



# “Under Pressure” – a guide for Charities in Financial Distress

Presentation to the BHP Charity Conference

13<sup>th</sup> November 2024

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**Dave Broadbent**

Email: [dave.broadbent@btguk.com](mailto:dave.broadbent@btguk.com)

Offices: York & Teesside

Mobile: (07824) 656 866

## ...what's he on about now..?

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In this breakout session, Dave (the guy wittering on) will provide attendees with a number of examples where he has previously helped out charitable organisations based in Yorkshire and the North East...

From dealing with the “unincorporated headache” to helping those suffering from the “COVID hangover” the discussion should ensure Trustees are aware of their obligations (from a fiduciary duty perspective) as well as covering what options are available to them (should the need arise)

As ever, the best way to deal with a problem is to act as **early as possible** – the contents of the talk will therefore contain what you *may* need to know (even if it's never actually required in the future)

## ...it's worth reminding ourselves of what happened...

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In the Spring of 2020 the majority of businesses in the UK were told that they had to cease trading, as part of a Lockdown procedure – most (if not all) needed **financial assistance** during this period, which was provided through various mediums (e.g. grants / loans / Furlough)

Although the funds provided assistance (at the time) many small businesses are now **struggling to meet the repayments** on the legacy debt – in some instances, this has been exasperated by companies also seeing a **material drop in turnover**, as a result of the “cost of living crisis” brought about by high inflation and increased interest rates.

Let's remind ourselves of what financial assistance was provided to businesses (back in 2020) with particular focus on the **1.5 million Bounce Back Loans** provided to small limited companies...

Spring / Summer 2020

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# “What did our Boris do to help out..?”

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- COVID-19 Job Retention (“Furlough”) Scheme
- Small Business Grant Funding (one-off £10,000)
- Business Rates “Holiday” (Retail / Hospitality)
- COVID-19 Business Interruption Loan Scheme
- “Bounce Back” Loan Scheme (£2,000 to £50,000)



# Bounce Back Loans

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- Wholly guaranteed by Government
- Between £2,000 and £50,000 (up to 25% turnover)
- Unsecured
- No personal guarantee

*...prerequisites...*

- Impacted by COVID-19
- UK-based & carrying on business on 1 March 2020
- Incorporated in March 2019
- Must not be insolvent or a “business in difficulty” on 31 December 2019
- No due diligence



# Corporate Insolvency & Governance Bill 2020

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- Moratoriums / Arrangements & Reconstructions
- Termination clauses (suppliers)
- Winding-Up Petitions
- Suspension of Liability for Wrongful Trading
- Corporate Governance Measures

*...additional assistance...*

- Deferral of (June Quarter) VAT to March 2021
- Deferral of (July 2020) SA until Jan 2021
- The resurrection of the “Time to Pay” scheme (two years)
- Amnesty on historic tax debt







## ...fast forward to 2023 – “cost of living crisis” ...

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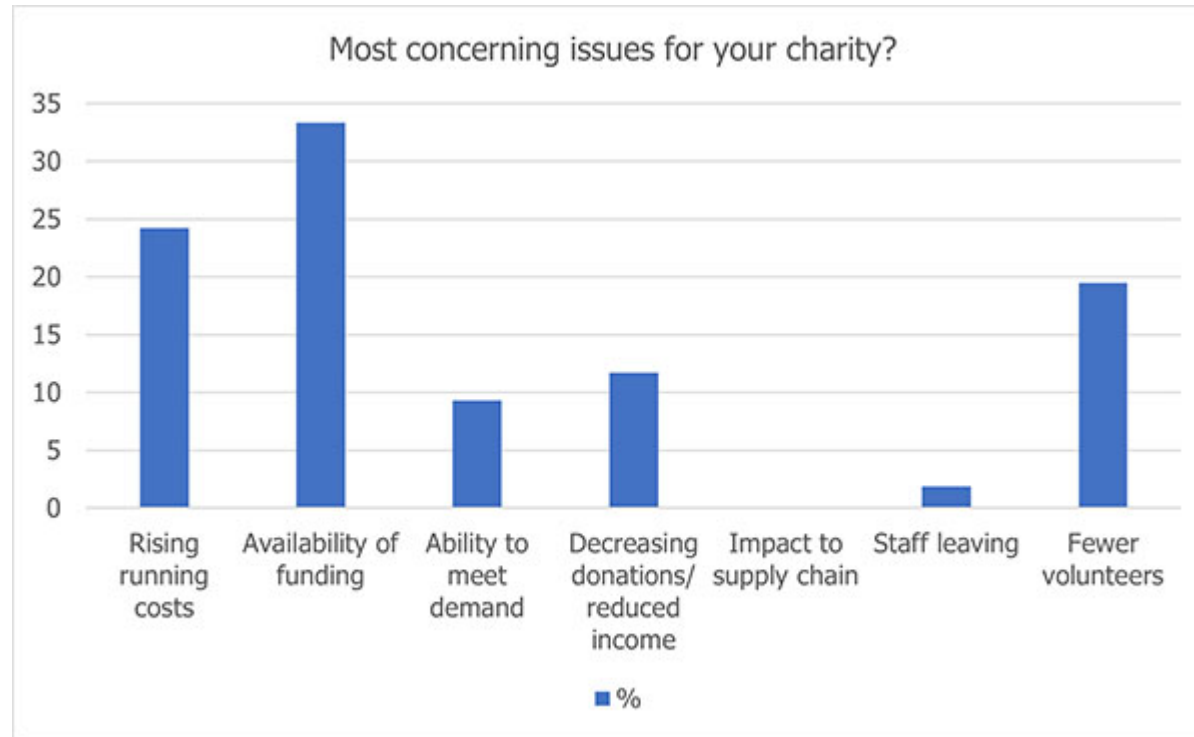
- Drop in turnover (public spending)
- Issues with obtaining materials
- Increase in utility costs
- Increase in fuel costs
- High rates of inflation
- Increase in interest rate

