Neutral Citation Number: **[2022] EWHC 762 (Ch)**

Case Number _001363 of 2019

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**INSOLVENCY LIST (Ch D)**
**IN THE MATTER OF PRAMOD MITTAL ( IN BANKRUPTCY)**
**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 1 April 2022

**Before** :

**DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE AGNELLO QC**

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**Between :**

**PAUL ALLEN**
**(AS TRUSTEE IN BANKRUPTCY)**

**Applicant**

**- and –**

**PRAMOD MITTAL**

**Respondent**

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**Mr Tony Beswetherick QC** (instructed by Mishcon de Reya LLP) for the Applicant
**Mr James Gibbons and Mr Chichester-Clark** (instructed by Collyer Bristow LLP) for the Respondent

Hearing dates: 10 and 19 November 2021

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# FINAL JUDGMENT

**Introduction**

1. Mr Mittal was made bankrupt by order of this court on 19 June 2020. He was due to be discharged, pursuant to section 279(1) of the Insolvency Act 1986 ('IA 86') on 18 June 2021. On 10 June 2021, the Trustee issued an application ('the suspension application') seeking an order to suspend discharge of the bankruptcy pursuant to section 279(3). Unless otherwise suspended by order of the court, a bankrupt is discharged at the end of one year beginning with the date on which the bankruptcy commences. The issue of the service of the suspension application is one of the matters which I need to determine. It is clear that there was insufficient time to serve in accordance with the Insolvency Rules between 10 June 2021 and the discharge occurring on 18 June 2021. On 17 June 2021, the suspension application came before ICC Judge Prentis on an urgent basis. The Judge made an order granting an interim suspension of Mr Mittal's discharge without prejudice to Mr Mittal's right to oppose the Trustee's application and at paragraph 4 of the order, stated, *'for the avoidance of doubt, this Order is made without prejudice to the Respondent's right to oppose suspension of his discharge from bankruptcy on any grounds at the Final Hearing, including those advanced on his behalf at the hearing on 17 June 2021'*. There is some dispute as between the parties as to the ambit of this part of the order and the effect, if any, of the representations made before the Judge on 17 June 2021.

2. The suspension application was then listed for hearing on 10 November 2021. Evidence was served by Mr Mittal being a witness statement dated 25 August 2021. By letter dated 29 October 2021, Mr Mittal's solicitor stated that he would contest the application on the issue of service and procedure and not in relation to the allegations which had been made as to his conduct which the Trustee averred justified the making of the suspension order. The matter was heard before me on 10 November 2021 and then was adjourned part heard by me for a further half day on 19 November 2021.

3. Shortly before the adjourned hearing date, the Trustee issued an application seeking post validation of service of the suspension application. There was no real reason as to why this application was not made before. I did ask Mr Beswetherick,

acting on behalf of the Trustee, to confirm at the hearing on 10 November 2021 that no such application had been made. He confirmed that no such application had been made. Although it is quite unusual that an application is issued between the first and the second day of the hearing, no real objection was taken. I considered it and deal with it below. Mr Gibbons, acting on behalf of Mr Mittal, had in many respects dealt with the merits of such an application in his skeleton. I should add that I had the benefit of Mr Gibbons' submissions before me, but the skeleton relied upon was drafted by Mr Chichester-Clark. Mr Gibbons took over the case at the very last minute when Mr Chichester-Clark became indisposed.

4. The grounds upon which Mr Mittal seeks dismissal of the suspension application are as follows:-
   (i) The Trustee failed to effect valid service of the suspension application prior to the date upon which Mr Mittal was discharged in accordance with section 279 IA 86;
   (ii) The Trustee failed to serve the suspension application and the evidence on Mr Mittal and the Official Receiver within time prior to the first hearing of his application on 17 June 2021.

5. Mr Gibbons on behalf of Mr Mittal confirmed that ground 2 was an alternative to ground 1. Effectively ground 2 is based on the premise that I conclude that there was valid service of the suspension application and the evidence albeit such service was not effected in accordance with the time limits in the IA 86 and the Insolvency Rules 2016 ('IR 2016').

6. The Trustee opposes this application and asserts in summary that:-
   (1) There was valid service of the suspension application and evidence on 11 June 2021, or there was an agreement/acceptance between the parties that valid service was effected on 11 June 2021, alternatively when the hearing bundle was served on 15 June 2021;
   (2) If there was no valid service prior to the hearing on 17 June 2021, then the issue of valid service was waived and/or Mr Mittal is estopped from relying

upon it by reason of the admissions/statements made at that hearing by Counsel in his skeleton as well as by reason of the conduct of Mr Mittal;

(3) There is now before me an application for post validation service issued by the Trustee and the Court should grant it in all the circumstances.

7. I should add that Mr Beswetherick on behalf of the Trustee also made strong submissions relating to the merits of the application for a suspension of the bankruptcy as well as taking me through in detail the background to the application and the conduct of Mr Mittal relied upon by the Trustee. I have not set all the details of these matters in this judgment. For the purposes of this judgment and on the basis of the evidence which has been filed, I am prepared to accept that there is a compelling case on the merits for the suspension of bankruptcy. As was made clear shortly before 10 November 2021, the hearing before me related only to the issue of service which I have identified above. Mr Mittal has elected not to file any evidence relating to the merits of the suspension application. In so far as necessary, I will deal with whether a suspension order should be made once I have dealt with the service issues. However, there is, on the evidence before me, no real defence raised by Mr Mittal on the points raised and relied upon by the Trustee.

**The issue of service of the suspension application**

8. The relevant facts as to what occurred are as follows. These are not disputed although the parties assert that what occurred is open to different interpretation. On 10 June 2021, the suspension application was issued by the Trustee. On 11 June 2021, the following exchanges took place:-

(1) At [15:18], Mishcon sent an email to Collyer containing a link to files stored on a Mimecast platform. The covering email stated:

*"Please see the attached correspondence, a hard copy of which has been sent today via same day courier."*

(2) At [18:53] Mishcon sent a further email to Collyer saying that no one had been at Collyer's offices to accept delivery of the application. They proceeded to ask whether Collyer were prepared to accept service via email:

*"We should be grateful if you would confirm you are content to accept service of our letter and Application via email. In any event, we have arranged for the hard copy to be re-delivered to your offices on Monday*

*morning."*

(3) At [19:14] Collyer replied as follows:

*"We have moved offices to....I thought that had been brought to your firm's attention.*

*In any event, we will accept service by email and there is no need to deliver a hard copy to our new offices. (I am still working remotely.)"*

Mishcon replied [19:19] saying *"Thank you, I shall be sure to update our records".*

(4) After the last email reply from Mishcon, there was no attempt to send the documents via email.

9. The relevant provisions relating to service of an application to suspend discharge from bankruptcy pursuant to section 279 IA 86 are in CPR Part 6 in respect to the service rules relating to a claim form. Insolvency Rule 2.9(1) (IR 2016 which are applicable here) requires that an applicant serves a sealed copy of the suspension application upon the Respondent and the Official Receiver. Paragraph 5.1 of the Practice Direction on Insolvency Proceedings provides that Schedule 4 to IR 2016 prescribes the requirements for service under IA 86 and IR 2016. CPR Pt 6 applies by virtue of Schedule 4 to IR 2016, save where it provides otherwise or the Court so directs. Paragraph 1(2) of Schedule 4 IR 2016 states,

*"Service is to be carried out in accordance with Part 6 of the CPR as that Part applies to either a "claim form" or a 'document other than the claim form" except where this Schedule provides otherwise or the court otherwise approves or directs."*

10. The above is agreed between the parties. The disagreement arises as to what is the effect of the string of emails set out above. Mr Gibbons for Mr Mittal submits that the email from Collyers agreeing to accept electronic service by email related to prospective transmissions. Mr Beswetherick on behalf of the Trustee submits that a reading of the emails is such that the agreement to accept electronic service encompassed the documents which had already been transmitted by electronic means on 11 June 2021, at 15.18.

11. I turn back to the emails. The email exchange states *,' We should be grateful if you would confirm you are content to accept service of the Application via email.'* The

reply to this request was, *'…we will accept service by email and there is no need to deliver a hard copy to our new offices.'* Mr Beswetherick submits that this related to the document which had been sent via email on 11 June 2021 at 15.18. The email sent on earlier that day stated, *'Please see attached correspondence, a hard copy of which has been sent today via same day courier'*. So when that email was sent, in my judgment, it was not on the basis that the service was being effected by electronic means. In my judgment, that email (and the covering letter which was attached to the email) did not contain a request for service by electronic means.

