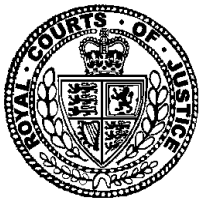

Neutral Citation Number: [2023] EWHC 920 (Ch)

Case No: CH-2022-000085

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**CHANCERY APPEALS**
**ON APPEAL FROM THE ORDER OF DEPUTY ICC JUDGE AGNELLO KC DATED 1 APRIL 2022**

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

Date: 24 April 2023

**Before**:

**THE HONOURABLE MR JUSTICE TROWER**

- - - - - - - - - - - - - - - - - - - - -

**IN THE MATTER OF PRAMOD MITTAL (a Bankrupt)**
**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

**Between:**

**PAUL ALLEN**
**(AS TRUSTEE IN BANKRUPTCY OF PRAMOD MITTAL)**

**Appellant**

**and**

**PRAMOD MITTAL**

**Respondent**

**TONY BESWETHERICK KC** and **ROWENA PAGE** (instructed by **Mishcon de Reya LLP**) for the **Appellant**

**ADAM CHICHESTER-CLARK (**instructed by **Collyer Bristow LLP**) for the **Respondent**

Hearing dates: 14 and 15 February 2023

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 24 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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THE HONOURABLE MR JUSTICE TROWER

**Mr Justice Trower :**

Introduction

1. This is an appeal by the trustee in bankruptcy (the "Trustee") of Pramod Mittal ("Mr Mittal") against the order of Deputy ICC Judge Agnello KC (the "Judge") dated 1 April 2022. By her order, the Judge refused the Trustee's application under section 279(3) of the Insolvency Act 1986 ("IA 1986") to suspend Mr Mittal's discharge from bankruptcy (the "suspension application").

2. The relevant parts of section 279 are as follows:

> "(1) A bankrupt is discharged from bankruptcy at the end of the period of one year beginning with the date on which the bankruptcy commences.
>
> …
>
> (3) On the application of the official receiver or the trustee of a bankrupt's estate, the court may order that the period specified in subsection (1) shall cease to run until:
>
> (a) the end of a specified period, or
>
> (b) the fulfilment of a specified condition.
>
> (4) The court may make an order under subsection (3) only if satisfied that the bankrupt has failed or is failing to comply with an obligation under this Part.
>
> (5) In subsection (3)(b) "condition" includes a condition requiring that the court be satisfied of something."

3. Prior to the hearing before the Judge, an interim order suspending Mr Mittal's discharge pending a substantive hearing had been made by ICC Judge Prentis pursuant to the jurisdiction confirmed by the Court of Appeal in *Bagnall v the Official Receiver* [2004] 1 WLR 2832 ("*Bagnall*"). This interim order was made on 17 June 2021, two days before the expiry on 19 June 2021 of the one year period referred to in section 279(1). As Arden LJ explained in *Bagnall* at [27]:

> "… the court has power to make an interim order under this section and in doing it must be satisfied that there are reasonable grounds for concluding that such an order would be made after the substantive hearing on the material then placed before the court."

4. There was no appeal against the interim order made by Judge Prentis. Although the Judge refused the relief sought at the substantive hearing, she extended the interim relief granted by Judge Prentis pending determination of the Trustee's application for permission to appeal against that refusal. Permission to appeal was granted by Edwin Johnson J on 4 July 2022. He further extended the suspension of Mr Mittal's discharge pending the substantive determination of this appeal.

5. The argument before the Judge did not focus on the question of whether the Trustee had established that Mr Mittal had failed to comply with any of his obligations under Part IX of IA 1986 so as to meet the requirements of section 279(4). Indeed, the Judge recorded that Mr Mittal had made clear that he would only contest the application on issues of service and procedure, and not in relation to the matters of conduct which the Trustee said justified a suspension of his discharge. She also explained that Mr Mittal had filed no evidence relating to the merits of the suspension application and held that, for the purposes of her judgment and on the basis of the evidence which had been filed, she was "prepared to accept that there is a compelling case on the merits for the suspension of bankruptcy."

6. The issues with which the Judge was concerned were Mr Mittal's submissions that the Trustee's suspension application should be dismissed because:

   i) he had failed to effect valid service of the suspension application prior to the date on which Mr Mittal was discharged in accordance with section 279; and

   ii) he had failed to serve the suspension application and the evidence on Mr Mittal and the official receiver within time prior to the first hearing of the application on 17 June 2021.

7. The Judge accepted Mr Mittal's case on the first issue and concluded that there had been a failure to effect valid service of the application prior to the date of what would have been his automatic discharge under section 279(1) of IA 1986 and that, for this reason, no order should be made for the suspension of his discharge. In refusing to make the order sought by the Trustee, the Judge also refused his application (made during the course of the hearing before her) for an order pursuant to CPR 6.15 and/or Schedule 4 of the Insolvency (England and Wales) Rules 2016 ("IR 2016")) that the delivery of the suspension application on two separate occasions shortly before the date on which Mr Mittal was to have his automatic discharge was good service.

## Background to the interim suspension order

8. Mr Mittal was adjudged bankrupt on 19 June 2020 on a petition debt of just under £140 million owed to Moorgate Industries UK Limited ("Moorgate"). Shortly thereafter, he proposed an individual voluntary arrangement ("IVA") under Part VIII of IA 1986 which was approved on 26 October 2020. The approval of the IVA was challenged by an application made by Moorgate on 13 November 2020. Revocation of the IVA was sought on the basis of material irregularity (including an allegation that creditors acted in bad faith). On 25 November 2022, Chief ICC Judge Briggs concluded that there was a material irregularity at the meeting of creditors convened to consider the proposal (*Moorgate Industries UK Limited v Pramod Mittal and others* [2022] EWHC 3009 (Ch)) and he made an order revoking the IVA. He determined that, in the light of other irregularities at the creditors meeting, it was unnecessary to deal with the issue of good faith. At the time of the hearing before me this order was subject to appeal, but permission has since been refused.

9. Meanwhile, on 10 June 2021, the Trustee had issued the suspension application. The relief sought included an order that the discharge of Mr Mittal's bankruptcy due to take

place on 19 June 2021 be suspended until such time as a full hearing could be listed. The application notice requested that the suspension should run until at least the determination of the application to revoke Mr Mittal's IVA (which was then pending). It also sought an order that, in the event of the IVA challenge being successful, the discharge continue to be suspended for a further nine months, provided that Mr Mittal complied with his obligations under the IA 1986 and cooperated with the Trustee's enquiries.

10. Rule 10.142 of IR 2016 governs the procedure applicable to the suspension application. The Trustee was required to file and deliver to the official receiver and Mr Mittal his evidence in support of the application at least 21 days before the date fixed for the hearing (rule 10.142(5) of IR 2016). Rules 10.142(6) and 10.142(7) required Mr Mittal, as the bankrupt, to file and deliver to the official receiver and the Trustee copies of a notice specifying any statements in the Trustee's evidence which he intended to deny or dispute. The Trustee was also required by rule 12.9(3) of IR 2016 to serve a sealed copy of the application endorsed with the venue for the hearing on Mr Mittal at least 14 days before the date fixed for its hearing. This requirement is subject to rule 12.10 of IR 2016 which permits the court, where the case is urgent (and without prejudice to its general powers to extend or abridge time limits) to hear the application immediately with or without notification to, or the attendance of, other parties.

11. The request for a suspension until such time as a full hearing of the suspension application could be listed adopted the procedure sanctioned by *Bagnall* in which the Court of Appeal confirmed that the court has jurisdiction to grant interim relief suspending discharge both (a) in circumstances in which the application has been filed and served in time but the court is unable to deal with a substantive (normally opposed) hearing before the date on which automatic discharge would otherwise occur and (b) in circumstances in which there is insufficient time for the requirements of rule 10.142 to be complied with before that date. This jurisdiction is of some practical importance because any order suspending discharge must be made before the one year period (at the end of which a bankrupt is automatically discharged pursuant to section 279(1)) expires. This is because section 279(3) only permits the court to order that the one year period shall cease to run. It follows that, once discharge has occurred without being suspended, the power given by section 279(3) is spent; the court has no jurisdiction to suspend with retrospective effect.

