

# **Monitoring The Moratorium: Assessing The Demanding Role of Monitors**

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## **Abstract**

This article examines the role of the monitor in commencing and supporting the integrity of the company moratorium process. The standalone moratorium was introduced by the Corporate Insolvency and Governance Act 2020 as part of the permanent measures seeking to strengthen the UK's rescue and restructuring regime. Entry into the moratorium requires an insolvency practitioner consenting to act as the monitor for the proposed moratorium. The process of obtaining, continuing, and terminating a moratorium is reliant on the co-operation of the monitor. Following the initial appointment, the monitor's role is to ensure that the strict eligibility requirements for the moratorium are met and to assess the likelihood of the company being rescued as a going concern. Evidently, the demands placed on monitors are extensive and they are required to fulfil their monitoring obligations within the short timescales available. To date, there remains substantial uncertainties as to the role, reputational risks, and potential scope of liabilities and criminal penalties for monitors. Furthermore, the professional risks of acting as a monitor appear to be more significant compared to the risks of acting as an administrator. Such factors have impacted on the willingness of some insolvency practitioners from acting as monitors. These ongoing issues may provide a possible explanation as to why the standalone moratorium has seldom been used since its introduction. Consequently, this article will consider the onerous burdens placed on monitors in fulfilling their functions of assessing the prospects of a successful company rescue.

## **Key words**

Corporate Insolvency; Moratorium; Monitors; Company Rescue; Compliance

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## Introduction

As a direct response to the financial distress exacerbated by the COVID-19 pandemic, many jurisdictions proceeded to fast-track insolvency reforms and restructuring measures to maximise the survival prospects of financially distressed companies.<sup>2</sup> The Corporate Insolvency and Governance Act 2020 came into force on the 26<sup>th</sup> of June 2020 and inserted a new Part A1 in the Insolvency Act 1986. The provisions of the Corporate Insolvency and Governance Act 2020 introduced a range of permanent and temporary changes to the UK's insolvency framework. While the temporary changes<sup>3</sup> were emergency provisions initiated by the economic repercussions of the COVID-19 pandemic, the permanent measures introduced three long-standing changes to enhance company rescue. The permanent changes were consulted on for a number of years and generally reflected a need to introduce more debtor-in-possession options for achieving a company rescue.<sup>4</sup> The permanent changes to the regime were extensive and included a new restructuring plan,<sup>5</sup> a restriction on contractual termination (ipso facto) clauses<sup>6</sup> and a new standalone restructuring moratorium.<sup>7</sup> These permanent changes signified the most extensive changes to the UK's insolvency framework since the enactment of the Enterprise Act 2003 and aimed to promote rescue culture as the main objective.<sup>8</sup> The permanent measures of the framework aimed to provide businesses with the flexibility needed to continue trading during a period of significant economic uncertainty.<sup>9</sup>

The changes to the UK insolvency regime with the inclusion of a reorganisation plan, treatment of executory contracts and a moratorium on enforcement action, demonstrate

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<sup>2</sup> See A Gurrea-Martinez 'The Future of Insolvency Law in a Post-Pandemic World' (2022) 31(3) *International Insolvency Review* 384 at 385.

<sup>3</sup> The temporary measures included temporary exclusions for small suppliers (Corporate Insolvency and Governance Act 2020 s15(2)(b)); temporary prohibitions on winding up petitions and orders (Corporate Insolvency and Governance Act 2020 Schedule 10, Part 1 s1(3)(b); and suspension of wrongful trading (Corporate Insolvency and Governance Act 2020, s2(2)(b). The temporary rules were brought to an end by 30 September 2020.

<sup>4</sup> See The Insolvency Service, *A Review of the Corporate Insolvency Framework: a consultation on options for reform*, 2016. Available at <https://www.gov.uk/government/consultations/a-review-of-the-corporate-insolvency-framework>; Department for Business, Energy and Industrial Strategy, *Insolvency and Corporate Governance: Government response*, 2018. Available at [https://assets.publishing.service.gov.uk/media/5b826986e5274a4a77e83ebd/ICG\\_-\\_Government\\_response\\_doc-](https://assets.publishing.service.gov.uk/media/5b826986e5274a4a77e83ebd/ICG_-_Government_response_doc-24_Aug_clean_version_with_Minister_s_photo_and_signature_AC.pdf)

[24 Aug clean version with Minister s photo and signature AC.pdf](https://assets.publishing.service.gov.uk/media/5b826986e5274a4a77e83ebd/ICG_-_Government_response_doc-24_Aug_clean_version_with_Minister_s_photo_and_signature_AC.pdf). Accessed 10 March 2025. The Government considered introducing a short-term moratorium, amongst other things.

<sup>5</sup> Companies Act 2006, Part 26A.

<sup>6</sup> Insolvency Act 1986, Section 232B.

<sup>7</sup> Insolvency Act 1986, Part A1 as inserted by Corporate Insolvency and Governance Act 2020.

<sup>8</sup> See The Insolvency Service, *Major changes to insolvency law come into force*, June 2020. Available at <https://www.gov.uk/government/news/major-changes-to-insolvency-law-come-into-force>. Accessed 10 January 2025.

<sup>9</sup> See The Department for Business, Energy and Industrial Strategy, *Corporate Insolvency and Governance Bill: Explanatory Notes*, page 16. May 2020. Available at <https://publications.parliament.uk/pa/bills/cbill/58-01/0128/en/20128en.pdf>. Accessed 10 March 2025.

a convergence to the UNICTRAL Legislative Guide on Insolvency Law<sup>10</sup> and aligns the UK with international insolvency developments which feature access to a statutory moratorium as part of their restructuring and rescue frameworks.<sup>11</sup> The inclusion of moratoria can be beneficial as a means of preserving value in financially distressed yet viable companies and the inclusion of a free-standing moratorium expands the range of options available to distressed companies in the UK.

This article will focus exclusively on the inclusion of the new permanent standalone moratorium and the role of the monitor. The free-standing moratorium provides eligible companies with the necessary breathing space against legal and enforcement proceedings to negotiate and pursue rescue and restructuring options. The moratorium is overseen by a licensed insolvency practitioner acting as a monitor who will assess the progress of the company and safeguard creditor interests. Put simply, the monitor bears the responsibility of overseeing the entire moratorium procedure and the company's affairs.<sup>12</sup> As will be discussed, the process of obtaining, continuing, and terminating the moratorium is reliant on the monitor's co-operation and accompanying statements. The rest of this article proceeds as follows. Section 1 provides a general overview of the Part A1 moratorium. Section 2 outlines the role of the monitor during the pendency of the moratorium. Section 3 outlines the obligations of the monitor when the moratorium comes into force. Section 4 outlines the monitor's responsibilities during the cessation of the moratorium. Section 5 concludes.

## **An Overview of The Part A1 Moratorium**

The Part 1A moratorium is intended to give viable companies an opportunity to consider possibilities of rescue without the immediate creditor pressure before the advent of formal insolvency. The process of a moratorium exists as a 'light touch' alternative to administration and is a way of avoiding the adverse costs of operating under an administrative regime.<sup>13</sup> The moratorium might also avoid the reputational risks of damaging relations with suppliers, customers and staff which is a common repercussion of a company entering administration.<sup>14</sup> Similarly to the administration moratorium, no legal proceedings may be commenced against the company nor steps taken to enforce

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<sup>10</sup> The UNICTRAL Legislative Guide on Insolvency Law 2021. Available at [https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency\\_law](https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law). Accessed 12 May 2025.

<sup>11</sup> The new measures adopt some of the provisions of the US Chapter 11 regime and the European Restructuring Directive, such as restructuring tools, a statutory moratorium or stay of actions, the restriction of termination clauses and a mechanism for cross-class cramdowns. Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventative restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), Arts 5–7. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32019L1023>. Accessed 11 April 2025.