12. Again, there is no real disagreement as to the rules relating to service by email in CPR Part 6. In order to effect service by email, prior written consent as to the principle of service by email and the form which it is to be transmitted is necessary. CPR 6.3(1)(d) states that a claim form may be served, *'…by..fax or other electronic communications in accordance with Practice Direction 6A.*' Paragraph 6A of the Practice Direction states, *'4.1……where a document is to be served by fax or other electronic means –*

*(1) the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving –*

*(a) that the party to be served or the solicitor is willing to accept service by fax or other electronic means; and*

*(b) the fax number, e-mail address or other electronic identification to which it must be sent….'*

*4.2 Where a party intends to serve a document by electronic means (other than by fax) that party must first ask the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means (for example, the format in which the documents are to be sent and the maximum size of attachments that may be received)."*

13. Mr Beswetherick accepted that, at the time of the email of 11 June 2021 at 15.18, there had been no prior request for service to be effected by electronic means. He also accepted that the email itself (or indeed the covering letter attached) did not request for service to be by electronic means. As Mr Gibbons submitted, the intention at that stage was to effect service personally via courier. Mr

Beswetherick submits that the correct interpretation of the email dated 11 June 2021 at 19.14 is that the documents sent via email at 15.18 were accepted as proper service by Collyer and there was no need to resend those documents by way of service.

14. I have considered carefully the exchange of emails and I find that I am unable to accept Mr Beswetherick's submission relating to the construction and interpretation of the emails. The evidence which is before me is that set out in the emails. In my judgment, the email on 11 June 2021 at 19.14 dealt with service via email on a prospective basis. It used clear and unambiguous language. It stated that, *'we will accept service by email and there is no need to deliver a hard copy to our new offices'.* I am unable to accept that this can be interpreted as accepting as valid service of the suspension application and the documents sent by email earlier that day. That is not what the email says. In my judgment, the words used in the email are clear and unambiguous. It dealt with prospective service.

15. Mr Beswetherick also sought to persuade me on the basis that clearly the parties intended to and did agree that the email transmission of the documents earlier that same day would constitute good service, then service was properly effected. The difficulty with this argument is that the words used in the exchange of emails is contrary to this proposed construction. I will deal later in this judgment with the related argument that, by reason of the conduct of Mr Mittal and/or his legal representatives, they have accepted the service as being valid and effectively have waived an entitlement to challenge service. However, in my judgment, service was not effected in accordance with the rules on 11 June 2021.

*Barton v Wright Hassell LLP and limitation defences*

16. Mr Gibbons took me to the case of *Barton v Wright Hassall LLP [2018] 1 WLR 1119* , being a judgment of the Supreme Court. Mr Gibbons took me to the facts of *Barton*, which are, in my judgment, important. Mr Barton sought to serve his claim for professional negligence against Wright Hassall LLP through their solicitors, Berryman Lace Mawer LLP ( Berrymans ) who had agreed to accept service. Mr Barton was a litigant in person. He sent an email to Berrymans on the

last day of the period prescribed for service pursuant to CPR r 7.5, in the following terms:-

*'Please find attached by means of service upon you.*

*1. Claim Form and Response Pack*

*2. Particulars of Claim*

*3. Duplicated first and last pages of the Particulars of Claim showing the court seal and the signature on the statement of truth.*

*The Particulars of Claim were filed into Chesterfield County Court this morning.*

*I would appreciate if you could acknowledge receipt of this email by return'*

17. Mr Barton received an automatic reply which contained a number to contact if the matter was urgent. He did not use that number. A few weeks later, Berrymans wrote to Mr Barton and stated that they had not confirmed that they would accept service by email and it was not a permitted mode of service without permission being provided prior to its use. By that time, the claim form had become statute barred.

18. Before the District Judge, Mr Barton argued (1) that his service complied with the rules because Berrymans' correspondence with him on 24 June 2013 amounted to an indication that they would accept service by email. Alternatively, similar to the case before me, (2) Mr Barton asked for service to be validated under CPR rule 6.15(2). Finally, (3) Mr Barton also asked for the validity of the claim form to be extended under CPR rule 7.6. Mr Barton failed on all three of his contentions. He was given permission by the Court of Appeal to appeal in relation to the second ground, being post validation service. The Supreme Court dismissed the appeal by a majority of 3-2.

19. At paragraphs 15 and 16, Lord Sumption stated,

*'15. Mr Barton is appealing against a discretionary order, based on an evaluative judgment of the relevant facts. In the ordinary course, this court would not disturb such an order unless the court making it had erred in principle or reached a conclusion that was plainly wrong. In my opinion both Judge Godsmark and the Court of Appeal identified the critical features*

*of the facts of this case and reached a conclusion which they were entitled to reach. Indeed, save for one minor misdirection, which I have pointed out, I think that the same was true of the district judge.*

*16 The first point to be made is that it cannot be enough that Mr Barton's mode of service successfully brought the claim form to the attention of Berrymans. As Lord Clarke JSC pointed out in Abela v Baadarani [2013] 1 WLR 2043, this is likely to be a necessary condition for an order under CPR r 6.15, but it is not a sufficient one. Although the purpose of service is to bring the contents of the claim form to the attention of the defendant, the manner in which this is done is also important. Rules of court must identify some formal step which can be treated as making him aware of it. This is because a bright line rule is necessary in order to determine the exact point from which time runs for the taking of further steps or the entry of judgment in default of them. Service of the claim form within its period of validity may have significant implications for the operation of any relevant limitation period, as they do in this case. Time stops running for limitation purposes when the claim form is issued. The period of validity of the claim form is therefore equivalent to an extension of the limitation period before the proceedings can effectively begin. It is important that there should be a finite limit on that extension. An order under CPR r 6.15 necessarily has the effect of further extending it. For these reasons it has never been enough that the defendant should be aware of the contents of an originating document such as a claim form. Otherwise any unauthorised mode of service would be acceptable, notwithstanding that it fulfilled none of the other purposes of serving originating process.'*

20. At paragraph 21, after considering the steps taken by Mr Barton, Lord Sumption stated:-

*'21.Like the Court of Appeal, I would readily accept Mr Elgot's submission that the claimant need not necessarily demonstrate that there was no way in which he could have effected service according to the rules within the period of validity of the claim form. The Court of Appeal rejected this suggestion in Power v Meloy Whittle Robinson Solicitors [2014] EWCA Civ 898. That, however, was a case in which the problem was that the court itself had failed to effect proper service because of an administrative error. The submission that the Court of Appeal rejected was that this*

*did not justify relief under CPR r 6.15 because it had been open to the claimant's solicitor to effect personal service. However, I agree with the general point that it is not necessarily a condition of success in an application for retrospective validation that the claimant should have left no stone unturned. It is enough that he has taken such steps as are reasonable in the circumstances to serve the claim form within its period of validity. But in the present case there was no problem about service. The problem was that Mr Barton made no attempt to serve in accordance with the rules. All that he did was employ a mode of service which he should have appreciated was not in accordance with the rules. I note in passing that if Mr Barton had made no attempt whatever to serve the claim form, but simply allowed it to expire, an application to extend its life under CPR r 7.6(3) would have failed because it could not have been said that he had taken all reasonable steps to comply with rule 7.5 but has been unable to do so. It is not easy to see why the result should be any different when he made no attempt to serve it by any method permitted by the rules.'*

21. It is also important to understand the reasoning behind the approach in this area and the decision of the Supreme Court. At paragraph 28 of the judgment of Lord Briggs, his Lordship stated,

    *'While I would not wish in any way to depart from Lord Clarke JSC's dictum in the Abela case [2013] 1 WLR 2043 that the most important purpose of service is to ensure that the contents of the claim form (or other originating document) are brought to the attention of the person to be served, there is a second important general purpose. That is to notify the recipient that the claim has not merely been formulated but actually commenced as against the relevant defendant, and upon a particular day. In other words it is important that the communication of the contents of the document is by way of service, rather than, for example, just for information. This is because service is that which engages the court's jurisdiction over the recipient, and because important time consequences flow from the date of service, such as the stopping of the running of limitation periods and the starting of the running of time for the recipient's response, failing which the claimant may in appropriate cases obtain default judgment.'*

22. Mr Gibbons submitted that these passages and the approach in *Barton* are equally applicable in the current case. He also contends that on the evidence, there was no reason why service could not have been effected and that the Trustee could have taken steps to service the application in accordance with the rules. Mr Beswetherick served a supplemental skeleton with submissions relating to the post validation application and some further submissions which Mr Beswetherick sought to make. Mr Beswetherick sought to expand and strengthen his original submission that the position here is different from that in *Barton* because, he submits the limitation defence point is inapplicable here.

