Neutral Citation Number: [2017] EWHC 718 (Ch)

Appeal ref: CH-2016-000191

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
HIGH COURT APPEAL CENTRE ROYAL COURTS OF JUSTICE
On appeal from the Truro County Court
Order of Deputy District Judge Healey dated 28th June 2016
County Court Case number: 54 of 2016

Rolls Building, Fetter Lane,
LONDON EC4A 1NL

Date: Thursday 6th April 2017

Before:

MR JEREMY COUSINS QC,
SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION

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BETWEEN:

ANTONY CANNING Debtor and Appellant

-and-

IRWIN MITCHELL LLP Creditor and Respondent

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Miss Alice Hawker (instructed by **Wilson Barca LLP**, of Carlisle Buildings, 18, Carlisle Street, LONDON W1D 3BX) for the Appellant
Miss Catherine Doran (instructed by **Irwin Mitchell LLP**, of Riverside East, 2, Millsands, SHEFFIELD S3 8DT) for the Respondent

Hearing date: 17th March 2017

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JUDGMENT APPROVED

MR JEREMY COUSINS QC:

Background

1. This is an appeal, brought with the permission of Mann J, granted on 24th November 2016, from the decision of deputy District Judge Healey ("the District Judge"), sitting at the Truro County Court on 28th June 2016, whereby the District Judge extended the hearing of the bankruptcy petition presented by the Respondent, Irwin Mitchell LLP ("Irwin Mitchell"), and transferred the same to the Southend County Court, and granted leave for the petition to be amended. The order made by the District Judge recited that it was made upon the Court's finding that Irwin Mitchell had not done all that was reasonably required to bring the statutory demand (upon which the petition was founded) to the attention of the Debtor (the Appellant, "Mr Canning"), but that, in the circumstances in which the demand was based upon a court order of which Mr Canning knew and with which he had failed to comply, Mr Canning had suffered no prejudice such that it would be disproportionate to set aside the statutory demand, even if an application to do so were before the court. Mr Canning's case is that since the District Judge accepted that there was a failure on the part of Irwin Mitchell properly to serve the statutory demand, he erred in principle in refusing to set it aside and dismiss the petition; he also says that the petition should have been dismissed on the basis that it was brought in the wrong court.

2. The background to the case is that on 7th May 2014, Irwin Mitchell commenced proceedings in respect of unpaid fees for legal services which it had provided to Mr Canning, against whom a default judgment was entered on 9th July 2014 in the sum of£11,729.57 plus interest. On 27th October 2014, by consent, it was ordered that Irwin Mitchell's bills of costs should be assessed. On 3rd August 2015, Master Rowley ordered that Mr Canning pay assessed costs of £14,347.42 plus interest. Irwin Mitchell issued a statutory demand ("the First Demand") in respect of the sums due to it on 21st March 2016; this was hand-delivered to Rosehill Barn, Bodmin, Cornwall, on 10th April 2016, and following this, on 6th May 2016, Irwin Mitchell presented the bankruptcy petition ("the Petition"). Mr Canning applied to the Southend County Court to vary the judgment debt so that he could make instalment payments. Before that application was heard, the matter came before the District Judge, who made the order now under appeal. Before considering that order further, it is convenient to mention later developments which are said to be relevant to the issues now before me. By order of District Judge Foss of 21st July 2016, the application to vary the judgment debt was listed to be determined on 13th September following. On 29th July 2016, Mr Canning applied for permission to appeal the order of the 28th June. Then on 16th August 2016, District Judge Foss, in the Southend County Court dismissed the application to pay by instalments, and vacated

the hearing listed for 13th September. Following an application for that order to be reconsidered, and directions being given that Mr Canning should supply documents in support of his application to vary the judgment debt, on 17th February 2017, and subsequent to the grant of permission to bring this appeal, Deputy District Judge Cooksey, having heard from the parties, dismissed Mr Canning's application to pay the judgment debt by instalments, further ordering that Mr Canning should pay the costs of that application.