<sup>12</sup> The duties of the monitor are contained within the Insolvency Act 1986, Part A1, Chapter 5.

<sup>13</sup> *MI Squared Ltd v King* [2022] EWHC at [36].

<sup>14</sup> *Ibid*, at [36].

security during a moratorium.<sup>15</sup> The standalone moratorium shares similar parameters to the administration moratorium.<sup>16</sup> The moratorium provides the company with protection by restricting enforcement actions which trigger the repayment of certain pre-moratorium debts for which the company has a payment holiday.<sup>17</sup> Accordingly, the main objective of the standalone moratorium is to facilitate the rescue of the company with the aim of returning the company to profitable trading.<sup>18</sup> The moratorium is focused on facilitating the rescue of the company as a legal entity rather than the company's business or realisation of its assets.<sup>19</sup> The protection afforded by the moratorium grants the company a short timeframe to explore restructuring and refinancing options, while restricting any hostile legal actions against the company. The Insolvency Service summarised the four primary policy objectives of the standalone moratorium as: first, to provide companies a period of protection so they can seek advice, negotiate with creditors; second, to enable companies using the moratorium to benefit from greater opportunities for company survival; third, to provide companies using the moratorium enough time during a breathing space to consider the best option for the company; fourth, to ensure that all struggling companies that meet the eligibility criteria should be able to use the moratorium.<sup>20</sup>

To be eligible for the moratorium, the company must be unable to pay its debts or likely to become so, however, the company must still be capable of being rescued.<sup>21</sup> The moratorium is obtained by filing relevant documents at court and the initial period of the moratorium is 20 business days beginning with the business day after the day on which the moratorium comes into force.<sup>22</sup> The process is largely administrative and the moratorium commences as soon as the relevant documents are filed. The duration of the moratorium may be extended with or without the consent of the pre-moratorium creditors or alternatively can be extended by the courts in defined circumstances.<sup>23</sup> The moratorium is standalone and does not need to be used in conjunction with any other insolvency or restructuring proceedings, however it may be combined with other formal procedures if required. Appropriate restructuring or refinancing options may include a company voluntary arrangement (CVA) or a restructuring plan<sup>24</sup> and will be determined on the basis of the company's current financial circumstances and future viability. As

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<sup>15</sup> See Insolvency Act 1986, Part A1, Chapter 5, Section A20-A23 for the full restrictions on insolvency proceedings.

<sup>16</sup> Insolvency Act 1986, Schedule B1, paragraphs 42 and 43.

<sup>17</sup> Insolvency Act 1986, Part A1, Chapter 4, Section A18.

<sup>18</sup> See The Insolvency Service, *Guidance for monitors* (June 2020). Available at <https://www.gov.uk/government/publications/insolvency-act-1986-part-a1-moratorium-guidance-for-monitors/test-doc>. Accessed 10 March 2025.

<sup>19</sup> *Re Grove Independent School Ltd* [2023] EWHC 2546 (Ch) at [7].

<sup>20</sup> The Insolvency Service, Corporate Insolvency and Governance Act: Post Implementation Review, 2023. Available at [https://www.legislation.gov.uk/ukia/2023/69/pdfs/ukia\\_20230069\\_en.pdf](https://www.legislation.gov.uk/ukia/2023/69/pdfs/ukia_20230069_en.pdf). Accessed 15 January 2025.

<sup>21</sup> Insolvency Act 1986, Schedule ZA1. Schedule ZA1 contains provisions for determining the eligibility of companies.

<sup>22</sup> Insolvency Act 1986, Part A1, Chapter 3, Section A9(2).

<sup>23</sup> *Ibid.*

<sup>24</sup> Companies Act 2006, Part 26A.

such, rescue may be achieved by a CVA, a restructuring plan or through refinancing. To date, Companies House data indicates that the standalone moratorium has been used effectively to enable a company to enter a CVA with the restriction on enforcement actions enabling companies to seek approval of the CVA.<sup>25</sup> If a formal insolvency process is agreed upon, the moratorium will be brought to an end, once the company enters into the chosen formal procedure.

In contrast to the moratorium attached to administration, the standalone moratorium permits directors to continue to run the company in conjunction with a licensed insolvency practitioner and is thus a debtor-in-possession process. Accordingly, management will not be displaced, and the process allows directors to be in control of the planning for the proposed restructuring alongside the guidance of a licensed insolvency practitioner. This bears some similarities to the US Chapter 11 model, by which the company remains under control of management by the company's directors, subject to the oversight of the insolvency practitioner. The standalone moratorium requires engaging a licensed insolvency practitioner to act in the capacity of the monitor.<sup>26</sup> The monitor is likely to provide expert advice which will form the basis of restructuring options for the company.<sup>27</sup> Where it is proposed that more than one person should act as the monitor, subsequent statements must specify which functions are to be carried out by which monitor or whether such functions are to be carried out jointly.<sup>28</sup> Contrary to the position under the CVA where the duties of the supervisor are vague, the duties of the monitor have been specified. The discussion will now turn to discuss the specific responsibilities of the monitor in anticipation of the moratorium process.

## **The Role of The Monitor During The Pendency of The Moratorium**

### **A) Confirming The Eligibility of The Company**

To ensure that the monitor can fulfil their statutory and compliance obligations, the monitor has to undertake a number of tasks in advance of the moratorium. To obtain a moratorium, a monitor is required to provide statements confirming the eligibility of the company, confirming that they are qualified and consent to act as the monitor<sup>29</sup>, and that a moratorium is likely to result in the rescue of the company as a going concern.<sup>30</sup>

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<sup>25</sup> The Insolvency Service, *Company Insolvency Statistic, May 2025* (2025), 2.1. Available at <https://www.gov.uk/government/statistics/company-insolvencies-may-2025/commentary-company-insolvency-statistics-may-2025>. Accessed 30 June 2025.

<sup>26</sup> See Insolvency Act 1986, Section 388(1), which has been amended to encompass monitors within the regulatory framework applicable to insolvency practitioners acting as insolvency office-holders.

<sup>27</sup> V Dennis, *Insolvency Law Handbook*, 4<sup>th</sup> Ed, (London, The Law Society, 2021), p38.

<sup>28</sup> Insolvency Act 1986, Part A1, Chapter 2, Section A6, 2(a) and (b).

<sup>29</sup> Insolvency Act 1986, Part A1, Chapter 2, Section A6. The proposed monitor's statement and consent to act should contain the following: certificate evidencing that the monitor is qualified to act as an insolvency practitioner in relation the company, insolvency practitioner number assigned to the officeholder, the name of the recognised professional body authorising the monitor to act, and a statement that the proposed monitor consents to act as monitor.

<sup>30</sup> Insolvency Act 1986, Part A1, Chapter 3, Section A6(1)(a)-(e).

Entry into a moratorium is thus contingent on the monitor authenticating the eligibility requirements and attesting the suitability of a moratorium. The task of preparing the report on the eligibility of the company and preparing the relevant documentation and legal materials falls on the proposed monitor. The proposed monitor is thus expected to have a sound understanding of the moratorium eligibility and qualifying criteria, in order to make the assessment as to whether the company meets the qualifying conditions. The monitor can conduct insolvency searches at Companies House to confirm whether the company is subject to an insolvency procedure, which would render the company ineligible from the moratorium process.<sup>31</sup> The monitor must have full comprehension of the wide-ranging exclusions to the general eligibility of the moratorium and will need to understand the financial position of the company in order to form the viewpoint of the likelihood of achieving a rescue.