23. Mr Beswetherick submitted that the court has jurisdiction to make a suspension order providing the period of bankruptcy has not expired. The court can make a suspension, in reality an interim suspension, in cases where there has been no service of the suspension application as well as where there has been short service of the application. This is clear from many of the cases referred to in the skeleton arguments. Mr Beswetherick relied in particular upon *Bagnell v Official Receiver [2004] 1 WLR 2832*. The Court of Appeal confirmed that rule 12.10 (formerly r 7.4) applied to applications seeking to suspend discharge of a bankruptcy despite the mandatory nature of the words used in r 10.142 (formerly r 6.125). Accordingly, the court was able to hear the application, if urgent, on a without notice basis as well as making such orders, or directions for abridging time for service. The suspension application in the current case did not seek any abridgment of time on the issue of service. It sought an interim suspension until the hearing of the IVA challenge by a creditor, Moorgate Industries UK Limited.

24. In reality, an interim suspension is not something which appears from section 279 IA 86. It arises very much from the case law. However, it has become a convenient shorthand used for cases where, for reasons which must be set out in the evidence, the Trustee seeks a suspension order despite not having provided sufficient time to the Bankrupt to deal with the suspension application. So an interim suspension order is one where the Court is invited to make a suspension order over to particular date or event (such as an effective hearing or judgment) so as to provide the bankrupt with an opportunity to deal with the application being made. In many cases, this is because a Trustee has left it very late when such an

application for a suspension is made. In other cases, an interim suspension is made because the effective hearing date of a contested application will be after the expiry of the bankruptcy period.

25. I accept of course that the Court has jurisdiction to make an interim suspension order, to hear the application on a without notice basis or on the basis that time is abridged. However, as is clear from *Bagnall*, the Court would expect evidence which supported an application which is made effectively in breach of the relevant service rules. The merits of the application itself are important, but this does not mean that the Court ignores the evidence relating to why the application has not been made with service being effected in accordance with the rules. In my judgment, an application made on a without notice basis must also be supported by evidence which justifies the application being made on a without notice basis. A suspension order, whether it is called an interim suspension or a suspension until a certain date, is a serious matter for a bankrupt.

26. In the current case, no application was made seeking that an interim suspension order was made without notice. In fact, as I have already stated above, the notice of application does not seek an abridgement of time relating to the service of the suspension application. It does seek an interim suspension order, probably on the basis that service had not been effected in accordance with the time limits set out in the rules. However, I do not accept Mr Beswetherick's submission that the position relating to suspension orders is not comparable to the position set out relating to the service of claim forms and expiry of limitation periods.

27. A suspension order can only be made by the Court prior to the expiry of the discharge period. As Mr Beswetherick pointed out, there are many cases where the Court grants an interim suspension. These are cases where due to the application being issued so close to the expiry date of the bankruptcy, the Court needs to consider whether to make an interim suspension pending a full hearing of the application itself. I have already referred to this above. A trustee will need to establish, as the case law shows, some good reason as to why the application is being made at a time when it is not possible for the court to hear and determine

the application without the need to consider making an interim suspension order. The Court will consider the merits of the suspension application as well as any representations made in the short period of time by the bankrupt. If an interim suspension or suspension order itself is not made prior to the date of the expiry of the bankruptcy period, then there is no jurisdiction thereafter for the court to make such a suspension order. The court needs to hear and make an order prior to the expiry of the bankruptcy period. In my judgment, the point relied on in this case by Mr Mittal is akin to that being considered by the Supreme Court in *Barton v Wright Hassall LLP*. If the suspension application has not been served prior to the hearing of that suspension application, then the order made at that hearing cannot be valid, save in a case where the Court considers it appropriate, at that hearing, to make an order directing that the steps taken in respect of service constitute good service. For example, an order abridging time for service can be made. Alternatively, the Court directs that the application can be heard on a without notice basis. In the current case, the issue of service is extremely important because of the time limits which are set out in section 279 IA 86.

28. If service has not been properly effected prior to the expiry of the bankruptcy period, then the Court lacks jurisdiction to make an interim suspension order, unless the Court also makes orders relating to abridgement of service or directions relating to hearing the matter on a without notice basis. Mr Beswetherick submitted that as the order made by ICC Judge Prentis on 17 June 2021 was made before the expiry of the bankruptcy period, then this case falls outside of the principles in *Barton*. In my judgment, that is not the correct analysis. The order of ICC Judge Prentis did not provide for an abridgment of time for service or consider and make a post validation service order. It expressly reserved the issues relating to service until the next hearing to enable those points to be heard when there was more time. In my judgment, it was therefore clear to the Trustee that service points would be argued after the expiry of the bankruptcy period because that period was due to expire the next day.

29. In my judgment, there is no real and substantial difference between the current scenario and the position in *Barton* relating to service of the claim form. The

difference is that in a *Barton* type case, time stops running for the purposes of limitation periods by the service of the claim form. Parties know the 'red line'. A court would need to be satisfied that the application was properly served before making a suspension order (even an interim suspension order). ICC Judge Prentis expressly reserved all points which Mr Mittal would seek to raise. That included any service point, including those which had already been highlighted by Counsel at the hearing on 17 June 2021. In my judgment, it is not possible to rely on the fact that an interim suspension order was made by the Court on 17 June 2021 as in some way depriving Mr Mittal of the limitation defence he now seeks to rely upon.

30. The Trustee did not seek or obtain any orders validating service or abridging time prior to the expiry of the bankruptcy period. That meant, in my judgment, that the order made on 17 June 2021 was made expressly subject to those points which would be argued, in so far as Mr Mittal sought to do so, at a later date. Of course, the Court can consider and make a post validation service order in both types of cases. That is what was before the Supreme Court in *Barton*. Before me there is also a post validation service application. Like in *Barton*, the post validation application is being made after the expiry of the limitation period. In *Barton*, there was a failure to serve the claim form before the expiry of the limitation period. Here, it is a failure to serve the suspension application prior to the expiry of the bankruptcy period.

31. It seems to me, as I have analysed above, that there is a limitation defence which arises in this case. Mr Beswetherick submitted that the reason the Trustee finds himself in this position is because the issue relating to the service of the suspension application was not raised by Mr Mittal and/or those acting for him. Effectively, had the issue relating to service of the suspension application been raised, then doubtless an application would have been made before the expiry of the discharge period for post validation service. This submission seems to me identical to the one made by Mr Barton in the Supreme Court case. As Mr Gibbons submitted, there is no duty or obligation upon the other party to alert the Trustee to a service point.

32. These passages I have set out above were relied upon by Mr Gibbons additionally in support of his submission (made before the application for post validation of service but equally applicable now such an application is before me) that a post validation application would have failed. There was nothing preventing the Trustee's solicitors from serving in accordance with the rules. Having obtained permission to serve by electronic means, the documents were then not served with a covering letter stating that the documents were being served by electronic means in reliance upon the previous permission granted for this to constitute good service in accordance with the Rules. Equally, there was no email asking Collyer whether they would accept as being good service the documents which had been sent earlier on 11 June 2021. That may not have been service in accordance with the Rules, but consent from Collyers would have prevented the current point being taken. In my judgment, as in *Barton*, there was really no reason for the non-compliance. The Trustee had left it very late to make the application pursuant to section 279(3). In fact, the Trustee's application had to be heard at short notice and did not provide for the requisite days between service and hearing date.

33. At paragraph 23 in *Barton*, Lord Sumption concluded as follows on this point:- *'Naturally, none of this would have mattered if Mr Barton had allowed himself time to rectify any mishap. But having issued the claim form at the very end of the limitation period and opted not to have it served by the court, he then made no attempt to serve it himself until the very end of its period of validity. A person who courts disaster in this way can have only a very limited claim on the court's indulgence in an application under CPR r 6.15(2). By comparison, the prejudice to Wright Hassall is palpable. They will retrospectively be deprived of an accrued limitation defence if service is validated. If Mr Barton had been more diligent, or Berrymans had been in any way responsible for his difficulty, this might not have counted for much. As it is, there is no reason why Mr Barton should be absolved from his errors at Wright Hassall's expense'.*

34. In my judgment service was not effected in accordance with the rules. The application being made now by the Trustee seeking post validation service therefore falls to be considered at a time when there is a limitation defence. For the reason I have set out above, I do not accept that the interim suspension granted

by ICC Judge Prentis on 17 June 2021 in some way prevents this being a limitation defence matter. This is because the very terms of the order enabled such arguments to be taken at a later date when evidence could be served and submission could be heard by the court with more time. Obviously, that later hearing would occur after the expiry of the bankruptcy period. That is simply a consequence of the fact that the Trustee brought his application so late in the day. This is exactly what Lord Sumption was referring to in the passages I have quoted above. I now turn the second argument raised by Mr Beswetherick, namely that there is an acceptance of service, a waiver, or an estoppel such that Mr Mittal is prevented from raising the service point relating to service of the suspension application.

