Bevan Brittan

THE MARCHES LOCAL ENTERPRISE PARTNERSHIP LIMITED

POTENTIAL DIRECTORS' LIAIBLITIES IN A MEMBERS VOLUNTARY LIQUIDATION

1 BACKGROUND AND ADVICE REQUESTED

1.1 The Marches Local Enterprise Partnership Limited (the **Company**) is one of 38 English local enterprise partnerships and its activities cover Herefordshire, Shropshire and Telford & Wrekin. Following the Government's direction for all local enterprise partnerships to incorporate from 1 April 2019, the (former unincorporated) Marches LEP and its activities have been operating through the Company since February 2019.

1.2 Shropshire Council, as the Company's **Accountable Body**, receives funding allocations from Government by way of grant on behalf of the Company and provides financial and legal support to the Company to enable the latter to carry out is activities. The Company then contracts with a wide range of deliver partners including local authorities, universities, colleges, private training providers, the voluntary and community sector and private sector businesses with the aim of improving the economic prosperity of the Marches area and creating sustainable private sector employment.

1.3 Current Government policy requires the Company to integrate its functions into the Accountable Body. Thereafter, the Company is to be wound up. We have been requested to advise the Company on potential liabilities attaching to the Company's directors in the context of a winding up.

1.4 As we have been instructed by the Company, we are obliged by our professional rules and insurance to highlight that only the Company, as our client, may place reliance on the contents of this Paper. It may be shared with individual directors of the Company on an information-only basis. Should a director have any particular concerns regarding his or her position, that director should seek independent advice.

2 LIQUIDATION PROCESS

2.1 We understand that the Company is currently solvent and in that context it has two principal options available to it - a member's voluntary liquidation (**MVL**) and striking-off. Our instructions are that a MVL is the proposed route, so we have not explored striking-off further, but can do so if requested. We have summarised the process of voluntary liquidation in Schedule 1 to this Paper.

3 DIRECTORS AND OFFICERS (D&O) INSURANCE

3.1 D&O liability insurance policies operate to indemnify directors and officers (usually individuals with a senior management role) for loss suffered as a result of wrongful acts carried out in the scope of their regular duties. *"Loss"* usually includes defence costs, legal representation costs, awards of damages, claimant's costs (if the insured party is liable to pay them) and any settlement amounts.

3.2 Policy coverage is never absolute and as with all insurance policies depends on the policy terms and conditions. Certain areas will not be covered on grounds of public policy (for example, it is usually not possible to purchase insurance against paying fines or penalties, as the deterrent for committing an offence is diminished if the liability for paying the resultant fine can be passed to an insurance company).

3.3 D&O insurance cover will usually begin upon the appointment of a new director or officer and the Company should have kept the insurer informed of any appointment of new directors or officers within the period specified in the policy.

3.4 The period of cover does not always end upon the cessation of a director's or officer's appointment. It has become common market practice for there to be a period of "run-off" cover (also known as "retired directors' cover"), which means that individuals are protected against any claims made after the termination of their appointment which relate to actions or omissions during their period of appointment. The length of run-off cover varies from policy to policy and could be anything from 6 months to 6 years, or more. In its guidance note on D&O insurance, the Chartered Governance Institute (formerly ICSA) recommends that the longer period of six years' run-off cover is adopted.[1]

3.5 We have seen extracts of company documents relating to the availability of D&O insurance with its insurer (Markel).[2] Whilst not the full policies, we would note the following:

3.5.1 on renewal, the Company would have acknowledged the truth of assumptions made by the insurers, namely that:

(a) the Company's gross income/fees for its then last financial year did not exceed £1,722,000 (whilst not an exact science, this gives some indication of the level of additional cover which might be available. as noted below, currently the D&O cover is limited to £1,000,000. The insurer may query why significant additional cover above this is required given the turnover figure assumed here);

(b) the Company/its directors were unaware of any claims or circumstances that were likely to give rise to a claim that it/they had not already told the insurer about; and

(c) apart from the above assumptions, the Company/directors were able to confirm there were no changes in circumstances which would cause the Company/directors to amend the answers shown in the accompanying risk profile or to any other specific question which the insurer would have asked.