The proposed monitor is responsible for making an impartial and robust assessment of the company's position. By confirming the eligibility of the company, the proposed monitor provides objectivity and impartiality to the moratorium process. However, there is evidence to suggest that there are issues with the complexity of the eligibility criteria. The Insolvency Service has indicated that there is a certain lack of understanding and knowledge of the eligibility criteria, with a sizeable minority of responses by insolvency practitioners not knowing if all companies in financial distress that meet the eligibility criteria were able to use the moratorium.<sup>32</sup> This is despite the assumed costs of training insolvency practitioners to be familiar with the new permanent measures and the legislative changes.<sup>33</sup> Doubts remain as to whether eligible companies are able to use the moratorium and to date, there have been misunderstandings with certain aspects of the qualifying criteria.<sup>34</sup>

As a debtor-in-possession procedure, the monitor will need to engage consistently with the directors to be able to assess the company's prospects and ensure that the company is compliant with the eligibility conditions of the standalone moratorium. The role of the monitor is restricted to merely monitoring the affairs of the company rather than managing the affairs of the company, with the latter responsibility remaining with the directors.<sup>35</sup> The monitor's relationship with the directors is pivotal for maintaining the debtor-in-possession rescue procedure.

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<sup>31</sup> Insolvency Act 1986, Schedule ZA1, Paragraph 2(2).

<sup>32</sup> The Insolvency Service, above n19, at para 3.12.

<sup>33</sup> The Insolvency Service had assumed that the costs of the training courses were in the region of £180-£400 per IP, with an overall estimate of £374k for the number of appointment-taking IPs. See The Insolvency Service, above n19, at para 5.5.

<sup>34</sup> P Walton and L Jacobs, *The Corporate Insolvency and Governance Act 2020- Final Evaluation Report* (November 2022), commissioned by The Insolvency Service. Section 4.3.1. Available at <https://www.gov.uk/government/publications/corporate-insolvency-and-governance-act-2020-evaluation-reports/corporate-insolvency-and-governance-act-2020-final-evaluation-report-november-2022>. Accessed 16 January 2025.

<sup>35</sup> The monitor is not involved with the administration or management of the company.

At this stage of the process, the monitor is expected to exercise a degree of due diligence when assessing the company's financial position, prospects and eligibility for a moratorium, as the monitor will be acting in the capacity as an officer of the court.<sup>36</sup> As an officer of the court, the monitor is thus obliged to act honourably and fairly and be subject to the decisions of the court. If at any time, the proposed monitor is uncertain how to act, the monitor can apply to the court for directions about the carrying out of the monitor's functions.<sup>37</sup> This due diligence extends to the administrative task of maintaining records of any decisions made by the monitor which materially affect the company.<sup>38</sup> The monitor must be able to provide statements that sufficiently explain the decisions made in relation to commencing, terminating and granting consent for certain actions, such as the granting of security or payment of a pre-moratorium debt.<sup>39</sup> The role of the monitor in advance of the moratorium extends to keeping records of any decision made during and prior to the monitorship.

#### B) Obtaining Information Relating to The Company'S Affairs

The monitor's principal statutory duty is set out in section A35(1) which states that '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 company as a going concern.'<sup>40</sup> The monitor is required to apply this test prior to the commencement of the moratorium and must continually assess the prospects of rescue and the company's financial position during the moratorium process. In forming this view, the monitor is entitled to rely on information provided by the company, unless the monitor has reason to doubt its accuracy.<sup>41</sup> It is the responsibility of the monitor to obtain sufficient information relating to the affairs of the company. The term 'company's affairs' is deliberately broad and encompasses the wide-ranging subject matter of the monitoring process. For the purpose of carrying out their monitoring function, section A36 enables the monitor to require the directors of the company to provide any information needed by the monitor.<sup>42</sup> The monitor should seek to obtain management accounts, trading accounts, cashflow forecasts and details of banking arrangements as a starting point.<sup>43</sup> The monitor must exercise their professional judgement and ethical standards in relation to the accuracy of the information provided by directors when making the statement.<sup>44</sup> Clearly, the grounds for monitoring rests on the availability of relevant and reliable information. The monitor must also document

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<sup>36</sup> Insolvency Act 1986, Part A1, Chapter 5, Section A34.

<sup>37</sup> Ibid, Section A37.

<sup>38</sup> The Insolvency Practitioners Regulations 2005, Part 4, Regulation 13. The requirements of regulation 13 apply to the monitor.

<sup>39</sup> The Insolvency Service, above n17, at Part 4. Entry into a Moratorium, Monitor's Consent to Act and Appointment.

<sup>40</sup> Insolvency Act 1986, Part A1, Chapter 5, Section A35(1).

<sup>41</sup> Ibid, Section A35(2).

<sup>42</sup> Ibid, Section A36(1).

<sup>43</sup> A Jeffrey and M Jervis 'Checklist: taking a monitor appointment' (2021) 14(2) Corporate Rescue and Insolvency Journal 64.

<sup>44</sup> The Insolvency Service, above n17, at Part 2. Role and Functions of Monitor.

all steps taken to obtain information from the directors and this is specifically relevant in the context of non-cooperating directors.<sup>45</sup>

In practice, monitors have been reluctant to provide an opinion that the moratorium is likely to result in the rescue of the company as insolvency practitioners are not usually in the position to provide an assessment using potentially unreliable financial information.<sup>46</sup> It has been suggested that insolvency practitioners are less equipped to deal with a company's economic problems, preferring to address issues with balance sheets rather than issues related to underlying restructuring.<sup>47</sup> It is apparent that if reliable information cannot be ascertained, the monitor will not be able to carry out its monitoring functions. If such information is not forthcoming from the onset, it is very unlikely that the proposed monitor will agree to undertake this role as the monitor has no statutory power to compel the directors to provide the requisite information. A further issue lies in the promptness of receiving such information. Directors are required to comply with any requests for information from the monitor as soon as reasonably practicable<sup>48</sup> and failure to do so is a ground for the monitor to terminate the moratorium by notice.<sup>49</sup> At the time of writing, it is still unclear how 'as soon as reasonably practicable' is construed and whether there is scope for leniency before the monitor must bring the moratorium to an end by filing a notice. Further clarification as to whether monitors are able to provide non-cooperating directors with a warning or an opportunity to remedy the situation before triggering termination would also be welcome.<sup>50</sup> It is hoped that directors will do anything necessary for providing the information required by the monitors.

To expediate the punctuality of the process, the monitor should seek to put in place a detailed protocol with the directors which outlines the frequency of information.<sup>51</sup> In terms of timing, each statement under section A6(1)(b) to (e) must be made within 5 days of the day in which the statements are filed with the court.<sup>52</sup> Given the short timescales available, the need for prompt information is necessary for the monitor to be able to discharge their duty effectively and to be in a better-informed position to make the assessment. This is particularly relevant during the stages in advance of the moratorium

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<sup>45</sup> Ibid.

<sup>46</sup> P Walton, C Umfreville and L Jacobs 'A snapshot of company voluntary arrangements: Success, failure and proposals for reform' (2020) 29 *International Insolvency Review* 267 at 269.

<sup>47</sup> Department for Business, Energy and Industrial Strategy, *Insolvency and Corporate Governance: Government response*, 2018, para 5.62. Available at [https://assets.publishing.service.gov.uk/media/5b826986e5274a4a77e83ebd/ICG\\_-\\_Government\\_response\\_doc\\_-\\_24\\_Aug\\_clean\\_version\\_with\\_Minister\\_s\\_photo\\_and\\_signature\\_AC.pdf](https://assets.publishing.service.gov.uk/media/5b826986e5274a4a77e83ebd/ICG_-_Government_response_doc_-_24_Aug_clean_version_with_Minister_s_photo_and_signature_AC.pdf). Accessed 15 January 2025.

<sup>48</sup> Insolvency Act 1986, Part A1, Chapter 5, Section A36(2).

<sup>49</sup> Ibid, Section A38(1)(c).