## Waiver submissions – communications and the hearing before ICC Judge Prentis

35. As an alternative to the construction of the emails and his submission that the service of the suspension application was effected in accordance with the rules, Mr Beswetherick submitted that correspondence after 11 June 2021 as well as the position taken by those representing Mr Mittal was such that it was clear that no point was being taken by them in relation to the service of the suspension application. This is in some ways a point similar to that taken by Mr Barton in *Barton v Wright Hassall* where Mr Barton alleged that Wright Hassell were playing 'technical games'. The Supreme Court noted that Berrymans had taken the point that service was invalid but they had not done anything before the purported service by email and as observed by the Supreme Court, there was nothing that they should have reasonably done thereafter. In *Barton*, the claim form expired a day after it was served. As stated at paragraph 22 of *Barton, 'Even on the assumption that that they realised that service was invalid in time to warn him to re-serve properly or begin a fresh claim within the limitation period, they were under no duty to give him advice of this kind. Nor could they properly have done so without taking their client's instructions and advising them that the result might be to deprive them of a limitation defence. It is hardly conceivable that in those circumstances the client would have authorised it'*. In my judgment the emails which I have referred to above do not evidence a position being taken by

Mr Mittal and his legal representatives relating to service of the suspension application. The emails provide no assistance to the Trustee in this regard.

36. So I turn to consider the evidence relied upon by Mr Beswetherick in support of his submission relating effectively to the conduct of Mr Mittal or his lawyers being such that either, (1) there is some waiver and/or estoppel which prevents the service point being taken and relied upon before me, or (2) that the conduct of Mr Mittal and/or his lawyers is such that an application for post validation service should be granted. I will deal with the latter point first.

37. After the emails which I have referred to above were exchanged on 11 June 2021, Mischon sent an email dated 14 June 2021 at 20,07 referring to the suspension application listed for 17 June 2021 ( for effectively an interim suspension order) and asked what was the position of Mr Mittal. By email in reply dated 14 June 2021 at 20.35, Mr Kramer of Collyer stated, *'We are taking instructions and will then revert. In the meantime all our client's rights are reserved'*.

38. The next letter is dated 15 June 2021 from Mischon to Collyer. The letter referred to the application and then stated, 'We enclose, by way of service, the hearing bundle in electronic format in advance of the Hearing, which has also been lodged with the Court'. There was then an email from Mr Kramer dated 16 June 2021, at 11.59, which stated as follows, 'We have been instructed to oppose the application and attach our statement of costs'.

39. Mr Beswetherick also referred me to the skeleton of Counsel on behalf of Mr Mittal, Mr Chichester-Clark, filed in support of Mr Mittal's opposition to the interim suspension order sought before the Judge on 17 June 2021. Mr Beswetherick submits that the point as to service in relation to 11 June 2021 was not highlighted or taken in that skeleton. At paragraph 10, the skeleton states that service of the suspension application and evidence in support was effected by email on 14 June 2021, being three days before the hearing on 17 June 2021. The point being taken in the skeleton related to what Mr Gibbons called his second ground, being that by reason of the late service of the suspension application and

the evidence, the order sought cannot be made unless the court was minded to abridge time retrospectively for service and thereafter make a suspension order for service and make an interim suspension order. This, the skeleton argued, would require exceptional circumstances and it was submitted, none exist. The skeleton referred to the case of *Bell v Ide [2020] EWCA Civ 1469*. In his submissions, Mr Beswetherick asserts that ICC Judge Prentis was not much impressed by this argument. However, it is clear that the Judge made no specific decision on this argument. That is clear from the terms of his order and also, as at the time that the matter was before the Court on 17 June 2021,the bankruptcy discharge period had not expired.

40. So Mr Beswetherick submits before the Court on 17 June 2021, no point was taken, as to service of the suspension application not having been effected in accordance with the relevant rules. Mr Beswetherick submitted that had this point been taken or raised in correspondence before the hearing, then the Trustee could have taken steps to seek the appropriate order from the court before the expiry of the bankruptcy on 18 June 2021.

41. As in *Barton* and as I have set out above, in my judgment, there is no duty upon someone in Mr Mittal's position to alert the Trustee to the failure by the Trustee to effect service. Mr Beswetherick submitted that service of the hearing bundle constituted valid service of the suspension application. This appears to have been what was referred to in the skeleton of Mr Chichester Clark as being valid service. In my judgment, the service of a hearing bundle cannot constitute service of the suspension application. The letter dated 15 June 2021 which was sent with the hearing bundle electronically did not assert that the service of the hearing bundle was service of the suspension application. Obviously, this was because as far as Mischons were concerned, the suspension application had already been validly served.

42. As to the submission that by reason of the contents of the skeleton and the statement relating to service on 17 June 2021, Mr Mittal has waived an entitlement to argue that service has not been effected, this requires consideration

of the hearing itself and in particular the order made by ICC Judge Prentis. I accept what was submitted to me by Mr Gibbons, being that the application came before ICC Judge Prentis very much on an urgent basis. It was heard in the interim applications list. Mr Mittal and his legal team did not have a lot of time to consider the suspension application before the hearing on 17 June 2021. As is clear from the order of ICC Judge Prentis, he did not seek to deal with the issues relating to service. Paragraph 4 of the order states, *'The relevant period for the purposes of section 279 of the Insolvency Act 1986 shall cease to run pending further order of the Court. For the avoidance of doubt, this Order is made without prejudice to the Respondent's right to oppose suspension of his discharge from bankruptcy on any grounds at the Final Hearing, including those advanced on his behalf at the hearing on 17 June 2021*'. Mr Gibbons submits that the clear words of the second part of paragraph 4 of the order clearly allow Mr Mittal to oppose the suspension on any ground which would include the one relating to whether service of the suspension application was effected prior to the discharge of the bankruptcy. Mr Beswetherick sought to argue that paragraph 4 was limited to those arguments which were set out in the skeleton argument of Mr Chichester Clark for hearing on the 17 June 2021. However, the wording of paragraph 4 was deliberately wide. It did not limit what Mr Mittal could raise. This, in my judgment, was unsurprising because the matter was heard on an urgent basis and the Judge clearly did not want to prejudice arguments which Mr Mittal may seek to raise. However, Mr Beswetherick submits that there is a waiver based on what was contained in the skeleton argument as well as the failure of Mr Mittal and his legal team to take the service point before ICC Judge Prentis or refer to it in correspondence before the hearing on 17 June 2021.

43. Mr Beswetherick took me to the case of *Richard Raymond Rufus*, being *Mark Sands v Bruce Dyer and others [2021] EWHC 2124 ( Ch)*, a decision of ICC Judge Jones. This was the hearing of a strike out application relating to the application which had been made under sections 339 and 423 of the Insolvency Act 1986. Briefly, the respondents asserted in their strike out that there was a breach by the Trustee of rule 12.9 in relation to service of the applications. The Third Respondent submitted that rule 12.64 was inapplicable and that there were no exceptional circumstances arising pursuant to the principles set out in *Bell v*

*Ide [2020] EWCA Civ 1469*. This applicability of the exceptional circumstances expression arises in the following paragraphs of *Bell* :-

*'61. I therefore do not accept the premise of Mr Fennell's argument that there is a difference in substance between the position of a claim form not served in accordance with CPR r 7.5 and that of an application notice not served in accordance with rule 12.9. In each case an extension of time for service is needed from the court if the proceedings are to continue. In each case if the proceedings were brought within the limitation period but the limitation period has (or even arguably has) expired by the time the claimant or applicant applies for an extension, the effect of granting one would be to deprive (or arguably deprive) the defendant or respondent of a limitation defence. In my judgment the same principles ought to be applicable. That was the view adopted by JudgeWalden-Smith in Kelcrown [2017] EWHC 537 (Ch), in my view rightly.*

*62 Judge Matthews did not actually have to decide the point in light of his view on the meaning of rule 12.9 but in a thoughtful judgment expressed a clear preference for not following Kelcrown. The basis on which he did so was that there was a distinction between a claim form which becomes a nullity if not served in time, and an application notice where the requirement for service is purely procedural with the result that failure to serve in time does not invalidate the application: see at paras 24—28. But in this court, as I have said, Mr Fennell accepted that if an application notice is not served in time, and the court refuses an extension of time, then it cannot be proceeded with. That seems to me to rob the suggested distinction between an unserved claim form and an unserved application notice of any substance. In each case an extension of time is needed, and if limitation is engaged I can see no principled reason why it should be the primary question for the court under the CPR but of no relevance at all under the 2016 rules '*