The directors should consider whether circumstances have changed in any way which would make it a requirement or otherwise prudent to notify the insurer at this time. If run-off cover is purchased, we would expect similar assumptions to be made by the insurer regarding the Company and potential claims;

3.5.2 the Company's D&O insurance cover – referred to as *"Management liability"* cover - indemnifies *"Directors or officers against any claim first made against them during the policy period for any Wrongful Act in their capacity as a Director, officer or employee of the company"*. The reference to *"Directors"* will usually cover executive and non-executive directors;

3.5.3 a *"claim"* needs to be first made <u>during</u> the policy period (stated here to be 17 June 2022 to 16 June 2023) in the UK. Accordingly, if a claim was first made against a director, officer or employee outside of the policy period or outside of the UK, it would not be covered. In many cases the claim also needs to be notified to the insurer during the period of insurance. A claim will usually include any civil, criminal or regulatory proceeding or suit brought against an insured party;

3.5.4 a *"Wrongful Act"* will be defined in the underlying policy wording, but would usually cover any actual or alleged breach of trust, breach of duty, neglect, error, mis-statement, misleading statement, omission, breach of warranty, breach of authority or other act wrongfully committed or attempted. Coverage is sometimes extended to include libel, slander or wrongful trading under the Insolvency Act 1986, s 214 (see Schedule 2 for a summary of the offence and potential liability). This last point (regarding wrongful trading) is important in the context of liquidation and should be sought as part of any run-off cover; and

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1 Chartered Governance Institute – *"Guidance note, Protection against directors' and officers' liabilities – indemnities and insurance"* (2015).

2 *"Marches LEP PI Combined Insurance Summary extract"* (MS Word document) and *"Client Renewal Terms – PolicyID 38186505"* (PDF).

3.5.5 D&O cover is limited to £1,000,000 with a per claim excess of £0. This financial limit of cover is an aggregate amount to be shared between all directors and officers of the Company.

3.6 By way of next steps:

3.6.1 full copies of the policy wording should be obtained from the brokers/insurers to assess the precise cover afforded to the directors and officers; and

3.6.2 we would recommend speaking to the Company's brokers about the relative cost for an increase in cover both as to the coverage amount as well as the period covered (i.e. after the Company has ceased to exist). We cannot say whether the level of cover is sufficient for the purposes of individual directors – this is a commercial decision for the directors themselves to consider. In assessing the financial limit of cover, the directors may like to consider further:

(a) the turnover of the Company; and

(b) the nature of the more common claims which might be brought against them in the context of liquidation and the remedies which could be levied. We have sought to summarise these in Schedule 2.

4 POSSIBLE CLAIMS IN THE CONTEXT OF LIQUIDATION AND MITIGATIONS

4.1 As a separate legal person, the Company contracts with third parties, not the directors personally on the Company's behalf. This means that the Company has the liability for its own debts and wrongful acts giving rise (or which might give rise) to liability - in the first instance - belong to the Company.

4.2 The directors will owe certain statutory and common law duties to the Company, breaches of which can in some circumstances give rise to personal liability. It should be noted, however, that there is a longstanding principle that the directors of a company are not the guarantors of its success. A decision taken in good faith by the directors that later turned out to be wrong (for example, a commercial misjudgement leading to a significant loss) will not normally give rise to personal liability; there has to be a meaningful level of wrongdoing for personal liability to arise.

4.3 We have summarised in Schedule 2 what we consider the more common types of claims which can be brought against directors in the context of an MVL (or an MVL which converts into a creditors' voluntary liquidation), the nature of the remedies which could be levied against the directors and the possible mitigation strategies (in addition to any specific D&O insurance currently in place or contemplated). In our view, there are mitigation strategies for most of the potential claims listed. We would be happy to discuss this further with the Company if there is a particular type of claim which is a material concern.[3]

Bevan Brittan LLP
17 January 2023

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3 For the purposes of our advice, we have assumed that no director has given a personal guarantee or held themselves out as being responsible for particular debts of the Company, and that there are no grounds to argue that the Company has been involved in tax avoidance, evasion or "phoenixsm". Section 100 of and Schedule 13 to the Finance Act 2020 allow HMRC, with effect from 22 July 2020, to make directors and other persons involved in tax avoidance, evasion or phoenixism jointly and severally liable for a company's tax liabilities if there is a risk that the company may deliberately enter insolvency.