<sup>50</sup> G Davis, 'The role of the monitor in a rescue moratorium', *South Square Digest* special issue on Corporate Insolvency and Governance Act 2020, p27. [https://southsquare.com/wp-content/uploads/2020/07/Digest\\_Magazine\\_Mini\\_Digital-CIGA.pdf](https://southsquare.com/wp-content/uploads/2020/07/Digest_Magazine_Mini_Digital-CIGA.pdf). Accessed 15 January 2025.

<sup>51</sup> Jeffrey and Jervis, above n 42, at 64.

<sup>52</sup> The Insolvency Service, above n17, at Part 2. Role and Functions of Monitor.

where information will likely need to be obtained on a daily basis so that the monitor can be alerted of any material changes to the company.<sup>53</sup>

### C) The Threshold Test

The key role of the monitor is to assess whether a moratorium is likely to result in a rescue and this requirement involves considerable expenditure of time and effort to reach a satisfactory conclusion as to the prospects of rescue. The threshold test is paramount to the monitor's statutory functions. The test requires the monitor to apply a higher threshold, one which on the balance of probabilities, must determine whether a rescue is more likely than not, and this will need to be undertaken before their formal appointment. Furthermore, the test requires monitors to assess the rescue of the whole company as a going concern, rather than the business or part of the business. The objective of assessing the rescue of the company is ambitious as rescuing the company is rarely achieved in practice.<sup>54</sup> The requirement sets a higher barrier for monitors to meet and is considered to be more burdensome than the equivalent requirement of 'reasonably practicable' in administration, whereby the administrator must perform his functions unless he thinks that it is not reasonably practicable to achieve the purpose of administration.<sup>55</sup> For the purpose of commencing the moratorium, the monitor must positively certify the likelihood of company rescue. It is difficult to measure how a monitor will be able to form the viewpoint that a rescue will be achieved. Arguably, the monitor requires greater certainty to assess that the moratorium is likely to result in the company's rescue as a going concern.<sup>56</sup> As stipulated by the wording of section A6 of the Insolvency Act 1986, the monitor will require substantive engagement with management and significant preparatory work to confidently assess that a rescue of a company can be achieved. As stated by Doyle, 'such a statement is not to be made lightly and, self-evidently, is going to have to be demonstrably rational by reference to credible factual support.'<sup>57</sup> The proposed monitor will require access to current financial information and will have to consult with key creditors and lenders to be able to form such a view. In carrying out this responsibility, it is highly likely that the proposed monitor will have to consider the availability of finances, whether the support from lenders can be sought and seek information about the company's liabilities, assets and details of any security held by the company's creditors. The monitor is expected to rely on their professional experience and judgement in quantifying the extent of the pre-appointment work and the Insolvency Service has since clarified that the pre-appointment work should be proportionate to the size and complexity of the individual company.<sup>58</sup> Monitors have also been subject to additional oversight by insolvency

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<sup>53</sup> Jeffrey and Jervis, above n42, at 64.

<sup>54</sup> Davis, above n49, at 19.

<sup>55</sup> Insolvency Act 1986, Schedule B1, para3(3).

<sup>56</sup> P Sidle 'The new Standalone Moratorium Procedure under CIGA 2020' (2020) 4 Corporate Rescue and Insolvency119 at 122.

<sup>57</sup> L Doyle 'Part A1 moratorium monitorship: some practical problems and pitfalls' (2020) 33(4) Insolvency Intelligence 107 at 109.

<sup>58</sup> The Insolvency Service, above n17, at Part 2. Role and Functions of Monitor.

regulatory bodies, which adds another level of scrutiny as to why their decisions and pre-appointment work must be proportionately justified.<sup>59</sup> The extent of the pre-appointment work will vastly depend on the size of the company, however ultimately, the individual monitor will determine how much work must be done to justify statements that it is likely a moratorium would result in the rescue of the company as a going concern. Arguably, there is still uncertainty with the monitor's level of engagement with the pre-appointment work and the operation of the company. The monitor is subject to responsibilities which are still of uncertain scope.<sup>60</sup> However, whether a rescue is likely to be achieved needs to be considered on the basis of the information obtained. In any event, the process will require the proposed monitor to rigorously assess the position of the company in order to establish what outcomes can be reasonably achieved under the circumstances to form the required view. As will be discussed below, it is highly probable that the proposed monitor will have to be confident in their assessment that the moratorium is likely to result in the rescue of the company as a going concern, in part, to avoid liability. Monitors are required to assess the operational and financial position of the company to avoid liability and this in itself sets a threshold for the amount of work a monitor must undertake.

The proper construction of the phrasing 'likely to result in the rescue of the company' has yet to be determined by the court in the context of the new moratorium. However, it is envisaged that the interpretation of the word 'likely' may lead to possible uncertainties where cases are not so clear cut. Interpretational difficulties and the degree of subjectivity in cases often result in inconsistent judicial interpretations. For example, the meaning of 'likely' is not always precise as the word 'likely' is capable of numerous interpretations with different degrees of likelihood.<sup>61</sup> In the context of administration, the courts have construed 'likely' in numerous ways, with the wording of the threshold historically leading to various uncertainties. In *Re Consumer and Industrial Press*<sup>62</sup>, Gibson LJ interpreted 'likely to be achieved' as used in section 8(3) of the Insolvency Act as 'more probable than not'<sup>63</sup>, which set a high threshold. He observed 'that does not mean that it is merely possible that such purpose will be achieved; the evidence must go further than that to enable the court to hold that the purpose of the question will more probably than not be achieved.'<sup>64</sup> This can be contrasted with the position adopted by Hoffmann J in *Re Harris Simons Construction*<sup>65</sup> where a more modest interpretation was adopted. It was held in *Re Harris* that the interpretation requires the court to

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<sup>59</sup> The Insolvency Service, above n19, at para 4.6.

<sup>60</sup> A Cohen and A Pegg "Debtor-in-possession" processes and moratoria in English restructuring and insolvency law: a hesitant journey' (2023) 38(1) Journal of International Banking & Financial Law 659 at 662.

<sup>61</sup> See further, *Cream Holdings Limited v Banerjee* [2005] 1 AC 25 as per Lord Nicholls at [12]. Lord Nicholls stated: 'As with most ordinary English words 'likely' has several different shades of meaning...It is capable of encompassing different degrees of likelihood, varying from 'more likely than not' to 'may well.'

<sup>62</sup> *Re Consumer and Industrial Press* [1988] BCLC 177.

<sup>63</sup> *Ibid*, as per Gibson J at [178].

<sup>64</sup> *Ibid*.

<sup>65</sup> *Re Harris Simons Construction* [1989] 1 WLR 368.

consider that there is a ‘real prospect’ that one or more of the stated purposes may be achieved.<sup>66</sup> This interpretation demands a low threshold of proof. Within the context of the Part A1 threshold, it is still unclear whether monitors are obliged to adopt a more lenient or strict approach in assessing the likelihood of rescue. Arguably, if the correct interpretation of the phrasing requires the monitor to form a view that there is a ‘real prospect,’ this would align more broadly with the rescue culture and potentially may enable more companies to make use of the moratorium process.<sup>67</sup> It may also potentially expediate the process as the monitor could rapidly evaluate whether there is a real prospect rather than having to justify that a rescue *will* be achieved. Evidently, the various interpretations of ‘likely’ can be construed differently and further guidance on how monitors should interpret the threshold test would be welcomed.