*...effectively everything gets more expensive...*



## ...fast forward to 2023 – “cost of living crisis”...

“...a quarter of UK charities could be struggling during 2023...”



“32% of charities anticipate worsening financial situation over Autumn 2024 as local Government crisis bites...

...and recruitment challenges affect 40% charities, further disrupting delivery of vital services...”

# The Pay as you Grow Scheme

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*...assistance for Bounce Back Loans...*

Extend loan period (from six) to ten years

Pay interest-only for six months (three strikes)

Six-month repayment holiday (just the one)



# Department for Business Energy & Industrial Strategy

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- £47 billion borrowed
- £5 billion repaid in full
- £28 billion paying on time
- £7 billion (potentially bad)
- £1 billion (Loan Guarantee Scheme)
- £1 billion suspected fraud

*...not sure about the balance (£5 billion)*

**BAD DEBT**

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## So why not just apply for dissolution..?

### The Rating (Coronavirus) and Director Disqualification (Dissolved Companies) Act

- CDDA Investigations
- Was just live, but now for dissolved companies
- Disqualifications
- Compensation Orders (personal liability)
- Form DS01
- Failure to notify creditors



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## Form DS01 (and the ramifications)

### **Who you must tell**

Fill in an [application to strike off](#) and send a copy within 7 days to anyone who could be affected. This includes:

- members (usually the shareholders)
- creditors
- employees
- managers or trustees of any employee pension fund
- any directors who did not sign the application form

**If you do not follow the rules on who you must tell, you can face a fine and possible prosecution.**

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## Form DS01 (and the ramifications)

Abdulrazag Zagroba, 54, from Manchester, appeared at Manchester Crown Court on Friday 24 June 2022 where he was **sentenced to 24 months** before Recorder Hudson.

This was the first successful criminal prosecution of a bounce bank loan fraudster for the Insolvency Service, which also saw Abdulrazag Zagroba disqualified from acting as a director for 7 years.

The court heard that Zagroba was sole director of Amigo Pizza (Manchester) Ltd, incorporated in January 2020. The company operated a pizza takeaway business in the Stretford area of Manchester until it was dissolved in October the same year.

Zagroba's application to dissolve the company was originally signed on 17 June 2020 but less than two weeks later, he applied for a Bounce Back Loan of £20,000.

Zagroba did not disclose to the bank that the company was already in the process of being dissolved and he signed the loan declaration stating the company would be able to make repayments. By the time the loan was due to be repaid in June 2021, the company had already been dissolved.

# The Insolvency Service (Fact Sheet on Bounce Back Loans)

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If we find there was **misconduct** in the use of the loan, action may be taken against you and your company.

Types of misconduct can include:

- providing false information on loan application
- the loan being used for personal benefit
- dissolving your company to avoid repaying the loan



# The Insolvency Service (Case Studies)

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## **L V Distributions Limited / SIO Traders Limited (Shropshire)**

Two separate companies submitted false documents to at least 41 local authorities and the Government's Bounce Back Loan scheme to secure £230,000 worth of funding put in place to support businesses during the pandemic, including Bounce Back Loans totalling £100,000, despite having never traded.

Following an investigation by the Insolvency Service, the companies were wound up by the Court.

## **N & S Solutions Limited (London)**

An application for a Bounce Back Loan of £30,000 was made by the director of a company which was in Liquidation (and no longer trading) so would be unable to repay the loan – although the money was used to pay one company creditor, the company's other creditors were ignored and so not treated fairly.

The director signed a disqualification undertaking which prevents him from acting as a director for 9 years from 25 October 2021.

