

Coronavirus and director's liabilities: Changes to UK insolvency framework brings relief

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Over the weekend, the Minister for Business Energy and Industrial Strategy ('BEIS') announced a raft of changes to the UK Insolvency Framework, aimed at calming the nerves of directors of companies who have been reeling from the sudden and sharp shock that the Covid-19 ('coronavirus') pandemic and associated restrictions have delivered across the economy. The measures supplement other government initiatives aimed out providing financial support for UK businesses.

The news will come as a relief to directors, many of whom have been struggling to weigh how best to protect themselves and their families from the consequences of potential liability, with their desire to do the best for employees, suppliers and other stakeholders.

The announcement is light on details for now and further implementation will require legislation, which is unlikely to be forthcoming until after Parliament returns from its Easter recess, but here is what we know.

Wrongful trading

The measures announced a temporary suspension of wrongful trading provisions, which can lead to personal liability for directors of companies that carry on trading despite insolvency, to be applied retrospectively from 1 March 2020.

We highlighted the risk of personal liability for wrongful trading in our earlier article, which discussed how to [manage potential solvency risks in UK businesses](#). In summary, under the law as it stands, directors can be personally liable to contribute to the assets of a company if they allow it to continue to trade after they knew or ought to have known that it was unlikely to avoid insolvent liquidation or administration, and they do not do everything a reasonably diligent director ought to do to minimise creditors' losses.

Making a judgment about wrongful trading liability in virtually unprecedented times is challenging. A business suffering from a short to medium term shock may well be insolvent now, but with new government support and other initiatives being announced almost every day – it is conceivable that many such businesses can be rescued from the brink of insolvent liquidation, even if such an outcome might be unlikely in more conventional circumstances. Further, what steps are 'reasonable' to minimise creditor losses might be different today. For example, the Government has been encouraging businesses to avoid redundancies and lay-offs and the types of cost-cutting measures that they might typically implement to minimise losses.

However, as a director, you should bear in mind that the suspension of wrongful trading is not a panacea and there will remain risks of personal liability. In particular:

- Your statutory and common law duties to the company appear likely to remain unchanged, and if a company is in the 'zone of insolvency', you are required to prioritise the interests of creditors rather than shareholders in performing those duties;
- There are no announced changes to the provisions dealing with avoidance of transactions. In many SMEs, where there is likely to be commonality or at least overlap between directors and shareholders, you should bear in mind that if the company cannot avoid liquidation or administration, transactions you have entered into with the company over the preceding two years are likely to be scrutinised and are vulnerable to being reversed (i.e. requiring you to pay back money to the company);
- Other provisions, such as fraudulent trading and misfeasance, are to remain in full force to guard against misconduct by directors.

- Our practical guidance, in a time of heightened risk, remains to increase your focus on good corporate governance and record keeping, and to seek professional advice at an early stage if the company is struggling.

New restructuring plans

Other measures announced by the Government include:

- A moratorium for companies, giving you breathing space from creditors enforcing their debts for a period of time whilst you seek a rescue or restructure;
- Protection of your company's supplies to enable you to continue trading during the moratorium; and
- A new restructuring plan, binding creditors to that plan.

The new restructuring tools announced appear to fast-track proposals previously discussed in a 2018 consultation. The measures draw inspiration from the more debtor friendly insolvency regime in the United States, particularly 'Chapter 11'. The measures announced appear to provide for directors to remain in control of a business (albeit subject to supervision from a licensed insolvency practitioner) while working out a rescue plan under the protection of a 'moratorium' or stay on enforcement proceedings against the company.

At the date of writing, little information has been made available about the details of the changes. Further details are likely to be announced in the coming weeks and months but, in the meantime, if you would like further advice on any of the above points, please do get in touch.


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