Neutral Citation Number: [2020] EWHC 2429 (Ch)

Case No: CH-2020-000029

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

Rolls Building
7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: 10/09/2020

Before :

The Hon. Mr Justice Fancourt

- -

Between :

LAU YU **(also known as JAFFE LAU)**	**Debtor**
- and -	
PATRICK COWLEY AND WONG WING SZE TIFFANY (trustees in bankruptcy of the Debtor in Hong Kong)	**Trusteess**

- -
- -

Ian Clarke QC and Oberon Kwok (instructed by **Zhong Lun Law Firm**) for the **Debtor**
Christopher Boardman QC and Katie Longstaff (instructed by **Marriott Harrison LLP**) for the **Trustees**

Hearing date: 27 July 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HON. MR JUSTICE FANCOURT

Mr Justice Fancourt :

1. This is an appeal against a recognition order made under The Cross-Border Insolvency Regulations 2006 (S.I. 2006 No.1030) ("the Regulations") by Deputy Insolvency and Companies Court Judge Barnett on 8 January 2020.

2. By his order, the Deputy Judge ordered that bankruptcy proceedings (number 104 of 2017) regarding Lau Yu, also known as Jaffe Lau ("the Debtor"), in the High Court of the Hong Kong Special Administrative Region Court of First Instance be recognised as a foreign main proceeding in accordance with the UNCITRAL Model Law on Cross-Border Insolvency as set out in Schedule 1 to the Regulations ("the Model Law"). The Deputy Judge also ordered that, in so far as was necessary, service of the recognition application ("the Application") be validated retrospectively, the Application having been served on the Debtor by courier on Wednesday, 11 December 2019 at his home in Regalia Bay, Stanley, Hong Kong.

3. Permission to appeal was granted on 28 April 2020 by Birss J on one ground only, namely whether there was power under Sched 2 to the Regulations ("Sched 2") retrospectively to validate service of a recognition application outside England and Wales.

4. The Debtor says that there is no such power because Sched 2, on its true construction, requires an application to be made to the court prospectively to obtain authority to serve proceedings including recognition applications outside the jurisdiction and contains no provision for the grant of permission with retrospective effect.

5. The respondents ("the Trustees") contend that there is such a power because CPR rule 6.15 applies under Sched 2 and such a power is in any event implicit; but no such exercise of the power was needed in any event because the Debtor had been validly served under Sched 2 without any court order. Alternatively, the Trustees submit that if the regulations do require a prior application, there is simple non-compliance with them that had no consequences, since the Debtor received the Application in time and contested it at the hearing, when he was represented by lawyers. In those circumstances, the court should treat non-compliance as an irregularity and waive the breach, alternatively dispense with the need for formal service. In the further alternative, the Trustees argue that the Debtor submitted to the jurisdiction by engaging with the merits of the Application at the hearing.

6. A recognition application under the Regulations is a claim for ancillary relief in Great Britain in support of foreign insolvency proceedings, made by an authorised foreign representative. In general terms, its purpose is to stay any proceedings or execution against the debtor in Great Britain or to prevent the disposal of the debtor's assets in Great Britain (article 20.1 of the Model Law). Additional specific relief can be granted, including entrusting the administration or realisation the debtor's assets in Great Britain to the foreign representative (article 21.1(e)), or the distribution of those assets (article 21.2), and especially conferring standing on the foreign representative to apply for relief under various provisions of the Insolvency Act 1986.

7. The court in either part of Great Britain has jurisdiction under article 4.2 of the Model Law if:

> "(a) the debtor has –
>
> (i) a place of business; or
>
> (ii) in the case of an individual, a place of residence; or
>
> (iii) assets,
>
> situated in that part of Great Britain; or
>
> (b) the court in that part of Great Britain considers for any other reason that it is the appropriate forum to consider the question or provide the assistance requested."

