Neutral Citation Number: [2022] EWHC 2346 (Ch)

Case No: BR-2020-000490

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC4A 1NL

Date: 16/09/2022

Before :

ICC JUDGE MULLEN

- -

In the Matter of Ramesh Philippe Dusoruth (a bankrupt)

And in the Matter of the Insolvency Act 1986

Between :

Ramesh Philippe Dusoruth	**Applicant**
- and -	
Orca Finance UK Limited (in liquidation)	**Respondent**

- -
- -

Rory Brown (instructed by **RIAA Barker Gillette**) for the **Applicant**
Lance Ashworth KC and **Wilson Leung** (instructed by **Stephenson Harwood LLP**) for the **Respondent**

Hearing dates: 27th to 29th April 2022

- -

Approved Judgment

I direct that this judgment may be treated as authentic.
The hand-down time is 10:30am

.....

ICC JUDGE MULLEN

ICC JUDGE MULLEN :

Mr Dusoruth's application to annul his bankruptcy

1. Mr Ramesh Dusoruth was adjudged bankrupt on 16th November 2020 on a petition presented to this court by Orca Finance UK Limited (in liquidation) ("Orca UK") on 1st October 2020. On 7th June 2021 Mr Dusoruth applied to annul that bankruptcy order under section 282(1)(a) of the Insolvency Act 1986 ("IA 1986"), that is to say on the ground that it ought not to have been made ("the Annulment Application"). The application was supported by a statement from Mr Dusoruth's solicitor, Mr Mohammed Qaiser Khanzada, of the same date and that statement was later supplemented by a statement from Mr Dusoruth himself, dated 3rd August 2021. The Annulment Application also sought to set aide the order dated 12th October 2020 permitting the petition and associated documents to be served on Mr Dusoruth out of the jurisdiction ("the Service Out Order") or permission to appeal that order.

2. Mr Dusoruth's case, as it appears from those documents, is that, first, the debts set out in the petition were not for liquidated sums. They were thus incapable of founding a bankruptcy petition so that the petition and the statutory demand that preceded it were, as the Annulment Application puts it, "irredeemably defective". Secondly, he says that his centre of main interests ("COMI") for the purposes of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings ("the recast EU Regulation") was not in England and Wales at the relevant time and the court had no jurisdiction to make a bankruptcy order in respect of him. Finally, he contends that the petition debts are disputed. The reason that he did not raise any of these issues in advance of the bankruptcy order being made was because he had not been aware of the proceedings until he was informed of the making of the order itself on or about 16th December 2020.

3. Orca UK's evidence in answer to the Annulment Application is contained in a statement from Detective Inspector Paul Ridley of the Bermuda Police Service, dated 12th November 2021, and a statement from Mr Paul Appleton, the joint liquidator of Orca UK and joint trustee in bankruptcy of Mr Dusoruth, dated 16th November 2021. Mr Dusoruth at first appeared to intend to reply to those witness statements and his evidence in reply was to have been filed by 26th October 2021. The parties agreed to vary the directions timetable and Mr Dusoruth then obtained a further extension to file his reply evidence by 7th December 2021. On 6th December 2021 he applied for an order for extending time for filing that reply evidence to 7th February 2022 but abandoned that application and did not file any further evidence.

4. On 1st February 2022, Orca UK made an application for an order that Mr Dusoruth attend the hearing of the Annulment Application to be cross-examined. That was granted by Deputy ICC Judge Agnello QC on 21st April 2022, though she directed that the scope of cross-examination, in particular whether it be limited to questions relating to Mr Dusoruth's COMI or extend beyond that issue to explore Mr Dusoruth's contentions as to the dispute as to the debts, should be determined at the hearing of the Annulment Application.

5. Mr Dusoruth did indeed attend the hearing for cross-examination but, with my permission, by video link rather than in person. He is currently in the Netherlands having been convicted of an offence of "bankruptcy fraud" by the Overijssel Criminal

District Court on 12th October 2021. He was sentenced to 30 months in prison, which was extinguished by time already served. Mr Dusoruth contends that this conviction is subject to appeal and it seems that his acquittal on further fraud and forgery charges is subject to an appeal by the public prosecutor. He is required to remain in the Netherlands. Further, Mr Dusoruth was, until 8th March 2019, on bail in Bermuda having been charged with a number of offences by the Bermuda Monetary Authority ("the BMA") but left that jurisdiction in the rather extraordinary circumstances that I shall describe. As far as the Bermudan authorities are concerned he absconded in breach of his bail conditions, with the result that he is the subject of an Interpol Red Notice. The effect of all that is that if he were to leave the Netherlands he would not only be in breach of his bail conditions in the Netherlands but also be liable to arrest and extradition to Bermuda.

6. The final point I should note in relation to the progress of the Annulment Application is that, on the day after the hearing before Deputy ICC Judge Agnello QC, leading counsel for Orca UK who had been retained for the substantive hearing before me and had, I think, represented it at all previous hearings, had to withdraw unexpectedly for entirely understandable and unavoidable personal reasons. With only a matter of days to go before the hearing of the Annulment Application, the solicitors for Orca UK asked Mr Dusoruth's representatives to agree to an adjournment. That request was refused. Mr Lance Ashworth KC and Mr Wilson Leung of counsel were therefore instructed at short notice and were able to appear for Orca UK at the hearing, as well as to provide a full skeleton argument in time for the pre-hearing reading day. I am very grateful to both of them for enabling the hearing to be effective.

Background to the petition

7. Mr Dusoruth's business interests are wide-ranging. He holds 99.9% of the share capital of Les Petits Fourmies ("LPF"), a company registered in Malta, and is acknowledged in its filings in that jurisdiction as its ultimate beneficial owner. LPF is the owner of the issued share capital in –

    a) St George's Limited ("St George's"), registered in Bermuda, of which Mr Dusoruth was chairman and a director, along with a Mr Vincent Mast and a corporate director called Harbour Administration (BVI) Limited.

    b) Orca UK, registered in England and Wales, of which Mr Dusoruth was sole director as at the date of its liquidation, having been appointed on 16th June 2016. Its previous two directors, Mr Benjamin Colas and Ms Carole Pevny, resigned in 2016.

    c) Marsh Wall 30 Limited ("Marsh Wall UK"), registered in England and Wales, of which Mr Dusoruth, Orca UK and, from 23rd May 2019, a Mr Quamelle Green were directors.

    d) PS66 Ltd, PS66B Ltd, and PS66G Ltd, ("the Pont Street Companies"), all registered in England, of which Mr Dusoruth and Orca UK were among the directors.

e) Lioncross Limited ("Lioncross"), incorporated in Cyprus but, according to Mr Dusoruth, operated from and domiciled in Malta.

f) MW30 Limited ("Marsh Wall Jersey"), incorporated in Jersey.

g) PSSI Limited ("PSSI"), incorporated in Malta.

It is not in dispute that all of these companies are ultimately owned by Mr Dusoruth by reason of his shareholding in LPF. Mr Dusoruth is also a director and the ultimate beneficial owner of Brazz Services NV ("Brazz"), a company incorporated under the laws of Belgium in 2003 which operated a consultancy business. Other companies are mentioned in his evidence with similar names to Brazz or Orca.

8. Marsh Wall Jersey and PSSI respectively held property at 30 Marsh Wall, London E14 9FY ("the Marsh Wall Property") and four apartments that formed part of a house at 66/66a Pont Street, London SW1X 0AE ("the Pont Street Properties") until 2017, when the properties were "on-shored" by the transfer of the Marsh Wall Property into the ownership of Marsh Wall UK and the Pont Street Properties into the ownership of the Pont Street Companies. These properties have since been sold by receivers. The sale of the Pont Street Properties completed on 13th December 2019 for £9.5 million and the Marsh Wall Property on 20th December 2019 for £26.65 million.

9. Orca UK's winding up happened as follows. On 7th March 2019, Rachelle Frisby and John Johnson were appointed as joint provisional liquidators of St George's by the Supreme Court of Bermuda. The evidence of Ms Frisby, dated 28th June 2019, in support of an application for the appointment of provisional liquidators in respect of Orca UK sets out how that came about. In summary, it is alleged that St George's procured investments from wealthy individuals, which investments were transferred to other companies controlled by Mr Dusoruth by way of unsecured loans. These loans are thought by the Bermudan joint provisional liquidators to have been used to repay lending incurred in relation to the purchase of the Marsh Wall Property and the Pont Street Properties. St George's auditors raised concerns as to the recoverability of these loans in 2017 and, at around this time or in 2018, the BMA became involved. Mr Dusoruth and his co-director Mr Vincent Mast, were arrested on 15th November 2018 and charged with various offences, including in Mr Dusoruth's case, providing misleading information to the BMA.

10. The appointment of Ms Frisby and Mr Johnson as joint provisional liquidators of St George's followed the presentation on 27th February 2019 of a petition to wind up St George's by Harbour International Trust Company Limited in Bermuda. St George's presented a petition for the winding up of Orca UK in this jurisdiction on 5th June 2019, based on an unsatisfied demand for repayment of an intercompany loan in the sum of $1.35 million. On 14th June 2019, Ms Frisby and Mr Johnson made an application for recognition of their appointment here. The application for recognition was heard and granted by me on 28th June 2019.

11. Mr Appleton and Mr Paul Cooper were appointed as joint provisional liquidators of Orca UK on 12th July 2019 and were appointed as joint liquidators following the order for the compulsory liquidation of that company on 24th July 2019.

12. The investigations of the liquidators of Orca UK led them to cause it to present the bankruptcy petition against Mr Dusoruth. On the same day, Orca UK also made a without notice application ("the Service Out Application") for a declaration that it had taken all reasonable steps to bring a statutory demand dated 5th June 2020 to Mr Dusoruth's attention, together with an order dispensing with personal service of the petition and giving permission for it to be served on Mr Dusoruth out of the jurisdiction in the Netherlands, where Mr Dusoruth was then being held pending his trial. That application was supported by the first witness statement of Mr Appleton, dated 30th September 2020.

13. The Service Out Application was also accompanied by written submissions from leading counsel and Orca UK asked that the application be determined on paper on the basis of the evidence and submissions. It was referred to me in boxwork and, though I was satisfied on an initial review that it appeared that enough had been done to bring the statutory demand to the attention of Mr Dusoruth, I was not so satisfied as to COMI. Mr Dusoruth, as Mr Appleton's evidence in support of the Service Out Application acknowledged, regularly travelled between London, Belgium and Bermuda and had interests in a number of jurisdictions, including in residential property in Belgium. Orca UK did not, however, rely on Mr Dusoruth's residence but contended that he operated an independent business or professional activity and that London was his principal place of business. Orca UK, it was said, was Mr Dusoruth's "pocket book" from which he took large sums to fund his family's lifestyle and was the administrative hub for Mr Dusoruth's business interests, carried on via the network of companies ultimately owned by him.

14. My concern was that some of the evidence relied upon as to this was historic, particularly in the context of a case where Mr Dusoruth had been in Bermuda for an indeterminate period prior to his arrest and did not address the effect of Mr Dusoruth having been on bail there for several months, immediately followed by spending over a year in prison in the Netherlands, where he remained detained.

15. The Service Out Application was therefore listed on 12th October 2021, as it so happened before me once again. Having received further written submissions and heard from leading counsel then instructed I was satisfied for the purposes of the Service Out Application that Mr Dusoruth's principal place of business from which his affairs were administered was London. I therefore granted permission to serve him out of the jurisdiction and directed that he could apply to set aside the order within seven days of it being served upon him.

16. That hearing was listed to consider my concerns over COMI but the Service Out Application, as required by rule 6.37(1) of the Civil Procedure Rules, asserted that Orca UK believed that the petition had a reasonable prospect of success. Neither the Service Out Application, the evidence in support, the initial written submissions, the supplemental written submissions nor the oral submissions engaged with the question of whether the petition debt was a liquidated sum, beyond stating that it was. In the paragraphs appearing under the heading "Full and frank disclosure on the merits" in Mr Appleton's first witness statement this question does not feature among the fifteen arguments that it is said Mr Dusoruth might seek to raise in response to the petition.

17. Following that hearing, Orca UK lodged evidence of service of the petition, the Service Out Application, the Service Out Order and associated documents in the form

of a witness statement of Mr Jurgen van den Heuval, a Dutch lawyer, dated 6th November 2020. His evidence was that he instructed a court bailiff to attend the prison in which Mr Dusoruth was detained. He confirmed that the documents had been served in accordance with my order and that such method of service was good under Dutch law. He exhibited a copy of the original Dutch certificate of service with an English translation. Mr Dusoruth did not apply to set aside the Service Out Order, nor did he respond to the petition at all. The petition came before Deputy ICC Judge Schaffer on 16th November 2020 and he made the bankruptcy order.

18. Mr Dusoruth's discharge from bankruptcy was suspended by an order made on 5th November 2021. The evidence in support of the application to suspend was again given by Mr Appleton and set out a prolonged failure to provide information repeatedly requested over the course of about 10 months. Mr Dusoruth did not file evidence in answer to that application but was represented by Mr Brown of counsel at its first hearing, who also appeared for him on the hearing of the Annulment Application. Deputy ICC Judge Schaffer was satisfied, in the absence of any answer from Mr Dusoruth, that he had failed to provide the trustees with information as to his affairs and directed that his discharge from bankruptcy be suspended until the determination of the Annulment Application.

The petition debt

19. There are two elements to the petition debt. The first is the sum of €361,899.73 in relation to the payments that Orca UK's liquidators have identified as being made from Orca UK's bank accounts which, they say, discharged Mr Dusoruth's personal American Express credit card bills ("the American Express Debt"). The American Express statements were recovered from Orca UK's offices and were addressed to Mr Dusoruth at its former office address at Pont Street. By way of illustration, the expenditure shown on one of these statements alone, dated 26th August 2018, includes €32,000 spent at Hermès, New York, in July 2018, a family trip to New York, Boston, Niagara Falls, Toronto and Vancouver, together with expenditure on restaurants, hotels, and sportswear and other shops. The sums due under that statement, totalling €84,701, are said to have been discharged by Orca UK. Mr Appleton's evidence is that he is unable to identify a single business expense.

20. Mr Dusoruth is further said to have caused Orca UK to pay the rent on Flat 3, 9A Curzon Street, London W1J 5HQ ("Curzon Street") in the total sum of £276,838.01 between 16th March 2016 and 13th February 2019 ("the Curzon Street Debt"). Curzon Street is said to have been used by Mr Dusoruth and his family, rather than for the benefit of Orca UK. It is not clear from the information obtained by the liquidators whether the lease was in the name of Orca UK or Mr Dusoruth himself. No lease has been found and the rent demands that the liquidators have refer to both Mr Dusoruth himself and Orca UK.

Legal principles applicable to an application to annul

21. Section 282(1) IA 1986 provides, insofar as is material:

> "The court may annul a bankruptcy order if it at any time appears to the court—

> (a) that, on any grounds existing at the time the order was made, the order ought not to have been made".

The argument raised by Mr Dusoruth is that the requirements for presenting a petition were not satisfied. The petition could not properly have been presented and a bankruptcy order should not have been made on it. I shall briefly go through the relevant requirements as set out in the statute.

Standing to present a petition

22. Section 264(1) IA 1986 deals with who may present a bankruptcy petition as follows:

> "A petition for a bankruptcy order to be made against an individual may be presented to the court in accordance with the following provisions of this Part –
>
> (a) by one of the individual's creditors or jointly by more than one of them".

It is well established that, if the petition debt is disputed so as to raise a genuine triable issue as to its existence, and thus there is a question as to whether the petitioner is a creditor at all, this court does not resolve that dispute but will dismiss the petition, leaving the parties to resolve the question in Part 7 or Part 8 proceedings. The effect of such a dispute as to the existence of the petition debt was explained in the context of the substantively identical provisions relating to company liquidation by Ungoed-Thomas J in *Mann v Goldstein* [1968] 1 WLR 1091, 1098 as follows:

> "until a creditor is established as a creditor he is not entitled to present the petition and has no *locus standi* in the Companies Court; and that, therefore, to invoke the winding-up jurisdiction when the debt is disputed (that is, on substantial grounds) or after it has become clear that it is so disputed is an abuse of the process of the court."

23. In this case, the dispute raised by Mr Dusoruth is that the repayment of the American Express credit card liabilities were legitimately made pursuant to a consultancy agreement dated 27th March 2015 ("the Consultancy Agreement") made between LPF, Brazz and Orca UK, whereby fees due to Brazz for services supplied by Mr Dusoruth could be discharged by the payment of Mr Dusoruth's personal expenses. In relation to the Curzon Street Debt, he says that he stayed at Flat 2, 66a Pont Street and had no need to use Curzon Street. It was instead used exclusively by Orca UK's consultants and the rent constituted a proper business expense.

