



TCSP Webinars

Session 1: The Duties of Directors in a COVID-19 climate

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Introduction

Format of the webinar

Asking questions

Further webinars and updates

Reference to materials / webinar playback



Webinar presenters



Kristan King

Director, Advisory

KPMG in the Isle of Man

T: +44 1624 681050

E: kristanking1@kpmg.co.im



Peter Glucas

**Managing Director
Litigation**

Cains Advocates Limited

T: +44 1624 638361

E: peter.clucas@cains.com



Catherine Ridge

Senior Manager, Advisory

KPMG in the Isle of Man

T: +44 1624 681000

E: cridge1@kpmg.co.im



David Doyle

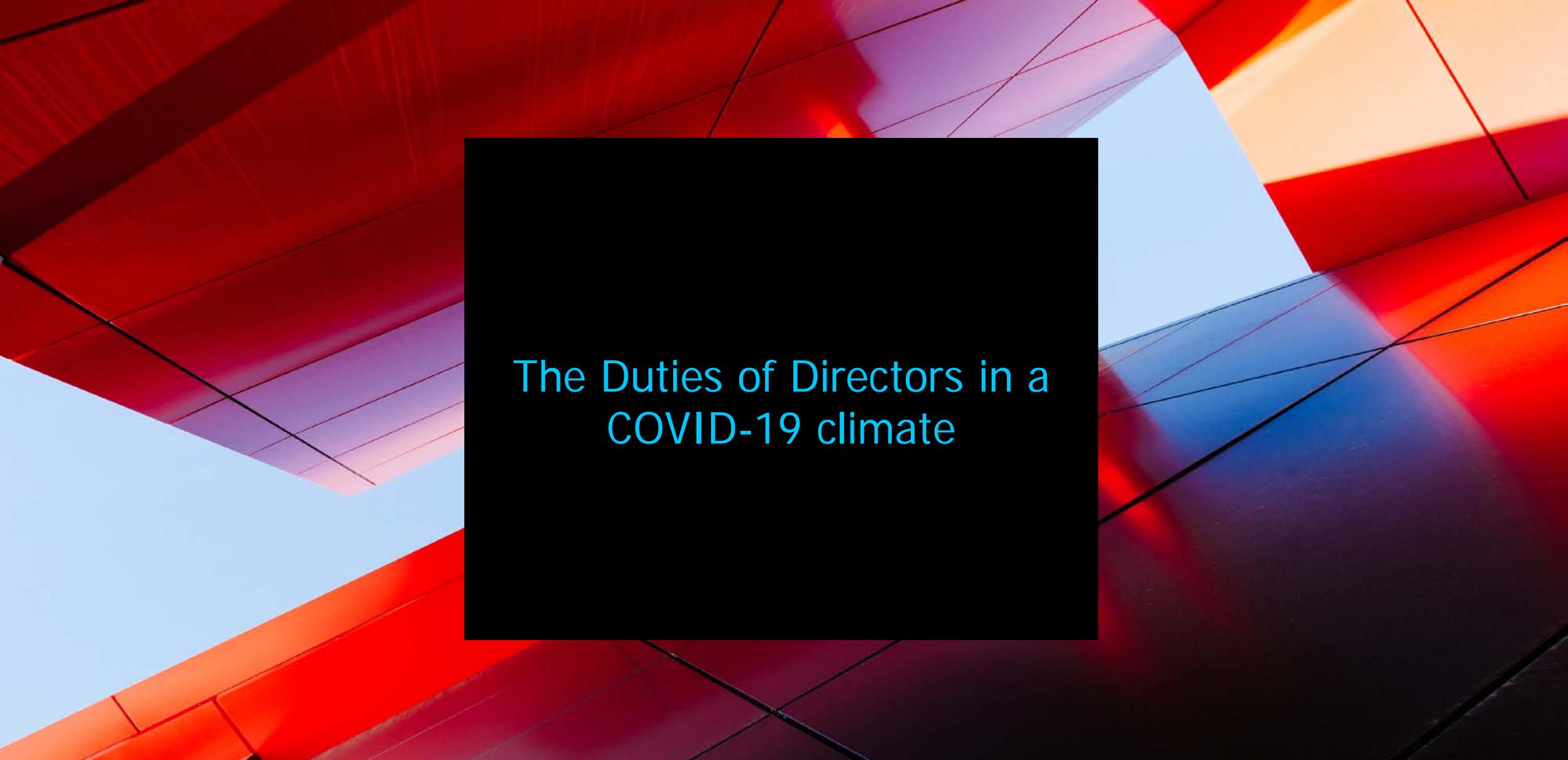
**Senior Legal Adviser
Litigation**

Cains Advocates Limited

T: +44 1624 638368

E: david.doyle@cains.com





The Duties of Directors in a COVID-19 climate

Cains' presenters



Peter Clucas
Managing Director
Litigation
+44 1624 638361
peter.clucas@cains.com



David Doyle CBE
Senior Legal Adviser
Litigation
+44 1624 638 368
david.doyle@cains.com

Directors' Duties

- Judiciary and regulators expect and require high standards from company directors
- Deemster Khamisa's comments at paragraph 194 of his judgment in *Isle of Man Financial Services Authority v Montpelier* (2 October 2019) in respect of the Island's reputation
- Deemster Corlett in *Templeton Insurance Limited v Corlett* 2013 MLR N13 (18 June 2013) at paragraph 1 referred to:

“...the high standards required from company directors...”

Failure to properly execute the duties of a director may result in penalties being imposed in the context of civil, criminal and regulatory proceedings, including disqualification of the director or indeed the revocation of a regulatory licence.

Directors' Duties

Quotes to remember:

***National Crime Agency v Baker* [2020] EWHC 822 (Admin) where Mrs Justice Lang at paragraph 97 stated:**

“The use of complex offshore corporate structures or trusts is not, without more, a ground for believing that they have been set up, or are being used, for wrongful purposes, such as money laundering. There are lawful reasons – privacy, security, tax mitigation – why very wealthy people invest their capital in complex offshore corporate structures or trusts.”

Hadden-Cave LJ in *Lakatamia Shipping Co v Morimoto* [2019] EWCA Civ 2203 at paragraph 34 (5):

“Businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their assets. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures.”