8. There may therefore be questions about whether the domestic court has jurisdiction to act at all (though no such challenge was raised in this case). That is so whether the debtor is served in England and Wales at his proper address as of right, under para 22(2) of Sched 2, or elsewhere in Great Britain or overseas in accordance with the directions of the court. There is no suggestion that the court must resolve the substantive issue of jurisdiction under article 4.2 of the Model Law before permitting service out. Service out therefore performs the function of giving the debtor (and any other person required to be served) notice of the proceedings in good time, not of establishing the court's substantive jurisdiction. The issue and service of a recognition application under the Regulations is by no means the same as satisfying the court under Section IV of CPR Part 6 that there exists a sufficiently arguable ground for the court to assume jurisdiction over a foreign defendant.

9. Article 10 of the Model Law states:

> "The sole fact that an application pursuant to this law is made to a court in Great Britain by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of Great Britain or any part of it for any purpose other than the application."

10. Foreign proceedings are to be recognised if the court has jurisdiction over the debtor under article 4.2 and if (paraphrasing the effect of article 17.1 of the Model Law):

    i) it is a foreign proceeding as defined in paragraph (i) of article 2 of the Model Law (essentially foreign insolvency proceedings);

    ii) the foreign representative applying for recognition is a person or body authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

iii) the application is accompanied by appropriate certified evidence as to the foreign proceedings and any other insolvency proceedings known to the foreign representative; and

iv) the application has been submitted to the Chancery Division of the High Court in England and Wales or the Court of Session in Scotland.

11. These matters are required to be established by the recognition application itself and the affidavit in support of it: Sched 2, paras 2, 3, 4.

12. Part 6 of Sched 2 (which includes paras 20, 21 and 22) is concerned specifically with "Principal Applications", which include a recognition application. Para 20 of Sched 2 requires such an application to be filed, whereupon the court fixes a hearing date and venue. By para 21(2): "unless the court otherwise directs, the application shall be served on the following persons", and there then follows a list, which includes the debtor, any British insolvency office holder and any other foreign representative acting in other foreign proceedings in relation to the debtor. Para 22 provides:

> "(1) Service of the application in accordance with paragraph 21(2) shall be effected by the applicant, or his solicitor, or by a person instructed by him or his solicitor, not less than 5 business days before the date fixed for the hearing.
>
> (2) Service shall be effected by delivering the documents to a person's proper address or in such other manner as the court may direct.
>
> (3) A person's proper address is any which he has previously notified as his address for service within England and Wales; but if he has not notified any such address or if for any reason service at such address is not practicable, service may be effected as follows –
>
> (a) (subject to sub-paragraph (4)) in the case of a company incorporated in England and Wales, by delivery to its registered office;
>
> (b) in the case of any other person, by delivery to his usual or last known address or principal place of business in Great Britain.
>
> (4) If delivery to a company's registered office is not practicable, service may be affected by delivery to its last known principal place of business in Great Britain.
>
> (5) Delivery of documents to any place or address may be made by leaving them there or sending them by first class post in accordance with the provisions of paragraph 70 and 75(1)."

Para 22(2) appears to be mandatory, in the sense that either delivery to a proper address or directions are required, but para 22(3) and (4) extend it by permitting

service at certain non-notified addresses. There is no express requirement for an application for service out of the jurisdiction in part 6 of Sched 2. In part 9, which contains general provisions as to procedure and practice, para 30(1) provides:

> "The CPR and the practice and procedure of the High Court (including any practice direction) shall apply to proceedings under these Regulations in the High Court with such modifications as may be necessary for the purpose of giving effect to the provisions of these Regulations and in the case of any conflict between any provision of the CPR and the provisions of these regulations, the latter shall prevail."

