IMPORTANT NOTICE

This judgment is covered by the terms of an order made pursuant to Practice Direction 4C – Transparency. It may be published on condition that the anonymity of the incapacitated person and members of her family must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.

Citation: [2024] EWCOP 16

Case No: 12934173

COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

Before: Her Honour Judge Hilder

First Avenue House
42-49 High Holborn,
London, WC1V 6NP

Date: 19th March 2024

IRWIN MITCHELL TRUST CORPORATION

Applicant

and

(1) PW
(by her litigation friend the Official Solicitor)

(2) THE PUBLIC GUARDIAN

Respondents

Hearing: 24th & 25th January 2024

JUDGMENT

Mr. D. Rees KC (instructed by Irwin Mitchell LLP) for the Applicant
Mr. R. Dew (instructed by the Official Solicitor) for the First Respondent
Ms. M. Lloyd (instructed by the Public Guardian) for the Second Respondent
The hearing was conducted in public subject to a transparency order made 30th August 2023 [**21**]. The judgment was formally handed down to the parties at a hearing for which attendance was excused at 10am on 19th March 2024, and e-mailed to the parties thereafter. It consists of 30 pages, and has been signed and dated by the judge.
The numbers in square brackets and bold typeface refer to pages of the hearing bundle.

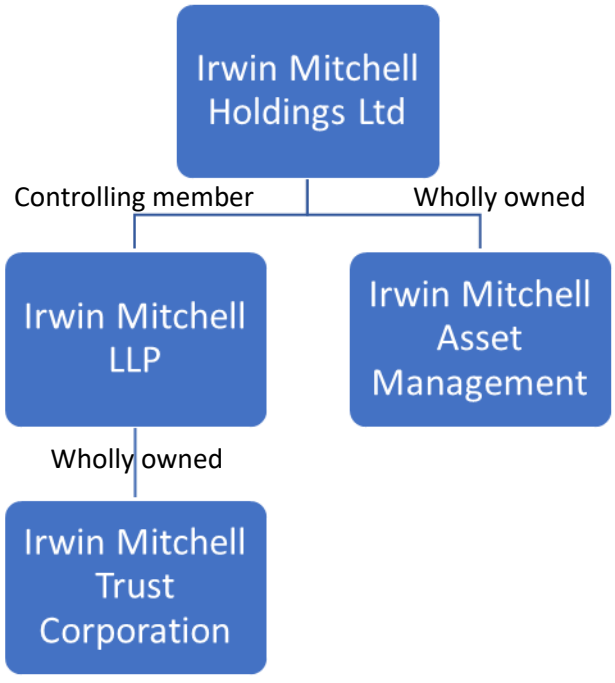
A. THE ISSUE

1. Irwin Mitchell Trust Corporation ("IMTC") is appointed as property and affairs deputy for PW. In that capacity, IMTC appointed Irwin Mitchell Asset Management ("IMAM") to manage the investment of PW's funds. The issue for determination is whether the appointment of IMAM by IMTC as PW's deputy breached the rules against conflict of interest.

B. THE CONTEXT

<u>The Irwin Mitchell group</u>

2. 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 owns IMAM. The names provide an obvious indication of linked corporate structure. In simplistic terms, the corporate relationship between Irwin Mitchell Trust Corporation and Irwin Mitchell Asset Management may be represented thus:



3. There is some financial information about the Irwin Mitchell organisation in the public domain and in the hearing bundle [**250-389**], namely the Annual Report and Accounts of Irwin Mitchell Holdings Ltd for 2022. From this document I note that:

    a. assets under management (ie by IMAM) are more than £1 billion [**259, 314**];

    b. the explanation of business model [**276**], under the heading "How we generate sustainable growth", includes a pictogram which refers to "Maximis[ing] cross-sell capabilities" and states that "Our range of legal and financial services provides us with the opportunity to offer existing clients additional complementary services and products, thereby increasing lifetime value. In addition, through our existing client relationships, brand strength and referral network, we are able to retain and generate new business and client engagement."

The Office of the Public Guardian

4. Pursuant to section 58(1)(c) of the Mental Capacity Act 2005, deputies appointed by the Court of Protection are supervised by the Public Guardian. At October 2023, there were 76 307 deputies subject to such supervision, across 60 780 deputyship orders for 58 932 protected persons. Just over 20% of appointments are professional deputies, as distinct from lay deputies and public authority deputies.

5. There is no statutory definition of supervision. In reality, oversight mechanisms reflect funding capacity. Consequently, the Office of the Public Guardian has adopted a "risk-based" approach to supervision, meaning that issues are dealt with when a complaint is made or an irregularity identified. The OPG expects regulated professional deputies to understand the law and apply the deputyship requirements. The Public Guardian makes applications to the Court of Protection each year in respect of less than 1% of the deputies whom she supervises.