3. Given the importance of the issue of service in this case, it is necessary now to deal rather more fully with the manner in which Irwin Mitchell handled the task of serving the First Demand upon Mr Canning. The steps taken are described in the witness statement, dated 23rd June 2016, of Miss Sarah Marshall, a paralegal employed by Irwin Mitchell. This statement was made in support of an application for an order for substituted service of the Petition, and for related orders. She stated at para 6 of her evidence:

> "In the course of [Mr Canning's] original dealings with [Irwin Mitchell] (pursuant to which the Petition debt is due), [Mr Canning] had resided at 16, Hospital Road, Shoeburyness, Southend … . However, as the last correspondence sent to that address was in July 2014, [Irwin Mitchell] instructed a Trace Agent to locate [Mr Canning] on 4th March 2016. The trace results confirmed that [Mr Canning] resided (as at 4th March 2016) at Rosehill Barn … . A statutory demand was therefore served on [Mr Canning] by process servers of Elliott Davies … by way of substituted service by posting the same in a sealed envelope marked for the attention of [Mr Canning] through the letterbox at the address of Rosehill Barn …"

Miss Marshall's evidence referred to an exhibit which included a witness statement from Mr Glen Butler, a process server with Elliott Davies. Mr Butler's evidence was that on 4th April 2016 he had attended at Rosehill Barn to find that Mr Canning was not present. Mr Butler said that he spoke to a man who confirmed that Mr Canning lived at Rosehill Barn, but was not there at that time, with the result that Mr Butler posted a letter of appointment to Mr Canning at Rosehill Barn; when he attended at Rosehill Barn for the appointment on 10th April, Mr Canning was not present, so that Mr Butler posted the First Demand through the letterbox.

4. Miss Marshall's evidence continued at para 7, saying that no response to the First Demand was received from Mr Canning, following which the Petition was issued, and Elliott Davies were instructed to serve it. However, she referred to an e-mail, dated 16th June 2016, to her from Elliott Davies. This reported that Mr Canning had contacted Elliott Davies to say that he did not reside, and never had resided, at

Rosehill Barn; he requested that the statutory demand be reserved on him (as he had never received it) at the address of his solicitors, Wilson Barca, of Carlisle Street, London W1, on the following Thursday. Thereupon Irwin Mitchell requested Elliott Davies to serve a statutory demand, this time dated 17th June 2016 ("the Second Demand") personally upon Mr Canning care of Wilson Barca at their offices. Miss Marshall's evidence does not elaborate upon what happened with regard to the Second Demand subsequently; it is upon the First Demand alone that the Petition is based, the Second Demand not even having been generated at the time that the Petition was presented. However, Miss Marshall's evidence goes on to state that Irwin Mitchell is of the view that the First Demand is "deemed served" pursuant to Rule 6.3(2) of the Insolvency Rules 1986 ("the 1986 Rules") as Irwin Mitchell took all reasonable steps to bring the First Demand to Mr Canning's attention.

5. Mr Canning made two witness statements which were before the District Judge. He disputed that he had ever been served with the Petition, or the First Demand; he produced correspondence between solicitors, in which Irwin Mitchell asserted that the First Demand had been served by substituted service. He denied that he had ever lived in Cornwall. He confirmed that he had attended at his solicitors' offices on 23rd June 2016 in order to be served, but that the process server did not serve him then. He produced ample evidence that he lived in Essex. He explained that he had been a director of a company, Wardcentral Developments Limited ("Wardcentral") whose registered office was at Rosehill Barn, which is the address of Mr Robin Parry who is an accountant.

6. Mr Parry also provided a witness statement explaining that he had set up Wardcentral for another client, and confirming that it had not traded. Mr Parry disputed Mr Butler's evidence concerning the attempts made to serve Mr Canning, saying that Mr Canning had never lived at Rosehill Barn and contradicting the suggestion that he had said that Mr Canning lived at that address. He said that he returned the papers delivered for Mr Canning to Irwin Mitchell.