24. Counsel were not agreed as to whether it remained sufficient on an annulment application for the bankrupt to raise a genuine triable issue as to the existence of the petition debt, as Mr Brown contended, or whether it was necessary to go further and show, on the balance of probabilities, that the petition debt was not due at all, as argued by Mr Ashworth. It was necessary for me to give a ruling on this in the context of Mr Ashworth's wish to cross-examine Mr Dusoruth on the dispute as to the debt.

25. Counsel were content for me to give my reasons in this judgment. In the event, I gave a brief ex tempore judgment at the time, which I shall expand upon here, and this part of my judgment constitutes my reasons for that decision. I concluded that Mr Brown was correct as to the test that his client had to meet. As I said at the time, I will extend the period for applying for permission to appeal on this question so as to run from the hearing to consider consequential orders following the handing down of this judgment.

26. Mr Brown relied, first, on *Guinan v Caldwell Associates Ltd* [2004] EWHC 3348 (Ch), in which the bankrupt contended that he had not been properly served with the bankruptcy petition and that the debt was disputed on substantial grounds. The district judge rejected both arguments and the bankrupt appealed. Neuberger J, as he then was, allowed the appeal, accepting that there was no distinction between the test to be applied on an application to set aside a statutory demand, at the hearing of a petition and on an application to annul. In each case the court must consider whether the debt is genuinely disputed. He said:

> "[16] I turn then to what at least to my mind is the central point in the case, which is whether or not Mr Caldwell has an arguable case. In this connection it is I think common ground, and consistent with what was said by Laddie J in para [60] of his judgment in *Everard v The Society of Lloyd's* [2003] EWHC 1890 (Ch), [2003] BPIR 1286, that:
>
> > 'The court's assessment of the seriousness of the challenge should [not] differ from one stage to the other.'
>
> In other words, if there is what he called 'a genuine triable issue' then, whether it is raised at the statutory demand stage, the petition stage or the annulment stage, it is an equally valid point. However, as I mentioned, that is not the end of the matter in this case, because, even if there is a genuine triable issue, that does not automatically mean that I should annul the bankruptcy; I still have a discretion. But, subject to that, as I think Mr De La Rosa, albeit sub silentio has accepted, the test is the same: is there a genuine dispute?"

27. Mr Ashworth, noting that Neuberger J's judgment was based on a concession by counsel, invited me to follow the decision of Mr Anthony Elleray QC, sitting as a deputy High Court Judge, in *Flett v HM Revenue and Customs and Daly* [2010] EWHC 2662 (Ch). In that case, HMRC had obtained judgment for the sums set out in its own determinations and assessments as to the tax-payer's liability. He was subsequently adjudged bankrupt. He applied to annul on the basis that he had been unaware of the petition, at least one of the determinations had been displaced by a return filed before the presentation of the petition and his liability had subsequently been reduced to nil following the provision of returns to displace further determinations and a payment made shortly after the bankruptcy order.

28. The district judge did not accept that the relevant return had been filed before the presentation of the petition and declined to annul the order. The deputy judge dismissed the taxpayer's appeal. He said:

> "[45] …I should remind myself of what I am and am not doing. A debtor who challenges the making of a bankruptcy order against him on the basis that he disputes the relevant debt alleged by the creditor puts in his written evidence and the bankruptcy court decides whether or not on that evidence there is a real prospect of the debtor making out the alleged defence. If there is, its resolution is not a matter for this court but should be a matter for ordinary civil proceedings in which there will be disclosure and in due course, unless there is an application for summary judgment, a trial.
>
> [46] In the case of an application under s 282(1), which necessarily follows after the bankruptcy order has been made, it is the bankrupt who is applying to establish in the bankruptcy court that for example under s 282(1)(a) the bankruptcy order ought not to have been made on grounds existing at the time the order was made. In context it appears to me that the court hearing the application of the debtor for annulment must be satisfied as to those grounds on the balance of probability. It may not be enough in my view for a debtor to say at the time of an application for annulment: 'I had an arguable defence to a given case'. He should be saying: 'I did not in fact owe the money for this or that reason,' and it is for that reason that he now seeks the annulment of the order."

29. In *Re Payne; Woolsey v Payne* [2015] EWHC 968 (Ch), Mr John Male QC, sitting as a deputy High Court Judge, considered an appeal from the Chief Registrar. He was referred to both *Guinan* and *Flett* and said:

> "[19] Ms Clarke submits that the test as stated in *Flett* is to be preferred. She points out that in *Guinan* the parties were agreed as to the test and therefore the court did not have the benefit of argument on the point. She says that *Everard* (which was relied upon by Neuberger J) was dealing with a narrower point, namely, whether the test to be applied on an application to set aside a statutory demand was different to that applied to an opposed petition in circumstances where the rules and practice directions stipulated the stage at which certain disputes needed to be raised. She also pointed out that, where a debtor seeks to annul on grounds that a petition debt is disputed, the debtor relies upon grounds that could and should have been raised at the petition stage. So, she says, it is legitimate to place the onus upon an applicant to establish that the debt is not owed and to impose a more stringent test than would have applied in the event that the applicant had responded in a timely fashion. She reinforced this latter point in her oral submissions by reminding me that an order operated against the world and that this was another reason for the more stringent test because to annul it could prejudice third parties who had acted on the order. Also, she pointed out that under s 282(1)(a) the application to annul

could be made 'at any time' and that actual experience showed that this could be many years after the bankruptcy order when the order had been acted upon. So, again, it was appropriate to impose a more stringent test.

[20] In contrast, Mr Flower submitted that I should adopt the approach of Neuberger J in *Guinan*. He pointed out that *Guinan* was not cited in *Flett.* Also, he submitted that the facts of *Flett* were significantly different as they concerned a statutory assessment by HMRC which the court could not go behind. And, in any event, it was questionable whether what Mr Elleray said in para 46 actually went as far as Ms Clarke contended.

[21] For the reasons set out below, I consider that I should adopt the approach taken by Neuberger J in *Guinan*.

[22] First, while it does appear that the point was not argued by the parties in *Guinan*, so far as I can see the same applies to *Flett*. Secondly, neither *Guinan* nor *Everard* is referred to in the judgment of Mr Elleray QC. Thirdly, the decision of Neuberger J drew on the reasoning of Laddie J in *Everard*. While I accept that *Everard* concerned a narrower point, it seems to me that what Laddie J said in that case in para [60] was sound in principle and applies equally to the issue before me. He said 'there is every reason why the height of the hurdle the debtor has to negotiate should be substantially the same at whichever stage he mounts his challenge' and there is 'no reason why the debtor's challenge should have to reach a different level of substantiality when he challenges the debt … at the petition stage'. I respectfully agree. Fourthly, I agree with Mr Flower that what Mr Elleray QC says is ambiguous. Mr Elleray said 'It *may not* be enough … for a debtor to say at the time of an application for an annulment: I had an arguable defence …' I have added the emphasis because, as Mr Flower argued, Mr Elleray seems not to have been entirely sure of the position. Fifthly, the application of different tests to the different stages could, as Mr Flower argued, produce strange results. This case illustrates that very point in that the application of different tests to the same basic issue might lead to Mr Payne succeeding in setting aside the statutory demand, but Mrs Payne failing to set aside the bankruptcy order.

[23] As to Ms Clarke's points about the order operating against the world and the effect of the passage of time, in the case of an application to annul the court has a discretion in that 'The Court may annul …'. If the passage of time or the operation of the order against third parties was shown in a particular case to have caused the sort of practical problems which Ms Clarke referred to in her oral argument, then that is a matter which I expect that the court would bear in mind in exercising its

> discretion and which might incline the court against making an order."

30. I cannot accept Mr Ashworth's submission that Mr Male was bound to follow *Flett* on the basis that it is was decided subsequently to *Guinan* following full, or at least fuller, argument. It is quite clear that Mr Male was well aware that the point had not been fully argued in *Guinan*. That is apparent from paragraph 21 of his judgment. It also appears that *Guinan* was not cited to Mr Elleray in *Flett* and, in any event, he was dealing with a different situation. There the petition was based on judgments for the statutory debt that was due at the time of the order, albeit that HM Revenue and Custom's assessments were displaced by returns thereafter and a payment was also made. That cannot have altered the fact that the debt was due as at the date of the order. Mr Elleray's observations were made in context – that is quite clear from the fact that he uses those words in paragraph 46 of his judgment. One can see that, in that context, it might be said to be necessary for the taxpayer to show that the statutory debts had been extinguished by the filing of nil returns and payment when the order was made. That was not the position in *Payne* nor is it the position in this case.

31. I consider that I am bound to follow Mr Male's approach, with which I respectfully agree. Section 282(1)(a) IA 1986 requires me to consider whether "on any grounds existing at the time the order was made" the order ought not have been made. If, at the time the order was made, there was a genuine triable issue as to existence of the debt, it seems to me that the order could not have properly been made. It would strange if, say, a debtor who did not become aware of an ordinary trade creditor's petition until the day after the bankruptcy order was made had to meet a more stringent test than he or she would have faced the day before.

32. This does not mean that the order will be annulled. The court retains a discretion to decline to do so, save where the order was made without jurisdiction, the meaning of which I shall return to later, and a bankrupt who has ignored the petition and unreasonably delayed making the application may find that he or she has an uphill task in persuading the court to annul.

33. As a coda to the discussion of the test I should say that, while the cases traditionally use the expressions "genuine triable issue" or "genuinely disputed on substantial grounds" when approaching a challenge to the existence of the debt, there is no material difference between those concepts and that of a "real prospect of success" familiar in the context of summary judgment applications. It means more than a fanciful prospect of success or a merely arguable dispute. There must be something to suggest that the dispute is sustainable, beyond mere assertion. The court does not conduct a mini-trial but may reject evidence that is inherently implausible or contradicted, or not supported, by contemporaneous documents (see *Collier v P & M J Wright (Holdings) Ltd* [2007] EWCA Civ 1329 at paragraph 21, per Arden LJ).

34. The court must take a realistic approach to the assessment of the merits and be alive to the risk that a debtor will seek to raise what has been described in the context of corporate insolvency as "a cloud of objections". The timing of an application may be of relevance not only to the exercise of a discretion to annul but also to the court's assessment of the case the debtor seeks to advance. Where the bankrupt has been inexplicably dilatory in identifying the dispute upon which he relies or in producing

documents in support of it the court is, in my view, entitled to weigh the dispute against that background. That does not alter the test that the bankrupt has to meet but inevitably will inform the assessment of the substance of the dispute that the bankrupt seeks to raise.

Against whom a petition may be presented

35. The second element of the requirements for presentation of a petition is set out in section 265 IA 1986 and specifies the persons against whom a bankruptcy petition may be presented. At the time of presentation it provided as follows, as far as relevant:

> "(1) A bankruptcy petition may be presented to the court under section 264(1)(a) only if—
>
> (a) the centre of the debtor's main interests is in England and Wales…
>
> (4) In this section, references to the centre of the debtor's main interests have the same meaning as in Article 3 of the EU Regulation."

Again, Mr Dusoruth says that his COMI was not in England and Wales and the requirement of this section was not met either.

36. At the dates of the presentation of the petition and the bankruptcy order the United Kingdom had left the European Union. Article 67(3)(c) of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ("the Withdrawal Agreement") provided for the continued application of the recast EU Regulation during an implementation period, which came to an end on 31st December 2020. The relevant parts of the recast EU Regulation applicable at the time of presentation of the petition and the bankruptcy order were as follows:

> "1. This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:
>
> …
>
> The proceedings referred to in this paragraph are listed in Annex A."

Annex A includes bankruptcy.

37. Article 3 provided:

> "**International jurisdiction**
>
> 1. The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have

> jurisdiction to open insolvency proceedings ('main insolvency proceedings'). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.
>
> …
>
> In the case of an individual exercising an independent business or professional activity, the centre of main interests shall be presumed to be that individual's principal place of business in the absence of proof to the contrary. That presumption shall only apply if the individual's principal place of business has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.
>
> In the case of any other individual, the centre of main interests shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. This presumption shall only apply if the habitual residence has not been moved to another Member State within the 6-month period prior to the request for the opening of insolvency proceedings."

If a person carries out an independent business or professional activity, it is their principal place of business that is presumed to be their COMI, not their habitual residence. A person's COMI must be the place in which a debtor conducts the administration of their interests on a regular basis and must be ascertainable by third parties. The preamble to the recast EU Regulation notes, at paragraph 28, that "special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests."

38. The principles applicable to the substantively identical predecessor regulation were summarised by Judge Purle QC, sitting as a High Court Judge, in *Sparkasse Hilden Ratingen Velbert v (1) Benk (2) The Official Receiver* [2012] EWHC 2432 (Ch), at paragraph 22, as follows:

> "(a) A debtor can only have one COMI.
>
> (b) A debtor's COMI is, in the case of professionals, the place of their professional domicile and for natural persons in general, the place of their habitual residence…
>
> …
>
> (d) While a debtor's choice as to where he conducts the administration of his affairs may be subjective, where he actually carries on the administration of his affairs on a regular basis such that it is ascertainable by third parties and by the court is an objective question.

> (e) 'Regular administration' of a debtor's interests means that the court must look for the place from which the debtor exercises the management, organisation and control of his interests …
>
> (f) The term, 'on a regular basis' indicates 'a quality of presence', 'a degree of continuity', 'an idea of normality', 'a stable link with the forum', and 'a degree of permanence'…
>
> (g) Particular regard must be had for the COMI to be ascertainable by third parties, in particular creditors and potential creditors…
>
> (h) Whilst the date on which the COMI is to be established is the date of presentation of the petition, evidence as to [the debtor's] activities and actions at other times may be significant in that they cast light on the truth or otherwise of his claim to have had his COMI in England at the relevant time'

The debt must be for a liquidated sum

39. Finally, Mr Dusoruth argues that the petition is defective in that it does not comply with section 267 IA 1986 as follows:

> "(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—
>
> …
>
> (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…"

He contends that neither element of the petition debt is for a liquidated sum. I propose to consider that question having considered Mr Dusoruth's case on COMI and the dispute raised as to the petition debt.

The scope of cross-examination

40. I have explained the procedural history and the scope of the dispute between the parties. Deputy ICC Judge Agnello QC left the question of the scope of cross-examination to me in her order of 21st April 2022. There was no doubt that it was to include the question of COMI, and cross-examination on that issue is not unusual. Cross-examination where service of proceedings is disputed is similarly relatively common. Mr Ashworth cross-examined Mr Dusoruth on both and, having concluded

that exercise, wished to question him as to the disputes raised as to the petition debts, which is extremely unusual and was opposed by Mr Brown. In this case I allowed cross-examination, and, again, I gave my decision in summary form at the time, which I explain below. Again, I extended time for applying for permission to appeal that decision to run from the hearing to consider consequential matters following handing down of this judgment.

41. Mr Brown emphasised that cross-examination on the question of whether a debt is disputed is very rare. He took me to *Hayes v Hayes* [2014] EWHC 2693 (Ch) in which Nugee J, as he then was, described the practice of the court as follows:

> "21 Mr Wolman makes a number of submissions in support of the appeal. The first is that he should have been permitted to cross-examine Mr Hayes in order to test the genuineness and substance of the cross-claim which Mr Hayes sought to advance. The registrar obviously found that a surprising application saying that the practice was not to allow cross-examination on the issue of whether there is a genuine and substantial dispute and saying 'you know very well [this is to Mr Wolman] this court does not decide cases by way of cross-examination on the hearings of petition where the issue is whether there is a genuine and substantial dispute' And then later: 'It is unbelievably rare to have any cross-examination. We have these trials day in day out and we always do it on papers.'
>
> …
>
> 23… It is clear that the practice in insolvency proceedings before the CPR was that questions as to whether the petition debt or a cross-claim was the subject of a genuine and serious dispute were to be decided without any cross-examination. One can see that clearly set out, for example, in the judgment of Robert Walker J in *Moscow Savings Bank and the Russian Federation v Amadeus Trading Ltd* 26 March 1997 where he said, at p 18 of the transcript:
>
> > 'I cannot possibly adjudicate on that issue [that was an issue as to forgery] without both cross-examination and expert evidence from document examiners, neither of which is appropriate on the hearing of a winding up petition.'
>
> 24 That is supported by a case referred to by Robert Walker J, at p 3 of the transcript, namely the Court of Appeal decision of *In re Claybridge Shipping Co SA* [1997] 1 BCLC 572, 579 where Oliver LJ said:
>
> > 'it is only too easy for an unwilling debtor to raise a cloud of objections on affidavits and then to claim that, because a dispute of fact cannot be decided without cross-examination,

> the petition should not be heard at all but the matter should be left to be determined in some other proceedings.'

That quotation from Oliver LJ's judgment makes it perfectly plain that he pre-supposed that there would not be cross-examination on the hearing of a petition.

