Respondent simply as "the Respondent".

THE FACTS

3. The Appellant and the Respondent were formerly husband and wife. They were married in 1992 and have three daughters. They separated in about 2008 and were divorced in 2011. The divorce has been described as acrimonious and there have been several previous contested court proceedings between them. The debt which is the foundation of the petition is £8,834.80, comprising three costs orders made against the Appellant in ancillary relief proceedings in the Birmingham County Court in 2009 and 2011, and a fourth order of the County Court at Huddersfield made in 2014 in related possession proceedings regarding the former matrimonial home. There have also been contested proceedings in 2014-15 in the Family Court at Wolverhampton brought by the Appellant concerning contact with the children, and some aspects of those proceedings have been relied on in evidence in the present proceedings.

4. The Appellant does not dispute that the bankruptcy debt is due and states that he has the means to pay it. He says that he would do so if the bankruptcy were annulled so that he can access his assets. There is no suggestion that he has failed to pay any other creditors. Sadly, the conduct of the present proceedings on both sides bears all the hallmarks of the acrimony which seems to have characterised the divorce. The costs of these proceedings no doubt now greatly exceed the amount of the underlying debt.

5. In May 2013 the Appellant re-married. His second wife is Ms Harbinder Takhar and they have a young son. That marriage proved unsuccessful and they are now estranged. Quite when and to what degree they became estranged became an issue in these proceedings. What is clear is that since about September 2014 Ms Takhar was living with their son in a house at 26 Saltwood Avenue, Milton Keynes. The tenancy of that property was in Ms Takhar's sole name.

6. On 21 September 2015, the Respondent issued a statutory demand in the sum of £8,834.80. There was apparently no correspondence from the Respondent or her

solicitors to the Applicant chasing payment of the costs in the period immediately before the issue of this demand.

7. Mr John Power, a process server instructed on behalf of the Respondent, attempted to serve the statutory demand on the Appellant at 26 Saltwood Avenue on 29 September 2015 but there was no reply, so he returned on 1 October 2015 when he spoke to a lady with a small child who said that the Appellant had gone out. Mr Power says that when he told her that he wished to speak to the Appellant on a legal matter she banged the door closed. On 3 October 2015 Mr Power sent a letter by first class post to the Appellant as follows:

> "I have been directed to serve you with a Statutory Demand issued under the Insolvency Act 1986. I have already attended your address without meeting you. I have to inform you that I will attend 26 Saltwood Avenue, Milton Keynes, MK4 4HP at 18:15 hours on Thursday 8 October 2015 for the purpose of serving you personally with the Statutory Demand.
>
> Should the above appointment prove inconvenient, I will endeavour to attend any other reasonable appointment you may suggest. I can be contacted on either my office telephone number 01582 656 392 or my mobile number 07831 200066.
>
> It is my duty to inform you that should you fail to attend the above appointment, or any other made in lieu thereof, I propose to serve you by putting a copy of the Statutory Demand through your letter box (or other suitable place if this is not possible) or via advertisement in the local press.
>
> In the event of service by putting a copy through your letter box (or other suitable place) I will do this on the day of appointment and that will be the day of service if you do not attend the appointment. It is my duty to inform you that in the event of a Bankruptcy Petition being presented the Court will be asked to treat such service as service of Statutory Demand on the Debtor."

8. Mr Power's uncontested evidence was that he duly attended at the property at 6.15 pm on 8 October 2015 but got no reply from knocking on the door despite seeing lights on inside the house. He therefore posted the statutory demand through the letter box in an envelope addressed to the Appellant marked "private and confidential."

9. There was no response to the statutory demand and on 20 January 2016 the Respondent issued a bankruptcy petition based on the demand. The petition gave the address of the Appellant as 26 Saltwood Avenue, Milton Keynes. The petition form requires (in accordance with rule 6.7(1)(e) of the Insolvency Rules 1986) that the petitioner "insert any other address or addresses at which the debtor has resided at or after the time the petition debt was incurred" but no other address was inserted. Mr Power attempted to serve the petition personally at 26 Saltwood Avenue on 25 January 2016 but there was no reply, and returned on 26 January when he spoke to a lady who told him that she was the child minder and that the Appellant "has gone out". He left his contact details

and, according to Mr Power's uncontested witness statement, she said that she would ask the Appellant to ring him "on his return later that day." Mr Power further states:

> "I have undertaken investigative enquiries but I have been unable to obtain any alternative employment, business or residential address for Surjit Singh Ardawa or am I aware of any mobile or land line telephone numbers or email address on which I am able to make any contact with the Debtor or if he is represented by a solicitor."

10. It is not suggested for the Respondent that Mr Power is not telling the truth when he says that he made such inquiries. But it is accepted that the Respondent, and thus by implication her solicitors, were aware of both a mobile number and an email for the Appellant. Indeed, the Respondent was in regular contact with the Appellant over this period regarding access arrangements for the two younger daughters and the Appellant has exhibited text messages passing between him and the Respondent on 22 and 24 January 2016. Evidently, Mr Power was not given this information. It is also appropriate to note that while the daughters were seeing their father on a fortnightly basis, with text messages passing between the Appellant and Respondent concerning the arrangements, none of the messages over this period from either Appellant or Respondent makes any reference to the statutory demand or the petition.