SCHEDULE 1 – MEMBERS VOLUNTARY LIQUIDATION

1 LIQUIDATION: GENERAL

1.1 By way of background, there are two types of liquidation:

1.1.1 **Compulsory liquidation** - this is liquidation by order of the court

1.1.2 **Voluntary liquidation** - there are generally two forms of voluntary liquidation:

(a) ***Members voluntary liquidation (MVL)***: this is where the directors are willing to give a statutory declaration of solvency (see below). An MVL is started by the company's members passing a special resolution.

(b) ***Creditors voluntary liquidation***: this is where the directors are <u>not</u> willing to give a statutory declaration of solvency. A creditors voluntary winding up is started by the company's members passing a special resolution to the effect that the company should be wound up and is followed by a creditors' meeting.

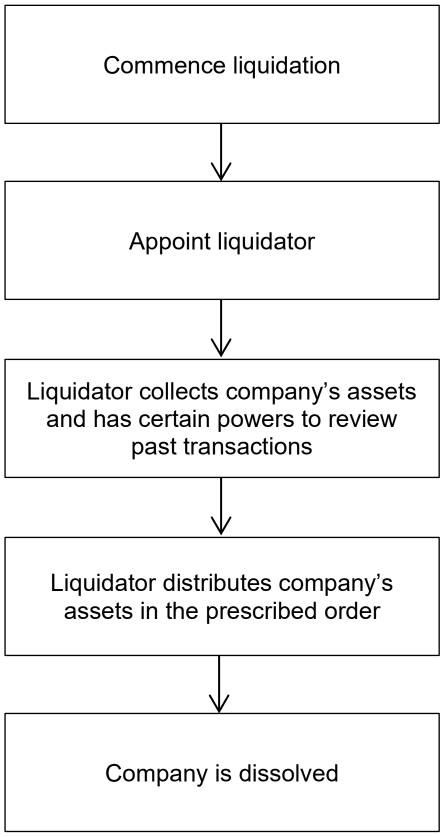
1.1.3 For the purposes of this Paper, we are assuming that any liquidation of the Company will be an <u>MVL</u> commenced by the Company's members on the basis of a directors' declaration of solvency being given, rather than a compulsory liquidation commenced by the court or a creditors' voluntary liquidation commenced by any creditor(s). Please let us know if this is not the case.

1.1.4 Any reference to a board meeting means any meeting held physically (in person), by telephone or videoconference or by resolutions passed in writing by the directors.

1.1.5 **Important note** - by necessity this schedule is a high level summary of the law and it is not intended to be a comprehensive statement of all matters relating to MVLs, the powers of liquidators or the treatment of assets. Further advice may be required depending on the assets which may need to be transferred and the proposed mechanism of transfer. In particular, we have not considered tax matters.

2 MEMBERS VOLUNTARY LIQUIDATION (MVL)

2.1 Liquidation is the procedure under English law by which the assets of a company are realised and distributed to creditors in the order of priority provided for in the Insolvency Act 1986. The process can be summarised as follows:



A further flowchart is attached at the end of this section 2, showing the broad stages and timetable of an MVL. The following sections outline the steps that would need to be taken.

2.2 Meeting of the company's board of directors

2.2.1 The company's directors meet to:

(a) resolve to recommend to the members that the company be placed in liquidation;

(b) decide to seek a special resolution of the members to approve the winding up. Other resolutions will normally also be passed at the same time, as required by the liquidators, but this special resolution is the key resolution;

(c) select a director to act in relation to the special resolution (e.g. circulation of notice of general meeting or circulation of written resolution to the members, dealing with the liquidator, etc.); and

(d) consider and make a statutory declaration of solvency (see below), or nominate the directors who will make the declaration.

2.2.2 Minutes of the board meeting are prepared, and signed by the Chair. This could also be done by way of directors' written resolutions if necessary in accordance with the company's constitution.

