

## 'Mora' the same: reflecting on the latest attempts to salvage company rescue

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## **“Mora’ the same: Reflecting on the latest attempts to salvage company rescue”<sup>1</sup>**

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“The end of all our exploring will be to arrive where we started”

*Little Gidding*, T.S. Eliot

### **I Introduction**

The concept of the rescue culture has been at the heart of UK insolvency law since the introduction of the Insolvency Act 1986 (“the Act”).<sup>2</sup> Implementing many of the recommendations in *Insolvency Law and Practice, Report of the Review Committee* (“the Cork Report”),<sup>3</sup> the Act introduced new procedures with a view to preserving viable businesses. Whilst the concept of corporate rescue may now be entrenched, there have been significant reforms and proposals for reform over the ensuing three decades in an attempt to give full affect to this laudable aim.<sup>4</sup> Most recently, in May 2016, the Insolvency Service launched “A Review of the Corporate Insolvency Framework: A consultation on options for reform” (the “Consultation”).<sup>5</sup> The Consultation put forward four key proposals with a view to enabling rescue of viable businesses and delivering the best outcomes, central to which was the introduction of a new pre-insolvency restructuring moratorium.

Since the introduction in the early 2000s of two pre-insolvency moratoria, both of limited availability and intended as gateways to formal insolvency procedures, there have been a number of suggestions for further reform, but none has made it on to the statute books. With the latest proposals seemingly in abeyance following the vote to leave the European Union in June 2016 and more recently the snap General Election in June 2017, this is a good time to review the possible role of a pre-insolvency moratorium before the matter is returned to in Whitehall.

This paper will consider a number of proposals for reform over the past decade. In doing so, the underlying rationale for the introduction of a pre-insolvency moratorium will be identified, together with the perceived need for a more widely available moratorium. Through analysis of the various proposals and responses, the paper will seek to identify the extent to which a pre-insolvency moratorium would enhance the insolvency landscape and the manner in which it could operate.

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<sup>1</sup> This article replicates some of the material previously published in “A Review of the Corporate Insolvency Framework: A New Moratorium to Help Business Rescue?” (2016) CLN, 385, 1-4. The author is very grateful to the Editor of the Company Law Newsletter for permission to reproduce this material here.

<sup>2</sup> *Powdrill v Watson* [1995] 2 AC 394, HL, per Lord Browne-Wilkinson at 442A.

<sup>3</sup> 1982 Cmnd. 8558.

<sup>4</sup> See e.g. Insolvency Act 1994, Insolvency Act 2000, Enterprise Act 2002, Small Business, Enterprise and Employment Act 2015, Insolvency Rules 2016.

<sup>5</sup> Available, together with responses, at [www.gov.uk/government/consultations/a-review-of-the-corporate-insolvency-framework](http://www.gov.uk/government/consultations/a-review-of-the-corporate-insolvency-framework) Last accessed 9 June 2017.

## II The origins of pre-insolvency moratoria

The concept of the moratorium was introduced into modern insolvency law with the creation of the Administration process by the Act.<sup>6</sup> The importance of the moratorium was recognised by Sir Kenneth Cork in his autobiography, where he reflected that many companies in financial difficulty “needed a period when the dogs were called off and they were able to recover a degree of equilibrium.”<sup>7</sup> The Cork Committee envisaged the administration moratorium being used with the second new process introduced by the Act, the Company Voluntary Arrangement (“CVA”).<sup>8</sup> An insolvent company could use a CVA to negotiate a compromise of its debts with the agreement of three quarters of unsecured creditors by value, with secured creditors not being bound unless consenting. In practice, however, the stigma associated with a formal insolvency process together with the burdensome process for entering administration stymied this intention.

Pre-insolvency moratoria are currently available in two situations. Firstly, Schedule A1 of the Act (introduced by the Insolvency Act 2000 reforms) allows small companies to initiate a moratorium of up to 28 days to allow the approval and implementation of a CVA, subject to meeting specified criteria and filing at court. This can be extended by up to two months to allow a CVA to be approved. Secondly, a company or its directors intending to appoint an administrator out of court pursuant to paragraph 22 Schedule B1 of the Act (introduced by the Enterprise Act 2002 reforms) will initiate a moratorium of up to ten business days under paragraph 44 where notice of the intention to appoint is given to relevant parties. Broadly speaking, these moratoria prevent creditors from taking individual or collective action to recover sums owing prior to the formal insolvency procedure commencing. Both are relatively short in time and intended to act as a gateway to a formal non-terminal insolvency procedure.