11. Mr Power says that he sent a letter by first class post to the Appellant at 26 Saltwood Avenue which was in similar form to the letter quoted above save that it referred to the petition instead of the statutory demand and stated that a further call would be made at 10.30 am on 1 February 2016 for the purpose of personal service, unless the Appellant called Mr Power to arrange an alternative appointment. That letter concluded:

> "It is my duty to inform you that should you fail to attend the above appointment, or any other made in lieu thereof, the Creditor will apply to the Court for an Order of substituted service either by advertisement in the press or in such other manner as the Court may deem fit."

12. On 1 February 2016, Mr Power duly attended when he spoke to the same lady as before who told him that she had been instructed by the Appellant "not to accept anything" from him. Mr Power then placed a copy of the petition in an envelope addressed to the Appellant through the letter-box.

13. On 17 February 2016, District Judge Hickman in the County Court at Milton Keynes made an order on reading this witness statement of Mr Power that the bankruptcy petition posted through the letter box at 26 Saltwood Avenue on 1 February 2016 is deemed service on the Appellant "and no further steps as to service is [sic] required." It is that order which the Appellant seeks to set aside as part of his application.

14. On 6 April 2016, Deputy District Judge Tansey made the bankruptcy order.

15. As explained further below, it is the Appellant's case that he was not living at 26 Saltwood Avenue but at 32 Bland Street in Huddersfield, and that he was unaware of either the statutory demand or the bankruptcy petition at the time. He says that around April-May 2016 he started to receive telephone sales calls offering bankruptcy services

which he first assumed were 'scam' calls but eventually he pressed one of the callers for more information and was told that a bankruptcy order had been made against him in Milton Keynes County Court. He then contacted the County Court on 8 June 2016 by email, which he has exhibited, as follows:

> "I hope you can assist.
>
> I received a strange call from company that maybe a hoax call, suggesting they can help with my bankruptcy court order. I am not aware of any recent interaction with the county court not any court orders and certainly nor any bankruptcy proceeding.
>
> Can you confirm if you have any pending hearing, court orders or [sic] any nature please?
>
> My details are set out below.
>
> Name Surj Ardawa
> Address: 32 Bland Street, Lockwood, Huddersfield. HD1 3RA"

16. He then learnt from the Court staff about the bankruptcy order and immediately obtained a form to apply to annul the order, which he completed and submitted on 30 June 2016. At that stage, the Appellant was acting in person. Prior to service of that application, on 5 July 2016, the Respondent's solicitors wrote to the Applicant complaining of breach of the order made in the County Court in Birmingham in 2011 as regards the sale of a property and threatening to apply to the court to seek enforcement. That is the same order pursuant to which the Appellant was ordered to pay costs of £3000 which forms part of the bankruptcy debt. The Respondent's solicitors' letter was addressed to the Appellant at 32 Bland Street, Huddersfield, not 26 Saltwood Avenue, Milton Keynes.

17. In late 2017, the Appellant began Children Act proceedings against his second wife in relation to their son.

THE PROCEEDINGS BELOW

18. The course of the proceedings below suffered unfortunate delay. As it emerged that the County Court had no record of the Appellant's application, he re-submitted it on 16 December 2016. On 24 April 2017, District Judge Burgher gave directions for limited further evidence and adjourned the hearing of the application to a date after 24 May 2017. On 16 October 2017, the application came on for hearing before District Judge Thorpe but she was concerned that she lacked jurisdiction to set aside the order of District Judge Hickman and so ordered the transfer of the application to HH Judge Clarke at Oxford County Court. Judge Clarke determined that the District Judge indeed had the necessary jurisdiction and so transferred the matter back, and so it came on for hearing before District Judge Thorpe on 20 February 2018. I was told that the hearing lasted all day but there was no cross-examination. As noted above, the judge reserved her decision.

19. In the court below, a main plank of the Appellant's case was that he had never been resident at 26 Saltwood Avenue. He asserted that his relationship with Ms Takhar

ended in the summer of 2014, when she moved away and went to live in 26 Saltwood Avenue which, it is not in dispute, she rented in her sole name in September 2014. It also not in dispute that 32 Bland Street, Huddersfield is the address of the Appellant's parents, and indeed the Appellant and Respondent had first lived there together after their marriage before moving to another address in Huddersfield. He said that he had gone back to live with his parents at 32 Bland Street after his marriage with Ms Takhar broke down. But he says that he and Ms Takhar sought to keep the breakdown of their marriage relatively secret, and that when relations with her "were better" she would let him use the Milton Keynes house as a "neutral meeting point" where he could meet their son, and also his daughters from his first marriage for contact. In his Counsel's skeleton argument on this appeal (although not in his witness statements), it is said on his behalf that he and Ms Takhar "kept up the appearance of a family unit for the sake of the children." In his evidence, the Appellant said:

> If the documents had been sent to 26 Saltwood Avenue, these would not have been brought to my attention because I simply did not live there, at the time, nor at any time. Relations between myself and Harbinder were at that time extremely strained and when Mr Power attended the property I consider it is likely that Harbinder simply ignored anything she received.

He added that Ms Takhar never forwarded any mail to him or told him about it so he did not receive either the statutory demand or the petition.

20. In her judgment, the District Judge stated (at para 10):

> … on the balance of probabilities, I have concluded that Mr Ardawa was residing at the then family home at 26 Saltwood Avenue at the material time, and that he was aware of efforts made to serve him with both the statutory demand and the petition at that address but that he was evading service.

