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ARTICLE

Corbin & King: The UK's First Reported Contested Standalone Moratorium

Devi Shah, Partner, and **Amy Halsall**, Associate, Mayer Brown International LLP, London, UK

Synopsis

Corbin & King is the first reported case involving a contested standalone moratorium. The High Court judgment will be very useful for companies considering the use of the tool in the future and also for insolvency professionals considering taking on the role of monitor. The judgment provides guidance on the degree of latitude a monitor will be afforded with regards to when they 'think' a certain state of affairs exists: and provides further clarity in respect to what is to be regarded as a company being *able to pay its debts* during a standalone moratorium; when a monitor is under an obligation terminate the moratorium due to it no long fulfilling the requirements; and the court's discretion with regards to the ordering of such a termination.

Introduction

The first reported case to consider the requirement of a monitor to terminate a moratorium if they think a company is unable to pay certain debts was heard by the High Court on 4 February 2021. The case provides further clarity on the UK standalone moratorium process and is an example of a moratorium being used in order to restrain secured creditor action.

What is the moratorium process?

The standalone moratorium process was introduced pursuant to the Corporate Insolvency and Governance Act 2020 which added a new Part A1 to the Insolvency Act 1986. The moratorium process aims to afford breathing space to a company in financial distress in order that it can assess potential rescue and restructuring options without the threat of creditor action. The moratorium is therefore focused upon the rescue of the company as a going concern rather than on the realisation of assets.

The monitor must be an insolvency practitioner and throughout the moratorium they must monitor the company's affairs in order to assess whether it remains likely that the moratorium will result in the company being rescued as a going concern. Should the monitor 'think' (amongst other grounds) that (i) the company is unable to pay its pre-moratorium debts for which there is no payment holiday or (ii) it is not likely that the company will be rescued as a going concern, then the monitor must terminate the moratorium.

Background

This case involved the Corbin & King group which owns and operates several very well-known restaurants such as The Wolseley and The Delaunay. Corbin & King Limited ('TopCo') was provided its working capital through two loans (i) a GBP 14.25 million facility which became due for repayment in May 2020 and (ii) a GBP 20 million loan due for repayment in 2024 but which had provisions for acceleration (together, the 'Loan') lent by Minor Hotel Group ('MHG'). MHG is an associate company of MI Squared Ltd ('MI Squared'), the majority shareholder in TopCo and both are subsidiaries of Minor International plc ('Minor International'). The minority shareholders include Christopher Corbin and Jeremy King.

TopCo failed to repay the GBP 14.25 million facility which in turn was an event of default under the GBP 20 million loan. The Loan was fully secured by guarantees over TopCo's assets (including all its interests) in the two intermediate holding companies below it in the group structure as well as the eight operating or asset owning restaurant businesses below them (together, the 'OpCos'). MHG issued a notice of repayment 19 months after the failure to repay on 19 January 2022.

Following MHG's service of the demand notice, a credit fund, Knighthead Opportunities Capital Management LLC ('Knighthead'), made an offer to acquire Minor International's direct and indirect interests in TopCo and the OpCos for an amount equalling the outstanding Loan but this offer was rejected. On 25 January 2022, MHG appointed Joint Administrators to TopCo.

The directors of the OpCos then decided to commence the standalone moratorium procedure in order to try and rescue the OpCos as a going concern and appointed Joint Monitors. The standalone moratorium

requires (i) the directors to provide a statement that the company concerned is, or is likely to become, unable to pay its debts and (ii) the proposed monitor to provide a statement that in their view it is likely that the moratorium will enable the company to be rescued as a going concern. Some of the evidence that assisted the Joint Monitors in forming their decision was (i) the offer from Knighthead and (ii) the cash flow forecasts of the OpCos showing that they were able to pay their normal trading debts as they fell due.

The day after the appointment MHG made a demand against each of the OpCos pursuant to the guarantees. Knighthead made a second offer to the Joint Administrators of TopCo to purchase the direct and indirect interests in the OpCos for consideration at least equal to the outstanding group debt plus accrued and unpaid interest. Minor International, MI Squared and the directors of MHG warned the Joint Administrators that should they accept this offer, the parties would claim against them personally. MHG also applied to the court to terminate the moratoria claiming the Joint Monitors should have terminated the moratoria as the OpCos were unable to pay the debts that were not subject to a payment holiday and by not doing so they were unfairly harming MHG's interests.