…

27 It follows that the only question remaining on this aspect of the appeal is whether Mr Registrar Jones exceeded the generous ambit of the discretion available to him in refusing to order cross-examination. In my judgment, he did not. Firstly, this is a case management decision which, on well established authority, is difficult to disturb on appeal. Secondly, the practice of the registrars is a matter which is much more within the knowledge of the registrars than of the judge hearing an appeal and a judge hearing an appeal should be slow to depart from what is said to be the regular practice of the registrars without very good reason. Thirdly, the whole basis of the practice in company winding up or bankruptcy is that the insolvency court is not generally a suitable forum for trying factual disputes. That is precisely why, if there is a real dispute, an order for winding up or bankruptcy will not be made. To allow cross-examination, as Mr Wolman sought, to test the genuineness of a cross-claim, would be likely, in practice, to just lead to every case where there was said to be a dispute as to the existence either of the petition debt or of the cross-claim, turning into a preliminary trial on the merits, but without the safeguards of disclosure and statements of case, et cetera, which are the normal practice when a court is resolving issues of fact. I cannot believe that that would be desirable. The registrar said, at para 25 of his judgment, having referred to Mr Wolman's application to be entitled to cross-examine the respondent in order to ascertain whether the quantum claimed was genuine:

> 'I refused this. The starting point is that this court will not normally hear cross-examination because it is only deciding the question whether there is a genuine and substantial dispute not the dispute itself. This normally can and should be decided on the written evidence because that evidence will provide the answer to that question. Cross-examination will not be allowed to trespass into evidence relevant to determining the dispute when the decision to be made is whether there is one.'

I agree and dismiss this ground of appeal."

42. Mr Brown further cautioned me with the words of Neuberger J in *Guinan* as follows:

> "[38] I find this case very difficult, because there can be no doubt whatever that if one had to decide who one believes on the evidence currently available and a decision had to be made now, one would (essentially for the reasons identified in the district judge's judgment and summarised very clearly and helpfully by Mr De La Rosa) say that Mr Guinan was much less likely to be believed than Mr Caldwell. All the factors I have identified point in that direction. However, our system works on the basis that where there is a serious issue of fact to be tried, particularly where that issue involves whether or not there was an agreement reached on the telephone on a certain date and whether the agreement was intended to have legal consequences that were binding, that unless there is no real prospect of one person's evidence being believed or accepted, the matter has to go to cross-examination (and disclosure), and to shut out one party from being able to cross-examine the other party and himself being cross-examined would, unless the court is satisfied there is no real prospect of his case being accepted, be unjust and inconsistent with our notions of justice…
>
> [48] I often find myself in a position where I have a fairly strong view as to who is telling the truth, but that strong view, based on documentation and witness statements, may turn out to be wrong. In those circumstances, the court does find itself in an unhappy position in one sense, because it puts the party who is likely to be right (Mr Caldwell) at the disadvantageous position in this sort of case of having to issue proceedings and pursue the claim, in circumstances where he is likely to win, and the court is therefore tempted (as I think the district judge was) to cut the Gordian knot at this stage. On the other hand, one's assessment of the likely outcome based on documents, where the issue is purely one of what was said on the telephone and possibly at a later meeting, may turn out to be wrong. The fact that the person who may actually have been rather dishonestly treated is going to leave court disappointed and find himself at the risk of incurring substantial delay and financial expenditure, is a result one regrets. But on the other hand, the law says that if there is any doubt as to whether a man who may well be dishonest is telling the truth or not, then he is entitled to disclosure and to cross-examination, and that is what he would be denied if the court confirms the bankruptcy order in a case such as this. I am afraid from Mr Caldwell's point of view this is that sort of case, and Mr Guinan's rights have to prevail over Mr Caldwell's reasonable expectations."

43. Rare though it is to permit cross-examination on the question of a disputed debt it is not impermissible and it is ultimately a case management decision. While Mr Dusoruth has to show a genuine dispute as to the debt, and that test is the same whether considered prior to the bankruptcy or an annulment, these disputes are being

considered long after the bankruptcy order was been made. I bore in mind that the effect of an annulment so long after the making of the bankruptcy order has the potential to affect the rights of the creditors as a class. For this reason, a court should not annul a bankruptcy order without investigation *(Housiaux v HM Customs & Excise* [2003] BPIR 858 at paragraph 25, per Chadwick LJ).

44. Secondly, this is a wholly exceptional case. Mr Dusoruth has been found guilty of an offence described as "bankruptcy fraud" in the Netherlands and Mr Ashworth, in cross-examining him on the question of COMI, did not seek to lull him into a false sense of security. He said at the outset of his questioning that he would be putting to him that he was a serial liar and fraudster. It appeared to me to be artificial to seek to put out of my mind the wholesale attack on Mr Dusoruth's credibility in the context of COMI when considering the question of the disputed debt. Mr Dusoruth chose not to file evidence in reply to Mr Appleton's third witness statement in order to address the challenges made to the assertions in Mr Dusoruth's statement in support of the Annulment Application, in particular in relation to the sudden production of documentary evidence. It appeared to me to be fairer to allow Mr Dusoruth to answer the criticisms of his evidence on the debts head on. I bear in mind the dangers of one party being cross-examined without the benefit of disclosure and without witnesses for the petitioner similarly being cross-examined. I also keep in mind the low threshold that Mr Dusoruth has to meet in respect of the dispute on the debt and that it is not the function of the court to conduct a mini-trial.

45. Here, of course, the other party to the proceedings is Orca UK, acting by its joint liquidators. Those office-holders have no direct knowledge of the affairs of Orca UK and are reliant on documents that they have obtained and an interview with Mr Green. It is not a case where one witness's credibility must be weighed against another's. Their case in relation to the alleged dispute is principally directed to the paucity of the evidence produced by Mr Dusoruth and its production late in the day. In reality, as Mr Ashworth accepted, cross-examination was of limited value. Many of the points put to Mr Dusoruth as to the inadequacies of his evidence could equally have been raised in submissions but cross-examination gave him the opportunity to address the petitioner's case on those inadequacies. In my judgment, Mr Dusoruth was at no disadvantage in being given the opportunity to address the points raised by Mr Ashworth.

Mr Dusoruth's evidence

46. Mr Dusoruth was not an impressive witness. He was evasive, failed to engage with questions and repeatedly sought to place reliance on legal advice to explain gaps in his evidence, such as:

    i) why he had not put in evidence demonstrating an extant appeal of his conviction in the Netherlands;

    ii) why he had left Bermuda in breach of his bail conditions, though he said this was a misinterpretation of the advice received;

    iii) why he did not inform his trustee that he was the ultimate beneficial owner of assets of £240 million, as he now appears to claim in contending that his bankruptcy has triggered a "fire sale" of his assets and losses of £172 million.

He did this so repeatedly that he had to be warned that he was in danger of waiving privilege in relation to the legal advice he received.

47. Many of his answers were simply extraordinary. In the first part of his cross-examination on COMI, Mr Ashworth questioned him on the circumstances of his departure from Bermuda following being charged with various offences of dishonesty. The account of this is given by Detective Inspector Ridley and Mr Dusoruth has filed no evidence to challenge it.

48. Mr Dusoruth and Mr Mast were arrested on 15th November 2018. On 16th November 2018 Mr Dusoruth was granted conditional police bail, which provided that he was not to leave Bermuda, that he was to "surrender passports" and to notify police of any change of address whilst on bail. Those conditions concluded with the following statement:

> "I have been informed that if I fail to surrender to custody I may commit an offence and be fined, imprisoned, or both; that if I fail to comply with any of the conditions set out above, I may be arrested; and that if I wish to vary any of the conditions I may apply to either the police station or court specified, stating my reasons".

Mr Dusoruth did indeed surrender his British passport in compliance with these bail conditions.

49. He was charged on 13th February 2019 with the following offences:

i) inducing persons to invest money on deposit with St. George's by dishonest concealment of material facts;

ii) removing from Bermuda criminal property, namely credit balances representing funds in St. George's; and

iii) three counts of knowingly or recklessly providing materially false information to the BMA.

The sums alleged to have been abstracted from St George's run to some tens of millions of dollars. Both he and Mr Mast were bailed to appear at Bermuda Magistrates Court on 21st March 2019.

50. Nonetheless, he left Bermuda on 8th March 2019, in the company of Mr Green, by an aeroplane privately chartered at a cost of €50,000. According to DI Ridley, enquiries of provider of the aeroplane yielded the response that "the client" had requested "the engines were to be started and ready to go, in time for the final passenger, who was described as 'the boss', who would arrive and board the aircraft with zero delay".

51. Mr Dusoruth's flight from Bermuda was made using a replacement British passport. The passport that he had surrendered to the police was due to expire on 3rd March 2019. The Bermudan police released it to his Bermudan lawyers for the purposes of renewal, on the condition that the expired passport and its replacement would be sent to those lawyers for onward transmission to the police. Mr Dusoruth's bail conditions required the surrender of "passports" in the plural. The expiring passport was sent to

HM Passport Office with letters from both Mr Dusoruth's lawyer and the Bermudan Police making it clear that the new passport was to be sent to the lawyer and not to Mr Dusoruth directly.

52. It appears from DI Ridley's evidence that someone calling himself Ramesh Dusoruth contacted the Passport Office on 25th February 2019 saying that he was now resident in Antwerp and asking for the passport to be sent there. How it then found its way back to Bermuda to allow Mr Dusoruth to use it is not entirely clear but it is alleged by DI Ridley that it was brought to Bermuda by Mr Green, who arrived in Bermuda on 7th March 2019. Mr Dusoruth denied that he had arranged this. His case was that the passport appeared at the reception of his hotel in Bermuda on 7th March 2019 and that he understood from his lawyer that he could leave. He said that he was given to understand that he had been given his "marching orders", though he later expressed this as "his marching orders not to do business in Bermuda". He accepted that his lawyer did not tell him in terms that he could leave Bermuda but that had been his interpretation of the conversation.

53. Mr Dusoruth did not put in any evidence in answer to this account and did not seek to cross-examine DI Ridley. His position was that he did not know how his new passport appeared at his hotel and that he innocently believed himself to be free to go following his conversation with his lawyer. One only needs to have set out the sequence of events to see that Mr Dusoruth's account is wholly incredible. No plausible explanation has been given for the appearance of his passport in Bermuda, it having been sent to Antwerp. The only realistic explanation is that this was arranged by persons acting on his behalf, as was the private aeroplane ordered to be standing on the runway ready to take him away, which arrived on the same day as Mr Green and his new passport.

54. To suggest that Mr Dusoruth believed himself to be free to go stretches credulity beyond breaking point. He had been charged with serious offences of dishonesty and required to surrender his "passports". A new passport appeared, and he fled the country on the following day, avoiding the additional risks of detection occasioned by taking a commercial flight, without any confirmation from the police that the charges had been dropped or that his bail conditions had been varied. Were this a genuine misunderstanding one might anticipate an honest person to surrender himself to the jurisdiction, but Mr Dusoruth is resisting the attempts of the Bermudan authorities to extradite him. In order to clothe this improbable account with any credibility at all one would expect evidence from his lawyer to confirm the possibility that he might have misunderstood his conversation with her, but Mr Dusoruth has chosen not to put in such evidence.

55. That is not the only apparent untruth in his evidence. He says in his first witness statement that:

> "On 18 November 2018 Mr Mast and I were arrested in Bermuda – in simple terms the allegations centred around an apparent missing USD 20 million. What followed was that between November 2018 and February 2019, I managed to demonstrate USD 20 million was not missing with it then being suggested that USD 5 million was missing which was later reduced by the Bermudan Crown Prosecution to USD 600,000.

> I presume that those making these allegations will be able to explain their actions once they make all documents available. At present I am unable to comment further."

DI Ridley is a member of the Bermuda Police Service assigned to the Financial Crime unit of the Specialist Investigations Department and was responsible for arresting Mr Dusoruth. He is clear in his statement that Mr Dusoruth did not cooperate and had demonstrated no such thing. Mr Dusoruth again chose not to answer this allegation or to put in a single document to show that any reduction in losses had been accepted by the authorities. I remind myself that charges in relation to the activities of St George's are not the subject of the petition. This is not a trial of those charges of any offences in connection with Mr Dusoruth's departure from Bermuda in breach of his bail conditions. Nonetheless, Mr Dusoruth's incredible account and apparent willingness to misrepresent the position in relation to the proceedings is inevitably of relevance when I consider whether I can take his evidence at face value in these proceedings.

56. This is particularly so in circumstances where Mr Dusoruth seeks to rely in opposition to the petition debt, insofar as it relates to the American Express Debt, on the Consultancy Agreement that he first produced to the liquidators of Orca UK in August 2021. This had not been produced in response to requests for information from his trustees. Mr Ashworth's position was that Mr Dusoruth produces documents as the circumstances require and again points to proceedings in which Mr Dusoruth has been involved, which, though not directly linked to this petition, shed light on Mr Dusoruth's credibility.

57. In this regard he cross-examined Mr Dusoruth as to litigation between Lioncross and a Dutch insurer called Delta Lloyd, and in particular a consultancy agreement allegedly entered into on 30th November 2011. Mr Dusoruth alleges that Delta Lloyd stopped honouring its obligations to Lioncross in about 2014, as a result of which Lioncross commenced proceedings. Delta Lloyd's response to the proceedings, according to Mr Dusoruth's statement, was as follows:

> "8.4.8… Delta Lloyd defended itself by claiming I had worked for free; the transactions were all a coincidence, and the consultancy agreements were forgeries. The lawyer representing Lioncross in the matter, Mr. Pieter Van der Korst of Lemstra Van der Korst advised (in which advice legal professional privilege is not waived) Mr Scicluna, the director of Lioncross, and myself that the position taken by Delta Lloyd was ridiculous and that no Dutch court would ever accept the position of Delta Lloyd. Hence, Lioncross did not respond to the positions taken by Delta.
>
> 8.4.9 This resulted in a judgment dated 14 November 2018, communicated on 17 November 2018, where the position of Delta Lloyd was accepted as Lioncross had not commented on it. That claim is now subject to an appeal by Lioncross which is to be further considered on 9 December 2021."

In fact, the judgment of the Netherlands court makes it clear that evidence and argument were presented by Lioncross. As Mr Dusoruth accepted, the court

concluded that Lioncross had forged a consultancy agreement and associated emails. It is true to say that it did not make a finding as to the individual responsible but it is notable that that court relied upon the use of a Flemish expression, according to the judgment an expression uncommon in Dutch, in an email purportedly sent to Mr Dusoruth, which expression was also used by Mr Dusoruth himself in examination in those proceedings. Mr Dusoruth offered no explanation as to how these documents could have come to be created without his knowledge as ultimate beneficial owner and director. He simply maintained that there was an extant appeal in relation to this decision, the existence of which remains unevidenced.

58. It was also put to Mr Dusoruth that, on 12th October 2021, Mr Dusoruth was convicted of bankruptcy fraud in the Netherlands. The finding was that he took $4.1 million from a company when faced with a claim from Delta Lloyd for $211 million. Mr Dusoruth disputed this, saying that the finding was that $22.4 million had been removed from the company and that $18 had been returned. There is no evidence of that.

59. Mr Ashworth took Mr Dusoruth to a penalty notice issued by HM Revenue and Customs, dated 12th August 2019, directed to Marsh Wall UK, imposing a penalty of £4.7 million. The notice explained that a penalty included in HMRC's consideration of the level of penalty was the behaviour of the director as follows:

> "the Director of the company knew or should have known that the input tax claim regarding the purchase of the property was linked to the fraudulent claim to input tax made by [Marsh Wall Jersey] to offset the output tax collected when it sold the property to [Marsh Wall UK]".

A personal liability notice was also issued in respect of Mr Dusoruth in the same amount. That is dated 16th September 2019 and has not been appealed. HMRC have proved in Mr Dusoruth's bankruptcy for that amount.

60. Mr Ashworth's reliance on this is twofold. First, he points to it as yet another example of Mr Dusoruth's dishonesty. Secondly, he says that the existence of this debt goes to the exercise of the court's discretion to annul the bankruptcy. I shall return to the latter point at the end of my judgment.

61. For the moment I should make it clear that the charges brought by the Bermudan authorities are currently unproven, the decisions of the Netherlands court are not binding on me and, while I cannot go behind HMRC's tax assessment in so far as it creates a debt, its stance as to Mr Dusoruth's knowledge in relation to a fraudulent input tax claim is no more than opinion evidence. Nonetheless, no objection was taken to their admissibility and Mr Brown accepted there were "considerable stains" on his client's character.

62. The significance of the evidence put in from the petitioner as to the flight from Bermuda, the absence of any reduction in the amount regarded by the Bermudan police as having been abstracted from St George's, the findings of the Netherlands Court and the decision of HMRC is that it was abundantly clear that Mr Dusoruth's credibility was being called into question so as to seek to demonstrate that the assertions in his witness statement could not be relied upon without supporting

documents sufficient to lend them credibility and that those documents themselves should be treated with caution where they emanated from Mr Dusoruth without corroboration of their provenance. Mr Dusoruth did not seek to provide any additional corroboration in the form of written evidence. Given what I have said about the extraordinary account given by him in relation to his flight from Bermuda, his general evasiveness and convenient reliance on undisclosed advice I cannot say that his oral evidence served to lend any further credibility to his case as to the disputed debt or in relation to COMI.

