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Re Mittal (a bankrupt); Allen (as trustee in bankruptcy of Mittal) v Mittal

[2023] EWHC 920 (Ch), [2023] All ER (D) 07 (May)

The Chancery Division allowed the appellant trustee's appeal against an order striking out the trustee's application to suspend the discharge from bankruptcy of the respondent (M). An order would be made in the form originally sought at the substantive hearing before the judge, subject to certain appropriate conditions.

Catchwords

BANKRUPTCY – TRUSTEE – DISCHARGE OF BANKRUPTCY

Background

In June 2020, the respondent (M) was adjudged bankrupt on a petition debt of just under £140m owed to Moorgate Industries UK Ltd (Moorgate). Shortly thereafter, he proposed an individual voluntary arrangement (IVA) under [Part VIII](#) of the Insolvency Act 1986 ([IA 1986](#)), which was approved in October 2020. The IVA was challenged by an application made by Moorgate in November 2020. Revocation of the IVA was sought on the basis of material irregularity.

In June 2021, an interim order was made by the court, suspending M's discharge.

In April 2022, the judge refused the trustee's application under [s 279\(3\)](#), [IA 1986](#) to suspend M's discharge from bankruptcy (the suspension application).

In November 2022, the Chief ICC Judge concluded that there had been a material irregularity at the meeting of creditors convened to consider the proposal, 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.

The trustee in bankruptcy for M (the trustee) appealed to the Chancery Division, against the judge's order of April 2022.

Issues and decisions

(1) Whether, among other things, the suspension application had been served properly. The judge had concluded that M's solicitors (CB) had not accepted service and that the language used in an email of 11 June 2021 from the trustee's solicitors (Mishcon) had only been concerned with service on a prospective basis. CB had stated that 'we will accept service by email'. The judge had held that she was unable to accept that what had been said could be interpreted as accepting valid service of the suspension application and documents sent by e-mail earlier that day.

The word 'will' was capable of expressing a present intent. Thus, the phrase 'I will accept the documents you have just sent me' was capable of meaning that the acceptance of what had already been sent took immediate effect and carried with it no implied statement to the effect that the acceptance was conditional on a further transmission. However, what mattered was not so much whether the word 'will' was used but whether, as a matter of construction of what the writer had said, the words were only referable to what was to occur in the future, or whether it was also referable to what had

already occurred (see [40] of the judgment).

The judge had been wrong to conclude that CB's 11 June 2021 response was to be construed as the former rather than the latter. The context in which the response had been sent was one in which CB had known 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' was informed by his further statement that there 'is no need to deliver a hard copy to our new offices' (see [41] of the judgment).

Kenneth Allison Ltd Petitioners And A E Limehouse & Co (A Firm) Respondents [\[1990\] 1 WLR 1386](#) considered

(2) Whether the judge had erred in finding that M had not been served with the suspension application when the hearing bundle containing it had been sent to CB by e-mail on 15 June 2021, which had been after they had confirmed that they would accept service on behalf of M by that method.

The question of whether what had occurred on 15 June 2021 had amounted to service of the suspension application as well as service of the hearing bundle needed to be judged objectively (see [50] of the judgment).

The judge had not approached that aspect of the matter from the correct perspective. The essence of the question she had asked herself was whether the subjective state of mind of the transmitters of the material was that they had thought that they were serving the suspension application. She had 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. That was the wrong question (see [52], [53] of the judgment).

The issue for the court was whether what had occurred had amounted, objectively speaking, to service. The court needed to have regard to what had actually been done, which from a purely physical point of view, had fulfilled all the necessary criteria as to the method which, on any view, CB had by then agreed could be used to effect service (see [53] of the judgment).

It follows that, even if the judge had been correct to reach the conclusion she had done on the construction of the e-mail exchange between Mishcon and Collyer Bristow on 11 June 2021, she had been wrong to reach the conclusion that service had not then been effected on 15 June 2021 (see [54] of the judgment).

Asia Pacific (HK) Ltd and others v Hanjin Shipping Co Ltd and another [\[2005\] All ER \(D\) 419 \(Nov\)](#), [\[2005\] EWHC 2443 \(Comm\)](#) considered

(3) Whether the judge had erred in holding that she had no jurisdiction to make an order suspending M's discharge at the conclusion of the hearing before her, because no directions had been given at the time that the interim order had been made either that the hearing should proceed without notice or that the time for service should be abridged. 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* [\[2018\] 3 All ER 487](#) (*Bagnall*).

The judge had been wrong to adopt the approach that she had done. It was not the case that the interim order had been invalid, not least because it had neither been appealed nor set aside. Because the matter had been urgent, the court had had power to make the interim order at the time it had been made, whether on short service or with no notice at all (see [79], [80] of the judgment).

The judge's conclusion that a court would need to be satisfied that the application had been properly served before making a suspension order, even an interim suspension order, could not stand with the approach adopted in *Bagnall* (see [81] of the judgment).

The interim order had operated to suspend M's discharge until the substantive hearing and the only question for the judge at the substantive hearing had been whether to exercise her discretion to continue that suspension. So long as an interim suspension order was in fact made before the one year period had expired, and that order had not later been set aside whether on appeal or otherwise, there was nothing in the [IA 1986](#) or the [Insolvency \(England and Wales\) Rules 2016](#) which precluded the court from further extending the suspension as a matter of jurisdiction, merely because the court had not granted 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 (see [84] of the judgment).

The appeal would be allowed and an order would be made in the form originally sought at the substantive hearing

before the judge. The appropriate conditions were: (i) the expiry of nine months from the date of determination of the IVA challenge; (ii) compliance by M with his obligations under [IA 1986](#); and (iii) cooperation by M with the trustee. It was appropriate for the court to be satisfied that conditions (ii) and (iii) had been satisfied before the one-year period started to run again (see [102] of the judgment).

Barton v Wright Hassall LLP [\[2018\] All ER \(D\) 109 \(Feb\)](#), [\[2018\] 3 All ER 487](#), [\[2018\] UKSC 12](#) distinguished

Judgment date

24 April 2023

Judge

Judge Trower (Chancery Division)

Representation

Tony Beswetherick KC and Rowena Page (instructed by Mishcon de Reya LLP) for the trustee.
Adam Chichester-Clark (instructed by Collyer Bristow LLP) for M.

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