C. MATTERS CONSIDERED

6. I have considered all the documents in the 591 page bundle prepared for the hearing, and in particular:
    a. for the Applicant:
        i. a skeleton argument dated 17th January 2024;
        ii. a statement by Julia Lomas dated 14th October 2020 [**32**];
        iii. statements by Lucinda Nicol dated 4th December 2023 [**391**] and 3rd January 2024 [**413**];

    b. for the First Respondent:
        i. a position statement dated 19th January 2024;

    c. for the Second Respondent:
        i. a skeleton argument dated 19th January 2024;

ii. a statement by Adam Lawson dated 27th November 2023 [**239**].

7. I heard evidence from the jointly instructed expert witness, James Mann; and oral submissions from counsel for each party.

D. THE FACTUAL BACKGROUND

8. PW is married and has four adult sons. Her 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, with PW's husband acting as her litigation friend. The claim settled, with an order made on 27th April 2017 approving an award of £1.85 million and periodical payments rising to £151 000 per year by 2037.

9. IMTC was appointed as property and affairs deputy for PW by order made on 27th March 2017 [**50**]. On 15th December 2017 the deputy determined to appoint IMAM as investment manager for a significant part of PW's damages award.

10. In 2019 PW's deputy made an application to the Court of Protection for authority to execute a statutory will for her. As is usual in such applications, the Official Solicitor was appointed to act as litigation friend for PW. Ultimately a statutory will was approved but during the process, in the light of the decision in *Re ACC* [2020] EWCOP 9, the Official Solicitor raised concerns about the appointment of IMAM as investment manager [**118**, **121**, **124**]. By order made on 26th June 2020 [**126**], the deputy was directed to make an application "to seek retrospective authority" to instruct IMAM.

11. That application was duly made by COP1 dated 14th October 2020. Thereafter it proceeded slowly, not least because of practical issues in funding independent representation of PW. IMTC declined to fund prospectively a litigation friend or a panel deputy to act for PW in the application. I made an order on 3rd January 2023 which included the following recital:

> "11. It appears to the Court that:
> a. in order to determine the conflict application the Court needs the benefit of argument independent of both the Deputy and the supervising authority;
> b. the wider importance of resolving the conflict application (for the integrity and supervision of the deputyship system as a whole) and the relative modesty of [PW]'s estate require that the costs of the process should not fall, even initially, on the protected person;
> c. the costs of the Official Solicitor acting as litigation friend for [PW] could be met by agreement between IMTC and the Public Guardian jointly; …"

12. The parties then reached an agreement, dated 24th February 2023 [**16**], involving the Official Solicitor accepting a reduced rate, and IMTC and the Public Guardian meeting that cost equally between them. The agreement is expressed to be "limited to the work up to and including the first directions hearing."

13. By COP9 application dated 23rd August 2023 [**6**], the Court was invited by the parties to list an attended first directions hearing. (Two earlier COP9 applications had not reached me.) By order made on 30th August 2023 [**10**], directions were given in respect of further statements from the parties, statements by no more than four professional deputies jointly invited, and joint instruction of an expert; and the matter was listed for this "final" hearing.

14. The unchallenged evidence of IMTC [**45-46**] is that £600 000 of PW's funds was initially invested with IMAM. There have been two subsequent withdrawals. The total return during the period of investment is £49 255, equivalent to approximately 3% per annum. The total charges for the calendar year 2019 were 1.89%, including 0.59% in IMAM's advice fees and 0.08% in IMAM transaction costs.

15. The Court was informed that PW's husband was invited to participate in these proceedings but he declined to act as PW's litigation friend and has not taken any further part. I do not know the views of PW, her husband, or any other family members, as to the current application. IMTC has taken the view that it ought not to discuss the issue with Mr. W for fear of appearing to influence him, and that his views should be more appropriately sought by PW's representatives.

16. Capacity: Two assessments of PW's capacity have been undertaken. The first [**131**], by a consultant neuropsychologist, was filed in support of the original deputyship application and concluded that PW lacked capacity for "managing Property and Affairs." The second [**142**], by a 'Specialist Mental Capacity Assessor', was filed with the statutory will application and concluded that PW lacked capacity "to make a will." Both assessors concluded that there was no prospect of PW regaining capacity. There is no suggestion by any of the parties that there has been any material change in PW's capacity since these assessments. I am asked to proceed on the basis that PW currently lacks capacity "to manage her property and affairs" and I am satisfied that it is appropriate to do so.

E. THE FUNDAMENTAL PROPOSITIONS

17. The Mental Capacity Act 2005 ("the Act") provides at section 19(6):

> "A deputy is to be treated as P's agent in relation to anything done or decided by him within the scope of his appointment and in accordance with this Part."