Service of the petition and knowledge of the bankruptcy order

63. It is logical to start with the question of service of the petition. Whether Mr Dusoruth had knowledge of it informs my approach to the genuineness of the case he now advances and my approach to the exercise of any discretion that I might have as to whether it should be annulled. Mr Dusoruth's evidence is as follows:

> "The first time that I became aware of the Bankruptcy Order was on or about (I am not entirely sure) 16 December 2020 when my lawyer I.J.K. (Ilse) van der Meer of Van Dijk Van Der Meer Advocaten called me at the prison at Zwolle and informed me that my wife, Barbara Eyckmans (Barbara) had become aware of the Bankruptcy Order. I was completely in shock and could not understand how this was possible."

64. The evidence of Mr van den Heuvel in his witness statement dated 6th November 2020 is that he instructed the court bailiff to serve on Mr Dusoruth, the petition, order for service, transcripts of the without notice hearing before me, my judgment of 12th October 2020, and the written submissions prepared for that hearing on Mr Dusoruth at Penitentiary Institution Overrijsel – HvB Zwolle, Postbus 400033, 8004 DA Zwoll ("the Prison"), together with the hearing bundles. The bailiff verified that Mr Dusoruth was still in the Prison and informed Mr van den Heuvel that the documents had been placed in sealed envelopes marked, in Dutch, "Official document. Read contents immediately" and served by his colleague on 14th October 2020. A report was annexed to Mr van den Heuvel's witness statement from the bailiff who effected service, confirming such service by delivery to the Prison.

65. A bailiff further delivered a letter to the Prison dated 9th November 2020 enclosing the statement of Mr van den Heuvel and asking Mr Dusoruth to provide him with an email address if he wished to attend the hearing of the petition by video link. A report confirming service at the Prison from the bailiff is exhibited to Mr Appleton's third witness statement. He similarly exhibits a report confirming service by the bailiff of the bankruptcy order at the Prison on 17th November 2020.

66. A receipt for documents is also exhibited by Mr Appleton, bearing the date 14th October 2020 and what looks like Mr Dusoruth's signature. This was provided by a Ms Schrijnder, a case manager at the Prison. Mr Dusoruth did not deny that this was his signature but suggested that it could be a receipt for documents in relation to another court case and that if he had received the documents, he would have responded.

67. I am afraid that I cannot accept this answer. There is a clear trail of documents showing service as directed by this court and in accordance with Dutch law. It terminates, in the case of the petition and details of the hearing, with a receipt by Mr Dusoruth. The provenance of that receipt is clearly explained in Mr Appleton's third witness statement and Mr Dusoruth has had ample opportunity to request from the Dutch authorities evidence as to what might have been delivered to him on around that date by other persons. He has not done so.

68. I am satisfied that he was properly served with the petition, Service Out Order and the petitioner's submissions on COMI, and received them into his hands, on or about 14th October 2020. I am similarly satisfied that he received the bankruptcy order itself on or about 17th November 2020. I reject his case that he was not aware of any of this until December 2020. It follows that he knew the Petitioner's case as to both his COMI and as to the debts relied upon before the petition was heard. He was informed that the petition hearing would take place by video and invited to provide an email to which the hearing link could be sent. He has offered no reason why he was unable to do so.

Mr Dusoruth's COMI

69. I turn then to consider the evidence on COMI, an issue that Mr Dusoruth could have raised on receipt of the petition and the Service Out Order but which he did not raise until making the Annulment Application in June 2021.

70. The petitioner's position is that the centre of Mr Dusoruth's business interests is in London. Mr Appleton's witness statement in support of the Service Out Application states that Mr Dusoruth administered his interests from Orca UK's offices in London and owned and developed properties in London for his own benefit using the companies of which he was the ultimate beneficial owner. In short, his position was that Mr Dusoruth's COMI was in England on the basis that he conducted his independent professional activity as a company director and investor from this jurisdiction. That was ascertainable by third parties and was indeed used by third parties, who corresponded with Mr Dusoruth at the basement flat at Pont Street.

71. The joint liquidators' evidence is that the basement flat at Pont Street was used as the office for Orca UK, though later this function was later moved to 1 Fore Street, London EC2. Mr Appleton puts into evidence a record of an interview with Mr Green that shows that he told the liquidators that St George's was similarly administered by Orca UK in London. He told them:

> "Orca, they provided like the trust services to St George's. There was like this computer system that we had that managed like all of the insurance policies. It used to do compliance and a lot of things related to that and that is what Orca would manage. That was what they would do mostly and then on the side they would also – it was like a private family office, so, you know, the logistics of – the logistics of how basically it would run".

He was asked if the administration of St George's was done in London and he said:

> "Almost everything. I think almost everything, admin-wise, yes. The programming for the system as well and it was all online. When I say 'online', it was like we were running off servers".

No objection was taken to the admissibility of this. I also note that the registered office of Marsh Wall UK was given, not merely as the same office as used by Orca UK but as "Orca Finance UK Ltd, 1 Fore Street London EC2Y 9DT".

72. Mr Appleton also points to the following in his written evidence –

i) Mr Dusoruth described himself as "self-employed" and an "investor" in a client identification form dated 19th September 2016 for a Cypriot corporate services provider, which gives Acacialaan in Antwerp as his "permanent address", Pont Street as a "temporary address" and a UK mobile phone number. He described himself as an "investor" "in real estate, insurance and derivatives", which might be said to be work carried out via the Marsh Wall Jersey, St George's and Orca UK companies.

ii) Mr Dusoruth held a British passport. The copy exhibited to Mr Appleton's statement expired in 2019 but a replacement was issued in the circumstances that I have described. He also has a UK National Insurance number.

iii) He also held a Belgian identity card, valid from 2016 to 2021, which states that his "nationality" is "United Kingdom".

iv) His nationality was given to the Registrar of Companies as British, his country of residence given as the United Kingdom and his address given as an address in London in relation to five companies of which he was a director, being the Pont Street Companies, Marsh Wall UK and Orca UK. He again gives his occupation as "investor" in relation to each of the Pont Street Companies and Marsh Wall UK and as "director" in relation to Orca UK.

v) Two offices in London were used for Mr Dusoruth's companies, the first being a basement flat at Pont Street, used as an office for Marsh Wall UK and Orca UK, and the second, used later, being in Fore Street. The Liquidators discovered files relating to Orca Finance NV, a Belgian company controlled by Mr Dusoruth, and documents related to his other companies, such as "know your client" checks in relation to investors in St George's, were recovered from Orca UK's London office.

vi) The tax affairs of March Wall Jersey and Marsh Wall UK were administered from London and tax advice obtained from DLA Piper in August 2017, addressed to Mr Dusoruth at a Marsh Wall company email address. This appears to have been invoiced to Marsh Wall UK and recovered from the Pont Street address, as were notes of meeting between Mr Dusoruth and representatives of HMRC in relation to Marsh Wall Jersey and March Wall UK, which took place at 1 Poultry in the City of London in October 2018.

vii) The Marsh Wall Property and the Pont Street Properties were to be developed by certain of Mr Dusoruth's companies. The economic gain on those

transactions, in which Mr Dusoruth was ultimately interested, would arise in England and Wales.

viii) Large sums were paid to Mr Dusoruth from Orca UK's HSBC sterling and euro accounts with the reference "expenses". Some £459,599.22 appears to have been paid to him from Orca UK's sterling account between 2015 and 2019 and €460,000 was paid to him from the euro account between 2013 and 2015, though large sums were also paid into these accounts by him, leading to a net outflow to Mr Dusoruth of £141,255.58. These "expense" claims were administered from Orca UK's offices.

ix) Similarly, large sums were paid to Mr Dusoruth's companies for services purportedly provided by them. These were billed to Orca UK and processed in London. The invoices were found at Orca UK's offices by the liquidators.

x) Mr Green told the liquidators that he would see Mr Dusoruth at Orca UK's office in London "maybe once every two weeks" and "at one point every single week". He had a desk in the office opposite Mr Green's own. Mr Green told the trustees that St George's was run from London.

xi) Invoices for the rent on Curzon Street were sent to Orca UK, for the attention of Mr Dusoruth, at Curzon Street, indicating his presence in the jurisdiction as a contact for Orca UK.

73. There are also factors highlighted by Mr Appleton that are of a more personal character but, at the least, serve to reinforce Mr Dusoruth's close and long-standing association with the jurisdiction –

i) He had a bank account at a branch of Barclays Bank, denominated in sterling, another two at a branch in Canary Wharf. Barclays wrote to him about the latter two accounts in February 2018. That letter was addressed to an address in Antwerp used by Brazz, but Mr Appleton's evidence is that the original letter was found in the Pont Street office. He held a further bank account at Metrobank's Southampton Row branch and it corresponded with him at Pont Street.

ii) Mr Dusoruth's American Express statements show consumer and personal expenses being incurred in London and were addressed to him at Pont Street.

iii) When he purchased a property in Belgium in 2010, the sales documentation recorded an address in London, as did a charge document in 1998. 1998 was also the year in which Mr Dusoruth married his wife at the Chelsea Register Office.

74. Mr Dusoruth's position was that he provided his services to his various companies via Brazz. Brazz was engaged by Orca UK and LPF to provide services to the companies and Mr Dusoruth was paid a salary accordingly. It was Brazz that was the nerve centre of his business operations and of Orca UK. It operated from Bosmanslei 34, 2018 Antwerp, along with other related companies. Its IT infrastructure was operated from a town a few miles away. Following Mr Dusoruth's imprisonment the main office closed and the business operated from a nearby property in Antwerp.

75. Mr Dusoruth's written evidence in relation to Orca UK sought to emphasise an international character in its operations. He said that individuals working in Bermuda, the Netherlands, the United Kingdom and the United States reported to Mr Vincent Mast (ordinarily resident in Belgium), Mr Pieter Steltenpool (ordinarily resident in the Netherlands) and Mr Kurt De Wreede (ordinarily resident in Belgium). Those gentleman would, with Mr Dusoruth, report to Mr Noel Buttigieg Scicluna in Malta. Additionally working as part of Orca UK's "core team" were a Mr Scott Willkolm, Mr Michael Crane, Mr Tim Stoddaert (all ordinarily resident in the USA) and Mr Benjamin Colas (ordinarily resident in the UK) Orca UK itself had operations in Belgium, Bermuda, Malta, the Netherlands and the UK.

76. He lists a further 14 "employees of Orca", who he describes as 'heavily centred in Belgium". These were however, as indeed Mr Dusoruth goes on to say in his evidence, employees of European Datacomm NV ("EDC"), which went into liquidation in December 2017. This company was concerned in vehicle tracking systems and there is nothing in the evidence to satisfy me that it had any role in the operation of Orca UK or Brazz. There is no basis on which Mr Dusoruth could justify prefacing his list of these employees with the words "Employees of Orca are heavily centred in Belgium." They were not employees of Orca UK at all, or of another of Mr Dusoruth's companies with "Orca" in its name, and had not been employed by EDC since 2017. I cannot accept Mr Dusoruth's account of the structure of Orca UK's administration.

77. There is a conflict between the accounts given by Mr Dusoruth in his evidence as to the amount of time that he would spend in London and the account given by Mr Green at interview with the liquidators. Mr Dusoruth explains that he himself hardly ever travelled to London for Orca UK's business. Those meetings that he had were concerned with business dealt with by Brazz. In 2009, UK activities represented 15% of Orca UK's worldwide team's activities. Again, he gives details of the structure of the UK operation. A Miss Belinda Van Kooten was responsible for Phase 1 of the development of the Pont Street Properties, but also assisted with the Marsh Wall project. She initially lived in the Netherlands and travelled to the UK but later emigrated to the UK. Mr Dusoruth says his contact with her was principally by telephone and video conference. Miss Carol Pevny was ordinarily in resident in London but travelled to the main office in Antwerp for meetings. It was following her resignation in 2016 that Mr Green was employed. He was ordinarily resident in London and used Pont Street and then Fore Street as a "satellite office", travelling to the main office in Antwerp and also to Bermuda.

78. As to his own background he explains that he was born in Antwerp and held dual Belgian and British nationality. At the age of eight he and his mother and brother moved to London following the death of his father but they returned to Belgium in under a year. He moved to London in November 1994 for work and lived in London until 2000, but maintained close links with Belgium, purchasing his family home in Antwerp in 1995 and returning there at least two weekends a month. His UK income was paid into a UK account. Following his return to Belgium he travelled to various countries over just under a year. From 2002 to 2012 he would travel to the UK for meetings but managed his business affairs from Antwerp. The trips involved signing documents but the development of the Pont Street Properties was the responsibility of Ms Van Kooten. He remained resident in Belgium and he sets out a number of

documents that show his domestic life is located there, such as car insurance, personal loans and so forth. It is not in fact in dispute that he is indeed resident in Belgium, but it is notable that this is really the only documentary evidence he supplies, apart from the questioned Consultancy Agreement and a handful of invoices to which I shall refer later.

79. He gives a detailed account of the amount of time that he would spend in the UK. I do not need to set it all out but, from November 2008 to March 2014, he would spend two to four days in London, staying overnight in addition to day visits once a week. From March 2014 to March 2016 he would spend four days a month in London, staying in Pont Street and also visit London for the day about twice a month. From March 2016 to November 2018 he travelled to London for the day about once a week for 20 weeks of the year. He has not been in the UK since November 2018. Throughout those periods he was principally living at the family home in Belgium and also travelled to Bermuda and other jurisdictions. Given Mr Dusoruth's misleading account of the number of staff employed by "Orca" in Belgium and the unsatisfactory nature of his evidence as a whole I am unable to accept this evidence as a reliable account.

80. I start from the position that Mr Dusoruth's description of himself as a "self-employed investor" or "director" / "investor" should be taken at face value. That is how he described himself on publicly available registers. It is a description that accords with the evidence. Mr Dusoruth operates his business and investment interests through a number of corporate vehicles of which he was the ultimate beneficial owner and of which he was a director. A number of these companies are registered outside England and Wales but the centre of gravity of the administration of Mr Dusoruth's business interests, on the evidence available to me, was in London.

81. The significant part of those interests, on the evidence before me, was the development of the London-based properties. The evidence is that monies were paid from St George's by way of unsecured loans to companies then holding the Marsh Wall Property and Pont Street Properties, which were based in London. Mr Dusoruth procured that the ownership of these companies would be "on-shored", by which process the properties came to be held by Marsh Wall UK and the Pont Street Companies. These were very substantial assets. The Pont Street Properties have been sold by receivers for £9.5 million and the Marsh Wall property for £26.65 million. Any profit from the intended development of these properties would have been realised in England. These assets were held by companies registered in England and Wales and beneficially owned and controlled ultimately by Mr Dusoruth, who gave his usual country of residence as the UK in documents filed at Companies House and the relevant company's registered office address as his service address. While Mr Dusoruth also stated that he had property interests in a number of countries, there is no evidence of this.

82. There is evidence of the administration of a number of Mr Dusoruth's companies, such as Orca NV and St George's, from the offices of Orca UK in Pont Street and the processing of Mr Dusoruth's expenses and invoices from his companies there. Documents relating to Mr Dusoruth's business and personal finances in England were also found at the Pont Street office. Mr Dusoruth's American Express statements were sent to the address and were processed and met by Orca UK, on his case to reimburse expenses, both business and personal, incurred all over the world. This tends to

suggest that the Pont Street office was not merely the administrative centre of Orca UK but, in turn, the regular administrative hub of Mr Dusoruth's business and financial interests as a whole.

83. I also take into account the evidence that I might expect to have from Mr Dusoruth to counter the petitioner's case. He provides extensive evidence of his residence and personal life in Belgium, which is not disputed, but has been unable to do so in respect of the administration of his business affairs. Nothing has been produced to show that Brazz provided an administrative hub for this in Belgium, indeed Mr Dusoruth's account of the extent of that company's operations at the time of the petition is unsupported by independent evidence. Troublingly, his account is misleading. He seeks, rather transparently, to pass off employees of EDC as employees of Orca UK, or a related entity including the word "Orca" in its name, in Belgium. This seems to me to be a crude attempt to create the impression of a substantial administrative backroom in Belgium. As I have said, I do not accept his account of this.

84. Strikingly, he provides no instances of third parties with whom he did business, or business creditors, being provided with details of a place of business outside England. The one exception to this is the Consultancy Agreement, which refers to Mr Dusoruth as "a British citizen with a professional address at Bosmanslei 34, 2018 Antwerp". I place no reliance on this document given that the unchallenged evidence is that it was not among the papers found by the liquidators and there is no evidence to support Mr Dusoruth's contention that it was made in 2015. Mr Dusoruth accepted that he had known for a long time that the petitioner's case was that this document was a later creation – a "forgery" as it was put to him in cross-examination – and yet he produced nothing to support the assertion that it was created in 2015. As I shall explain in the context of the disputed debt, this is extraordinary given the manner in which Mr Dusoruth says that this document was created and approved. I do not accept this document as a contemporaneous document recording an agreement reached in 2015 between the parties referred to in it. Moreover, it is not a document that would serve to demonstrate to third parties where Mr Dusoruth's COMI was in any event. The three companies mentioned in the Consultancy Agreement were each vehicles for Mr Dusoruth. The Consultancy Agreement is a document internal to the administration of Mr Dusoruth's business interests and was not for external consumption at all.

