The Role *of the* Monitor *in a* Rescue Moratorium

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Under the new Part A1 of the Insolvency Act 1986 (**Part A1**) introduced by section 1 of the Corporate Insolvency and Governance Act 2020 (**CIGA**)[1], an eligible company[2] which is or is likely to become insolvent will be able to obtain a moratorium, in most cases simply by filing documents at court[3]. During the moratorium, the company will enjoy a 'payment holiday' for many of its pre-moratorium debts (although not its bank debts and other debts and liabilities under contracts or instruments involving financial services[4]) and protection against most enforcement action by creditors. The directors of a financially-stressed company retain day-to-day control and responsibility for management while the company explores a possible rescue.

The objective of the new regime is not set out directly in Part A1, but appears from section A38(1)(b). It is *rescuing the company as a going concern*. The aim is survival of the enterprise itself, rather than survival of all or part of the company's business (which might be achieved by a transfer). In that regard, the objective is more limited and more ambitious than in an administration, where rescuing the company is the first objective under paragraph 3(1)(a) of Schedule B1, but the one which is most rarely achieved in practice.

Whether a moratorium can be obtained, whether it should continue, whether the objective has been achieved, and whether the moratorium must terminate, will all be determined by the professional opinion of the monitor. The key question, which the monitor must certify positively, at the outset if the company is to obtain a moratorium[5], or if it wishes to extend it[6], and which the monitor must keep under review during the moratorium[7], is whether, in the monitor's view, it is *likely that the moratorium will result in the rescue of the company as a going concern*.

That is not the monitor's only function under Part A1, but it is the central and determining one; the new role of 'monitor', and the monitor's relationship with the directors, will therefore be pivotal to this 'debtor-in-possession' *rescue moratorium* procedure.

Modifications during the Coronavirus crisis

Although these reforms have been on the books for some time awaiting a parliamentary slot, they have been brought forward urgently as part of the Government's package to address the immediate economic consequences of the COVID-19 pandemic. CIGA also contains a package of temporary measures to relax the Part A1 regime for the immediate future[8]. These will apply initially until 30 September 2020 (the **Relevant Period**)[9], but there is power to extend that period by up to six months if the Secretary of State considers it reasonable to do so to mitigate an effect of coronavirus[10].

Among the adjustments which apply during the Relevant Period, directors can obtain a moratorium by filing documents at court even if the company is subject to an outstanding winding-up petition[11]. The threshold question which the monitor must consider at the outset is modified so that any worsening of the financial position of the company for reasons relating to coronavirus is to be left out of account[11]; the same applies if an extension to the moratorium is sought[12].

The monitor's statutory duty of monitoring under section A35 is similarly modified in relation to a moratorium which comes into force during the relevant period[13], so that it becomes:

'*the monitor must monitor the company's affairs for the purpose of forming a view as to whether:*

(a) *it is likely that the moratorium will result in the rescue of the company as a going concern, or*

(b) *that, if one were to disregard any worsening of the financial position of the company for reasons relating to coronavirus, it is likely that the moratorium would result in the rescue of the company as a going concern.*'

A monitor's duty to terminate a moratorium under section A38(1)(a) will arise if the monitor thinks both that the moratorium is not likely to result in the rescue of the company as a going concern, and also that, *even if one were to disregard any worsening of the financial position of the company for reasons relating to coronavirus, the moratorium would not be likely to result in the rescue of the company as a going concern*[14].

The expression '*reasons relating to coronavirus*' is clearly very wide and no doubt deliberately imprecise. The

1. CIGA received Royal Assent on 25 June 2020, and came into force on 26 June 2020.

2. Eligible companies are defined in Schedule ZA1 of the Insolvency Act, introduced by section 1(2) and Schedule 1 CIGA. Paragraph 38 of Schedule 3 CIGA will amend regulation 5 of the Limited Liability Partnerships Regulations 2001, so that the provisions in Part A1 will also apply to LLPs. They will also apply to some Charitable Incorporated Organisations (Schedule 3 paragraph 49 CIGA) and potentially to Co-operative and Community Benefit Societies (Schedule 3 paragraph 52 CIGA).

3. Directors of a company which is not an oversea company and is not subject to a winding-up petition will be able to obtain a moratorium simply by filing the relevant documents (described in section A6). In other cases, there will need to be an application to court, under sections A4 (petition) or A5 (other overseas companies). During the Relevant Period, a domestic company which is subject to a winding-up petition will nonetheless be able to obtain a moratorium by filing the relevant documents (paragraph 6(1)(a) of Schedule 4 CIGA).

4. As defined in new Schedule ZA2 of the Insolvency Act, introduced by section 1(3) and Schedule 2 CIGA.

5. Section 6A(1)(e).

6. Under section A10, without creditor consent; under section A11, with creditor consent; or on an application by the directors for the court to grant an extension, under section A13.

7. Section A35(1).

8. introduced under section 3 and Schedule 4 CIGA.

9. The 'relevant period' is defined in Schedule 1 paragraph 4 CIGA.

10. Under sections 41(1)(b) and 41(2)(c) CIGA.

11. Sub-paragraph 6(1)(b) of Schedule 4 CIGA.

12. Sub-paragraphs 8(2) and 8(3) of Schedule 4 CIGA.

13. Paragraph 9 of Schedule 4 CIGA.

14. Paragraph 10 of Schedule 4 CIGA.

intention is clearly to insulate companies which are under financial stress for pandemic-related reasons, but these provisions (which we can probably expect to operate for the immediate and foreseeable future) do mean that monitors are required to approach this central judgment call on a somewhat hypothetical basis.

The Statutory Framework

Part 1A articulates a rather sparse framework for the operation of a rescue moratorium. It prescribes who can be a monitor and prescribes what a monitor may or must do at certain key points, but there is no general description of the monitor's functions (which include, but go wider than, monitoring) or how a monitor is to go about performing them.

The Insolvency Service has published guidance to coincide with CIGA coming into force, intended to assist insolvency practitioners by setting out the principal duties and actions required of the monitor (the ***Guidance***)[15]. Although the Guidance will no doubt assist monitors and those advising them as we all get to grips with the new regime, it will have no statutory force and is not designed to be a complete manual.

For the initial Relevant Period after CIGA (or relevant provisions of CIGA) come into force, there are also temporary procedural rules (**Temporary Rules**) set out in Schedule 4 CIGA) which include application of certain provisions of the Insolvency (England and Wales) Rules 2016 (**2016 Rules**). The government's expressed intention is that these temporary provisions will in due course be superseded by permanent provision in amended 2016 Rules[16].

It is also likely that much of what a monitor will do will in practice be extra-statutory. A company in financial distress which becomes subject to a moratorium will no doubt require expert assistance if it is to achieve a corporate rescue. The monitor or the monitor's firm will be the obvious and natural source of such advice. There is nothing in the framework to preclude a monitor from assisting in this way, although it may give rise to potential issues of conflict which will need to be managed.

Choice of 'monitor' as a title

The word '*monitor*' has clearly been selected with some care to signpost that this is a new and distinct office under the Insolvency Act.

The modern sense of the word 'monitor' describes one who observes and keeps under review (although in fact a monitor will have some administrative functions). A monitor will not be expected to superintend the conduct of a company in a rescue moratorium, still less will they be involved in management or administration. They will not have any direct control over assets or spending (although their consent will be required for a grant of security and for significant expenditure).

The expression 'monitor' is used in an insolvency context elsewhere but cases from other jurisdictions are unlikely to be relevant (or will at least require to be understood from their different context and treated with some caution). For example, a monitor is appointed in proceedings under the Canadian Companies Creditors' Arrangements Act, but in that case the monitor acts as the Canadian court's proactive officer, to implement that court's commercial oversight of a restructuring and to report to the court, for example, on the fairness and reasonableness of a proposed plan of arrangement or compromise. That is very different from the light-touch monitorship contemplated here under Part A1.