21. She explained that she arrived at those conclusions based on the evidence of the process server, Mr Power, as to what happened when he attended at the property; consideration of the text messages that were in evidence (i) between the Appellant and the Respondent, (ii) between the Appellant and his middle daughter, Nikhita, and (iii) between Nikhita and Ms Takhar arranging costumes for a fancy dress party in December 2015; and on a witness statement from Nikhita herself. The District Judge acknowledged that the witness statement from Nikhita (who was then 18) should be treated with caution because of the strained family relations, but accepted it as true since it was supported by the contemporaneous text messages. The District Judge concluded (at para 21):

> "Therefore, all of the contemporaneous evidence appears very strongly to suggest an ongoing family situation with Mr Ardawa, Ms Takhar and Arjun [their son] living together in their family home in Milton Keynes."

22. The District Judge proceeded to find that this conclusion was supported by what the Appellant said in a witness statement made in the Children Act proceedings concerning Arjun, dated 16 November 2017, where the Appellant had stated:

> "Three weeks ago, on 26 October 2017, the relationship between Harbinder and myself became very fragile, distant, unworkable and broke down. I felt that living under the same roof would introduce a great risk of the ripple effect and thus impact Arjun. We are no longer living together."

23. The District Judge continued:

> 23. That evidence … is entirely consistent with Nikhita's clear account that the family were very much living together and enjoying normal family life in terms of their living arrangements, holiday arrangements, etc over the 2015 to 2016 period.
>
> 24. In all of the circumstances, the evidence that Mr Ardawa was living in Milton Keynes at the relevant time is rather overwhelming. The fact that Mr Ardawa chose to use his parents' address for service in other proceedings and other business matters does not displace, in my judgment, the very clear evidence that factually, Mr Ardawa was at home with his wife and child in Milton Keynes throughout the time in question when both the statutory demand and the petition were posted through the letterbox at his address in Milton Keynes.
>
> 25. I am, in the circumstances, left in no doubt that Mr Ardawa was aware of these proceedings at all material times and I simply cannot accept that he was ignorant, as he suggests.

24. The District Judge further held that District Judge Hickman was entitled to make the order for substituted service on 17 February 2016. She said that if she was wrong in that regard, the court still had a discretion on the question of annulment under sect 282(1)(a) of the Insolvency Act 1986 ("IA"), and on that basis she would refuse to annul the bankruptcy proceedings:

> 27. At the time the bankruptcy order was made on 6 April 2016, I had found Mr Ardawa was, on the balance of probability, fully aware of the petition and the bankruptcy proceedings. He does not dispute the debt which this court understands is still owing. He chose at that time not to engage in those proceedings. He was properly deemed served and the bankruptcy order was subsequently made against him. In my judgment, he is not now in a position to complain of any injustice.
>
> 28. Nor do I find in this case any other procedural irregularity of sufficient significance to cause me to exercise my discretion to annul the bankruptcy order. Mr Ardawa has made numerous complaints of Ms Uppal that she failed to attempt to bring proceedings to his attention such as by service at other addresses or notification by email or by text. These complaints, in my judgment, have no weight in light of my primary finding of fact that Mr Ardawa was fully aware of the bankruptcy proceedings prior to the bankruptcy order being made against him. This is, in

> my judgment, a clear case of a debtor attempting to evade service, who was dealt with fairly and appropriately by the court at the time within those proceedings.

THE APPEAL

25. In this appeal, Mr Tunkel very properly accepts that he cannot challenge the District Judge's factual finding that 26 Saltwood Avenue was the Appellant's residence at the material time. However, he seeks to challenge her further findings that the Appellant (a) was aware of the statutory demand and the bankruptcy petition, and (b) was evading service. It seems to me that (b) largely stands upon (a): if the Appellant was not aware of the documents it is hard to see how he could be evading service.

26. Mr Tunkel emphasised that the conclusion that the Appellant was aware of these documents was an inference. There was no direct evidence of that fact. In that regard, Mr Tunkel referred to the recognition by the Court of Appeal that the reluctance of an appellate court to interfere with findings of fact by a first instance judge applied with less force in a case where the finding was not of primary fact but an inference drawn from primary facts, and where there had been no oral evidence. See *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10 at [97], where Green LJ cited the statement of Clarke LJ in *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577, itself approved by Lord Mance in *Datec Electronics Holdings Ltd v United Parcel Services Ltd* [2007] UKHL 23 at [46]. Clarke LJ said, at [15]-[16]:

> 15. In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere. As I see it, that was the approach of the Court of Appeal on a 'rehearing' under the Rules of the Supreme Court and should be its approach on a 'review' under the Civil Procedure Rules.
>
> 16. Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of discretion and, in my opinion, appellate courts should approach them in a similar way.

27. However, in the present case I consider that this overlooks a further finding by the District Judge: i.e. that the Appellant was living with Ms Takhar and their son as a family unit at the material time. As summarised above, I consider that there was abundant evidence on which the District Judge could reach that conclusion, which was also a finding of primary fact. Mr Tunkel argued that there was no evidence that they were still in a close and loving relationship. That may be so, and as he suggested, it may well be that their marriage had its 'ups and downs'. But that is a very different

thing from accepting that the marriage was so strained that Ms Takhar would fail to pass to the Appellant two letters addressed to him, or to inform him of what the process server had said when he called. That essentially was the Appellant's evidence, and it was of course founded on his fundamental assertion that he did not live at 26 Saltwood Avenue at all and that post would have had to be forwarded to him. Given the District Judge's rejection of that assertion (which is not, and cannot be, challenged), I see no basis to disturb her finding that Ms Takhar and the Appellant were continuing to live together as a family.