# The Insolvency Service (Case Studies)

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## **LTH Scaffolding Services Limited (Sunderland)**

A man obtained a Bounce Back Loan of £50,000 in May 2020 to which he was not entitled, for a business which had already stopped trading (the director having taken up alternative employment)

The money was not used for the purpose it was intended, instead using it to repay third parties rather than to meet ongoing business costs.

He then declared himself bankrupt (in October 2020) including the loan in his bankruptcy debts.

As a result of his improper application for the Bounce Back Loan (and the risk he posed to other creditors) he entered a bankruptcy undertaking which extended his bankruptcy restrictions for 10 years, meaning he is limited to what credit he can access, as well as not being able to act as a company director without the permission of the Court.

## **Parthart Limited / Bargain Basement 90 Limited / Bargains Basement 90 Limited (Rotherham)**

A director obtained Bounce Back Loans of £150,000 across three companies which had never traded, and so were not entitled to the loans.

The money was used for cash withdrawals by the director, and payments made to a company owned by a “close friend” and other third parties.

He was disqualified from acting as a company director for 13 years as a result – the “close friend” was also banned as a director for similar reasons.

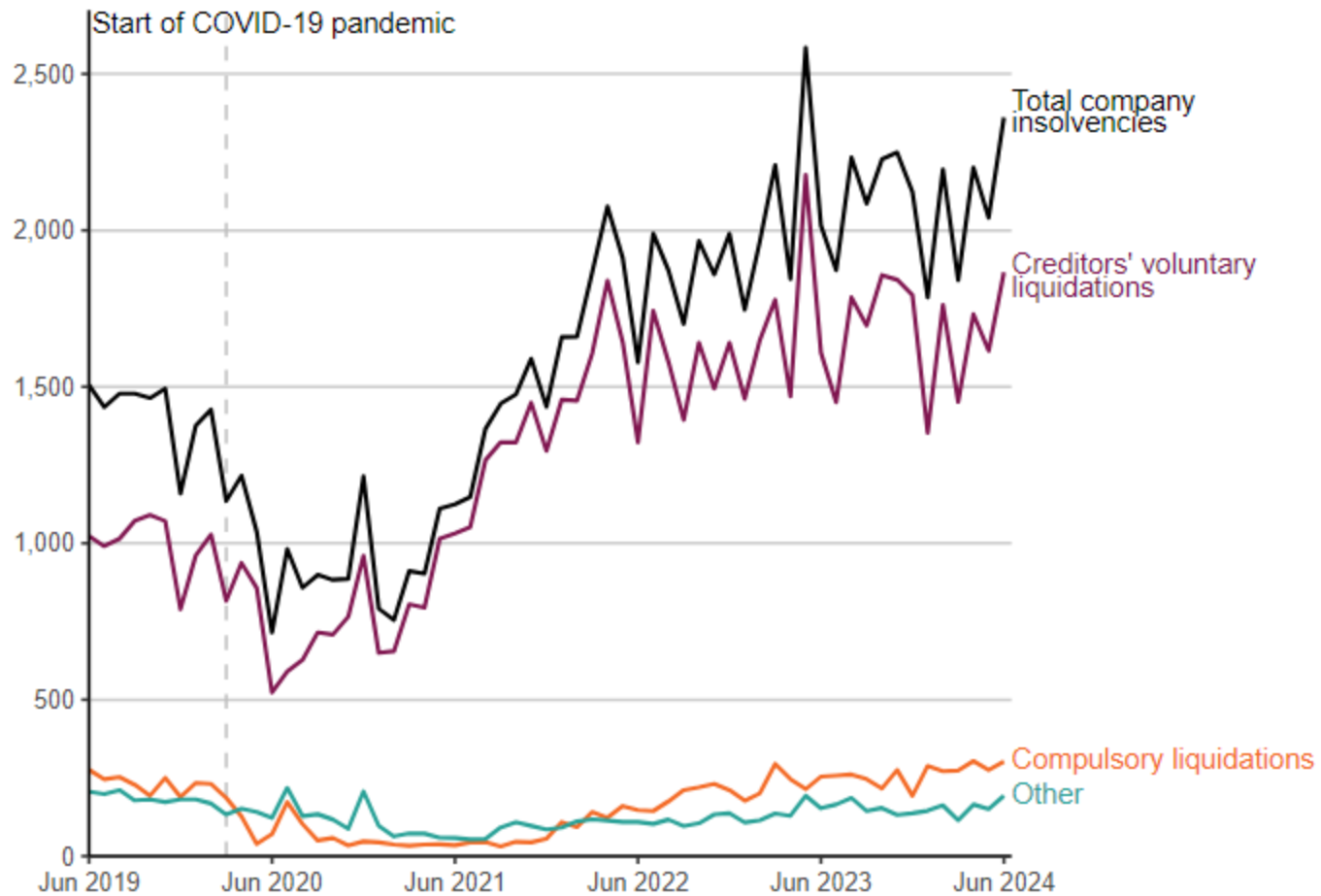
## ...but what if we “do nothing”..?