## III Proposals for reform

As set out above, the Consultation proposed various changes to the legislative landscape for financially distressed companies. Central among these is the introduction of a pre-insolvency moratorium to operate as a gateway to a variety of restructuring options.<sup>9</sup> At present there are three main options available to companies looking to restructure their liabilities: an informal consensual agreement with creditors; a CVA; and a Scheme of Arrangement under the Companies Act 2006. A common feature of each is that prior to entering into a restructuring agreement, there will be some initial negotiation with creditors as the proposal is developed. During this period, there is an inherent risk of creditors, alerted to the financial difficulties faced by the company, taking steps to benefit themselves at the expense of other creditors and, ultimately, the proposed rescue. The

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<sup>6</sup> See s.30 Insolvency Act 1986. The administration process was in fact created by the Insolvency Act 1985, though these provisions were repealed as soon as they came into force and replaced immediately by the Insolvency Act 1986. For a discussion of the somewhat chaotic process see Fletcher, I ‘The implementation of the Insolvency Act 1986’ JBL 1987, Jan, 3-4.

<sup>7</sup> Cork, K. *Cork on Cork* (Macmillan, London, 1988) p.195.

<sup>8</sup> *The Cork Report* para 423 *et seq.*

<sup>9</sup> The Consultation also proposed protection of essential supplier contracts, a new cram-down procedure and new rescue finance options. For a discussion of these see Bailey, P ‘Insolvency Service consultation on corporate insolvency framework: the remainder’ (2016) CLN, 386, 1-4.

Consultation recognises this and aims to address the key issues that can undermine successful restructuring.

Proposals for reform to, and indeed expansion of, the availability of a moratorium to companies in financial difficulty are not new. In addition to consultations launched by the Labour Government in 2009 and the Conservative-Liberal Democrat coalition in 2010, there have also been suggestions for reform from the Conservative Party whilst in opposition in 2008 and more recently the R3 paper “A Moratorium for Businesses” published in April 2016. Despite repeated suggestions for reform, none has made it on to the statute book. This raises the question as to whether there is a need for a pre-insolvency moratorium and, if so, how it should operate. A review of the various proposals will help to address this question. The paper will proceed to consider five key features of each of the proposals, namely: the length of the process; who would be in control of the process; the qualifying conditions to entering the process; how the process would be commenced; and what supervisory oversight there would be.

#### A) The 2016 Proposal for a Restructuring Moratorium

A sensible starting point is the Consultation itself. It seeks to ensure that the insolvency regime delivers the best outcomes by enabling more corporate rescues of viable businesses. Underpinning the Consultation was the 2015 Conservative election manifesto pledge to make the UK number one in Europe and in the top five globally of the World Bank’s Doing Business Report. The UK is currently ranked sixth overall, though when it comes to the measure for insolvency outcomes appears to be lagging behind, having dropped from sixth in 2012 to thirteenth in 2015 (which remain the position).<sup>10</sup> This appears to be a clear rationale for the Consultation, though concerns have been raised about the methodology, and therefore the reliability, of the World Bank’s rankings.<sup>11</sup>

The central tenet of the Consultation is the proposed moratorium, to allow companies the opportunity to consider the best approach for rescuing the business free from creditor pressure. This moratorium is intended to act as a single gateway to a variety of restructuring outcomes, both statutory and non-statutory.<sup>12</sup> Proposed to run for up to three months, with the possibility of extension subject to creditor approval, it is intended that the benefit of the moratorium would allow for a faster completion of the restructuring. During the moratorium, a variety of actions would be prevented, in line with those in Schedule A1 of the Act, including enforcement of security, repossession of hire purchase equipment and forfeiture of a lease.

The directors would remain in control during the moratorium, subject to oversight from a supervisor. Directors would be subject to their usual duties and obligations, though would be relieved from any liability for wrongful trading under s.214 of the Act whilst the moratorium remains effective (and presumably by extension s.246ZB of the Act). Should the qualifying conditions cease to

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<sup>10</sup> The annual reports can be accessed at <http://www.doingbusiness.org/reports/global-reports/doing-business-2017>.

<sup>11</sup> McCormack, G ‘World Bank “Doing Business” project: should insolvency lawyers take it seriously?’ *Insolv Int* 2015, 28(8), 119-123.

<sup>12</sup> The Consultation suggests outcomes including a compromise with creditors a contractual/consensual workout, a CVA, administration or a scheme of arrangement.

be met, exposure to liability would resume. This is intended to motivate directors to make use of the moratorium, though arguably does not go far enough. Directors could still find themselves liable for misfeasance pursuant to s.212 of the Act or even a contribution order under s.15A of the Company Directors' Disqualification Act 1986, which came into force after the Consultation closed.

Entities which have access to CVAs and administration would be eligible for the moratorium, provided the company is, or imminently will be, in financial difficulty, or is insolvent.<sup>13</sup> Qualifying conditions will be imposed to ensure that companies have the prospect of emerging from the moratorium as a going concern and that creditors are prepared to support a debt restructure. Companies must show that there are sufficient funds to meet their current obligations as they fall due during the moratorium as well as any new obligations that arise, to ensure creditors are no worse off. It is not clear how far these obligations would extend, and could possibly include significant liabilities arising during the moratorium period, such as interest, amortisation, rent, dilapidations and more. In addition, companies must demonstrate that there is a reasonable prospect at the outset of agreeing a compromise or arrangement with its creditors. Supervisors would need to be satisfied that these conditions are met, based on information provided by the directors.