28. As against that, Mr Tunkel pointed to: (a) the email which the Appellant sent to the County Court on 8 June 2016: para 15 above; (b) the fact that the Appellant was in direct text correspondence with the Respondent at the time and made no reference to or complaint about her starting bankruptcy proceedings against him; and (c) the fact that the Appellant, who worked as a management consultant and had ample funds to discharge the debt which he did not dispute, would hardly allow himself to be placed into bankruptcy with all the adverse consequences that produces, if he had been aware of what was happening.

29. I recognise (although this was not a point particularly relied on by Mr Tunkel) that the inference as to knowledge of the documents was drawn without cross-examination, and apparently no application was made to cross-examine the Appellant. See in that regard the observations of Registrar Briggs (as he then was) in *Gate Gourmet Luxembourg Sarl v Morby* [2015] EWHC 1203 (Ch) at [30]-[31]. But the conclusions of primary fact regarding both the Appellant's residence and his relations with his second wife mean that his credibility was seriously damaged. Both points (a) and (b) are consistent with a determined attempt to disguise his awareness of the documents. As to point (c), the human motives that fuel conduct in acrimonious disputes between former husband and wife are not straightforward. It is also the case that the Appellant had failed to pay these debts, which he does not dispute and which arose from court orders against him in the matrimonial proceedings, for several years. Moreover, there is the evidence of Mr Power that the lady to whom he spoke at 26 Saltwood Avenue for the second time when he called at the house on 1 February 2016 told him that she had been told by the Appellant not to accept anything from the process server: para 11 above. Altogether, I consider that there was ample basis for the District Judge to draw the inference that the Appellant would have been aware of both the statutory demand and the petition, and that there is insufficient basis for this court to interfere with that conclusion.

30. The further points taken by Mr Tunkel for the Appellant concern (a) service of the statutory demand; (b) the content of the petition; (c) service of the petition; and (d) the jurisdiction of District Judge Hickman to make the order for substituted service. Before addressing these arguments, it is necessary to set out the legislative provisions.

The Legislative Provisions

31. The petition here was based on a statutory demand. In other words, the Respondent relied, to satisfy the necessary criterion under sect 267(2)(c) IA that the Appellant is unable to pay the debt, on the statutory presumption that flowed from the service of a statutory demand which had not been set aside: sect 268(1)(a) IA.

32. These proceedings were governed by the Insolvency Rules 1986 (the "IR"). The replacement Insolvency (England and Wales) Rules 2016 operate from 6 April 2017 and are not retrospective.

33. Service of a statutory demand is governed by rule 6.3(2) IR:

> (2) The creditor is, by virtue of the Rules, under an obligation to do all that is reasonable for the purpose of bringing the statutory demand to the debtor's attention and, if practicable in the particular circumstances, to cause personal service of the demand to be effected.

34. Further, rule 6.11 IR provided, insofar as relevant:

> **6.11. Proof of service of statutory demand**
>
> (1) Where under section 268 the petition must have been preceded by a statutory demand, there must be filed in court, with the petition, a certificate or certificates proving service of the demand.
> (2) Every certificate must be verified by a statement of truth and have attached to it a copy of the demand as served.
> …
> (5) If neither paragraph (3) nor paragraph (4) applies, the certificate or certificates must be authenticated by a person or persons having direct personal knowledge of the means adopted for serving the stator demand, and must–
>
> (a) give particulars of the steps which have been taken with a view to serving the demand [personally], and
> (b) state the means whereby (those steps having been ineffective) it was sought to bring the demand to the debtor's attention, and
> (c) specify 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.
>
> (6) The steps of which particulars are given for the purposes of paragraph (5)(a) must be such as would have sufficed to justify an order for substituted service of a petition.
> …
> (9) The court may decline to file the petition if not satisfied that the creditor has discharged the obligation imposed on him by Rule 6.3(2).

35. As regards a petition, rule 6.7 IR prescribed the content of the petition, including at rule 6.7(1):

> (d) any name or names, other than his true name, in which he has carried on business at or after the time when the debt was incurred, and whether he has done so alone or with others;
>
> (e) any address or addresses at which he has resided or carried on business at or after that time, and the nature of that business;…

36. Service of the petition was governed by rule 6.14, which included the following:

> **6.14. Service of petition**
>
> (1) Subject as follows, the petition shall be served personally on the debtor by an officer of the court, or by the petitioning creditor or his solicitor, or by a person instructed by the creditor or his solicitor for that purpose; and service shall be effected by delivering to him a sealed copy of the petition.
> (2) If the court is satisfied by a witness statement or other evidence on oath that prompt personal service cannot be effected because the debtor is keeping out of the way to avoid service of the petition or other legal process, or for any other cause, it may order substituted service to be effected in such manner as it thinks just.
> (3) Where an order for substituted service has been carried out, the petition is deemed duly served on the debtor.