15. *Insolvency Act 1986 Part A1: Moratorium – A Guide for Monitors'*: the draft was published on 16 June 2020 and is available on-line at https://www.gov.uk/government/publications/insolvency-act-1986-part-a1-moratorium-draft-guidance-for-monitors

16. Guidance, p4.

Qualified person

A monitor must be a 'qualified person', presently defined in section A52(1)[17] as a person qualified to act as an insolvency practitioner. This drafting structure leaves open the possibility (which has already been canvassed) that other suitably-qualified professionals (particularly accountants or turnaround professionals) might in future be brought within the definition and permitted to become monitors. This would potentially widen the pool of prospective office takers, perhaps with different skill sets. Competition could lead to a reduction in costs, particularly for smaller cases. It could be a material consideration whether the monitor would also be qualified to go on and take an appointment as an administrator or liquidator.

However, for now the Government is relying on the experience and expertise of licensed insolvency practitioners as a known quantity with a ready-made regulatory structure under the insolvency regime. During the debates on the Bill, the Government emphasised that, as Lord Callanan[18] put it when introducing the Bill in the House of Lords, insolvency is a highly-regulated profession, and insolvency practitioners are qualified members of a recognised professional body who are required to abide by legislative, professional and ethical standards[19]. The Government relies in particular on monitors following the ethical and regulatory guidelines laid down by their professional body, and on them having regard to the recently-updated Insolvency Code of Ethics[20] (the **Ethics Code**).

It remains to be seen how far insolvency practitioners will embrace the new regime rather than their more familiar role as administrators, but it is worth recalling that many leading firms have been calling for years for the UK to introduce a debtor-in-possession procedure. R3, the representative body for business recovery professionals, had already put forward plans for a 'business rescue moratorium'[21], drawn up with the support of many experienced IPs, before the Government consulted in this area in 2016, and R3 supported the concept of a rescue moratorium when Government announced its response to the Insolvency and Corporate Governance consultation in 2018[22].

As the relevant provisions in Part 1A and the Temporary Rules currently stand, the only requirement is that the monitor is an insolvency practitioner who consents to act. There is, for example, no equivalent of the requirement in Rule 3.2(1)(f) of the 2016 Rules for a proposed administrator to state whether or not they have had a prior professional relationship with the company, and if so to provide a short summary of the relationship so that it is at least a matter of public record. It also appears that there would be no bar, in principle, to a practitioner who has acted as monitor going on to act as administrator or liquidator if the rescue moratorium comes to an end.

A monitor '*acts as an insolvency practitioner in relation to the company*' for the purposes of the Insolvency Act[23]. That means that they will need to have a bond as required under the Insolvency Practitioner Regulations 2005 (the **IPR**), and to keep records as required by Reg 13 IPR. Those records must contain information sufficient to show and explain their administration of the monitorship and any decisions which materially affect the case.

The Threshold test

As already noted above, the threshold test for a moratorium to be obtained or continued is that it is *likely* that it would (or will) result in *rescue of the company as a going concern*.

That formulation reflects a positive series of policy choices which will be material to the monitor's function. During the Committee Stage in the House of Lords, the Government was invited to accept amendments that would have had the effect of reducing the barriers to obtaining moratorium, by altering 'would' to 'could' (so that a possibility of rescue would suffice) or providing in the alternative for rescue of part or all of the company's business, rather than survival of the company itself. These were rejected.

The concept of a company being rescued and surviving as a going concern implies that the company itself will be able to pay its debts into the foreseeable future and so to continue trading with at least a reasonable prospect of profit. The company will need to have paid or compromised its debts (either informally or through a CVA or scheme) and to have sufficient working capital to support a realistic business plan. It may need to curb its expenditure, close loss-making parts of its business, restructure its workforce, re-focus investment.

The question for a monitor when a moratorium is being considered, and on an on-going basis if the question is answered positively at that initial stage, is whether it is 'likely' that this outcome will be achieved on the basis of the information then available.

On its face, that appears to be a relatively high barrier to entry, but the word 'likely' in a statute is capable of encompassing different degrees of likelihood, varying from "more likely than not" to "may well"[24]. It does not carry any necessary connotation of 'more probably than not', and (at least where the context is a jurisdictional threshold), that there may be good reason to suppose that the legislature intended a modest threshold of probability[25].

17. References to sections beginning 'A' are references to the sections in Part 1 to be introduced by section 1 CIGA.

18. Under-secretary of State, Department for Business, Energy and Industrial Strategy.

19. Hansard 9 June 2020, col 1729.

20. The updated Ethics Code came into force on 20 May 2020.

21. e.g. https://www.r3.org.uk/press-policy-and-research/news/more/28983/store/455877/page/3//

22. https://www.r3.org.uk/press-policy-and-research/r3-blog/more/28706/page/5/corporate-insolvency-reforms-new-tools-for-business-rescue/

23. Section 388 of the Insolvency Act is modified by Schedule 3, paragraph 21 CIGA.

24. *Cream Holdings Limited v Banerjee*, [2005] 1 AC 253, per Lord Nicholls at [12].

25. Chadwick LJ in *Three Rivers DC v Bank of England* (No 4) [2002] 4 All ER 881.

26. [1988] BCLC 177.

27. [1988] 4 BCC 455.

28. [1989] 1 WLR 368.

29. [1990] BCLC 98.

30. [1993] BCLC 734.

31. [2003] BPIR 324.

32. [2005] 2 BCLC 8.

33. https://www.gov.uk/government/publications/corporate-insolvency-and-governance-bill-2020-factsheets/moratorium

When administrations were introduced under the Insolvency Act, it was necessary to make an application to court, and the conditions for the court to have power to make an order were set out in section 8(1) of the Insolvency Act. The court was required to be satisfied that the company was or was likely to become unable to pay its debts (section 8(1)(a)), and also to consider that the making of an administration order would be likely to achieve one or more of the purposes of administration (which were listed in section 8(3), and included *the survival of the company, and the whole or any part of its business, as a going concern*) (section 8(1)(b)).

In those early days, courts asked to construe the word 'likely' in those provisions came to different conclusions before the Companies Court arrived at a settled practice. Peter Gibson J held that the word "likely" meant "more probably than not" in *Re Consumer and Industrial Press*[26], and he was followed by Harman J in *Re Manlon Trading*[27]. But in *Re Harris Simons Construction*[28], Hoffmann J held that 'likely' in section 8(1)(b) only required the court to consider that there was '*a real prospect*' that one or more of the stated purposes might be achieved, and he was followed by Peter Gibson J in *Re SCL Building Services*[29] and by Vinelott J in *Re Primlaks*[30]. In *Re Colt Telecom Group Plc* (No.2)[31], Jacob J followed *Harris Simons Construction* and *Re Primlaks* on section 8(1)(b), but held that the word "likely" in section 8(1)(a) did mean more probable than not. There was, therefore, a difference in the threshold of persuasion required between section 8(1)(a) and section 8(1)(b).

The wording of the threshold conditions was changed with the introduction of Schedule B1 to the Insolvency Act in 2003. Under paragraph 11 of Schedule B1, the court is now required to be satisfied that a company is or is likely to become unable to pay its debts (paragraph 11(a)), and that the administration order is reasonably likely to achieve the purpose of administration (paragraph 11(b)). In *Re AA Mutual Insurance Company Ltd*[32], Lewison J said that this replicated the position which had been arrived at under section 8, so that it was necessary to establish that the company is more probable than not to become unable to pay its debts, but that there is a real prospect that the administration order will achieve its purpose.