Incontrovertibly, the relationship between a deputy and the person for whom the deputy is appointed is a fiduciary one.

18. The basic proposition about the position of a fiduciary in a position of conflict was set out by Lord Herschell in the House of Lords in *Bray v Ford* [1896] AC 44 at 51 – 52:

> "It is an inflexible rule of a Court of equity that a person in a fiduciary position…. is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that,

> human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing. Indeed it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustees should act for them professionally rather than a stranger, even though the trustee were paid for his services."

19. This general principle was restated by the House of Lords in *Boardman v. Phipps* [1967] 2 AC 46 per Lord Upjohn at 123:

> "Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case. The relevant rule for the decision of this case is the fundamental rule of equity that a person in a fiduciary capacity must not make a profit out of his trust which is part of a wider rule that a trustee must not place himself in a position where his duty and his interest may conflict. I believe the rule is best stated in *Bray v. Ford* by Lord Herschell, who plainly recognised its limitations:
>
> [*then sets out the passage quoted above*]
>
> It is perhaps stated most highly against trustees or directors in the celebrated speech of Lord Cranworth LC in *Aberdeen Railway v. Blaikie* 136 where he said:
>
> > 'And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.'
>
> The phrase "possibly may conflict" requires consideration. In my view it means that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in conflict."

20. The consequence of this rule, and the underlying rationale for it, is 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.'

21. Conversely, the law of agency generally provides that an act of an agent may rank as the act of the principal *if* the principal ratifies it, either prospectively or retrospectively, presupposing that that the principal could validly have done the act at the time it was done

and the relevant act was voidable rather than void. Where the principal lacks capacity to make decisions about their property and affairs, only the Court of Protection may grant such ratification. Its jurisdiction for doing so, as articulated by Lieven J in *Riddle v. Public Guardian* [2021] ECOP 38 at 30-34, is found in the conjunction of sections 15(c) and 19(4) of the Mental Capacity Act 2005.

F. THE QUESTION(S) FOR DETERMINATION

22. By the order made on 30th August 2023, the questions identified by the parties for determination in these proceedings are set out in a schedule [**19**] as follows:

(1) Does the appointment by the Deputy of IMAM as investment manager for [PW] require ratification by the Court?

(2) Is the answer to (1) affected by:
   (a) the guidance provided to the Deputy by the Senior Judge of the Court of Protection as to the applicability of his decision in *Re MWS*;
   (b) the process adopted by the Deputy in selecting an investment adviser for [PW] including (i) a process of tendering and (ii) the involvement of family members in that process;
   (c) the approach of the Public Guardian to the supervision of the appointment of investment advisers; and
   (d) the approach taken by property and affairs deputies generally to the selection and appointment of investment advisers?

(3) If the answer to (1) **is** affected by the process referred to at (2)(b), then:
   (a) what information must be disclosed to the family members; and
   (b) what process must be followed?

(4) If the appointment of IMAM **does** require ratification:
   (a) are there any circumstances (and, if so, what circumstances) where an appointment of IMAM as investment manager can be made by the Deputy without such appointment requiring ratification? *or*
   (b) is the only permissible means of the Deputy appointing IMAM to apply to the court for prospective approval? *and*
   (c) should the appointment of IMAM be ratified here:
      i. having regard to the matters set out at question (2)? *or*
      ii. what additional process should there be to consider whether to give such ratification?

(5) If the appointment of IMAM is not to be ratified, what further consequential directions need to be given in respect of the consequences of that decision in relation to (a) [PW] and (b) other cases?

(6) Is there any further guidance that the court can provide as to the steps that should be taken by (a) the Deputy and (b) other deputies for property and affairs when appointing investment managers?

23. The Applicant's case, as set out in Mr. Rees' position statement at paragraphs 42 and 43, is:
    a. firstly, that the engagement of IMAM in this case should be treated as having been already "authorised" by Senior Judge Lush in a judgment now published as *Re MWS* [2015] EWCOP 94 and subsequent communications; or
    b. in the alternative, that the conflict of interest rule does not apply on the facts of this case.

    The ordering of these two alternatives strikes me as logically surprising. The argument in reliance on *Re MWS* rests on the basis that there was something for Senior Judge Lush to "authorise" - ie acceptance of an actual conflict of interest. Accordingly, whilst acknowledging that IMTC chooses to prioritise its arguments as it does, I shall consider the alternative argument first.

24. PW's case is that:
    a. the conflict of interest rule applies in this matter;
    b. accepting (by the time of oral submissions) that the Court of Protection *may* ratify what would otherwise be a breach of the self-dealing rule, this Court has *not* already done so, and *should not* do so, in this case.