2.3 Statutory declaration of solvency

2.3.1 A statutory declaration of solvency is made by a majority or all of the company's directors.

2.3.2 The directors making the declaration state that have made a full inquiry into the company's affairs and have formed the opinion that the company will be able to pay its debts in full, together with interest at the official rate,[4] within a period specified by the directors not exceeding 12 months from commencement of liquidation.[5]

2.3.3 The declaration of solvency must be made within the 5 week period prior to the winding up resolution being passed and embodies a statement of assets and liabilities as at the latest practicable date preceding the declaration. The statement of assets and liabilities is usually based on the most recent management accounts. In all but the simplest of cases, it would be prudent for the directors to take advice from the company's auditors prior to making the declaration.

2.3.4 In relation to the statutory declaration of solvency:

(a) The declaration of solvency is an important document and is equivalent to a statement made under oath.[6] The process for the directors (and the standard which they must attain) is: (1) to make full enquiry into the company's affairs, and (2) having made full enquiry, to form the opinion that the company will be able to pay its debts within a period specified by the directors not exceeding 12 months.

(b) No further assistance is given in the Insolvency Act 1986 as to what *"full enquiry"* entails. It is likely that a natural rendering of these words would entail the directors undertaking full (as opposed to merely *"reasonable"*) financial, commercial and legal due diligence into the assets, liabilities and business of the company.

(c) In relation to the directors' opinion that the company will be able to pay its debts within a period specified by the directors not exceeding 12 months, it must be an opinion which the directors can reasonably make. If the directors have not made full enquiry of the company's affairs, it is less likely that they can, in all the circumstances, have formed a reasonable opinion as to the company's ability to meet its debts. Equally, after making full enquiry, the findings of that enquiry need to back up the opinion formed (i.e. if the data obtained from the enquiry points to a particular conclusion and the directors form an opinion which contradicts that conclusion, it will be difficult to show that the opinion so formed was reasonable).

(d) If a director's declaration turns out to be wrong, and the company is unable to pay all its debts in full within the period stated, the normal burden of proof is reversed and a director will have to prove that there were reasonable grounds for the conclusion reached.

(e) A director making a declaration without having reasonable grounds for doing so can be liable to severe penalties of up to two years' imprisonment, an unlimited fine, or both. The sanction of imprisonment is more likely where it can be shown that a director either wilfully disregarded the results of full enquiry or, alternatively, decided

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4 The "official rate" of interest is defined as the higher of the contractual rate of interest applicable to a debt and the judgment rate. The judgment rate is set by statute and has been 8% per annum since 1993; the rate applying in a particular liquidation is the rate on the date of commencement.

5 It is not possible to specify a period longer than 12 months, but in practice all debts do not have to be paid and the liquidation does not have to be completed within this period. However, the Company must have the ability to pay all its liabilities (actual and contingent) were they to be determined within that time frame.

6 The declaration can be made before a solicitor or a commissioner for oaths in the UK, or overseas before a UK solicitor, a notary or a consular official.

not to make full enquiry and nevertheless made a declaration of solvency. In most other cases, a fine would be imposed.

2.3.5 Another factor for the directors to consider is that of their potential disqualification, which is relevant if the company later becomes insolvent.[7] A director is not automatically disqualified if the company becomes insolvent. However, the liquidator would be obliged to send the Secretary of State a report on the conduct of any director who held office up to 3 years prior to insolvency. It is then the Secretary of State's decision to seek a disqualification order against any of the directors concerned.

2.3.6 Schedule 1 to the Company Directors Disqualification Act 1986 (**CDDA 1986**) provides a non-exhaustive list of grounds for seeking a disqualification order and these grounds include a failure of the directors to comply with provisions of the Insolvency Act 1986. This would include the indictable offence of a director making a declaration of solvency without having reasonable grounds for doing so.

2.3.7 A prosecution for disqualification will be heard in court. If the director is disqualified, the court will inform the Registrar of Companies so that the register of disqualified directors (which is a public register) may be updated.

2.3.8 Under the CDDA 1986, a court may make a disqualification order against a person that he shall not, without leave of the court, be a director of a company or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company for a specified period beginning with the date of the order.

2.3.9 Upon the initiation of the Secretary of State, a disqualification order may be made by the court against a director of a company which becomes insolvent, if his conduct as a director makes him unfit to be concerned in the management of a company.

2.3.10 When assessing conduct, the court is entitled to judge a director unfit on the strength of his conduct regarding the insolvent company in question alone or his conduct regarding that company and as director of any other company or companies.