Incidentally, there is inherent uncertainty around striking the appropriate balance in forming the viewpoint as to whether it is likely that a moratorium would result in company rescue. If the proposed monitor adopts an overtly stringent application, they run the risk of excluding financially distressed companies with a chance of a success from being able to use the moratorium.<sup>68</sup> As emphasised by Payne ‘getting this wrong could lead to the exclusion of financially troubled companies, which might benefit from a moratorium without there being any real prospect of abuse.’<sup>69</sup> As such, a careful balance must be struck and the difficulty of this assessment lies with the monitor. The monitor must be able to justify their assessment to avoid potential criminal liability/breach of duty and to maintain the overall integrity of the moratorium process.<sup>70</sup> There is also a danger of the monitor misconstruing the viability of the company and allowing a moratorium to be accessed by companies with very little chance of avoiding failure. Despite the eligibility criteria acting as a safeguard to avoid such an outcome, the probability of human error still persists, and the monitor must ensure that non-viable companies are not permitted to use the moratorium process opportunistically. Monitors must remain vigilant to directors strategically using the moratorium to the detriment of the company’s creditors. In practice, there has been some reluctance from monitors in providing their opinion and a general concern that they may incur personal liability for providing a potentially defective opinion.<sup>71</sup> The burden imposed on monitors in forming this viewpoint is considered extensive and onerous.

The test imposed on monitors can also be contrasted to the position of the court. On the hearing of the application, the court may make an order than the company should be subject to a moratorium.<sup>72</sup> The test for the court is whether it is satisfied that the moratorium for the company would achieve a better result for the company’s creditors

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<sup>66</sup> *Ibid*, as per Hoffmann J at [370]-[371].

<sup>67</sup> Davis, above n49, at 22.

<sup>68</sup> J Payne ‘An assessment of the UK restructuring moratorium’ (2021) 3 *Lloyd’s Maritime and Commercial Law Quarterly* 454 at 470.

<sup>69</sup> *Ibid*, at 473.

<sup>70</sup> Potential criminal liabilities is discussed further below.

<sup>71</sup> Walton, Umfreville and Jacobs, above n45, at 269.

<sup>72</sup> Insolvency Act 1986, Part A1, Chapter 2, Section A4.

as a whole than would be likely if the company were wound up (without first being subject to a moratorium).<sup>73</sup> This test has since been confirmed in *Re Grove Independent School Ltd*<sup>74</sup>, in which the court granted an application for a moratorium to a company which was the subject of a winding-up petition. This is arguably a lower threshold test than what is expected from the monitor as the court does not need to be satisfied that the company is likely to be rescued, but rather has to consider the benefits to the company's creditors. This can be contrasted with the position of the monitors who on the balance of probabilities, must have strong and positive justifications as to the prospects of rescue.

#### D) Potential Criminal Penalties

As aforementioned, to obtain a moratorium, directors are required to state that, in their view, the company is, or is likely to become, unable to pay its debt,<sup>75</sup> coupled with a statement from the proposed monitor, that the moratorium would result in the rescue of the company as a going concern.<sup>76</sup> The former requirement guards against the possibility of the moratorium being misused to avoid liabilities which the company is capable of meeting, while the latter requirement deters directors or the monitor from prolonging economically non-viable companies that are not capable of being rescued.<sup>77</sup> Safeguarding against the possibility of abuse and supporting the integrity of the company moratorium process falls under the remit of the monitor. The moratorium process heavily relies on directors' and the monitors' assessments, and there is a danger that such assessments might not fully reflect the company's situation. This in turn raises specific issues regarding the transparency of the moratorium process and the risk of information asymmetry. It is well established that directors have long been a barrier to transparency and personal accountability for the acts of companies, which necessitates further safeguarding measures. This risk is more prevalent within the context of the moratorium where the directors remain at the helm of the company throughout the debtor-in-possession process. The perceived problem of directors' conduct has been highlighted by recent statistical evidence that a number of moratorium cases ended on account of the lack of co-operation from company's directors.<sup>78</sup>

To counterbalance this issue, new offences were introduced to enhance the integrity of the moratorium process including an offence to commit fraud during or in anticipation of moratorium and an offence of false representation to obtain a moratorium.<sup>79</sup> The plethora of safeguarding measures ensures that the moratorium process cannot be used to misallocate resources by postponing the inevitable insolvency of the company. Additionally, these offences offset the wide discretion afforded to those involved with

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<sup>73</sup> *Ibid*, Section A4(5).

<sup>74</sup> *Re Grove Independent School Ltd* [2023] EWHC 2546 (Ch).

<sup>75</sup> Insolvency Act 1986, Part A1, Chapter 3, Section A6(1)(d).

<sup>76</sup> *Ibid*, Section A6(1)(e).

<sup>77</sup> Payne, above n67 at 470.

<sup>78</sup> The Insolvency Service, above n19, at para 4.5.

<sup>79</sup> Insolvency Act 1986, Part A2, Chapter 7.

the moratorium process, most notably the monitor.<sup>80</sup> Evidently, the new offences require monitors to discharge their duty with the highest professional standards to avoid potential criminal penalties. The monitors must also be able to justify their decision as to avoid liability under the new offences and this will most likely involve the monitor having to rely on their professional judgement and experience to substantiate the claims that a rescue of the company can be achieved.<sup>81</sup> To protect themselves from liability, the monitor will be incentivised to access to as much information on the company's circumstances and to explain their decisions for enabling or preventing the company access to the moratorium. However, at the time of writing, it is still unclear as to how penetrating the due diligence must be to avoid criminal penalties. As stated by Davis '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.'<sup>82</sup> As such, there remains some uncertainty relating to the actions of a monitor, and the extent of work required will need to be clarified by the courts at a future date. Arguably, the risks facing a monitor appear to be more significant compared to an administrator, as monitors face potential criminal penalties for actions taken in their capacity as monitors. To date, insolvency practitioners appear to be reluctant to provide an opinion and have demonstrated general unwillingness to act as monitors on account of incurring personal and criminal liability for providing a defective opinion.<sup>83</sup> Further guidance on the potential liabilities of a monitor may help to ease the current concerns of insolvency practitioners. The risks of criminal penalties add another layer of pressure on the demanding role of monitors.<sup>84</sup>

#### E) Unintended Consequences- reputational Risks and Concerns

The stringent test imposed on monitors has raised some unintended consequences. The Post-Implementation Review of the effectiveness of the moratorium procedure has produced ambiguous results,<sup>85</sup> with monitors raising serious issues regarding reputational concerns that the moratorium may not result in the rescue of the company.<sup>86</sup> Conversely, the qualitative data has shown that there is a largely indifferent perception from insolvency practitioners in relation to the effectiveness of the standalone moratorium and the obligations of the monitor.<sup>87</sup> There is a perceived reputational risk of acting as a monitor in cases where a company rescue is not achieved and concerns in relation to subsequent appointments. Despite the moratorium procedure being a debtor-in-possession with the failure of the company not the responsibility of the monitor, in practice, the monitors are still concerned with the professional risks of

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<sup>80</sup> J Wood 'Creative destruction and the post COVID-19 economy: a critique of the (un)creative rescue value contained within the permanent CIGA 2020 reforms' (2023) 3 Journal of Business Law 197 at 203.

<sup>81</sup> Sidle, above n55 at 122.

<sup>82</sup> Davis, above n49, at 26.

<sup>83</sup> Walton, Umfreville and Jacobs, above n45, at 269.

<sup>84</sup> The Insolvency Service, above n19, at para 4.10.

<sup>85</sup> Ibid.

<sup>86</sup> Walton and Jacobs, above n33.

