Substituted service of a bankruptcy petition not available retrospectively

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The *Ardawa v. Uppal* decision

1. In Ardawa v. Uppal and Jordan [2019] EWHC 456 (Ch) the High Court held that, under the Insolvency Rules 1986, the Court cannot retrospectively make an order for substituted service of a bankruptcy petition, so as to authorise steps that have already been taken towards service (at [48]).

2. The decision (of Roth J.) helpfully dealt with a number of issues including:

   2.1. what constitutes valid service of a statutory demand;

   2.2. whether the court has the jurisdiction to make a retrospective order for substituted service of a bankruptcy petition;

   2.3. whether the use of a previous address on the petition causes a petition to be defective; and

   2.4. the exercise of the discretion under Section 281(1)(a) to annul the bankruptcy petition for irregular service.

3PB's Analysis

3. **The Facts.** The Appellant was served with a statutory demand for £8,834.80 by his former wife. She instructed a process server who attempted to effect personal service of the statutory demand at 26 Saltwood Road Avenue, Milton Keynes (**"the Property"**). He visited the property on three separate occasions and gave notice of an appointment at the address (in the usual way). He was not able to effect personal service and instead posted the statutory demand through the letter box addressed to the Appellant marked 'private and confidential'.

4. There was no response to the statutory demand. A bankruptcy petition was therefore issued. The petition named the Property as the Appellant's address. The same process server visited the Property on three separate occasions in order to effect personal service, but was unable to do so. Instead, on the last occasion he placed a copy of the petition in an envelope addressed to the Appellant through the letterbox of the Property.

5. On the Respondent's application to the Court a District Judge made an order that the steps already taken (the bankruptcy petition being posted through the letter box) constituted deemed service and that '*no further steps as to service [were] required*'. A bankruptcy order was obtained a couple of months later.

6. **The Application to set aside.** The Appellant made an application: (i) to set aside the order for substituted service of the petition; (ii) to annul the bankruptcy order; and (iii) to dismiss the bankruptcy petition. He contended that he had been unaware of the statutory demand or the petition until after the bankruptcy order was made, because he had never been resident at the Property.

7. He had been living at another address, of which the Respondent must have known since her solicitors wrote to him there shortly after he was made bankrupt. The wife was also aware of the Appellant's mobile number and email address, and had been in regular contact with him during the relevant period. The process server was not given this information, nor was the Court informed when asked to authorise substituted service.

8. **The decision.** Given the date of the Appellant's application, it is noted that the proceedings were governed by the Insolvency Rules 1986 (**"IR"**), not the Insolvency (England and Wales) Rules 2016 (**"the 2016 Rules"**).

9. The judge hearing the application found that the Appellant *had* been residing at the Property, would have been aware of both the statutory demand and the bankruptcy petition, and had been evading service. Those findings were upheld on appeal.

10. **The Rules.** Roth J. first contrasted the rules for service of a statutory demand, with those for service of a bankruptcy petition (at [41],[47]). The primary obligation for service of a statutory demand is to do "*all that is reasonable for the purpose of bringing the statutory demand to the debtor's attention*" (**IR r.6.3(2)**). By contrast a petition must be served personally unless the court orders substituted service (**IR r.6.14**).

11. Thus, **IR r.6.3(2)** set out that: "*(2) The creditor is, by virtue of the Rules, under an obligation to do all that is reasonable for the purpose of bringing the statutory demand to the debtor's attention and, if practicable in the particular circumstances, to cause personal service of the demand to be effected.*".

12. **IR rule 6.14** provided:

    (1) Subject as follows, the petition shall be served personally on the debtor by an officer of the court, or by the petitioning creditor or his solicitor, or by a person instructed by the creditor or his solicitor for that purpose; and service shall be effected by delivering to him a sealed copy of the petition.

    (2) If the court is satisfied by a witness statement or other evidence on oath that prompt personal service cannot be effected because the debtor is keeping out of the way to avoid service of the petition or other legal process, or for any other cause, it may order substituted service to be effected in such manner as it thinks just.

    (3) Where an order for substituted service has been carried out, the petition is deemed duly served on the debtor.