12. As *Bagnall* itself demonstrates (see [23] and [27] of Arden LJ's judgment), the court is able to grant interim relief whether or not the bankrupt is notified of or served with the application so long as the case is urgent and so long as the reasonable grounds test I have cited above is satisfied. However, as Arden LJ explained in [30] of her judgment, fairness demands that a bankrupt should be given as much notice as practicable even if the 21 or 14 days periods are thereby foreshortened. The power derives from rule 12.10 of IR 2016 (then rule 7.4(6) of the Insolvency Rules 1986 ("IR 1986")).

13. On Friday 11 June 2021, the day after the suspension application had been issued, the Trustee's solicitors, Mishcon de Reya LLP ("Mishcon"), took two steps to give notice of the hearing to Mr Mittal:

    i) First, they sent by courier to Collyer Bristow LLP at an address at 4 Bedford Row, a letter notifying them of the filing of the suspension application. They said that they were enclosing by way of service the application notice, a draft

order and a witness statement of the Trustee together with its exhibit. Collyer Bristow had been instructed by Mr Mittal throughout his bankruptcy, but there was no suggestion that they had at this stage agreed to accept service of the suspension application. Mishcon's letter of 11 June explained that they proposed to apply for an order suspending discharge on an interim basis at the first hearing of the suspension application, which had been listed for 10:30 on 17 June 2021, two days before Mr Mittal's automatic discharge would occur.

ii) Secondly, Mr Nicolaides of Mishcon sent an e-mail to Mr Gavin Kramer of Collyer Bristow at 15.18 in which he said "Please see the attached correspondence, a hard copy of which has been sent today via same day courier." The attachments, comprising the documents which had been sent by courier, took the form of a Mimecast shared file.

14. At 18:53 on 11 June 2021, Mr Nicolaides sent an e-mail to Mr Kramer explaining that Mishcon's courier had informed Mishcon that:

> "… no one was at your offices this afternoon to accept delivery of our hard copy letter and Application sent to you today.
>
> We should be grateful if you would confirm that 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."

15. 20 minutes later, at 19:14 on 11 June 2021, Mr Kramer responded to Mr Nicolaides' e-mail in the following terms:

> "We have moved offices to 140 Brompton Rd London SW3 1HY. 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.)
>
> If any future substantive hearing is heard in person, we will require a hard copy of the hearing bundle to be delivered to 140 Brompton Road."

16. There was then a short further exchange in which Mr Nicolaides confirmed that hard copies of any hearing bundle would in the future be delivered to 140 Brompton Road. On the following Monday 14 June, Mishcon chased Collyer Bristow for confirmation of Mr Mittal's position in respect of the 17 June hearing to which Collyer Bristow responded that they were taking instructions and all their client's rights were reserved.

17. On 15 June 2021, Mishcon sent an e-mail to Collyer Bristow enclosing an electronic version of the hearing bundle. They offered to deliver a hard copy of the bundle in advance of the hearing and in their accompanying letter said the following:

> "We write further to our letter of 11 June 2021 and your e-mail dated 14 June 2021 in relation to our client's application to suspend the discharge of your client's bankruptcy on an interim basis (the "Application"). As you know, the hearing of the Application is listed for Thursday 17 June 2021 at 10:30 am (or as soon thereafter) (the "Hearing").

> 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.
>
> We understand that the Hearing is to be held remotely via Microsoft Teams. Please confirm whether there will be attendees at the Hearing on behalf of your client. We can then provide their email addresses to the Court so that they will receive a Microsoft Teams invite."

18. The following day, which was the day before the hearing, Collyer Bristow sent an e-mail to Mishcon notifying them that they had been instructed to oppose the suspension application. The nature of the opposition was then outlined in a skeleton argument prepared on behalf of Mr Mittal by Mr Chichester-Clark. There were three bases for the opposition:

    i) The first was that the Trustee had not complied with the rules requiring him to serve the evidence on which he relied 21 days prior to the hearing (a reference to rule 10.142(5) of IR 2016) and to serve the application 14 days prior to the hearing (a reference to rule 12.9(3) of IR 2016).

    ii) The second was that the Trustee's evidence did not disclose any exceptional circumstances, or indeed any circumstances which would justify the exercise of the court's discretion to extend or abridge time, even if such an application had been made. The need for exceptional circumstances was said to be required on the present facts by the decision of the Court of Appeal in *HH Aluminium & Building Products Ltd and another v Bell and another (Joint Trustees in Bankruptcy of Ide)* [2020] EWCA Civ 1469 ("*Bell v Ide*").

    iii) The third was that the court should not exercise its discretion to grant interim relief in circumstances in which non-compliance with the IR 2016 is attributable to a deliberate decision not to bring the application at an earlier date.

19. There was no mention in the skeleton argument of any suggestion that the method of service on Mr Mittal was deficient and it was asserted in terms that service of the application and evidence in support had been effected by e-mail on 14 June 2021. This seems to have been based on a computation that confirmation of receipt by Collyer Bristow after hours on Friday 11 June meant that service took place on Monday 14 June, i.e., the following working day. The complaint was not that it had not been served at all, but that it had only been served three working days prior to the date fixed for the hearing.

Hearing of the application for an interim suspension order by ICC Judge Prentis

20. The suspension application was heard by ICC Judge Prentis on the morning of 17 June in the ICC Judges' interim applications list at a hearing conducted on Microsoft Teams. Mr Beswetherick, then as now acting for the Trustee, said that he was seeking an interim suspension of the discharge pending a further substantive hearing and directions for evidence leading to a hearing at which there could be a full determination of the application after full argument.

21. Mr Chichester-Clark developed the three arguments outlined in his skeleton, but he started by making clear that he had to reserve his rights to raise the question of law to which the application gave rise at the substantive hearing. In particular, he said that there was no explanation in the evidence which justified the Trustee in bringing the suspension application at the last minute. This was something that should only be done in exceptional circumstances. It is plain from the transcript of the hearing and his skeleton argument that the references to the question of law was a reference to Mr Mittal's legal argument that the approach to late applications for suspension of discharge explained in *Bagnall* had been affected by a requirement established by *Bell v Ide* that, where it was necessary to abridge time under rules 10.142(5) or 12.9 of IR 2016 to enable an interim suspension order to be made before the expiry of the one year period, exceptional circumstances had to be shown.

22. In making those submissions, the only issue on service related to timing but not method of service. Indeed, Mr Chichester-Clark distinguished between the two and said that, although it was late, service had in fact taken place. The fact that the method of service was not in issue (although the timing was) is well illustrated by the following passage from the transcript in which submissions were being made on the facts:

> "My learned friend criticises us, my client, for not replying until yesterday to say that we were opposing in circumstances where we were served, deemed service would have taken place if it was a claim or analogous to a claim form, on Tuesday, and in circumstances where the office holder and the solicitors have failed to serve an application on a bankrupt until the Friday night before a Thursday hearing."

23. A similar distinction between method of service and timing was made in Mr Chichester-Clark's submissions on the law. In support of the exceptional circumstances argument based on *Bell v Ide*, he submitted that it was for the Trustee to demonstrate exceptional circumstances before interim relief could be granted, which he had not done. He said that this was because there was an analogy to be drawn between a late suspension application for which it was necessary to seek an extension or abridgment of time and a situation in which an extension of time for service of an ordinary insolvency application seeking insolvency claw back relief was required after the expiry of the limitation period. In that context, there was the following exchange:

> "ICC Judge Prentis: But if there is a limitation date here, then unlike in *HH Aluminium & Building Products Ltd and another v Bell and another (Joint Trustees in Bankruptcy of Ide)*, the application and the evidence has been served before that date.
>
> Mr Chichester-Clark: Yes
>
> ICC Judge Prentis: So this is some way away from *HH Aluminium & Building Products Ltd and another v Bell and another (Joint Trustees in Bankruptcy of Ide)*, is not it, where actually, at the relevant date, it had not been served and therefore limitation cut in.
>
> Mr Chichester-Clark: Yes, that is correct."