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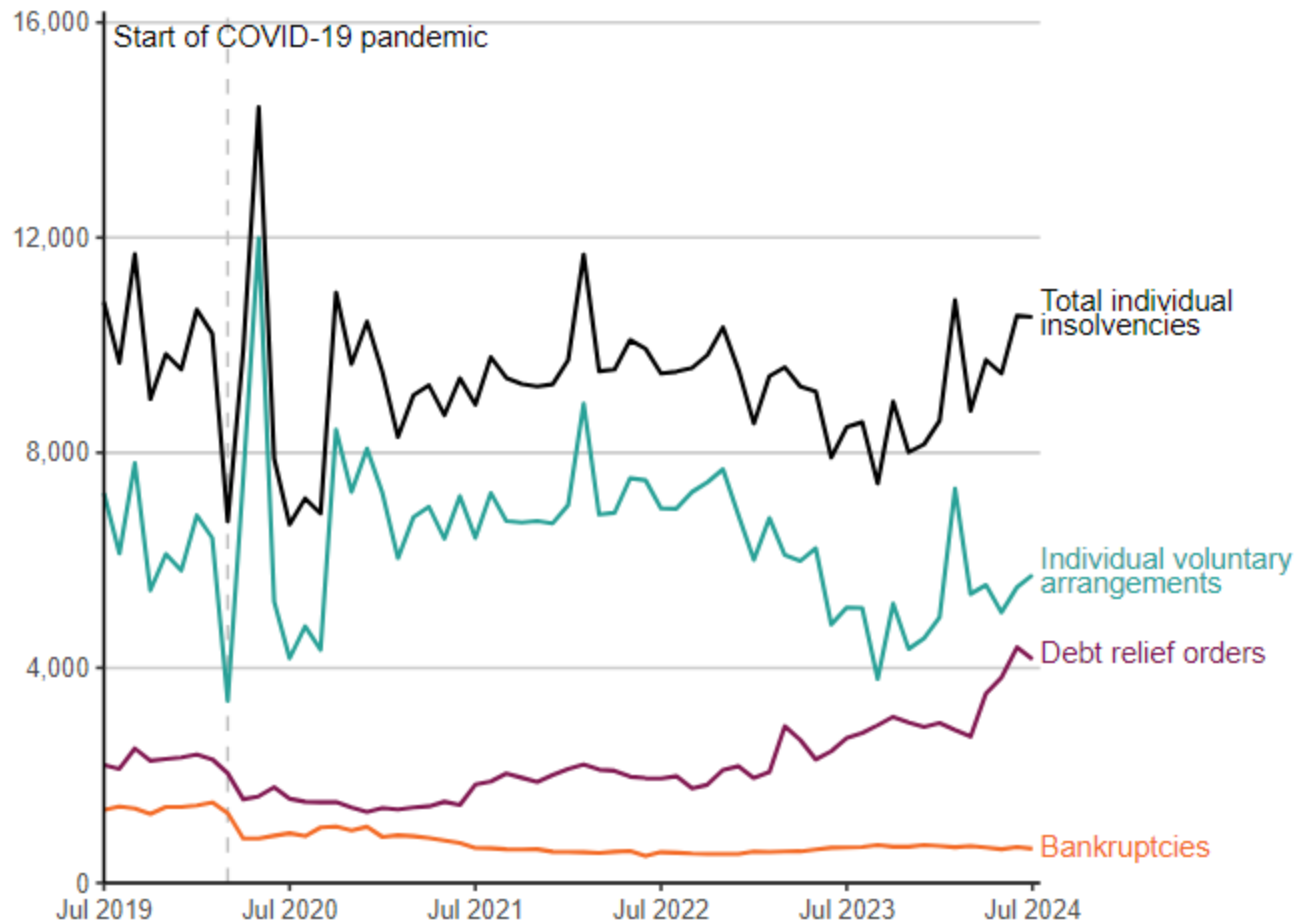
“Zombie companies threaten to cause new financial meltdown..”



# Corporate Insolvencies



# Personal Insolvencies



# Unincorporated Charities

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You'll be surprised (or not) to know there are still 172 active unincorporated charities, and 82 inactive ones, including some well-known names...

We always need to remember that, although a charity may provide an indemnity to its Trustees, this is only limited to the assets it owns...

## **Chandra v Mayor**

Claim was brought by an employee against the Chair of the charity for wrongful dismissal.