There is therefore some room to argue that, in the new context of Part A1, the word 'likely' does not inevitably bear the meaning 'more probable than not'. Interpreting the relevant provisions as only requiring the monitor to form the view that there is a 'real prospect' that a rescue of the company would be achieved is undoubtedly more consistent with a rescue culture, and would enable more companies to obtain the benefits of the new process. However, against that it may well be said that Part A1 is to be construed in the context of the Insolvency Act as a whole, and if the draughtsman had wish to provide for a lower threshold, they could and would have used an expression qualifying 'likely' (such as the 'reasonably likely' which appears in paragraph 11(b) of Schedule B1 and in the statement of opinion regarding the purpose of administration being achieved which a prospective administrator is required to make in their statement and consent to act, under rule 3.2(1)(h) of the 2016 Rules).

It is worth noting in this context that the model offered by the Government to illustrate how the moratorium would work[33] is a relatively simple one. They posit an SME which has suffered a bad debt after a major customer entered administration. The company is described as having a healthy order book, but as being cash-flow insolvent. A director proposes to raise money by re-mortgaging her house, but the company requires protection until this can be achieved. In such a case, the question of whether rescue will be achieved will depend on the probability that the mortgage lending will be granted and will be sufficient, so one can see that a prospective monitor would readily be able on limited enquiries to form the required view. Most cases will be much more complicated. If the prospect of rescue turns on successful negotiations with creditors or lenders, and perhaps on whether a CVA or scheme restructuring historic debt will achieve sufficient support, it is difficult to see how a monitor will be able to reach the view that rescue <u>will</u> be achieved (although it is much more likely that they could rapidly evaluate whether there is real prospect that it will be achieved).

It is likely that the proper construction of the tests which a monitor is required to apply will need to be settled by an application to the court for directions. If it is confirmed that 'likely' means 'more probably than not', it is perhaps unlikely that there will be many cases in which a prospective monitor feels able to be that certain at an early stage of what is, after all, a process intended to give a company time to explore whether a rescue is possible.

Officer of the Court

Section A34 provides that the monitor in relation to a moratorium is an officer of the court. This is of course a familiar proposition in the context of insolvency (compare paragraph 5 of Schedule B1, which makes similar provision for administrators), and has a number of practical implications and consequences.

A monitor will be required to act with integrity and to act independently, even-handedly and impartially. He must avoid any conflict and must not act if conflicted. In the final analysis, a monitor will be required to act fairly and to the standard set by and expected by the court of its officer, the essential principle being that the court would not permit its officers to act in a way in

34. This is the general principle underlying the rule in *Re Condon Ex p James* (1873-74) LR 9 Ch App 609, as recently explained by the Court of Appeal in *Lehman Brothers (Australia) (in Liquidation) v MacNamara* [2020] EWCA Civ 321.

36. See David R5chards LJ in *Lehman Brothers (Australia) (in Liquidation) v MacNamara* at [38].

36. cf Re Colt Telecom Group Plc (No 2) [2003] BPIR 324 at [80]. Under the procedure which then applied, administration required an application to court supported by a report by an independent person under Rule 2.2 of the Insolvency Rules 1986.

37. cf the comments of Nicholls LJ in the analogous (although not identical) situation where an administrator is asked to consent to enforcement of security: *Re Atlantic Computer Systems plc* [1992] Ch 505, at 529-530.

38. cf Expandable Ltd v Rubin [2009] BCC 443 at [41]-[42].

39. See footnote 3 above.

which it would clearly be wrong for the court itself to act, to be judged by the standards of right-thinking people, representing the current view of society[34]. This standard is an objective one[35].

Where a monitor is required to furnish statements in documents to be filed in court (or put before a court) in support of a moratorium being commenced or continued, they will act as an expert, and so will be under an analogous duty to that of an expert in court proceedings under Part 35 CPR[36].

Where a monitor's consent is required (for creation of security during a moratorium, under section A26(1), or for the company to make payments which exceed the specified maximum, under section A28(1)(a), or for a disposal of property outside the ordinary course of business, under section A29(2)(b)), the fact that the monitor is an officer of the court means that they will be expected to make their decisions speedily, as far as they are able to do so, and to make them responsibly[37]. A monitor will be well-advised always to record a succinct summary of the reasons for their decisions, and should certainly do so if they are withholding a consent which has been sought.

A court has considerable powers of control over a monitor. It can give the monitor directions on an application by the monitor under section A37. It can 'confirm, reverse or modify' a monitor's act or decision on an application under section A42, considered further below. To the extent necessary, it can also probably act under its inherent jurisdiction to control its own officer.

The court has power under section A39(1) to appoint an additional monitor (for example, to address a possible conflict) or to replace a monitor (for example, in a case of incapacity), and the court also has power under section A39(2) to make an order that a person ceases to act as monitor. Section A39(3) provides that an order under sub-section A39(1) or (2) may only be made on an application by the directors or the monitor. It remains to be seen whether a court will regard itself as powerless to act if it concludes that the conduct of a monitor is such that they should be removed, but neither the directors nor the monitor are willing (or able) to make the requisite application.

As the court's officer, a monitor will be required to be open and candid in all their dealings with the court. In an extreme case, they may even be required to disclose privileged material if that is required to enable the court to resolve outstanding issues[38].

Pre-monitorship enquiries and arrangements

There is no bar on accepting a monitorship where there has been a prior professional relationship. It is left to the professional judgment of the practitioner to assess whether they can carry out the role with sufficient objectivity and independence. The Guidance stresses that they will need to have regard to any guidelines laid down by their Recognised Professional Body, and to the Ethics Code.

A prospective monitor will obviously need to engage with the company. They will need to understand the company's business and financial position sufficiently to be able to form a reasonable view as to the likelihood that the threshold test will be satisfied (ie that a moratorium would be likely to result in a rescue of the company). They will therefore need to have sufficient comfort about the sources and availability of funding for the duration of a moratorium, and to reach agreement on their own fees and expenses.

On all these matters, the prospective monitor will need to rely primarily on information from the company. The procedure is intended to be 'light-touch' and 'low cost', and the Guidance suggests that pre-appointment work should be proportionate to the size and complexity of the company. Practitioners will need to exercise their professional judgment as to the extent of the inquiries they should make and the accuracy and completeness of information which is provided.

The prospective monitor will need specifically to confirm that the company is eligible to obtain a moratorium (ie that it is not in one of the excluded categories in Schedule ZA1), because that is something they will be required to certify for a moratorium to be obtained.

They will also need to obtain a list of creditors with their contact details and details of their claims as recorded in the books of the company, because they will be required to notify those creditors if a moratorium is obtained.

A monitor will need to have a clear picture of the pre-moratorium debts for which the company will not have a payment holiday (which will include those under 'financial services contracts'), and of the debts which will fall due for payment during the moratorium. They will need to keep them under review in a moratorium, because (unless they are to be left out of account, as discussed below), if the monitor thinks that the company is unable to pay any of these which have fallen due, they will be obliged to bring the moratorium to an end under section A38(1)(d).

A prospective monitor will need to confirm whether the company is or has been an employer in respect of an occupational pension scheme that is not a money purchase scheme, and whether the company is an employer in respect of such a pension scheme that is an eligible scheme within the meaning given by section 126 of the Pensions Act 2004 (the **Pensions Act**). If so, there will be

obligations to notify the monitor's appointment to the Pensions Regulator or the Board of the Pension Protection Fund (**PPF**), and the PPF will have certain rights in a moratorium, as discussed below.

A monitor will be well advised to put in place a detailed protocol agreed with directors at the outset, so that it is entirely clear what information is to be provided during a moratorium, and with what frequency.

