

# Directors during COVID-19: Risk? Yes. But how much risk?



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**THERE has been a lot of talk of the serious risk to company directors of personal liability due to the unprecedented and unique challenges COVID-19 has brought to businesses.**

I want to take this opportunity to pour a little cold water over the fear of personal liability and to provide some (cautious) comfort to those directors out there about the risks they've probably heard or read about.

Firstly, there is absolutely real risk. There is always risk as an office bearer of a company. And for businesses with the real potential to fall into insolvency that risk is ramped right up.

But I think it is important to also approach that risk in a measured, proportionate and practical way.

The key issues facing well-intentioned directors include:

- Liability for wrongful trading
- Clawback of monies paid out to directors (or others)
- Liability for breach of directors' duties

Wrongful trading arises where, after a company has entered into a liquidation process, the liquidator identifies that there was a point in time prior to

liquidation when the director(s) knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation/administration. That is somewhat simplifying the legal position, but it should also be noted that the bar of 'no reasonable prospect' is a high one. In other words, if there was any reasonable prospect that the company would pull through, say due to unprecedented government assistance, then there is no wrongful trading. Furthermore, the UK Government has already expressed an intention to relax the law on wrongful trading even further.

As regards directors duties, there are a number of these enshrined in the Companies Act 2006. The first duty which comes to mind in this situation is the duty to exercise reasonable care, skill and diligence. This is the standard which a director must meet in terms of his general performance in the job. As one will note, the standard is vague and not prescriptive at all. The conduct to be expected is judged against objective standard of reasonableness and that inevitably must be considered against the reality of the moment – namely a national crisis. The courts have always been reluctant to try and second guess what a director should

or should not have done, particularly with the benefit of hindsight. I expect the courts will be even less interested in doing so now.

If that isn't comfort enough, the 2006 Act specifically provides to the court power to grant relief where a director of a company has been found liable to pay a sum of money for a failure of the sort described where he has acted honestly and reasonably having regard to all the circumstances.

- And on a practical level, the risk really only materialises if there is an insolvent liquidation or administration of the company or if there are some particularly active shareholders.
- Directors do need to be aware. They need to take relevant advice - namely from their accountants and from their lawyers about what they should or should not be thinking about in the performance of their role. But having done that, a director, acting honestly and reasonably, should be comforted to know that the law does not expect perfection of them and in these unprecedented times there are a manner of ways in which the law takes account of this very unique economic context.

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