37. Further provisions relating to service are set out in the Practice Direction: Insolvency Proceedings (the "PDIP"). The version of the PDIP in effect at the material time was the 2014 PDIP, of which para 13.2 provided, insofar as material:

> **13.2** *Substituted service of statutory demands*
>
> 13.2.1 the creditor is under an obligation to do all that is reasonable to bring the statutory demand to the debtor's attention and, if practicable, to cause personal service to be effected (r.6.3(2)).
>
> …
>
> 13.2.3 Where personal service is not effected …, substituted service is permitted, but the creditor must have taken all those steps which would justify the court making an order for substituted service of a petition. The steps to be taken to obtain an order for substituted service of a petition are set out below. Failure to comply with these requirements may result in the court declining to issue the petition (rule 6.11(9)) or dismissing it.
>
> 13.2.4. In most cases, evidence of the following steps will suffice to justify acceptance for presentation of a petition where the statutory demand has been served by substituted service (or to justify making an order for substituted service of a petition):
>
> (1) One personal call at the residence and place of business of the debtor where both are known or at either such places as is known. Where it is known that the debtor has more than one residential or business address, personal calls should be made at all addresses.
>
> (2) Should the creditor fail to effect personal service, a letter should be written to the debtor referring to the call(s), the purpose of the same and the failure to meet the debtor, adding

> that a further call will be made for the same purpose on the [day] of [month] 20[…] hours at [place]. Such letter may be sent by first class prepaid post or left at or delivered to the debtor's address in such a way as it is reasonably likely to come to the debtor's attention. At least two business days' notice should be given of the appointment and copies of the letter sent or left at all known addresses of the debtor. The appointment letter should state that:
>
> > (a) in the event of the time and place not being convenient, the debtor should propose some other time and place reasonably convenient for the purpose;
> >
> > (b) (In the case of a statutory demand) if the debtor fails to keep the appointment the creditor proposes to serve the debtor by [advertisement][post] [insertions through a letter box] or as the case may be, and that, in the event of a bankruptcy petition being presented, the court will be asked to treat such service as service of the demand on the debtor;
> >
> > (c) (In case of a petition) if the debtor fails to keep the appointment, application will be made to the Court for an order for substituted service either by advertisement, or in such other manner as court may think fit.

38. By a Respondent's Notice, the Respondent contends that any defect there may have been in the petition, or in service of either the statutory demand or the petition, here comes within rule 7.55 IR, which states:

> **7.55 Formal defects**
>
> No insolvency proceedings shall be invalidated by any formal defect or by any irregularity, unless the court before which objection is made considers that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the court.

(The Respondent's Notice also relies on CPR rule 3.10 but that was not pressed at the hearing as an independent ground.)

39. Finally, the court's power to annul a bankruptcy order is set out in sect 282(1) IA, of which the material part provides:

> The court may annul a bankruptcy order if it at any time appears to the court –
>
> a) that, on any grounds existing at the time the order was made, the order ought not to have been made, …

The further grounds of appeal

(a) *Service of the statutory demand*

40. Mr Tunkel argued that although in the light of the District Judge's findings it had to be accepted that 26 Saltwood Avenue was the Appellant's residence, the obligation under rule 3(2) IR, as elaborated in para 13.2 PDIP, required the demand to be served at 32 Bland Street, Huddersfield. Further or alternatively, the Appellant should have been contacted by text message or email to inform him of the statutory demand. He relied on the fact that the Appellant, to the Respondent's knowledge, was using the Huddersfield address for correspondence. More particularly, in the contact proceedings in the Family Court, the Huddersfield address was the one that the Appellant disclosed and which the Respondent used as the address for service in those proceedings in 2014-15. Moreover, on 5 July 2016, the Respondent's solicitors wrote to the Appellant to complain of non-compliance with the order concerning a property made by the District Judge in the Birmingham County Court in 2011, threatening committal proceedings: that was the same order which included provision for payment for costs that formed part of the bankruptcy debt. That letter was sent by the Respondent's solicitors to the Appellant at the Huddersfield address.

41. Mr Tunkel suggested that 32 Bland Street was effectively his additional residence, and he stressed the requirement to serve at "all addresses" in para 13.2.4(1) PDIP, where it is known that the debtor has more than one residential address. But I find that there is no support on the evidence, in the light of the District Judge's findings, that the Huddersfield address of his parents was also his own "residential address". The fact that it was his address for service in other proceedings does not make it his residence. Nonetheless, there is no doubt that the Respondent through her advisors could have sent a copy of the statutory demand to the Appellant at 32 Bland Street, and could equally have sent a copy by email. But the primary obligation for service of a statutory demand in rule 6.3(2) is to do "all that is reasonable for the purpose of bringing the statutory demand to the debtor's attention." Here, once it is accepted that 26 Saltwood Avenue was where the Appellant lived, and that at the time he was living there with Ms Takhar and their son as a family, I consider that the legal obligation as to service was satisfied. Moreover, that is borne out by the finding, which I have upheld, that he did become aware of the statutory demand so that the express purpose of rule 6.3(2) was fulfilled.

42. Mr Tunkel submitted that where, as here, the whole basis of the bankruptcy petition was the statutory demand, the burden on the creditor as to service of the demand was a high one. In that regard, he relied strongly on *Regional Collection Services Ltd v Heald (*also known as *Re H (a debtor))* [2000] BPIR 661. That was an appeal by the creditor against a decision to dismiss a bankruptcy petition on the basis that the requirements for service of the statutory demand under rule 6.3(2) IR had not been complied with. There, a process server had attended at the debtor's home address on nine occasions in the month of February with a view to making personal service. He then came again in mid-March, left a letter similar to the one in the present case informing the debtor that he would attend again at a stipulated time three days later for the purpose of serving the demand, and then when he did so and the debtor was not present he put the demand through the letter box. The respondent debtor's case was that while he knew that the process server was trying to contact him, he had completely moved out of his home at the end of February and did not see the statutory demand until August, some three months after presentation of the petition. Crucially, he also had a business address

where his office was operated throughout March. The judge refused to infer that the debtor had been aware that the process server was trying to serve a statutory demand. He referred to the requirements of the PDIP and held that there was no reason why the process server did not visit the debtor's business address which was in the same area, or at the very least post a letter to the business address. The Court of Appeal upheld the judge's view that the test under r. 6.3(2) is a high one and declined to interfere with his decision. In his short judgment, Nourse LJ stated (at 665):

> "This is a perfectly simple case where the judge had to make a decision which it was for him to make on the evidence that was before him. It was not, strictly speaking, a question within his discretion, but it was one which this court habitually regards as being essentially a decision for the judge. Judge Behrens not having misdirected himself in any way or taken into account anything which he ought not to have taken into account or left out of account something which he ought to have taken into account, I am quite satisfied that it would be wrong for this court to interfere with his decision."

