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General Duties of Directors Remain Despite Proposed Relaxation of Wrongful Trading Laws

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Further to our update to the existing insolvency laws, whilst it appears from the recent government announcement that UK wrongful trading provisions may be retrospectively relaxed from 1 March for a three month period, directors should continue to have regard to their individual conduct, particularly given the increase of claims funded by the growing litigation funding market.

- There are as yet no firm details regarding relaxation of personal liability for wrongful trading, but rather only an indication by HMG as to what is intended. Directors will bear the risk for any conduct that may amount to wrongful trading up to any retrospective legislation that may be imposed from end of April onwards. Even then it is likely that any relaxation of personal liability with respect to wrongful trading will be evidentially linked to direct impact of COVID-19, meaning that directors will not simply have carte blanche to continue trading in any circumstances.
- Directors are still at risk of misfeasance provisions – this means that liquidators can bring summary proceedings for breach of fiduciary duties.
- Directors are still at risk for fraudulent trading provisions under section 213 of the Insolvency Act. Therefore, directors are still at risk of recourse to if they knowingly carried on a business with the intent to defraud creditors or for any fraudulent purpose.
- Directors of a company which is in the zone of insolvency owe duties primarily to creditors rather than the company's shareholders. Directors will need to consider their position carefully and take professional advice and record their decision-making to demonstrate that account has been taken of creditors' interests when making major decisions.
- The directors' disqualification rules still apply. If a director or former director of an insolvent company is found to have engaged in conduct which makes him "unfit", he must be disqualified or have a disqualification undertaking accepted. Other legal provisions will continue to apply – transactions at undervalue, transactions defrauding creditors, preferences, among others.

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