It is proposed that the moratorium would be an out-of-court process. Where companies meet the abovementioned eligibility criteria and qualifying conditions, they will nominate a supervisor and the moratorium will commence by the filing of certain documents with the court and Companies House. Creditors would have the ability to challenge the moratorium within 28 days if their interests are unfairly prejudiced or there is a dispute over the qualifying conditions having been met. It is not clear from the Consultation how or when creditors would be notified of the moratorium or by whom. This key information will go some way to determining the efficacy of such protection.

In addition to confirming that the qualifying conditions are met at the outset, supervisors should ensure these continue to be met throughout. Directors would be obliged to provide information and supervisors would be entitled to attend company meetings. Supervisors would also be required to provide information requested by creditors during the moratorium. Should the qualifying conditions cease to be met, supervisors would bring the moratorium to an end. There is, therefore, significant onus on the supervisor to protect the interests of the creditors and the integrity of the moratorium process. Despite this, the supervisor need not be a qualified insolvency practitioner, but could be a solicitor or accountant with 'relevant expertise' in restructuring. This is a concern. Commercial decisions as to whether companies should exit a moratorium may be too weighty for the role as defined. This relaxation also appears inconsistent with the SRA no longer being a recognised professional body for insolvency work, should any solicitors wish to work as a supervisor. Further thought needs to be given to this point together with guidance as to the accountability of the supervisor, on which the Consultation is surprisingly quiet.

Should the moratorium be brought to an early conclusion, it would most likely lead to a formal insolvency process in which the supervisor would not be permitted to hold office. It is further

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<sup>13</sup> Somewhat confusingly, the Impact Statement issued in support of the Consultation suggests that it is anticipated that only a small number of large companies would use the proposed moratorium, despite there being references in the Consultation about measures to encourage use by all companies.

proposed that any subsequent administration would be shortened by the amount of time that the company has benefitted from the pre-insolvency moratorium. Individually these factors appear unnecessary, but together they make even less sense. If a different individual is to take the subsequent appointment, there is little logic in allowing that person less time to achieve a potentially very different set of objectives. The rationale for preventing sequential appointments is to avoid conflicts of interest between procedures arising. This seems counterintuitive. Supervisors could seek to prolong the moratorium period in the knowledge that they cannot take a subsequent appointment. Perhaps worse still, insolvency practitioners may be dissuaded from acting as supervisor in the hope of securing appointment in any subsequent, and more lucrative, insolvency process. This could have the undesired consequence of the moratorium not being overseen by the most suitable professionals. The professional conduct rules could surely be adapted to address the issue of sequential appointments.

The aim of enabling company rescue, by facilitating the negotiation and actioning of restructuring plans through the protection of a moratorium period, is, at first blush, a positive proposal. The Consultation seeks to address the recommendations of the World Bank, in setting out a system of limited but specific duration that strikes a balance between creditor protection and insolvency proceeding objectives.<sup>14</sup> There are a number of concerns raised by the proposals that require far more detail. Significant among these is whether the Consultation proposals offer anything that has not already been considered, and not adopted, in the past. Let us then consider the various proposals for a moratorium that have been put forward over the last decade.

#### B) 2008: The Conservatives in Opposition

As the global financial crisis unfolded in 2008, the Conservative Party in opposition put forward an economic recovery plan for the United Kingdom. A key element of this was the paper “Helping businesses cope with the downturn: Reforming Britain’s insolvency system” (the “Conservative Proposals”).<sup>15</sup> The aim of the Conservative Proposals was to “reform the insolvency system to ensure that good companies have the breathing space to stay afloat during times of economic difficulty,” addressing what was perceived by the Opposition as a failing of the existing insolvency procedures. The preservation of employment also appears to have been high on the agenda.

A central aspect of the Conservative Proposals was the introduction of an automatic stay on debt enforcement by financial creditors for a period of two months. During this time, suppliers and customer creditors would not be able to terminate contracts solely due to the stay being in place, but could expect debts to be paid as they fell due. This would provide directors with breathing space to put together a plan for the rescue or restructuring of the company. This moratorium could be renewed if appropriate, though it is not clear how this would be determined.

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<sup>14</sup> The World Bank, ‘Principles for effective insolvency and creditor/debtor rights systems’ (Revised 2015), p.19 Available at [siteresources.worldbank.org/EXTGILD/Resources/5807554-1357753926066/2015\\_Revised\\_ICR\\_Principles\(3\).pdf](http://siteresources.worldbank.org/EXTGILD/Resources/5807554-1357753926066/2015_Revised_ICR_Principles(3).pdf) Last accessed 9 June 2017.