Commencing a moratorium

In order for a company to obtain a moratorium under Part A1, the proposed monitor must confirm in the documents to be filed for an out-of-court appointment (or which must accompany an application to court where that is required[39]):

(i) that they are a *qualified person* (section A6(1)(b)(i)) and that they consent to act as the monitor in relation to the proposed moratorium;

(ii) that the company is an *eligible company* (section A6(1)(c));

(iii) that, in the proposed monitor's view, *it is likely that a moratorium for the company would result in the rescue of the company as a going concern* (section A6(1)(e)).

During the Relevant Period, the statement under section A6(1)(e) will be modified so that the proposed monitor is required to state that, in the proposed monitor's view, *it is likely that a moratorium for the company would result in the rescue of the company as a going concern, or would do so if it were not for any worsening of the financial position of the company for reasons relating to coronavirus* (Schedule 4 paragraph 6(1)(b)). The threshold condition under section A6(1)(e), whether modified or unmodified, is considered in detail below.

It will be the directors, rather than the proposed monitor, who are required to state that, in their view, the company is, or is likely to become, unable to pay its debts. However, the proposed monitor will no doubt need to understand the extent of the company's insolvency in order to form a view as to the likelihood of achieving the objective of corporate rescue.

Under the temporary rules, these statements must be made within the five-day period before the documents are filed with the court (or if filed on different days, the last of those days): Schedule 4 paragraph 18 CIGA).

The moratorium will come into force at the time when the relevant documents are filed in court (section A7(1)(a)) or when the court makes an order (section A7(1)(b) or (c)). On the moratorium coming into force, the person or persons who made the statements under section A6(1)(b) (ie that they were a *qualified person* and consented to act) automatically become the monitor in relation to the moratorium, under section A7(2).

At that point, they have the functions and powers, and become subject to the statutory duties, of a monitor as provided under Part A1.

Joint appointments

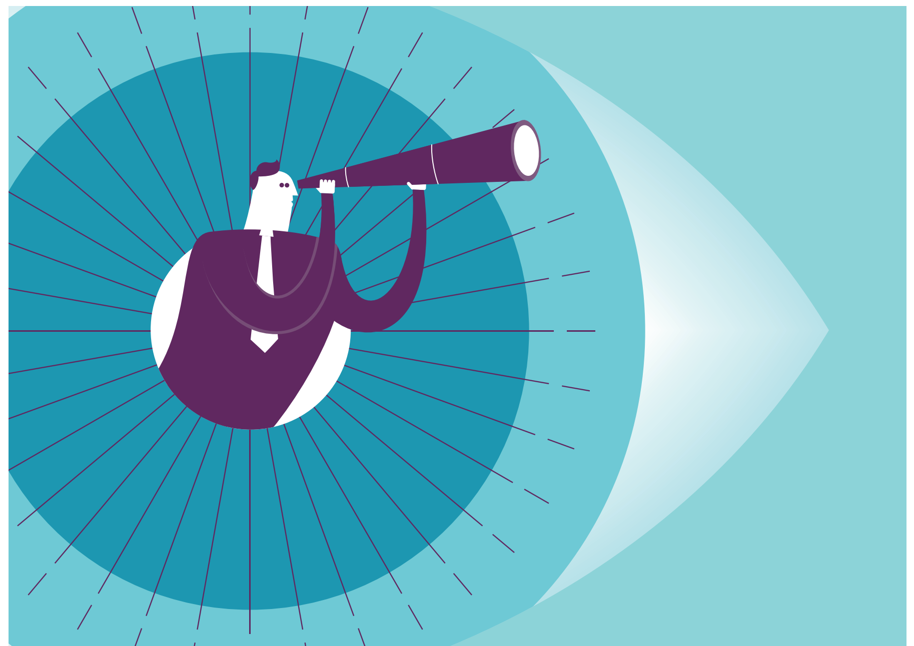
It is clear from section A6(2) that more than one person can be appointed to act as monitor. It is likely that joint appointments will be common in all but the smallest cases, and that they will be required by larger firms to cover the possibility of incapacity or unavailability. In that case, section A6(2) requires each of the proposed monitors to make the requisite statements, and the statement of consent under section A6(1)(b) to state which functions are to be exercised jointly and which (if any) are to be exercised by any or all of them. As with other appointments under the Insolvency Act, it is likely that monitors will usually prefer to be able to act independently, to avoid the inconvenience of having to act jointly.

Appointment takes effect

The framework does not envisage that the monitor will be directly involved in filing documents in court or participating in court hearings (although of course it may be helpful for them to do so in a complex case). They provide their statements and then await developments.

The appointment of a monitor takes effect when the moratorium comes into force (section A7(2)). That will be when the relevant documents are filed with the court where that is sufficient under Section A3, or when the court makes an order where an application will required under section A4 because there is an outstanding winding up petition (disapplied during the Relevant Period, as explained above), or under A5 (for other overseas companies).

Section A41 provides that an act of the monitor is valid notwithstanding a defect in their appointment or qualification. This is the equivalent of the provisions which appear in section 232 of the Insolvency Act in respect of administrative receivers, liquidators and provisional liquidators, and in paragraph 104 of Schedule B1 in respect of administrators.



... the monitor may well be involved in assisting the company with the proposal of a CVA or a scheme ...

Notification and publicity

As soon as reasonably practicable after the moratorium comes into force, section A8(1) requires that the directors must notify the monitor. Failure to do so without reasonable excuse will be a criminal offence.

It will then be the monitor's responsibility to notify the registrar of companies and every creditor of whose claim they are aware (section A8(2)). If the company is or has been an employer in respect of an occupational pension scheme that is not a money purchase scheme, the monitor must notify the Pensions Regulator, and if the company is an employer in respect of such a pension scheme that is an eligible scheme within the meaning given by section 126 of the Pensions Act, the monitor must also notify the Board of the PPF. The notice must specify when the moratorium came into force and when, subject to any permitted variation, it will come to an end (section A8(3)). Again, failure to comply on the part of the monitor without reasonable excuse would be a criminal offence (section A8(5)). If the company is a regulated company, the monitor must also send the notice to the appropriate regulator (i.e. the FCA or PRA) (section A48(3)).

It will similarly be the monitor's responsibility (under section A17) to notify if the moratorium is extended or comes to an end or (under section A39) if a monitor is replaced or an additional monitor is appointed.

During a moratorium, section A19 requires that the name of the monitor must be included in a notice prominently displayed at every place of business to which customers or suppliers of goods and services have access, and that it must also appear on the company's website and on every business document issued by the company.

Extensions of the Moratorium

The moratorium will initially last for a period of 20 business days beginning with the business day after it comes into force (section A9(2)).

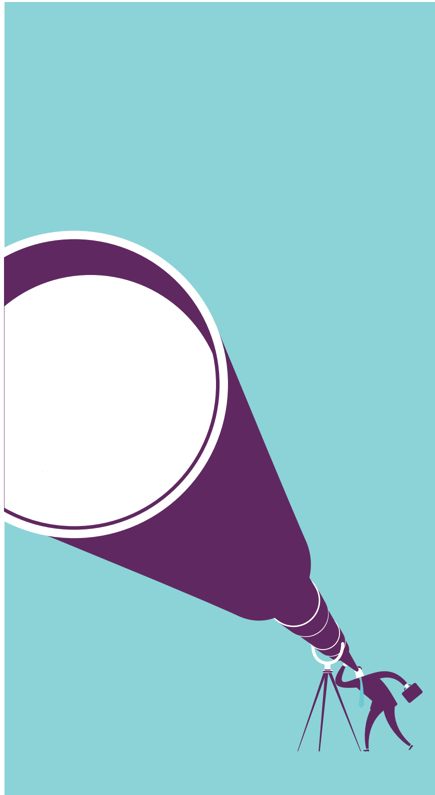
That initial period may be extended once under section A10 for a further 20 days by the directors filing documents with the court. This does not require consent of creditors, and it does not formally require consent of the monitor, but the documents must include a further statement from the monitor that in their view it is likely that the moratorium will result in the rescue of the company as a going concern. The monitor will therefore be required to reappraise that question in the light of information then available, and their statement must be made within the three day period before the last of the documents is filed.