13. Part 12 of Sched 2 also contains general provisions. Para 70 permits service of any document by post or personally. The following provisions of part 12 are material:

> "76. General Provisions as to service and notice
>
> Subject to paragraphs 22, 75 and 77, CPR part six (service of documents) applies as regards any matter relating to service of documents and the giving of notice in proceedings under these Regulations.
>
> 77. Service outside the jurisdiction
>
> (1) Sections III and IV of CPR Part 6 (service out of the jurisdiction and service of process of foreign court) do not apply in proceedings under these Regulations.
>
> (2) Where for the purposes of proceedings under these Regulations any process or order of the court, or other document, is required to be served on a person who is not in England and Wales, the court may order service to be affected within such time, on such person, at such place and in such manner as it thinks fit, and may also require such proof of service as it thinks fit.
>
> (3) An application under this paragraph shall be supported by an affidavit stating –
>
> (a) the grounds on which the application is made; and
>
> (b) in what place or country the person to be served is [in], or probably may be found."

14. Thus, the gateway provisions of Section IV of CPR Part 6 for service out of the jurisdiction are disapplied. This has the effect of removing restrictions and prescriptive requirements for service of claim forms out of the jurisdiction. But Section II of Part 6 does apply and it includes the following rules:

> "6.15—(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order

> permitting service by an alternative method or at an alternative place.
>
> (2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service.
>
> …….
>
> 6.16—(1) The court may dispense with service of a claim form in exceptional circumstances.
>
> (2) An application for an order to dispense with service may be made at any time and –
>
> (a) must be supported by evidence; and
>
> (b) may be made without notice."

15. The first question for decision is whether an applicant for a recognition order is free to serve the application on the debtor or other person required to be served out of the jurisdiction without obtaining first a direction from the court. The Trustees submit that there is no express requirement for directions in the provisions dealing with service of "Principal Applications", and that Sched 2 para 77(2) and (3) is general and permissive, not prescriptive. The Trustees submit that this general provision must cede to the specific provisions of Sched 2 para 22 relating to service of "Principal Applications", which are deliberately fluid. Sched 2 para 27 provides that on exercising a power to adjourn the hearing of a recognition application, the court may at any time give such directions as it thinks fit as to service or notice of the application on any person. That, say the Trustees, shows that the court can deal with any issue about appropriate service at the first hearing.

16. I do not agree that the Regulations give an applicant freedom in the first instance as to the means of service of a recognition application. The provisions of para 22(1) and (2) are mandatory – both use the word "shall". They denote what the applicant is required to do. The applicant is therefore required to serve the application by delivering documents to a person's proper address or "in such other manner as the court may direct". Therefore an applicant who cannot be served at his "proper address", as defined for this purpose in para 22(3), must be served in accordance with the court's directions. Although in many cases of an application for a recognition order, the applicant and the persons required to be served will be outside England and Wales, that does not mean that an applicant has free rein on the manner of service of any person who cannot be served at their proper address or in accordance with para 22(3), (4).

17. The next question is whether an application for directions as regards the manner of service has to be made prospectively, i.e. before the delivery of the relevant documents to a person required to be served. The Debtor's contention that such an application must be made prospectively is based on the language of para 77(2) of Sched 2, in particular the words "the court may order service *to be* affected…"

(emphasis added), and an asserted requirement for the court to perform a "gatekeeper" function, akin to that under Section IV of CPR Part 6 for service out of the jurisdiction. The Debtor relies on a decision of Roth J in Re Ardawa (A Bankrupt) [2019] EWHC 456 (Ch); [2019] Bus LR 1075 in what he contends is an analogous case.

18. In Re Ardawa, Roth J had to decide whether substituted service of a bankruptcy petition under the Insolvency Rules 1986 ("IR") could be authorised retrospectively, and if not whether failure to effect personal service was an irregularity that could and should be waived by the court. IR rule 6.14 provided:

> "(1) Subject as follows, the petition shall be served personally on the debtor by an officer of the court, or by the petitioning creditor or his solicitor, or by a person instructed by the creditor or his solicitor for that purpose; and service shall be effected by delivering to him a sealed copy of the petition.
>
> (2) If the court is satisfied by a witness statement or other evidence on oath that prompt personal service cannot be effected because the debtor is keeping out of the way to avoid service of the petition or other legal process, or for any other cause, it may order substituted service to be effected in such manner as it thinks fit.
>
> (3) Where an order for substituted service has been carried out, the petition is deemed duly served on the debtor."