<sup>87</sup> The Insolvency Service, above n19, at para 3.10.

undertaking the role of the monitor.<sup>88</sup> The monitors are concerned with the damaging perception that the failure of the company rests on their monitoring capabilities. This can be contrasted with the appointment of an administrator where there does not appear to be the same reputation concerns for insolvency practitioners.<sup>89</sup> Incidentally, an inherent tension may arise in situations where the monitor has to evaluate the likelihood of rescue based on their own capabilities of monitoring or the capabilities of their colleagues working within the same firm.<sup>90</sup>

This has inadvertently impacted on the willingness of some insolvency practitioners from acting as monitors. This issue was explored further in the evaluation process whereby 85% of responses indicated that reputational risk was a deterrent, and over a third (36%) indicate that reputational risks was a significant deterrent to acting as a monitor.<sup>91</sup> The risk of reputational damage has created further issues whereby insolvency practitioners are choosing to recommend administration proceedings in preference to the standalone moratorium.<sup>92</sup> It appears that insolvency practitioners are showing reluctance towards the new regime and are preferring the more familiar role as administrators. It has been made clear that the moratorium is only recommended by insolvency practitioners where the prospects of rescue are extremely likely.<sup>93</sup> The responses seem to suggest that there have not been many cases where the monitor feels able to certify the threshold and be certain that a moratorium is likely to result in the rescue of the company as a going concern. Accordingly, the implications of reputational risks may also be a factor which is preventing uptake of the standalone moratorium.<sup>94</sup> According to the Insolvency Service Official Statistics, between 26 June 2020 and 31 May 2025, only 61 companies obtained a moratorium, with the uptake being much lower than expected.<sup>95</sup> Reputational risks and the perception of successive rescue failures confers additional strain on the monitor and may provide a possible explanation why the moratorium has not been widely used. Additionally, insolvency practitioners may not be willing to take on further appointments due to the change in priority for their fees in a subsequent insolvency.<sup>96</sup>

Evidently, the amount of preparatory work in advance of the moratorium is significant, however the monitor's expenses does not include remuneration in respect of work carried out before the moratorium begins and accordingly, the monitor will need to

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<sup>88</sup> Walton and Jacobs, above n33 at Section 4.3.3.

<sup>89</sup> The Insolvency Service, above n19, at para 4.10.

<sup>90</sup> Davis, above n49, at 26.

<sup>91</sup> The Insolvency Service, above n19, at para 4.10.

<sup>92</sup> Cohen and Pegg, above n59 at 662.

<sup>93</sup> The Insolvency Service, above n19, at para 4.11.

<sup>94</sup> *Ibid*, para 3.6.

<sup>95</sup> The Insolvency Service, *Company Insolvency Statistics, May 2025* (2025), 2.2. Available at <https://www.gov.uk/government/statistics/company-insolvencies-may-2025/commentary-company-insolvency-statistics-may-2025>. Accessed 30 June 2025.

<sup>96</sup> Walton and Jacobs, above n33 at Section 4.3.3. The insolvency practitioner's fees would rank behind the moratorium, pre-moratorium debt and any accelerated bank debt.

ensure that they are paid, before the company enters the moratorium.<sup>97</sup> During the pendency of the moratorium, the pre-appointment work, reputational risks and potential criminal penalties whilst acting as a monitor confer additional burdens on the monitoring role and in some cases these factors are deterring recommendations to use a moratorium. The precise scope of work during this period is uncertain.

## **Obligations of The Monitor When The Moratorium Comes into Force**

### **A) Notification And Involvement with Creditors**

The monitor is officially appointed once the moratorium comes into force.<sup>98</sup> Once notified by the directors that the moratorium comes into force, the monitor is obliged as soon as reasonably practicable to notify the registrar of companies, all creditors of the company and where appropriate, the regulator e.g. the Pensions Regulator/ the Board of the Pension Protection fund (PPF).<sup>99</sup> Failure to comply with the duty to notify, without a reasonable excuse, constitutes a criminal offence.<sup>100</sup> The principal task of the monitor during the duration is to review compliance with the terms of moratorium.

Throughout the monitorship, monitors are obliged to follow the Insolvency Code of Ethics which provides a high standard of professional and ethical guidance to be applied in relation to their role.<sup>101</sup> As officers of the court, they are governed by the principle reinforced in *Lehman Brothers (Australia) (in Liquidation) v MacNamara*<sup>102</sup> that that the court will not permit its officers to act in a way which does not accord with the standards which right thinking people or, society would think should govern the conduct of the court or its officers.<sup>103</sup> A monitor is required to act with integrity to the standard expected by the court and its officers.

The monitor has a relatively minor role with regard to creditors, with the role limited to notifying creditors of the start and end of the moratorium, and informing creditors of any changes to the end date should the moratorium be extended.<sup>104</sup> The obligations to notify creditors that a moratorium has come into force extends only to the creditors of the company of whose claim the monitor is aware.<sup>105</sup> During the moratorium there is no statutory requirement on monitors to provide any additional information to creditors

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<sup>97</sup> Insolvency Act 1986, Part A1, Chapter 4, Section A18(7). The remuneration of a monitor is a contractual matter between the monitor and the company.

<sup>98</sup> Ibid, Chapter 2, Section A7.

<sup>99</sup> Ibid, Chapter 2, Section A8.

<sup>100</sup> Ibid, Chapter 2, Section A8(4)-(5).

<sup>101</sup> The Insolvency Service, *Insolvency Practitioner Code of Ethics*, 2014. Available at <https://www.gov.uk/government/publications/insolvency-practitioner-code-of-ethics>. The Code of Ethics was updated in 2020. Accessed 19 March 2025.

<sup>102</sup> *Lehman Brothers (Australia) (in Liquidation) v MacNamara* [2020] EWCA Civ 321.

<sup>103</sup> Ibid, at [35] in which the court explains the principle in *Re Condon Ex p James* (1873-74) L.R. 9 Ch. App 609.

<sup>104</sup> The Insolvency Service, above n17, at Part 2. Role and Functions of Monitor.

<sup>105</sup> Insolvency Act 1986, Part A1, Chapter 2, Section A8. In this context, this refers to pre-moratorium and moratorium creditors.

or engage directly with creditors. However, a monitor may find the input of the company's creditors helpful when assessing the fundamental question of whether the moratorium will result in a rescue of the company. To continue successfully trading through the moratorium and to ensure that creditors are supplying further goods or services, the monitor is able to rely on S233B to prevent suppliers from terminating supply contracts for debts not being paid due to the payment holiday.<sup>106</sup> However, the actions of a monitor may be challenged by creditors and others in a number of different ways.<sup>107</sup> The moratorium can be challenged during the moratorium or once the moratorium has ended.<sup>108</sup> Creditors, directors, members of the company or any other person affected by the moratorium can challenge the moratorium and the actions of the monitor on the ground that an act, omission, or decision of the monitor has unfairly harmed their interest.<sup>109</sup> Creditors have the right to apply to bring the moratorium to an end, in the circumstances where the monitor has not done so.<sup>110</sup> At the time of writing, the precise meaning of unfair harm has yet to be clarified by the courts in the context of the new statutory framework. However, in *Minor Hotel Group MEA DMCC v Dymant & Amor*<sup>111</sup> a creditor's application to terminate the moratorium on the basis that the monitor's failure to terminate the moratorium had unfairly harmed its interest was refused by the court. A monitor's decision will only be open to challenge if it was made in bad faith or was clearly perverse in the sense that no reasonable monitor could have reached such decision.<sup>112</sup> As such, it appears difficult to challenge the decision of the monitor and the above case illustrates that despite stating that the monitor ought to have brought the moratorium to an end, the order to terminate the moratorium was subsequently refused by the court. This bears similarities with administration cases, where the courts have been traditionally reluctant to interfere with the decisions of office-holders.<sup>113</sup> Conversely, it is assumed that 'unfair harm' will be subject to the same criteria the court uses in administration cases and existing case law may well assist the court with this regard due to the similarity in language of the administration provision.<sup>114</sup> However, much will depend on where the line will be drawn by future moratorium cases. If the challenge is successful, an appropriate remedial order(s) will be made by the court, which may include reversing or modifying the monitor's decision

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<sup>106</sup> Insolvency Act 1986, Part 6, Section 233B.

<sup>107</sup> Ibid, Part A1, Chapter 6.

<sup>108</sup> Ibid, Sections A42(3) and A44(2).