The directors will need to be able to make statements that moratorium debts, and pre-moratorium debts for which the company does not have a payment holiday, that have fallen due have been paid or otherwise discharged, and that the company is or is likely to become unable to pay its pre-moratorium debts. The monitor does not have responsibility for those statements.

Alternatively, the moratorium may be extended under section A11, with creditor consent, for a period of up to 1 year from the start of the initial period. This will again require the support of a further statement from the monitor that in their view it is likely that the moratorium will result in the rescue of the company as a going concern (and the same statements from the directors discussed above). The creditors' consent is to be obtained using a qualifying decision procedure (Section A12(2)), and Part 15 of the 2016 Rules is applied for this purpose. The monitor is not formally involved in the process of seeking an obtaining the creditors' consent. However, the Guidance acknowledges that the directors may not be familiar with the rules surrounding decision making in insolvency procedures, and indicates that, whilst it is not part of a monitor's statutory duty to assist directors in obtaining the consent of creditors, they may choose to do so in an advisory capacity.

Thirdly, the moratorium may be extended by court order on an application by the directors under section A13. Once again, the application must be accompanied by a statement from the monitor that in their view it is likely that the moratorium will result in the rescue of the company as a going concern (and the same statements from the directors). On such an application, section A13(5) requires the court to consider the interests of pre-moratorium creditors, and also the likelihood that the extension of the moratorium will result in the rescue of the company as a going concern.

The monitor is not a party to such an application by the company, and while the monitor will have expressed their view that it is likely that the moratorium itself will result in rescue, they are not required to give reasons for that view. While the court will give weight to the fact that a monitor has felt able to make the requisite statement, it will be obliged to assess the question of 'likelihood' for itself (and although that is not a threshold condition for the exercise of the court's discretion, it is unlikely that a court would order an extension unless it is sufficiently satisfied on this point). There will therefore need to be evidence



to enable the court to consider the matters it is required to consider, and in many cases it will be appropriate for the monitor to assist in this regard as the court's officer.

For completeness, a moratorium will also be extended under section A14, while a proposal for a company voluntary arrangement is pending (and until it has been disposed of), or under section A15 where an application is made under section 896 or 901C of the Companies Act 2006 for a meeting to consider a scheme, in which case the court has power to extend the moratorium. In these cases, there is no requirement for any statement from the monitor to support the extension. Although nowhere spelt out, it is to be understood that the monitor or other members of a monitor's firm may well be involved in assisting the company with the proposal for a CVA or a scheme, and that they may go on to have role in the arrangement or scheme in the future.

The monitor's core duty

A monitor's core statutory duty is set out in section A35(1):

During a moratorium, the monitor must monitor the company's affairs for the purpose of forming a view as to whether it remains likely that the moratorium will result in the rescue of the of the company as a going concern.

Section A35(2) goes on to provide that, in forming that view, the monitor is entitled to rely on information provided by the company, unless the monitor has reason to doubt its accuracy.

The expression 'the company's affairs' – the subject of the monitoring – is very broad. It necessarily encompasses performance of the company's business and cash-flows, but arguably goes wider than that, and extends to an understanding of the company's material relationships and stakeholders. There is no detail as to the manner in which, how frequently, or to what level of detail, the monitor is to monitor the company's affairs. All that is left to the professional judgment of the monitor. The duty is a continuing one, but in practice a monitor will satisfy it if they put proportionate reporting arrangements in place, together with some system which will immediately alert the monitor to any material adverse changes.

Of course, where the monitor or their firm are themselves involved in advising on a company's restructuring with a view to rescue, they could well have an alternative source of information from their own experience. In this regard, an inherent tension may arise if the question of whether a rescue is likely to be achieved turns on the monitor's evaluation of the likelihood of their own or a partner's success in negotiations.

One particularly important aspect which a monitor will need to keep under close review is whether (or to be precise, whether the monitor *thinks*) the company is unable to pay any of the moratorium debts, or pre-moratorium debts for which the company does not have a payment holiday. (Under the Temporary Rules, paragraph 37 of Schedule 4 provides that the monitor is to disregard for this purpose any debts the monitor has reasonable grounds for thinking are likely to be paid within 5 days of the decision and any debts the creditor has agreed to defer beyond that date). This requires that the monitor identifies: that a qualifying debt has fallen due and is not deferred; that the company has not paid when the debt fell due; and that the company does not have sufficient cash to pay it and is unlikely to have sufficient cash (and pay) within five days. The reference to what the monitor 'thinks' implies that the monitor may (assuming reasonable grounds) form a different view from the directors, for example, as to the likelihood of a sum being received within five days which will enable a debt to be paid.

If, and as soon as, a monitor concludes that it no longer *remains likely that the moratorium will result in the rescue of the of the company as a going concern*, or that the company is unable to pay a relevant debt and is unlikely to pay it within the next five days, the monitor has no choice. They must bring the moratorium to an end by filing a notice in court as soon as practicable after the duty to do so arises (section A38(1)(a) or (d); Temporary Rules: Schedule 4 paragraph 36(1) CIGA).

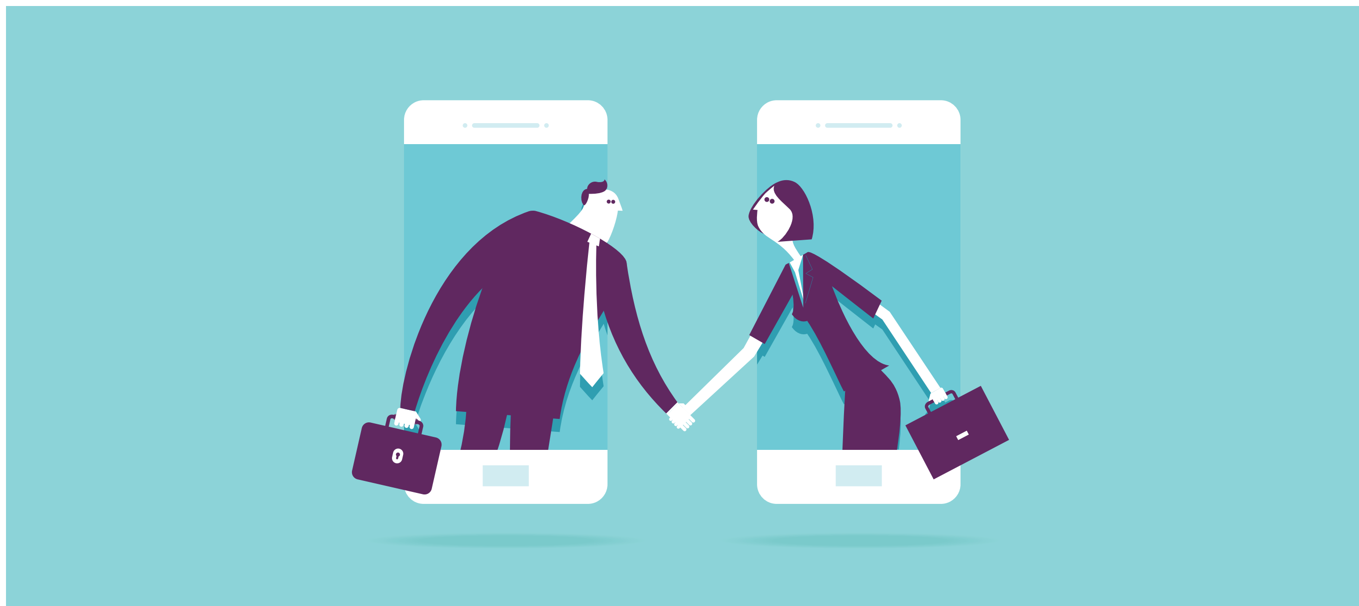
Relationship with directors

In most cases, it is likely that the relationship between the monitor and the directors will be a co-operative one, at least at the outset. After all, the directors want the benefit of the moratorium while they explore a possible rescue, and are reliant on the monitor continuing to support that objective and remaining of the view that it is likely to be achieved.