85. Standing back and looking at where Mr Dusoruth's principal place of business was as at the time of the petition, and where, objectively, his COMI would have appeared to be to third parties, particularly creditors, on the evidence I have, the answer must be England and Wales. Not only is this jurisdiction recorded at Companies House for Mr Dusoruth in connection with his administration, as a director, of the companies through which he conducted his business as an investor, it was also the location of the principal business assets of which he was the ultimate beneficial owner, insofar as the evidence shows. The management of Mr Dusoruth's business interests generally appears to have been conducted at Pont Street, as evidenced by documents relating to various of his corporate vehicles being found there and the expense and invoice processing function performed there. Mr Dusoruth's contrary case would have been quite easy to evidence by, for example, witness statements from the many people whom he claims were involved in the administration of his business interests in Belgium, but none have been produced.

86. I am satisfied that Mr Dusoruth's principal place of business was in England and Wales and he has not displaced the presumption that this was his COMI at the relevant time. To the contrary, I am satisfied that, considered objectively, England and Wales was the jurisdiction that would be ascertainable by third parties as the jurisdiction in which he carried on the administration of his affairs on a regular basis. None of this is altered by the fact that he was detained in Belgium when the petition was presented.

Disputed Debt

87. The debt is set out in the petition as follows:

> "The debtor is justly and truly indebted to us in the aggregate sum of £601,323.76 being payments made for the benefit of the debtor from the petitioner's bank accounts in respect of the debtor's personal American Express bills (denominated in Euros) in at least the sum of €361,899.73 and payments made for the benefit of the debtor from the petitioner's bank accounts in respect of rental of a property for the use of the debtor at Flat 3, 9A Curzon Street, London W1J 5HQ in the sum of £276,750.01. The petitioner is entitled to the repayment by the debtor of the said sums of €361,899.73 (equivalent to £324,573.75 as at 5 June 2020 being the date of the statutory demand at the rate of €1.115 to the Pound Sterling) and £276,750.01 amounting in total to £601,323.76 which were utilised by the debtor for his and his family's benefit and not for the benefit of the petitioner."

<u>The dispute as to the American Express Debt</u>

88. Mr Dusoruth accepted in cross-examination that his American Express bills were paid off every month from 26th November 2017 to 26th January 2019. He also accepted that the liabilities discharged by Orca UK included luxury goods and holidays but also substantial business expenditure. What he relies upon in his statement is an arrangement with Orca UK and Brazz reflected in the Consultancy Agreement, which he says allowed for this personal credit card to be paid off by Orca UK, which payments would be set off by Brazz against sums due from Orca UK for the time that he "spent working for Orca UK and/or its clients". He explains that this was because Orca UK was a small company and unable to obtain sufficient credit to finance its costs. The element of the sum that Brazz set off against sums due from Orca UK that was referable to his personal expenses was set off as between Brazz and Mr Dusoruth against loans made by Mr Dusoruth to Brazz. The way he puts this convoluted arrangement in his witness statement is as follows:

> "What was finally decided upon, resulting in the Consultancy Agreement was for Orca UK to pay the American Express balance with corporate control procedure and for Orca UK to set off payment of the personal costs against [Brazz]'s fees thereby eliminating the risk for Orca UK that it would not be repaid for my personal costs. Separately, [Brazz] to invoice Orca UK for the services whereby the payment is reduced with

> my personal costs. Instead of [Brazz] repaying a part of the outstanding debt to me, the debt is cancelled for an amount equal to my personal costs. As a result, [Brazz] obtains the same position without any cash flows."

89. Mr Dusoruth has produced the Consultancy Agreement and three invoices, which, he says, evidence the arrangements between his companies. The Consultancy Agreement expressed to be made between LPF, defined as "the Company" on the one part, Brazz, defined as "the Consultant" on the second part and Orca UK on the third part. LPF and Brazz were collectively referred to as the "Parties". Orca UK was not included in that definition. Remuneration was dealt with under that agreement at article 5 as follows:

> "5.1. In consideration for the Services, the Company shall pay to the Consultant for the Services rendered a base fee of EUR 1.500,- (one thousand five hunderd euro) per day increased with to the extent that travel required seperates the Consultant for more than two days from his family, an additional fee of EUR 1.500,- (one thousand five hunderd euro) per day. (the "Servicing Fee").
>
> 5.2. Travel time from the offices of the Consultant to the office of the Company, any Subsidiary thereof and their respective related clients will be included in the time that is charged. The Company agrees to pay any travel and accomodation expenses related to the family of the Consultant in relation to any travel required for the Services, subject to a maximum cost of EUR 1.500,- (one thousand five hunderd euro) per day.
>
> 5.2 The Consultant will be entitled to use a personal credit card (the Consultant Card) for travel, transport, accommodation expenses and other expenses incurred to travel to and during his presence at the office of the Company, any Subsidiary thereof and their respective related clients (the "Business Expenses") including any related meetings.
>
> 5.3. The Company and Orca UK agrees that Orca UK will on a monthly basis pay the total balance rendered on the Consultant Card. (the "Consultant Expenses") when requested by the Consultant.
>
> 5.4. The Consultant will send an invoice indicating the Invoice Amount to Orca UK. The Invoice Amount is the sum of the Servicing Fee and the Business Expenses reduced with the Consultant Expenses. The fee will be invoiced and paid on a monthly basis, the VAT is payable upon the issuance of the invoice.
>
> 5.5. To the extent possible, the Consultant will use property that is owned by the Company in order to minimise hotel costs. In such a case, the Company indemnifies the Consultant or any

> representative thereof for any and all related tax consequences of the use of such property.
>
> 5.6. All taxable remuneration paid to the Consultant shall be in gross amounts, without deduction of withholding tax, and the Consultant shall be solely responsible for registering with the VAT authorities and paying all taxes and social security contributions required under Belgium law or the laws of any other governmental body (and for filing the necessary forms and returns in that regard)."

I have retained the misspellings from the original document in the quote above. It is apparently signed on behalf of Brazz by Mr Dusoruth, Mr Colas on behalf of Orca UK and Mr Scicluna on behalf of LPF.

90. Mr Appleton's unchallenged evidence is that neither the Consultancy Agreement nor the invoices were among the papers found by the liquidators. The Consultancy Agreement was only produced by Mr Dusoruth as an exhibit to his witness statement in August 2021. Mr Ashworth put it to him that this document was simply a forgery. Mr Dusoruth stated that he obtained the Consultancy Agreement from "the central administration in Antwerp", which he again described as the administrative centre of his group of companies. Specifically he said that he obtained it from the back-up server in Aurelium. He said in oral evidence that it was drafted by someone with legal experience at the accountancy practice PwC, possibly with input from one of a number of well-known City firms – he gave the names Clifford Chance, Simmons & Simmons and Baker McKenzie. Given the tortuous drafting of the Consultancy Agreement, and the number of spelling errors and grammatical infelicities in it, I find this surprising.

91. Mr Ashworth asked him where the preparatory documents for this agreement were, such as emails circulating drafts. Mr Dusoruth also thought these would be on the server in Antwerp. He maintained that it was the decision of Mr Colcas and Mr Sciculuna and him to enter into the Consultancy Agreement, following advice from Mr Steltenpool, and it had been checked with PwC. He said that there would have been discussions about it by telephone and email. Similarly, he said that any minutes approving this arrangement would be kept electronically in Antwerp. Despite this, there is no evidence to show that the Consultancy Agreement was discussed at around the time it purports to have been signed. Nor is there any minute of board approval for this arrangement, which one might readily expect to be available if kept electronically, and there is no evidence from anyone alleged to have been involved.

92. Mr Dusoruth accepted that he had not produced a single contemporaneous document to support this agreement as a document entered into in 2015 or provided any metadata to show when it had been created. This is extraordinary given Mr Dusoruth's acceptance that he had understood for a long time that the petitioner's case was that the Consultancy Agreement was a forgery, in that it was a later creation to try to explain away the payments made to him. One might have expected a contemporaneous email proposing or confirming the arrangement or referring to it in some way. This is particularly so given that, on its face, the Consultancy Agreement was executed electronically on the same day by three people in three different cities. If there were any prospect of successfully meeting the challenge to the provenance of

this document I am satisfied that something could have been produced to support the contention that it was made in 2015. The fact that Mr Dusoruth has chosen not to produce a shred of evidence in support of this document, either in evidence filed in support of the Annulment Application or in response to the wholesale attack on his credibility set out in Mr Appleton's evidence in answer leads me to the conclusion that there is no real prospect of him doing so.

93. In any event, in my judgment, the Consultancy Agreement does not raise a genuine triable issue on the question of the propriety of the payments to American Express. It is very difficult to follow and inaptly drafted to reflect the agreement that Mr Dusoruth says was reached in 2015. It sets out what has been agreed between "the Parties", that is to say LPF and Brazz. Article 5, dealing with remuneration, imposes no obligation on Orca UK, except at article 5.3, which contains an agreement between LPF and Orca UK alone.

94. Article 5.1 provides for Brazz to charge a fee to LPF for services provided to LPF or its subsidiaries ("the Servicing Fee"). It does not contemplate a fee being charged to Orca UK. Article 5.2 provides that travel time from the offices of Brazz to LPF and its subsidiaries was to be included in the time charged, together with travel and accommodation expenses for the "Consultant's family", up to a cap, and a personal credit card ("the Consultant Card") could be used for the "Business Expenses".

95. Article 5.3 contains the agreement between LPF and Orca UK that Orca UK will pay the "total balance rendered on the Consultant Card". This is defined as the "Consultant Expenses". Mr Dusoruth maintains that this allowed the payment of the whole balance on the card, no matter what the expenditure related to. That does not seem to be the natural reading of the word "expenses". The clause envisages that an invoice will be rendered for the Servicing Fee and the Business Expenses, net of any Consultant Expenses paid. No provision is made for what is to happen if the total balance discharged exceeded the amount of the Service Fee and the Business Expenses, which is indicative of the Consultant Expenses being limited to Business Expenses incurred, rather than all conceivable expenditure charged to the card. More fundamentally, article 5.3 is not an agreement between Brazz and Orca UK to discharge the Consultant Expenses. The agreement is between LPF and Orca UK in this regard. The obligation to pay Brazz for the Servicing Fee and Business Expenses lay with LPF, although invoices were to be sent to Orca UK. There is no provision for the set off of sums paid to discharge the credit card liability against sums properly due from Orca UK to Brazz. I cannot see how discharge of Mr Dusoruth's credit card liability can be said to have benefitted Orca UK and the disparity between the arrangement that Mr Dusoruth sets out in his witness statement and the Consultancy Agreement itself is not explained.

96. Also exhibited to Mr Dusoruth's statement are three invoices, signed as approved by Mr Dusoruth himself, the provenance of which is as unclear as that of the Consultancy Agreement. The invoices are not consistent with article 5.4 of the Consultancy Agreement. They are not monthly invoices, but annual invoices, simply setting out large and barely particularised charges and stating that the sums will be discharged by set off. The invoice of 12th December 2017 for €93,000 concludes:

> "Payment will occur via set-off of company current balance of EUR 18,000 and a transfer of EUR 75,000 to our account."

The invoice of 30th June 2018 for €200,743.68 concludes:

> "Payment will occur via set-off in relation to American Express payments between 1st September 2017 and 30th March 2018 based on the agreement between Les Petit Fourmies, Orca Finance UK and Brazz Services for an amount of EUR 186,743.68 and an increase of EUR 14,000 in our favour into our current account."

The invoice of 30th June 2019 for €197,182.05 concludes:

> "Payment will occur via set-off in relation to American Express payments between 1st April 2018 and 30th March 2019 based on the agreement between Les Petit Fourmies, Orca Finance UK and Brazz Services for an amount of EUR 207,182.05 and a transfer of EUR 14,000 to your account."

These do not set out the Servicing Fee and the Business Expenses, "reduced with the Consultancy Expenses", but simply provide for the sums said to be chargeable by Brazz to be set off against, in the case of the latter two invoices, payments to American Express by Orca UK. There is no information to show how the invoiced sums were calculated so as to show that these invoices are anything more than a smokescreen to provide cover for the use of Orca UK's monies to discharge Mr Dusoruth's expenses.

97. Even bearing in mind the low threshold that Mr Dusoruth has to meet, I cannot accept at face value a Consultancy Agreement that is belatedly produced, as if out of thin air, and that is inconsistent with the invoices provided in support of it and the account Mr Dusoruth gives as to what it was intended to achieve. One would not of course expect Mr Dusoruth to produce the evidence that might have been produced at a trial, but in order to clothe this document, and Mr Dusoruth's case on the reasons for the payment of his personal credit card bills, with a degree of credibility against an allegation that this is an example of the dishonest creation of documents of a similar sort to that alleged in the Lioncross litigation, one would have expected some minimal corroborative evidence to have been provided.

98. I find that Mr Dusoruth's case in this regard is not sufficiently credible to meet the threshold of raising a genuine triable issue. This court daily must consider the quality of the evidence put before it when considering whether that threshold is met. It approaches alleged disputes with a degree of realism and in context. Where the authenticity of a document is raised in the context of a history of serious questions about the honesty of the debtor relying upon it, a debtor should provide some minimal evidence of its provenance, or at least explain why such evidence is not available, sufficient to satisfy the court that there is a real prospect that its authenticity will be accepted at trial. Mr Dusoruth has chosen not to do so. Even were I to be satisfied that there was a realistic prospect of this document having been agreed at the time, it goes nowhere near to supporting Mr Dusoruth's claim that there was an arrangement whereby his personal expenditure could properly be discharged by Orca UK.

The Curzon Street Debt

99. Curzon Street is described as a two or three bedroom flat in Mayfair, for which the rental was £8,450 a month, going up to over £9,000 a month. Mr Green in interview with the liquidators said that it was occupied by a member of Mr Dusoruth's family. The invoices are addressed to Orca UK with the name "Ramesh Dusoruth" underneath that of the company and above the address of the flat. Mr Ashworth put it to Mr Dusoruth that rent demands were addressed to Mr Dusoruth at that address because he was in occupation with his family. I am not satisfied that this, of itself, must lead to the conclusion that Curzon Street was rented by Mr Dusoruth personally or that it was used by him or his family. It is not unusual for a document addressed to a company to identify a point of contact, even if it does not expressly state that it is for the attention of that person.

100. It is, however, notable that the invoice was addressed to an address in England rather than the address in Belgium that Mr Dusoruth says was the administrative hub of his business interests. More notable still is that the invoices for rent, insofar as they are in evidence, were addressed to the company, giving Mr Dusoruth's name as the contact, at the flat itself, not the registered office of Orca UK.

101. Mr Dusoruth's evidence is that he and his family stayed at 66a Pont Street when in London. Curzon Street was used only for Orca UK's consultants, including Mr Steltenpool and a Mr Willkolm and latterly Miss Van Kooten, whom he describes as a "Dutch citizen who initially lived in the Netherlands and then emigrated to the United Kingdom" who "mainly worked from home, travelling from the Netherlands to the United Kingdom as part of her own agreement with Orca". Ms Van Kooten originally was provided with hotel accommodation from March 2012 but, as her time in the UK in connection with the Pont Street and Marsh Wall projects increased, it was decided towards the end of 2015 that Orca UK would rent a flat. Mr Dusoruth says:

> "As an employee of Orca UK, she assisted the architects in relation to the Marsh Wall Project … and was preparing for the conversion of the basement and ground floor apartment at 66A Pont Street".

102. Mr Appleton notes it is not at all clear why expenses related to Ms Van Kooten, as the person responsible for the refurbishment of the Pont Street Properties, should be payable by Orca UK. Pont Street was not owned by Orca UK or by St George's from which monies paid into Orca UK came. Again there is simply nothing to support this alleged arrangement, nor why it appears from the liquidators' investigations that €387,879 and £49,628.35 was paid to Ms Van Kooten from Orca UK's bank account.

103. The sending of rent demands addressed to Orca UK and Mr Dusoruth and of electricity demands addressed to Orca UK at the flat are strongly suggestive that the address was given to the landlord and electricity provider on the basis that correspondence sent to it would come to the attention of a person involved in the management of Orca UK, and indeed to the attention of the person named on the rent demand. That is inconsistent with the flat being occupied by a consultant. Again, it would have been easy to produce some evidence of the alleged arrangement with Ms Van Kooten, given her apparently long association with the company, in the form of a witness statement from her or from someone else who could confirm the

arrangements. Again, however, Mr Dusoruth has chosen to assert the propriety of the arrangements and then decline to put in any sort of reply to the incongruities highlighted about his assertion in the evidence filed by the petitioner in answer. That will inevitably inform the court's view as to the substance of the dispute.