25. The Public Guardian takes a position full square behind the Official Solicitor.

26. So, the primary question which I am now asked to determine is 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?*

27. If the answer to the primary question is "no, the conflict of interest rule does not apply here", then that is the end of the matter. The appointment of IMAM stands, without any need for further order.

28. However, if the answer to the primary question is "yes, the conflict of interest rule applies here", then the next question to be determined is *whether the Court should now authorise the appointment of IMAM, with retrospective effect?*

29. Whatever the answer to that second question, there will be consequences to consider. At this stage, the Court does not have evidence to address those issues and has heard no submissions on them. As indicated at the hearing, further directions and probably a further hearing will be required.

G. "REAL SENSIBLE POSSIBILITY OF CONFLICT": RELEVANT LAW

30. The parties agree that 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."

31. Mr. Dew for PW says that this may be because the point is trite.

32. IMTC however casts its net more widely. IMTC accepts, and has always accepted, that its engagement of IMAM gives rise to "a theoretical potential" (emphasis in the position statement) for a conflict of interest; but it contends that there is no "real sensible possibility" of conflict because it has adopted procedures which eliminate that potential. In support of that position, Mr. Rees for IMTC relies on "two very relevant authorities from other jurisdictions":

    a. *Jones v. AMP Perpetual Trustee Company NZ Ltd* [1994] 1 NZLR 690 – New Zealand:

    A corporate trustee invested in an insurance contract arranged by its parent company under fees which were paid to the parent company. The court declined to impose any accountability on the trust company in respect of the fees.

    Thomas J held that the question of whether there has been a breach of the underlying principle is to a large extent a question of fact and degree; and in the circumstances no conflict arose between the personal interests of the trust company and the interests of the beneficiaries. Two factors were of particular importance to the conclusion:

    > "*The first…is the fact that AMP was a pre-eminent life insurance company with a comparatively attractive investment record. Perpetual, as the trustee, was not placed in the position of having to figuratively detach itself from AMP in order to question its relationship with that company. It could at one and the same time direct the business to its parent and yet serve the best interests of the trust. Secondly, I do not believe that Perpetual was motivated, or even influenced, in its decision by the thought that AMP would benefit or profit by the receipt of the fees as contended by Mr. Dugdale. Once the decision had been made to invest the fund in a life insurance policy, the equivalent fees would be payable to any company which Perpetual selected to take the policy. The essential point is that the placement of the business with its holding company did not create a conflict of the kind which impaired Perpetual's ability to serve the best interests of the beneficiaries.*"

    In the alternative, Thomas J also held that, if a conflict of interest *had* arisen, he would excuse the trustee of liability.

    b. HSBC (HK) Ltd v. Secretary of State for Justice (2001) 3 ITELR 763 – Hong Kong:

    The trustee of a charitable trust sought a discretion to entrust the fund's management to financial and market specialists. The Secretary of State opposed

the application, asking the court to impose a condition that the trustee could not employ the services of any wholly owned subsidiary of its parent company to manage or advise on the fund's investments. Hartmann J held that there was no real and sensible possibility of conflict arising.

The judge accepted a number of points made by the trustee applicant, including that it had in the past employed consultants outside its own business group, had always sought to advance the best interests of the trust fund, had always dealt at arm's length with third parties (including the group's own asset management company) in this regard, and had a global reputation which it would seek to guard. Ultimately, the conclusion at 773d was that:

> '*What must be remembered, of course, is that the trustees have not said that they will necessarily stay 'within the Group'. That is a matter to be decided by reference to objective criteria as and when the need arises. But if a decision is made to do so, I see no reason to frustrate that decision simply because the trustees have a range of other choices open to them. The trustees have the responsibility of deciding which investment managers will best serve the fund and decisions in that regard are tempered by commercial experience. Choice per se takes the matter no further. The art, I would suggest, is identifying the right choice. That is a matter for the trustees and it is one which all the evidence suggests they will deal with in the full knowledge of their obligations in law (and morality) as trustees*.

33. With the greatest of respect to each of the judges and jurisdictions, neither of these authorities is binding on me. Neither am I persuaded by them.

    a. In the *Perpetual* case, the two factors said to save the day do not in my judgment stand up to testing against Lord Herschell's exposition of the rule. I am not assessing the merits of IMAM but 'human nature being what it is,' neither pre-eminence nor success of the linked business is any guarantor of unconflicted motivation in the fiduciary. Indeed they may just encourage complacency, so that the fiduciary fails to consider the alternatives properly. The rule is founded in practical expediency and applies even though it may be breached without disadvantage to the beneficiary.

       And the second factor is a finding of fact in the particular case. Mr. Rees in oral submissions reminded me that the witness evidence of Ms. Lomas and Ms. Nicol went unchallenged, so it is not open to me "to attack the *bona fides* of the decision to appoint IMAM." Maybe so, but I am at this stage considering whether there is a 'real sensible possibility of conflict', not whether the conflict was in fact operative.

