



## Directors of Industrial and Provident Societies

Every Industrial and Provident Society (IPS) must have a board of directors more commonly known as the committee. Although an IPS must have at least three members there is no minimum number of directors required - any minimum will be specified in the rules of the IPS. However every IPS must have a secretary.

### Appointment

There is no statutory procedure for the appointment of directors - the procedure for the appointment of directors must be prescribed in the rules of that IPS. The Financial Services Authority (FSA) in their function as registrar is only concerned to see that, at the time of registration of a new IPS or upon amendments to the rules, the IPS is run democratically. The rules of an IPS will lay down the number of directors, and the length of term of office. Details of IPSs officers must be kept in their register of members and included in the IPSs annual return to the registrar.

### Disqualification

Again there are no statutory rules concerning the disqualification and removal of directors of an IPS. However, no individual under 18 years may be an officer of the IPS or be a director. The grounds for disqualification and removal will be set out in the rules of the IPS, For example, the rules of an IPS may disqualify undischarged bankrupts, and people of unsound mind who are incapable of managing their own affairs, from acting as directors. In deed the FSA consider it good practice to include these provisions in the rules.

### Liabilities of Directors'

Directors of IPSs are protected by the concept of limited liability. This means that when the IPS goes into liquidation or is wound up with outstanding debts, they will not have to contribute to the assets of the IPS above the amount of the value of the shares they hold

(usually a nominal sum). This protection may be lost in certain situations as follows:

### Wrongful trading

The court can order the director of an IPS that has gone into insolvent liquidation to make a contribution to the assets of the IPS, if it appears that s/he knew or ought to have known that the IPS was going into insolvent liquidation, but took no steps to try and avoid it. The court may make such an order even if the director didn't know the IPS was going insolvent. The crucial test is that s/he *ought* to have known.

### Fraudulent trading

If it can be proved that directors have carried on trading with the intent to defraud creditors, the court has the power to order a director to contribute to the assets of the IPS. Unlike limited companies, there is no power to bring criminal proceedings against directors of IPS for fraudulent trading.

### Personal Guarantees

If an IPS approaches a bank or other financial institution for a loan, it is common practice for them to ask that the directors give personal guarantees, particularly if the IPS of which they are a director does not have many assets. Giving a personal guarantee is the equivalent of taking out a personal mortgage, and the director will not be protected by limited liability.

### Powers of Directors

The powers of the directors will be set out in the rules of the IPS. Usually the rules provide that the directors have all the powers to manage and conduct the business of the IPS. The rules of the IPS will also set out specific powers that a IPS has, i.e. it will state that a IPS has the power to borrow, to take on leases etc. The rules will set out the procedures an IPS must adhere to. The rules of the IPS therefore contain important information about the management of the IPS and it is essential that the directors are familiar with their provisions, so that they can carry out their duties in the correct manner.

### **Duties of Directors**

Directors owe a duty to the IPS, not to individual members or employees. Directors are bound by legal duties and failure to carry out those duties can result in personal liability. Broadly there are three categories of legal duty, these are:

- Fiduciary duty
- The duty of good faith
- The duty of care and skill

### **Fiduciary duty**

The director of a IPS owes a fiduciary duty first of all to the IPS of which s/he is a director and not to the individual members of that IPS. This essentially means that the director of that IPS must always act in the best interests of the IPS as a *whole*, and not of themselves or of one particular section of the membership with which they may be associated.

### **Duty of Good Faith**

Directors are responsible for the IPSs property and its application. As a result, the law imposes a duty of good faith on directors which requires them to act in the best interests of the IPS, ensuring that the IPSs needs come first. Directors should be aware

of the following points in relation to the duty of good faith.

### **Dealing with directors' interests in contracts**

The procedure for dealing with a conflict of interest should be set out in the IPSs rules. Conflicts of interest typically arise in the case of contracts with third parties. Usually the rules would provide that a director would be required to declare his/her interest to the Board and would not be allowed to vote on the issue. If the rules of the IPS make provision for this and the correct procedure is followed then the IPS cannot challenge the transaction or claim the directors profits. Where the rules fail to provide a procedure for dealing with a conflict of interest then the IPS has the following remedies - it can decide to set aside the contract and recover any loss from the director or it can decide to go ahead with the contract and recover any profits that the director may have made from the transaction. In such a situation the director has a duty to provide full information about the contract to a general meeting of the IPS which will decide whether to exercise its rights to recover profits.

### **Misuse of Property or Information**

A director must deal with the assets of an IPS in accordance with the IPSs interests. If a director is in breach of this duty then the IPS can recover any loss from a director in breach through the courts in the normal way. IPSs also have a cheap and easy alternative to this - they can recover money or other property misappropriated with an order from the magistrates court (with or without the director gaining a conviction for a criminal offence).

### **Liabilities to third parties**

A director of an IPS can be personally liable to a third party in these situations:

- If s/he signs a cheque which doesn't contain the full and proper name of the IPS,
- If s/he doesn't make it clear s/he's signing as an agent of the IPS,
- If the third party has the impression that the contract is being made personally with the director and not with the IPS,
- If s/he makes fraudulent or negligent statements to the third party which that person subsequently relies on,
- If s/he acts outside his/her area of responsibility without the authority of the board of directors (a concept known as "breach of warranty").

In each of these situations any debt which follows and which remains unpaid will be considered to be the debt of the director and s/he may be sued for payment.

### **The Duty of Skill and Care**

In carrying out their responsibilities, directors must take proper care. They are expected to show:

- (a) such skill and care in carrying out their responsibilities as a person having their background and experience would reasonably be expected to show; and

- (b) the levels of skill and care that a person carrying out that role would reasonably be expected to show.

Therefore, directors are not expected to be experts but they are expected to use what expertise they have to carry out their role appropriately. Practical examples which show a good duty of care are:

- Reading board minutes before meetings;
- Attend meetings regularly and obtain and read the minutes of meetings they have missed prior to the next meeting;
- Participate in and undergo any appropriate training and development appropriate to their role.