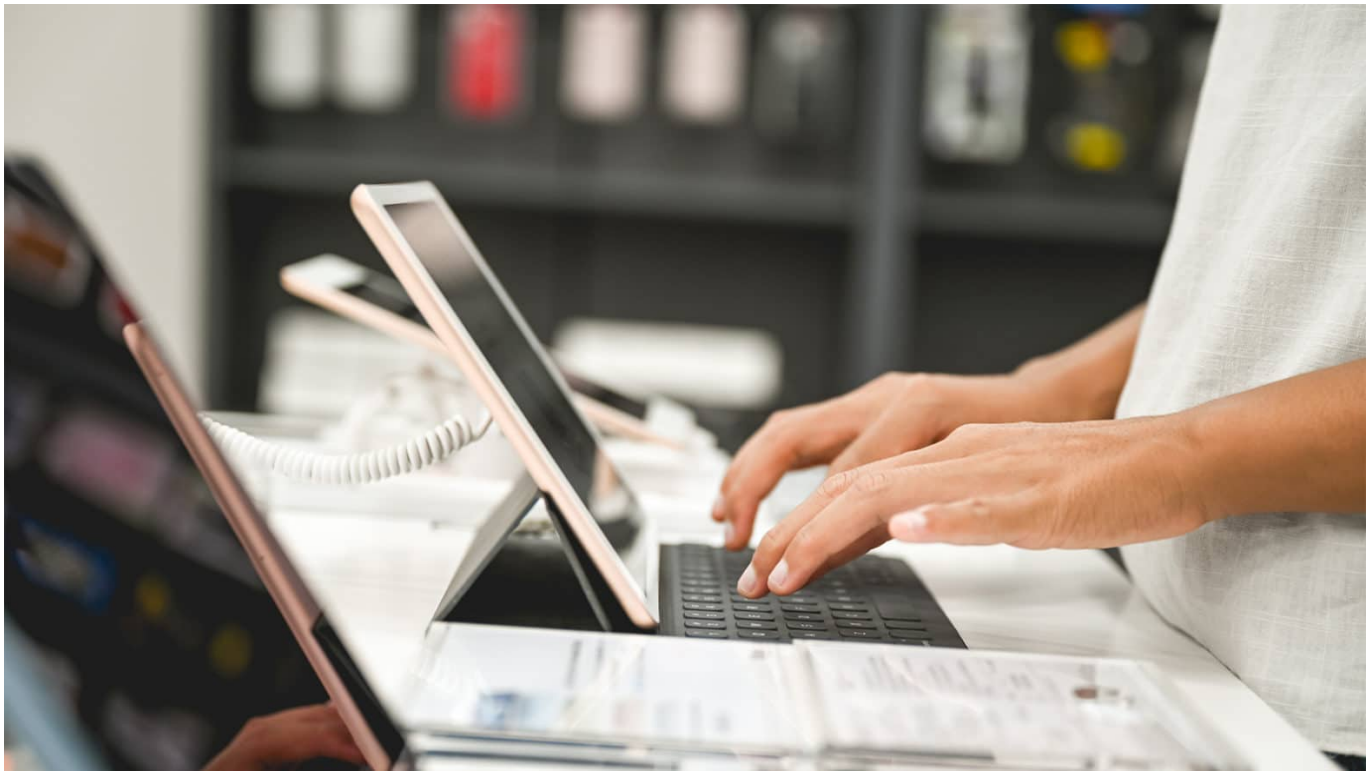
Insolvency claims: getting the basics right (part 1)



There have been a number of interesting developments over the last couple of years arising from what would otherwise have been fairly routine insolvency applications. These cases have highlighted the importance of focusing on the basics when issuing insolvency applications as well as providing useful guidance for office holders when determining whether or not to assign claims. This article is the first in a short series which will cover these cases and their implications, starting with the decision in *Manolete v Hayward Barret and others* in 2021 which considered the previously widespread practice of issuing hybrid claims under the Insolvency Act.

Hybrid claims

A hybrid insolvency claim includes both office holder and company claims. It means that claims under the Insolvency Act are brought together with claims for breach of duty, unlawful dividends, unjust enrichment (among others) as one Insolvency Act application and are managed under one set of proceedings.

Manolete Partners plc v Hayward Barrett Holdings Limited and Others (Re. Blackwater Plant Limited) [2021] EWHC 1482 (Ch) ("Manolete")

In Manolete, ICC Judge Briggs cast doubt on the (until then, well established) practice of including all ancillary claims in one "hybrid claim" as part of an insolvency act application. He found that the existing statutory framework restricted Insolvency Act Applications to solely insolvency proceedings meaning that, in accordance with rule 1.35 of the Insolvency Rules, if an applicant cannot state that an application is made solely under parts 1 to 11 of the Insolvency Act, it is not appropriate to make a claim by way of an Insolvency Act application. Instead, a claim should be brought under Part 7 of the Civil Procedure Rules. The upshot of this is that claims brought under other sections of the Insolvency Act (such as a section 423 Insolvency Act claim for transactions

defrauding creditors which sits outside of parts 1 to 11 of the Insolvency Act) must be brought under CPR Part 7.

In addition, in this case the claims had been assigned by the joint liquidators of Hayward Barrett and Blackwater Plant to Manolete, a litigation funder. Judge Briggs considered that a distinction must be drawn between claims vested in the joint liquidators and capable of assignment and claims vested in the company but that only the joint liquidators had standing to bring under an Insolvency Act application, for example a claim for misfeasance under section 212 Insolvency Act. The conclusion was that claims for misfeasance can be brought by office holders as part of an Insolvency Act application on the basis that there is an effective procedural gateway for bringing such claims that is afforded to office holders by virtue of their position. However, the same procedural gateway is not available to an assignee who must bring a breach of duty claim under part 7.

The impact of the decision

Increased costs

The costs of issuing an Insolvency Act application are relatively minimal compared with a Part 7 claim, which attracts an issue fee of £10,000 for claims in excess of £200,000.The more complex procedure involved in the case management of a part 7 claim also means that the costs of running a part 7 claim have the potential to far exceed the costs of an Insolvency Application.

It may affect recoverability

The costs of a part 7 claim may be prohibitive to an office holder if there aren't sufficient funds in the insolvent company to fund it. The knock on effect is a negative impact on any returns to creditors. Litigation funders may be able to afford the increased costs, although the impact on recoverability caused as a result of issuing a part 7 claim may mean that they are less willing to take assignments of some claims.

Conclusion

It is worth noting that Judge Briggs was willing to exercise his discretion under CPR rule 3.10 to allow the claim to continue under the Insolvency Act on payment of an increased issue fee. It is possible that where there are separate actions brought under the Insolvency Act and Part 7 that the Court may be willing to manage them together rather than in parallel. However, it is clear from Manolete the vital importance of only including claims capable of being insolvency proceedings in an insolvency application at the point of issue.

How we can help

If you would like further advice or information on this topic, then we can help. Get in touch with us or contact our restructuring and insolvency team.

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