Court of Protection
Property and Affairs Update:
Irwin Mitchell Trust Corporation v (1) PW (2) the Public Guardian [2024] EWCOP 16

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1. In *Irwin Mitchell Trust Corporation v PW & Anor* [2024] EWCOP 16, the question for the Court was whether the rules against conflict of interest were breached when a professional deputy (Irwin Mitchell Trust Corporation ("**IMTC**")) appointed a linked asset management firm (Irwin Mitchell Asset Management ("**IMAM**")) to manage P's assets [1].

2. The basic facts of the case are as follows:

   a. IMTC and IMAM are linked in a corporate structure. IMTC is a wholly owned subsidiary of Irwin Mitchell LLP. The controlling member of Irwin Mitchell LLP is Irwin Mitchell Holdings Ltd, which also wholly own IMAM [2].

   b. PW contracted viral encephalitis in 2005 leading to global cognitive impairment. Following the issuing of a damages claim against the treating healthcare trust that claim was settled in 2017. The Court approved a settlement comprised of an award of £1.85 million, alongside periodical payments rising to £151,000 per year by 2037 [8].

   c. On 27 March 2017, IMTC was appointed as PW's deputy for property and affairs. On 15 December 2017, IMTC appointed IMAM as investment manager for a significant part of PW's damages award [9].

   d. In 2019, IMTC made an application to the Court of Protection for authority to execute a statutory will for PW. During the process, the Official Solicitor raised concerns about the appointment of IMAM as investment manager and IMTC was directed to make an application to seek retrospective authority to instruct IMAM [10].

3. The starting point for the Court was to consider the relationship between a deputy and P and the law on conflict of interest:

   a. The Court reminded the parties of s19(6) of the Mental Capacity Act 2005 and confirmed that the relationship between a deputy and P is a fiduciary one: *"incontrovertibly, the relationship between a deputy and the person for whom the deputy is appointed is a fiduciary one"* [17].

   b. The basic proposition from *Bray v Ford* [1896] AC 44 at [51]-[52] was set out with the Court explaining that *"…transactions entered into where the fiduciary's duty conflicts with their interests are capable of being set aside as of right by their principal. This is 'the self dealing rule'."* [20].

4. The specific question that the Court had to consider was *"whether the conflict of interest rule applies to the appointment by IMTC as deputy of IMAM as asset manager for PW's funds: ie. would a reasonable man looking at the relevant facts and circumstances of this particular case think there was a real sensible possibility of conflict"* [26].

5. The Court concluded that there was a "very clear, not remotely fanciful actual conflict of interest in IMTC appointing IMAM to manage PW's funds. IMTC's processes were not capable of extinguishing the conflict [67]. The Court's rationale was explained at [62]-[66]:

   "62. The conflict of interest in question in this matter comes down to IMTC being financially better off if IMAM is appointed. IMTC accepts this as a "theoretical potential". IMTC's argument is that such potential is extinguished to the point of no "real sensible possibility" because of procedures it has adopted. Yet nowhere in the development of those processes or in these proceedings has IMTC ever denied either that the decision to appoint IMAM is made by IMTC in its fiduciary role (with all the duties which that implies) or that, even with full implementation of those processes, IMTC is better off if IMAM is appointed. At a most basic level, those two concessions amount to recognition of the existence of a conflict of interest: one plus one makes two.

   63.The processes which IMTC has adopted when considering the appointment of IMAM do not target the substance of the self-dealing rule: that is, they do not remove the financial gain to IMTC. Such processes could have been adopted, for example by agreeing to waive any fee to IMAM where the instruction comes from IMTC as deputy. Then there would be no financial advantage to IMTC in the instruction of IMAM, no interest to be in conflict with the interests of the person for whom IMTC acts. Of course, I recognise that the Irwin

Mitchell group would be likely to reject this approach as lacking commercial sense but that merely reinforces the existence of IMTC's interest in the appointment of IMAM.

64. If the processes adopted do not remove the benefit to IMTC, how can they be said to reduce the situation to no 'real sensible possibility' of conflict? The answer to this question must lie in interpreting IMTC's case along these lines: that its processes ensure that its client ends up with the best financial adviser, and therefore there is no 'conflict' of interest when IMAM is appointed because its own interests and the interests of the person for whom it acts as deputy are aligned. Unfortunately, in my judgment this viewpoint cannot be sustained. It is laden with value judgments of the very type which Lord Hershell identified as underlying the rule against self-dealing. The fiduciary is still making the appointment, from which it still benefits.

65. Does it matter, if investment management fees have to be paid somewhere? In my view it does matter. That fees will fall to be paid at all does not extinguish the risk which Lord Hershell identified. More particularly, I am not persuaded by IMTC's assertion that total exclusion of IMAM from consideration would be contrary to PW's best interests because of the limited size of the field of potential investment managers. There are more specialist firms on IMTC's panel than are ever invited to a beauty parade – 10 on the panel; 3 or 4 in the parade. Mathematically, excluding one from the 10 still leaves more than twice the number needed to run the usual type of beauty parade. Since IMTC must be of the view that a choice from 3 or 4 candidates is sufficient, its argument of detriment by reducing the field to 9 lacks credibility.

66. IMAM is only included in IMTC's process for selecting an investment adviser where there is a family member who does not object. It must follow that the inclusion of the family member is considered by IMTC to be key to reducing the theoretical risk to the level of no 'real, sensible possibility.' What basis is there for placing such weight on family participation? I agree with the Official Solicitor that IMTC appears to be treating the family member as conferring some sort of ratification, when the family member can do no such thing. The family member is not the principal in the fiduciary relationship. Only the Court can stand in the shoes of the principal for the purposes of ratification. Taking into account the views of family engaged in caring for the person for whom IMTC acts or otherwise interested in their welfare is the right thing to do pursuant to section 4(7) of the Mental Capacity Act but, as I have already noted (at paragraph 42(a) above), it is necessary to be cautious about the effective scrutiny which a family member in reality brings to bear on the question of conflict of interest. I am not persuaded that it does anything to reduce a 'theoretical potential' conflict of interest to a non-existent one."

6. The general application of this decision is therefore clear: where there is a connection between a professional deputy and an investment manager, it will be a conflict of interest for the investment management firm to be appointed to manage a principal's assets.

7. Following *Re: ACC* it is common for professional deputies, where they wish to instruct a connected law firm to litigate on P's behalf, to undertake a 'beauty parade' whereby various firms, including the connected firm, are considered. Such an approach has been ruled out as being appropriate to overcome a conflict of interest in the case of investment managers as, whilst allowing a best interest decision to be made, it did not remove the financial benefit to the deputy.

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