A monitor has power under section A36(1) to require the directors of the company to provide '*any information required by the monitor for the purpose of carrying the monitor's functions.* Section A36(2) provides that the directors must comply with a requirement to provide information as soon as practicable.

If the directors fail to provide information which the monitor requires, the monitor has no coercive power to compel them. The question will be whether the monitor thinks that the failure means that the monitor is unable properly to carry out their functions. If the information has been identified by the monitor as 'required', it is clearly likely to follow that failure to provide it does affect the monitor's ability to carry out their functions.

However, the directors' duty under A36 is to provide information 'as soon as reasonably practicable'. That is not the most precise formulation. It is reasonable to expect that a monitor



would afford the directors some margin in this regard, and would wish to act proportionately. A short delay or an initial and inadvertent provision of incomplete information should not generally trigger termination, and a monitor would probably be well advised to give the directors a warning and an opportunity to remedy the default before deciding that they are now unable to carry out their functions as monitor

A monitor who reaches that conclusion has no choice in the matter; this is another case in which they must bring the moratorium to an end by filing a notice in court as soon as practicable after the duty to do so arises (section A38(1)(c); Temporary Rules: Schedule 4 paragraph 76 CIGA). That is likely to be a considerable incentive to ensure that timely information is provided in most cases.

Separately, the fact that the directors remain in control of the company means that they are in a position to initiate insolvency proceedings in respect of the company. Section A24 imposes a duty on the directors to notify the monitor before they present a winding-up petition, make an administration application or appoint an administrator under paragraph 22(2) of Schedule B1, or recommend that the company passes a resolution for voluntary winding up under section 84(1)(b) of the Insolvency Act.

Relationship with creditors

The legislative framework provides for the monitor to have only very restricted contact with creditors. The monitor is required to notify those creditors of whom the monitor is aware when a moratorium has been obtained (section A8) or if it is extended or comes to an end (section A17), and if the monitor is replaced or an additional monitor is appointed (section A39). Otherwise, there is no requirement to inform or engage with creditors. The creditors' approval or sanction is not required for a monitor's actions or decisions. In this regard, the rescue moratorium differs from other processes under the Insolvency Act.

However, that may not be the end of the story. The attitude of creditors – particularly a company's bank and any significant creditors such as trade suppliers – may well be relevant to the monitor's consideration of the key question of whether it continues to be likely that the moratorium will achieve a rescue of the company. A creditor who considers themselves to have been significantly harmed may challenge the monitor's act or omission by an application to court under section A42. The Guidance unsurprisingly anticipates that monitors may find it helpful on occasions to provide additional information to some creditors.

Consent to payments

Section A28 restricts the amount the company can pay to a person in respect of pre-moratorium debt[40] for which it has a payment holiday (i.e. those which are not in a category excluded under section A18(3)) without the monitor's consent (unless the payment is in pursuance of a court order or is required by A31(3) (proceeds of charged property) or A32(3) (proceeds of goods which were subject to a hire-purchase agreement).

This will apply to unsecured debts owed to trade and service suppliers. The effect of section A18(3) is that there is no payment holiday for:

(i) the monitor's own remuneration or expenses for the period after the moratorium begins;

(ii) amounts payable in respect of goods and services supplied during a moratorium;

(iii) rent payable in respect of a period during a moratorium;

40. The Guidance makes clear that the definition of 'pre-moratorium debt' in Part A1 is intended to reflect the distinction between provable debts and expenses in administration made in *Re Nortel GmbH (in administration)* [2013] UKSC 52, so that liabilities such as contribution notices and financial support directions under the Pensions Act 2004 should be considered pre-moratorium debts and therefore not payable during the moratorium: see Guidance at p18.

(iii) wages and salary arising under a contract of employment, defined under section A18(7) to include holiday pay, payment in lieu of holiday, sick pay and pension contributions;

(v) redundancy payments;

(vi) debts or other liabilities arising under a contract or other instrument involving financial services (an expression defined under section A18(7) and Schedule ZA2 to include a wide range of contracts including contracts for lending or providing guarantees, securities contracts, commodities contracts, and swaps, so prospectively wide enough to catch bank and inter-group lending).

The limit for such payments is the greater of £5,000 or 1% of the aggregate value of the debts and liabilities owed by the company to its unsecured creditors when the moratorium began, to the extent that the amount of such debts and liabilities can be ascertained at that time. It will therefore be necessary for the monitor (and the company) to identify that aggregate amount at the start of the moratorium, in order to calculate the 1% figure.

It is worth noting that the expression 'debt or liability' here (and in Part A1 generally) carries the usual wide meaning that it has under the Insolvency Act: i.e. that it is *immaterial whether it is present or future, whether it is certain or contingent, or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion* (here provided by section A52(2)). It is therefore at least theoretically possible that some of the sums which fall to be included in the aggregate amount will be unascertained but capable of being ascertained, and it will be a question of fact and for inquiry by a monitor whether there is sufficient information available to enable them to be ascertained.

Section A28(3) provides that the monitor is only permitted to give consent to such a payment if the monitor thinks that the payment will support the rescue of the company as a going concern. An example of a situation when that might be the case would be where a supplier is insisting on a ransom payment as the price of continuing supply. As elsewhere under Part 1A, the monitor is entitled to rely on information provided by the company unless the monitor has reason to doubt its accuracy (section A28(4)).

A monitor's firm's pre-moratorium fees and expenses may pose a particular challenge in this area. They are carved out by section A18(7) from the exclusions from the payment holiday: so they are subject to the payment holiday. They may well exceed £5,000 or 1% of the aggregate unsecured debts, so payment would require the monitor's consent. The monitor would be in a position of conflict in consenting to a payment in which they have a direct interest. It would therefore be sensible to ensure that arrangements are in place to ensure that this issue does not arise.

Where a monitor does consent to a payment being made, or decides to withhold consent, they should document the information on which they have relied and their reasons for doing so.

Consent to property disposals

The monitor's consent is required for a company to dispose of property which is not subject to a security interest, unless the disposal is in the ordinary course of business or the disposal is in pursuance of a court order (section A29(2)).

Where a monitor's consent is required, the monitor may only consent if the monitor thinks that the disposal will support the rescue of the company as a going concern (section A29(3)). That is a subjective test, but the formulation suggests that the monitor must be of the opinion that it is more probable than not that the grant of security will support that objective; it will be insufficient if the monitor only thinks that the grant *might* achieve that end. There will need to be reasonable grounds for the monitor reaching that opinion, but in deciding whether to consent, the monitor is entitled to rely on information provided by the company unless the monitor has reason to doubt its accuracy (section A29(4)).

If the property is subject to a security interest, the monitor's consent is not required. The company may dispose of the property if that is permitted under the terms of the security or with the permission of the court under section A31. Similarly, the monitor's consent is not required if the company wishes to dispose of property in its possession under a hire-purchase agreement. The company may dispose of the property if that is permitted under the terms of the agreement or with the permission of the court under section A32.

Of course, the monitor may well be interested in the possible effects of such property disposals on the financial position of the company and the implications for the prospective rescue.

