

David Bowden Law[®]

ideas are always in credit

Bankruptcy petition dismissed where creditor failed in requirement to bring statutory demand to debtor's attention

*Antony Canning v. Irwin Mitchell LLP
[2017] EWHC 718 (Ch)*

Article by David Bowden

Bankruptcy petition dismissed where statutory demand not brought to debtor's attention
Antony Canning v. Irwin Mitchell LLP - [2017] EWHC 718 (Ch)

Executive speed read summary

A law firm sued its former client for unpaid fees and obtained a forthwith default judgment. The creditor purported to serve a statutory demand but this was served at an accountant's office in Cornwall. The debtor proved he had always lived in Essex. The creditor knew the debtor had solicitors acting for him but made no attempt to try and serve either the statutory demand or bankruptcy petition on them. The accountant returned the statutory demand he received to the creditor. The creditor issued a bankruptcy petition. The debtor disputed the validity of the petition saying he had not been served with a statutory demand and this was a fatal and incurable defect. The judge in the county court ruled in the creditor's favour. On appeal, this ruling was reversed by a chancery division judge. He reviewed the evidence and found that on a clear balance of probability the debtor did not receive the demand. The appeal judge also reviewed the prior case law on service of statutory demands but said there was a critical distinction between those cases and the present case because the document required to be served actually reached, or at least came within the dominion of, the intended recipient. If he was wrong on this, the appeal judge said there were 3 other factors in this case which would have meant he would have exercised his discretion against ruling in the creditor's favour on an application to cure the defects. Finally the appeal judge ruled that the fact that the bankruptcy petition was presented in the wrong court did not by itself warrant its striking out.

Antony Canning v. Irwin Mitchell LLP
[2017] EWHC 718 (Ch) 6 April 2017
High Court of Justice, Chancery Division, Deputy Judge Jeremy Cousins QC

How did the debt arise?

Mr Canning ('the debtor') had been a client of Irwin Mitchell ('the creditor'). The creditor sent the debtor a bill for unpaid legal fees of £11,729.57. These costs were later assessed by Master Rowley in the SCCO at £14,347.42. The bill was not paid and a debt action in the county court was raised. No defence was filed and the creditor obtained a default judgment on 9 July 2014.

What are the facts relating to service of the insolvency proceedings?

The creditor issued a statutory demand dated 21 March 2016 demanding the sums due under its unsatisfied judgement. This was hand delivered by a process server on 10 April 2016 to an address in Bodmin, Cornwall. No application was made to set aside or pay or compound. On 6 May 2016 the creditor issued a bankruptcy petition in Truro County Court. The debtor applied to Southend County Court to vary the forthwith judgement to enable him to pay by instalments. By order dated 16 August 2016 District Judge Foss dismissed that application and this order was upheld on a reconsideration by Deputy District Judge Cooksey on 17 February 2017.

The debtor disputed he had been served with the Bankruptcy petition. The debtor said he had always lived in Essex and had never lived in Cornwall. Although the debtor had been had been a director of a company (Wardcentral Developments Limited) whose registered office was in Cornwall, this was the address of Mr Robin Parry, an accountant. The debtor said this company had never traded. Mr Parry provided a witness statement corroborating this which confirmed that he had returned the papers left for the debtor at his office to the creditor.

What did the judge in the County Court rule?

District Judge Healey in Truro County Court on 28 June 2016 extended the hearing of the bankruptcy petition but transferred it for hearing to Southend County Court. His order recorded that '*Irwin Mitchell had not done all that was reasonably required to bring the statutory demand... to the attention of the Debtor...but that, in the circumstances in which the demand was based upon a court order of which Mr Canning knew and with which he had failed to comply, Mr Canning had suffered no prejudice such that it would be disproportionate to set aside the statutory demand.*'

What were the issues the appeal judge had to decide?

There were 3 issues on this appeal:

- Had the creditor had done enough under the IA/IR to bring the statutory demand to the debtor's attention?
- If not, should the court nevertheless exercise a discretion in the creditor's favour?
- Should the petition be dismissed in any event because it was issued in the wrong court?

Bankruptcy petition dismissed where statutory demand not brought to debtor's attention
Antony Canning v. Irwin Mitchell LLP - [2017] EWHC 718 (Ch)

Are there any other prior authorities of relevance?

These 5 authorities are relevant in this case:

Re a debtor (nos 49 and 50 of 1992) [1995] Ch 66 (Court of Appeal – Sir Donald Nicholls VC)

A bankruptcy petition cannot properly be presented on the basis of the existing statutory demand because the only debt the debtor appears unable to pay is a debt which is less than the bankruptcy level. It would not be sensible or just to leave the statutory demand extant. The very presentation of a petition would be oppressive and an abuse of process

Regional Collection Services Ltd v. Heald [2000] BPIR 661 (Court of Appeal)

The test as to whether a creditor had done all that was reasonable to bring a statutory demand to a debtor's attention so as to effect valid service is a high one.