At that time, CPR Part 6 was entirely disapplied to the service of a bankruptcy petition (IR para 12A.16(2)). Para 13.2 of the Practice Direction: Insolvency Proceedings of 2014 ("the PDIP") set out the steps that a creditor was expected to take in order to obtain an order for substituted service of a bankruptcy petition, which were specific and detailed.

19. IR rule 7.55 provided that no insolvency proceedings would be invalidated by any formal defect or irregularity unless the court considered that substantial injustice had been caused by the irregularity that could not be remedied by any order of the court.

20. The creditor in that case caused the petition to be posted through the debtor's letterbox without making any application for substituted service. The debtor appeared at the hearing of the petition to argue that he had never been resident at the address in question. Para 48 of the judgment is in the following terms:

> "Mr Tunkel submitted that the court has no jurisdiction to make a retrospective order for substituted service, and relied on the decision to that effect of Mr Registrar Briggs in the *Gate Gourmet* case [2015] BPIR 787. As Mr Kwok for the Trustees pointed out, the *Gate Gourmet* case was strictly obiter on this point, since the Registrar had decided that personal service had been effected, a decision which was upheld on appeal by Mr Recorder Murray sitting as a Deputy Judge of the Chancery Division (and who did not therefore address the issue of

> substituted service): [2016] Bus LR 218. However, I agree with Mr Registrar Briggs's conclusion and reject Mr Kwok's submission that he was wrong. In the first place, the wording of rule 6.14(2) suggests that an order may only be prospective: 'the court … may order substituted service *to be effected* in such manner as it thinks just' (emphasis added). That is supported by the structure of PDIP para 13.2.4 addressing the steps that will justify making an order for substituted service of a petition. Para 13.2.4(2)(c) requires the appointment letter for personal service of a petition to warn the debtor that if he fails to keep the appointment 'application will be made to the court for an order for substituted service either by advertisement, or in such other manner as the court may think fit' [is] indeed almost exactly the wording in the letter that Mr Power put through the letterbox on 26 January 2016. That sits ill with the proposition that putting the petition through the letterbox on the date of that appointment without any order of the court could subsequently become the substituted service authorised by the court. Secondly, in the *Gate Gourmet* case, Mr Registrar Briggs contrasted the wording of rule 6.14 IR with the provision for substituted service of a claim form in CPR r 6.15, where sub-rule (2) provides:
>
> > 'On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service.'
>
> Part 6 of the CPR does not apply to the service of a bankruptcy petition: rule 12A.16(2) IR. Therefore, the retrospective order of District Judge Hickman could not be made under CPR r 6.15, and the lack of an equivalent provision in the applicable rule for service in the Insolvency Rules is striking."

21. At the hearing before the Deputy Judge, the Trustees relied on the case of Abela v Baadarani [2013] UKSC 44; [2013] 1 WLR 2043, a decision of the Supreme Court concerned with substituted service of a claim form on a defendant in Beirut. In issue in that case was CPR rule 6.37(5), which provides so far as material:

> "where the court gives permission to serve a claim form out of the jurisdiction--…(b) it may—(i) give directions about the method of service; and (ii) give permission for other documents in the proceedings to be served out of the jurisdiction"

22. By the time of the hearing in the Supreme Court, the defendant had conceded that CPR rule 6.15(2) could be used retrospectively to accept prior actions as constituting good service where the defendant is outside the jurisdiction. Lord Clarke of Stone-cum-Ebony JSC said at [20]:

> "For my part, I would accept that that concession was correctly made. The judge was to my mind correct to hold in para 71

> that, just as the power under rule 6.15(1) prospectively to permit alternative service in a service out case is to be found in rule 6.37(5)(b)(i) or is to be implied generally into the rules governing service abroad (because that must have been the intention of the draftsman of the 2008 amendments to CPR Pt 6), so rule 6.37(5)(b)(i) is to be construed as conferring the power, via rule 6.15(2), retrospectively to validate alternative service in such a case, or such a power is to be implied generally into the rules governing service abroad."

