

Conflicts in the Court of Protection (and beyond)

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Topics

1. Re ACC and instruction of own firm
2. Re PW: the decision and implications
3. Beyond the COP



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Re ACC

- The issue and the decision
- Can a Deputy instruct their own firm?
- Seeking Court approval



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Re PW History

- *Re MWS*
- *Re ACC*
- OPG Guidance
- *Re PW* itself



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The Decision

The Judgment:

- Strict rules
- Beauty Parades (and other processes)
- Effect of Re MWS
- Effect of OPG 'decisions' and guidance
- The result



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Scale of the Problem

- 37% of IMTC's clients have funds invested with IMAM: [40]
- IMAM has over £1bn assets under management: [3a]
- Practice not confined to one firm: [37]



Prospective Authorisation

- Duty to review choice of investment manager from time to time: [88]
- Best interests decision, but Deputy has a conflict
- Therefore only the CoP can decide



Retrospective Authorisation

- Appointment of IMAM voidable
- Best interests decision whether to avoid or ratify
- Deputy has a conflict, so again only the CoP can decide



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Potential claims

- Equitable compensation (if P could prove that investment performance would have been better but for the decision to invest with IMAM): *Target Holdings v Redferns* [1996] AC 421
- Rescission of investment management agreement (return of fees)?
- Specific authority to litigate would be needed if a claim were to be brought: *Re ACC* [2020] EWCOP 9
- Might the bond be called in? (Summary procedure in *LB Enfield v Matrix Deputies Ltd* [2018] EWCOP 22)



Deputy's Position

- Deputy has behaved in a way that contravenes its authority
- It now has the following conflicts:
 - whether to retain IMAM prospectively
 - whether to bring a claim against itself / IMAM to set aside appointment and for compensation
- Revocation of deputyship under s 16(8) MCA therefore a possibility, but would that be in P's best interests?



Beyond the Court of Protection

- Implications for others (e.g. trustees):
 - This is not new!
 - Use of connected firms, organisations including asset management and investment.
 - Trustees as directors of related organisations
 - Law firm's trust company's and instruction of the firm (Re ACC).
 - Exemption clauses in trust deeds? – will help for some.
- Also : Executors, law firms, banks, any fiduciaries ...