Andrews v. Bohm [2005] EWHC 3520 (Ch) (Mann J)

There is not jurisdiction in High Court proceedings to provide for substituted service in the later bankruptcy proceedings. The statutory demand is not to be set aside because there had been no personal service or substituted service. It was properly served. The debtor had been evading service and was intending to continue to do so. The debtor had had the bankruptcy petition for a good period before it was heard.

Bush v. Bank Mandiri (Europe) Ltd [2011] BPIR 19 (Registrar Barber)

A creditor is required to do all that was reasonable for the purpose of bringing the statutory demand to a debtor's attention. If practicable, to cause personal service of the demand to be effected. The service requirements for statutory demand should be strictly observed. The requirements in IR and the Practice Direction as to service of statutory demands were there for a good reason. A debtor served with such a demand had very limited time within which either to pay a sum demanded or to apply to have the demand set aside. The creditor had failed to meet the required standard. However the debtor had (1) received the statutory demand, (2) obtaining an extension of time for setting it aside, and (3) had known links to the service address. Any prejudice was confined to having to make a rushed application to set the demand aside but this was cured by an extension of time when he had been granted. The statutory demand would not be set aside under IR 6.5(4)(d) because the creditor's failure had not caused the debtor serious prejudice. It would be disproportionate to set it aside.

Gate Gourmet Luxembourg IV Sarl v. Morby [2016] Bus LR 218 (Deputy Judge Edward Murray)

The bankruptcy petition had been placed in a rubbish bin by the debtor's friend. Service had been effected because the debtor had sufficient opportunity to take possession of it. He could have asked the friend to hand it over or he could have retrieved it from the bin himself. The petition was left 'with or near' the debtor thereby satisfying the test of 'leaving a document with the person to be served'.

What does Insolvency Act 1986 (IA 1986) say?

There are 2 relevant provisions in IA 1986. Firstly section 267 deals with 'Grounds of creditor's petition' and says:

'267(1) A creditor's petition must be in respect of one or more debts owed by the debtor, and the petitioning creditor or each of the petitioning creditors must be a person to whom the debt or (as the case may be) at least one of the debts is owed.

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

(a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the bankruptcy level,

(b) the debt, or each of the debts, is for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain, future time, and is unsecured,

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

(d) there is no outstanding application to set aside a statutory demand served (under section 268 below) in respect of the debt or any of the debts.'

Section 268 deals with 'Definition of "inability to pay", etc.; the statutory demand' and says:

'268(1) For the purposes of section 267(2)(c), the debtor appears to be unable to pay a debt if, but only if, the debt is payable immediately and either—

(a) the petitioning creditor to whom the debt is owed has served on the debtor a demand (known as "the statutory demand") in the prescribed form requiring him to pay the debt or to secure or compound for it to the satisfaction of the creditor, at least 3 weeks have elapsed

Bankruptcy petition dismissed where statutory demand not brought to debtor's attention *Antony Canning v. Irwin Mitchell LLP - [2017] EWHC 718 (Ch)*

since the demand was served and the demand has been neither complied with nor set aside in accordance with the rules, or
(b) execution or other process issued in respect of the debt on a judgment or order of any court in favour of the petitioning creditor, or one or more of the petitioning creditors to whom the debt is owed, has been returned unsatisfied in whole or in part.'

What do the Insolvency Rules 1986 (IR) say?

There are 3 relevant provisions in the IR. Firstly Rule 6.3 deals with '*Requirements as to service*' and provides that:

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

Rule 7.12 deals with '*Proceedings commenced in wrong court*' and provides that:

'7.12.Where winding-up or bankruptcy proceedings are commenced in a court which is, in relation to those proceedings, the wrong court, that court may—
(a) order the transfer of the proceedings to the court in which they ought to have been commenced;
(b) order that the proceedings be continued in the court in which they have been commenced; or
(c) order the proceedings to be struck out.'

Finally Rule 7.55 deals with '*Formal defects*' providing:

'7.55.No insolvency proceedings shall be invalidated by any formal defect or by any irregularity, unless the court before which objection is made considers that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the court.'

What does the Practice Direction say?