Consent to grant of security

A company which is subject to a moratorium is only permitted to grant security over its property if the monitor consents (section A26(1)).

The monitor only has power to consent if the monitor thinks that the grant of security will support the rescue of the company as a going concern (section A26(2)). Again, that is a subjective test, and the monitor will need to have reasonable grounds for their opinion. In deciding whether to give consent, the monitor is again entitled to rely on information provided by the company unless the monitor has reason to doubt its accuracy (section A26(3)).

Section A26(6) provides that the monitor is not permitted to give consent if the granting of security would be an offence under section A27, which prohibits the company entering into a market contract or financial collateral arrangement, giving a transfer order, granting a market-charge or system-charge or providing collateral security.

Security granted by the company without the consent of the monitor will be unenforceable (section A23(1)).

Challenges to a monitor's conduct

A creditor, director or member of the company, and any other person affected by the moratorium, has standing under section A42(1) to apply to the court to challenge a monitor's 'act, omission or decision'. It appears that this extends to a failure to take a decision it is alleged the monitor should have taken.

If a moratorium is in force in relation to a company which is (or has during the moratorium been) an employer in respect of an eligible scheme as defined in section 126 of the Pensions Act and

the trustees or managers of the scheme are a creditor of the company, section A44A provides that a challenge to a monitor's conduct which could be brought by those trustees or managers as a creditor under section A42(1) may be made by the PPF. (The PPF will also have a similar power to challenge the conduct or prospective conduct of directors during a moratorium under section A44).

The particular example which appears in the section is a failure by the monitor to bring the moratorium to an end under section A38(1). No doubt there will also be challenges where a monitor's consent is required and is not forthcoming.

The sole ground for an application under section A42 is that the act, omission or decision *has unfairly harmed* the interests of the applicant. This contrasts with the position in an administration under paragraph 74 of Schedule B1, where it is possible to complain that a present act or proposed act threatens unfairly to harm the interests of the applicant. An application will therefore need to be founded on an allegation of actual and non-trivial harm which has been suffered.

On an application, the court has power under section A42 to:

(a) confirm, reverse or modify any act or decision of the monitor;

(b) give the monitor directions; or

(c) make such other order as it thinks fit (although it cannot order the monitor to pay compensation).

In making an order, the court is required by section A42(7) to have regard to the need to safeguard the interests of those who have dealt with the company in good faith and for value.

The concept of '*unfair harm*' is a familiar one. It is the preferred modern formulation (as in paragraph 74 of schedule B1) whereas section 27 of the Insolvency Act, the statutory predecessor of paragraph 74, had referred to 'unfair prejudice'.

It is not mere 'harm' but only harm which is 'unfair' which invokes the court's jurisdiction. It has long been accepted in an insolvency context that *some* harm may be necessary, especially as a price worth paying for the prospect of a corporate rescue or at least a better realisation.

The expression 'unfair harm' can connote some unequal or differential treatment to the applicant's disadvantage, which cannot be justified by reference to the interests of the creditors as a whole or to achieving the statutory objective: that was how Norris J understood it in *Re Coniston Hotel (Kent) LLP*[41]. In *Hockin v Marsden*[42], Nicholas Le Poidevin QC said that the requirement of unfairness certainly prevents a creditor complaining of a disadvantage to his own interests when the disadvantage is justifiable by reference to the interests of the creditors as a whole, but it did not necessarily require unjustifiable discrimination; a lack of commercial justification for a decision causing harm to the creditors as a whole may be unfair in the sense that the harm is not one which they should be expected to suffer. In *Re Meem SL Limited*[43], David Halpern QC agreed and said that, as a matter of language, the term "unfair" is not limited to cases of unequal treatment but is capable of including conduct which is unfair to everybody within the class.

More recently, the concept of 'unfair harm' in the analogous context of paragraph 74 of Schedule B1 was considered in some detail by the Court of Appeal in *Lehman Brothers (Australia) (in Liquidation) v MacNamara*[44] and although paragraph 74 is couched in wider terms than section A42, the discussion of principles by David Richards LJ at [81]-[84] is directly relevant. Applying those principles to a monitor exercising statutory functions and discretions under Part A1, and paraphrasing where necessary:

i) the office of monitor is a statutory creation, and a monitor is empowered to take only those steps for which there is express or implied statutory authority;

41. [2013] 2 BCLC 405, at [36].

42. [2014] 2 BCLC 531.

43. [2017] EWHC 2688 (Ch).

44. Footnote 34 supra.

ii) if a monitor acts without authority, they would be acting unlawfully and an aggrieved creditor would not need to rely on section A42, and equally if an administrator exercised a power in bad faith or for an improper purpose, it would be an unlawful exercise of the power;

iii) where a monitor is acting in accordance with his obligations under Part A1, there can be no question that he is causing unfair harm;

iv) however, where the monitor is exercising a discretion, but does so in a manner which unfairly harms a creditor, the court should grant relief in an appropriate case;

v) the court's jurisdiction under section A42 is not restricted to those cases where a monitor's act cannot be justified by reference to the interests of the creditors as a whole or to achieving the objective of a rescue moratorium, or is discriminatory in effect;

vi) section A42 adopts an objective test of unfairness and conduct engages section A42 if it meets that objective test;

vii) in judging whether any conduct can be said to have caused unfair harm, it is a factor of great importance that the monitor is carrying out statutory functions and is or should be doing so in the interests of creditors as a whole (or in the interests of rescuing the company), but that may still involve the infliction of unfair harm on a particular person.

It is also material to consider that, while a moratorium is in place, a monitor is required to exercise independent commercial judgement. The courts are traditionally and notoriously reluctant to interfere with such commercial judgments of office-holders. In *Re CE King Ltd*[45] [2000] 2 BCLC 297 Neuberger J said at 302-3: *'First, prima facie, what the administrators should do about [a particular] contract is a commercial decision. Secondly, at least in principle and in general, it is not for the court to interfere with such commercial decisions: those are to be left to the administrator.'*

It is generally only if what an office-holder is proposing to do (or has done) is *'so utterly unreasonable and absurd that no reasonable man would have done it'* (per the Court of Appeal in *Re Edennote*[46]) or an office-holder is *'proposing to take a course which is based on a wrong appreciation of the law and/or is conspicuously unfair to a particular creditor or creditors or contractor of the company'* (per Neuberger J in *CE King*) that the court is prepared to interfere.

It is probable that there will be early challenges to test the proper interpretation of these provisions in the context of a rescue moratorium, but where a suitably-experienced insolvency practitioner has on reasoned and apparently reasonable grounds taken a view of what is (or what is not) likely to support the rescue of the company as a going concern, or as to the fundamental and continuing question of whether the moratorium is likely to achieve that objective, they will be afforded a wide margin of appreciation and it is likely to be very difficult to persuade a court to substitute its own judgment. That is not to say, impossible, but the cases in which a court is prepared to do so will be rare.

Conversely, where a decision is one which a monitor is bound to take if certain facts are proved, and the court forms a different view of those facts on the available evidence (which may go beyond what was available to the monitor), there can be little doubt that a court would be prepared to substitute its own decision for that of the monitor.

End of a Moratorium

A moratorium lasts for the initial 20-day period or that period as extended, and comes to an end at the end of that period (section A9(1)).

A moratorium automatically comes to an earlier end (under section A16(1)(a)) at the time when a court sanctions a compromise or arrangement under section 899 or section 901F of the Companies Act 2006.

A moratorium also automatically comes to an end (under section A16(1)(a)) at the time the company enters a relevant insolvency procedure. This will be when a voluntary arrangement takes effect, when an interim moratorium under paragraph 44 of Schedule B1 begins to apply, when the company enters administration, or when the company goes into liquidation.