       Equally, that fees would have to be paid to *someone* for the service secured goes to the question of (dis)advantage to the beneficiary, not to the existence of conflict.

I agree with Mr. Dew that the factors spelled out by Thomas J in this New Zealand case would not, on English authorities, mean there was no real sensible possibility of conflict of interest.

b. In the *HSBC(HK)* case, the application was for a *prospective* authorisation that *might* include the linked company. The decision rejected any requirement of a condition to exclude that possibility. That context is significantly different to the one presently before me, where IMTC may not always appoint IMAM but the whole point of the litigation is that they wish to do so.

Mr. Dew argues that the reasoning of the *HSBC* decision is poor and would not be followed in England. It would not be appropriate perhaps for me to put it so boldly but I bear in mind that this decision was taken 23 years ago, in a specific context and when experience of delegated investment powers was less developed. The judgment (at page 373) turned the question of conflict of interest into concern about being "*in danger of setting down a legal principle which may be expressed as follows: 'if a trustee is a wholly-owned subsidiary in a corporate group, it will not be able to seek the services of another wholly-owned subsidiary within the same group even though a prudent person would acknowledge that those services are required for the protection or advancement of the trust.*" The reasons then given (at page 375) for avoiding that 'danger' were threefold – past use of consultants outside the group, acceptance that the trustees in the past always sought to advance the best interests of the fund and dealt with others at arm's length, and the global reputation of HSBC. In my judgment, it is far from apparent why the reasonable person should be assured by those 'reasons' that no real and sensible possibility of conflict arises.

It would appear (from page 376) that the weight of the evidence in the case before Hartmann J was that the trustees would not be likely to wish to instruct other companies within the HSBC group: "*If I may reduce his submission to a colloquialism, it was that 'there are many fish' in the sea'. The trustees accept that there are numerous other investment managers, he said, so why would the need arise to stay 'within the group'*? That is the context in which Hartmann J saw 'no reason to frustrate their decision simply because the trustees have a range of other choices available to them'. The context explains the 'simply because' rather differently to how it may otherwise be read; and it is a different context to the decision which I am called upon to make.

The determination on the facts of the particular case before Hartmann J is different to a finding that a conflict does not arise at all in the circumstances which I am considering.

34. In the absence of any binding authority otherwise, the acceptance of "theoretical potential" for conflict of interest in engagement of IMAM by IMTC requires me to consider whether processes adopted by IMTC have *in fact* extinguished any "real sensible possibility" of the theory being realised.

H. "REAL SENSIBLE POSSIBILITY OF CONFLICT": PROCESS

35. The evidence as to the process(es) adopted by IMTC when considering the engagement of IMAM has not been disputed.

The Applicant's position

36. IMTC invites the Court to have regard to "the fact that [it] is a highly experienced deputy well used to taking decisions regarding the investment of assets and the appointment of investment advisers (irrespective of whether IMAM is itself under consideration)" [**ps para 43 (6)**]. I do so.

37. IMTC asserts that it is not alone in using a linked financial adviser or investment manager. Although the Office of the Public Guardian does not keep records of such situations [**246**], there is reference in the evidence before the Court to the use of in-house financial advisers at another firm [**218**] and to "joint ventures" and arrangements whereby deputies are "expected" to include a specific investment firm on their panel [**438**, **439**]. I am aware of general interest in these proceedings. The Chair of the Professional Deputies Forum sent me a news journal report, which I have shared with the parties, and there have been more observers than usual at the hearing. I do not understand IMTC to be arguing that its approach must be acceptable because others are doing similar things (which would not be persuasive), but I do recognise a cautionary reminder that the decision in respect of PW is likely to have wider repercussions.

38. IMTC acknowledges that:
    a. the appointment of an investment manager for the funds of a protected person generally and for PW specifically is a 'best interests' decision;
    b. the relationship between the deputy and the protected person for whom it acts is a fiduciary one; and
    c. IMAM is a linked entity to itself and this gives rise to "a potential conflict of interest" [Julia Lomas, **38**] or "a theoretical potential for a conflict of interest" [ps, para 31].

39. IMTC's contention is that there is in fact "no real sensible possibility of conflict" because any potential conflict is effectively extinguished by the procedures it has adopted:

    a. General features of IMTC's process for selecting an investment adviser:

    IMTC maintains a "panel" of investment advisers for consideration on behalf of any person for whom it acts as deputy. Inclusion on that panel is a matter kept under review by an "investment executive committee" of IMTC [**43**, **398**] which consists of 4 directors of IMTC [**42**]. All the companies on the panel have specialist teams that deal either exclusively or largely with Court of Protection clients and it is a strict requirement that they do not have any entry charge fees nor any exit fees applicable to the portfolio [**396**].