Directors' Duties

Deemster Doyle in *Belgravia Corporate Services Limited v B3 Group Limited* 2005-06 MLR 139 at paragraph 85:

(a) to act in good faith in what he believes to be the best interests of the company as a whole;

(b) to exercise his powers for the purposes for which the powers were conferred;

(c) to exercise his powers fairly as between different sections of shareholders;

(d) save so far as permitted by the constitution of the company, not (without the informed consent of the company) to put himself in a position in which his personal interests or duties to others are liable to conflict with his duties to the company;

(e) to exercise his independent judgment in relation to the exercise of his powers, and not to abdicate them or (save where necessary in the interests of the company) to fetter them or (save where permitted under the constitution of the company or where necessary in the interests of the company) to delegate them.

Practical Tips

1: whether you are a director of a TCSP or a director of an underlying company you need to be conscious of your duties;

2: you should always exercise independent judgment- do not act as a puppet with someone else pulling the strings; do not always do what others tell you to do especially if it is not the right thing to do;

3: you should review all material contracts (and where possible and desirable seek to renegotiate them or terminate them if cost control means it is absolutely necessary);

4: you should check the company's financial information and cashflow position in order to monitor the implications for the solvency of the company;

5: you need to have regard for the interests of shareholders, employees, clients, customers, creditors and others;

6: you should document your efforts to comply with your duties and state the reasons for your decisions and where professional advice is taken carefully note that advice;

7: you should review the provision of insurance for directors;

8: you should review, and where necessary amend, your articles of association in order to allow for hybrid / wholly – virtual shareholders / directors meetings;

9: you should keep all stakeholders especially the regulators, onside- cash may be king but open communication and cooperation is key;

10: if you are in a difficult situation (with possible or probable personal liabilities) take professional advice.