<sup>15</sup> The paper is no longer available on the Conservative Party website, however useful summaries can be found in Tribe, J ‘The Extension of Small Company Voluntary Arrangements: A Response to the Conservative Party’s Corporate Restructuring Proposals’ in Omar, P (ed) *International Insolvency Law: Reforms and Challenges* (Ashgate Publishing Ltd, Farnham, 2013) and ‘British Tories call for ‘UK Chapter 11’’ Global Turnaround, July 2008, 8-9.

During the proposed stay, the company's management would remain in place, continuing to manage the company's affairs whilst also negotiating the restructuring. The Conservative Proposals did seek to address the issue of mismanagement, allowing the company's creditors to request management be replaced if it had acted fraudulently or incompetently (though it is not clear how this would be determined). In such circumstances, the court would appoint an agent to manage the company and the process, though whether this would be a regulated professional or some other alternative was not discussed.

The Conservative Proposals pitch the stay on enforcement actions at companies with fundamentally good businesses, but whose capital structures are not workable in the prevailing economic climate. The process was aimed at distressed companies, suggesting an intention to capture companies before they become insolvent. The company would be required to pay debts owed to non-financial creditors (i.e. not lenders) as they fall due during the stay, though it was not predicated that companies would need to have sufficient funds to do so as a condition to initiating the moratorium.

It was proposed that the stay be commenced by court petition by either the company's directors or its creditors, using a new fast-track judicial process. The court would order the stay if the company was not in a position to meet its obligations to financial creditors but there was a reasonable prospect of negotiating a restructuring. Creditors and shareholders would have the opportunity to submit reasoned objections. With no provision for expert commercial opinion, the courts would be required to make a commercial decision at the outset. The Conservative Proposals have been likened to Chapter 11 of the US Bankruptcy Code, and perhaps in this aspect they borrow from the judicial system in the United States as well as the legislative framework.

There appears to be a limited oversight role for the stay set out in the Conservative Proposals. Upon granting the stay on enforcement proceedings, the court would appoint an agent. This agent would be responsible for supervising the process, preventing improper use of the moratorium, and would report to the court on the progress of the restructuring. Importantly the court's agent would not have any powers to control or direct the company. As such, it is not clear how these duties would be discharged. With the agent only involved once the stay is granted, it would not be involved in assessing the virtue of the proposals presented to court. It is also not clear whether the agent would be a member of a regulated profession.

### C) 2009: Encouraging Company Rescue – A response from the Labour Party

The Government's response in Parliament to the Conservative Proposals suggested that no legislative reform was imminent.<sup>16</sup> However, in June 2009 the Insolvency Service launched "Encouraging Company Rescue: A Consultation" (the "2009 Consultation").<sup>17</sup> The rationale for the

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<sup>16</sup> Tribe, J 'The Extension of Small Company Voluntary Arrangements: A Response to the Conservative Party's Corporate Restructuring Proposals' in Omar, P (ed) *International Insolvency Law: Reforms and Challenges* (2013, Ashgate, Farnham) p.240.

<sup>17</sup> Available at

[http://webarchive.nationalarchives.gov.uk/20140311023846/http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con\\_doc\\_register/comprsc/comprsc09.pdf](http://webarchive.nationalarchives.gov.uk/20140311023846/http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/comprsc/comprsc09.pdf) Last accessed 9 June 2017.

2009 Consultation was that the Government wanted to provide “companies which have a viable future but are facing difficulties, with an opportunity to establish a more stable footing and prosper, helping to preserve jobs and livelihoods.” There are echoes here of the Conservative Proposals.

There were two key proposals within the 2009 Consultation. The first was the extension of the Schedule A1 pre-CVA moratorium to all companies. This was relatively straightforward, simply extending Schedule A1 to medium and large companies, and does not require further comment here. The second was the introduction of a court sanctioned moratorium for all companies. Both proposals would facilitate the use of a CVA, and no alternative form of rescue proceeding. This therefore appears more limited in scope than the Conservative Proposals (or any of the proposals considered below).

The court sanctioned moratorium would operate for an initial 42 days. This period could be extended once, allowing a maximum moratorium period of 3 months. During this period, the company would need to arrange both members’ and creditors’ meetings for approval of a CVA. This is intended to give larger companies with more complex affairs additional time to put together proposals with protection from the risk of value being destroyed by the announcement of a formal restructuring. It appears to recognise that 28 days is insufficient for some companies, especially larger ones, to gain approval for a CVA. The protection offered by the moratorium is not expressly stated in the 2009 Consultation, though as it appears to be an extension of the Schedule A1 moratorium for companies needing more than 28 days to negotiate a CVA, the Schedule A1 protections would likely apply.

During the moratorium the directors of the company would retain control. There is no provision either to protect directors during this period or to prevent certain directors from retaining control. By avoiding the need to enter administration to gain the benefit of the moratorium, it was envisaged companies would save money by virtue of lower process-related costs.