23. The Debtor contends that Abela v Baaderani falls to be distinguished, as the conclusion in that case was reached via CPR rule 6.37(5), which is disapplied by Sched 2, and so there is no equivalent basis for concluding that CPR rule 6.15(2) is incorporated or implicit in para 22 of Sched 2. The Trustees submit that Re Ardawa is distinguishable as being about the importance of personal service of a bankruptcy petition on the debtor, and that the rule in consideration in that case is in a different context, even if some of the language is similar. Further, they argue that rule 6.15 is expressly applied in the Regulations, by para 76, if not para 30, of Sched 2, and that as a matter of policy there is no reason at all why retrospective permission for service out can be granted under the CPR but not under the Regulations.

24. I agree with the Trustees. The words "service *to be* effected" in IR rule 7.55 is only a cautious starting point in Roth J's analysis. The substantive points leading to his conclusion are the background and structure of the PDIP and the express exclusion of the whole of CPR Part 6 by IR rule 12A.16(2). (The position is different under the new Insolvency (England and Wales) Rules 2016.) Roth J also emphasises, by reference to previous authority, the traditional approach to the importance of personal service of a bankruptcy petition.

25. Under the Regulations, on the other hand, Section 2 of CPR Part 6 is expressly applied. The Debtor accepts, in the light of that, that a court could retrospectively authorise substituted service within the jurisdiction. It would be likely to do so where de facto delivery of documents achieved the purpose of giving the recipient sufficient notice of the hearing of the application. That being so, it is unclear why the court should read paras 22 and 72 of Sched 2 as depriving it of jurisdiction to do the same for service out, if it is just and appropriate to do so. That is particularly so given that the court has such a power (see Abela v Baadarani) where a Part 7 or Part 8 claim form has been served on a defendant out of the jurisdiction without prior permission, cases where the court performs a "gatekeeper" function under section IV of CPR Part 6, which it does not in the same way under the Regulations. The Court's function under the Regulations is to lend support to a foreign representative appointed in foreign proceedings. It is often the case that the debtor and others requiring to be served are abroad. There is nothing "exorbitant" about issuing a recognition application in Great Britain and service abroad should be routine.

26. I accept the Trustees' submission that, if a debtor contends that there is no jurisdiction under the Regulations, this can and should be raised as a standard CPR Part 11 application, by virtue of para 30 of Sched 2, which incorporates the CPR and the practice and procedure of the High Court. The court does not need to be concerned with jurisdiction issues prior to the issue of the application but only with effective and

demonstrable service of the application in good time prior to the identified hearing date.

27. Thus, if for sufficient reason the applicant fails to obtain directions for service but the debtor and all others receive the documents in good time and are able to act without detriment, the court is likely retrospectively to authorise the "service" that took place, since it effectively performed the function that service in compliance with Sched 2 paras 21 and 22 is intended to perform.

28. In my judgment, power retrospectively to authorise service out is implicit in para 22(2), given the power under CPR rule 6.15(2) that applies expressly in the case of service within the jurisdiction and the general power of the court to give directions. Mr Clarke QC for the Debtor argued that an equivalent power was unnecessary for service out, given that there was no element of prescription in Sched 2 as regards service out of the jurisdiction, unlike in Section IV of Part 6 and therefore the court does not need such a power. I disagree. It is easy to envisage a case in which something has gone wrong with the process where a power retrospectively to validate is beneficial. It is easy for a foreign representative inadvertently to overlook the need for directions, or omit to obtain them in relation to a particular person requiring to be served. A power retrospectively to authorise something that furthers the overriding objective and causes no one detriment is always salutary. That is why it is provided in CPR part 6.15 and why the Supreme Court in the Abela case held that it was incorporated or implicit in rule 6.37(5), which is a general power to give directions about service out of the jurisdiction.