    In any given case, "three or four" firms on the panel will be selected to take part in a "beauty parade" [**41**, **396**] - four for cases involving assets over £10 million,

otherwise three [**43**]. If the protected person has a family member available to participate in the beauty parade, then their view will be sought about including IMAM in the beauty parade. If the family member is unwilling for IMAM to be included, it will not be [**39**], without any attempt to persuade them [**41**]. If the family member raises no objection "[t]he shortlist would typically include IMAM…" [**43**]

If a family member is participating in a beauty parade which includes IMAM, it will be explained to them who IMAM is, how IMAM is connected to Irwin Mitchell Trust Corporation, and that IMAM will be kept at arm's length during the tendering process [**41**]. That explanation is typically given "by the fee-earner with conduct of the matter or any IMTC director", at the post-settlement meeting [**41**].

Each of the firms selected to take part in the beauty parade is given the same instructions and invited to prepare a proposal. If there are no family members involved, the proposals are considered on paper [**43**, **396**]. Where a family member is involved, there will be an attended event [**396**].

The assessment of the various bids is by set criteria. [**ps para43(2)(d)**]

A 'best interests' decision is then taken having regard to all relevant circumstances and the factors set out in section 4 of the Mental Capacity Act 2005. The views of P's family members are relevant matters that need to be, and are, taken into account.

There is no set review period – "rather, the performance of the portfolio and investment managers is continually reviewed" [**418**]. Quarterly performance reports are reviewed by a director of IMTC. The investment manager may attend the annual deputyship review; otherwise, an annual report is received or a separate financial meeting held.

b. <u>The process actually used when selecting an investment adviser for PW</u>:

PW's husband was told of IMAM's connection with IMTC, did not object to IMAM being considered, and was present at an attended beauty parade. Three other firms took part as well – JM Finn, Vestra Wealth and Smith & Williamson. A "scorecard" was used to assess the proposals of all 4 firms [**44**].

The IMAM proposal [**451 – 485**] includes an "introduction" which includes the following bullet points:

- "We are experts in the Personal Injury market. Currently 95% of the clients we look after are in receipt of personal injury awards. Of the 95% over three quarters are protected parties with Deputies or beneficiaries of Personal Injury Trusts.

- Irwin Mitchell are the largest law firm specialising in Personal Injury work, and will use IM Asset Management based on its own merits to cater for their client's specialised financial needs."

The views of PW's husband were taken into account as part of a 'best interest' decision.

c. Latterly adopted changes to the Applicant's process:

IMTC "became concerned that fund managers were becoming aware of the criteria required by" the score card system [**44**], and so in August 2018 it was replaced with a "grid" [**44**] and subsequently a "spreadsheet" [**397**].

d. Current process:

Since February 2023, following the issue of new guidance by the Office of the Public Guardian and pending outcome of these proceedings, IMAM has not been included in any beauty parade, whether or not a family member is available to participate [**398**].

40. The Applicant deputy points to the *outcomes* of this process as confirmation of its robustness: even where IMAM is within the pool of potential investment managers under consideration, there are many cases where IMAM is not appointed. IMTC's evidence [**44**] is that, as at July 2020:
    a. 37% of IMTC's clients have funds invested with IMAM;
    b. 45% have funds invested with another provider;
    c. 18% have funds which are not externally invested;
    d. of the 45% not invested with IMAM, "the majority (56/90) followed a beauty parade where IMAM was one of the options under consideration. The remaining 34 were cases where IMAM had been excluded from consideration."

41. Given the evidence in the same statement [**38**] that IMTC "acts as deputy for a very large number of individuals (currently 990)", which accords with the Court's general awareness, it seems to me that the evidence quoted at (d) above cannot be accurate – 45% of 990 is very significantly higher than 90, so the 56 and the 34 added together cannot be 45% of the caseload. This brings into doubt the accuracy of the broader explanation.

42. Even before considering the other evidence, IMTC's account of the process(es) it adopted invites some further cautionary observations:

    a. excluding IMAM from consideration where the protected person has no family member or a family member who objects to IMAM's inclusion clearly eliminates the potential for conflict. The same cannot be said for taking account of family views. Such views are clearly relevant for the purposes of section 4(7) of the Mental Capacity Act but they are an insubstantial safeguard against conflict. Many family members will have no experience at all of managing the kinds of sums which are awarded in personal injury damages. The explanation of connection between IMTC and IMAM is given to them, only orally, by someone who is already known to them or at least part of the legal firm which is already known to them, who themselves is connected to the Irwin Mitchell group. That person has

the advantage of framing the conversation as they choose, and the family member is already in a position of trust towards them - Mr. W as litigation friend for PW had instructed Irwin Mitchell LLP, who conducted a damages claim to successful conclusion. The IMAM proposal is then presented with familiar graphic style and express reference to its close relationship to the Irwin Mitchell law firm. Such inclusion of a family member is hardly robust oversight.

