

## Unjust enrichment claim not a 'liquidated sum' capable of founding a bankruptcy petition (Dusoruth v Orca Finance)

03/10/2022

**Restructuring & Insolvency analysis:** The court clarified the requirement, in section 267(2) of the Insolvency Act 1986 (IA 1986), that the debt upon which a bankruptcy petition is founded must be for a 'liquidated' sum. The court held that a claim for restitution based on unjust enrichment was, by its nature, not for a 'liquidated' sum. This is the case even if the creditor can specify an exact amount for the claim or the amount could be easily calculated by the court and claimed to be subrogated by reason of payment of another debtor's liquidated sum. Hence, when drafting a bankruptcy petition, practitioners should check that the petition debt is for a liquidated sum (especially where the claim is not simply based on a straightforward debt). However, even if the petition debt was not for a liquidated sum but the bankruptcy order was made, and the bankrupt subsequently applies to annul the bankruptcy order, the court still has a discretion whether to annul. Written by Lance Ashworth KC and Wilson Leung, barristers at Serle Court (who acted as counsel in the case).

*Re Dusoruth (a bankrupt); Dusoruth v Orca Finance UK Ltd (in liquidation)* [\[2022\] EWHC 2346 \(Ch\)](#), [\[2022\] All ER \(D\) 31 \(Sep\)](#)

### What are the practical implications of this case?

This is a valuable judgment which clarifies the requirement, in [IA 1986, s 267\(2\)](#), that the debt upon which a bankruptcy petition is founded must be for a 'liquidated' sum.

The court explained that a liquidated sum is one which is 'pre-ascertained' or 'a specific amount which has been fully and finally ascertained' (para [123]). This would exclude claims for unliquidated damages or claims for an account and payment.

The court confirmed that a claim for restitution based on unjust enrichment was, by its nature, not for a 'liquidated' sum. This is the case even if the creditor can specify an exact amount for the claim or the amount could be easily calculated by the court, including where the creditor relies on being subrogated to the claim by reason of having discharged an indisputable debt which was a liquidated sum owed by the debtor.

Thus, when drafting a bankruptcy petition, practitioners should check that the petition debt is for a liquidated sum. This will require careful attention in cases where the claim is not simply based on a straightforward debt, for example, where (as occurred on the facts here) the petitioner's debt derives from its former director having misapplied company funds.

But there is an important caveat. The judgment establishes that, even if the petition debt was not for a liquidated sum but the court made a bankruptcy order, and the bankrupt subsequently applies to annul the bankruptcy order, the court still has a discretion whether to annul. Although the court would lean in favour of annulment if [IA 1986, s 267\(2\)](#) had not been satisfied, this could be outweighed by other factors such as the bankrupt's conduct or the existence of other creditors.

### What was the background?

The respondent (Orca UK) was a company owned and controlled by the applicant (Mr Dusoruth). Orca UK was wound up by a creditor. In turn, the liquidators of Orca UK petitioned in England to bankrupt Mr Dusoruth. It was alleged that Mr Dusoruth had wrongfully used Orca UK's money to fund his family's lavish lifestyle. The petition relied on two categories of spending:

- first, money belonging to Orca UK that was used to discharge Mr Dusoruth's personal American Express credit card bills (the American Express Debt)
- secondly, Orca UK's money that was applied to pay rent on a flat in Curzon Street, London (the Curzon Street Debt), which was apparently used by Mr Dusoruth and his family

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

In June 2021, Mr Dusoruth applied to annul the bankruptcy order under [IA 1986, s 282\(1\)\(a\)](#), on the ground that the order ought not to have been made. Mr Dusoruth argued that his 'centre of main interests' (COMI) was not in England and Wales.

Mr Dusoruth also contended that the petition debts were not for 'liquidated' sums as required by [IA 1986, section 267\(2\)](#), and therefore were incapable of founding a bankruptcy petition. He asserted that, if he was right on this point, the court had no discretion and must annul the bankruptcy order.

He further argued that the debts were disputed so as to raise a triable issue.

### **What did the court decide?**

The court rejected Mr Dusoruth's arguments on COMI and triable issue.

The judge accepted Ms Dusoruth's argument that the American Express Debt and the Curzon Street Debt were not for 'liquidated' sums. Orca UK based its claim on unjust enrichment: having discharged Mr Dusoruth's liability to American Express and the landlord of the flat, Orca UK was 'subrogated' to their respective claims against him. Orca UK argued that the claim was liquidated because it was in a specific sum and did not require further accounting by the court. The judge rejected this contention. He applied *Hope v Premierpace (Europe) Ltd* [1999] BPIR 695 (per Mr Justice Rimer), and *McGuinness v Norwich and Peterborough Building Society* [2011] EWCA Civ 1286 (per Lord Justice Patten), which held that an unjust enrichment claim is, by nature, a claim for an account, which entails that it is not a claim for a liquidated sum. It made no difference that the creditor could state the precise amount of its claim, or that the court could easily ascertain the quantum. (paras [106]–[127])

But the judge proceeded to hold that, even if the statutory requirements of [IA 1986, s 267\(2\)](#) had not been met, the court had a discretion whether to annul the order (para [144]). The judge then decided not to annul, relying on factors such as Mr Dusoruth's failure to respond to the petition; his delay in applying for annulment; the existence of other indisputable creditors; and his lack of co-operation with his trustee (paras [145]–[151]).

Therefore, his annulment application was dismissed.

### **Case details**

- Court: Business and Property Courts of England and Wales, Insolvency and Companies List (ChD)
- Judge: Insolvency and Companies Court Judge Mullen
- Date of judgment: 16 September 2022

Lance Ashworth KC and Wilson Leung are barristers at Serle Court (who acted as counsel in the case). If you have any questions about membership of our Case Analysis Expert Panels, please contact [caseanalysiscommissioning@lexisnexis.co.uk](mailto:caseanalysiscommissioning@lexisnexis.co.uk).