2.3.11 The minimum period of a disqualification order is 2 years and the maximum is 15 years. It is open to a disqualified director to apply to the court for leave to act as a director or manager of a company.

2.3.12 Please note that the directors also need to be mindful of various potential offences contained in the Insolvency Act 1986 and the Companies Act 2006 (such as wrongful and fraudulent trading) – see Schedule 2 for further summary details.

2.4 Liquidators' consent to act

The proposed liquidators provide the director nominated to deal with the special resolution which the members will need to approve and with a statement that they are authorised insolvency practitioners and are qualified and consent to act as liquidators.

2.5 Member resolutions

2.5.1 Any private company may pass written resolutions notwithstanding any provisions in the company's memorandum and articles of association, rather than holding a general meeting. If a written resolution is proposed:

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7 If during the course of an MVL, the liquidator becomes of the opinion that the Company will be unable to pay its debts together with any interest in full, the winding up can be converted to a creditors' voluntary liquidation. This is done by the liquidator calling a meeting of the creditors to present a full statement of affairs of the Company. The effect is as if the directors had not made a statutory declaration and the resolutions passed at the meetings of the Company and creditors become those necessary for a creditors' voluntary liquidation.

(a) it must be sent to the company's auditors (if it has auditors) at or before the time they are sent to members for signature; and

(b) the written resolution lapses if it is not passed before the end of the period specified for this purpose in the company's articles of association, or, if none is specified, the period of 28 days beginning with the circulation date. So long as the written resolution is signed before it lapses, then it becomes effective upon signature.

2.5.2 The resolution to wind up must become effective within five weeks of the declaration of solvency being made.

2.5.3 In any event, the member resolutions to be approved are:

(a) a special resolution to wind up the company – this is the key resolution referred to in the flowchart below;

(b) an ordinary resolution to appoint the liquidators; and

(c) an ordinary resolution to set the basis of the liquidators' remuneration.

2.5.4 Other member resolutions that may be approved at the same time are:

(a) a special resolution to give authority for the liquidators to distribute assets in specie; and

(b) a special resolution authorising the liquidators to exercise powers contained in Part 1 of Schedule 4 of the Insolvency Act 1986.

2.5.5 The liquidators will usually have their own standard form resolutions which they require to be passed.

2.6 Certificate of appointment

The director nominated to deal with the member resolutions signs a certificate of appointment and gives it to the liquidators.

2.7 Filing and advertising by the company

2.7.1 The company files the following documents with the Registrar of Companies within 15 days of the members' resolutions being passed:

(a) a copy of the special resolution to wind up the company;

(b) the declaration of solvency; and

(c) copies of any other special resolutions.

2.7.2 The company also advertises the resolution to wind up the company in the London Gazette within 15 days of the members' resolutions being passed.

2.8 Filing and advertising by the liquidators

2.8.1 The liquidators within 14 days of appointment:

(a) file a notice of appointment with the Registrar of Companies; and

(b) advertise the appointment in the London Gazette.

2.8.2 The liquidators must also notify their appointment to all creditors of which they are aware within 28 days of appointment.

2.9 **Assets and distributions**

2.9.1 Following their appointment, the liquidators undertake their statutory duties to realise the company's assets and seek out, agree and pay creditors' claims.

2.9.2 The liquidators will write to all potential creditors (actual or contingent) giving them a period of not less than 21 days to make a claim in the liquidation. The liquidators must advertise for claims in the London Gazette and are also likely to advertise for claims in appropriate newspapers. Any creditor that does not make a claim in the prescribed period risks being excluded from any distribution.

2.9.3 Once creditors' claims have been paid (with interest at the official rate from the date of liquidation to the date of payment), or determined and provided for, the liquidators should be in a position to deal with any surplus assets in accordance with the company's constitution.

2.10 **Periodical duties of the liquidators of companies registered in England and Wales**

Within two months of the anniversary of the liquidation, the liquidators send a progress report to the members, providing an account of their acts and dealings and the conduct of the liquidation during the year. The liquidators also file a copy of their progress report with the Registrar of Companies.