<sup>109</sup> Ibid, Section A42(1)-(2). It is also possible to challenge the directors' actions, see Insolvency Act 1986, Section A44(1).

<sup>110</sup> Ibid, Section A42(5).

<sup>111</sup> *Minor Hotel Group MEA DMCC v Dymant & Amor* [2022] EWHC 340 (Ch); [2022] BCC 710. This case will be discussed in more detail in section 5 which discusses the termination of the moratorium.

<sup>112</sup> Ibid, at [22].

<sup>113</sup> The court can use the breadth of established precedents on administration. See further, *Re CE King Ltd* [2000] 2 BCLC as per Lord Neuberger at [302]-[303]. Lord Neuberger stated: '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.'

<sup>114</sup> Insolvency Act 1986, Schedule B1, para 74(1). See in particular, *Lehman Brothers Australia Limited (in liquidation) v MacNamara* [2020] EWCA Civ 321 as per Blackburne J at [34]-[39].

or the court may choose to bring the moratorium to an end.<sup>115</sup> The court may not order the monitor to pay any compensation to the company.

### B) Consent of The Monitor For Specified Actions

The duty to monitor the company's affairs also extends to the duration of the moratorium as the monitor is also expected to consult, engage with directors and seek additional information concurrently during the moratorium process. The monitor is obliged to report to the appropriate authority if they become aware that an officer of the company has committed an offence in relation to the moratorium and provide such information as that authority may require.<sup>116</sup> As such, the monitor is regarded as a safeguarding mechanism to prevent abuse and ultimately protect the interest of creditors. During the moratorium, the monitor's consent will be required for certain actions such as the grant of security<sup>117</sup>, the disposal of assets<sup>118</sup> or the payment of pre-moratorium debts (that are not subject to a payment holiday).<sup>119</sup> Consequently, the monitor will need to have a sufficient understanding of the company's pre-moratorium debts and knowledge as to whether the company has sufficient funds to be able to pay the debts.<sup>120</sup> This extends to debts for which the company will not have a payment holiday. In terms of securing new funding for the company, the monitor is instrumental in having to approve the grant of new security. Security will only be enforceable if the monitor consented to the security being given and only if the monitor thinks that the grant of security will support the rescue of the company as a going concern.<sup>121</sup> With the exception of consenting to grant security, the monitor should not interfere with the control of the company, the company's assets or expenditure. Where the consent of the monitor is required, the monitor, as an officer of the court, is obliged to make such decisions responsibly, but also speedily.<sup>122</sup> They will also be expected to maintain records of any decisions, analogous to their duty to do so prior to the commencement of the moratorium.

The initial 20 business day length of the moratorium can be extended in a number of different ways, such as filing documents at court with or without the consent of creditors<sup>123</sup> or the moratorium can be extended by a court order.<sup>124</sup> The moratorium may be extended more than once, subject to the monitor's view and providing that the moratorium is not extended beyond the maximum of one year from the commencement

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<sup>115</sup> Insolvency Act 1986, Schedule A1, Sections A42.

<sup>116</sup> For registered and unregistered companies in England and Wales, the appropriate authority is the Secretary of State For registered and unregistered companies in Scotland, the appropriate authority is the Lord Advocate.

<sup>117</sup> Insolvency Act 1986, Part A1, Chapter 4, Section A26(1).

<sup>118</sup> Ibid, Section A29(2)(b).

<sup>119</sup> Ibid, Section A28(1)(a).

<sup>120</sup> See further, Insolvency Act 1986, Chapter 5, Section A38. Section A38 is discussed below in Section 4 of the article.

<sup>121</sup> Insolvency Act 1986, Part A1, Chapter 4, Section A26(1)-(6).

<sup>122</sup> Davis, above n49, at 23.

<sup>123</sup> Insolvency Act 1986, Chapter 3, Section A11 deals with the extension provisions

<sup>124</sup> Ibid, Section A13.

date of the moratorium.<sup>125</sup> The granting of an extension will require the involvement of the monitor as the application for an extension must be supported by the monitor's statement that in their view it is likely that an extension of the moratorium will result in the rescue of the company. The monitor is therefore required to reassess the threshold question in light of considering a possible extension to the moratorium. While smaller companies with less complex financial affairs may be able to restructure and formulate possible rescue plans within the short timeframe, a proposal for extension during a moratorium is likely for larger companies with more complex issues to address. It is unlikely that the initial 20 business days provides sufficient time for companies to implement restructuring.<sup>126</sup> Therefore, the monitor must be proactive in ensuring that any extension papers coupled with their statements are filed within the correct timeframes. To obtain a further 20 business days extension, the directors must file the relevant papers at court after the first 15 days of the initial moratorium period.<sup>127</sup> Statements which form part of the extension must be filed within the period of three days ending with the day on which the document is filed at court.<sup>128</sup> The monitor is unlikely to participate in the court hearings or be directly responsible for filing the documents in court, however the direct involvement of the monitor will vary on a case by case basis, depending on the complexity of the case. The requisite statement by the monitor will nevertheless be considered by the court when making the assessment for an extension itself.

The monitor may choose to offer their expertise by assisting the company to realise the objective of corporate rescue. The statutory framework does not preclude a monitor from assisting in this way, however any issues of conflict will need to be managed accordingly.<sup>129</sup> Monitors are best placed to provide such advice but will need to ensure that in doing so, they comply with the principles of the Insolvency Code of Ethics.<sup>130</sup>

### **Obligations of The Monitor During The Cessation of The Moratorium**

The monitor is obliged to oversee the company's compliance with the qualifying conditions of the moratorium process. In line with the qualifying conditions, the moratorium must be brought to an end if it becomes apparent that the company is unlikely to be rescued. As stipulated by A38(1), monitors must terminate the moratorium if they think the company is unable to pay certain debts, if the moratorium is unlikely to result in the rescue of the company as a going concern, if the objective of rescuing the company has been achieved or if the monitor is unable to properly carry out the monitoring functions.<sup>131</sup> The latter requirement encompasses situations where

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<sup>125</sup> Ibid, Section A11(4).

<sup>126</sup> The Insolvency Service, above n19, at para 3.11.

<sup>127</sup> Insolvency Act 1986, Chapter 3, Section A10 and A11.

<sup>128</sup> Corporate Insolvency and Governance Act 2020, Schedule 4, para 22.

<sup>129</sup> Davis, above n49, at 26.

<sup>130</sup> The Insolvency Service, *Insolvency Practitioner Code of Ethics*, 2014. Available at <https://www.gov.uk/government/publications/insolvency-practitioner-code-of-ethics>. The Code of Ethics was updated in 2020. Accessed 19 March 2025.

<sup>131</sup> Insolvency Act 1986, Part A1, Chapter 5, Section A38(1) (a)-(d).

the directors have failed to provide the monitor with the requisite information. Each of the four circumstances is contingent on the monitor ‘thinking’ that such circumstances have in fact arisen. These judgement-based criteria involve considerable factual assessments for the monitor to view that a termination is needed. Additionally, the word ‘must,’ is indicative of the monitor being mandated (rather than being afforded discretion) to bring an end to the moratorium under such circumstances.<sup>132</sup> The monitor is under a duty to evaluate the purpose of the moratorium and file a notice with the court to terminate the moratorium in the event of such circumstances.