24. Judge Prentis then delivered a clear and concise ex tempore judgment in which he explained why he was going to make an interim suspension order. He set out the

background, the broad nature of Mr Mittal's non-compliance and the fact that he was satisfied by reference to *Bagnall* at [27] that there were reasonable grounds for concluding that an order would be made at the substantive hearing on the material then placed before the court. As he put it in [26] of his judgment: "as I have already indicated, it seems to me that, on the evidence which I have in front of me, there are ample reasonable grounds for concluding that the application would succeed on this evidence."

25. It was also clear from the face of his judgment that Judge Prentis considered that the basis on which he was proceeding was that the application had been served, although service was late. This was particularly apparent from [24] of his judgment, which was in the following terms:

> "I am afraid that on the arguments which I have heard today, which are at this interim hearing I emphasise, I am not convinced that *HH Aluminium & Building Products Ltd & another v Bell & another (Joint Trustees in Bankruptcy of Ide)* provides any foundation for undermining the scheme described in *Bagnall v Official Receiver*. What we have here is an application made and served before the cut-off date. The cut-off date is an absolute one here: the Court cannot make an order once the 12 month period has expired. Effectively it has today and tomorrow to do it in, but presently it does have the power to make the order and, as *Bagnall v Official Receiver* makes clear, it can do so even if, actually, nothing has been served. But we are in a better position here."

26. After Judge Prentis had given judgment, Mr Beswetherick acknowledged that there would need to be some sort of recital in the order preserving or confirming that he had granted interim suspension but that he had not "finally determined any of the arguments, effectively". This was then reflected in the order Judge Prentis made, which recited that he was satisfied that it was appropriate to order an interim suspension of Mr Mittal's discharge and gave directions for the substantive hearing. The important part of his order was paragraph 4:

> "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 the 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."

27. The proviso was added by Mr Chichester-Clark when the precise form of order was being agreed with Mr Beswetherick. He explained that "I've added some additional wording at paragraph 4, to reflect the fact that the parties and the Court proceeded on the basis that my submissions were without prejudice to the respondent's right to raise them at a further hearing if there is one." This reflected a concern he expressed at the beginning of the hearing that Judge Prentis' decision should not be treated as finally determinative of any of the points on which he reached a conclusion for the purposes of the interim order application.

28. At the conclusion of the hearing Mr Mittal sought permission to appeal on two grounds. The first was that the effect of Judge Prentis' order was to abridge time where there was no application to do so and insufficient weight was given to the fact that the Trustee's decision to bring the suspension application late was deliberate and "in contravention

of" rules 12.9 and 10.142(5) of IR 2016. The second was that the Trustee produced no evidence of exceptional circumstances or any circumstances which would justify abridgement of time given the fact that the application was a last minute one. This application was refused by Judge Prentis. Mr Mittal did not renew his application for permission to appeal before a High Court judge, and no appeal against the interim suspension order was pursued.

Hearing of the substantive suspension application by Deputy ICC Judge Agnello

29. Mr Mittal's evidence in opposition to the suspension application was served more than two months later on 25 August 2021. In that evidence, he indicated for the first time that he would argue at the substantive hearing that he had not been served at all before the time of his discharge and that for this reason the court could not grant the relief sought by the Trustee.

30. The substantive hearing took place before the Judge over two days on 10 and 19 November 2021. The reasons she gave for dismissing the suspension application were set out in a judgment she handed down on 1 April 2022 (*Allen v Mittal* [2022] EWHC 762 (Ch)). She also explained why she was dismissing an application issued by the Trustee on 15 November 2021 (the "service application") seeking an order that the delivery of the suspension application to Collyer Bristow on 11 June and/or 15 June 2021 constituted good service, alternatively an order dispensing with service and/or an order abridging time for service of the application. The service application was issued in the period between the two days on which the hearing before her was held.

31. The Judge held that the Trustee had not served the suspension application on Mr Mittal prior to the hearing before Judge Prentis on 17 June. She also decided that he had not waived his ability to deny service and was not estopped from doing so. Having reached that conclusion, the Judge went on to hold that, because service was not formally effected and no orders for abridgment of time were granted by Judge Prentis at the 17 June hearing, she lacked jurisdiction to continue the suspension and was obliged to dismiss the application.

32. The Judge also held that she could not make an order on the service application validating the steps taken by the Trustee to serve the suspension application or dispensing with service of it. The reason for this was that a limitation defence had arisen in favour of Mr Mittal and that exceptional circumstances were therefore required before an order validating service could be granted and there were none. Similarly, she held that, even if the suspension application had been served before the first anniversary of Mr Mittal's bankruptcy, it would have been served short and she would not have granted the relief sought on the basis that exceptional circumstances were required, and that test was not satisfied in the present case.

Ground one: service on 11 June

33. Like ground two, this ground of appeal relates to the Judge's finding that the suspension application was not served at all prior to the hearing before Judge Prentis. The Trustee

also contended (as part of the argument on grounds five to seven) that service on Mr Mittal was not necessary either prior to that hearing or prior to the expiry of the one year period, but this point was addressed later in his submissions, and I shall adopt that same course in this judgment.

34. The Trustee did not submit in support of his argument on ground one that there was any indication of a willingness to accept service by electronic means prior to Collyer Bristow's e-mail sent at 19:14 on 11 June 2014, but he contended that the Judge was wrong to conclude that Collyer Bristow did not agree to accept service by that e-mail. If the Judge was wrong about that, she would also have been wrong to conclude that the Trustee failed to effect valid service of the suspension application prior to the date on which Mr Mittal was discharged pursuant to section 279, which would itself have undermined her conclusion on jurisdiction, the issue with which grounds five to seven is concerned.

35. There is no challenge to the Judge's conclusion that, in order to effect service by e-mail, a prior indication in writing that a solicitor is willing to accept service by that method is required (CPR 6.3(1)(d) and PD 6A para 4.1 as applied by para 1(4) of Schedule 1 to IR 2016). However, it was also not in issue that the parties were free to reach an ad hoc agreement as to the method of service (*Kenneth Allison Ltd v Limehouse & Co* [1992] AC 105 at 106H to 107B).

36. The reason the Judge concluded that Collyer Bristow had not accepted service was that the language used in the 11 June 2021 e-mail was only concerned with service on a prospective basis (see [14] of her judgment). She said that she was unable to accept that what was said could be interpreted as accepting valid service of the suspension application and the documents sent by e-mail earlier that day. The Judge expressed herself with some certainty on the point, concluding that the words used in the e-mail were clear and unambiguous.

37. Both parties relied on the context in which Collyer Bristow said "we will accept service by email". Mr Beswetherick submitted that the word "will" is not a clear and unambiguous statement as to future intention. He said it is also conventionally and commonly used to refer to *now* and was so used in the present case. He gave as an example that if X says to Y "I am sorry" and Y says to X "I will accept your apology" the natural construction is not that Y is expecting a further apology. He said that what Collyer Bristow said in their 11 June e-mail was a confirmation that what had already been served by e-mail by Mishcon earlier that day was effective as to method.

38. Mr Chichester-Clark submitted that the Judge was correct to reach the conclusion that she did. He relied on CPR PD6A, paragraph 4.1 of which provides that, where a document is to be served by electronic means, the party who is to be served or the solicitor acting for that party, must *previously* have indicated in writing that they are willing to accept service in that manner. He submitted that this demonstrated that a prior indication of a willingness to accept service by electronic means is therefore required. Although he did not submit that it was impossible for parties to agree that receipt of an electronic communication already received could not amount to good service, he said that the agreement reflected in the e-mail exchange between Mishcon and Collyer Bristow must be construed in the context of and against the background of paragraph 4.1. He said that any intention to accept a previous transmission as good and valid service should have been expressed in unequivocal terms.