104. I am not satisfied that Mr Dusoruth has raised a triable issue as to this flat being used by him or a family member for his benefit. No such documents have been produced and Mr Dusoruth, again having known of what the petitioner says about the Curzon Street Debt since 2020, has produced nothing to support his case.

105. In my judgment, Mr Dusoruth has not raised a triable issue in this case. It was, given the circumstances in which Mr Dusoruth finds himself, inevitable that he would be expected to show some corroborative evidence of his case. I should say that I am satisfied that that is a conclusion to which I have would have come had this question been determined on submissions alone. As is often the case, cross-examination served in large measure simply to draw to the court's attention the relevant documents and highlight gaps in the evidence. Mr Dusoruth's failure to provide credible answers in cross-examination fortifies my view but, at bottom, this is a familiar type of case in which assertions are made by a debtor that are not credible in themselves and the minimal level of evidence that might serve to fortify those assertions so that they cross the sustainability threshold is absent.

Liquidated sum

Legal principles

106. Section 267 IA 1986 provides insofar as it is relevant:

> "(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—
>
> …
>
> (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".

Mr Dusoruth's position is that neither of the debts set out in the petition is a liquidated sum and neither is capable of founding a petition.

107. No definition of "liquidated sum" is given in the statute but the concept has been considered both by the courts and in academic works. The Petitioner's case is straightforward. Mr Ashworth referred me to the concise summary of the principle given by Chief ICC Judge Briggs in *Sandelson v Mulville* [2019] EWHC 1620 (Ch) at paragraph 5:

> "To be liquidated the sum of money has to be 'a specific amount which has been fully and finally ascertained'. If a debt is subject to an account or a claim for damages it will not be liquidated: section 383 of the Act and see generally *Personal Insolvency: Law and Practice* fifth Edition at 8.35-8.39""

To like effect is the statement in *Law of Insolvency* (5th Ed), at paragraph 6-047:

> "The decisive hallmark of a liquidated claim is that the process of quantification is already complete and there is an absence of any element of 'penalty' to be imposed over and above the actual loss sustained."

108. The petitioner says that its claim is for a specific sum in the case of the American Express Debt and the Curzon Street Debt. In relation to the American Express Debt it says that Orca UK, having discharged Mr Dusoruth's liability, is subrogated to American Express's debt claim against him and can petition just as American Express itself could. Similarly, if Orca UK discharged Mr Dusoruth's personal liability to pay rent on Curzon Street, it would similarly be subrogated to the landlord's claim for the rent. Even if the lease were in Orca UK's name the rent was properly a liability of Mr Dusoruth. The debt is claimed in a specific sum. It is not a damages claim, which would plainly be unliquidated, and nor is it a claim for an account of Mr Dusoruth's use of company money. It would be open to Orca UK to seek such an account, but it does not have to do so. Its claim is for restitution for unjust enrichment and it can simply claim payment of the specific sum of money misapplied by him without any need for an accounting exercise. This is what it did and nothing further is required to quantify its claim. Mr Dusoruth may dispute liability for some or all of that debt but that does not render the claim itself a claim for an unliquidated sum.

109. Mr Dusoruth's position is that this is not open to the petitioner on the basis of long-established authority. I shall consider those authorities first before addressing Mr Ashworth's subrogation point. Mr Brown relied on *Hope v Premierpace (Europe) Ltd* [1999] BPIR 695. Rimer J (as he then was) there considered an appeal from the district judge's refusal to annul a bankruptcy order on the grounds that it ought not to have been made. The petition was based on a claim that the debtor had misappropriated monies during his employment with the petitioner. The debtor in fact admitted that he had taken monies from the company but said that this was reimbursement of payments he had personally made on its behalf. The debtor had not attended nor been represented at the original hearing, having been told by an court official that the hearing had been adjourned. He applied to annul on that basis. The district judge dismissed the annulment application.

110. The appeal to the High Court was presented, first, on the basis that it was elementary the courts should not make final orders without giving the debtor the opportunity to be heard and it was inconceivable that the judge would have made the bankruptcy order had she known that the debtor had been misled as to the hearing date. There was only one way that the judge hearing the annulment application could properly have exercised her discretion in the circumstances and that was to annul the bankruptcy order.

111. That argument succeeded and Rimer J considered that he should deal with the matter on the basis of the argument that had been advanced before the district judge, without consideration of the underlying merits. The bankrupt had, however, obtained permission to argue the additional ground that the petition debt was not for a liquidated sum. Rimer J dealt with this at 699 as follows:

> "The point Mr Rainey makes is that a creditor's petition can only be based on a debt for a liquidated sum (see s 267 of the Act). If there is no such debt then the court has no jurisdiction to make a bankruptcy order. He submits that there is no such debt in this case. The company's claim is that the debtor stole the money. The debtor disputes that but, assuming the company is right, what is its cause of action to recover the money? Mr Rainey submits, and I did not understand Miss Bristoll to disagree, that the alternatives, in descending order of likelihood, are: (i) a claim for money had and received; (ii) a claim against the debtor as a constructive trustee; (iii) a claim in deceit; (iv) a claim for breach of an implied term in his contract of employment; and, (v) money paid under a mistake of fact.
>
> Mr Rainey submits, and I agree, that claims (iii) and (iv) are claims for damages and cannot be claims for a liquidated sum. He also submits that claims (i), (ii) and (v) are claims for an account and payment and cannot be claims for a liquidated sum either.
>
> I have no difficulty in accepting that claim (ii) can only be one for an account and payment. Mr Rainey did not show me any authority expressly demonstrating the proposition that claim (v) is also such a claim but I am prepared to accept that he is correct; and, in any event, I regard it as highly improbable that the company would so formulate its claim against the debtor. As to claims for money had and received the decision of the Court of Appeal in *Portman Building Society v Hamlyn Taylor Neck (a Firm)* [1998] 4 All ER 202 affirms that the remedy for such a claim is an account and payment. Millett LJ said at p 205d:
>
> > 'By its writ the society maintains a number of alternative causes of action. It claims damages for breach of contract, the tort of negligence or breach of trust; compensation for breach of fiduciary duty; or repayment of moneys had or received to the use of the society. It is to be observed that, with the exception of the last, all are claims to recover monetary compensation for loss in consequence of a wrong alleged to have been committed by the firm. The last claim, however, is a straightforward claim in quasi-contract for money had and received or, as we would now call it, restitution. As counsel for the society acknowledged, the

> remedy for such a claim is not damages but an account and payment.'
>
> Mr Rainey submits that it follows that none of the company's claims for a remedy is in the nature of an order for payment of a liquidated sum. It is irrelevant that the company claims to be able to identify its claim down to the last penny. It is still faced with the difficulty that its range of alternative claims against the debtor are claims for damages or for an account and payment. A claim for damages is not a claim for a liquidated sum; and nor is a claim whose remedy is that of an account, even though it may be that the taking of the account so ordered could be dealt with in a summary way and a judgment there and then given for a specific sum.
>
> I accept that submission. I agree with Mr Rainey that the petition is not based on a debt for a liquidated sum. It follows that in my judgment no bankruptcy order could properly be made on it. I will therefore not merely discharge that order. I will also dismiss the petition."

Mr Brown argued that that is exactly the position here. A claim for restitution for unjust enrichment, or money had and received to use the terminology in *Hope v Premierpace*, is a claim for an account and order for payment. The petitioner's claim is thus not for a liquidated sum.

112. Mr Ashworth argued that the statement in *Portman Building Society v Hamlyn Taylor Neck (a Firm)* [1998] 4 All ER 202 that the remedy for a claim for money had and received is an account and order for payment was based on a concession by counsel and was *obiter dicta*. An account is not "a remedy", is discretionary and is not necessary in all cases. Thus, in *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 Lord Millett, sitting as a judge of the Hong Kong Court of Final Appeal, said:

> "167. It is often said that the primary remedy for breach of trust or fiduciary duty is an order for an account, but this is an abbreviated and potentially misleading statement of the true position. In the first place an account is not a remedy for wrong…
>
> 168. In the second place an order for an account does not in itself provide the plaintiff with a remedy; it is merely the first step in a process which enables him to identify and quantify any deficit in the trust fund and seek the appropriate means by which it may be made good… Where the defendant is ordered to make good the deficit by the payment of money, the award is sometimes described as the payment of equitable compensation; but it is not compensation for loss but restitutionary or restorative.
>
> …

> 172. At every stage the plaintiff can elect whether or not to seek a further account or inquiry. The amount of any unauthorised disbursement is often established by evidence at the trial, so that the plaintiff does not need an account but can ask for an award of the appropriate amount of compensation. Or he may be content with a monetary award rather than attempt to follow or trace the money, in which case he will not ask for an inquiry as to what has become of the trust property. In short, he may elect not to call for an account or further inquiry if it is unnecessary or unlikely to be fruitful, though the court will always have the last word."

It is notable there that, while Lord Millett states that an account is not a remedy, he nonetheless identifies it as the first step in a process enabling the claimant "to quantify" a loss and "seek the appropriate means" by which that loss can be restored.

113. Rimer J considered the point again in *Navier v Leicester* [2002] EWHC 2596 (Ch). This was again an appeal to the High Court. Mr Leicester sought to reverse the decision of the district judge setting aside a statutory demand presented against Mr Navier, who was the official receiver attached to the court. The alleged debt arose from the execution of a writ of *fi. fa.,* apparently leading to damage to Mr Leicester's property and, the failure of the enforcement officer to account for property taken, including some £60,000 of cash. The official receiver in fact had no involvement in Mr Leicester's affairs at the time and no involvement in obtaining or executing the warrant. The district judge set aside the statutory demand on the basis that there was plainly a genuine and substantial dispute as to the debt. On appeal, Rimer J thought it "an almost unprecedented proposition" that the point was even arguable and the appeal would have failed on that basis alone. The judge himself also raised what he described as the "fairly obvious" point that the claims could not be regarded as claims for liquidated sums. He said at paragraph 20:

> "Most of the claims are, quite obviously, claims for compensation for damage to his business and, therefore, are in the nature of claims for damages, which are obviously not claims for payment of a liquidated sum."

He went on at paragraph 21:

> "The claim in respect of the £60,000 cash might be thought to be different, but, as it seems to me, the claim for that would be a claim for money had and received, or, as it is more popularly known nowadays, a claim for restitution. So it is a claim for an account and payment and not a claim in debt, and it makes no difference that the claim can be calculated down to the last penny. I had occasion to consider points such as this in my decision in *Hope v. Premierpace (Europe) Ltd* [1999] BPIR 695, at 699. I expressed the view in that case that a claim for an account and payment was not one for debt which could form the subject of a statutory demand. I have no reason to depart in this case from the view I expressed in that one. Again, however, I have not heard from Miss Markham on that point,

> and it is not necessary for the purposes of the disposition of this appeal."_

Mr Ashworth thus notes that the point was obiter, unargued and unanalysed in *Navier* and is not clothed with the status of ratio by which I am bound.

114. In *Truex v Toll* [2009] EWHC 396 (Ch) a solicitor sought to bankrupt his former client for unpaid fees, which had not yet been assessed. The Chief Registrar at first instance held that the sum due must exceed the statutory minimum required to found a bankruptcy petition. He gave permission to appeal. Proudman J held that the fees had not been judicially assessed and did not constitute a liquidated sum to any extent. She said:

> "36. In my judgment whether a sum is liquidated and whether there is a defence to the claim are separate issues and the first must be determined before the second is addressed. Accordingly any admission, acknowledgment or agreement converting the amount claimed from an unliquidated to a liquidated sum must be one from which the client has bound himself not to resile. A mere acknowledgment would be insufficient to bind him to forego judicial assessment or determination.
>
> 37. On this basis it was not possible to say that any part of the work done by Mr Truex had been quantified, or was quantifiable by the bankruptcy court as a mere matter of arithmetic. It seems to me that the chief registrar conflated the issue of whether there was a genuine dispute about a liquidated debt with that of whether the sum claimed was liquidated in the first place. The bill as a whole was capable of challenge as to quantum, was thus for an unliquidated sum and did not fulfil the requirement of section 267. The same point applies to the chief registrar's alternative finding that there could not be a genuine dispute as to at least £750 of the costs."

I pause there because I have, in my discussion above, dealt with the question of dispute first. That is because that question was dealt with first by way of cross-examination and then in counsel's submissions. It is of course right that, logically, the question of whether a debt can found a petition at all is a threshold question that must be answered before one needs to move on to the question of whether, if so, it is disputed. The potential for dispute must not however cloud the question of whether the debt is a liquidated sum in the first place.

115. The principle was discussed again by Briggs J, as he then was, in *McGuinness v Norwich and Peterborough Building Society* [2010] EWHC 2989 (Ch). This was an appeal from the decision of a deputy registrar to make a bankruptcy order on a petition based on sum due under a guarantee agreement. He held that the agreement created a liquidated liability in debt rather than an unliquidated liability in damages. On appeal, Briggs J held that the deputy registrar had been correct to characterise the obligation as one of debt, but he observed:

> "23… It was a liquidated sum within the meaning of section 267(2)(b) of the Act. It is therefore unnecessary for me to decide whether, as Ms Start submitted, I should depart from the decision in *Hope v Premierpace (Europe) Ltd* [1999] BPIR 695. None the less, and in case the issue should arise again, I will make the following observations about it.
>
> 24 The first is that it does seem remarkable that a person from whom £1,000 has simply been stolen should be unable to present a bankruptcy petition (following a statutory demand), whereas a person with a £1,000 contract debt may do so, always assuming that there is not a bona fide defence to either claim on reasonable grounds. As Proudman J said in *Truex v Toll* [2009] 1 WLR 2121, 2129, the question whether a sum is liquidated and whether there is a defence of the claim are entirely separate issues.
>
> 25 Secondly, I have real doubt whether distinctions based on different causes of action (ie debt, account and payment, damages) satisfactorily address the purpose behind section 267(2)(b) of the Act, which seems to me to distinguish between cases where there is no issue as to the amount of a liability, and cases where some process of assessment by the court is necessary, before the amount can be identified. I can well understand that a claim for an account which depends upon the defendant providing disclosure as to the amount of an alleged secret profit cannot possibly be a claim for a liquidated sum. By contrast, a claim to recover stolen money, where the precise amount stolen is known by the claimant, seems to me in principle to be a claim for a liquidated sum, even though the form of action is one for account and payment."

116. On a further appeal to the Court of Appeal, reported at [2011] EWCA Civ 1286, Patten LJ carried out an extensive review of the authorities which I do not propose to repeat in full but I will set out some parts of it. He identified the introduction of the term "liquidated sum" in the Bankruptcy Act 1869 as a codification of the earlier decisions of the court not admitting to proof debts which were not quantified and had to be determined by a jury. He said:

> "[36] These authorities indicate and I think establish that a debt for a liquidated sum must be a pre-ascertained liability under the agreement which gives rise to it. This can include a contractual liability where the amount due is to be ascertained in accordance with a contractual formula or contractual machinery which, when operated, will produce a figure. *Ex parte Ward* is the obvious example of that. Claims in tort are invariably unliquidated because they require the assistance of a judicial process to ascertain the amount due by way of damages. In some cases the calculation of the award will be straightforward and obvious but the unliquidated nature of the

> claim excludes it from being a good petitioning creditor's debt which satisfies the requirements of s 267 of the 1986 Act.
>
> [37] The most obvious use of the term 'liquidated' has been in relation to liquidated damages. 'Liquidated' has been defined judicially as meaning the sum which the parties have by their contract assessed as the damages to be paid for its breach: see *Wallis v Smith* (1882) 21 ChD 243, at 267, per Cotton LJ. If a genuine pre-estimate of loss the provision is enforceable according to its terms. I would therefore regard a claim for liquidated damages as one for a liquidated sum within the meaning of s 267 of the 1986 Act unless a claim in damages is excluded by the use of the word 'debt'.
>
> [38] Another familiar context in which the word 'liquidated' appeared was RSC Ord 13 which governed when a plaintiff could enter final judgment against a defendant who failed to give notice of intention to defend. Final judgment could only be entered when the writ was endorsed with a claim for a liquidated demand: see RSC Ord 13, r 1. Claims in debt or for liquidated damages fell within this rule but it did not include claims in tort where the damages were necessarily unliquidated or those for contractual damages where the measure of liability was not specified in the contract itself.
>
> [39] The authorities in the field of bankruptcy as to what constitutes a liquidated sum are consistent with this approach. *In Re Broadhurst* the measure of liability under the contract was readily calculable but that did not make it a liquidated claim. As Maule J put it in his judgment, there was no specific sum engaged to be paid to the creditor."