b. the frequency with which IMAM is invited to take part in the 'beauty parade' seems very likely to give IMAM an advantage in knowing how to pitch its presentation. It would be failing to learn from its own experience if it did not. Even IMTC became concerned about this, as its change from scorecard to grid to spreadsheet is explained. It is very far from clear how far those changes could substantively address the problem of unequal familiarity with the presentation process.

c. the scorecards from PW's beauty parade record overall scores of 55% for JM Finn [**177**], 71% for IMAM [**178**], 42% for Vestra [**179**] and 68% for Smith & Williamson [**180**]. However there are obvious errors or inconsistencies in the addition of the separate scores to reach that percentage:
    a. for the six categories under the heading "Financial Planning",:
        i. JM Finn [**177**] has scores of 2, -,1,2,2,2 adding up to 10%;
        ii. IMAM [**178**] has five scores of 2, adding up to 16%;
        iii. Vestra [**179**] has scores of 0,0,2,0,2,0 adding up to 8%;
        iv. Smith & Williams [**180**] has five scores of 2 adding up to 22%;

    b. for the four categories under the heading "**Presentation"**:
        i. JM Finn [**177**] has scores of 1,1,1,0 adding up to 9%;
        ii. IMAM [**178**] has scores of 1,1,1,1, adding up to 12%;
        iii. Vestra [**179**] has scores of -,1,-, - adding up to 1%;
        iv. Smith & Williams has scores of 1,1,0,0 adding up to 2%.

    However 'objective' the scoring system is intended to be, it is 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 expert evidence

43. James Mann is an independent financial adviser at Dune Financial Planning Ltd. with "extensive experience" of working with professional deputies. He was jointly instructed by the parties to report on:
    a. good practice in the selection and appointment of investment managers by fiduciaries;
    b. the specific process adopted by IMTC for PW;
    c. whether the appointment of IMAM as investment adviser for PW is one that may reasonably be considered to be in her best interests.

44. In a report dated 21st November 2023 [**423**], Mr. Mann :
    a. opines that, if the deputy is not going to use an unconnected party to assess the suitability of each investment adviser/firm, "then it would be good practice to

ensure that only fully independent advisory firms form part of the panel for selection to avoid any conflicts of interest" [**427**];

b. notes that no "documentational (*sic*) evidence" has been provided as to how the four participants in PW's beauty parade were selected [**429**];
c. considers that the due diligence questionnaire used by IMTC is "comprehensive" [**429**], but:
    i. he suggests that questions relating to the disclosure of commercial links and financial arrangements between firms looks like "box-ticking" [**430**];
    ii. he notes that in any event IMTC was unable to provide the questionnaires completed by the participants in PW's beauty parade [**430**]; and so
    iii. he is unable to comment on the use made of the information in these questionnaires [**430**];
d. in respect of the scorecards used in PW's beauty parade, he considers that "the content and scoring methodology appear to be diligent and robust" but the scoring "is left to the interpretation of the deputy, supported by family members", which "could create a bias which supports an outcome in the appointment IMAM" (*sic*) [**431**]. In particular:
    i. the inclusion in the scoring system of the question "Do the family have a strong preference for the adviser/firm?" is particularly queried as "self-supporting in the appointment of an adviser and firm that is commercially linked";
    ii. if this question was excluded, Vestra would have scored the same as IMAM [**431**];
    iii. in the file note by Julia Lomas, it is recorded that "… it was [PW's husband] who said that he wanted IMAM to be appointed. This was extremely fortuitous since on the score card they were in fact the most highly rated" [**436**]
e. by analysing the data provided within each proposal for the beauty parade [**432-437**], Mr. Dunn concludes that the JM Finn portfolio was the most suitable for PW;
f. nonetheless, he concludes [**438**] that "the appointment of IMAM was a best interests decision for PW", apparently because of Mr. W's expressed view.

45. I heard from Mr. Mann in oral evidence. I am satisfied that he did his best to answer everything that was asked of him. Given that I am not determining the merits of IMAM as an investment manager, much of his evidence was at this point of limited assistance to the Court.