39. Mr Chichester-Clark also relied on the fact that the 11 June e-mail by which Mishcon sent the attachments (hard copies of which had also been sent earlier the same day by courier) referred only to correspondence and made no reference to an application or to the means by which Collyer Bristow would accept service. In my view this does not take matters very much further. The correspondence referred to on the face of the e-mail was a letter of the same date which itself made explicit reference to the fact that it enclosed by way of service an application notice, a draft order, a witness statement and an exhibit, all of which were also described in the e-mail as the Mimecast sent files. It is evident that, in responding to the second e-mail, Mr Kramer had already opened the electronic version sent under cover of the first e-mail. This can be seen from the fact that the covering letter enclosed in the Mimecast share file disclosed that Mishcon had addressed his firm at 4 Bedford Row, which he explained in his response was an address from which they had now moved.

40. I agree with Mr Beswetherick's submission that the word 'will' is capable of expressing a present intent. Thus, the phrase "I will accept the documents you have just sent me" is plainly capable of meaning that the acceptance of what has already been sent takes immediate effect and carries with it no implied statement to the effect that the acceptance is conditional on a further transmission. However, that is not necessarily an answer to the issue in the present case, because what matters is not so much whether the word 'will' is used but whether, as a matter of construction of what the writer has said, the words are only referable to what is to occur in the future, or whether it is also referrable to what has already occurred.

41. In my judgment the Judge was wrong to conclude that Collyer Bristow's 11 June response is to be construed as the former rather than the latter. In reaching this conclusion, I do not consider that the Judge had sufficient regard to the fact that the 11 June response was to a chain which included two previous e-mails. The first e-mail enclosed the relevant documents by way of a Mimecast share file available for download. The second e-mail referred to the failed attempt to serve by way of hard copy because nobody was at Collyer Bristow's offices and sought the relevant confirmation that Collyer Bristow would accept service via e-mail. Therefore, the context in which the response was sent was one in which Mr Kramer knew that Mishcon had already attempted to deliver both by e-mail and by hard copy. The sense of his response that "we will accept service by e-mail" is informed by his further statement that there "is no need to deliver a hard copy to our new offices".

42. Mr Chichester-Clark submitted that this was a point in favour of his construction. He said that Mr Kramer was distinguishing between an express confirmation that a hard copy did not have to be delivered and a reference to the future acceptance of service by e-mail for which, as a matter of implication, a further transmission of the documents to be served had to be made.

43. I do not agree. In my view the distinction between a statement that a hard copy did not have to be delivered and the reference to "we will accept service by email" does not carry the weight sought to be attributed to it by Mr Chichester-Clark or (as I understand it) by the Judge, most particularly when read in the context of the previous two e-mails. In his second e-mail, Mr Nicolaides had sought confirmation that Collyer Bristow would accept service of the relevant document via e-mail. The relevant documents had already been sent by way of transmission under cover of the first e-mail. In that context,

the more natural reading of Mishcon's request was for Collyer Bristow to confirm that what had already been done was sufficient to effect service.

44. Looked at in that way, I think that Mr Kramer's response was confirmatory that what had already been done by e-mail was indeed sufficient. He knew that what had been sent earlier included the application and evidence in support and he expressed himself content that no hard copy delivery was required. It is difficult to see what possible reason he may have had for requiring a further electronic transmission of the same documents when there was and is no suggestion that what had already been sent and received was unsatisfactory in some way, and none has been given. This may be because it is obvious that, if he had done so, the request could have been dealt with straightaway. Although any requirement for retransmission would have led to service on the next working day (because the confirmation was only given at 19:14 on 11 June), it still would have been a few days before the proposed hearing.

45. In these circumstances, I consider that the most natural reading of the second sentence of Mr Kramer's e-mail of 11 June, and the correct one, is that there was no need for a further electronic transmission to be made and that the e-mail that had already been sent was accepted by Collyer Bristow as service (albeit late) on Mr Mittal. It follows that the first ground of appeal succeeds.

Ground two: service on 15 June

46. The Judge also concluded that, on the basis that service had not taken place on 11 June 2021, service of the hearing bundle on 15 June 2021 could not constitute service of the suspension application. She held (at [41] of her judgment) that the letter which was sent with the hearing bundle electronically "did not assert that the service of the hearing bundle was service of the suspension application" and went on to say that "Obviously, this was because as far as Mishcons were concerned, the suspension application had already been validly served." If she was wrong about that, her error undermines her conclusion on jurisdiction, to the same extent as any error in relation to what occurred on 11 June.

47. The Judge's conclusions in relation to the service of the hearing bundle on 15 June gave rise to the second ground of appeal. It was said that the Judge erred in concluding that the Mr Mittal was not served with the suspension application when the hearing bundle containing it was sent to Collyer Bristow by e-mail on 15 June 2021, which was after they had confirmed that they would accept service on behalf of Mr Mittal by that method. Mr Beswetherick submitted that the Judge's finding to this effect was wrong. He said that, if service was not effected on 11 June 2021, it was effective when the hearing bundle was sent to Collyer Bristow in electronic form on 15 June 2021. The covering letter attached to the e-mail of 15 June expressly stated that it was "by way of service" and it was sent after the time at which Collyer Bristow had confirmed that they would accept service by e-mail and that a hard copy bundle would only be required to be delivered if any future substantive hearing were to be heard in person, which was not the case for the hearing listed for 17 June.

48. He also submitted that the Judge approached the matter the wrong way round because, as he put it, when the Judge said that the covering letter of 15 June did not assert that

service of the hearing bundle was service of the suspension application, she read into IR 2016 a requirement that simply is not there. He said that, where delivery is made, it will be treated as service unless it is implicit in what occurred that service was not intended, for example by use of the words "for information only". To that end, he relied on the decision of Christopher Clark J in *Asia Pacific (HK) Limited v. Hanjin Shipping Co Limited* [2005] EWHC 2443 (Comm) at [25], in which the judge also concluded at [33] that:

> "When a claim form is delivered to the recipient in a manner provided for by the rules it is, in my view, served unless it is made clear by the person who delivers it that, whilst he is delivering the form by such a method he is not in fact serving it."

49. Mr Chichester-Clark's answer to this submission was that transmission of the hearing bundle did not constitute service of the suspension application in circumstances in which Mishcon neither announced nor intended that this was the way in which it was to be treated. He again relied on a submission that it was incumbent on Mishcon to inform Collyer Bristow in unambiguous terms that the purpose of transmission of the hearing bundle was to effect formal service. This was a matter of key importance in circumstances in which the Trustee sought to list a hearing on an urgent basis by reason of the fact that the suspension application had been delayed until the last minute and service was being effected substantially in breach of the time limits prescribed by rules 10.142 and 12.9 of IR 2016. He also adopted the Judge's conclusion that Mishcon could not have intended to effect service of the suspension application merely by delivery of the hearing bundle in circumstances in which they thought that service had already been effected.

50. The question of whether what occurred on 15 June amounted to service of the suspension application as well as service of the hearing bundle must be judged objectively. As Christopher Clarke J said in *Asia Pacific* at [19]:

> "The first question, therefore, is whether what happened on 21st March amounts to service. That question must - as is common ground - be judged objectively, that is to say by looking at what was done and said by and as between the parties in order to determine whether it amounts to service. If it does so, an unexpressed intention that it should not do so cannot alter the position. If it does not do so, the fact that the person who did the acts in question intended or thought that what he did constituted service does not make it so. Whether service has been effected cannot depend upon the views, possibly idiosyncratic or even bizarre, of individual litigants or their advisors."