63. *No doubt if there is no question of limitation, the court will usually deal with late service under the 2016 rules by permitting it and, if necessary, granting an adjournment. In that sense I agree that service is a procedural matter, to be regulated by the court's case management powers. But, as can be seen from Zuckerman, in cases where limitation is engaged, the requirement for timely service ceases to be simply a matter of case management and becomes a matter of substance. Limitation is a defence, not just a procedural matter, and a defendant is entitled to expect that a claimant who issues a claim*

*form within the limitation period but does not serve it within the four months will not, absent exceptional circumstances, be able to obtain an extension if the limitation period has by then expired. I see no reason why the same should not apply to an application under the IA 1986.* '

44. After considering the principles set out by Lord Justice Nugee in *Bell v Ide*, the Judge stated as follows:-

*'18. The third matter for the overview is that the Court of Appeal's decision does not concern, and did not need to address, a case where the applicant contends that the respondent can no longer rely upon the breach. Obviously, if there has been an agreement or a legal estoppel, the respondent will not be able to raise any further objection to the Rule 12.9 breach. Equally, a respondent may waive the right to do so by conduct, for example by taking steps in the proceedings. If so, the defence of equitable waiver can be relied upon as a submission to the jurisdiction.*

*19. For the purposes of such a defence the court considers whether the respondent's conduct establishes a waiver making it equitable in all the circumstances to preclude the respondent from relying upon the breach, in this case, of Rule 12.9 (see the principles identified in Roebuck v Mungovin [1994] 2 A.C. 224, H.L.). If so, the respondent will have submitted to the jurisdiction and "will be precluded from objecting to the court exercising its jurisdiction in respect of the claim" (to use the words of Robert Goff LJ in Astro Exito Navegacion SA v Hsu (above)).*

*20. Therefore, it is not really an issue of whether waiver is a "knock-out" blow as described in submissions (see paragraph 10 above). This particular dispute of the submissions arises in the context of the concern that the Third Respondent should not be prevented through the conduct summarised at paragraph 4 above from raising the facts and matters that he relies upon to support the Strike Out Application and, to the extent necessary, oppose an application to extend time. However, the point is that equitable waiver requires the court to decide what is equitable in all the circumstances when addressing the conduct relied upon. The weight of the facts and matters the Third Respondent wishes to raise will of course depend upon all the other circumstances including his conduct but they will be part of those circumstances. This also means there is no need to try to resort to*

*r.12.64 IR 2016 even assuming it is not superseded by Rule 12.9(3), which it is. An equitable decision cannot give rise to substantial injustice'*

45. There is a clear distinction between those cases where an extension of time is sought where there is no limitation issue and those, like the current case, where there is a limitation issue. This is clear from the characterisation set out above from the passages of *Bell v Ide*. It is no longer procedural but becomes a matter of substance. As I have already indicated above, in my judgment it makes no difference that the limitation point arises pursuant to section 279 and not a limitation period for bringing a cause of action.

46. At paragraphs 22 and 23, ICC Judge Jones stated in *Rufus*:-

*22.The fact that the proceedings remain valid (paragraph 21(d) above) means that a claimant/applicant can rely upon an agreement to extend time (it not being excluded by CPR Rules 2.11 and 7.5, as applied in Thomas v Home Office [2006] EWCA Civ 1355; [2007] 1 W.L.R. 230, CA), legal estoppel, waiver, acquiescence or equitable estoppel, if appropriate on the facts. Therefore, as is not in dispute, a party who ignores irregular service (which service in breach of Rule 12.9 will be) and allows the proceedings to continue risks the conclusion that, for example, waiver has occurred (applying the general principles identified in Roebuck v Mungovin above and considered below).*

*23. This leads to the dispute between the competing submissions as to whether the Trustees are able to argue waiver/submission to the jurisdiction as a ground on its own for dismissing the application to strike out or whether it must be argued as one of the discretionary factors to be taken into consideration upon the Strike Out Application and, if made, the application to extend time. For reasons above and which will become further apparent, I do not consider it matters in practice because the court when addressing equitable waiver considers what is equitable in all the circumstances.*

*However. I need to address the issue as presented in submissions.'*

47. In *Rufus*, the Judge then went on to carefully consider the facts and held that the participation of the Third Respondent in the proceedings from the period after

May 2020 resulted in a waiver. The evidence demonstrated that from May 2020 until the notice to strike out was issued in November 2020, there had been numerous steps taken in the proceedings by the Third Respondent. However, in my judgment, it is noteworthy that the Judge concentrated in the period after May 2020. Prior to this date, the following had occurred. At the hearing on 11 March 2020, the Judge adjourned the substantive application, which effectively granted the relief sought in the 9 March application subject to the order being set aside at a between parties hearing. The 9 March application issued by the Trustees sought (1) an adjournment of the 11 March hearing and (2) an extension of time. The limitation period had expired prior to the 11 March 2020 hearing (on 25 February 2020). The 11 March hearing did not therefore determine the alternative request for an extension of time and that part of the application remained unresolved and available to be placed before the court depending upon whether the Trustees needed and wished to ask for that relief. It was then not sought at the between parties hearing on 18 May 2020 but nor was an objection taken by the Third Respondent to service and directions for further progress of the Application given.

48. Mr Beswetherick relies on this case on the basis that he submits that no point relating to service of the suspension application either on 11 or 14 June 2021 was taken by Mr Mittal at the hearing on 17 June 2021. No point was taken in an email and no point was made at the hearing itself. Had such a point been made, submitted Mr Beswetherick, then the Trustee could well have sought to serve the application before the expiry of the bankruptcy period. Mr Beswetherick also relied on the statement in the skeleton that the service date was 14 June 2021.

49. In my judgment, there is, on the facts of the current case, considerable difficulty in establishing a waiver. Firstly, the hearing on 17 June 2021 was the first hearing. It came before the court on an urgent basis in the interim applications list. It is clear that there was insufficient time to deal with the arguments. That can be seen by paragraph 4 of the order. It is not clear that the point relating to a failure to effect service on 11 June 2021 had been picked up by those acting on behalf of Mr Mittal. There is no evidence that Mr Mittal and his legal representatives were aware of that service point on 17 June 2021. In my judgment, there is also no evidence that Mr Mittal and his legal representatives were aware of the service

point on 17 June 2021 and decided not to take it on that day. It is difficult to be able to assert a waiver in relation to a point which, due to the matter being brought before the court on an urgent basis, had not as yet been considered. The evidence does not demonstrate an awareness of the point. Waiver requires knowledge. Moreover, paragraph 4 clearly enables all points including those which were not before the Judge to be taken. That is perhaps indicative of the fact that the matter had come before the Court on an urgent basis. In fact, paragraph 4 of the order militates firmly in my judgment against a waiver being established.

50. In my judgment, this is the reason why in Rufus, the Judge did not consider that there was any waiver in relation to hearings which occurred before the May 2020 hearing. The hearing on 11 March 2020 also allowed points relating to service etc to be taken at the later hearing. The time extension application was issued on 9 March, being 2 days before the 11 March hearing. The waiver argument related to what occurred after the May 2020 hearing.

51. Mr Beswetherick also relies upon the case of *Edray v Canning [2015]EWHC 2744 (Ch*), being an appeal against an order setting aside a default costs certificate. The District Judge had set aside the default costs certificate on the grounds that there had not been good service of the notice of commencement and on the basis that communications between the receiving party and the paying party's solicitors, following service of notice of commencement, did not give rise to a waiver or estoppel, thereby preventing the paying party from relying on the fact that the notice of commencement had not been validly service. On appeal, the Judge held that the communications from the paying party's new solicitor were clear statements that they treated the sending of the notice of commencement to them as good service. He held that the doctrine of estoppel therefore applied. The communications relied upon consisted of a letter from the paying party's solicitors noting the points of dispute were due to be served the next day and asking for an extension of time for them to be filed, failing which, an application would be made. So this was clearly on the basis that the notice of commencement had been served and they were aware of the deadline for service of the points of dispute.