Court viewed that the employment contract was between the employee and the members of the management committee (or trustee board)

This means that the Trustees were held as ultimately responsible for the employment contract, even if it was agreed by other people, several years before the Trustee in question joined the organisation.

Such actions could therefore result in Trustees having to personally contribute towards a Court (or other tribunal) award, where the charity's assets cannot cover the liability.

# Bankruptcy – Moral of the Story

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Make sure you consider EVERYTHING before pressing the button...

...it's EASY to declare yourself Bankrupt...

...but a NIGHTMARE (and **very expensive**) to unwind the process...



# Bankruptcy – ...“pull the other one”...

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- Unemployed
- Divorce proceedings
- Matrimonial home (estranged wife)
- Rental property (housing daughter & family)
- Transaction at an Undervalue (Bankruptcy Restriction Order)
- Rental income is Bankruptcy asset
- Sale undertaken at Market Value?

*...never have the attitude of “it won’t be looked at” (because it usually will)...*





# Individual Voluntary Arrangements

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## The Process...

- Work out strategy
- Produce the Proposal document
- Appoint a Nominee (produces Report)
- Convene a Virtual Meeting of Creditors

## *...prerequisites of approval...*

- 75% of those voting (in value)
- Exclude “associates” (50% majority)



# Individual Voluntary Arrangements

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...but how do we decide on the Strategy..?

- Monthly contributions
- Lump sum payment (sale of the business)

...work undertaken...

- Cashflow Forecast
- Historic accounting results
- Asset valuations (by independent agent)
- Comparison Statement (baseline Bankruptcy)
- Speak to key stakeholders



# Individual Voluntary Arrangement

ESTIMATED OUTCOME FOR CREDITORS					
	Notes	Bankruptcy		Voluntary Arrangement	
		£	£	£	£
<b>Asset Realisations</b>					
Motor Vehicle		20,000		<i>Excluded</i>	
Less: costs of sale (est.)		(2,000)		-	
Less: due to Finance Company		(20,000)		<i>Excluded</i>	
			(2,000)		-
Business Assets		5,000		<i>Excluded</i>	
Stock		1,000		<i>Excluded</i>	
			6,000		-
Income Contributions (£500 pcm x 5 years)		-		30,000	
Income Payments Order (£350 pcm x 3 years)		12,600		-	
			12,600		30,000
<i>Total assets before costs</i>			18,600		30,000
<b>Less: Costs of Procedure</b>					
Petitioner's costs		1,500		-	
Official Receiver's Case Administration Fee	1	2,775		-	
Official Receiver's General Fee	1	6,000		-	
Trustee's fees	2	25,000		-	
Nominees' fees		-		2,500	
Supervisors' fees	3	-		10,000	
Disbursements		500		500	
			(35,775)		(13,000)
<i>Assets available for Unsecured creditors</i>			(17,175)		17,000
<b>Less: Unsecured Creditors</b>					
Shortfall to Finance Company		2,000		-	
Bounce Back Loan		45,000		45,000	
Credit Cards & Loans		23,000		23,000	
			(70,000)		(68,000)
<b>Shortfall</b>			<b>(70,000)</b>		<b>(68,000)</b>
<b>Dividend to Unsecured creditors</b>		<b>(p in the £)</b>	<b>Nil</b>	<b>(p in the £)</b>	<b>25</b>
<b>Notes</b>					
1.	The Insolvency Service charge a fee in relation to the dealing of bankruptcy cases				
2.	The Trustee's fees have been estimated on a time costs basis for dealing with a Bankruptcy estate of this nature				
3.	The Supervisors' fees have been estimated on a time costs basis for dealing with an arrangement of this nature				

# Individual Voluntary Arrangements – Bad Advice Example

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- Individual already subject to an IVA
- Personal guarantees (failed business)
- Minimal contributions (retirement age)
- Large amount of equity in home
- Modification (remortgage in fourth year)
- Likely sale of property

*...always read the small print (and seek a second opinion if unsure)...*



# Individual Voluntary Arrangements – Moral of the Story

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The secret to a successful solution is in the proper preparation and planning...

...the production of the Proposal is the EASY part...

...but the strategy of its contents is where the SOLUTION lies...