The test where the monitor considers the company is unable to pay pre-moratorium debts has since been clarified by the High Court in *Minor Hotel Group MEA DMCC v Dymant & Amor*.<sup>133</sup> which marked the first judicial consideration of the standalone moratorium. The case concerned an application to the court for an order terminating a moratorium which had been obtained. As aforementioned, under section A38(1) a monitor must bring the moratorium to an end if the monitor thinks that the company is unable to pay certain debts. However, in this case, the operating companies could not meet the demand for payment under the guarantees they had given to Minor Hotel Group (MHG) and the monitors did not bring an end to the moratorium.<sup>134</sup> The monitors believed that the loans would be discharged in the reasonably near future and in their view, this satisfied the basis that they were not unable to pay debts. Consequently, MHG applied to the court to terminate the moratorium on the grounds that the monitors had failed to terminate the moratorium and had unfairly harmed the MHG’s interests. The application was dismissed by the court and the moratorium was permitted to continue until lapse. The case emphasised that a considerable degree of latitude is afforded to monitors with regard to section A38(1).<sup>135</sup> In considering whether the company is unable to pay debts, the court held that ‘a company ‘is able’ to pay a presently due pre-moratorium finance obligation if...it has the immediate prospect of receiving third party funds...What is an ‘immediate’ receipt or realisation is a matter of commercial judgment for the monitor (as to which the monitor is allowed considerable latitude) bearing in mind that anything over 5 business days requires specific assessment.’<sup>136</sup> As this case shows, monitors are able to delay the termination of the moratorium, provided that there is an ‘immediate prospect’ of repayment. While the court did not specify what would constitute ‘immediate prospect’, the court confirmed that the monitor can exercise their ‘commercial judgment’ with regards to the interpretation of immediate realisations to pay debts. Monitors will have to determine whether a company is able to pay a presently due pre-moratorium debt and can take a flexible and commercially realistic approach when making this decision.<sup>137</sup> Provided that the monitor has reasonable grounds to believe that the debt is likely to be paid within five days of the

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<sup>132</sup> Doyle, above n56, at 108.

<sup>133</sup> *Minor Hotel Group MEA DMCC v Dymant & Amor* [2022] EWHC 340 (Ch); [2022] BCC 710.

<sup>134</sup> *Ibid*, at [14]-[19].

<sup>135</sup> *Ibid*, at [33].

<sup>136</sup> *Ibid*, at [33].

<sup>137</sup> R Peel et al ‘Send it Back! – Wolseley restaurant lender’s attempt to terminate moratorium rebuffed’ (2022) 15(2) Corporate Rescue and Insolvency 56.

decision, the monitor may disregard non-payment.<sup>138</sup> The case also confirmed that a monitor's decision will only be open to challenge if it were made in bad faith or was clearly perverse in the sense that no reasonable administrator could thought it was not reasonably practicable to rescue the company as a going concern.<sup>139</sup>

The standard imposed by A38(1) has been criticised for compelling unrealistic expectations on monitors. It is unrealistic to expect the monitor to make a call, at any time, that the company is unable to meet its obligations.<sup>140</sup> Furthermore, it is still uncertain as to how much investigation the monitor is reasonable expected to do to reach the conclusion that the company cannot meet its financial obligations and a rescue is not likely to be achieved. Much will depend upon how closely the monitor scrutinise the company's financial position. The statutory framework does not provide a general description of the monitoring functions, nor does it specify how a monitor should go about performing such functions, which has led to some criticism that the framework on the operation of the rescue moratorium is rather sparse.<sup>141</sup> The Insolvency Service has since attempted to clarify the actions required of the monitor by stating that due diligence should be proportionate to the size and circumstances of the company.<sup>142</sup> The guidance does not provide, with sufficient clarity, the precise extent of obligations to investigate the company. This clarification is unlikely to dispel the concerns of monitors and evidently, uncertainty persists around the expectations of the monitorship.

On a similar vein, there is no clear guidance on how frequent the ongoing monitoring must be. However, A38(1) suggests that monitoring to the requisite standard requires an ongoing and continual oversight. Arguably, this is an unworkable standard that does not lend itself to the practical application of monitoring.<sup>143</sup> This is exacerbated by the fact that monitors are required to fulfil their monitoring obligations within the short timescales available. The initial period of the moratorium is 20 business days, which may also be extended by a further 20 business days without creditor consent and can be extended even further with the consent of the courts or pre-moratorium creditors.<sup>144</sup> Given the short initial length of the moratorium, a monitor is expected to investigate the grounds of A38(1) very quickly, and most certainly within the first days, if not weeks of the procedure. Furthermore, to investigate complex companies can amount to a herculean task for the monitor. The ability of the monitor to react quickly to investigate the grounds for mandatory termination is thus heavily contingent on information being made available to the monitor. Once again, the process can be impeded if the provision of information is delayed. Furthermore, concerns have been raised at the consequent haste of reaching decisions within this short timeframe.<sup>145</sup>

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<sup>138</sup> Dennis, above n26 at 44.

<sup>139</sup> *Minor Hotel Group MEA DMMC v Dymant & Anor* [2022] EWHC 340 (Ch); [2022] BCC 710 at [22].

<sup>140</sup> Doyle, above n56, at 108.

<sup>141</sup> Davis, above n49, at 20.

<sup>142</sup> The Insolvency Service, above n17, at Part 2. Role and Functions of Monitor.

<sup>143</sup> Doyle, above n56, at 108.

<sup>144</sup> Insolvency Act 1986, Section A9(2).

<sup>145</sup> Walton and Jacobs, above n33 at Section 4.3.

Over a third of responses to the Post-Implementation Review of the CIGA measures, thought that the moratorium was too short, with a further 23% thinking it was far too short.<sup>146</sup> There was also a general consensus from the insolvency practitioners that the period of 20 business days is too short<sup>147</sup>, which hinders the effectiveness of the moratorium in providing monitors with insufficient time to investigate grounds under section A38. Evidently, the short window of opportunity in which to assess the grounds under section A38 is regarded as another operational burden for the monitor.

Once the monitor has filed the appropriate notice with the court under section A38, the moratorium will come to an end.<sup>148</sup> The monitor is obliged to notify the registrar of companies, creditors and the Pensions Regulator under such circumstances.<sup>149</sup> However, if the moratorium lapses after the initial 20 business day, the monitor is under no obligation to notify creditors or the registrar of companies that the moratorium has come to an end.

## **Conclusion**

Evidently, the monitor plays an integral part of the moratorium process, with the fundamental duty of monitoring the company's compliance with the qualifying conditions throughout the moratorium. The duties imposed on monitors ensure that financially distressed yet viable companies are provided the time and protection to consider their future. The viewpoint of the monitor is critical at all stages of the operation of the moratorium, as they must form an assessment prior to the commencement of the moratorium, at any time whereby an extension is required and at the cessation of the moratorium.

The above discussion has sought to identify some areas of concern with the role of monitors, including administrative difficulties, uncertain parameters and reluctance to use the moratorium/ be appointed as monitors. Conversely, monitors are subject to a stringent set of legal and operational hurdles in discharging their duties and monitoring functions. On account of the reputational risks as well as potential criminal penalties for actions taken whilst acting as a monitor, the risks facing monitors are considered more significant than the risks facing administrators.

Furthermore, the evaluation process has also highlighted some unintended consequences such as insolvency practitioners disincentivised from using a moratorium and preferring to recommend administration proceedings, even when a moratorium might be more suitable.<sup>150</sup> This may in part, provide a possible explanation as to why the moratorium has seldom been used since its introduction. Furthermore, the

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<sup>146</sup> The Insolvency Service, above n19, at para 3.11. The Insolvency Service note that the responses were too ambiguous to draw firm conclusions.

<sup>147</sup> Ibid, para 3.11.

<sup>148</sup> Insolvency Act 1986, Part A1, Chapter 5, Section A38(3).

<sup>149</sup> Ibid, Chapter 3, Section A17(8).

<sup>150</sup> The Insolvency Service, above n19, at para 4.10.

unwillingness of insolvency practitioners to recommend the moratorium process is problematic and potentially suggests that the balance of probabilities test as to whether a moratorium is likely to result in a rescue is set at too high a threshold. Arguably, the role of the monitor in the moratorium process requires further consideration and there is still uncertainty relating to their role and level of engagement with the operation of the company at all stages of the moratorium process.