52. The next day, the solicitors issued an application for the extension of time sought. That application included a statement of truth from the solicitors which stated that the petitioning creditor's solicitors had served the Notice of Commencement, the bill of costs on a certain date and then referred to the letter sent seeking an extension of time for service of the Points of Dispute. The Judge held that this statement of truth was a clear and unambiguous statement that the letter sent to them on 13 March 2014 constituted service of the Notice of Commencement on their client. The court wrote back after checking the file stating that it appeared that case had concluded on 17 February 2014 and asking the solicitors what they wished to do with the application. The solicitors then took no further steps. New solicitors were then instructed by the paying party. At the appeal hearing, based on the evidence, the Judge was satisfied that the paying party's solicitors who wrote the letter seeking an extension as well as made the application, were authorised to do so by the paying party.

53. From the judgment, it is clear that even in cases where there has not been service in accordance with the relevant rules, a party can be prevented from arguing that the documents were not properly served. The Judge analysed from the relevant cases the principles relating to waiver and estoppel.

54. In relation to waiver, the Judge stated as follows:-

*'31. I will deal first with waiver. Waiver is an expression that is used to refer to a number of different situations. It can be used to refer to an election by a party to a contract not to terminate the contract, as with waiver of the right to forfeit or waiver of the right to terminate a charterparty. It can be used to refer to a situation where a provision in a contract is included solely for the benefit of one party and that party*
*communicates to the other an election not to require compliance with that provision. In those types of waiver, the focus is on the need for a clear and informed communication by the party waiving of his decision. There is no need for any consequential reliance or alteration of position by the other party. The focus is entirely on the actions and knowledge of the party who is waiving and not on actions of the party who is in receipt of the waiver.*

*32. It is established that for this sort of waiver, the person waiving must know the facts and must also know of his right to elect. Mr Spanier accepts that that this requirement of knowledge must apply to waiver in the context of waiving a failure to comply with the requirements of the Civil Procedure Rules in relation to service. If somebody does not know they have the right to treat a communication as not constituting good service, they could not be treated as waiving their right to contend that the communication was not good service when they do discover that. That, Mr Spanier accepted.'*

55. The Judge then considered whether or not waiver applied to a case where there has been a failure to comply with the CPR. There was no authority before the Judge of this type of applicability. However on the facts, he continued as follows:-

*'35. If, however, it is a relevant concept then, as I have said, Mr Spanier accepts that knowledge of the right to waive is essential. And, here, there is this difficulty for Mr Spanier, that there is nothing in the evidence to suggest that either Teacher Stern or Mr Canning were aware that there was a choice to treat the sending of the Notice of Commencement to Teacher Stern as good service or bad service. It just seems to have been assumed by Teacher Stern on behalf of Mr Canning that it was good service. It seems to me that the election would have to be made by Mr Canning, unless he authorised Teacher Stern to make it on his behalf. Although I have held that it is right to infer that he authorised them to deal with the matter on his behalf, I think it is not possible to infer that either he or they had knowledge sufficient to make the concept of waiver applicable.*

*36. Accordingly, it is unnecessary for me to decide whether it is possible to waive the requirements in the CPR relating to the service of documents simply by an informed communication of a decision not to require those requirements to be complied with. That may well be possible, but even if it is, the facts of this case do not support the existence of a waiver'*

56. In my judgment, the above demonstrates the difficulty in the Trustee seeking to rely on waiver. It is clear that knowledge is essential. There is no evidence in the case before me of knowledge of the right to elect and waive the service point. The reliance for the purposes of waiver by the Trustee relates to a failure by Mr Mittal

and his legal representatives to notify that they would take the issue that service had not been effected in accordance with the relevant rules. However there is no evidence that Mr Mittal knew and made the election. Reliance upon the statement in the skeleton is to my mind much more ambiguous than the evidence before the Judge in the *Edray Limited* case. As I have already set out, the application came on urgently. The Judge adjourned it whilst preserving all the points which had been raised as well as any others which could have been raised. In my judgment, the level of knowledge required for an effective waiver is not established on the evidence in the case before me. There is no evidence to establish that either Mr Mittal or his solicitors or Counsel were aware of the service point and that there was an election to treat the 'service' of the suspension application as good or bad service. There is no evidence therefore to support any knowledge of an election being made on the basis of the statement in the skeleton. Incidentally, the Judge also rejected in *Edray* there being evidence sufficient to establish the waiver. Mr Beswetherick's submission relating to there being a waiver on the evidence accordingly fails.

57. Mr Beswetherick referred me to paragraph 38 which is part of the analysis relating to estoppel, being here entitled estoppel by convention. The Judge analysed this type of estoppel as follows:-

*As for the requirements of estoppel by convention, the principles are summarised in the extract from Wilken that was cited. There has to be a shared assumption which has to be communicated, a crossing of the line. It must be unjust or unconscionable to allow one party to resile from the common assumption, and:*

*"The requirement of unconscionability has been summed up as: 'In almost all cases, such unconscionability must be based on the prejudice which would be caused to the claimant if the strict legal position applied. As I see it, the claimant must also establish that the prejudice arises from its reliance upon the convention. In other words, the court generally must be satisfied that (a) the claimant will suffer real prejudice, and (b) the prejudice arises from its reliance upon the convention. It should be emphasised that, even if the claimant satisfies these criteria, there may still be no estoppel, because there may be other, more powerful, factors pointing the other way.'"*

*That is a quotation from the judgment of Neuberger J in PW & Co v Milton Gate Investments [2004] Ch 142 at [222]. The authors also say in the previous paragraph that, because of the requirements of this form of estoppel, it will only arise in limited circumstances. Where there is no shared assumption, there will be no estoppel by convention no matter how unjust the other party's conduct may be.*

*39. In my judgment, the communications from Teacher Stern referred to above were clear statements that they treated the sending of the Notice of Commencement to them as good service. So, we have a clear communication from Lyndales, on behalf of Edray, that they treat sending the Notice of Commencement as good service on March 13, and we have on April 3 and 4 communications from Teacher Stern, on behalf of Mr Canning, also communicating that they treat it as good service, the clearest being the witness statement that formed part of the application to the court on April 4. That seems to me to be a clear communicated common assumption.*

*41. Mr Spanier has relied on a number of matters as constituting prejudice, but the one that impressed me was this. If Teacher Stern had not created the impression that they had, that valid service had been effected, it is more likely than not that good service would have been effected on Mr Canning. The probable effect of Teacher Stern's communications that the notice of commencement had been served was that Lyndales would give no further thought to the question of service and would not consider whether service direct on Mr Canning was needed and effect such service. It is true that there is no evidence saying that this is what would have happened, but any such evidence could only really be speculation about what, hypothetically would have happened in different circumstances. That seems to me to be a matter on which I can and should reach a decision based on the inherent probabilities'*

58. In my judgment, despite Mr Beswetherick's submissions, there is no estoppel by convention arising in this case. This is because on the evidence, there is no common assumption. A failure by Mr Mittal and his legal representatives to notice the service issue, cannot in my judgement create such a common assumption. As is clear in *Barton*, there is no duty to raise issues relating to service. That leaves, for the purposes of establishing the required common assumption, the statement set out in the skeleton which stated that service was effected on 14 June 2021. In my judgment, that is far from being a common assumption that service had been effected in accordance with the rules and no

point would be taken. Firstly, it is hard to see how there could have been any such common assumption when the terms of paragraph 4 of the order made by ICC Judge Prentis expressly reserved the entitlement of Mr Mittal to raise objections, 'on any grounds' including those not before the Court. Secondly, as far as the Trustee was concerned, service had been effected on 11 June 2021 and not 14 June 2021. Furthermore, as submitted by Mr Gibbons, there is no evidence at all before me that the statement made in a skeleton filed for an urgent hearing can be considered as being such a type of assumption. It is, in my judgment, extremely far away from a statement made in a letter sent to the other party alongside a statement of truth lodged and filed at court. Those are the facts in *Edray v Caning*. Each case will turn on its facts, but as I have set out above, the facts in this case simply do not support a common assumption. Mr Beswetherick relied upon paragraph 41 as being support for his submission that had the matter been raised, it was likely that an application would have been made before the expiry of the bankruptcy. However, on the facts as I have set out above, in my judgment, neither waiver or the common assumption necessary for an estoppel have been established. Accordingly there is no need for me to assess this issue relating to what the Trustee would have done had he ascertained the issue of service.

59. Mr Gibbons referred me to *Phoenix Group Foundation v Cochrane and other [2017] EWHC 418( Comm*), where an urgent freezing injunction had been sought and obtained before Newey J on 30 September 2016 and then continued by order of Rose J (as she then was) on 4 October 2016. The point which arose before Mr Justice Popplewell related to whether one of the respondents to the freezing injunction, Stewarts, were entitled to advance argument as to why the freezing order should be discharged. The claimant submitted that the opportunity to make those arguments had been before Rose J. In fact several arguments as to whether the freezing order should be continued were made before Rose J. Before Mr Justice Popplewell, the Claimant asserted effectively that Stewarts were seeking to re run those arguments which fell foul of the principle in *Chanel v F W Woolworth & Co Ltd [1981] 1 WLR 485*.