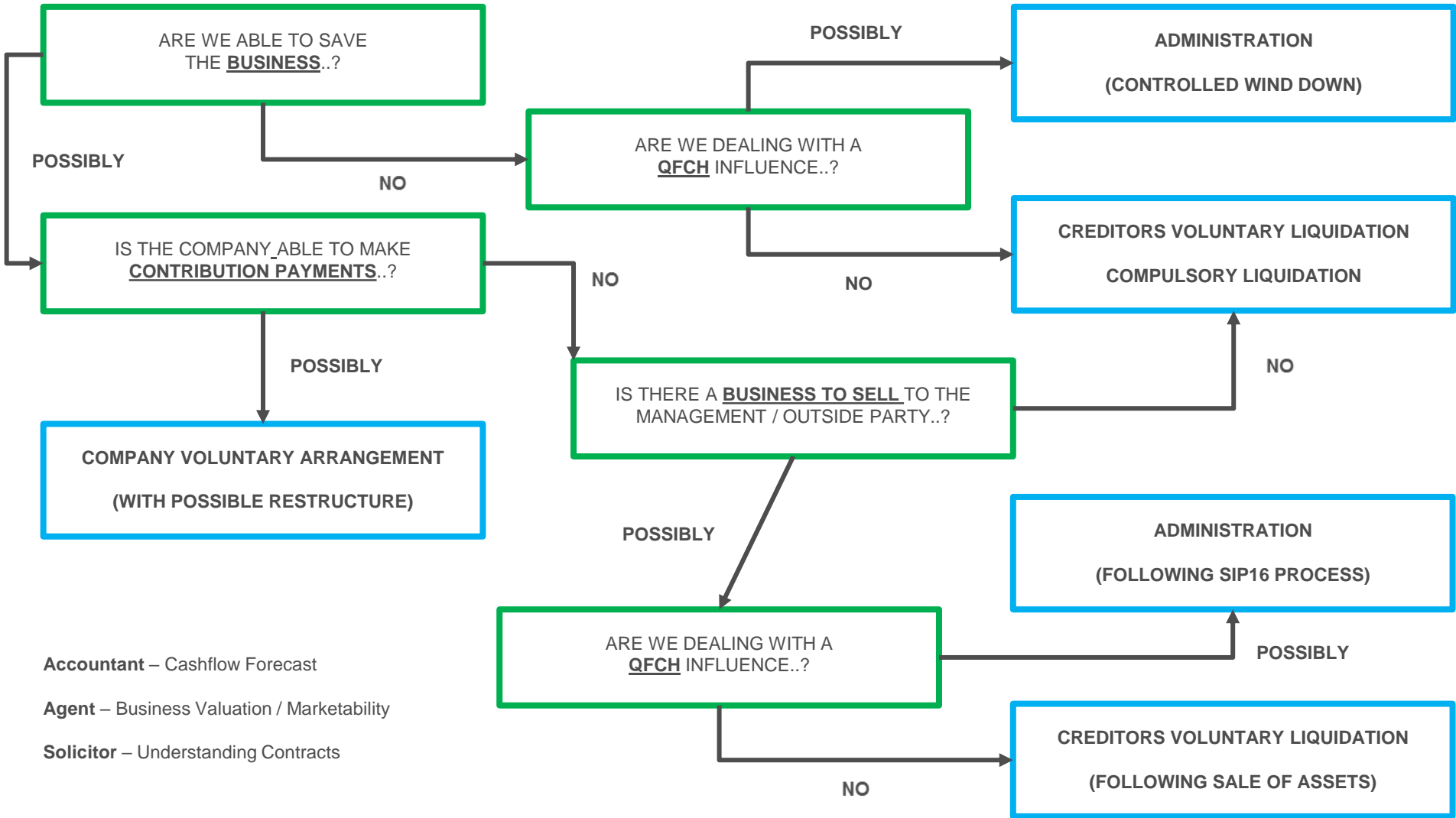
# Introduction – Corporate Options

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- Introduction to Client
- Company Search (structure)
- Historical Accounts (the numbers)
- General Discussion (“high level”)
- Cashflow Forecast (working with the accountant)
- Asset Valuations (independent agent)
- Points of Concern (legal advice)
- Second Meeting (“concentrated”)



# Corporate Flow Chart



**Accountant** – Cashflow Forecast  
**Agent** – Business Valuation / Marketability  
**Solicitor** – Understanding Contracts

# Members Voluntary Liquidation – ...why do we do them..?

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## Peace of Mind

- H M Revenue & Customs clearance
- Notice of Intended Dividend (advertised)

## Tax Advantages

- Capital distributions (better than dividends)
- Annual Allowance – £3,000 in 2024/5
- Potentially no Stamp Duty Land Tax (on distributions “in specie”)

**BENEFITS**



# ...and what are the other options..?

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## Application to H M Revenue & Customs

- Set format of request
- Allows for funds to be distributed as capital
- No ability to distribute share capital (£4,000 “de minimis” level)
- Assets must be less than £25,000
- Possibility of reinstatement to Register



# Creditors Voluntary Liquidation – the Process

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- Phase One – Entering Liquidation
- Phase Two – the Audit
- Phase Three – Release of the Liquidator



# Creditors Voluntary Liquidation – ...the Dark Side...

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## The Audit

- Report to the Department for Business & Trade
- Director Questionnaire
- Breaches of Companies Act and the Insolvency Act
- Preference Payments
- Transaction at an Undervalue
- Wrongful Trading
- Furlough Fraud / Mis-use of Bounce Back Loans
- Disqualification / Fine