The Practice Direction: Insolvency Proceedings [2014] BCC 502 makes provision for substituted service of statutory demands. Paragraph 13.2.1 repeats the requirement in IR 6.3. 13.2.3 permits substituted service of a statutory demand '*but the creditor must have taken all those steps which would justify the court making an order for substituted service of a petition*'. Paragraph 13.2.4 sets out the evidence of 5 steps which '*will suffice to justify acceptance for presentation of a petition where the statutory demand has been served by substituted service*'. These are

- One personal call at the residence and place of business of the debtor where both are known or at either of such places as is known,
- a letter should be written to the debtor referring to the call(s), the purpose of the same and the failure to meet the debtor, adding that a further call will be made for the same purpose on a specified date and time. Such letter may be sent by first class prepaid post or left at or delivered to the debtor's address,
- When attending any appointment made by letter, inquiry should be made as to whether the debtor has received all letters left for him,
- If a debtor is represented by a solicitor, an attempt should be made to arrange an appointment for personal service through such solicitor. IR enable a solicitor to accept service of a statutory demand on behalf of his client, and
- The certificate of service of a statutory demand filed pursuant to IR 6.11 should deal with all the above matters including all relevant facts as to the debtor's whereabouts and whether the appointment letter(s) have been returned.

What did the appeal judge rule on whether the creditor had done enough to bring the statutory demand to the debtor's attention?

Deputy Judge Cousins ruled that in his judgment '*the requirements for the proper presentation of a bankruptcy petition founded upon inability to pay a debt are extremely clear*' and that a petition may be presented under s267(2) '*only if, at the time the petition is presented .. (c) the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay*'. On this he ruled that he was '*concerned with an immediately payable debt*' such that his inability to pay will appear '*if, but only if, ... (a) the petitioning creditor ... has served on the debtor a [statutory] demand*'. The judge went on to say that he would '*have no hesitation in finding that the District Judge's conclusion as to the inadequacy of service of the First Demand in this case was fatal to the Petition*'.

After reviewing the evidence before the court below he ruled that '*the evidence suggests, on a clear balance of probability, that Mr Canning did not receive the demand*'. He went on to distinguish the prior cases on service of statutory demands on their facts. Following this review of the authorities, the

Bankruptcy petition dismissed where statutory demand not brought to debtor's attention
Antony Canning v. Irwin Mitchell LLP - [2017] EWHC 718 (Ch)

judge said there was a 'critical distinction' between those cases and the present case because 'the document required to be served actually reached, or at least came within the dominion of, the intended recipient'. However here 'there was a fundamental failure to effect service' and that 'in no meaningful sense, could Mr Canning be said to have been served with the statutory demand, which never reached him, or came within his dominion'. For this reason the judge ruled that he considered 'the deficiencies relating to service in this case' could not be categorised as either a 'formal defect' or 'irregularity' and there was 'no scope for the application of Rule 7.55'. He went on to rule that it was 'not possible for considerations of the absence of prejudice, or proportionality, to enable so fundamental a defect as to service to be cured'.

In conclusion the judge ruled that 'the District Judge was wrong to allow the Petition to proceed' because an 'essential prerequisite to the entitlement of Irwin Mitchell to present the Petition, namely the service of a statutory demand, was lacking' and for this reason 'this is not a case in which the exercise of discretion arises.' Finally he ruled that the 'Petition should have been dismissed.'

What factors did the appeal judge consider relevant to exercising his discretion?

In case the appeal judge was wrong on his primary finding that service was invalid, he said there were 3 factors relevant to the exercise of his discretion as to whether he should nevertheless rule that the defects were not fatal or could be cured. These factors are:

- The evidence filed with the court proving service of the statutory demand under IR 6.11 was 'positively misleading'. The presentation of the Petition was 'procured by misleading evidence'. IR 6.11(9) provides that the court may decline to file the petition if not satisfied that the creditor has discharged the obligation imposed on him by IR 6.3(2),
- To the knowledge of the creditor, the debtor was represented by a solicitor, 'yet no attempt was made to achieve personal service through that route' and there was a failure to comply with para 13.2.4(4) of the Practice Direction, and
- The debtor did not receive the statutory demand. The judge below did not when exercising his discretion appear to have taken into account the fact of non-receipt of the demand.

The appeal judge said he considered he was entitled to review the exercise of the discretion of the judge below but that he did 'not consider that in the present case it would be appropriate, or proportionate, to exercise any discretion effectively so as to validate the steps which were taken by, or on behalf, of Irwin Mitchell so as to treat the First Demand as having been properly served' in light of these 3 important factors.

The debtor did not have it all his own way because the appeal judge added that he did not 'consider that Mr Canning suffered any meaningful prejudice' and he rejected 'the suggestion that he suffered prejudice in not being able to make an application to the county court to make payments by instalments' because 'he was always able to that course' and he observed that 'his application in that respect lacked merit' noting that 'when heard on 17th February, it was dismissed'.

What did the appeal judge rule on whether the bankruptcy petition had been presented in the wrong court?

This point was dealt with shortly with the judge ruling that in his judgment 'the fact that the Petition was presented in the wrong court did not, by itself, warrant the striking out of the Petition. The District Judge would have been entitled to order transfer to the correct court'.

7 April 2017

David Bowden is a solicitor-advocate and runs [David Bowden Law](http://DavidBowdenLaw.com) which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.