Agreeing, Mantell LJ observed that whether the creditor had met the test in the rule was a question of fact so that the Court would not interfere with the judge's conclusion.

43. I recognise that the test of "all that is reasonable" under the rule is a high one, but *Heald* demonstrates that it is very fact sensitive. A critical factor in the approach of the judge there was that the guidance in PDIP para 13.2.4 as regards the business address had not been followed, in circumstances where the judge refused to find that the debtor was aware of the statutory demand at the time. By contrast, in *Yang v Official Receiver* [2017] EWCA Civ 1465, the Court of Appeal upheld the decisions of the courts below that a statutory demand issued by a local authority had been validly served in accordance with rule 6.3(2) IR when it was sent to the last known address of the debtor (from where the debtor said that she had moved out some months before). The Court regarded this as sufficient although the demand had not been sent to an address of a friend of the debtor which she had provided to the local authority as a "correspondence address." Gloster LJ stated, at [46], that this correspondence address was "irrelevant, since there was no requirement to attempt to serve a SD at an address which was not a residential or business address."

44. Here, the District Judge did find that the Appellant would have been aware of the statutory demand, and as explained above I see no basis to overturn that finding. Although the District Judge does not expressly refer to rule 6.3(2), she implicitly found in para 24 of her judgment that the statutory demand was validly served, and in any event that is my own conclusion on the particular facts of this case. I should add that the fact that the Appellant was, to the Respondent's knowledge, away in Canada attending a family funeral over the weekend of 3-4 October 2015, and very possibly for a few days either side (although he gave no evidence of this) does not affect that conclusion.

(b) *Content of the petition*

45. The petition gave as an address for the Appellant only 26 Saltwood Avenue. It did not give any previous addresses for the Appellant at or after the time the debts were

incurred. That was a breach of rule 6.7(1)(e) IR: see para 9 above. The Respondent would have known at least some of the Appellant's addresses, since one was their former matrimonial home, 213 Bradley Road, Huddersfield.

46. However, although formally a defect in the petition, this seems to me exactly the kind of defect which falls within the scope or rule 7.55 IR. It could not possibly cause any injustice to the Appellant, who was of course well aware of his own past addresses. Accordingly, I consider that this provides no ground for annulment.

(c) *Service of the petition*

47. Unlike a statutory demand, for a bankruptcy petition the primary obligation is to effect personal service; substituted service requires a court order to that effect: rule 6.14 IR. Here, the order for substituted service was made only on 17 February 2016, over three weeks after the petition was posted through the letter-box.

48. Mr Tunkel submitted that the Court has no jurisdiction to make a retrospective order for substituted service, and relied on the decision to that effect of Registrar Briggs in *Gate Gourmet.* As Mr Kwok for the Respondent pointed out, *Gate Gourmet* was strictly *obiter* on this point, since the Registrar had decided that personal service had been effected, a decision which was upheld on appeal by Mr Recorder Murray sitting as a deputy High Court judge (and who did not therefore address the issue of substituted service): [2016] EWHC 74 (Ch). However, I agree with Registrar Briggs' conclusion and reject Mr Kwok's submission that he was wrong. In the first place, the wording of rule 6.14(2) suggests that an order may only be prospective: "the court … may order substituted service *to be effected* in such manner as it thinks just" (my emphasis). That is supported by the structure of PDIP para 13.2.4 addressing the steps that will justify making an order for substituted service of a petition. Para 13.2.4(2)(c) requires the appointment letter for personal service of a petition to warn the debtor that if he fails to keep the appointment "application will be made to the court for an order for substituted service either by advertisement, or in such other manner as the court may think fit." That was indeed almost exactly the wording in the letter that Mr Power put through the letter box on 26 January 2016. That sits ill with the proposition that putting the petition through the letter box on the date of that appointment without any order of the court could subsequently become the substituted service authorised by the court. Secondly, in *Gate Gourmet*, Registrar Briggs contrasted the wording of rule 6.14 IR with the provision for substituted service of a claim form in CPR rule 6.15, where sub-rule (2) provides:

> On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service.

Part 6 of the CPR does not apply to the service of a bankruptcy petition: rule 12A.16(2) IR. Therefore, the retrospective order of District Judge Hickman could not be made under CPR rule 6.15, and the lack of an equivalent provision in the applicable rule for service in the Insolvency Rules is striking.

49. Mr Kwok argued in the alternative that the court had a general power to authorise substituted service under CPR rule 3.1(2)(m), which provides that the court may:

> "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, …"

50. Assuming that CPR Part 3 is applicable to bankruptcy proceedings, I reject as wholly untenable the suggestion that this provision can be applied to give some general authorisation to the court as regards service of proceedings that is supplementary to the specific prescriptions regarding service in the rules. CPR rule 3.1(2) begins with the proviso, "Except where these Rules provide otherwise…." The CPR does contain Rules providing for service in Part 6, so sub-rule 3.1(2)(m) does not give power to the court to circumvent the requirements regarding service laid down in the CPR. Just because Part 6 does not apply to service of a bankruptcy petition, which is covered by specific and express provision in the Insolvency Rules, in my view that cannot in consequence permit rule 3.1(2)(m) to be used to circumvent the requirements regarding service in rule 6.14 IR.