In order to access the moratorium, companies would have to satisfy three requirements. Firstly, that the company was unable to pay its debts, as defined in s.123 of the Act, at the time or within three months of the court hearing. Secondly, that there was a reasonable prospect of a CVA being approved by the company’s creditors. And thirdly, that sanctioning a moratorium would be in the interests of the creditors as a whole. Importantly, a company would not be eligible for this moratorium if it had already made use of the proposed expanded Schedule A1 moratorium.

The company’s directors would present a petition to court to access the moratorium, which would be considered at a private hearing. The court would need to be satisfied that the three qualifying conditions were met. The court would not be required to make a commercial decision, but would rely on the professional view of an insolvency practitioner that the tests were satisfied. It appears that the insolvency practitioner would be chosen by the company.

During the moratorium period, the insolvency practitioner would be required to report to the court should circumstances change such that any qualifying conditions ceased to be satisfied. In that event, any further action would be at the discretion of the court. This could have included terminating the moratorium, altering any conditions imposed, or putting the company into an

alternative insolvency procedure. The court could not, however, extend the moratorium period beyond three months.

#### D) 2010: The Coalition Proposals for a Restructuring Moratorium

The ministerial statement of Ian Lucas MP in November 2009 suggested that the Insolvency Service would further develop the 2009 Consultation proposals following publication of the responses.<sup>18</sup> These plans appear to have been derailed by the General Election in May 2010, with a Conservative-Liberal Democrat coalition deposing the incumbent Labour Government. The Coalition did not waste any time in revisiting the prospect of a pre-insolvency moratorium, launching “Proposals for a Restructuring Moratorium: A Consultation” (the “2010 Consultation”) in July 2010.<sup>19</sup> The 2010 Consultation proposed a moratorium to provide companies needing to restructure their debts with the option of a protected breathing space for the negotiation and implementation of a restructuring deal. This moratorium was targeted at larger businesses with more complex funding structures that were not insolvent. It was envisaged that the proposals would help reduce the time taken to negotiate a restructuring.

Companies accessing the moratorium before developing a proposal with creditors would have protection for an initial three month period. During this time, companies would have the same protections as under Schedule A1 of the Act, unless the court authorised otherwise. This was intended to allow companies to pursue a variety of compromise agreements, including a contractual workout, CVA or Scheme of Arrangement. This period could be extended up to a maximum of six months if needed to agree a proposal, or alternatively as long as needed for approval of a relevant statutory compromise, where such proposal had been developed in the initial three month period. Companies could also apply for a moratorium where a proposal for a CVA or Scheme of Arrangement had been put forward but not yet agreed.

During the moratorium period, the directors would retain control of day-to-day operations and the restructuring proposals. There would be constraints and checks in place, including statutory obligations to provide information to a monitor. The 2010 Consultation makes it clear that directors should be aware of the commercial consequences of utilising a moratorium, hinting at the potential negative reception of the process by suppliers and customers. There are no restrictions on these parties withdrawing or altering terms of service. Robust provisions to deter misuse of the moratorium by directors were also laid out, including fines or criminal sanctions.

To gain access to the proposed moratorium a company would need to satisfy eligibility tests. Firstly, whilst there would not be a restriction based on size (despite the fact the process is intended for larger companies), companies in certain sectors, such as finance and insurance, would be excluded. In addition, save in limited circumstances, a company subject to a winding up petition could not utilise the moratorium. Finally, the moratorium could not be accessed if the company had enjoyed the benefit of it or the Schedule A1 moratorium in the previous twelve months.

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<sup>18</sup> HC Deb 11 November 2009, col 19WS.

<sup>19</sup> Available at

<http://webarchive.nationalarchives.gov.uk/20140109094217/http://www.bis.gov.uk/insolvency/consultations/restructuring> Last accessed 9 June 2017.

Eligible companies would then need to meet two prescribed qualifying conditions. Firstly, the company must be able to demonstrate a reasonable prospect that a compromise or arrangement could be agreed with creditors. The backing of creditors was considered to be an indicator of commercial viability, as it would be unlikely to be forthcoming in the absence of faith in the underlying business or the incumbent management. Where a company applied for the moratorium having already put forward a proposal for a CVA or Scheme of Arrangement, this limb could be satisfied by reference to the statutory requirements for each. Secondly, the company would have to show that it was likely to have sufficient funds to carry on its business during the moratorium period. Both of these aspects would require confirmation by an insolvency practitioner.

The moratorium would be commenced by court sanction following application by the directors. Although a formal court hearing would involve additional costs, the 2010 Consultation considered this would allow a transparent process where creditors could raise any objections, whilst also allowing the court to act flexibly in making or declining any order. Given the delay in holding even a fast-tracked hearing, an interim moratorium would run from the directors giving notice of their intention to apply for the moratorium until a substantive decision was made by the court. The issue of possible abuse of this interim moratorium was not considered by the 2010 Consultation.

