

Report relating to the proposed liquidation or dissolution of the Heart of the South-West LEP C.I.C. (the “Company”)

1 SUMMARY

- 1.1 The purpose of this paper is to set out key legal issues to be considered should a decision be taken by the Company to close down in light of HM Government’s decision to transfer LEP functions to local democratic institutions.
- 1.2 On the basis that Somerset Council as accountable body for the Company will ensure that any debts of the Company are settled/discharged in full, the Company can decide to either (i) voluntarily strike the Company off the register at Companies House (by way of dissolution) or (ii) use a formal liquidation process such as a members’ voluntary liquidation.
- 1.3 The purpose of this paper is to outline:
 - 1.3.1 the process for a members’ voluntary liquidation (**MVL**);
 - 1.3.2 the process for a voluntary strike off and dissolution of the Company
 - 1.3.3 practical issues to be worked through ahead of undertaking either a MVL or a voluntary strike off and dissolution of the Company.

2 MEMBERS’ VOLUNTARY LIQUIDATION

- 2.1 On the basis that the Company would be solvent at the point in time it wishes to close down, any liquidation procedure would have to be structured as a members’ voluntary liquidation (an **MVL**).
- 2.2 A MVL would be initiated by the Board of the Company and must be approved by the members of the Company (via a special resolution). The process is then managed by a liquidator and, once concluded, the Company is dissolved.

Statutory declaration of solvency

- 2.3 The key feature of an MVL is that all creditors of the Company are paid in full.
- 2.4 The statutory declaration is a statement made by the majority of directors on the Board to the effect that, having made a full inquiry into the Company’s affairs, they are satisfied that it will be able to pay its debts in full, together with any interest, within a specified period not exceeding 12 months from the commencement of the winding up.
- 2.5 The statutory declaration must be accompanied by a statement of affairs setting out the Company’s assets and liabilities.

Member approval

- 2.6 The liquidation process is deemed to commence on the date on which the special resolution is passed by the members.
- 2.7 For an MVL, the special resolution must be passed within five weeks of the statutory declaration of solvency. Failure to comply with this time limit will cause the statutory declaration to become invalid.
- 2.8 In addition to the special resolution, the members will also be required to pass an ordinary resolution to appoint one or more insolvency practitioners to act as liquidators.
- 2.9 An ordinary resolution requires:

- 2.9.1 the approval of more than 50 per cent of the members present (in person or by proxy) at a general meeting; or
- 2.9.2 the approval of more than 50 per cent of members if a written resolution is used.

Liquidator

- 2.10 The liquidator must be a qualified insolvency practitioner.
- 2.11 On the liquidator's appointment, the powers of the directors typically cease. Within 14 days of appointment, the liquidator must publish a notice of their appointment in the London Gazette, along with the resolution to appoint, and must also file a notice of the appointment with the Registrar of Companies.
- 2.12 A liquidator's function is to collect in and realise the Company's assets and to distribute the proceeds to the Company's creditors. The liquidator's fees are generally paid as an expense of the winding up.
- 2.13 Under the Articles, it is not possible to return the surplus (if any) to the Members. Instead, this must be "given to some other institution or institutions with similar objects which is or are regarded as charitable under the law of every part of the United Kingdom".

3 VOLUNTARY STRIKE OFF AND DISSOLUTION

- 3.1 There are various conditions which must be satisfied before a Company can be voluntarily struck off. These are as follows¹:
 - 3.1.1 The company must not have, in the last 3 months -
 - (a) changed its name;
 - (b) traded or otherwise carried on business;
 - (c) made a disposal for value of property or rights which, immediately before ceasing to trade or otherwise carry on business, it held for the purpose of disposal for gain in the normal course of trading or otherwise carrying on business; or
 - (d) engaged in any other activity, except one which is:
 - (i) necessary or expedient for the purpose of making an application for striking off under section 1003, or deciding whether to do so;
 - (ii) necessary or expedient for the purpose of concluding the affairs of the company;
 - (iii) necessary or expedient for the purpose of complying with any statutory requirement; or
 - (iv) specified by the Secretary of State by order for the purposes of section 1004 (1) (d).
- 3.2 In addition, an application cannot be made at any time when² -
 - 3.2.1 an application for the court to sanction a scheme of arrangement or Part 26A restructuring plan has been made on behalf of the company and the matter has not been concluded;
 - 3.2.2 a voluntary arrangement in relation to the company has been proposed under the Insolvency Act 1986; or