13. Roth J. recognised that the requirement to do '*all that is reasonable*' to serve the statutory demand is a high one, but emphasised that on existing authority (including Regional Collection Services Ltd v. Heald (also known as Re H (a debtor)) [2000] BPIR 661) the test is fact-sensitive.

14. He rejected the Appellant's argument that the Respondent should also have served the statutory demand at the alternative address about which she knew. On the facts that was not a 'residence' of his. Neither was she required to make contact by text message or email to bring the statutory demand to the Appellant's attention (see paragraphs [40]-[42]).

15. **Failure to include a known, previous address on the bankruptcy petition.** In breach of the rules as to the content of the petition, the Respondent had not identified the Appellant's alternative address. That, however, was a formal defect in the petition that did not cause any prejudice to the Appellant on the judge's findings, and could be cured by **IR 7.55** (see paragraphs [45]-[46]).

16. **Jurisdiction to make a retrospective order for substituted service of a bankruptcy petition.** Of greatest significance, Roth J. held that the Court had no jurisdiction to make a retrospective order for substituted service of the petition. This was supported by the wording of **IR 6.14(2)** and para. 13.2.4 of the (now-replaced) Insolvency Practice Direction. CPR 3.1(2)(m) could not be relied upon to authorise substituted service (see paragraphs [49]-[51]).

17. Moreover, the District Judge's Order authorising retrospective substituted service had not only been made without jurisdiction but also on the basis of misleading information (see paragraphs [54]-[55]).

18. Further, the failure to personally serve the petition could not be described as a 'formal defect' or 'irregularity' which fell within the scope of **IR 7.55**. Whether a deficiency constitutes a 'formal defect' or 'irregularity' depends on both the nature of the requirement that has not been complied with, and the circumstances of that failure to comply. The service of a petition, on the basis of an order for substituted service obtained on evidence that was seriously misleading, was a fundamental failure regarding the rules as to service (see paragraphs [58]-[61]).

19. **The discretion to annul.** Section 282(1)(a) of the Insolvency Act 1986 provides that: "*The court may annul a bankruptcy order if it at any time appears to the court… that, on any grounds existing at the time the order was made, the order ought not to have been made ...*".

20. Roth J. considered there were two issues for the court to determine:

    20.1. was the power to annul under the provision engaged; and

    20.2. if so, should the court annul the petition in this case (give the power is discretionary)?

21. Although the power was engaged, the court refused to exercise its discretion to annul because the debt was undisputed and the debtor had failed to explain why he had failed to pay, the debtor had been aware of both the demand and the petition, and he had been untruthful in his evidence on those matters (see paragraphs [62]-[66]).

Impact of the Decision

22. The decision is particularly significant because Roth J. determined that the Court has no jurisdiction to make a retrospective order for substituted service of a bankruptcy petition under the Insolvency Rules 1986. Previous authority on that point,[1] while to the same effect, had been strictly obiter. It equally serves as a reminder that even a fundamental failure of service, which cannot be treated as a "*formal defect*", may not result in the Court exercising its discretion to annul a subsequent bankruptcy petition.

23. It is unlikely that the case would be decided differently under the 2016 Rules. A creditor's obligations as to service of the statutory demand and the petition have not fundamentally changed and remain as summarised in paragraph 10 above.[2] The requirements for obtaining substituted service have changed under the 2018 Insolvency Practice Direction, but still, probably, suggest that the order for service will be prospective.[3]

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This article intends to state the law at the date indicated above. Although every effort is made to ensure accuracy, this article is not a substitute for legal advice.

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[1] Gate Gourmet Luxembourg Sarl v Morby [2015] EWHC 1203 (Ch). The point was not considered on appeal [2016] EWHC 74 (Ch).

[2] **2016 Rules, rr.10.2, 10.14(1), Sch.4**.

[3] Although para. 12.7.1 of the 2018 Practice Direction expects that the requisite steps to justify *making* the order "*have been taken*" when the creditor applies for substituted service, the creditor is still obliged to warn the debtor that "*if the debtor fails to keep the appointment, an application will be made to the Court for an order that service be effected either by advertisement or in such other manner as the Court may think fit*". The change to the subjunctive is unlikely to be treated as diminishing the value of that warning, or undermining Roth J.'s reasoning at [48].