51. It is clear that the use of the phrase 'by way of service' in the covering letter for the hearing bundle demonstrated that a level of formality was being adopted in relation to the electronic transmission of the documents contained in the bundle and that the formality related to service. I also think that, by sending the documents including the application notice and the evidence, in the way that they did, Mishcon did all that was necessary to effect service, unless there was something said or done which excluded transmission by this means from being service: see the passage from *Asia Pacific* at [33] referred to above. In that regard, the Judge found that service of the suspension application cannot have been intended, because the transmitter of the documents considered that service had already taken place. It was said that use of the phrase 'by way of service' referred to nothing more than service of the hearing bundle.

52. I have reached the conclusion that the Judge did not approach this aspect of the matter from the correct perspective. The essence of the question she asked herself was whether the subjective state of mind of the transmitters of the material was that they thought they were serving the suspension application. She asked herself that question having noted that the transmission was not accompanied by an explicit assertion that the transmission was service of the suspension application rather than service of the hearing bundle.

53. But in my view that was the wrong question. As Christopher Clark J made clear in *Asia Pacific*, the issue for the court is whether what occurred amounted, objectively speaking, to service. In looking at what occurred, the court should have regard to what was actually done, which from a purely physical point of view, fulfilled all the necessary criteria as to the method which, on any view, Collyer Bristow had by then agreed could be used to effect service. In the hypothetical circumstances in which service of the suspension application had not already been effected by the 11 June e-mail, which is the only circumstance in which this issue arises, there is nothing apart from the subjective belief of the transmitters that service had already taken place, to count against service being effective by what occurred on 15 June. In my judgment, that purely subjective state of mind, (based, as it would be on this hypothesis, on a mistaken belief), is not sufficient to negate satisfaction of the objective criteria that service was thereby effected.

54. It follows from this that, even if the Judge was correct to reach the conclusion she did on the construction of the e-mail exchange between Mishcon and Collyer Bristow on 11 June, I think that she was wrong to reach the conclusion that service was not then effected on 15 June. For this reason I consider that the Trustee succeeds on the second ground of appeal as well.

Grounds three and four: waiver and estoppel

55. The Trustee then submitted that, even if he was wrong to say that service had been effected prior to the 17 June hearing, albeit late, Mr Mittal's conduct at that hearing amounted to an express and implied waiver of his right later to deny service; alternatively he is estopped from doing so. In the light of my conclusions as to what occurred on 11 June and 15 June, I can take this aspect of the case quite shortly, but I still think that it is necessary for me to consider the Judge's factual findings on this issue for two separate reasons. The first is that what occurred has some bearing on the way in which the Judge should have exercised her discretion to deal with the suspension and service applications at the substantive hearing. The second is because it is appropriate for me to explain my conclusions in case the case goes further, and I am wrong on my construction of what occurred in the e-mail exchanges during the run-up to the hearing before Judge Prentis.

56. Any analysis of this part of the case must proceed on the hypothesis that Mr Mittal had not in fact been served or that I am otherwise wrong in my construction of what occurred on 11 June and 15 June. If I am not wrong, I agree with Mr Beswetherick's submission that there could be no basis for the court to conclude that Mr Mittal should not be held to what was accepted on his behalf, more particularly once the twelve months period had actually expired: see e.g., *National Westminster Bank v De Kment*

[2016] EWHC 3875 (Comm). It was either a binding agreement to accept that service had been effected, or an unequivocal renouncement of his right to challenge the method of service, sufficient to amount to a waiver, which, once effective, it was not open for Mr Mittal to withdraw. It was no longer open to him to seek to assert his (now abandoned) rights.

57. On that hypothesis, Mr Mittal's conduct at the hearing before Judge Prentis and the arguments advanced on his behalf must be assessed on the basis that, although he knew about the hearing, he was still expecting service to be effected. This follows from the fact that it is his case that service by e-mail was acceptable in principle, but only when effected after the time of Mr Kramer's 11 June e-mail. Did he waive his right to take a point on the fact of service or is he estopped from doing so?

58. The applicable principles, drawing out the distinction between waiver by election and estoppel by convention, are helpfully explained in the judgment of Rix LJ in *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] Bus LR 931 ("*Kosmar*") in a passage at [38], which summarises the effect of lengthy passages from the speeches of Lord Diplock and Lord Goff in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850:

> "In sum, therefore, election is the exercise of a right to choose between inconsistent remedies. It generally requires knowledge of the facts giving rise to the choice on the part of the party electing, and knowledge of the choice having been made on the part of the other party. Those are the conditions which make the doctrine mutually fair. It typically arises where the parties to a contract have to know where they stand. Thus the choice has either to be communicated unequivocally by the party electing to the other party or else the objective circumstances have to be such that the effluxion of time by itself constitutes that communication. Since the election is the choice of the party electing, it is his conduct which is decisive. Once made the election is final and irrevocable. Estoppel, however, is a promise, supported not by consideration but by reliance. It is a promise not to rely upon a defence (per Lord Diplock) or a right (per Lord Goff). It requires a representation, in words or conduct, which must be unequivocal and must have been relied upon in circumstances where it would be inequitable for the promise to be withdrawn. The need for such unfairness probably means that the reliance of the representee has to constitute a detriment, but even the detriment has, I would think, to be such as to make it inequitable for the promise to be withdrawn. For these reasons, the estoppel may not be irrevocable, but may be suspensory only. An unequivocal representation without the necessary reliance, and reliance without the necessary unequivocal representation, are each insufficient. It follows that, as concepts each in their own way designed to hold parties to fair dealings with one another, waiver by estoppel is the more flexible doctrine."

59. The facts on which the Trustee relied in support of his argument that Mr Mittal's conduct of and appearance at the 17 June hearing amounted to a waiver of his right to assert that he had not been served at all are that Mr Mittal attended the hearing by counsel, did not take issue with the fact of service and positively asserted that he had been served, albeit late. The way in which he did so was by a statement in his counsel's skeleton argument that 'Service of the Application and evidence in support was effected by email on 14 June 2021, 3 working days prior to the date fixed for the hearing…' This confirmed in writing that it was common ground that service had taken place,

because Mr Beswetherick had spelt out in his skeleton argument that the application had been served on Collyer Bristow on 11 June and that "Whilst they have confirmed service, and despite requests, they have yet to confirm their client's position in relation to the hearing."

60. The Trustee also contended that Mr Mittal's case that service had already occurred, albeit late, was then further confirmed during the course of Mr Chichester-Clark's submissions in the passages I have cited above. He said that they cannot be read as having any other meaning. Mr Beswetherick therefore submitted that, not only was no point relating to the effectiveness of service (as opposed to its timing) taken at the hearing, the written and oral arguments accepted that service had indeed occurred. He submitted that, if this had not been the case and that, if Mr Mittal had given any indication that he was reserving the right to take a point on method of service (notwithstanding his attendance at the hearing through counsel), the Trustee could have sought to serve the application before the expiry of the period of one year from the making of the bankruptcy order.

61. It was also submitted that the hearing before Judge Prentis proceeded on the common understanding, encouraged and reflected in Mr Mittal's written and oral submissions, that the application had been duly served albeit late. This common understanding was also shared by Judge Prentis who recorded as much in the passage from [24] of his judgment I have cited earlier in this judgment. This was said to give rise to an estoppel by convention which precluded Mr Mittal from denying the assumed fact that he had been served, because it would now be unjust to allow him to resile from that common assumption (for the principles see *Republic of India v India Steamship Co Ltd* [1998] AC 878, 913).

62. Mr Mittal's answer to both of these ways of putting the Trustee's case was that the suspension application came before Judge Prentis on an urgent basis and that his legal team did not have much time to consider it before it was first heard in the interim applications list. Mr Chichester-Clark submitted, in reliance on the decision of Popplewell J in *Phoenix Group Foundation v. Cochrane and another* [2017] EWHC 418, that a respondent should not be precluded from deploying any argument at a full blown inter parties hearing by reason of the fact that the arguments could have been run at an initial hearing in circumstances where the time and opportunity to consider such arguments prior to the initial hearing was limited by reason of the urgency with which it was convened.

