Unjust enrichment: what's liquidated?

Dusoruth v Orca: does the absence of a liquidated debt automatically lead to the annulment of a bankruptcy order? Wilson Leung & Ryan Tang examine the judgment

IN BRIEF

- In the judgment in *Dusoruth v Orca* in September 2022, ICC Judge Mullen held that a claim in restitution for unjust enrichment (even if it can be precisely quantified) is not a claim for a 'liquidated sum' within the meaning of s 267(2) of the Insolvency Act 1986, and hence cannot form the basis of a bankruptcy petition.
- However, the court also held that it had a discretion not to annul the bankruptcy order even if the petition debt was not for a liquidated sum. In exercising its discretion, the court would consider various factors such as the bankrupt's conduct, the interests of other creditors, and whether the annulment would be for no good purpose (eg where the bankrupt was plainly insolvent anyway due to other debts).

In *Re Dusoruth (a bankrupt) Dusoruth v Orca Finance UK Ltd (in liquidation)* [2022] EWHC 2346 (Ch), [2022] All ER (D) 31 (Sep), the applicant, Mr Dusoruth, was a businessman who owned and controlled a number of companies around the world.

The respondent, Orca, was a company beneficially owned by Mr Dusoruth until its winding-up in June 2019. The liquidators of Orca presented a bankruptcy petition against Mr Dusoruth based on payments made by the company which had discharged Mr Dusoruth's personal American Express credit card debts (of around €360,000) and a rental bill for a flat in London (of around £275,000).

Mr Dusoruth failed to respond to the petition, and in November 2020 the court made a bankruptcy order against him.

In June 2021, Mr Dusoruth applied to annul the bankruptcy order pursuant to s 282(1)(a) of the Insolvency Act 1986 (IA 1986), on the ground that the order ought not to have been made. Mr Dusoruth submitted that the bankruptcy order should be annulled on the grounds that:

1. his centre of main interests (COMI) was not in England and Wales;
2. the petition debts were genuinely disputed; and
3. the petition debts were not for 'liquidated sums' as required by s 267(2), IA 1986, and were thus incapable of founding a bankruptcy petition.

Centre of main interests

The court rejected Mr Dusoruth's submission that his COMI was outside of England and Wales. The court found that his London office was the 'administrative hub' of his business and financial interests (para [82]) and his principal place of business, as presented to the public, was England.

Disputed debt

The court further rejected Mr Dusoruth's case that a genuine dispute existed. Mr Dusoruth submitted that the American Express payments were set off against sums due from Orca in respect of consultancy services pursuant to a purported 'consultancy agreement'. The judge, however, observed that the consultancy agreement was inconsistent with Mr Dusoruth's oral evidence and unsupported by contemporaneous evidence (para [97]). The judge also found that the London flat was used by Mr Dusoruth for his personal benefit, rather than (as he alleged) by Orca's staff members (para [104]).

Liquidated sum

It is established that a liquidated sum within the meaning of s 267(2), IA 1986 must be for a 'specific amount' which is 'fully and finally ascertained' (*Sandelson v Mulville* [2019] EWHC 1620 (Ch), para [5]).

Orca's counsel submitted that the petition debts were for a specific sum that had been fully ascertained. Orca's claim was (as its counsel argued) for restitution for unjust enrichment. Thus, Orca could claim payment from Mr Dusoruth of the specific sum due without any further steps; it was not a damages claim or a claim for an account. In essence, Orca had become *subrogated* to American Express and to the landlord of the flat by virtue of discharging Mr Dusoruth's respective personal liabilities towards them (para [108]). Therefore, these debts were for liquidated sums and were capable of founding a bankruptcy petition.

However, Insolvency and Companies Court (ICC) Judge Mullen rejected this argument, holding that a claim in restitution for unjust enrichment cannot be regarded as a claim for liquidated sums even if it could be precisely quantified. It was essential, in the judge's view, to distinguish between the question of whether a debt is for a liquidated sum and the question of whether it is disputed (para [123]). Even if Mr Dusoruth's substantive defence against Orca's claims lacked credibility, whether he had been unjustly enriched and to what extent remained a matter for judicial determination. Until such determination had been made, his liability could not be accurately described as pre-ascertained (para [124]). The judge observed that an order for an account was the 'first step' in effecting restitution; until this quantification process had taken place, the claim could not be regarded as liquidated. It was irrelevant that the facts in this case were so straightforward that no real accounting process was necessary; the situation remained that the sum to which Orca was entitled had not yet been established by the court.

ICC Judge Mullen also rejected Orca's submission that it had become subrogated to the debts discharged by the payments. The judge held that subrogation is an equitable remedy for unjust enrichment. No court had yet established that Mr Dusoruth was unjustly enriched. Subrogation could not be regarded as an 'automatic' remedy (para [126]). The judge emphasised (citing *Banque Financiere de la Cite v Parc (Battersea) Ltd* [1999] 1 AC 221, [1998] All ER (D) 79) that even where subrogation is granted, the claimant does not automatically acquire all the rights of the original creditor and is not necessarily treated for all purposes as if he had simply stepped into its shoes (para [125]).