The District Judge's decision

7. Having referred to the facts, the District Judge accepted that Mr Canning was not served on 4th April. As to what happened on 10th April, the District Judge said that "… service, if that is what it was, was effected by posting the demand through the letterbox [at Rosehill Barn]". He then reminded himself, by reference to *Muir Hunter on Personal Insolvency* at paras 7-170 to 172, and the commentary contained therein upon the decision of the Court of Appeal in *Regional Collection Services Ltd v Heald* [2000] BPIR 661 that the test, as to whether a creditor had done all that was reasonable to bring the statutory demand to the debtor's attention so as to effect valid service, was a high one. The District Judge expressly found, and this is not

challenged, that there was, on every view, an open channel of communication between Irwin Mitchell and Mr Canning's solicitors such that a request could, and should, have been made to them to co-operate over service. He inferred from the fact that Mr Canning and his solicitors did co-operate over service at their offices, although in the event it came to nothing, that there would have been co-operation over the service of the First Demand, had it been sought; he expressed the view that the failure to make a telephone call was possibly one that would have resolved any difficulty as to service. Having reached these conclusions, he held that Irwin Mitchell had fallen short of the high standard by reference to which the adequacy of steps to bring a statutory demand to a debtor's attention are to be judged.

8. However, having resolved the issue of service of the First Demand against Irwin Mitchell, the District Judge went on to consider whether his decision on that issue was determinative of the case. He referred again to the same passages in *Muir Hunter*, and on this occasion to the commentary upon the decision of Miss Registrar Barber in *Bush v Bank Mandiri (Europe) Ltd* [2011] BPIR 19. The notes in *Muir Hunter* state that in that case, whilst the learned Registrar held that the service requirements in respect of a statutory demand should be strictly observed, and despite her finding that the creditor had failed to meet the required standard, the Registrar declined to set aside the statutory demand under Rule 6.5(4)(d) of the 1986 Rules because the creditor's failure had not caused the debtor serious prejudice, so that it would have been disproportionate to set the demand aside.

9. The District Judge, expressing himself as applying the reasoning in *Mandiri*, held that a demand was not to be equated with a formal step in court proceedings; rather it was simply a formal demand for payment of what should be an uncontentious debt. He referred to the procedure for setting aside a statutory demand, but reminded himself that a court would not look behind a judgment requiring a sum of money to be paid. In this case, he said, the debt concerned arose under a judgment. He reasoned that Mr Canning had been deprived of an opportunity to set aside the First Demand, but any application to do so would have been bound to fail, with the result that no serious prejudice has been sustained, so that it would be disproportionate to set aside the First Demand.

The relevant statutory provisions

10. Section 267(2) of the Insolvency Act 1986 ("the Act"), so far as its wording is material, is in these terms:

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

presented—

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

11. Section 268(1) of the Act provides as follows:

> "For the purposes of section 267(2)(c), the debtor appears to be unable to pay a debt if, but only if, the debt is payable immediately and either—
> (a) the petitioning creditor to whom the debt is owed has served on the debtor a demand (known as *"the statutory demand"*) in the prescribed form requiring him to pay the debt or to secure or compound for it to the satisfaction of the creditor, at least 3 weeks have elapsed since the demand was served and the demand has been neither complied with nor set aside in accordance with the rules, …"

Relevant provisions in the 1986 Rules and the Practice Direction: Insolvency Proceedings

12. The 1986 Rules make provision in respect of service of both a statutory demand, and a petition. Rule 6.3(2) provides as follows:

> "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."

It was the wording of this provision, quite clearly, that the District Judge had in mind in the recital to the order which he made.

13. The court is given power, under Rule 6.5(4), to grant an application to set aside a statutory demand if satisfied of various specified matters, set out at Rule 6.5(4)(a)-(c), none of which is relevant to this appeal, but also, under Rule 6.5(4)(d) "on other grounds, that the demand ought to be set aside". This latter ground was held to extend to setting aside for bad service in *Mandiri* [2011] BPIR 19, at para 31.

14. Rule 6.11(1) provides that where under s268 of the 1986 Act "the petition must have been preceded by a statutory demand, there must be filed in court, with the petition, a certificate" proving service of the demand. For the purposes of the present case, under Rule 6.11(5), such certificate must be authenticated by a person having direct personal knowledge of the means adopted for serving the statutory 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. For the purposes of this case, Irwin Mitchell relies upon the evidence of Mr Butler, to which I have referred for the purpose of compliance with these requirements.