60. However the Judge did not shut out the arguments which Stewarts Law were seeking to make. At paragraphs, 14 15 and 16, the Judge stated :-

*' The scope of the principle in relation to interlocutory applications is controversial. In Hollyoake v Candy [2016] EWHC 3065 (Ch) Nugee J drew attention at paragraphs [14] to [18] to the apparent conflict between on the one hand the decision of the Chancellor, Sir Terence Etherton, at an earlier stage of those proceedings, to the same effect as my summary in Orb v Ruhan quoted above, and on the other hand the Court of Appeal judgment in Woodhouse v Consignia Plc [2002] EWCA Civ 275.*

*15. On these applications it is not necessary to explore that tension further or seek to resolve it. Even on the stricter view which I and the (then) Chancellor took, the principle is not engaged to shut out Stewarts Law from addressing any arguments which are appropriate on this application. The circumstances in which the issues previously arose in front of Rose J were very different. The without notice application had come before Newey J in the early hours of Friday morning 30 September 2016, as a result of an error on the part of the court staff in insisting that the matter had to be addressed to the duty Chancery Judge. As a result Newey J properly considered that fresh proceedings needed to be commenced in the Chancery Division in which he was sitting to support the grant of injunctive relief, with a view to their being transferred in due course to the Commercial Court. The return date of 4 October 2016, the following Tuesday, was fixed in anticipation that there would be only a 20 minute hearing. Phoenix had on 30 September 2016 issued an application notice seeking an order that the freezing order be continued until trial. The return date hearing in the Chancery Division was not intended to hear or dispose of that application; it was for the more limited purposes of addressing the question whether the freezing order would be continued until the full inter partes hearing of the application. It was not intended to be a final determination of the interlocutory relief sought in that application notice, which it was anticipated would only be determined at a later hearing with the parties having the opportunity to address evidence and full argument. In the event Rose J allowed Mr Charles Bear QC, who then appeared on behalf of Stewarts Law, to address her for a considerably longer period than 20 minutes as to why a freezing order should not be continued until the hearing of that application. However it was perfectly clear that the basis on which the submissions were being made was that there would be a further full blown inter partes hearing of the application in the Commercial Court once the proceedings*

*had been transferred. The hearing was on very short notice, namely one clear day, and it could not reasonably have been expected that Stewarts Law would have marshalled all its evidence, or even necessarily all its arguments. Phoenix's counsel submitted at the time that Rose J was dealing with a narrow application to continue relief on an "interim interim basis" until "a fuller hearing" in the Commercial Court. He opened by saying that Phoenix was content that the matter having been transferred to the Commercial Court there should if necessary be a contested hearing as to whether or not the freezing order continued. Accordingly the only question on that occasion was whether the order issued by Newey J in the early hours of the Friday morning should continue until a hearing in the Commercial Court.*

*16. In those circumstances it was open to Stewarts Law to deploy such arguments as it thought best in the limited time available in order to seek to persuade Rose J not to continue the freezing order on that interim interim basis. It was entitled to be selective, and was not bound to bring forward at that time all available arguments as to why the relief should not be continued until trial. Nothing in that course was intended to preclude Stewarts Law from repeating or expanding upon those arguments, with the benefit of filing evidence, at the anticipated full inter partes hearing in the Commercial Court; nor would it have been so understood by either Phoenix or Rose J. Paragraph 3 of Rose J's order continued the freezing order specifically only until such a further hearing. She ordered that the proceedings should be transferred to the Commercial Court "as soon as practicable". The fact that some of the argument has overlapped is no barrier to my considering it: Rose J had very limited preparation time and limited hearing time, whereas I have had the benefit of full argument, with evidence, following reading time, in a case in which I have considerable familiarity with the background.'*

61. In my judgment, *Phoenix* endorses the position I have taken on the facts of the current case. In any event, the terms of paragraph 4 of ICC Judge Prentis are clearer here than the orders made in *Phoenix*.

62. After the hearing on 17 June 2021, Mr Mittal did seek an extension of time to file his evidence (the order had required his evidence to be served by 4pm on 29 July 2021). As Mr Gibbons submitted, that was an extension in order for him to file

evidence which raised the issue of service. Mr Beswetherick does not accept that Mr Mittal raised the issue of service of the suspension application in his witness statement.

63. At paragraph 11 of the witness statement dated 25 August 2021, he stated,
*' The Trustee' s solicitors ( Mishcon de Reya LLP) sought to serve the application and supporting evidence by courier at my solicitors' former office on 11 June 2021, 4 working days before the first hearing on 17 June 2021.They also emailed copies to my solicitors by email at 15.18 on the same day. At 18.53, having been unable to effect service by courier, the Trustee's solicitors asked my solicitors Collyer Bristow LLP to accept service by email. Mischon de Reya acknowledged my solicitor's response at 19.19, but did not, following that, send a further email serving the application and supporting evidence.'*

64. Paragraph 12 states,
*'At the hearing on 17 June 2021, my counsel opposed the granting of an interim suspension on the following grounds:*
*(1) The late service of the Trustee's application in breach of the requirements of the Insolvency (England and Wales) Rules 2016*
*(2) The failure of the Trustee to apply for an abridgement of the time for service.*
*(3) The lack of good reason for the late service and the absence of any exceptional circumstances which would justify an abridgement of time'*

65. At the end of paragraph 13, Mr Mittal states *'I therefore wish to rely on the grounds advanced by my counsel on 17 June, as these remain to be determined by the Court, at the final hearing of the Trustee's application on 10 November 2021. Full legal submissions in respect of these grounds, and any other grounds concerning the Trustee's failure to effect service, or proper service, on which I am entitled to rely, will be made by counsel in due course'.*

66. In reply, Mr Allen, the Trustee stated at paragraph 11 as follows:-
*'I note that in the (late) skeleton argument filed on Mr Mittal's behalf before the First Hearing it was said that "service of the Application and evidence in support was effected by email on 14 June 2021". However, Mr Mittal accepts in*

*paragraph 11 of his witness statement that the Application and evidence was emailed to his solicitors( Collyer Bristow LLP ( 'Collyer Bristow')) at 3.18 pm on 11 June 2021. My solicitors ( Mishcon) emailed Collyer Bristow later that day and asked for confirmation that they were content to accept service of the application via email. Mr Kramer of Collyer Bristow confirmed this and said that there was no need to deliver a hard copy. Apparently, Mr Mittal now wishes to argue that despite this exchange and although Mr Kramer already had the documents by email, Mischon should have re sent the documents to Mr Kramer by email a second time. If he does advance such an argument, it will be addressed on my behalf by counsel at the hearing'.*

67. In my judgment, it is clear that Mr Allen was aware of the point relating to service. The paragraph also makes clear that there was no permission prior to the request to serve by electronic means. Whether service had been effected in accordance with the rules would depend upon the construction of the emails sent. I have dealt with this above. No application for post validation of service was made until just before the adjourned hearing before me.

68. I should add for completeness that the request for an extension of time to file evidence in reply to the suspension did not constitute, in my judgment, in some way, a waiver or any form of common assumption. In my judgment, the extension of time which was granted for him to file evidence did not in itself create any waiver of the service point. The witness statement made the position of Mr Mittal clear, namely that he was taking all points relating to service.

**The post validation service application**

69. I have already set out above some of Mr Gibbons's submissions relating to this application. Mr Beswetherick impresses upon me the merits of the suspension application as well as the seriousness of the conduct of Mr Mittal. Mr Beswetherick also submitted that there is no need to establish exceptional circumstances because of his submission that this does not fall to be considered as a limitation defence type case. As I have set out above, I do not accept this to be the case. I accept Mr Gibbons's submission that a post validation service

application would need to show exceptional circumstances as explained by Lord Justice Newey in *Bell v Ide*.