An insolvency practitioner would play a key role throughout this moratorium process. Initial responsibilities would include ensuring creditors and others were notified when the interim moratorium was triggered, and providing an evidenced statement that the qualifying conditions had been met by the company. The insolvency practitioner would become a monitor following court sanction of the moratorium, with the principal duty of withdrawing from the role should any qualifying conditions cease to be met. Such is the importance of the role of the proposed monitor, that the court would need to be satisfied the proposed monitor had adequate depth of experience to perform its duties.

#### E) 2016: A Moratorium for Businesses

The responses to the 2010 Consultation suggested that there was no urgent need for the moratorium as proposed.<sup>20</sup> Although the Government proposed to work with stakeholders to refine the moratorium proposals, the matter was not addressed during the remainder of the Coalition Government. The baton lay untouched until picked up by R3, the Association of Business Recovery Professionals, with the publication of its paper “A Moratorium for Businesses: Improving Business & Job Rescue in the UK” (the “R3 Proposals”) in April 2016.<sup>21</sup> The R3 Proposals aim to plug a capability gap by providing directors of struggling companies with breathing space to consider their options.

R3 proposed introducing a short moratorium of 21 days. During this period all creditors would be prohibited from enforcing debts arising before the moratorium and suppliers could not withdraw or change the terms of supply and companies would only be able to dispose of assets in the usual course of business. This would allow companies to formulate a comprehensive rescue plan and enter

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<sup>20</sup> See the Ministerial Statement of Edward Davey MP at HC Deb 11 May 2011, col 37WS.

<sup>21</sup> R3, ‘A Moratorium for Businesses: Improving Business & Job Rescue in the UK’ (April 2016).

discussions with creditors. The moratorium could be extended either by issue of a CVA proposal or application to court for a 21 day extension. At the end of the moratorium, the company could enter a formal insolvency process, continue trading as before or restructure.

Directors would remain in control during the moratorium. As with the Consultation proposals, directors would also be relieved of liability for wrongful trading under s.214 of the Act, except where debts arising during the moratorium are not met. The directors would be obliged to make a weekly progress report to a moratorium supervisor. It is suggested that this would allow the concept of debtor-in-possession to be further introduced in the UK, encouraging directors to take action without the fear of losing control but avoiding the high costs associated with the US regime.

Any company would be able to utilise this moratorium provided it meets the entry requirements. The company must be insolvent, or insolvency be in prospect, and the directors make a statutory declaration to this end. The directors must also set out the objectives of the moratorium and identify a moratorium supervisor. Finally, the directors must confirm that there are funds to meet debts created during the moratorium.

This moratorium would be triggered by filing a notice in court. Creditors would not need to be notified prior to filing, unless a winding up petition is outstanding, in which case the petitioner must be given three days' notice. Creditors would be notified once the filing has been made, either by email, post or gazetting, and could seek to challenge the moratorium in court.

Licensed insolvency practitioners would play a key role in the capacity of moratorium supervisor. Acting as a mediator between company and creditors, the moratorium supervisor would receive weekly progress reports from directors and would need to support any request for an extension of the moratorium. Should they perceive at any time that creditors' interests would be damaged by the continuation of the moratorium, the moratorium supervisor would be required to resign, ending the moratorium.

#### **IV Prevailing moratorium themes**

Clear themes emerge following a review of the various reform proposals over the last decade. All of the proposals aim to promote enterprise and improve the UK insolvency system. In many cases, the reforms being put forward are strikingly similar.

##### **a) Moratorium**

Prime amongst these themes is that the moratorium be a debtor-in-possession procedure, allowing management to retain control. There are clear benefits to this. Not only is the high cost of introducing new management (usually insolvency practitioners and their firms) avoided, but importantly it encourages engagement with the process. If directors fear losing control of their business, they are less likely to utilise a process, and when they do it may be too late. There is also a better chance of the company surviving if management is kept involved, rather than being dislodged.

It is possible to involve directors in a company's management during administration,<sup>22</sup> however, this power is not automatic and appears little used in practice. The latest proposals do go further, with a suggested relaxation of wrongful trading liabilities in the Consultation and R3 Proposals. The issue of poor management arguably needs to be addressed, as the apparent reliance on creditor support as a gauge of management strength appears thin.

#### b) Court involvement

Another constant is the involvement of the court in the moratorium process. Whilst the nature of this involvement has changed through the proposals, an extra-judicial process has not been suggested. There is a move away from a process initiated by court sanction to simple filing at court. This is a process which has been well received in administration,<sup>23</sup> and in the current climate of higher court fees and case volumes is appropriate. Insolvency practitioners responding to the Consultation back filing at court for offering efficiency and cost savings, though raised concerns about possible abuse. The opportunity for creditor challenge would address this to a degree, though not immediately.