15. The *Practice Direction: Insolvency Proceedings* [2014] BCC 502 makes provision,

by para 13.2, in respect of substituted service of statutory demands as follows:

> "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 or the demand is not advertised in the limited circumstances permitted by rule 6.3(3) , 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 of 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 the 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[…] at […] 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 to or left at all known addresses of the debtor. The appointment letter should also 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] [insertion 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 the 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 the court may think fit.
> >
> > (3) When attending any appointment made by letter, inquiry should be made as to whether the debtor has received all letters left for him.

> If the debtor is away, inquiry should also be made as to whether or not letters are being forwarded to an address within the jurisdiction (England and Wales) or elsewhere.
>
> (4) If the debtor is represented by a solicitor, an attempt should be made to arrange an appointment for personal service through such solicitor. The Insolvency Rules enable a solicitor to accept service of a statutory demand on behalf of his client but there is no similar provision in respect of service of a bankruptcy petition.
>
> (5) The certificate of service of a statutory demand filed pursuant to rule 6.11 should deal with all the above matters including all relevant facts as to the debtor's whereabouts and whether the appointment letter(s) have been returned. It should also set out the reasons for the belief that the debtor resides at the relevant address or works at the relevant place of business and whether, so far as is known, the debtor is represented by a solicitor."

16. Moving to the issue of commencing bankruptcy proceedings in the wrong court, Rule of the 1986 Rules provides:

> "Where … bankruptcy proceedings … are commenced in a court or county court hearing centre which is, in relation to those proceedings, the wrong court or county court hearing centre, that court or county court hearing centre may—
>
> (a) order the transfer of the proceedings to the court or county court hearing centre in which they ought to have been commenced;
>
> (b) order that the proceedings be continued in the court or county court hearing centre in which they have been commenced; or
>
> (c) order the proceedings to be struck out."

17. Finally, I should mention Rule 7.55 of the 1986 Rules, which provides that:

> "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 requirements of s268 of the 1986 Act

18. The conclusion as to service of the First Demand reached by the District Judge, Miss Hawker, for Mr Canning, submitted, amounted to a finding that it had not been served. From this, she argued that it followed that the Petition must be dismissed, and that there was no discretion in the matter, because the requirements of s 268 left no room for doubt; without having served a statutory demand, a creditor could not establish a ground for a petition founded upon inability to pay a debt. Moreover, an opportunity to apply to pay the judgment debt by instalments had been lost, so there was real prejudice.

19. Miss Doran, for Irwin Mitchell, sought to avoid this conclusion by reliance upon *Mandiri*, a case which she submitted was consistent with the decisions in other

insolvency cases in which principles informed by the Civil Procedure Rules or Rule7.55 of the 1986 Rules suggest that irregularities as to service may be cured where there is no injustice to the debtor. She referred in particular to *Andrews v Bohm and another* [2005] EWHC 3520 (Ch) (Mann J), and *Gate Gourmet Luxembourg IV Sarl v Morby* [2016] Bus LR 218 (Mr Edward Murray sitting as a deputy High Court Judge). She submitted, relying upon *Howell v Lerwick Commercial Mortgage Corpn Ltd* [2015] 1 WLR 3554 (Nugee J) and *Debtor (Nos 49 and 50 of 1992)* [1995] Ch 66, CA, that it was a well-established principle that a statutory demand would not be allowed to remain extant where it could not form the foundation for a bankruptcy petition; in the latter case the problem with the demand related to the debt being below the bankruptcy level, but the principle established is unaffected. She drew particular attention to the judgment of Sir Donald Nicholls V-C, as he then was, in *Debtor (Nos 49 and 50 of 1992)* at page 71:

> "In the present case, … it is apparent that a bankruptcy petition cannot properly be presented on the basis of the existing statutory demand. It cannot properly be presented, because the only debt the debtor appears unable to pay is a debt which is less than the bankruptcy level. There is no question or suggestion of any other creditors or other debts. There is no suggestion that Mr. Wallace-Jarvis [the creditor] may be joining forces with another creditor to present a joint petition. In those circumstances it would not be sensible or just to leave the statutory demand extant. The only purpose in doing so would be for this demand to form the foundation for a bankruptcy petition. Here such a petition would be bound to fail. That being so, the very presentation of a petition would be oppressive and an abuse of process. It could be struck out summarily. Accordingly, at the earlier stage of the statutory demand the court should intervene. When able to foresee the inevitable the court will always intervene summarily to anticipate it. The court does not countenance parties proceeding to a blank wall. Hence in the case now under consideration the court ought not to permit the statutory demand to stand."