51. Nor can I accept Mr Kwok's further suggestion that there is nonetheless power to authorise substituted service under the inherent jurisdiction of the court. The authority on which he relied, *Langley v NW Water Authority* [1991] 1 WLR 697, concerned the court's power to issue a practice direction concerning the service of medical evidence in the County Court and is far removed from the issue in the present case. Moreover, in his judgment in that case Lord Donaldson MR said, at 702C:

> "Although there is no statutory authority for making local practice directions, none is needed because every court has inherent jurisdiction to regulate its own procedures, *save insofar as any such direction is inconsistent with statute law or statutory rules of court*" [my emphasis].

Here, there is statutory provision in the Insolvency Rules governing service of a bankruptcy petition and, as I have interpreted them, they do not permit a retrospective order for substituted service. In those circumstances the residual power of the court's inherent jurisdiction does not enable the court to make an order inconsistent with the rules.

52. It follows that the court did not have jurisdiction to make the order on 17 February 2016 authorising substituted service of the petition. Although I was told that it was cited in argument, the District Judge does not discuss *Gate Gourmet* or the terms of rule 6.14 IR in her judgment, and I find that her conclusion that the court was entitled to make the order for substituted service is wrong.

53. By his amended Application, the Applicant sought to set aside Judge Hickman's order for substituted service. Mr Kwok pointed out that this was a late amendment, advanced some 18 months after the original Application. However, in June 2016 when the Applicant first applied to annul the bankruptcy order, he was acting in person and I do not think it would be right to hold against him the fact that he failed to appreciate that he should also apply to annul the order for substituted service. Knowing that the Appellant was seeking to annul the bankruptcy order, the Respondent, who has been represented throughout, was in no way prejudiced by the subsequent addition of an application to set aside the order concerning service of the petition.

54. The question of setting aside Judge Hickman's order does not rest purely on lack of jurisdiction. The court made that order on the basis of the witness statement from Mr Power, who said that having made inquiries he was not "aware of any mobile or land line telephone numbers or email address on which I am able to make any contact with the Debtor." The most obvious source from which the process server would make inquiries is of course the solicitors instructing him on behalf of the debtor. I obviously do not know what passed between Mr Power and the Respondent's solicitors, but it is not in dispute that the Respondent had both a mobile telephone number and an email address of the Appellant; indeed, she was in regular contact with him by text message at this time concerning arrangements regarding the children. I make no personal criticism of Mr Power, but I regard this passage in what is a short witness statement as very misleading. Moreover, on a matter as serious as a bankruptcy petition, I think it would have been appropriate to tell the court that the Respondent had another postal address that he had given for service of documents in County Court proceedings concerning financial relief, the more especially as those were the proceedings in which the bankruptcy debt had arisen. That address was of course 32 Bland Street. If District Judge Hickman had been given full and correct information, I consider that he may well – to put it at its lowest - have directed that an attempt be made to contact the Debtor by telephone and/or that a copy of the petition should also be sent by email. Very possibly he would also have directed that a copy of the petition be sent to 32 Bland Street.

55. Having regard to the fact that it was made without jurisdiction and on the basis of misleading information, I have no doubt that the order of District Judge Hickman authorising substituted service should be set aside. The consequence, it seems to me, is that considered as of today, the petition was not duly served on the Appellant. I do not see that rule 6.14(3) IR leads to a different conclusion: the petition cannot be "deemed duly served" when that relies on a court order that is no longer effective.

56. Mr Kwok submitted that curative provision of rule 7.55 IR was applicable here also, such that these deficiencies cannot be a basis for invalidating the bankruptcy proceedings. I do not accept that rule 7.55, which applies only to a "formal defect" or "irregularity", is sufficiently broad to cover purported substituted service of a bankruptcy petition in the circumstances here.

57. In *Andrews v Bohm* [2005] EWHC 3520 (Ch), the bankruptcy petition was not personally served nor was there any application (or order) for substituted service. The petition was simply posted to the debtor's solicitors, but the court found that it had reached the debtor in good time before the making of the bankruptcy order. Mann J stated, at [58]:

> The service of a bankruptcy petition is obviously a very important step, and it is right and proper for the integrity of the system and for achieving fairness for debtors that those provisions [i.e. rule 6.14 IR] be properly adhered to so that there can be no doubt that proper service has been established.

He proceeded to doubt that such a complete failure to abide by the normal service provisions of the Insolvency Rules was a formal defect or irregularity that could fall within rule 7.55, but this view was *obiter* as the decision rested on other grounds.

58. More recently, the scope of rule 7.55 in the context of defective service was considered both in the appeal from the decision of Registrar Briggs in *Gate Gourmet* (concerning service of a bankruptcy petition) and in *Canning v Irwin Mitchell LLP* [2017] EWHC 718 (Ch) (concerning service of a statutory demand). In *Gate Gourmet*, the petition was handed to a friend accompanying the debtor who had a discussion with the debtor concerning the petition. Upholding the decision of Registrar Briggs, Mr Edward Murray QC (as he then was), sitting as a deputy High Court judge, held that this constituted personal service of the petition. But if it was not, such that personal service had not been effected, he doubted that this could constitute a formal defect or irregularity capable of cure by rule 7.55, although he added that "as a policy matter" there was no barrier to the application of rule 7.55 to the particular circumstances of that case.

