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AN ADDITIONAL COST IN LITIGATING CLAIMS

Antecedent claims made by office-holders under the Insolvency Act 1986 ("the Act"), will commonly give rise to breach of directors' duties claims under the Companies Act 2006.

The Courts have been content for such hybrid claims to be commenced by issuing one set of proceedings under the Act.

The recent ruling in *Manolete Partners Plc v Hayward and Barrett Holdings & Ors [2021] EWHC1481(Ch)* has, at least temporarily, changed that.

Transaction avoidance claims were assigned to Manolete which also acquired "*all and any claims… such claims to include … breach of duty at common law, breach of fiduciary duty or statutory duty or other legal or equitable duty… and/or any claim under the Companies Act 2006".*

Claims were issued under the Act, however two of the Respondents, who were also pursued for breach of duties as directors, sought an order that Manolete issue separate proceedings and pay the additional issue fee for the separate Companies Act claims.

The fee for issuing proceedings under the Act is currently set at £280. The fee for issuing proceedings under Part 7 of the Civil Procedure Rules, as required for a breach of duty claim, is currently set at 5% of the claim, with a value between £10,000 and £200,000.

Above that amount the fee for issuing such a claim is set at a maximum of £10,000. In general, insolvent companies do not have access to liquid funds, so such up-front litigation costs would, in many instances, prohibit office-holders from issuing claims in that way.

The judgment confirmed that hybrid actions for breach of duty claims also have to be commenced as Part 7 claims. The judgment also confirmed that applies to claims under Section 423 of the Act.

ICC Judge Briggs stated: "*I reach these conclusions with regret. The criticisms of the procedure are well made... They do not promote a convenient or sensible or economical use of court resource. In modern parlance the result fails to ensure that claims of this nature are dealt with expeditiously, allotting an appropriate share of the court's resources.*

An office-holder and assignee of claims will be forced to issue claims arising from an insolvency using different procedures, in different lists within the Business and Property Courts, with a risk that without a transfer they will be case managed, at least, by different judges although the claims arise out of the same facts".

Manolete have suggested that a change needs to be made to the Insolvency Rules to allow hybrid claims to be commenced within an application under the Act. A consultation by the Insolvency Service took place in June. The outcome is not yet known.

Editor's note

Unless there is a reform of the Insolvency Rules, to allow hybrid claims to be issued under the Act, well-funded claims companies are likely to gain more business as office-holders balk at the increased costs of commencing such litigation.

Ironically, it is also unhelpful to respondents who may face additional costs if they lose at trial.

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