When a moratorium ends, the directors are required to notify the monitor under section A17, and the monitor must in turn notify the Registrar of Companies and every creditor of the company of whose claim the monitor is aware.

Termination of a Moratorium

There are also four circumstances specified in section A38, some of which have been referred to above, where the monitor must bring a moratorium to an end by filing a notice with the court. In these cases, the moratorium comes to an end when the notice is filed (section A38(3)).

The four situations listed in section A38(1) each turn on a subjective assessment by the monitor. Once the relevant opinion is formed, the monitor has no choice or discretion. The duty will arise if (and immediately when) the monitor thinks:

(a) that the moratorium is no longer likely to result in the rescue of the company as a going concern;

(b) that the objective of rescuing the company as a going concern has been achieved;

45. [2000] 2 BCLC 297, at 302-3.

46. [1988] BCC 718 at 722 G-H.

In general, any dispute regarding a monitor's remuneration or expenses will be a civil matter to be resolved between the monitor and the company.

(c) that the monitor is unable properly to carry out their functions because of a failure by the directors to comply with a requirement to provide information to the monitor under A36];

(d) that the company is unable to pay moratorium debts, or pre-moratorium debts for which the company does not have a payment holiday (and under the temporary rules in Schedule 4 of the Bill, the monitor is to disregard for this purpose any debts the monitor has reasonable grounds for thinking are likely to be paid within 5 days of the decision and any debts the creditor has agreed to defer beyond that date: Schedule 4 para 37 CIGA).

The Temporary Rules (Schedule 4 paragraph 36 CIGA) require that a notice of termination under section A38(1) must be filed with the court as soon as practicable after the duty arises. It appears that the monitor is not immediately required to inform the directors (although that would undoubtedly be good practice); the formal requirement under section A17(4) and paragraph 34 of Schedule 4 CIGA is for the monitor to notify the company, the Registrar of Companies and every creditor of the company of whose claim the monitor is aware within 3 business days beginning with the day the notice under section A38(1) is filed with the court, with a copy of the notice that has been filed.

Remuneration and Expenses

The remuneration of a monitor will be a contractual matter for negotiation between the monitor and the company. There is no provision for a monitor's remuneration and expenses to be reviewed and approved by creditors, and the parts of the 2016 Rules which relate to an office-holder's remuneration are not applied to the fees charged by a monitor[47].

Where the contract between the monitor and the company is entered into before the moratorium, the monitor's remuneration and expenses will fall within the definition of 'pre-moratorium debt' in section A51(1), because the company will become subject to them because of a pre-moratorium obligation. (There is seemingly nothing to prevent a monitor from entering into a new contract with the company after a moratorium has come into force.)

Where a practitioner acts as monitor and they or their firm also provide advisory services in connection with a possible restructuring and rescue, care will need to be taken to distinguish the head under which particular costs are incurred.

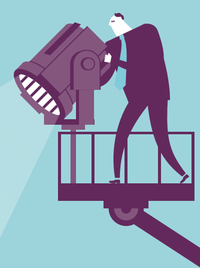
A prospective monitor who does not wish to wait for payment would be well advised to make arrangements to ensure that they are in funds to cover their preparatory work up to the start of the moratorium. As discussed above, the effect of section A18(7) is that a monitor's remuneration (although not it appears their expenses) in respect of anything done before the moratorium begins will not be exempted from the payment holiday under section A18(3).

During a moratorium, the monitor's remuneration and expenses will be exempted from the payment holiday and so payable (in effect, as an expense), and should be paid as they fall due. They will therefore be taken into account by the monitor in considering the company's ability to meet foreseeable cash-flow. If they are not paid when they have fallen due (and the monitor does not have reasonable grounds to think they are likely to be paid within five days and is not prepared to defer them), that will trigger the monitor's obligation to terminate the moratorium under section A38.

In general, a moratorium is expected to be a 'light touch', and therefore lower cost, insolvency process, and in practice the costs are likely to be proportionate to the size and complexity of the company's affairs. The usual expectation will apply that work will be undertaken by members of a monitor's staff with appropriate levels of seniority and experience for the particular task.

However, it is clearly possible that costs will escalate, particularly if unforeseen issues require a monitor to seek legal advice or directions

47. See Guidance, page 40.



from the court, or if there is a challenge to a monitor's conduct. In such cases, a monitor will be in a weaker position than, for example, an administrator, precisely because they do not have control over the company's cash.

The effect of the new paragraph 64A of Schedule B1[48] is that if the end of a moratorium is followed by an administration with 12 weeks, moratorium debts and pre-moratorium debts for which the company did not have a payment holiday are to be paid with super-priority over floating charge security and the costs and expenses of the administration payable under paragraph 99 of Schedule B1. Similarly, if winding-up proceedings are begun (a petition is presented or a resolution for voluntary winding-up is passed) within 12 weeks of the end of a moratorium, moratorium debts and pre-moratorium debts for which the company did not have a payment holiday will have super-priority under new section 174A of the Insolvency Act[49].

Where section 174A or paragraph 64A of Schedule B1 apply, the Temporary Rules provide[50] that the monitor's remuneration and expenses will rank for payment behind:

(a) amounts payable in respect of goods or services supplied during the moratorium under a contract where, but for section 233(B)(3) or (4) of the Insolvency Act[51], the supplier would not have had to make that supply;

(b) wages or salary (including holiday pay, sick pay and pension contributions) arising under a contract of employment;

(c) other debts or other liabilities apart from the monitor's remuneration or expenses.

In general, any dispute regarding a monitor's remuneration or expenses will be a civil matter to be resolved between the monitor and the company.

A subsequent administrator or liquidator will be able to challenge the remuneration charged by a monitor on the ground that it was excessive[52]. The application will have to be brought within a 2-year period beginning the day after the moratorium

48. inserted by Schedule 3 paragraph 31 CIGA.

49. inserted by Schedule 3 paragraph 13 CIGA.

50. Schedule 4 CIGA, paragraphs 42 (subsequent winding-up) and 43 (subsequent administration).

51. ie the provisions added by CIGA which protect supplies notwithstanding clauses which provide for automatic termination or a right to terminate on insolvency.

ends. The court will have power to order the monitor to repay some or all of the remuneration (or make such other order as it thinks fit). Unless the court orders otherwise, the costs of the application will be paid as an expense of the administration or liquidation. An administrator or liquidator will be able to assign the right to bring this claim, which is regarded as a 'cause of action'[53].

Reporting Offences

Chapter 7 of Part 1 creates a number of offences which may be committed by a director or shadow director in connection with a moratorium. These include, for example, making a false representation for the purpose of obtaining a moratorium or an extension of a moratorium (section A46(1)), or concealing a debt due to or from the company or property worth £500 or more (section A45(2)(a)).

If it appears to a monitor (i.e. the monitor forms the view) that a past or present officer of the company has committed an offence in connection with the moratorium, section A47 requires them to report it 'forthwith' to the appropriate authority (in the case of a company registered in England and Wales, the Secretary of State). The monitor must give the appropriate authority the information and access to documents that the authority requires.

A monitor may also be required to assist the Secretary of State if there is an investigation into the affairs of the company.

Concluding thoughts

The new rescue moratorium regime represents a reform of the UK's insolvency procedures which is long overdue, but the bill's rapid passage through Parliament as part of the economic response to the Coronavirus pandemic means there has not been time for the usual degree of scrutiny. As with any new insolvency regime, there is likely to be a period of bedding down before the meaning of key provisions becomes settled, and it appears inevitable that a number of provisions will be tested in the courts in the coming months. ■

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52. The present provision is in Schedule 4 paragraph 40 CIGA; the power to make rules is this regard is in section A43.

53. Section 246ZD of the Insolvency Act is amended to that effect by Schedule 3 paragraph 16 CIGA.