# Creditors Voluntary Liquidation – “How much..!?”

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- Recently ceased trading
- Number of employees with claims
- No assets
- Solicitor provided quote for issuing Petition
- Funded by director (equivalent amount)
- Payment over several months (indemnity provided)

*...let's try and find a solution to this, which doesn't just create another problem...*



# Compulsory Liquidation – “Comparable to the Voluntary Process”

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- Recently ceased trading
- Construction industry
- Large bad debt (main customer)
- H M Revenue & Customs (Petition issued)
- Subcontractors (threats made)
- Potential of a Creditors Meeting v Official Receiver interview

*...sometimes the best option is to do nothing...*



# Company Voluntary Arrangements

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...but how do we decide on the Strategy..?

- Monthly contributions
- Lump sum payment (sale of the business)

...work undertaken...

- Cashflow Forecast
- Historic accounting results
- Asset valuations (by independent agent)
- Comparison Statement (baseline Liquidation)
- Speak to key stakeholders



Company Voluntary  
Arrangement - Advice  
for Directors

# Company Voluntary Arrangement – who needs convincing..?

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## Different types of Creditors

- Fixed Charge (e.g. mortgage on a property)
- Preferential (*employee claims for (some) wages and holiday pay*)
- Secondary Preferential (*H M Revenue & Customs for VAT / PAYE & Employee's NIC*)
- “Prescribed Part”
- Floating Charge (*Qualifying Floating Charge Holder*)
- Unsecured (...*everyone else...*)

...and don't forget the Shareholders..!!



# Company Voluntary Arrangements

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H M Revenue & Customs VAS Unit

- “...we don’t choose to be creditors...”
- “...one strike and you’re out...”
- “...what’s changed..?”

*...so how do we get their blessing..?*

- Cashflow Forecast v Historic Results
- Historic filing compliance (VAT)
- Identify issues / highlight responses
- Secondary Preferential Status

 **Real Business Rescue**  
Licensed Insolvency Practitioners



Company Voluntary  
Arrangement – Advice  
for Directors



# Company Voluntary Arrangements – other aspects to consider...

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- “Shrinkage Effect”
- Are our premises too big..? COVID arrears..?
- Is the business too highly geared..?
- Do we employ too many staff..?
- Are all of those financed assets really needed..?
- Are we really going to win that legal battle..?
- We need breathing space
- ...but what happens to our Debtor Ledger..?
- ...and what will the bank say..?



# Company Voluntary Arrangements – why should a creditor agree..?

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- It's the same company / same people – “we're not walking away from this..!”
- Directors are in control (SIP16 on Administration)
- Full transparency – “business bears its soul”
- Better outcome than Liquidation
- You get to keep a customer...
  
- Refinance
- Redundancy
- Return (of onerous assets)
- Re-site (trading premises)



# Company Voluntary Arrangements

XYZ Limited				
Estimated Comparison Statement				
	Creditors Voluntary Liquidation		Company Voluntary Arrangement	
	£	£	£	£
<b>Assets</b>				
Motor Vehicles (x3)	50,000		50,000	
Less: costs of sale (est.)	(5,000)		(5,000)	
Less: due to Finance Company	(75,000)		(75,000)	
<i>Shortfall carried forward</i>		(30,000)		(30,000)
Book Debts	200,000		<i>Excluded</i>	
Less: costs of collection (est.)	(20,000)		-	
Less: due to Factoring Agent	(170,000)		<i>Excluded</i>	
		10,000		-
Plant & Machinery	25,000		<i>Excluded</i>	
Motor Vehicles	5,000		<i>Excluded</i>	
Office Furniture & Computer Equipment	1,000		<i>Excluded</i>	
Stock (subject to Retention of Title)	10,000		<i>Excluded</i>	
Less: agent's costs (est.)	(4,100)		-	
		36,900		-
Voluntary Contributions (£1,500 per month / 5 years)		-		90,000
		46,900		90,000
<b>Less: Costs of procedures</b>		(40,000)		(20,000)
		6,900		70,000
<b>Less: Secondary Preferential Creditors</b>				
H M Revenue & Customs (PAYE/NIC)	20,000		20,000	
H M Revenue & Customs (VAT)	20,000		20,000	
		(40,000)		(40,000)
		(33,100)		30,000
<b>Unsecured creditors</b>				
Finance Company (shortfall brought down)	30,000		30,000	
H M Revenue & Customs (CT)	30,000		30,000	
Trade Suppliers	50,000		50,000	
Employee Claims (Redundancy)	50,000		50,000	
Director Loan Account	50,000		<i>Waived</i>	
Bounce Back Loan	50,000		50,000	
		(260,000)		(210,000)
<b>Shortfall as regards unsecured creditors</b>		<b>(293,100)</b>		<b>(180,000)</b>
<b>Dividend to unsecured creditors</b>	<b>(p in £)</b>	<b>Nil</b>	<b>(p in £)</b>	<b>14</b>

# Administrations – Strategy

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## Administration Strategy

- Pre-Pack sale
- Supervised trading period
- Controlled wind-down

## Exit Route

- Hand back control (to the directors)
- Company Voluntary Arrangement
- Voluntary / Compulsory Liquidation
- Dissolution



# What is an Antecedent Transaction..?

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...a “*bit of naughtiness*” before the making of a Court Order / Winding-Up Resolution...