#### c) Entry criteria

There are also clear parallels in the basic conditions for accessing the proposed moratoria. The first is the prospect of success, which is a sensible bar to reduce the risk of abuse. The second is that companies must be able to pay their way through the moratorium process. How this is expressed varies, from having sufficient funds to carry on its business, being able to pay debts arising during the moratorium, to meeting current and new obligations as they fall due during the moratorium. Broadly this will act as a measure of whether the business is viable, so is again is sensible. It is submitted that the measure introduced in the Consultation is too far-reaching to be suitable. A financially distressed company would benefit from relief from certain liabilities during a moratorium period to enable it to successfully restructure.

#### d) Independent oversight

The need for oversight by an independent professional also appears all of the proposals. There is some difference between the nature of this supervision and the identity of the officeholder. The Consultation is the most radical in this regard, imposing significant obligations on the supervisor, but relaxing the need for qualified insolvency practitioners to perform it. This would appear to be a step too far, with the commercial judgment and experience needed to fulfil a supervisory role warranting a suitable qualification, for which insolvency practitioners are well placed to satisfy. Responses to

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<sup>22</sup> para 64 Schedule B1 Insolvency Act 1986.

<sup>23</sup> See, for example, C. Umfreville, P. Walton and P. Wilson, "Pre-Pack Empirical Research: Characteristic and Outcome Analysis of Pre-Pack Administration" (2014), Part A1.6, available at [www.gov.uk/government/publications/graham-review-into-pre-pack-administration](http://www.gov.uk/government/publications/graham-review-into-pre-pack-administration) Last accessed 9 June 2017. There have been problems with out of court administration appointments, see for example *Minmar (929) Ltd and another v Khalatschi and another* [2011] EWHC 1159 (Ch) and *Pettit & Bates v Bradford Bulls (Northern) Limited (In Administration) & others* (2016) Ch D (Mann J) 21/ 11/2016, however this does not appear to have detrimentally affected use of the process.

the Consultation show that both insolvency practitioners and solicitors (who would arguably benefit from this) are of the view that oversight should be reserved for insolvency practitioners.

#### e) Duration of moratorium

One area where the proposals broadly differ is the duration of the moratorium period. Suggestions range from 21 days to six months plus. This divergence needs some consideration. The R3 Proposals suggest that 21 days is sufficient to formulate a rescue plan and hold discussions with creditors. In contrast, the 2009 Consultation proposed the introduction of a separate moratorium in recognition of the fact that 28 days was insufficient for some companies to be able to negotiate a CVA, let alone explore other options. Interestingly, the responses to the Consultation from insolvency practitioner firms show a general view that three months is too long, with a preference for a shorter window in line with the R3 Proposals. Of course, the three months proposed by the Consultation need not be used in full, if an earlier resolution can be found.

#### **V A need for reform?**

The availability of a moratorium to allow a company to formulate plans for rescue or restructure is generally supported in the responses to the Consultation, and in responses to previous proposals. There are, however, differing views as to how this should best operate and which companies should be targeted. The question remains: is there a need for reform and, if so, the introduction of a new process? The introduction of additional processes should be considered with caution, for as Manson suggested in the nineteenth century:

“The English mind, by a complex paradox, is constitutionally distrustful of change while full of reforming energy. The result is a superabundance of legislation, but of a tentative and temporising kind, unscientific, crude, confused; the despair of judges and all who value law as a science.”<sup>24</sup>

Arguably there is a need for some level of reform. The uptake of administration and CVAs has declined in recent years and remains considerably lower than liquidation.<sup>25</sup> This suggests that companies are either making arrangements outside of the statutory framework, which may prove more costly in terms of professional fees and time to coordinate all parties without statutory protection, or are being allowed to fail unnecessarily. Furthermore, responses to the various proposals considered in this paper show a general support for the concept of a moratorium that could facilitate company survival. Perhaps this could be achieved by reforming existing processes, rather than the introduction of another process to an already crowded marketplace.

Let us therefore consider how existing processes could be utilised to achieve the core outcomes sought by the various proposals. There is broad agreement that companies in financial difficulty would benefit from a system which: provides for a stay on creditor actions; allows the directors to

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<sup>24</sup> Manson, E ‘Tinkering Company Law’ (1890) 24 LQR 428-435, p.428.

<sup>25</sup> Insolvency Statistics – January to March 2017 (Q1 2017) available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/611370/Q1\\_2017\\_statistics\\_release\\_-\\_commentary.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/611370/Q1_2017_statistics_release_-_commentary.pdf) Last accessed 9 June 2017.

remain in control; is commenced under court protection; and requires debts incurred during the stay to be paid. The suitable length of this stay would depend on the nature of the company, with some being able to put arrangements in place relatively quickly, whilst others would need a longer period. Involvement of qualified and regulated insolvency practitioners in this process is widely favoured. All of these elements could be fulfilled through the current administration process in Schedule B1 of the Act.