20. Thus, Miss Doran submitted, it is to be inferred that the court in *Mandiri* must have been satisfied that although in that case the statutory demand had been defectively served, it could still validly constitute the foundation for a bankruptcy petition where the court considered that the demand should not be set aside because of the absence of prejudice, and by reason of considerations of proportionality. There was, in the present case, she added, no suggestion that Mr Canning wished to make an application to set aside the First Demand, or that there would have been any grounds for doing so.

21. In my judgment, the requirements for the proper presentation of a bankruptcy petition founded upon inability to pay a debt are extremely clear. A petition may be presented, under s267(2) "only if, at the time the petition is presented … (c) the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay". In this case, we are concerned with an immediately payable debt, so that the debtor's

inability to pay will appear "if, but only if, … (a) the petitioning creditor … has served on the debtor a [statutory] demand"; see the material wording of s 268(1). The conclusion that service of a statutory demand is a prerequisite of entitlement to present a petition, is underscored in s268 by the words "but only if". In the absence of authority which would compel me to reach a different conclusion, I would therefore have no hesitation in finding that the District Judge's conclusion as to the inadequacy of service of the First Demand in this case was fatal to the Petition. I must therefore examine the authorities upon which Miss Doran relies.

22. *Andrews* concerned two appeals arising in the same case; the first was in respect of a District Judge's refusal to set aside a statutory demand, and the second arose from another District Judge's decision to make a bankruptcy order based upon the demand. In that case, a default judgment had been entered in High Court proceedings against Mr Andrews. The Master declined an application to set aside the judgment, and the Judge dismissed an appeal from that order. At the conclusion of the hearing before the Judge, he directed that the creditor (the Bohms) be permitted to serve any further proceedings, including enforcement proceedings upon the debtor by serving them by post to his then solicitors, Messrs Chua's. The Bohms prepared a statutory demand and sent it to Chua's, in reliance upon the Judge's order. Mr Andrews accepted that he did indeed receive the demand. An application to set aside the demand was made, impeaching the validity of the service; it failed before the District Judge, so that a petition was presented, sent by post to Chua's, and the bankruptcy order was ultimately made. The validity of service upon Chua's was challenged in respect of both the demand and the petition. Mann J, on appeal, was not satisfied that there was any jurisdiction in the High Court proceedings to provide for substituted service in the later bankruptcy proceedings; but he held in any event that he did not consider that this was what the Judge in the High Court proceedings had been trying to achieve. He considered that the order for substituted service had been directed to enforcement action within the High Court proceedings. However, Mann J rejected the submission that because (1) there had been no personal service, and (2) the affidavit of service relied simply on the order for substituted service, it must follow that the statutory demand was not properly served and should be set aside. His reasoning, at para 36 of his judgment, was that the primary obligation under Rule 6.3(2) was that the creditor was obliged to do all that is reasonable for the purposes of bringing the demand to the debtor's attention. Mann J referred in detail to the circumstances in which the order for substituted service had been made, including the exchanges with the Judge who made it; these revealed that Mr Andrews had been evading service, and was intending to continue doing so. The exchanges also showed that Mr Andrews' counsel had actually encouraged the serving of material on Chua's.