117. He went on to deal with *Hope v Premierpace* as follows:

> [40] For this reason *Hope v Premierpace (Europe) Ltd* [1999] BPIR 695 was in my view correctly decided on its facts. The misappropriation by the employee of money from his employer gave rise in that case to an obvious liability either for money had and received or for breach of trust or for deceit. But as Rimer J held, none of those claims is for a liquidated sum properly so-called. They are all claims for monetary compensation in a sum equivalent to the employer's loss…
>
> [41] Read in context, the judge was not saying that a claim in damages could not be a debt within the meaning of s 267 of the 1986 Act regardless of the nature of the claim. All that he was asked to decide was whether the claims on which the petition was based were for a liquidated sum."

118. Mr Ashworth's submission was that *Hope v Premierpace* was thus approved on its particular facts and Rimer J's obiter observations did not constitute a statement of

principle. He referred me further to *Goff & Jones: The Law of Unjust Enrichment* (9th ed) at paragraph 1-44, which says:

> "A claim for restitution on the ground of unjust enrichment is not a claim for damages or equitable compensation founded on the commission of a civil wrong, but a claim for a liquidated sum that is treated as a claim in debt for procedural purposes. This is true not only of claims for the value of a money payment, but also of claims for the value of services or goods which must be quantified before the court can make an order against the defendant."

To similar effect is the statement in *Chitty on Contracts* (34th Ed) at paragraph 32-068, to which Mr Ashworth also referred me, that:

> "the unjust enrichment claim has procedural and evidential advantages in that it is a liquidated claim"

119. The English authority given for the first of the two scenarios in the second sentence in the footnote to the extract from Goff and Jones, to which I was not referred, is *Merito Financial Services Ltd v Yelloly* [2016] EWHC 2067 (Ch). Master Matthews considered claims of misappropriation by a director from a company of certain sums (referred to as "category b." by the Master) and the submission of false claims for business expenses in breach of trust or his fiduciary duty (referred to as "category d."). At paragraphs 45 to 47 of his judgment Master Matthews considered these claims as follows:

> "45. As to categories b. (excluding c.) and d., the claims are also to specified sums, but rather as money had and received, or in old fashioned terms for *indebitatus assumpsit*, rather than as compensation for wrongs committed. In the prayer, the Claimant asks for 'restitution of all sums which the Defendant has received or is deemed to have received and by which he is unjustly enriched'. The wording in the Claim Form is more or less the same.
>
> 46. As Farwell LJ made clear in the citation from *Lagos v Grunwaldt* [1910] 1 KB 41, above, many of the different causes of action now subsumed within the theory of unjust enrichment/restitution were historically grouped under the old heading *indebitatus assumpsit*. A cause of action which gave rise to what was called an *indebitatus assumpsit*, if proved, resulted in a judgment for a money sum, and similarly therefore, in the case of a default judgment. Many of these causes of action were pleaded as 'money had and received to the use of the plaintiff' or 'money paid at the request of the defendant'.
>
> 47. In my judgment, if before the development of the unified theory of restitution a particular cause of action would have justified a default judgment for a sum of money rather than a

> judgment for damages to be assessed, it should and does not cease to justify that judgment merely because a group of academic lawyers (and, to a more limited extent, judges) have regrouped such claims under the banner of a different theory, namely unjust enrichment, which may include claims which have to be assessed. That would be the worst kind of academic interventionism. Litigants' rights and remedies must not depend on the state of academic discourse from day to day. And any cause of action giving rise to a liquidated demand under the RSC will now give rise to a claim for 'a specified amount of money', because this expression is at least as wide, and probably wider."

He held that those two categories were claims for "a specified amount of money" for the purposes of the Civil Procedure Rules and that default judgment could be entered for the amount claimed, together with interest, rather than for damages to be assessed.

120. The footnote to the passage from Chitty on Contracts cites *Biggerstaff v Rowatt's Wharf* [1896] 2 Ch 93. In that case, the question arose as to whether a claim for monies had and received for a consideration that had wholly failed in respect of undelivered barrels of oil could be set off against unpaid rent. The judge at first instance held that it could not, the claim in respect of the barrels being unliquidated and the claim in respect of rent being liquidated. The Court of Appeal disagreed. Kay LJ said at 105:

> "The point chiefly argued below seems to have been that Harvey, Brand & Co.'s claim against the company was a claim for unliquidated damages. But they bought from the company and paid for 7000 barrels at 3s. 6d. each; there was a short delivery, and they have a claim against the company of 3s. 6d. for each of the barrels which the company failed to deliver. As to those barrels there was a total failure of consideration, and Harvey, Brand & Co. had a liquidated claim for money had and received, and had before the appointment of the receiver an inchoate right of set-off."

121. The passages from the two practitioner texts relied upon by Mr Ashworth do not assist me. As the passage from *Goff & Jones* states on its face, and consideration of the authority puts beyond doubt, it is addressing a question of procedure and the ambit of a "claim for a specified amount of money" for the purposes of a request for default judgment under CPR Part 12. The treatment of a sum claimed in a prayer for relief for the purposes of a procedural judgment in default does not seem to me to be determinative of the substantive requirements of section 267 IA 1986. Although the Rules of the Supreme Court had previously used the term "liquidated demand" rather than "claim for a specified amount of money", the superficial similarities of the expressions "liquidated demand" and "liquidated sum" do not mean that the same approach is to be applied. It is clear from the judgment of Patten LJ in *McGuiness,* at paragraph 38, that he had in mind the use of the expression in the default judgment context but it did not lead him to doubt Rimer J's approach to the question of what constituted a claim for a liquidated sum in *Hope v Premierpace*. Similarly, the

treatment of cross-claimed sums for the purposes of the rules of set off is also an entirely different context.

122. I do not read Patten LJ's judgment as suggesting that *Hope v Premierpace* is confined to its facts. He was observing that it was not authority for the proposition that a claim for damages can never be regarded as a claim for a liquidated sum. It appears to me that it is good law as to the principle of what can be regarded as a liquidated sum for the purposes of section 267 IA 1986. Indeed, he says in terms that a claim for money had and received is not a liquidated sum within that section. Moses and Ward LJJ agreed. I am bound by the Court of Appeal's decision in that regard.

123. The law is that a liquidated sum is a sum that that is "pre-ascertained" or "a specific amount which has been fully and finally ascertained", although that allows for calculation in accordance with a contractual formula or mere addition. The question of whether a debt is for a liquidated sum must be kept distinct from whether it is disputed. A person may have no prospect of defending a claim for damages, or unassessed solicitors' fees, in excess of the statutory minimum but that does not convert the claimed sum into an unliquidated sum. By the same token it does not matter whether the petitioner puts a figure on his claim, even if he can calculate it "down to the last penny". It must be liquidated either because the quantification of the debt is one from which the debtor is not permitted to resile as a matter of admission, acknowledgment or agreement, or because it has been determined as a matter of the court process.

124. While it may be clear that the debtor's defence to the claim has no merit, until there is a determination that the petitioner has been unjustly enriched, and, if so, to what extent, and what restitutionary remedy is appropriate, it cannot be said that the debtor's liability has been pre-ascertained. To hold otherwise would, as Proudman J said, conflate the nature of the claim with whether there is a dispute about liability. The process may require little or almost nothing by way of an account – that is acknowledged by Rimer J in *Hope v Premierpace* in saying that the account may be dealt with in a "summary way" – but the process of accounting is, as Lord Millett says, the first step in a process enabling the claimant "to quantify" a loss and "seek the appropriate means" by which restitution may be effected. Until that quantification has taken place and the appropriate means of restitution determined, the claim cannot be liquidated within the meaning of section 267 IA 1986. It is true that there may be cases where the extent of the claimant's claim is so clear that a formal account is unnecessary and might not be even be pleaded – the claimant can simply say "this is the sum to which I am entitled". That would have been the position in both *Hope v Premierpace* and in respect of the cash in *Navier*. Nonetheless, the claimant's entitlement to his remedy and the sum in which he is entitled to be reimbursed must still be established before a petition may be presented.

125. That leads me to the question of subrogation to the debt discharged by the payments, on which Mr Ashworth relied as a means by which his client's claim could be characterised as a debt. He accepted that it arises out of the unjust enrichment of Mr Dusoruth. In *Swynson Ltd v Lowick Rose llp (formerly Hurst Morrison Thomson llp) (in liquidation)* [2017] UKSC 32. Lord Sumption JSC (with whom Lord Neuberger of Abbotsbury PSC, Lord Clarke of Stone-cum-Ebony and Lord Hodge JJSC agreed), described subrogation as follows:

> "18. Equitable subrogation is a remedy available to give effect to a proprietary right or in some cases to a cause of action. This is not a case where subrogation is invoked to give effect to a proprietary right. It belongs to an established category of cases in which the claimant discharges the defendant's debt on the basis of some agreement or expectation of benefit which fails. The rule was stated by Walton J in *Burston Finance Ltd v Speirway Ltd* [1974] 1 WLR 1648, 1652:
>
> > "[Where] A's money is used to pay off the claim of B, who is a secured creditor, A is entitled to be regarded in equity as having had an assignment to him of B's rights as a secured creditor … It finds one of its chief uses in the situation where one person advances money on the understanding that he is to have certain security for the money he has advanced, and, for one reason or another, he does not receive the promised security. In such a case he is nevertheless to be subrogated to the rights of any other person who at the relevant time had any security over the same property and whose debts have been discharged, in whole or in part, by the money so provided by him …"
>
> Most of the cases are indeed about subrogation to securities, but the principle applies equally to allow subrogation to personal rights: *Cheltenham & Gloucester plc v Appleyard* [2004] EWCA Civ 291 at [36] and *Investment Trust Companies v Revenue and Customs Comrs* [2018] AC 275."
>
> 19. In *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 the House of Lords reinterpreted the existing authorities so as to recognise that, subject to special defences, equitable subrogation served to prevent or reverse the unjust enrichment of the defendant at the plaintiff's expense. The argument for Mr Hunt is that HMT has been unjustly enriched at his expense by virtue of the discharge of the 2006 and 2007 loans, the loss on which would otherwise have been recoverable from them by way of damages. Equitable subrogation is invoked as the appropriate remedy to reverse that enrichment."

Lord Sumption cited Lord Hoffman's explanation of the operation of subrogation in *Banque Financière* at 236 as follows:

> "It is important to remember that … subrogation is not a right or a cause of action but an equitable remedy against a party who would otherwise be unjustly enriched. It is a means by which the court regulates the legal relationships between a plaintiff and a defendant or defendants in order to prevent unjust enrichment. When judges say that the charge is 'kept alive' for the benefit of the plaintiff, what they mean is that his legal relations with a defendant who would otherwise be

> unjustly enriched are regulated as if the benefit of the charge had been assigned to him. It does not by any means follow that the plaintiff must for all purposes be treated as an actual assignee of the benefit of the charge and, in particular, that he would be so treated in relation to someone who would not be unjustly enriched."

He went on at paragraph 31:

> "31. Two things, however, are clear. The first is that the role of the law of unjust enrichment in such cases is to characterise the resultant enrichment of the defendant as unjust, because the absence of the stipulated benefit disrupted a relevant expectation about the transaction under which the money was paid. The second is that the role of equitable subrogation is to replicate as far as possible that element of the transaction whose absence made it defective. This is why subrogation cannot be allowed to confer a greater benefit on the claimants than he has bargained for: see *Paul v Speirway Ltd* [1976] Ch 220 , 232 (Oliver J), the *Banque Financière* case [1999] 1 AC 221 , 236–237 (Lord Hoffmann) and *Cheltenham & Gloucester plc v Appleyard* [2004] EWCA Civ 291 at [38], [41]–[42] (Neuberger LJ). It can be seen that the fact that all the cases relate to defective transactions is not just an adventitious feature of the disputes that happen to have come before the courts. It is fundamental to the principle on which they were decided."

In *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29, Lord Reed JSC described the elements of unjust enrichment as follows:

> "24. In answering the question, both parties followed the approach adopted by Lord Steyn in *Banque Financière de la Cité v Parc (Battersea) Ltd [1999] 1 AC 221* , 227, and asked: (a) Has the defendant been benefited, in the sense of being enriched? (b) Was the enrichment at the claimant's expense? (c) Was the enrichment unjust? (d) Are there any defences?"

At paragraph 49 he went on to describe a situation similar to that which is alleged here:

> "A different type of situation is typified by the case where the claimant discharges a debt owed by the defendant to a third party. Although it is the third party creditor who receives the payment from the claimant, the defendant is directly enriched, since the payment discharges his debt: the enrichment is not the payment which the third party receives, but the discharge which the defendant receives. Where the transfer of value is defective, and the enrichment is consequently unjust, the law reverses it, as far as possible, by subrogating the claimant to the rights formerly held by the third party (as was explained, for example,

> by Walton J in *Burston Finance Ltd v Speirway Ltd* [1974] 1 WLR 164, 1652). There are many variations on the type of situation where equitable subrogation is an appropriate remedy to reverse or prevent unjust enrichment. The remedy differs from restitution, in that it does not have the effect of restoring the parties to their pre-transfer positions, but it is the most practicable means of reversing or preventing unjust enrichment in the types of situation where it is appropriate."

126. Equitable subrogation therefore is a remedy that may follow from a determination that the defendant has been unjustly enriched where it is appropriate. Whether there has been unjust enrichment and, if so, what the remedy for that unjust enrichment is, is a question for judicial determination. Subrogation is not automatic. Lord Sumption noted that it does not follow, even where such a remedy is granted, that the claimant will be subrogated for all purposes to the rights of the creditor whose debt his payment discharged. It does not seem to me to be open to the petitioner in this case to declare that it is subrogated to the rights of American Express or the landlord of Curzon Street. That remains a matter for judicial determination, which has not yet occurred.

127. It appears to me that neither of the debts in the instant case can be regarded as a liquidated sum. If all that were required were for the petitioner to name the sum he claims to be entitled to and to characterise any arguments to the contrary as simply going to dispute, rather than the threshold question of whether the debt is for a liquidated sum, it is difficult to see how any claimed sum could be regarded as unliquidated. I agree with Mr Brown that this case is really no different to that in *Hope v Premierpace*. The process of identifying the existence or extent of the unjust enrichment in a simple case of the taking of monies may not require an account to be pleaded, or more than an accounting exercise so vestigial as to need no special mention of it, but a determination of both liability in unjust enrichment and remedy to be given is required before the claimed sum can be regarded as a liquidated sum for the purposes of section 267 IA 1986.

Discretion to annul

128. Mr Brown contends that, if the debt set out in the petition is not such as to found a petition, then there is no discretion as to whether it should be set aside. He relies on Rimer J's observation in *Hope v Premierpace* that "no bankruptcy order could properly be made" on the petition. Rimer J was not however considering the question of discretion. He made that observation to explain his reasons for not merely annulling the bankruptcy order but dismissing the petition. The question of the exercise of discretion to annul in that case did not arise other than in Rimer J's observation that there was no way in which the district judge could properly have exercised her discretion other than in favour of the debtor in circumstances where the debtor had been misled into believing that the hearing would be adjourned. It is not authority for the proposition that a bankruptcy order made on a petition based on an unliquidated sum must be annulled.

129. In the case of a bankruptcy order made where the debtor's COMI was outside England and Wales, however, the authorities are clear that there is no discretion not to annul under section 282(1)(a) IA 1986, at least on a creditor's application. In

Raiffeisenlandesbank Oberosterreich AG v Meyden [2016] EWHC 414 (Ch), Nugee J considered the observations in *Munks v Munks* [1985] FLR 576 that a party affected by an order made without jurisdiction is entitled to have it set aside as of right, which he consider to be a general proposition. He went on to consider whether that general proposition continued to obtain under the statutory scheme of the IA 1986. He concluded:

> "35 It does seem to me that none of the COMI cases have taken into account the jurisprudence which I have been shown of the general law that where the Court makes an order without jurisdiction any person who might be affected by that order is entitled to have that order set aside as of right. An order made without jurisdiction, at any rate by the High Court being a court of unlimited jurisdiction in one sense, is an order which, as Lord Diplock explained in the case referred to in *Munks v Munks*, has to be complied with even if it was one that should not have been made. If it is good on its face, it must be treated as a valid order until it has been set aside. That is a very important and salutary principle which plays a significant role in the enforcement of orders. Any other rule would inevitably mean that those who did not want to comply with orders would argue that they did not have to because, although they were valid on their face, they were defective in one way or another. Once it has become apparent, according to Sir Roger Ormrod in *Munks v Munks* – and I have already said that I have seen nothing to suggest that this is not still good law – once the court's attention is brought to the fact that the order was made without jurisdiction, there is no alternative but to set it aside. That seems to me to be a general principle of English procedural law that would apply to insolvency proceedings just as much as to any other proceedings, and that, in the absence of section 282, the Court would nevertheless be obliged to set aside a bankruptcy order, on being satisfied that the Court did have no jurisdiction to make the order in the first place."

