

Court of Protection

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Fiduciaries and own-interest conflicts

Whether a person is a trustee, a solicitor, an agent, a director or a court-appointed deputy, their fiduciary duty demands that they care only for the interest of those whose trust they bear. Whatever kind of fiduciary they are, they must never allow their duty to conflict with their own interests. Yet many providers of legal services are large commercial organisations for whom a client is an opportunity to sell their other products.

Crossing the line may have serious consequences: a breach of duty may result in having to account to beneficiaries for profits; professional rules based on the same legal principles of conflict may be broken; reputation may be damaged.

A recent Court of Protection decision shows how long-established principles of fiduciary duty may be applied to fiduciary decisions where it is not just the beneficiaries' interests in play.

Irwin Mitchell Trust Corporation v PW (by her litigation friend the Official Solicitor) (1) and the Public Guardian (2) [2024] EWCOP 16 related to the affairs of a woman identified as PW.

PW's life was drastically changed in 2005 when she contracted viral encephalitis, leading to global cognitive impairment. A damages claim was brought against the treating healthcare trust. The claim settled in 2017 for £1.85m and periodical payments rising to £151,000 per year by 2037. Irwin Mitchell Trust Company (IMTC) was appointed as PW's property and affairs deputy under the Mental Capacity Act 2005.

In 2017, IMTC decided to appoint Irwin Mitchell Asset Management (IMAM) as PW's investment manager. There was nothing remarkable about the terms: an initial investment of £600,000 with IMAM produced a total return of approximately 3% per annum attracting charges from IMAM of 1.89% for advice and transaction costs.

Irwin Mitchell is well known as one of the leading claimant personal injury solicitors in the UK. It helps large numbers of, often vulnerable, people, many with catastrophic injuries, to secure compensation. It has many specialist and committed lawyers

who during the fight for compensation, no doubt form strong relationships with their clients.

More than three-quarters of Irwin Mitchell's clients receiving compensation are 'protected parties' with deputies or personal injury trusts. Irwin Mitchell entities form a substantial corporate group. Irwin Mitchell Holdings Ltd (IMHL), which is incorporated in the Channel Islands, controls Irwin Mitchell LLP (IMLLP) and wholly owns IMAM. IMLLP itself owns IMTC. The group's 2023 accounts report core revenue of £271m and a 'core group gross profit' of £140m. More than three-quarters of its revenue and profit came from complex personal injury cases and financial asset services. The group reports that it has more than £1bn under management. The group's business model is about 'maximising cross sell capabilities... thereby increasing lifetime value'.

In PW's case, the Official Solicitor raised concerns about the appointment of IMAM and IMTC was required to apply for retrospective approval of the appointment. The Official Solicitor's concerns arose in the context of three previous Irwin Mitchell cases relating to the recovery of costs incurred in legal proceedings by IMTC with IMLLP from protected persons' assets. Previously, in *ACC & Ors* [2020] EWCOP 9, the court had decided that IMTC had a duty to operate a proper selection process before appointing IMLLP for conventional legal work.

PW's case – supported by the Official Solicitor and the Public Guardian – was that the conflict-of-interest rule applied to the engagement of IMAM and that the court should not ratify it. The court asked itself whether a reasonable person looking at the relevant facts and circumstances of this particular case would think there was a real sensible possibility of conflict.

There is no direct English authority on the question of whether the engagement by a fiduciary of a related investment company presents 'a real possibility of conflict of interest'. The judge considered that the selection process adopted by IMTC did not,

in reality, avoid the conflict. The court found the selection assessment to be 'manifestly subject to subjective interpretation and then human error as well to a degree capable of changing who actually comes out with the highest score'.

The appointment process did not address the substance of the self-dealing rule – IMAM still profited from appointments. The possible distortion of judgement of who was best was at the heart of the rule. The arguments that any other investment manager would also be paid and that there was a limited number of specialists who could be appointed were also rejected. The court's conclusion was that on the evidence there was a very clear actual conflict of interest in the appointment of IMAM. The court refused to ratify the appointment.

In the absence of the decision being overturned on appeal, the potential consequences for IM are serious. The firm has nearly 1,000 deputyships and presumably a large number of trusts making up IMAM's £1bn under management. Breaches of fiduciary duties, in the absence of relief from the court, can give rise to actions to account for all benefits wrongly obtained. Acting as a solicitor or an associated trust company in a position of actual conflict, as the court has now found, has professional conduct implications.

This is, however, a cautionary tale for all solicitors. The circumstances in which a fiduciary, of whatever kind, can bestow a benefit on themselves or a related third party are highly circumscribed.

Solicitors who benefit from anything other than legal services recommended to clients or beneficiaries now need to reconsider these risks. A conviction that the appointee is the best choice may not go far. If the decision to appoint is truly independent of the fiduciary, the service is provided free or all the beneficiaries of the duty have capacity and give informed consent, the risk may be mitigated but not removed.

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