29. Since the Debtor was refused permission to appeal the exercise of the Deputy Judge's discretion, the conclusion that the court has power retrospectively to direct (if necessary) that delivery of the Application to the Debtor's home in Hong Kong on 11 December 2019 was good service disposes of the appeal. The appeal was only permitted on the sole ground that no such power exists.

30. Had the conclusion been that there was no such power under the Regulations, the Trustees argued, by way of Respondent's Notice, that the failure to obtain directions prospectively was an irregularity capable of being cured under Sched 2 para 57:

> "No proceedings under these Regulations 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",

or alternatively that formal service could be waived or dispensed with under CPR Part 6.16. In the further alternative, the Trustees argued that, by applying for an adjournment of the hearing with directions allowing him to put in evidence on the merits leading to a one-day trial in due course, the Debtor had submitted to the jurisdiction of the court.

31. The Deputy Judge had to consider and decide neither point. It is unnecessary for me to address them at any length in view of the conclusion that I have reached on the permitted ground of appeal. If the Debtor were right to say that the court has no power retrospectively to validate service out of the jurisdiction, because seeking and

obtaining prospective directions from the court is mandatory, it is difficult to see how invalid service could be considered a mere irregularity falling within para 57: see, by analogy, the observations of Roth J in Re Ardawa at [61]. Further, the Trustees have not explained in evidence the circumstances in which they failed to apply to the court for directions as to service, so it is difficult to see how the circumstances can be said to be "exceptional" under CPR rule 6.16.

32. As for submission to the jurisdiction, the Debtor argues that in raising the issue of invalid service and the need for an adjournment at the hearing, he did no unequivocal act that was inconsistent with maintaining a challenge to the jurisdiction of the court on the substantive issue (see Deutsche Bank AG (London Branch) v Petromena ASA (in bankruptcy) [2015] EWCA Civ 226; [2015] 1 WLR 4225 at [27] and [32] – the "disinterested bystander test". The Trustees submit that, in substance, the Debtor raised the issue of dubious service as one reason for seeking an adjournment of the hearing, the purpose of which was to allow him time to put in evidence on the merits of whether a recognition order should be made; and that thereby he did engage with the necessary steps to prepare for a final hearing of the recognition application.

33. The Trustees rely in particular on the evidence of the substance of the Debtor's bankruptcy affairs contained in the affirmation sworn in response to the application; and the request for the court to order a timetable for each side to adduce evidence, leading in due course to a full hearing of the recognition application. They contend that in substance the Debtor was seeking an adjournment of the hearing not solely for the purpose of investigating the regularity of service of the application but to deal with the substance of the application, and that the question of service only played a subsidiary part in seeking an adjournment. Further, there could not have been and has not been any challenge to the application of the Regulations on the ground of substantive jurisdiction given that the Debtor accepts that he has assets within England and Wales; the irregularity of service outside the jurisdiction was relied upon as a ground for adjourning the hearing, not for contesting jurisdiction.

34. I have considered carefully the terms of the Debtor's affirmation and the full transcript of the hearing before the Deputy Judge. In my judgment, the argument advanced on behalf of the Debtor was that the court should exercise its discretion to adjourn the hearing, so as to give the Debtor a proper opportunity to adduce evidence in support of its case on the merits. Miss Hausdorff on behalf of the Debtor at that hearing argued that the Debtor was not asking for the application to be dismissed (which could only have been justified on the ground of non-service) but instead that the directions identified in his affirmation be made (the timetable for evidence leading to a one-day hearing) so that the Debtor had a proper opportunity to adduce evidence. It is true that Counsel also mentioned that the adjournment would allow service to be "properly executed" but the principal purpose of the adjournment was to allow the Debtor time to engage with the merits.

35. I would therefore have accepted the Trustees' argument that, even if the Debtor were right on his ground of appeal, he had in any event voluntarily submitted to the jurisdiction of the court.

36. I dismiss the appeal.