63. Mr Chichester-Clark also explained that he began his submissions to Judge Prentis by expressly reserving Mr Mittal's right to raise the questions of law to which the application gave rise, a position which Judge Prentis accepted. This is plainly correct. He then submitted that the clear words of paragraph 4 of Judge Prentis' order allowed Mr Mittal to oppose the suspension on any ground, which would include whether service of the suspension application was effected prior to the discharge of his bankruptcy. He submitted that there was no evidence that Mr Mittal or his legal representatives knew that there was a point as to the validity of service such that they had knowledge of the right to elect, although it was not said that, at the time they appeared in defence of the application, they were still expecting Mr Mittal to be served.

64. The submissions on waiver made on behalf of Mr Mittal were accepted by the Judge. The Judge also concluded (at [58] of her judgment) that there was no estoppel by

convention because on the evidence there was no common assumption. In particular she said that there was no common understanding between the parties because they differed as to the date of service. She reached this conclusion because she was satisfied that Mr Mittal and his legal representatives failed to notice the service issue and could not be criticised for not doing so.

65. I agree that the principles explained by Popplewell J in *Phoenix* would have applied to enable Mr Mittal to run any points that went to the substantive merits of the Trustee's suspension application at the adjourned hearing before the Judge. These principles were confirmed by both parties as being applicable when they agreed to the inclusion of the reservation of rights articulated by paragraph 4 of the order made by Judge Prentis. However, I do not think that the Judge was correct to conclude that this extended to the question of whether, as a matter of fact, the method of service adopted by the Trustee had been accepted by Mr Mittal. This is because, although paragraph 4 reserved Mr Mittal's right to argue any grounds of opposition to the suspension application, it fell well short of preserving a right to argue that he had not (as a matter of fact) already been served with the suspension application in relation to which those grounds arose. The reservation of rights related to his ability to argue that, in light of the fact of service (including the fact that service was late), there were grounds on which the order suspending discharge ought not to be continued.

66. In my judgment, the nature of the reservation is clear from the circumstances in which Mr Mittal took issue at the 17 June hearing with the date of service but not the fact of it, and indeed went further by positively stating that he had in fact been served. As, on his own case as to the meaning of the 11 June e-mail, he was still awaiting service, it seems to me that this conduct amounted to a very clear waiver of his right to deny at a later stage that service had in fact taken place in the manner in which he then asserted it had occurred. He knew of all the necessary facts and clearly believed that he had been served. This all occurred before Judge Prentis made the order he did. If he wished to reserve his right to contend that, notwithstanding his attendance at the hearing by counsel, he had not been served at all, a very much clearer statement of his position would then have been required. Had he then said that he had not been served at all (as opposed to not served in time), Judge Prentis may have declined to hear him on the merits of the interim application and in any event there is no reason to doubt the Trustee's assertion that he would then have re-served the suspension application in order to close off the non-service argument now advanced.

67. As to the estoppel argument, the Judge concluded ([58] of her judgment) that there was no common understanding, because the Trustee and Mr Mittal disagreed as to the date of service and that any such understanding was in any event inconsistent with the wording of paragraph of 4 of Judge Prentis' order. I do not think that the Judge was correct in this conclusion, because I think that she asked herself the wrong question in evaluating the evidence that was before her.

68. The common understanding on which the Trustee relied so as to give rise to an estoppel by convention was as to the fact that service had been effected by the time of the hearing. In my judgment the fact that there may have been disagreement as to the precise date of service is neither here nor there. I agree with the Trustee's submission that the only way that Mr Mittal's conduct can be explained is that, by the date of the hearing before Judge Prentis, he had come to accept that service had in fact taken place. There can be no other legitimate explanation for the way that the hearing was conducted

on his behalf. In my view the Judge's conclusion on this point did not give sufficient weight to the distinction between a disagreement as to the date on which service had been effected (the Trustee said 11 June and Mr Mittal said 14 June) and the fact that there was no disagreement as to the fact of actual service.

69. So far as paragraph 4 of Judge Prentis' order is concerned, I think that the Judge's construction of it as it affected the estoppel argument was wrong for the same reasons that she was wrong on the impact it had on the Trustee's waiver argument. It follows that the evidence points inexorably to the conclusion that as at the time of the hearing before Judge Prentis, there was a common assumption as to the fact of service. If there had not been, counsel could not have made the arguments that he did.

70. As will appear, it is the Trustee's case (and my conclusion) that formal service before the date on which Mr Mittal's automatic discharge would otherwise have taken place is not a necessary pre-condition to the court's jurisdiction to continue the suspension at the substantive hearing. However, this argument would have remained open to Mr Mittal if he had not accepted and asserted that he was in fact served. At the hearing before the Judge, the uncontradicted evidence adduced on behalf of the Trustee was that he relied on the stance maintained by Mr Mittal at the hearing before Judge Prentis in not re-sending the suspension application by e-mail or by hand, which he could otherwise have done. In my view, if the Judge had taken the correct approach to ascertaining the common assumption, she would or should have gone on to conclude that this would have been sufficient to give rise to reliance by the Trustee on the common assumption from which it would be unconscionable and unjust for Mr Mittal now to resile.

71. For these reasons, the third and fourth grounds of appeal succeed to the extent necessary in light of my conclusions on grounds one and two.

Grounds five to seven: the Judge's jurisdiction to continue the suspension

72. These grounds go to the core of the Judge's reasoning. They challenge her conclusion that she had no jurisdiction to make an order suspending Mr Mittal's discharge at the conclusion of the hearing before her, because no directions were given at the time the interim order was made either that the hearing should proceed without notice or that the time for service should be abridged.

73. In [23] of her judgment, the Judge accepted that it is open to the court to make an order suspending a bankrupt's discharge in cases where there has been no service of the suspension application, as well as where there has been short service. It is plain that, in the light of *Bagnall* and the wording of rule 12.10 of IR 2016 (the current equivalent of rule 7.4(6) of the Insolvency Rules 1986 which was under consideration in *Bagnall*), the Judge was correct to reach that view. As she recognised, this may be an appropriate course where the case is urgent (as she accepted in her judgment that it was), both where a trustee has left it very late at the time his application is made, and also where the effective hearing date of a contested application will necessarily be after the expiry of the one year period. So far as the merits are concerned, the court is required to satisfy itself that there are reasonable grounds for concluding that such an order would be made

after the substantive hearing on the material then placed before it (see the passage from *Bagnall* at [27] cited at the beginning of this judgment).

74. All of this was entirely conventional, but the Judge went on to make findings at [27] and [28] of her judgment which were more problematic. They were couched in terms that go to the court's jurisdiction, and I should set them out in full:

> "27. 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 abridgment of service or directions relating to hearing the matter on a without notice basis."

75. The Judge then said that the order made by Judge Prentis did not make provision for an abridgment of time for service nor did he consider and make what she called a post-validation order. He reserved issues relating to service to the substantive hearing. The consequence of this was said to be that, unless the court was satisfied that the application was properly served before making a suspension order (even an interim suspension order), it could not suspend discharge. This was said to be a matter of jurisdiction. The Judge said that she therefore had no discretion to continue the suspension of Mr Mittal's discharge. The Judge then went on to say in [30] of her judgment that it was open to the Trustee to seek an order validating service prior to the expiry of the one year period, but that he did not do so. As I understand her judgment she accepted that, if he had done so, it could have been dealt with by reference to the question of whether there was good reason to abridge time and/or validate the steps already taken by the Trustee to bring the application to the attention of Mr Mittal pursuant to CPR 6.15 (as applied by Schedule 4 to IR 2016).

76. In his skeleton argument in opposition to the appeal, Mr Chichester-Clark explained the Judge's reasoning in a slightly different way. He said that the Judge's conclusion was that there was no jurisdiction to grant a suspension order after the date of discharge when there had been an urgent interim hearing at which relief was granted, but it transpired at the later substantive hearing that the application had been invalidly served and/or the court declined to validate service or abridge time retrospectively. He said that, having concluded that service of the suspension application had not been effected in accordance with the IR 2016, and that there was no good reason or exceptional circumstance which would justify an order validating the steps that the Trustee had taken to effect service, the court had no jurisdiction to extend suspension of the discharge.