2.11 **Closure of liquidation and dissolution**

2.11.1 Once all creditors' claims have been settled, the company's tax affairs have been agreed with HM Revenue & Customs, and surplus assets have been distributed in accordance with the company's constitution (see paragraph 2.9 above), the liquidators convene a final meeting of the members to conclude the liquidation.

2.11.2 The liquidators file a return of the final meeting with the Registrar of Companies within 7 days of that meeting and the company is dissolved 3 months thereafter.

2.11.3 A flowchart showing the broad stages and timetable of an MVL is set out below.

Directors hold first board meeting and give statutory declaration of solvency / liquidators confirm they are qualified to act

5 weeks (max) between statutory declaration of solvency and liquidation resolution being signed

Statutory declaration to be filed at Companies House within 15 days of being given

Within five weeks, liquidation commenced by special resolution of the members appointment of a liquidator

Within 15 days of members' special resolution being passed

Resolution and notice of liquidator's appointment advertised in London Gazette and notified to Companies House

No time limit, but if liquidation takes more than one year, the liquidators are required to report to Company's members annually

Assets collected in and distributed in prescribed order

Final meeting is called by advertisement in the Gazette one month before the meeting

Final meeting of the members held

Final return filed within one week of the final meeting

Final return filed with the Registrar of Companies at Companies House

3 months after final return is filed

Company dissolved

SCHEDULE 2 - POSSIBLE CLAIMS IN THE CONTEXT OF LIQUIDATION AND MITIGATIONS

Basis of claim	Potential remedies against the director	Potential mitigations
A director has breached his or her ***general duties*** set out in ss.171-177 of the Companies Act 2006.[8] Before the onset of insolvency, a breach of directors' duties can give rise to an action by the company. The duties are only owed to the Company, and only the company can enforce them. Under strict conditions, however, a member can bring a derivative action, in respect of an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company. There is no requirement for the director to have personally benefitted from the breach.	Liability for breach or threatened breach of the general duties is personal to the director concerned and unlimited in scale. Note that any claim for damages would need to prove and quantify the loss. The remedy for a breach of the duty to exercise reasonable care, skill and diligence will usually be damages. Remedies for breaches of other general duties may include: • an injunction; • setting aside of the transaction, restitution and account of profits; • restoration of company property held by the director; • damages; and/or • termination of the director's service contract.	Ensure that decisions taken are reasonable – in doing so, it will be much easier to show that the director concerned satisfied his/her duties. In that context, the following may be of assistance: • maintain up-to-date financial and operational information; • circulate meaningful information (i.e. information designed to promote debate and reasonable decision-making); • meet as often as necessary - more regularly if issues are raised; • don't ignore problems – always heed the warning signs and don't "put things off until tomorrow"; • be clear what the board is being required to consider and decide – ensure discussions are focused and culminate in unambiguous decisions; • seek professional advice where appropriate; • keep detailed records of decisions; and • always aim for collective decision-making.
A director has ***failed to act in the best interests of creditors*** (if	A claim for damages against the director. Note that any claim for	As above.

[8] These are:

- Duty to act within the powers conferred by the Company's constitution.
- Duty to promote the success of the Company. In so doing, a director must take a long-term view of wider considerations such as employees, the environment, suppliers and customers.
- Duty to exercise independent judgement.
- Duty to exercise reasonable care, skill and diligence. A director is expected to exercise the level of care, skill and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the Company, and the general knowledge, skill and experience that the director has.
- Duty to avoid conflicts of interest (to the extent that these are not authorised by the other directors).
- Duty not to accept benefits from third parties.
- Duty to declare an interest in proposed transactions or arrangements of the Company.