130. In considering the statutory overlay he considered that:

> "36 The real question, it seems to me, is whether the express enactment of a discretionary power to annul in section 282 can be taken as taking away the default position under which, if an order is made without jurisdiction, the Court has no alternative but to set it aside and any person who might be affected by such an order is entitled as of right to have it set aside. I do not see that that is the purpose of section 282. It does confer a discretion but the discretion is exercisable in many more situations than in the particular situation where the Court has no jurisdiction because the jurisdiction is ousted by Article 3 of the Insolvency Regulation, as imported into section 265 by (3).
>
> 37. It follows, in my judgment, that the fact that Article 4 refers to the national rules as to the effect of insolvency proceedings

> does not mean, as the Registrar was persuaded, that there is always a discretion. What it means is that the position in relation to the setting aside or annulment of bankruptcy petitions is the same as it would be in any other case in which an order was made without jurisdiction. I am persuaded by Miss Meech that, although in other circumstances section 282 confers a true discretion, in a case in which the bankruptcy order was made without any jurisdiction at all, the logic of *Munks v Munks* dictates that the Court has no choice but to set the order aside."

131. This was followed in *Deutsche Apotheker-UndArztebank EG v (1) Leitzbach (2) The Official Receiver* [2018] EWHC 1544 (Ch) by His Honour Judge Hodge QC, sitting a judge of the High Court, in an annulment application brought, as in *Meyden*, by a creditor of the bankrupt. He concluded:

> "[84]… I find that the bankruptcy order was made without jurisdiction because Dr Leitzbach's centre of main interests was not in England and Wales. Following the approach of Nugee J in the *Meyden* case, the court should annul the bankruptcy order. Insofar as there is any discretion, however, I would unhesitatingly exercise that discretion in favour of annulment. I am satisfied that Dr Leitzbach has not presented a true picture to the court, either now or in 2014; even on his own case, he did not tell the court that he was registered as a dentist in Luxembourg, or that he was undertaking a course of dental study in Germany and Austria. However, in addition, he produced receipts intended to give a false impression as to his presence in England and Wales at times when I am satisfied that he was not present here but was in Germany and Luxembourg, attending his course and attending an interview to be registered as a dentist in Luxembourg. None of that was disclosed to the court on the hearing of his bankruptcy petition. Indeed, on his second petition, he did not even disclose the existence of his first petition."

132. Mr Ashworth suggested that, notwithstanding the clear terms in which Nugee J expressed himself, his judgment left open the possibility of a residual discretion. In support of this he referred to Nugee J's expression of concern that the absence of a discretion gave rise to the possibility of an annulment application being brought many years after the order had been made. Nugee J dealt with this by noting the observation of Sir Roger Ormrod in *Munks* that any person affected by an order is entitled as of right to have it set aside. He suggested, but did not have to decide, that it might be very difficult for a creditor to show that he was "affected" by the order some 10, 15 or 20 years after the event.

133. Both Nugee J and Judge Hodge QC were dealing an annulment application brought by a creditor on the basis that the debtor's COMI was outside England and Wales, and the authorities to which they were referred were all directed to the effect of what is now the recast EU Regulation. In view of my finding that Mr Dusoruth's COMI was in England and Wales the principle does not apply directly but the question is whether

it applies more generally to annulment on the grounds that the statutory requirements for presenting a petition were not met.

134. In this regard Mr Ashworth accepted that the question of whether the debtor's COMI was within England and Wales was a genuine jurisdictional question, that is to say that the effect of the recast EU Regulation and section 265 IA 1986 at the time of the petition was to deprive this court of jurisdiction to open main proceedings where the debtor's COMI was elsewhere in the EU. As Nugee J said at paragraph 13 of his judgment:

> "It follows, as night follows day, that the effect of Article 3 of the Insolvency Regulation, and section 265(3) of the Insolvency Act is that the English court did not have jurisdiction to open insolvency proceedings, and therefore the bankruptcy order was made without jurisdiction."

Mr Ashworth's position, however, is that an annulment sought on the basis that the debt was not for a liquidated sum is no different from an annulment sought on the ground that the debt was genuinely disputed. In the latter case there is certainly a discretion. In *Guinan* Neuberger J said, at paragraph 11:

> "It is common ground that even if it is established that there was no valid service and/or that the debt is disputed, the court still has a discretion whether or not to annul. That concession seems to be clearly right in light of the wording and in particular the word 'may' in s 282(1) of the Insolvency Act 1986, and any doubt on the point must be put to rest, as [Counsel for Caldwell] rightly says, by the decision of the Court of Appeal, albeit on an application for permission to appeal, in *Askew v Peter Dominic Ltd* [1997] BPIR 160. Indeed, in that case the statutory demand and bankruptcy petition had been described by His Honour Judge Roger Cook as 'sheer nonsense' – see at 164E – a view which does not seem to have been dissented from by Millet LJ, and yet because the bankrupt 'did not dispute the debt' – see at 164H – His Honour Judge Cook did not set aside the bankruptcy order."

At paragraph 49 he went on:

> "As I have mentioned, there is a discretion even if there is an arguable case, but it seems to me that unless there are special circumstances such as other creditors who have undoubted debts, or clear other evidence of insolvency, or facts such as were before the Court of Appeal in *Askew v Peter Dominic Ltd* [1997] BPIR 163, namely that the debt in question was not challenged, then it seems to me, save in exceptional circumstances, that it must be right not to uphold a bankruptcy order."

135. After the hearing I was referred by an email from the petitioner's legal representatives to the decision of Mr David Mohyuddin QC, sitting as a deputy High Court Judge, in

Khan v Singh-Sall [2022] EWHC 1913 (Ch). I asked my clerk at the end of July to communicate to Mr Brown that he could make any submissions on this case by email. None were received prior to the circulation of the draft judgment. It seems that an email composed by Mr Brown in reply did not reach the court but, on receiving the draft of this judgment, Mr Brown confirmed that he did not wish to make any further submissions.

136. This case was an appeal from a district judge's refusal to annul the bankruptcy order made against the appellant. The annulment application had been made on the grounds that the debtor's application to adjourn the hearing of the petition should have been granted, the statutory demand had not been validly served, the statutory demand and the petition failed to give details of the petitioner's security and the debt was disputed on substantial grounds.

137. The district judge held that, in failing to disclose the security, the mandatory requirements of sections 267(2)(b) and 269 IA 1986 had not been complied with and that there was a genuine triable issue as to the petition debt. It followed from each of those findings that the bankruptcy order ought not to have been made. Nonetheless she declined to exercise her discretion to annul the bankruptcy.

138. The deputy judge on appeal set out the authorities in some detail. He referred, first, to the words of section 282(1) IA 1986 and the decision of the Court of Appeal in *Owo-Samson v Barclays Bank plc (No. 1)* [2003] EWCA Civ 714 in which it was said, at paragraph 35:

> "[T]he word 'may' in [IA 1986 s.282] makes clear that the court's power to annul, even if the grounds are made out, is discretionary. The court is not bound to set aside the petition, particularly if … the creditor is found to have acted reasonably and the debtor has failed to raise defences which were open to him at an earlier stage. In such a case, a critical factor in exercising the discretion … must be the prospects, if the order is annulled, of the debtor being able to satisfy the petitioner and meet his other liabilities."

139. He referred to *Guinan*, as above, and to *JSC Bank of Moscow v Kekhman and others* [2015] EWHC 396 (Ch) in which Morgan J said at paragraph 74:

> "The power to annul under section 282 is discretionary ("the court may annul"). Thus, even if the court is satisfied that on the grounds existing at the date of the bankruptcy order, the order ought not to have been made, the court can still decide not to annul the order. An obvious example would be where the annulment would be pointless, for example, where the circumstances were such that a new bankruptcy order would certainly be made. Another example would be where circumstances had changed following the bankruptcy order making it inappropriate to annul the order. It follows that when considering whether to exercise its discretion to annul an order which it has found ought not to have been made the court will

> take into account all relevant matters, including matters which have come about after the bankruptcy order was made."

140. The deputy judge concluded at paragraph 77:

> "In the light of the statutory scheme, it seems to me that where the petition debt is fully disputed such that there is no debt capable of founding the petition and no court could made a bankruptcy order (as in the COMI cases cited to me), there is a powerful argument that the court would have no discretion on an annulment application. However, I consider that I am prevented from reaching that conclusion by the Court of Appeal's decision in *Owo-Samson*. Even where there was no debt capable of founding the petition, if a bankruptcy order is nonetheless made the court retains a discretion when hearing an annulment application."

The deputy judge thus recognised, consistently with *Mann v Goldstein,* cited above, that whether a debt is disputed is, if I can use this shorthand, "jurisdictional" in nature in the sense in that, if there was a real dispute as to its existence, it deprived the creditor of standing to present the petition, but the court retained a discretion whether to annul.

141. In relation to whether "exceptional circumstances" had to be shown in order to decline to annul, he referred to *Guinan* and the decision of Hildyard J in *Mowbray v Sanders* [2015] EWHC 296 (Ch) in which he said:

> "[81] In my view, and although the discretion to do so is broadly stated, it is only in exceptional circumstances that it is right to decline to grant an annulment if it is demonstrated that a dispute as to the petition debt was genuine and on substantial grounds, and thus could not properly be the basis of an order of bankruptcy on that petition, so that the bankruptcy order ought not to have been made: and see per Neuberger J in *Guinan III v Caldwell Associates Ltd* [above] at para [49].
>
> [82] However, there is no doubt that even in such circumstances, the court is not only not bound to exercise its discretion by annulling the bankruptcy order, but is always concerned to be satisfied that by making an annulment order it would not be acting to the detriment of other creditors with undoubted debts, or for no good purpose (for example, because there is clear other evidence of insolvency). *Askew v Peter Dominic Ltd* [above] provides confirmation of this, and an example; so does *Re Coney (A Bankrupt)* [1998] BPIR 333, ChD.
>
> [83] Thus, the fact that I have reached a different conclusion than did the deputy district judge on the principal issues as to whether the conditions of s 282(1)(a) are satisfied, the question which she addressed in her final alternative way of determining

> the matter and in case she was wrong as to the validity of the petition debt … is substantially the same: whether the interests of creditors or the entitlement of the [trustee in bankruptcy] to payment of his proper costs and expenses outweigh the obvious logic in setting aside an order which should not have been made."

142. The deputy judge in *Khan,* at paragraph 104, considered Hildyard J's judgment as follows:

> "In my judgment, the proper way in which to understand Hildyard J's decision – not least given his reference to *Guinan III* – is not simply that there is an exceptional circumstances test per se but rather that the test requires the court to identify other factors which would suggest that the annulment should be refused; only in their absence would it be exceptional not to grant an annulment. This is another way of saying that all the relevant circumstances have to be taken into account and is also consistent with the Court of Appeal's decision in *Owo-Samson* which I have already considered."

143. As to the exercise of the district judge's discretion, he said at paragraph 112:

> "In conclusion, as I read these authorities and on the basis that the court has a discretion to exercise when asked to annul a bankruptcy order which should never have been made because the debt stated in the debt was disputed in full, there is no principle that the discretion must be exercised in favour of annulment unless there are exceptional circumstances. Rather, in the exercise of its discretion, the court must consider all the relevant factors. Where there are factors weighing in favour of and against annulment, it must take them into account, giving them appropriate weight. Where there are no factors weighing against annulment, then it might be expected that the court will annul the bankruptcy order."

144. I respectfully agree and I am bound by the decision of the deputy judge. I am similarly bound by the Court of Appeal's decision in *Owo-Samson*. There is no reason to treat an application to annul an order made on a petition based on a debt for an unliquidated sum differently to an application to annul an order made on a petition based on a disputed debt. In both cases the application is based on the petitioner's lack of standing to present the petition and the failure to comply with the requirements of the statutory regime. Such applications are of a different character to those concerning the jurisdictional limitations imposed by the recast EU Regulation. The effect of a debtor's COMI being in a member state other than the UK is to deprive the UK courts of jurisdiction to open main insolvency proceedings and instead to confer jurisdiction on the courts of the debtor's COMI. Where however the debtor's COMI is in England and Wales, the debtor is subject to the jurisdiction of the courts here in the sense that a creditor may seek to open main insolvency proceedings here and it is for the courts of this jurisdiction to determine those proceedings. The exercise of the statutory

discretion is not fettered by the operation of a regulation that provides that these courts should not be seized of the proceedings at all.

145. I start from the proposition that where a pre-condition for the presentation of a bankruptcy petition is not met the court should be strongly inclined to annul. Here the fact that the question was not drawn to my attention by leading counsel (not Mr Ashworth) on the Service Out Application or to the attention of the Deputy ICC Judge when making the bankruptcy order makes that argument all the stronger.

146. There are features of this case that persuade me that it would be wrong for me to annul the bankruptcy order, assuming that I am right that Mr Dusoruth's COMI was located here. I was satisfied when ordering service out in 2020 that the petitioner had done enough to bring the statutory demand to Mr Dusoruth's attention in June 2020. I am similarly satisfied having read the evidence of the process server in this case and heard Mr Dusoruth's oral evidence that he was served with the bankruptcy petition on 14th October 2020. He did nothing in response to it and he has offered no reason why he could not have engaged with it. He did not seek to set aside the Service Out Order within the time permitted by that order or until some six months after the bankruptcy order was made.

147. I am similarly satisfied that he received the petition on bankruptcy order itself in November 2020. He did not make the annulment application until 7th June 2021, having not, according to Mr Khanzada's evidence in support of the application itself, instructed Mr Khanzada until 20th May 2021. It was only in Mr Dusoruth's later evidence, dated 3rd August 2021, that the petition debt itself was disputed.

148. Mr Dusoruth thus could have (i) sought to set aside the order for service out of the jurisdiction as provided for in that order (ii) arranged to be represented at the hearing of the bankruptcy petition (iii) alternatively sought an adjournment to allow him to be represented and (iv) made an immediate application to annul. He did not. There must be finality in litigation and appears to me that when a debtor is confronted with a bankruptcy petition he must address his arguments to the court on the day appointed for it to be heard or obtain an adjournment of the date. Section 281 IA 1986 is not a licence to debtors not to engage with a petition and to make their arguments after the event.

149. That would perhaps not matter so much were it not for the creditor position. Mr Dusoruth is subject to a £4.7 million personal liability under a tax assessment from as long ago as September 2019. That has not been appealed and the time for doing so is long past, nor has it been paid and no evidence has been given that there is any prospect of it being so. Had there been any prospect of Mr Dusoruth meeting that liability I am satisfied that there would have been offers to do so. I can place very little weight on Mr Dusoruth's own evidence as to his financial position, to the extent that he gave any. The nearest he came was to say that his assets were "tied up in the bankruptcy". Mr Dusoruth has given no coherent evidence of any ability to discharge that debt and does not appear to have engaged with it at all. A claim for €200 million has been made by the receiver of Orca NV (now called Rolsa NV) and there is a small liability of a little over £20,000 proved for by American Express. Mr Dusoruth had the opportunity to address those claims and his solvency in reply evidence and chose not to do so. On any footing, the fact that there is a personal liability for unpaid VAT

in excess of £4.7 million, for which HMRC have proved, that has gone unpaid and apparently unaddressed is clear evidence of insolvency.

150. I am satisfied that he was insolvent when the petition was presented and remains so, though his lack of cooperation with his trustee makes the position a little less clear, but that lack of cooperation again weighs in the balance against annulling the bankruptcy. As Nugee J noted in *Meyden*, until a bankruptcy order has been set aside it must be complied with. That includes the obligations of the bankrupt to cooperate with his trustee. The correspondence with Mr Dusoruth's solicitors makes it clear that their client saw his obligations to provide his trustees with the requested information was contingent on the outcome of this application. That is an entirely incorrect understanding of the position. I cannot safely annul the bankruptcy where there has not been full cooperation with the trustees and there is evidence of insolvency. Bankruptcy is a class remedy and Mr Dusoruth is subject to substantial, and indisputable, liabilities and claims. To annul the bankruptcy now and dismiss the petition would require those creditors, who have been prevented from presenting petitions thus far, to seek a bankruptcy order themselves. The making of an order on a petition presented now would have potential consequences for the scope of any subsequently appointed trustee's powers – for example the power to set aside antecedent transactions. I am not prepared to do so where there is clear evidence of insolvency.

151. In the exercise of my discretion I decline to annul the bankruptcy. I would similarly have declined to do so, for the same reasons, had I concluded that Mr Dusoruth had raised a genuine triable issue on the petition debt.

Conclusion

152. I am satisfied that Mr Dusoruth was served with the statutory demand, the petition and the bankruptcy order. I am satisfied that his COMI was in England and Wales for the purposes of the recast EU Regulation at the date of presentation of the petition and the making of the order. I am not satisfied, in these circumstances, that Mr Dusoruth has met the low threshold for showing that the petition debts are genuinely disputed on substantial grounds. I am unable to accept Mr Ashworth's arguments as to nature of the petition debts, though I reject Mr Brown's submissions that they were totally without merit. Neither the American Express Debt nor the Curzon Street Debt were for a liquidated sum. This is, however, a case in which I should decline to exercise my discretion to annul.

153. The Annulment Application is dismissed.