Areas Of Concern

Four main areas of concern for directors to watch out for:

Constructive trust
liability

Section 260
misfeasance and
breach of trust

Section 259
fraudulent trading

Prosecution of
“delinquent
officers”

Conflicts Of Interest

- The general law (equitable principles);
- Provisions in the relevant Companies Acts;
- Articles of Association;
- Contractual provisions;
- Regulatory guidance (FSA Rule Book);
- Practical business realities;
- Legal and other professional advice.



Cashflow example - TCSP

Week	1	2	3	4	5	6	
	22 June 2020	29 June 2020	06 July 2020	13 July 2020	20 July 2020	27 July 2020	
Opening cash balance	15,000	14,000 -	5,000 -	6,000	6,000	8,000	
Cash inflows							
Corporate Service Debtors	2,000	2,000	2,000	15,000	5,000	5,000	
Total cash inflows	2,000	2,000	2,000	15,000	5,000	5,000	
Cash outflows							
Wages & salaries		15,000				15,000	
Property & utility expenses	2,000	5,000	2,000	2,000	2,000	2,000	
Administrative expenses	1,000	1,000	1,000	1,000	1,000	1,000	
Total cash outflows	3,000	21,000	3,000	3,000	3,000	18,000	
Net cash flow	-	1,000 -	19,000 -	1,000	12,000	2,000 -	13,000
Closing cash balance	14,000 -	5,000 -	6,000	6,000	8,000 -	5,000	



Balance sheet and cashflow example - SPV

		Week									
		1	2	3	4	5	6				
		22 June 2020	29 June 2020	06 July 2020	13 July 2020	20 July 2020	27 July 2020				
Book value											
At 22 June 2020											
£'000											
Property	250										
Cash at bank	6										
Debtor	4										
Accrued service charges	-5										
Tax payable	-3										
Loan	-200										
Net assets/(liabilities)	<u>52</u>										
Opening cash balance		6,000	6,000	750	450	200 -	50				
Cash inflows											
Rental Income											
Total cash inflows		-	-	-	-	-	-				
Cash outflows											
Corporate Services			5,000								
Property expenses			250	250	250	250	250	250		250	
HMRC										3,000	
Finance costs				50							
Total cash outflows		-	5,250	300	250	250	250	3,250			
Net cash flow		- -	5,250 -	300 -	250 -	250 -	3,250				
Closing cash balance		6,000	750	450	200 -	50 -	3,300				

Law on Conflicts

- The general law

Deemster Corrin in one of the *BCCI* cases 1993-95 MLR 272 at 280 referred to the well-established and “inflexible” rule of equity that:

“a person in a fiduciary position ... is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict”

- Companies Acts - sections 148 and 148A of the Companies Act 1931 re 1931 Act companies and sections 103-105 of the Companies Act 2006 re 2006 Act companies.
- Regulatory guidance – [The Financial Services Rule Book](#) especially rule 6.11 (conflicts generally) , rule 8.9 (conflicts of interest policy) and rule 8.10 (register of conflict of interests).

Need for proper records and documentation

- To evidence and justify decisions;
- Assists in demonstrating that Directors acted responsibly;
- May provide an element of protection for Directors when regulators or the judiciary become involved in a matter.





Summary

- Be aware and remain conscious of your duties as a director;
- For each entity or trust re-assess the performance and governance risks in light of Covid-19;
- Document the rationale for actions/decisions;
- Consider the value of third party advice.

Dates for your diary

Join us for the next two Thursday's at 10:00:

- 2 July – Insolvency considerations and practical steps
- 9 July – Valuation of investments





Thank you



Kristan King

Director, Advisory

KPMG in the Isle of Man

T: +44 1624 681050

E: kristanking1@kpmg.co.im



Peter Clucas

**Managing Director
Litigation**

Cains Advocates Limited

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E: peter.clucas@cains.com



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David Doyle

**Senior Legal Adviser
Litigation**

Cains Advocates Limited

T: +44 1624 638368

E: david.doyle@cains.com





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