70. On the facts of this case, no such good reason, or exceptional circumstances are apparent. There really is no reason as to why service could not have been carried out in accordance with the rules. The failure to serve in accordance with the rules is not something which can be blamed upon Mr Mittal or his legal representatives. I have already rejected both the waiver and the estoppel arguments on the basis of the evidence before me. Mr Gibbons referred me to the judgement of Mr Justice Popplewell in *Societe General v Goldas Kuyumculuk Sanayi and others [2017]EWHC 667 ( Comm*). In summarising the principles applicable to an application to validate the service which had been carried out or dispensing with service pursuant to Rule 6.16 ( CPR), the Judge stated as follows:-

*'49. ...(8) Limitation:*

*(a) Where relief under Rule 6.15 would, or might, deprive the defendant of an accrued limitation defence, the test remains whether there is a good reason to grant relief: Abela.*

*(b) However save in exceptional circumstances the good reason must impact on the expiry of the limitation period, for instance where the claimant can show that he is not culpable for the delay leading to it or was unaware of the claim until close to its expiry: Cecil at [108] and see Godwin at [50].*

*(c) It is not ordinarily a good reason if the claimant is simply desirous of holding up proceedings while litigation is pursued elsewhere or to await some future development; the convenience for a claimant of having collateral proceedings determined first is not a good reason for impinging on the right of a defendant to be served within the limitation period plus the period of validity of the writ: Battersby per Lord Goddard at p.32; Dagnell per Lord Browne-Wilkinson at p. 393C. Cecil at [99]-[106].*

*(d) Absent some good reason for the delay which has led to expiry of the limitation period, it is only in exceptional cases that relief should be granted under Rule 6.15 or 6.16; there is a distinction between cases in which there has been no attempt at service and those in which defective service has brought the claim form to the defendant's attention (Anderton*

*at [56]-[58], Abela [36]), with relief being less readily granted in the former case, but even in the latter case exceptional circumstances are required: Kuenyehia at [26]*

*(e) Absent some good reason for the delay which has led to expiry of the limitation period, it is never a good reason that the claimant will be deprived of the opportunity to pursue its claim if relief is not granted; that is a barren factor which is outweighed by the deprivation of the defendant's accrued limitation defence if relief is granted; that is so however meritorious the claim: the stronger the claim, the greater the weight to be attached to not depriving the defendant of his limitation defence: Cecil at [55], Aktas at [91].'*

71. In my judgment, this useful summary makes it clear that the focus of the investigation and the factors that the Court considers relates to the reason why service was not effected correctly and whether there is any explanation for the delay. The evidence of the Trustee relies upon the lack of funding for making the suspension application and that funding was only finalised in late May 2021. There lacks any real explanation as to why the steps to obtain the necessary funding to make the suspension application were made so late in the day. I agree with Mr Gibbons that steps could have been taken in December 2020 when the Trustee sought and obtained funding from Moorgate in relation to other applications. The Trustee's evidence does not deal with why he left it so late to seek the funding for the suspension application. His evidence states that he asked the OR if the OR was intending to issue an application for the suspension of Mr Mittal's discharge. That was on 29 March 2021. It was only after the OR replied in the negative that discussions started with the funders. No good reason is provided as to why the Trustee delayed in seeking the funding from the creditor as late as end of March 2021/April 2021 or any reason as to why this issue was not raised in December 2020. I should add that the issue of the challenge to the IVA does not really assist the Trustee in this respect. A CMC had been listed for half a day on 25 June 2021. The Trustee was therefore well aware that the IVA challenge would not take place prior to the expiry of the discharge period. Whilst the Trustee asserts in his statement he sought to take a measured approach in circumstances where there was an IVA and outstanding requests from him for

delivery up of items in the hands of Mr Mittal, in my judgment, these issues do not provide any real explanation as to why the Trustee delayed in seeking funding and making the suspension application. In my judgment, there is on the basis of the evidence, no good reason for the delay in bringing the application. Mr Beswetherick relies strongly upon the strength of the case for suspension and the unchallenged evidence of Mr Mittal's failure to cooperate. This argument is not one which the court takes into account. That is apparent, in my judgment from what is set out at (e) in the passage I have set out from *Societe Generale*. I adopt and agree with that statement of the factors. In my judgment, the argument that the Trustee will be deprived of a strong case for a suspension on the merits is met by the fact that the Mr Mittal would have an even stronger limitation defence. In my judgment, the application for post validation of service fails.

72. Mr Beswetherick also relied upon rule 12.64 which states, *'No insolvency proceedings will be invalidated by any formal defect or any irregularity unless the court before which objection is made considers that substantial injustice has been caused by the defect or irregularity and that injustice cannot be remedied by any order of the court.*' I do not consider that this provision provides the Trustee with another way to seek to validate the service of the suspension application. In the case where a limitation defence is not engaged, then rule 12.64 may be another way to validate the defective service. However once there is a limitation defence, then as Lord Justice Newey acknowledged in *Bell v Ide*, the matter becomes one of substance. In considering making orders under this rule, the Court considers the issue of prejudice. As Mr Mittal seeks to rely upon a limitation defence, in my judgment, that would constitute prejudice. In my judgment, in so far as I was to consider the matter under rule 12.64, the same considerations which I have set out above would apply.

**Failure by the Trustee to serve the suspension application and evidence within the time specified prior to the first hearing of the application on 17 June 2021**

73. This is an alternative ground to ground 1 which I have dealt with above. As I have already determined that service was not effected in accordance with the relevant rules and that the evidence does not establish a waiver or an estoppel, the application for a suspension of the discharge has been made out of time. Accordingly, it is not strictly necessary for me to deal with the alternative ground 2, but I will proceed to deal with it, albeit in a more summary fashion. Many of the arguments raised have been dealt with above in relation to the application for post validation of service as well as in the earlier passages relating to why there is a limitation defence issue in this case.

74. Mr Gibbons refers me to rule 12.9(3) which states that a sealed copy of the application or notice of the application must be delivered to the Respondent at least 14 days prior to the hearing, unless;

    a. The provisions of the Act or these Rules under which the application is made makes different provisions;
    b. The case is urgent and the court acts under rule 12.10; or
    c. The court extends or abridges the time limit.

75. As Mr Gibbons referred me to, rule 10.142 sets out specific obligations on the OR, the Trustee and the Court in the case of applications for suspending the discharge of the bankruptcy.

(i) rule 10.142(2) requires the OR or the trustee to serve evidence containing reasons why it appears that an order suspending automatic discharge should be made;

(ii) rule 10.142(3) provides that the Court must fix a venue for the hearing of the application and deliver notice of it to the OR, the trustee and the bankrupt;

(iii) Rule 10.142(5) copies of the trustee's evidence in support of the application

must be delivered by the trustee to the OR and the bankrupt at least 21 days before the date fixed for the hearing.

76. On the basis that the Trustee's evidence was served by the email sent to Collyer on 11 June 2021, then as Mr Gibbons submits, counting from 12 June 2021, the notice given would have been 4 days. This means that the Trustee's evidence was

filed 17 days late and the application was served 10 days late in accordance with the rules. At the first hearing date, Mr Gibbons pointed out that the Trustee had made no application to abridge either time limit. Mr Gibbons referred me to *Bell v Ide [2020] EWCA Civ 1469*. I have already dealt with this case above and the passages quoted above are equally applicable here. There is in summary a distinction to be made in relation to the breach of a procedural rule when there is no time limit issue and a breach where a limitation defence arises. As expressed by Lord Justice Newey, the matter then becomes one of substance. That is the case here for the reasons I have set out above.

77. Mr Gibbons submits that there is no basis upon which the Court should exercise its discretion in favour of suspending Mr Mittal's discharge on this ground alone. He relies on the fact that the importance of the application to a respondent is reflected in the detailed procedure set out in rule 10.142 in relation to applications made pursuant to section 279(3). Mr Gibbons submitted that in this case the application and the evidence were served at the last minute before the hearing of the Trustee's application, in breach of CPR r 12.9(1) and 10.142(5). The evidence does not demonstrate that there are any exceptional circumstances, or submits Mr Gibbons, any good reason why there was no attempt to observe the rules until the last minute or, at all.

78. The Trustee relies on the fact that he was awaiting funding from creditors and that there was a lack of clarity as to when the IVA challenge would be resolved. I have set out the relevant dates above and my conclusions relating to the application for a post validation order are equally applicable here. The factors which I take into account according to *Societe Generale* do not include the merits of the underlying application. Mr Beswetherick's submissions really concentrated on those as well as repeating the points he had made earlier relating to this not being a case of a limitation defence. I have rejected those submissions and do not need to lengthen this judgment any further in this respect.

79. In conclusion, I accept ground 1 and determine that the suspension application was not served in accordance with the rules. I have rejected on the evidence Mr

Beswetherick's submissions that there was an agreement between the parties that the service was valid as well as rejecting any waiver or estoppel. I have also considered the very late application made seeking a post validation service order. I have refused to make such an order on the grounds set out above. Accordingly, the Trustee's application is dismissed. As to ground 2, which is an alternative to ground 1, I have dealt with it very much in summary form for the reasons set out above. I shall hear the parties on any outstanding issues and/or costs.

**Dated**