77. The reasoning which underpinned the Judge's conclusion was an analogy she drew with the decision of the Supreme Court in *Barton v Wright Hassall LLP* [2018] 1 WLR 1119 ("*Barton*") (see [26] to [30] of the Judge's judgment). *Barton* was a case in which the court was concerned with the question of whether there was 'good reason' retrospectively to validate the non-compliant service of a claim form in exercise of its power under CPR 6.15 in circumstances in which the claim form was sent by e-mail to the defendant's solicitors on the day before it expired and any application to extend would be after the expiry of a limitation period. Lord Sumption explained at [10] that, in the generality of cases, the main relevant factors are likely to be:

> "(i) whether the claimant has taken reasonable steps to effect service in accordance with the rules and (ii) whether the defendant or his solicitor was aware of the contents of the claim form at the time when it expired, and, I would add, (iii) what if any prejudice the defendant would suffer by the retrospective validation of non-compliant service of the claim form, bearing in mind what he knew about its contents. None of these factors can be regarded as decisive in themselves. The weight to be attached to them will vary with all the circumstances."

78. The Judge applied the principles she derived from *Barton* because she considered that the expiry of the one year period from the making of a bankruptcy order was equivalent to the expiry of a limitation period. She said the following at [29] and [30] of her judgment:

> "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."

79. I agree with Mr Beswetherick's submission that the Judge was wrong to adopt the approach that she did on this point. I think that it would have been open to the Judge to conclude at the substantive hearing that the delay before making the application for an interim order was a sufficient ground to justify a refusal further to extend the

suspension of Mr Mittal's bankruptcy. She might also have concluded that it could now be seen that the interim order should not have been made at the time it was made, because there were insufficient grounds for exercising the jurisdiction under rule 12.10. This was the context in which the order made by Judge Prentis was without prejudice to Mr Mittal's right to oppose the suspension of his discharge on any grounds at the final hearing.

80. However, I do not think that the Judge was correct to suggest, as she appears to have done in [27] of her judgment, that the order Judge Prentis made was invalid, not least because it was neither appealed nor set aside. Because the matter was urgent, Judge Prentis had power to make the interim order at the time it was made, whether on short service or with no notice at all (see rule 12.10(1) of IR 2016). He was simply following the procedure for granting interim relief described by the Court of Appeal in *Bagnall*. This makes clear that the power under rule 12.10 is a power in an urgent case to proceed without notice where there is sufficient proof to justify the relief. Despite what the Judge seems to have thought (see [28] of her judgment), the jurisdiction does not depend on the court making an order that that is what it is doing. In any event, it is plain from [16] and [17] of his judgment that Judge Prentis appreciated that he was being asked to exercise his power under rule 12.10(1) to hear the application immediately and without proper service and that he considered it was appropriate for him to do so (see [26] of his judgment).

81. In my view the Judge's conclusion that a court would need to be satisfied that the application was properly served before making a suspension order, even an interim suspension order (see [29] of her judgment), cannot stand with the approach adopted by the Court of Appeal in *Bagnall*. I also consider that she sought to apply principles she took from *Bell v Ide* in what I consider to be an inappropriate context. This is a point to which I will revert when I explain my conclusions on the service application.

82. The interim order therefore operated to suspend Mr Mittal's discharge until the substantive hearing and the only question for the Judge at the substantive hearing was whether to exercise her discretion to continue that suspension. In my judgment, so long as an interim suspension order is in fact made before the one year period has expired, and so long as that order has not later been set aside whether on appeal or otherwise, there is nothing in the IA 1986 or the IR 2016 which precludes the court from further extending the suspension as a matter of jurisdiction, merely because the court did not grant relief pursuant to CPR 6.15 whether at the original interim hearing or at any other time prior to the expiry of the one year period.

83. I do not think that there is anything in *Barton* which either supports a contrary conclusion or operates to circumscribe the discretion which was available to the Judge at the substantive hearing. Apart from other considerations, it is apparent from Lord Sumption's judgment in *Barton* ([2018] 1 WLR 1119 at [8]), that the rules about service of a claim form are amongst the conditions on which the court takes cognisance of the matter in the first place. As he explained: "service of originating process is the act by which the defendant is subject to the jurisdiction." An application by a trustee in bankruptcy to suspend the bankrupt's discharge is a very different form of process. By reason of the bankruptcy order, the bankrupt is already subject to the court's jurisdiction. A suspension application is part of the administration of the bankruptcy over which the court already has general control (s.363 of IA 1986). It is an application made within the bankruptcy proceedings which are already then extant.

84. Furthermore, the context with which the Supreme Court was concerned in *Barton* was very different to an application to suspend the discharge of a bankrupt. *Barton* was concerned with the meaning of the phrase 'good reason' where it appears in CPR 6.15. That is not the same language as the language which Judge Prentis was required to apply when determining whether or not to exercise his discretion under rule 12.10 of IR 2016 to hear the suspension application immediately. The question for him was whether the case was 'urgent' and, if it was, to identify the discretionary factors which justified the grant of relief without proper service in that context.

85. It follows that, in my judgment, no question of jurisdiction arose at the hearing before the Judge. Mr Mittal's discharge had been suspended by Judge Prentis pursuant to an order made before the expiry of one year from the commencement of his bankruptcy, which had not been set aside whether on appeal or otherwise. That suspension continued to subsist at the time of the substantive hearing before the Judge and therefore it remained open to her to make an order pursuant to section 279(3) that the one year period referred to in section 279(1) should continue to cease to run. In my judgment, whether she should do so was matter for the exercise by her of a discretion which she wrongly concluded was not available to her.

Grounds eight to nine: the service application

86. By the service application, which was made during the course of the substantive hearing before the Judge, the Trustee sought an order pursuant to CPR 6.15 (as applied by Schedule 4 to IR 2016) that the delivery of the suspension application to Collyer Bristow on 11 June 2021 and/or 15 June 2021 was good service. In the alternative he sought an order pursuant to rule 12.9(2) of IR 2016 and/or CPR 6.16 dispensing with service and, so far as necessary, an order abridging time for service of the suspension application and evidence in support pursuant to one or more of section 376 of IA 1986, rules 12.9(3), 12.10 and 12.64 of IR 2016 and/or CPR 3.1 and CPR 3.10.

87. In the light of my earlier conclusions, I do not think that the points relating to the service application need to be determined in order to dispose of this appeal. That would only have been necessary, if the Judge had been correct to conclude that validation of the steps taken by the Trustee to serve the suspension application before the expiry of the one year period was required to enable her to grant the relief sought. As I do not think that is the case, the question of whether the Judge's approach was wrong does not strictly arise.

88. However, I think it is right to deal briefly with some of the conclusions reached by the Judge, because it is clear to me that her approach to the question of relief under the service application was an important influence on her approach to the case more generally. The reason for this is that the Judge held (at [69] and [70] of her judgment) that the decision of the Court of Appeal in *Bell v Ide* was authority for the proposition that exceptional circumstances had to be shown before the court would grant the relief sought by the service application, made as it was after the expiry of the period of one year from the commencement of Mr Mittal's bankruptcy. I think that she was wrong on this point.

89. The issue with which the Court of Appeal was concerned in *Bell v Ide* was whether the principles that apply to an extension of time for service of an insolvency application are the same as those that apply to the extension of time for service of a claim form under the CPR. The insolvency application in issue sought relief from persons other then the bankrupt (i.e., third parties to the bankruptcy proceedings) in respect of payments said to have been transactions at an undervalue, preferences or transactions defrauding creditors. There was no time limit for service of the insolvency application once issued, such as there would have been if the proceedings had been commenced by claim form (see the four month period for which provision is made by CPR 7.5(1)).