In reaching his conclusion, the judge relied on *Hope v Premierpace (Europe) Ltd* [1999] BPIR 695, [1998] Lexis Citation 14, in which Mr Justice Rimer had held that a claim for 'money had and received' (or, in

modern parlance, restitution) amounted to a claim for an account and payment, which was not a claim for a liquidated sum, even in circumstances where the taking of the account would be simple and straightforward. The judge also referred to *Norwich and Peterborough Building Society v McGuinness* [2011] EWCA Civ 1286, [2011] All ER (D) 63 (Nov), in which Lord Justice Patten approved the decision in *Hope v Premierpace* and explained that a claim for money had and received is not a liquidated sum for the purpose of s 267(2), IA 1986.

Discretion to annul

However, notwithstanding the court's finding that the petition debts were not for a liquidated sum, it ultimately dismissed Mr Dusoruth's annulment application.

The judge accepted that there is *no* discretion not to annul a bankruptcy order under s 282(1), IA 1986 where the debtor's COMI is located outside England and Wales, because in that situation the court simply lacks the jurisdiction to grant the bankruptcy order in the first place (para [129]). On the other hand, it is well-established that the court has the discretion not to grant an annulment even if the petition debt was genuinely disputed (para [134]) (*Guinan III v Caldwell Associates* [2004] EWHC 3348 (Ch) and *Khan v Singh-Sall (trustee in bankruptcy of Mohammad Razi Khan) and another* [2022] EWHC 1913 (Ch)).

Orca's counsel argued that an annulment sought on the basis that the debt is not for a 'liquidated sum' stands in the same position as an annulment sought on the ground that the debt is genuinely disputed (ie it is different to an annulment sought on the ground that the COMI requirement was not satisfied). The judge agreed. He held that the use of the phrase 'may annul' in s 282(1), IA 1986, which indicates that the court's power is discretionary, was also applicable to the present situation where the petition debt was not for a liquidated sum (para [144]). In support, he cited the Court of Appeal's decision in *Owo-Samson v Barclays Bank plc* [2003] EWCA Civ 714, [2003] All ER (D) 285 (May).

ICC Judge Mullen then considered how he would exercise the discretion. He commented that, in general, there would be a strong presumption in favour of annulment in circumstances where the bankruptcy order should not have been granted in the first place [145] (*Khan v Singh-Sall*). On the other hand, when deciding whether to exercise its discretion, the court must also consider whether there are factors suggesting that annulment should be refused, including the interests of other creditors and whether the annulment would be for no good purpose (*Mowbray v Sanders* [2015] EWHC 296 (Ch), [2015] All ER (D) 161 (Feb) (para [141]).

On the facts, the judge declined to grant an annulment. He placed considerable weight on Mr Dusoruth's failure to engage with or contest the bankruptcy petition when it was first presented (para [146]): Mr Dusoruth had been validly served with the petition in November 2020 but did not make the annulment application until June 2021 (and even then he did not offer a cogent explanation for this delay or for failing to taking any steps in the interim). The court observed that the annulment application process 'is not a licence to debtors not to engage with a petition and to make their arguments after the event' (para [148]).

Furthermore, even leaving aside Orca's petition debt, there was clear evidence of insolvency because Mr Dusoruth owed £4.7m in unpaid tax liabilities to HM Revenue & Customs (among other debts) (para [149]). If the court annulled Mr Dusoruth's bankruptcy, other creditors would have to present their own petitions, which would both create practical difficulties and potentially prejudice their interests. Any ambiguity as to Mr Dusoruth's financial position had largely been caused by his own lack of cooperation with the trustees. Among other things, Mr Dusoruth had taken the position that he was not required to cooperate with the trustees until his annulment application was decided; this was criticised by the judge as incorrect and constituting a breach of his obligations as a bankrupt (para [150]). In the circumstances, the judge concluded that it would not be appropriate to annul the bankruptcy order.

Guidance for insolvency practitioners

Insolvency practitioners should therefore note that a claim in unjust enrichment—even one which can be precisely quantified—cannot be regarded as a liquidated sum for the purpose of founding a bankruptcy petition. Where a bankruptcy petition was based on such a claim, there is a risk that the bankrupt order would be annulled on application by the bankrupt.

This case also offers useful guidance that, even where a bankruptcy petition is not founded on a debt for a liquidated sum (or where the debt is disputed on genuine grounds), an annulment application might nonetheless fail if there are strong reasons for maintaining the bankruptcy order. In particular, the court would have regard to the behaviour of the bankrupt (including any delay in making the annulment application and their overall cooperation with the trustees) and to any clear evidence of insolvency. The court retains a discretion to dismiss an annulment application even where the bankruptcy order should not have been originally granted. This will be of particular assistance to creditors in situations where the bankrupt is uncooperative and has failed to engage with the bankruptcy administration, then seeks to annul the bankruptcy order on the ground that the petition debts are genuinely disputed or are not founded on liquidated sums. This case is likely to be deployed in future to suggest that the court should be more inclined to dismiss an annulment application made by an uncooperative and evasive bankrupt. NLJ

Wilson Leung is a barrister at Serle Court, and acted for the respondent in the case (led by Lance Ashworth KC). **Ryan Tang** is a pupil barrister at Serle Court (*www.serlecourt.co.uk*).