

A black and white photograph of a modern office interior. Several people in business attire are standing and talking near a large window that offers a view of a city skyline, including a prominent skyscraper under construction. The scene is brightly lit, suggesting daytime.

DIRECTORS: WHEN TO ACT.

The impact of the Covid-19 pandemic represents a unique challenge to your business, so when should you seek legal advice?

BY MATTHEW RICE

The Covid-19 pandemic has presented potentially the most unprecedented and unique challenge to business that will occur in our lifetimes. Businesses are struggling with cashflow and even with a good underlying cash base may soon find themselves insolvent, especially when Government support reduces or ends.

AMB Law has years of experience in providing clear & concise legal advice to directors, companies and insolvency practitioners. With this experience comes an ability not only to advise you on the legal implications of your actions but also an awareness of when to engage other professionals that are better suited. We have a network of insolvency practitioners, accountants and professionals we can refer you to. There really is no reason not to contact us first.

'Interim Dividends' and Directors Loan Accounts

In many businesses, especially in smaller SMEs, it has become a common accounting practice for the directors to take 'interim dividends' throughout the year as a form of payment. Often these dividends are not authorised by a shareholder resolution and are recorded against the directors' loan account. An actual dividend is then legally declared at the end of the

financial year and applied as a credit to the director's loan account. In principle, there is nothing wrong with this process provided that you know that at the end of the financial year you will have distributable profits. It is important for the director to note however that 'interim dividends' drawn in this way are **not legal dividends** but rather a loan from the company to its director. Such loans will be repayable should the Company enter an insolvency process.

During the Covid-19 pandemic many companies are experiencing cashflow issues and most have witnessed a decline in profits. It is likely that most companies at year end will not have distributable profits and will be unable to declare a dividend. If you have a large director's loan account now is a good time to seek legal advice.

Alternatively if you are currently drawing 'interim dividends' you may wish to convert these into a salary. Whilst there will be tax consequences, these salaries will not be recoverable by an officeholder should your business enter an insolvency process. Should you need help in preparing service contracts for the directors please get in touch.

Companies House WebFiling

In light of work from home orders Companies House is experiencing significant delays in processing paper applications. All companies will have (or are able to request) an authentication code to use Companies House WebFiling. This code can be given to accountants, lawyers or practitioners working on your behalf and will streamline your Companies House filings. Our advice to all directors is to ensure that you keep this authentication code safe, it will help speed up the process should you, for example, refinance your company and need to notify Companies House of the satisfaction of certain charges.

Forfeiture of Commercial Premises

If your company is struggling to pay its rent you may be aware that there are currently restrictions on commercial landlords pursuant to *section 82 of the Coronavirus Act 2020*. The following restrictions will apply until 31 December 2020:

1. a right of re-entry or forfeiture for non-payment of rent may not be enforced by action or otherwise;
2. if court proceedings have already commenced an order for possession may not be enforced before 31 December 2020;
3. where an order for possession has already been made the tenant can apply to vary the order to ensure that possession may not be enforced before 31 December 2020.

Directors should note that there is nothing in the Act which prevents a commercial landlord commencing legal action now with a view to securing possession once the relevant period has ended. If you become aware of legal proceedings you therefore must still engage with them notwithstanding the restrictions.

The rent that accrues throughout the relevant period will remain payable and should be taken into account when assessing the solvency of your company. Landlord are being encouraged to make deals with their tenants and will be acutely aware that there is currently a lack of demand for commercial premises.

If you are subject to landlord action or wish to discuss your options AMB Law would be happy to assist.

Board Meetings

You and your fellow board members may not be in the office right now and indeed may not have seen each other face-to-face for some time. It is important however that board meetings continue.

In light of the impact that the Covid-19 pandemic is having on business' cashflow directors should be aware of their duties under the *Companies Act 2006* and fiduciary duties that they owe to the company. It is important to meet regularly, making use of conferencing software such as *Teams, Skype or Whatsapp* (other video conferencing software is available). A minute of each meeting should be kept as this will be evidence of what you have considered (and that you are meeting your directors duties).

Alistair Bacon, the Principal at AMB Law, often attends board minutes and prepares minutes on behalf of our clients and would be happy to discuss an affordable pricing structure to provide this support regularly.

Wrongful Trading

The suspension of liability for wrongful trading ends on 30 September 2020. This measure allows directors to ensure that their business can weather the storm and continue to operate without fear of personal liability. The provision could potentially be extended but directors must continue to be mindful of duties they still have.

The suspension has provided some much needed breathing space but all other sources of liability under the *Insolvency Act 1986* remain unaffected. Directors will still be bound by their fiduciary duties to the company and by the fraudulent trading provisions of *section 213*.

Directors **still** have duties to the creditors under the *Companies Act 2006* if the likelihood of insolvency increases. AMB Law is happy to advise on the duties you have as a director and how you can evidence that these duties are being met.

Solvency

Whilst our other points provide practical steps to consider, it is each director's highest priority to address the financial sustainability of their company in both the short and long term. We would recommend that directors carefully assess both the company's cashflow solvency and balance sheet solvency - with the former likely to be under significant strain during the Covid-19 pandemic.

Where you are the director of a group of companies you need to ensure that each time you consider the financial sustainability of each company your duties are owed to the individual company and not to the parent company or other companies in the group.

We often see directors when matters have progressed too far and many of the options we would like to explore are no longer available to them. We would strongly recommend that directors seek both legal and financial advice **early** and ensure that they are at all times apprised of the current financial position of the company.

AMB Law stands ready to assist, please don't hesitate to contact us on:

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Matthew is a contentious lawyer with five years' experience gained with a major firm with multiple offices nationally and globally. Matthew gained a first in law at Nottingham Law School and a distinction in the LPC from the University of Law. Matthew joined AMB Law in June 2018 and works across all departments assisting primarily with insolvency and commercial property.

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