90. However, rule 12.9(3) of IR 2016 provides that a sealed copy of an insolvency application must be served, or notice of the application and venue must be delivered, at least 14 days before 'the date fixed for its hearing'. The question with which the Court of Appeal was concerned was whether the 'date fixed for its hearing' was the date fixed by the court at the time of issue of the application or the date at which the hearing was eventually listed. This was important because, if it was the former, he would have to serve his application 14 days before the original date in any event. If it was the latter, the applicant's obligation to serve the application would be deferred simply by an adjournment of the date fixed for the hearing. The Court of Appeal concluded that it was the former not the latter, and that accordingly the time for service of the insolvency application would be set at or about the time of issue. If an applicant wanted further time to serve his insolvency application beyond the date 14 days prior to the first date fixed for the hearing, he would have to seek an extension of time pursuant to CPR 3.1(2)(a) (as applied by rule 12.1(1) of IR 2016).

91. Having reached that conclusion, the Court of Appeal then went on to apply it to the question of whether the judge below had adopted the right approach to an application for an extension of time for service of the application. It held that, where an extension of time for service is required but is only sought after the limitation period has expired, an extension will not be granted in the absence of exceptional circumstances. As Nugee LJ explained at [63] of his judgment:

> "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."

92. The Judge concluded that the consequence of the Court of Appeal's decision in *Bell v Ide* was that the court would not make an order in the form contemplated by the service application in the absence of exceptional circumstances. Her reasoning was (a) that the service application was to be treated in the same manner as an application to extend time for service of an insolvency application (b) that the suspension application was an insolvency application and was therefore to be treated in the same way as a claim form for these purposes and (c) that the need for the Trustee to have obtained an order suspending Mr Mittal's discharge prior to the expiry of the one year period was equivalent to a limitation defence.

93. I think that the Judge was wrong in the conclusion she reached on these points. *Bell v Ide* was concerned with an application for an extension of time for service of proceedings. The service application was not. Primarily, it was an application for retrospective validation of service by an alternative method for which the test is whether good reason has been shown, without the gloss of exceptional circumstances: *Abela v Baadarani* [2013] 1 WLR 2043 at [33].

94. More particularly I think that the analogy the Judge drew between an application to suspend discharge where the court is required to make any order before the one year period has expired, and the issue and service of proceedings where the claimant has to issue process before a limitation period expires, is a false one. *Bell v Ide* was concerned with an insolvency application in which the proceedings sought relief akin to ordinary adversarial litigation in respect of which a limitation period might be expected to function as a defence. As Nugee LJ himself recognised at [55] of his judgment, not all applications in insolvency proceedings should be so characterised; they include those which are more in the nature of applications for directions in which limitation periods have no or a much reduced part to play. I agree with the Trustee's submission that the suspension application with which the Judge was concerned should properly be characterised as falling into the latter category. By the very nature of the bankruptcy proceedings, the bankrupt is already a party to them and the application is part of the process through which the court is being asked by the trustee in bankruptcy to exercise its control of a proceeding to which a bankrupt is already subject (section 363 of IA 1986).

95. There are other substantive differences as well. The most obvious is that the expiry of a limitation period gives a defendant a statutory defence to a claim. The expiry of the one year period for automatic discharge without a suspension being granted does not give rise to what is properly to be characterised as a defence to a claim. It simply means that the court no longer retains the power to suspend the discharge. Furthermore, and as Mr Beswetherick pointed out, Arden LJ's analysis of the position in *Bagnall* is inconsistent with any such analogy, both because she accepted that an interim suspension order could be made without any service at all and because she made clear (in [31] of her judgment) that the protection for the bankrupt where a late application is made, derives from the court's obligation to ask itself whether:

> "a trustee has been so dilatory that the consequences to the bankrupt are so unfair that the court might take the view that it was not appropriate to exercise its power under section 279(3) despite the bankrupt's past or current failure to co-operate".

96. The court is therefore required to focus on the impact that a very late application for suspension should have on the exercise of its discretion. This is a different question from the impact of a time bar. If the Judge had appreciated that there was this principled distinction between the two categories of case, she would have applied the test of whether or not there was a good reason for the court to grant the relief sought under CPR 6.15 and should not have concluded that there was an exceptional circumstances test to be applied. In my view, her decision on this aspect of the application before her was therefore vitiated by an error of law and cannot stand. However, as the relief sought by the Trustee on the service application is not required in the light of my conclusion on the other grounds of appeal, the fact that the Judge went wrong on this point is immaterial to the outcome.

Conclusion

97. As the Judge did not exercise a discretion which I have concluded was available to her, there are two options available to the court sitting on appeal from her decision. The first is to remit the matter for a further hearing before the Judge or another ICC judge. The second is for this appeal court to exercise its power under CPR 52.20 to grant any of the relief that could have been granted by the Judge. Neither party suggested that I should take the former of these two courses and I am satisfied that it is appropriate for me, in accordance with the overriding objective, to decide whether the suspension order originally granted by Judge Prentis should be continued and if so on what terms.

98. I start with the fact that it was not said by or on behalf of Mr Mittal that, if the point on service did not succeed, an order suspending his discharge would not be justified. This is a substantial ground for continuing the relief sought, and it is relevant that the Judge herself proceeded on the basis (see paragraph [7] of her judgment) that there was a compelling case on the merits for an order suspending Mr Mittal's discharge to be made. But, in any event, I agree with the Trustee's submission that, if the Judge had concluded that she had a discretion available to her, she would and should have continued the order suspending his discharge, and that this is the order which should now be made. In addition to the attitude of Mr Mittal and the comments made by the Judge, the reasons for this can be shortly stated.

99. The evidence demonstrated serious non-compliance by Mr Mittal with his obligations to cooperate with the Trustee. The interests of his creditors and the policy justification of penalising a bankrupt who has failed to comply with his statutory duties of cooperation and compliance all pointed to the relief sought being granted. Set against that is the fact (which Arden LJ identified in *Bagnall* at [31] as being a relevant consideration) that the Trustee left the application until the last minute. On any view this is factor which goes into the balancing exercise and may be determinative if it can be said that the consequences for the bankrupt are "so unfair" that exercise of the power would be inappropriate.

100. The explanation for why it was left so late related to the fact that the Trustee only remained in office because, although Mr Mittal's IVA had been approved, it was still subject to an undetermined challenge, the trial date of which was unknown to the Trustee. In his evidence, the Trustee explained that the available assets were very limited and it was only on 26 May 2021 that he reached an agreement with Moorgate to fund the suspension application. This left insufficient time to give proper notice for the hearing before the one year period expired. In my judgment this is not a case in which the Trustee's delay makes the grant of the relief he seeks unfair.

101. Indeed, in the present case, I regard the delay as a factor of limited weight which falls well short of tipping the balance against the grant of the relief sought by the Trustee. Although the suspension application was made very late, the application notice and evidence had been provided to Mr Mittal both prior to the hearing before Judge Prentis and before the time at which his automatic discharge would otherwise have occurred. It was also relevant that Mr Mittal was represented at the hearing at which the interim suspension of his discharge was considered and had expressly accepted, both at and prior to the hearing, that he had been served with the application. Mr Beswetherick

also submitted (and I agree) that there was no evidence of any specific prejudice to Mr Mittal caused by the delay. While there may be cases in which late notification to a bankrupt would justify a refusal to grant relief suspending a discharge that would otherwise have been granted, in my judgment this is not one of them.

102. For these reasons the appeal will be allowed and an order will be made in the form originally sought at the substantive hearing before the Judge. In my view, the conditions which remain appropriate having regard to the facts of the case and the court's power under section 279(3)(b) of IA 1986, are: (a) the expiry of nine months from the date of determination of the IVA challenge, (b) compliance by Mr Mittal with his obligations under IA 1986 and (c) cooperation by Mr Mittal with the Trustee. It is appropriate for the court to be satisfied that conditions (b) and (c) have been satisfied (section 279(5) of IA 1986) before the one year period starts to run again. It will be open to Mr Mittal to apply for the court to resolve that question by making an application under rule 10.143 of IR 2016.