Basis of claim	**Potential remedies against the director**	**Potential mitigations**
there is any danger of the Company becoming insolvent or the Company has become insolvent).	damages would need to prove and quantify the loss. The types of remedy are likely to follow those set out above for breach of a director's general duties.	Ensuring, as far as possible, that all assets <u>and</u> liabilities relating to the Company's activities are transferred out prior to the start of the liquidation process. If the Company is wound up on a <u>solvent</u> basis, then this basis of claim would not arise, because the interests of creditors would have been protected through the liquidation process).
The ***directors' declaration for an MVL turns out to be wrong*** and the Company is unable to pay all its debts in full within the period stated (see paragraph 2.3.4 in Schedule 1).	A director making a declaration without having reasonable grounds for doing so can be liable to severe penalties of up to 2 years' imprisonment, an unlimited fine, or both. The sanction of imprisonment is more likely where it can be shown that a director either wilfully disregarded the results of full enquiry or, alternatively, decided not to make full enquiry and nevertheless made a declaration of solvency. In most other cases, a fine would be imposed.	Ensuring that *"full enquiry"* is made, being financial, commercial and legal due diligence into the assets, liabilities and business of the Company. Ensuring, as far as possible, that all assets <u>and</u> liabilities relating to the Company's activities are transferred out prior to the start of the liquidation process.
Wrongful trading – if the Company has gone into insolvent liquidation and it appears to the court that any person who has been a director knew or ought to have known that this would occur and failed to take all reasonable steps to minimise the loss to the creditors. No fraudulent intention is required – "honest but incompetent" is no defence, and the onus is on the director to prove that he took every reasonable step to minimise the potential losses to creditors.	The court may order a director liable to contribute to the assets of the Company and the disqualification of that person from acting as a director. The court may make a director disqualification order against any person who has been a director of a company which has gone into insolvent liquidation and who appears not to be a *"fit person"* to be concerned in the management of a company.	Keeping a company in a situation where it is trading at a loss, so increasing the deficit to creditors, rather than ceasing to trade or putting the company into liquidation, is clear failure to take such steps to minimise the loss to creditors. Undertaking a solvent winding up means that wrongful trading cannot arise. Therefore preparing for an orderly winding up on a solvent basis at the earliest possible time provides the clearest mitigation strategy.
Fraudulent trading - if in the course of the winding up of the company, it appears that business of the Company has been carried on with intent to defraud creditors or for any fraudulent purpose (note that the corresponding provision in the Companies Act 2006 does not require the company to be undergoing a	Any person knowingly a party to the fraud may be made liable to contribute to the Company's assets, may be convicted and (under the equivalent provision in the Companies Act 2006) imprisoned for up to 10 years and/or fined.	Fraudulent trading is rare, because it is difficult to prove "intent" and most directors in these circumstances pull back from actively seeking to defraud. In addition, a director should check his/ her motives in approving a given course of action, seek to comply with his/her

Basis of claim	**Potential remedies against the director**	**Potential mitigations**
winding up, so a charge of fraudulent trading can arise at any time). This includes where debts have been incurred by the Company knowing that they cannot be paid. Fraudulent intent must be shown.	A director may be disqualified from acting as a director for up to 15 years. Creditors may also have a remedy at common law through an action for deceit.	duties (set out above) and actively seek to avoid trading in this manner. In this way, fraudulent trading cannot arise.
Misfeasance – where a director or former director of a company who *"has misapplied or retained, or become accountable for any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company"* can be compelled by the court (on the application of the official receiver, liquidator or any creditor) to repay the money or property or any part of it, or to contribute such sums to the company as compensation.	Repayment of money or to contribute such sums to the company as compensation as the court thinks fit.	Ensuring decision-making is reasonable (see potential mitigations in relation to general duties, above).
Other Insolvency Act 1986 offences, including: • fraud in anticipation of winding up • transactions in fraud of creditors • misconduct in the course of winding up • falsification of company's books • material omissions from statement relating to company's affairs • false representations to creditors	Imprisonment, a fine, or both.	Not undertaking the acts referred to.
Disqualification – an order for disqualification of a director may be sought in the following circumstances: • the director has been guilty of 3 or more defaults in complying with companies legislation regarding the filing of documents with the Registrar of Companies	A disqualification order may prevent a person from acting as a director or from having any involvement in the promotion, formation or management of a company for a period of between 2 and 15 years.	Seeking to ensure that the Company is would up on a solvent basis. As above for wrongful trading and fraudulent trading.

Basis of claim	Potential remedies against the director	Potential mitigations
during the preceding 5 years; or • he or she is, or was, a director of a company that has at any time become insolvent and that his/ her conduct as a director of that company makes him or her unfit to be concerned in the management of a company; or • the director is found to be guilty of wrongful or fraudulent trading as defined in the Insolvency Act 1986 (see above).		