59. In *Canning,* the court below held that the statutory demand had not been served in compliance with rule 6.3(2), since among other things it had been delivered to an address which was not the debtor's home. But the district judge in that case had nonetheless declined to set aside the statutory demand on the basis that it would be disproportionate where no serous prejudice had been caused to the debtor. On appeal, Mr Jeremy Cousins QC, sitting as a deputy High Court judge, reversed that decision and in a careful judgment discussed the various relevant authorities on rule 7.55, including *Gate Gourmet*. The deputy judge cited the decision of Norris J in *In re Anderson Owen Ltd* [2010] BIPR 37 (a case concerning sect 212 IA), at para 24:

> "The essential purpose of rules as to service is to ensure that a party has proper notice of proceedings brought and a fair opportunity to deal with them. Of course, they might also have significance in other contexts e.g. in founding jurisdiction or enabling a claim to be brought within a limitation period. Whether the court should insist upon strict compliance with them will be influenced by all such considerations: and guidance as to how to weigh them can be found in CPR r.3.10."

60. The deputy judge observed, at [29], that in *Gate Gourmet* and several of the other earlier authorities the document to be served actually reached, or at least came within the dominion of, the intended recipient, whereas in *Canning* itself there was a fundamental failure to effect service, as the statutory demand never reached the debtor or came within his dominion. The deputy judge continued:

> "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. 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 ss267 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."

61. In line with these judgments, I consider that whether a deficiency constitutes a "formal defect" or "irregularity" falling within the scope of rule 7.55 depends on both the nature of the requirement that has not been complied with and the circumstances of that failure to comply. Here, I think it is significant that it concerns service of a petition not a statutory demand. The obligation under the Insolvency Rules for service of a petition is notably higher than for a statutory demand. Under rule 6.14 IR, personal service is mandatory, and it is only excused by obtaining, on an application supported by evidence, a court order authorising substituted service. No doubt that reflects the particular significance of a petition: it is a court document and can lead directly to the making of a bankruptcy order. Here, I have found that the authorisation of substituted service was by an order which the court lacked jurisdiction to make and which, moreover, was obtained on evidence that was in part seriously misleading. In my judgment, this cannot properly be categorised as a "formal defect" or "irregularity" but is a fundamental failure regarding the rules as to service. It therefore falls outside the scope of rule 7.55 and the question of whether the failure caused "substantial injustice" within the terms of that rule therefore does not arise.

(d) *Section 282 IA*

62. The key issue in this case is whether the bankruptcy order should be annulled under sect 282(1)(a). Two questions arise. First, is the power to annul under that provision engaged at all? Secondly, if it is, should the court annul the petition in the circumstances of this case, given that the power under sect 282(1)(a) is discretionary?

63. Mr Kwok submitted that here no grounds existed to annul at the time the bankruptcy order was made. That is because as at 6 April 2016, when the court made the bankruptcy order, the order for substituted service stood, and rule 6.14(3) IR provides, as set out above, that substituted service of a petition carried out in accordance with an order is deemed good service.

64. I do not accept that argument. If the court had been told on 6 April 2016 that the substituted service of the petition had been authorised by a retrospective order for substituted service which the court had had no jurisdiction to make, and which had been obtained on the basis of misleading information, I regard it as almost inconceivable that the court would nonetheless have made a bankruptcy order against the Appellant. The grounds to impugn the basis of substituted service all existed at the time the bankruptcy order was made and were not dependent on there being a formal order setting aside the prior order for substituted service. The situation in *Yang*, where the Court of Appeal held that sect 282(1)(a) could not apply when the liability orders establishing the debt were expressly deemed by the relevant regulations to fulfil the requirements of sect 267 IA, seems to me very different.

65. That takes me to the question of discretion. The District Judge held, at para 27 of her judgment, that if there was a procedural irregularity, she would in her discretion decline to annul the petition. However, she explained that in reaching that decision one factor

that she took into account was that the Appellant was properly deemed served; and she also appears to have left out of account, since it is nowhere mentioned, the fact that misleading evidence was presented on the part of the Respondent to the court on 17 February 2016. In the circumstances, I consider that her exercise of discretion cannot stand, and it falls to me to exercise the court's discretion afresh.

66. The facts that the order for substituted service was improperly made and the misleading aspect of the witness evidence relied on by the Respondent to obtain that order undoubtedly are factors counting in favour of annulment. On the other hand, there are several very significant factors pointing the other way, including those on which the District Judge did, very properly, rely. This was an undisputed debt, arising from orders in court proceedings between these parties, which the Appellant had failed to pay. It is undisputed that he has the means to pay that debt, and while he states, unsurprisingly, in these proceedings that he will do so if the bankruptcy is annulled, his evidence gives no explanation as to why he had failed to do so before these proceedings commenced. The Appellant was, on the factual findings that I have upheld, aware of both the statutory demand and the petition itself at the time, and untruthful in his evidence regarding his place of residence. All the indications are that he was deliberately seeking to evade service. Taking all this into account, I reach the same conclusion as the District Judge. This is not a case where it is appropriate for the court to annul the bankruptcy order.

CONCLUSION

67. Save as regards setting aside the order of 17 February 2016 for substituted service, this appeal is accordingly dismissed.