23. Not surprisingly, against this background, Mann J concluded that on the facts of that case, the Bohms had acted perfectly reasonably in serving the statutory demand upon Chua's. He explained at para 41:

> "The only thing that can be said about the steps that they took and the extent to which they do not comply with the Rules is that they did not set out fully the circumstances in which substituted service was justified, i.e. they did not set out the background to the order, the fact that they did not know where he lived and the fact that he would not say where he lived. If that is a defect, then I am prepared to waive it under 7.5(5)(*sic*). All in all, *I am quite satisfied that, on the material I have seen, they have done what is reasonable to bring the statutory demand to the attention of Mr Andrews.* If it matters, we know that they were entirely successful because, within a very few days, Chua's had drawn the statutory demand to his attention, as he admitted to the district judge when he said he had received the demand in early February and he was in a position to pass it on to his sister, who took the steps that she took in trying to get it set aside, commencing with her application and letter of 16th February 2005. In the circumstances, I hold that the statutory demand was properly served."
>
> (Emphasis added)

The crucial conclusion, and the one distinguishing it from this case, is in the passage which I have emphasised. Mann J's conclusion as to the steps taken was diametrically opposite to the conclusion of the District Judge in this case. In *Andrews*, there was valid service of the statutory demand; in the present case there was not. As for the service of the petition in *Andrews*, where Mann J found that Mr Andrews had in fact had the petition for a good period before it was heard, Mann J was prepared to exercise jurisdiction under CPR 6.9 (now CPR 6.28) and to deem service unnecessary so that it could be dispensed with. This was for broadly equivalent reasons to those given in relation to the statutory demand; see paras 63-67 of Mann J's judgment. The provisions of what is now CPR 6.28 in its current form are as follows:

> "(1) The court may dispense with service of any document which is to be served in the proceedings.
>
> (2) An application for an order to dispense with service must be supported by evidence and may be made without notice."

These provisions do not extend to the service of documents outside the proceedings, and, importantly do not apply where "another Part, any other enactment or a practice direction makes different provision"; see CPR 6.1(a). As explained above, s268 makes it a condition of entitlement to present a petition that a statutory demand has been served. Further, I note that Mann J did not rely upon CPR 6.9 in reaching his conclusion as to the validity of the statutory demand as opposed to the petition.

24. In all the circumstances, I do not consider that Miss Doran can derive any assistance

from *Andrews.* I turn next to *Mandiri.* In that case, Mr Bush applied for an order to set aside a statutory demand issued by the respondent bank ("the Bank"). The claim was for payment of sums alleged to be due under various guarantees. The statutory demand was not served upon Mr Bush at his residence in Switzerland, but was left, on the Bank's instructions, at the home of Mr Bush's girlfriend in England; this was despite the fact that the Bank knew of Mr Bush's Swiss address, and was in correspondence with him at that address. In that case, however, it appears from the judgment, at para 34, that Mr Bush did receive the demand, as well as an extension of time in which to apply to set it aside before the petition was presented. Further, he had known links to the address in England. Having referred to *Heald*, and the high standard to be met under Rule 6.3(2), Miss Registrar Barber emphasised, at para 28 of her judgment, that the creditor was required to do all that was 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. She expressly found, at para 29, that the Bank had failed to take such steps. She then turned to consider whether that failure should lead to the setting aside of the demand. In doing so she stressed that the requirements of the Rules and the Practice Direction as to service of statutory demands were there for a good reason, explaining that a debtor served with such a demand had very limited time within which either to pay a sum demanded or to apply to have the demand set aside. Failure to take such steps within the time limits would trigger a deemed insolvency, entitling the creditor to present a petition; thus, the service requirements should be strictly observed. However, on the facts of the case, she considered that setting aside the demand was not warranted. She mentioned the factors identified above; Mr Bush's actual receipt of the demand, his obtaining an extension of time for setting it aside, and his known links to the service address. His prejudice was confined to having to make a rushed application to set the demand aside, but that was cured by the extension which was granted to him for that purpose. The Registrar described the Bank's conduct in the mode of service as "highly unsatisfactory", but she considered it disproportionate to set aside the demand.

25. There are important factual distinctions between *Mandiri* and the present case; not least the known and real connection of the debtor to the service address (unlike the extremely tenuous one in the present case), and the fact that the demand was ultimately received by the debtor. In the present case, the evidence suggests, on a clear balance of probability, that Mr Canning did not receive the demand. There are further distinctions which are relevant to discretionary considerations, should those be relevant; I consider these below. However, Miss Doran is right to identify a point of similarity with *Mandiri*; it is the conclusion expressed by the Registrar at para 29 in that case that the Bank failed to take all such steps as were reasonable for the purpose

of bringing the statutory demand to Mr Bush's attention. Whether, and in what circumstances, such a conclusion can be reconciled with according to the statutory demand the status required to be the basis of a bankruptcy petition is something to which I will return after considering the further authorities.