Pursuant to s.A38 of the Insolvency Act 1986 a monitor must terminate the moratorium if a company is unable to pay a pre-moratorium debt, being a debt which the company has become or may become subject to during the moratorium that relates to an obligation incurred prior to the moratorium being put in place unless there is a payment holiday.

There are certain categories of debt which are excluded from qualifying for a payment holiday and this includes 'debts or other liabilities arising under a contract or other instrument involving financial services'[1] and the debt due under the loan would be included within this category. As such the OpCos were still liable to pay the amounts due under the guarantees but were unable to do so. Despite this, the Joint Monitors did not terminate the moratoria because they submitted that the loan would be repaid in the reasonably near future (by virtue of agreeing an offer with Knighthead) and the OpCos could be rescued as going concerns.

The judgment – the key takeaways

The irrationality threshold

Mr Justice Norris considered the extent of the duty to terminate the moratorium when the monitor 'thinks' that a certain state of affairs exists. He held that the use of the term 'thinks' rather than 'reasonably believes' (for example) indicated that Parliament intended for the monitor to have a degree of latitude (following previous authorities applying to administrators). Therefore a monitor's decision should only be challenged if it was made in bad faith or if the monitor's thinking was so clearly perverse that no reasonable monitor would have reached it and therefore it was 'irrational'. In this case it was agreed between the parties that there was no indication of bad faith.

Inability to pay test

Mr Justice Norris assessed what was meant by whether the company is 'able to pay its debts'. It was held that there should be a degree of commercial thinking applied. Rule 1A.24 of the Insolvency Rules 2016 states that, when deciding whether to bring a moratorium to an end, the monitor must disregard debts that they have reasonable grounds to believe are likely to be (i) paid or (ii) compounded to the satisfaction of the creditor within five business days of the decision.

As such the monitor could disregard any debts to be paid within 5 business days of their decision and Mr Justice Norris held that a company 'is able' to pay a presently due pre-moratorium finance obligation 'if (being itself unable to pay out of current cash resources) it has the immediate prospect of receiving third party funds or its own assets capable of immediate realisation'.[2] What was deemed 'immediate' was considered a matter of commercial judgement for the monitor and to which they should be afforded considerable latitude.

Monitors' decision not to terminate the moratoria

The court held that the Joint Monitors' decision not to terminate the moratoria at the request of MHG 'fell on the wrong side of the line'[3] of a decision that any reasonable monitor would make. It was clear that the OpCos did not have assets that were capable of immediate realisation nor was any third party funding being made available to them in the immediate future. It therefore had to be considered whether TopCo was in a different position in that it could either realise assets or receive third party funding which would repay the indebtedness and subsequently relieve the OpCos of their liabilities pursuant to the guarantees.

The Joint Administrators of TopCo would not be able immediately to accept the Knighthead offer due to their obligation in practice to run a marketing process and

Notes

1 Section A18(4)(f) Insolvency Act 1986
2 *Minor Hotel Group MEA DMCC v Dymant* [2022] EWHC 340 (Ch), paragraph 33.
3 *Minor Hotel Group MEA DMCC v Dymant* [2022] EWHC 340 (Ch), paragraph 36.

an open sale which made any immediate realisation impossible. However, a further offer made during the course of the hearing by Knighthead which involved providing immediate interim funding which could refinance the loan would provide cause for the Joint Monitors to 'think' that the debt could be repaid.

Court's discretion

It was held that if the court determined that the monitor ought to have terminated the moratorium, the court had discretion to order such termination, taking into account the facts as at the date of the hearing. Mr Justice Norris held that the harm caused to MHG as a creditor was less than the harm that would be caused to the OpCos should MHG put them into an insolvency process. He also took into account that there was an immediate prospect of the loan being repaid due to the most recent Knighthead offer and that the OpCos had a chance of being rescued as a going concern. Mr Justice Norris dismissed the application and allowed the moratoria to continue. Knighthead provided the funding as aforementioned and the loan was repaid allowing the OpCos to be rescued as going concerns.

Recent developments

An auction of the business was held on 1 April 2022 with both Minor International and Jeremy King putting forward offers to buy the business and assets of the Corbin & King business that they did not already own. Minor International was the successful bidder and bought the entire business for an estimated GBP 60 million.

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