A moratorium commences as soon as an administrator is appointed to a company, preventing a wide range of enforcement actions without leave of court or the administrator's consent.<sup>26</sup> During the administration process, directors are prevented from exercising management powers without the administrator's permission.<sup>27</sup> This could act as an effective filter to prevent poor management retaining control and undermining the process, addressing concerns of "leaving the fox in the chicken coop,"<sup>28</sup> even allowing for a partial divestment of management powers. The administration could be commenced by, *inter alia*, the company's management in or out of court<sup>29</sup> and all expenses incurred during the process receive priority in payment.<sup>30</sup> The administration period automatically runs for a year, but can be terminated early if the objectives are met, or even extended if necessary.<sup>31</sup> Within the administration, creditors must be provided with a statement of proposals no later than eight weeks and invited to vote on those proposals no later than ten weeks after the process commences, subject to extension by the court.<sup>32</sup> The wide set of objectives for administration would allow a company to pursue the various forms of restructuring identified by the Consultation, whilst ensuring that if these cannot be achieved the company will not need to be put in to a separate process before looking to alternative outcomes.<sup>33</sup>

On a number of levels, the administration process looks well set to provide the safe haven identified by the Consultation and its predecessors to assist with company rescue. Indeed, as previously stated, the Cork Committee envisaged the CVA being used in conjunction with administration to provide the benefit of the moratorium.<sup>34</sup> The Enterprise Act 2002 reforms to the Act allow further flexibility in line with the variety of outcomes envisaged by the Consultation.

That is not to say that the administration process is perfectly suited to this purpose. The moratorium proposals have moved over time towards financially distressed, rather than insolvent companies. This is with the intent of addressing issues before they become irretrievable. At present a company must be, or be likely to become, unable to pay its debts for an administrator to be appointed by the court or out of court by directors.<sup>35</sup> This would need to change to allow access for companies that are in financial difficulty, but not yet insolvent. Furthermore, the prospect of a pre-packaged

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<sup>26</sup> Paragraphs 42-43 Schedule B1 Insolvency Act 1986.

<sup>27</sup> Paragraph 64 Schedule B1 Insolvency Act 1986.

<sup>28</sup> 'British Tories call for 'UK Chapter 11'' Global Turnaround, July 2008, 8-9, p.9 quoting then President of R3 Nick O'Reilly.

<sup>29</sup> Paragraphs 10, 12 and 22 Schedule B1 Insolvency Act 1986.

<sup>30</sup> Paragraph 99 Schedule B1 Insolvency Act 1986.

<sup>31</sup> Paragraphs 76-80 Schedule B1 Insolvency Act 1986.

<sup>32</sup> Paragraphs 49, 51 and 107 Schedule B1 Insolvency Act 1986.

<sup>33</sup> Paragraph 3 Schedule B1 Insolvency Act 1986.

<sup>34</sup> See footnote 8.

<sup>35</sup> Paragraphs 11 and 27 Schedule B1 Insolvency Act 1986.

administration enabling the company's core business to be sold as a going concern can often prove more appealing than a restructuring. The pre-pack offers certainty of returns to creditors and removes a significant debt burden on the business. Reforms to the pre-pack process were introduced following the 2014 Graham Review, but statutory restrictions were resisted at this time.<sup>36</sup> Now may be the time to review the availability of pre-packs to encourage instead company rescue. Perhaps the biggest obstacle to using the administration process to facilitate work-outs is the stigma associated with the process. This is not something that can be addressed overnight, but would require careful consideration and communication with stakeholders.

## Conclusion

The Consultation and its predecessors considered in this paper all targeted promoting enterprise and allowing the rescue of viable businesses. The fact that this issue has been so regularly revisited in a relatively short period indicates that the current system is not achieving this outcome, but the lack of reform in the past decade suggests that the solution has yet to be found. Responses to the Consultation intimate this continues to be the case.

It is contended that legislative reform is needed to encourage companies and their management to take earlier action when facing financial difficulty. This would increase companies' prospects of survival and in turn improve the outcome for creditors. The introduction of a new procedure is not necessarily the answer though. Simply introducing a separate process for 'financially distressed' rather than insolvent companies may simply be a case of moving the goalposts, resulting in 'financially distressed' being tarred with the same stigma and undermining the intended reform.

Rather than creating something altogether new, attention should instead be given to reforming the administration process and giving it the chance to achieve its original aims. Lord Hoffman noted that "[administration] was introduced to enable a court to give insolvent companies a moratorium on the enforcement of debts and securities while the possibility of some form of rescue or arrangement with creditors was explored."<sup>37</sup> Perhaps it is time to allow it a chance to do so.

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<sup>36</sup> A so called 'sunset clause' was included in s.129 Small Business Enterprise and Employment Act 2015 to allow for restrictions to be imposed on connected party sales.

<sup>37</sup> *Centre Reinsurance International Co v Freakley; Freakley v Centre Reinsurance International Co* [2006] UKHL 45 at 6.