¹ Section 1004, Companies Act 2006

² Section 1005, CA2006

- 3.2.3 when the company is in administration, or where there is a moratorium following either an application for an administration order or the filing of a notice of intention to appoint an administrator;
 - 3.2.4 the company is being wound up, or there is an outstanding winding-up petition;
 - 3.2.5 there is a receiver or manager of the company's property; or
 - 3.2.6 the company's estate is being administered by a judicial factor.
- 3.3 Further, as a community interest company, the Company must ensure that any assets it holds which are subject to the statutory asset lock are dealt with in such a way that they can be used for community purposes. Our understanding is that the Company currently files dormant accounts and therefore is understood not to have any assets subject to the asset lock.
- 3.4 Once an application has been submitted, the Company's directors would be under an obligation to keep its activities under review and any such application would have to be withdrawn³ if certain circumstances occur (which are essentially the same as sections 1004 and 1005 set out above) which would have prevented the Company making its original application⁴.

Procedure

- 3.5 If the above conditions have been met, then the procedure that must be followed is described below:
- 3.5.1 convene a board meeting or arrange for the Board to pass a resolution in writing resolving to apply for the Company to be struck off;
 - 3.5.2 complete and file Form DS01 "Striking off application by a company" at Companies House with the relevant fee (currently £8 for an online application and £10 for a paper application); or
 - 3.5.3 the person who makes the application for voluntary striking off must within **seven days** of making the application, deliver⁵ a copy of it to the following persons⁶:
 - (a) members of the Company;
 - (b) employees of the Company;
 - (c) creditors of the Company (which includes both contingent or prospective creditors);
 - (d) directors of the Company; or
 - (e) managers or trustees of any pension fund established for the benefit of the employees of the Company.
- 3.6 If during the period of the day after the application is made and the day before it is finally concluded or withdrawn there is any new person falling within any of the above classes, then they must also be notified by a director of the Company within seven days from the day they become a member of such class in the same manner outlined above.⁷

³ Non-compliance with these notification requirements is a criminal offence

⁴ Section 1009, CA2006

⁵ A document will be treated as delivered if it is delivered to a person, left at his proper address or sent by post to him at his proper address. For the purposes of: (a) a firm incorporated or formed inside the United Kingdom, its registered or principal office (b) a firm incorporated or formed outside the United Kingdom: (i) if it has a place of business in the United Kingdom, its principal office in the United Kingdom, or (ii) if it does not have a place of business in the United Kingdom, its registered or principal office

⁶ Section 1007, CA2006

⁷ Non-compliance with these notification requirements is a criminal offence

Timings

- 3.7 Once Companies House receives the application they will examine the form and, if acceptable, register the information on the company's public record. They will also send notification to the company's registered office.
- 3.8 Companies House will then publish a notice in the Gazette which must remain there after publication for not less than 2 months. If there are any reasons for delay arising from publication, this process will last longer than 2 months.
- 3.9 Finally, and once satisfied that the notice has been in the Gazette for the requisite period of time, the Registrar will publish a further notice in the Gazette stating that the company has been struck off and it is at the time of this publication that the company is effectively dissolved.

4 PRACTICAL ISSUES TO BE CONSIDERED AHEAD OF EITHER A MVL OR VOLUNTARY STRIKE OFF AND DISSOLUTION PROCESS

- 4.1 The following are more practical considerations for the Company to consider ahead of any decision to close down the Company (please note that this is not an exhaustive list):
 - 4.1.1 contact HMRC to check any taxes due and, if the Company has only recently ceased trading, to seek its consent to the dissolution;
 - 4.1.2 check that the Company is not holding assets that require transferring (our understanding is that as the Company files dormant accounts it does not hold any assets);
 - 4.1.3 check that there are no contracts that the company is a party to;
 - 4.1.4 arrange for all contracts and agreements to be assigned, novated or terminated (this will be especially relevant for the funding agreements that the Company has entered into with various recipients);
 - 4.1.5 ensure that any staff arrangements either by way of secondment agreement or permanent employment have been terminated;
 - 4.1.6 arrange for any Company bank account to be closed (we assume that this will have to be dealt with by Somerset Council as accountable body for the Company).

TLT LLP

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