Irwin Mitchell Trust Corporation v PW

The increasingly entrepreneurial activity of professional service providers has, as entrepreneurial activity usually does, its problems and risks. The losses of Novitas Loans Ltd., an intermediate consumer lender serving the legal market, remind anyone that the legal market is not risk-free.

Development of a market outside legal services was envisaged in the 2005 White Paper *The Future of Legal Services: Putting Consumers First* (CM 6679), which foresaw that:

> "One-stop-shops which deliver packages of legal and other services that better meet consumers' needs will provide greater convenience for consumers."

A recent decision of the Court of Protection, *Irwin Mitchell Trust Corporation v. PW* [2024] EWCOP 16, reminds that there can be conflict of interest difficulties about this, even where legal and other service providers are careful to see that shops are not so much one-stop as next door, with clearly identified separate front doors. The case concerns events some years ago, and the Irwin Mitchell organisation changed its operation in 2023, but the case's interest is unaffected, not least because consequences of the decision remain to be seen.

The needs of those who have suffered life-changing personal injuries do not stop when any claim for damages is resolved. On the contrary, there is normally a new need, for specialist financial advice and investment management, and frequently a need for a property and affairs deputy (see the Mental Capacity Act 2005, particularly for the supervisory role of the Public Guardian).

The evidence on which the Court decided the case was that financial advice and investment management for very serious personal injury cases is a specialism distinct from other areas of financial advice and investment management, and that there is a somewhat limited pool of organisations offering services in that specialism.

The Irwin Mitchell law practice is, of course, an extremely well-known practice for high value personal injury work. Significant numbers of clients for whom it has acted successfully are people whose interests are overseen by the Court of Protection. The Irwin Mitchell group has established a number of legally distinct bodies which can provide not only legal services but other services needed by those who have suffered personal injury. A group aim was to obtain the benefit offered by cross-selling, in appropriate circumstances. Thus:

- Irwin Mitchell LLP conducts the law practice;

- Irwin Mitchell Trust Corporation Ltd provided services which include acting as a deputy under the Mental Capacity Act 2005 (this company is said, in its accounts to 2023, to be dormant);

- Irwin Mitchell Asset Management Ltd is an asset manager, which manages more than £1 billion of assets.

In the application the Applicant is named simply as Irwin Mitchell Trust Corporation, and the asset manager is named as Irwin Mitchell Asset Management. This note refers to them as "the Trust Corporation" and "the Irwin Mitchell Asset Management business".

Irwin Mitchell Holdings Ltd is the controlling member of Irwin Mitchell LLP; it owns the entire share capital of Irwin Mitchell Asset Management Ltd; and Irwin Mitchell LLP owns the entire share capital of Irwin Mitchell Trust Corporation Ltd.

Reducing to bare essentials:

In cases where the Trust Corporation was acting as a deputy, it needed to select an investment adviser and/or manager for the funds of the protected person;

The relationship between it and the protected person was fiduciary;

A person in a fiduciary position is not, unless otherwise expressly provided, entitled to make a profit, and is not allowed to put himself in a position where his interest and duty conflict. This is often referred to as the rule against self-dealing. (The authority principally relied on was Lord Upjohn's (dissenting) speech in *Boardman v. Phipps* [1967] 2 A.C. 46, in which he elaborated on authority from at least *Bray v. Ford* [1896] A.C.44);

The core questions (there were others, including the potential relevance of an earlier case involving the Irwin Mitchell Group) were:

1) Whether the appointment by the Trust Corporation of the Irwin Mitchell Asset Management business to manage the assets of the protected person, PW, conflicted with the rule against self-dealing;

2) If so, whether the appointment of the Irwin Mitchell Asset Management business should be ratified.

These questions were addressed in the context that the Irwin Mitchell entities involved, which wanted to address the problems of being connected, had put in place substantial steps designed to address the potential for conflict of interest. Among the steps were that:

1) The Trust Corporation, which recognised that the decision as to the appointment of an investment manager was a "best interests" one to be taken in a fiduciary relationship, maintained, and kept under review, a panel of specialist investment advisers/managers, which included the Irwin Mitchell Asset Management business;

2) For any given case, the Trust Corporation would make the decision which panel member to appoint after conducting a beauty parade of either three or four panel

members (the number depending on the size of the fund in question);

3) The Irwin Mitchell Asset Management business might, depending on circumstances, be included in the beauty parade. (This is no longer the case.) If, and only if, the protected person had a family member available to participate in the beauty parade, that person's view would be sought about whether the Irwin Mitchell Asset Management business should be invited to the parade. No attempt would be made at persuasion. If the family member were unwilling for the Irwin Mitchell Asset Management business to be invited it would not be; if the family member were willing, then typically it would be.

The practical results were said to include that, as at July 2020, 37% of the clients of the Trust Corporation had funds invested with the Irwin Mitchell Asset Management business (and, correspondingly, 63% did not).

The Court concluded that:

(1) The appointment by the Trust Corporation of Irwin Mitchell Asset Management Ltd in the PW case conflicted with the rule against self-dealing;

(2) The processes followed by the Trust Corporation did not, and could not, extinguish the conflict;

(3) The evidence available at the time of the judgment was not sufficient to enable the Court to decide whether the appointment of Irwin Mitchell Asset Management Ltd should be ratified, so further proceedings would be needed.

The case is certainly interesting and will continue to be so:

(1) It is clearly not a one-off case, and is potentially important for many others.

(2) (a) It is notable that the Judge identified an actual conflict of interest in that the Trust Corporation was taking a decision which, if the Irwin Mitchell Asset Management business were appointed, would provide financial gain to the Irwin Mitchell *group* (paragraph 93).

(b) It is not clear to this reader of the judgment on what basis Counsel instructed by the Official Solicitor submitted that the Trust Corporation, and Irwin Mitchell LLP, as well as Irwin Mitchell Holdings Ltd, were all better off as a result of the appointment of the Irwin Mitchell Asset Management business for PW. The Judge appears to have accepted this submission (paragraphs 57(b) and 62). The fees for such management would accrue to that business and would, indirectly, benefit the holding company. In the writer's view the sound basis for the decision was that the (indirect) connection of the appointing and appointed organisations created a conflict of interest for the purposes of the appointment process.

(3) The Judge declined to adopt the more relaxed approach seen in a decision from New Zealand (*Jones v. AMP Perpetual Trustee Company NZ Ltd* [1994] 1 N.Z.L.R. 690) and another from Hong Kong (*HSBC (HK) Ltd v. Secretary of State for Justice* (2001) 3 I.T.E.L.R. 763).

(4) Will the decision to appoint the Irwin Mitchell Asset Management business be ratified?

(5) If it is not ratified, how will the appointment be unravelled, and will there be a need for a financial remedy?

The Clementi report in 2004 referred to there being considerable issues around Multi-

Disciplinary Practices. This case confirms that the potential for conflict of interest is as alive as ever.

Nicholas Davidson K.C, Hailsham Chambers
11th April 2024

Disclaimer: this article is not to be relied on as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.