26. Miss Doran relied next upon *Gate Gourmet* particularly in relation to the application of Rule 7.55, but the application of that Rule in that case cannot be considered in isolation from the main issue which it decided, which was whether a bankruptcy petition had been personally served when it had been handed to a friend who was accompanying the debtor, and the debtor knew that the document was a petition seeking a bankruptcy order against him. The petition was then placed in a rubbish bin by the friend. The deputy judge in that case held that service had been effected in the circumstances, because he had sufficient opportunity to take possession of it; he could simply have asked the friend to hand it over, or he could have retrieved it from the bin himself. Thus, the petition was left "with or near" the debtor, thereby satisfying the test or "leaving a document with the person to be served" formulated by Lord Bridge and Lord Goff in *Kenneth Allison Ltd v AE Limehouse & Co* [1992] 2 AC 105, respectively at p113 and p124. In those circumstances, the application of Rule7.55 was unnecessary, but the deputy judge considered the point, as had the Registrar from whom the appeal was heard. The deputy judge's primary conclusion as to the application of the Rule to the case was that if, on the facts (contrary to his principal finding) there had been a failure to effect personal service, then there would have been no irregularity capable of cure by Rule 7.55.

27. The deputy judge then further considered the position on the premise that he was wrong, and the giving of the petition to the friend was "conceptually capable of being characterised as an "irregularity"; on that premise, then he concluded that there had not been a "complete failure to abide by the normal service provisions" in the Rules of the type found to be the case in *Andrews.* He said that such a complete failure, when no other form of service was available, would be a fundamental error that could not be cured under Rule 7.55, but that that was far from the case before him. He elaborated upon his reasoning, referring to the decision of Norris J in *In re Anderson Owen Ltd* [2010] BPIR 37 at para 24, where Norris J said:

> "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"

(The deputy judge cited only the first sentence of this passage; that was all that was relevant in the case before him, but I have set it out more fully, because the additional text is relevant to the circumstances of the present case.) It is important to make brief mention of the factual background in *Anderson Owen* as it appears from the judgment of Norris J. The case was argued on the premise, doubted by Norris J, that service of proceedings under s212 of the Insolvency Act, in accordance with an order made by the Chief Registrar, was defective service being non-compliant with the provisions of the Service Regulation (EC Regulation 1393/2007). However, the evidence disclosed that service had, at the request of the person to be served, been effected upon her German lawyers, and that it had been effective to inform her of the existence and nature of the claim.

28. Applying the test set out by Norris J, the deputy judge concluded that the essential purpose of service had been achieved on the facts in *Gate Gourmet*, which was scarcely a surprising conclusion on those facts. The debtor had himself chosen not to take control of the petition. However, the present case is far removed from such circumstance.

29. A critical distinction between *Andrews*, *Mandiri*, *Gate Gourmet*, *Anderson Owen*, and the present case, is that the document required to be served actually reached, or at least came within the dominion of, the intended recipient. In the present case, there was a fundamental failure to effect service; in no meaningful sense, could Mr Canning be said to have been served with the statutory demand, which never reached him, or came within his dominion. In these circumstances, I consider that the deficiencies relating to service in this case cannot be categorised as a "formal defect" or "irregularity", with the result that there is no scope for the application of Rule 7.55. 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. I observe that in *Mandiri*, it does not appear that the provisions of ss267 and 268 were cited to the court, nor was the court reminded of the principle identified in *Debtor (Nos 49 and 50 of 1992)* that the demand should not be allowed to remain extant if a petition could not be founded upon it. In Mann J's judgment in *Andrews*, it was the fact that the method of service accorded with what

was reasonable to bring the statutory demand to the attention of Mr Andrews that saved the statutory demand, not the absence of prejudice, or considerations of proportionality.