...that “*causes losses*” to the estate...

- Breaches of Companies Act and the Insolvency Act
- Preference Payments
- Transaction at an Undervalue
- Wrongful Trading
- Furlough Fraud / Mis-use of Bounce Back Loans



# Preference Payment

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“...choosing to pay someone in preference to other...”

- Section 239 (company) / Section 340 (individual)
- “**Desire**” – presumed if with an “Associate”
- “**Insolvent**” – at the time (or made insolvent as a result)
- “**Time**” – six months / two years (latter if with an “Associate”)



# Preference Payment – Example

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## Background

- Individual in Business
- “Seed monies” via loan from family member
- Loss of key customer (drop in turnover)
- Accrued liabilities with H M Revenue & Customs
- Bankruptcy Petition issued (Dec 2022)
- Bankruptcy Order made (Feb 2023)

“...repayment to family member...”



# Preference Payment – Example

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## Antecedent Transaction..?

- Family member is an “Associate” (therefore no need to prove “**Desire**”)
- “**Time**” is taken from date of Petition (not Order)

...but what about “**Insolvent**”..?

- Post-petition (nailed on)
- Pre-petition (evidence..?) – *Statutory Demand*

## Effect

- Trustee pursues family member (recovery of payment)
- Application to Court for Order for Restoration
- Official Receiver (Bankruptcy Restriction Order)





# Transaction at an Undervalue

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“...selling something for less than market value...”

- Section 238 (company) / Section 339 (individual)
- “**Gift**” – i.e. lower than market value
- “**Insolvent**” – at the time (or made insolvent as a result) – presumed if with “Associate”
- “**Time**” – two years (company) / five years (individual)

...and there’s no statutory time limit for Section 423...

“...*putting assets beyond the reach of (defrauding) creditors*...”



# Transaction at an Undervalue – Example

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## Background

- Individual in Business
- Jointly-owns matrimonial home with Spouse
- Suffered large bad debt
- Accrued liabilities with creditors
- Bankruptcy Petition issued (Dec 2022)
- Bankruptcy Order made (Feb 2023)

“...transfers home to sole name of Spouse...”



# Transaction at an Undervalue – Example

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## Antecedent Transaction..?

- “**Gift**” very ease to prove (agent’s value of property)
- Spouse is an “Associate” (therefore no need to prove “**Insolvent**”)
- “**Time**” is taken from date of Petition (not Order)

## Effect

- Trustee pursues Spouse (recovery of equitable interest)
- Application to Court for Order for Restoration
- Official Receiver (Bankruptcy Restriction Order)



# Wrongful Trading

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“...at some point in time, we should’ve known there was **no prospect of avoiding insolvent liquidation...**”

- Section 214 (Wrongful) / Section 213 (Fraudulent)
- Point of Insolvency – generally “Commercial Test” evidence
- Losses caused in subsequent period

...point of insolvency easier to prove the closer you get to Winding-Up date...

...burden of proof on Liquidator (more evidence / more likelihood)...



# Wrongful Trading – Example

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## Background

- Company in Construction Sector
- Accounts filed have always been “break-even”
- Cash levels always tight
- Loss of Major Contract (including bad debt)
- Inference of “new work” (but no written evidence)
- Winding-Up Petition issued (Order made)

“...losses incurred in final trading period...”



# Wrongful Trading – Example

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## Antecedent Transaction..?

- Point of Insolvency..?

...“Balance Sheet” test – accounts were always break-even (not insolvent)

...“Commercial” test – is the loss of the Major Contract enough..?

- Any evidence of creditor pressure..?
- No funds in the bank account
- Deficiency Account / Production of accounts..?

## Effect

- Liquidator pursues Director (personally) – very risky..!!
- Disqualification..?



# The Insolvency Service (Fact Sheet on Bounce Back Loans)

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If we find there was **misconduct** in the use of the loan, action may be taken against you and your company.

Types of misconduct can include:

- providing false information on loan application
- the loan being used for personal benefit
- dissolving your company to avoid repaying the loan

Please remember that ignorance is **not a defence**...

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# That's your lot...

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