30. I conclude that the District Judge was wrong to allow the Petition to proceed. An essential prerequisite to the entitlement of Irwin Mitchell to present the Petition, namely the service of a statutory demand, was lacking. In the circumstances, I accept Miss Hawker's submission that this is not a case in which the exercise of discretion arises. The Petition should have been dismissed.

Discretion

31. It follows from what I have said above that this appeal must be allowed. However, in case I am wrong in my conclusion as to the absence of any discretion, whether under Rule 7.55 or otherwise, whose exercise might cure the deficiency in Irwin Mitchell's case, and in case this matter should go further, I will now consider matters as to the exercise of discretion.

32. Factors which I consider would be important to the exercise of any discretion, I consider, are these:

    (i) The evidence filed with the court, proving service of the statutory demand, pursuant to Rule 6.11, was positively misleading for the reasons described above. In fairness to Irwin Mitchell, there is no suggestion that it was aware of the true position. It could not have had the evidence from Mr Canning or Mr Parry at that time, and until Elliott Davies contacted Miss Marshall, following a call from Mr Canning, on 16th June 2016, there would have been nothing to alert Irwin Mitchell to the true position. Nonetheless, the presentation of the Petition was procured by misleading evidence; Rule 6.11(9) provides that 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). This relevant factor was not weighed by the District Judge.

    (ii) To the knowledge of Irwin Mitchell, Mr Canning was represented by a solicitor, yet no attempt was made to achieve personal service through that route. There was thus a failure to comply with para 13.2.4(4) of the Practice Direction. The District Judge did mention this factor in his judgment.

    (iii) Mr Canning did not receive the demand; although the District Judge mentioned the point of contention between the process server and Mr Parry, he does not, when considering exercise of discretion, appear to have taken

into account the fact of non-receipt of the demand. His express finding that Mr Canning was not served relates to the period when the process server first called at Rosehill Barn.

33. Given what appear to me to be important factors that should have been weighed in the exercise of any discretion, that were not taken into account by the District Judge, I consider that I am entitled to review the exercise of his discretion. I do not consider that in the present case it would be appropriate, or proportionate, to exercise any discretion effectively so as to validate the steps which were taken by, or on behalf, of Irwin Mitchell so as to treat the First Demand as having been properly served in light of the important factors which I have enumerated. These alone distinguish the case markedly from the situation in *Mandiri.* To exercise any discretion in favour of Irwin Mitchell in this case would be to encourage others not to achieve the high standards set for achieving service of statutory demands described by the Court of Appeal in *Heald.*

34. I should, however, add that I do not consider that Mr Canning suffered any meaningful prejudice in respect of other factors advanced by Miss Hawker, and I reject the suggestion that he suffered prejudice in not being able to make an application to the county court to make payments by instalments. As Miss Doran submitted, he was always able to that course. Further, I would add, his application in that respect lacked merit as is demonstrated by the fact that when heard on 17th February, it was dismissed. I am entitled to take this factor into account; see, by analogy, the Court of Appeal's willingness in *Charles v Hugh, James, Jones and Jenkins* [2000] 1 WLR 1278, a solicitor's negligence action arising from the striking out of the plaintiff's previous action for want of prosecution, to take into account medical evidence relating to a plaintiff's injuries, which evidence related to prognosis and became available only after the notional trial date.

Presenting the Petition in the wrong court

35. In my judgment, the fact that the Petition was presented in the wrong court did not, by itself, warrant the striking out of the Petition. The District Judge would have been entitled to order transfer to the correct court.

DISPOSAL

36. Despite the attractively presented submissions made by Miss Doran on behalf of Irwin Mitchell, I am firmly of the view that by reason of the failure as to service of the statutory demand, there was no proper basis for the Presentation of the Petition. Further, even if I had been persuaded that I could exercise any discretion so as to cure

such failure, in the circumstances of this case, where there was "a complete failure to abide by the normal service provisions" it would be wholly wrong to do so.

37. In the circumstances, this appeal will be allowed, and the Petition dismissed.

38. If the parties are not able to agree an order, I will hear further submissions from them.

39. I am grateful to counsel on both sides to their assistance.