46. IMTC "is concerned" about Mr. Mann's evidence, in particular that he "fails to recognise the particular issues with the investment of personal injury awards for incapacitated individuals", including the importance of cost and the limited number of firms with expertise. In my judgment these concerns do not carry much weight:

    a. whilst expressing concern that Mr. Mann fails to recognise the importance of cost, IMTC also then criticises his alternative proposal for weighing the proposals (which has three separate columns for charges) as giving undue weight – 60% - to charges [**ps paragraph 29(1) and (6)**];

b. the debate [**ps para 29(2**)] about whether Mr. Mann's recommendation of using separate IFAs, or the Irwin Mitchell linked structure, would incur lower costs for P obfuscates the real issue as to conflict;

c. IMTC's contention [**ps para 29(4)**] that Mr. Mann's approach of selecting for consideration a long list of 10 to achieve a list of 6 "could exclude suitable firms" is not persuasive. His long list is exactly the same size as IMTC's current panel. In any event I am not concerned about the size of IMTC's standing panel or the number of firms invited to take part in a beauty parade (see below, paragraph 65.)

d. the suggestion that Mr. Mann largely discounts family views, even though they are a statutory factor, is belied by his ultimate conclusion that – notwithstanding JM Finn's higher score – the selection of IMAM for PW was appropriate in the light of Mr. W's expressed view.

47. I note Mr. Rees's oral submission that the Court cannot ask for further explanation of Ms. Lomas' comment in the attendance note because she was not required by the respondents to attend to give oral evidence. Mr. W's preference for IMAM may indeed have been "fortuitous" because IMAM was afforded the highest score. However, Mr. Mann's reference to it when considering scope for bias is unsurprising because it lends itself to other interpretation.

The evidence of other deputies

48. The parties were permitted to invite "no more than four" professional deputies to provide statements setting out the steps they take when appointing an investment manager for P. Three such statements have been filed, all of them by deputies recognised by me as frequent users of the Court of Protection.

49. Samantha Hamilton of Mullis & Peake LLP provided a statement dated 3rd October 2023 [**206**], from which I draw the following salient points:
    a. she is a solicitor of 20 years standing and has been a panel deputy for over 10 years, with cases ranging from very low value and effectively *pro bono* to multi-million pound personal injury awards;
    b. she generally uses three providers for 'beauty parades';
    c. clients are involved as far as possible and their capacity allows;
    d. family members are consulted "when appropriate";
    e. she "do[es] not use any internal advisers in relation to investments. [She has] not and would not consider investment in [her] business by clients."

50. Hugh Jones of Hugh Jones Solicitors provided a statement dated 17th October 2023 [**210**], from which I draw the following salient points:
    a. he is a solicitor, and from 1979 until 2013 he worked for the firm which became Pannone Solicitors;
    b. in 2013 he set up his own firm dealing exclusively with Court of Protection and ancillary, complementary matters;
    c. he is a panel deputy;
    d. when he worked at Pannone Solicitors, that firm "had a small financial services team [who]….managed investments on an advisory, rather than a discretionary basis and they did not manage the funds themselves";

e. he, a fellow director or the solicitor with conduct of the matter would discuss the prospect of investing with the client and/or their family, to seek their views in general, whether circumstances require any specific consideration such as the protected party's ethical views, religious beliefs, prior attitude towards investment and tax…"
f. three or four investment managers would be invited to prepare an investment proposal;
g. if the client and/or family has no interest in the investment process, he would tend not to request a 'beauty parade' but would make a decision on the paper proposals;
h. often there is little to differentiate paper proposals and the preference of a client/family member turns on "who they preferred on the day, who was most engaging in their presentation, who came across as more approachable or perhaps most prepared or most professional…";
i. if the client and/or family expresses a preference, he is "most often guided by" that, always on the basis that he as deputy is ultimately satisfied that the preferred investment manager is in the best interest of P;
j. his firm has no commercial relationship with any investment manager who we would consider to approach, and he does not accept instructions to act as deputy in cases where those referring the case would wish to place restrictions on any future choice of investment manager.

51. Martin Terrell of Warners Solicitors provided a statement dated 25th October 2023 [**227**], from which I draw the following salient points
    a. he has been a solicitor since 1991;
    b. where funds are set aside for longer term investment, his usual practice is to engage an independent financial adviser or investment manager;
    c. it is quite common to conduct a 'beauty parade' of 2 or 3 investment advisers but in other cases, where there is no one closely involved who should be consulted, he will use his own judgment in choosing the right adviser;
    d. he regards it as "important to ensure that [his] role as a fiduciary is to represent the interests of P and that there is no conflict of interest. He has not worked for a firm which offers its own investment advice but "would be concerned that in any such case the only way of avoiding a conflict of interest or potential conflict of interest is to avoid the arrangement as a matter of principle."

52. It is striking that *none* of the deputies whose statement was filed expressed any view in support of instructing a related investment manager.

53. IMTC contends that "having regard to the evidence of general practice" from the three deputies' statement, the procedure employed by IMTC is "robust" [**ps para 18**]. I do not agree. The crucial difference between the IMTC process and those described by the three deputies is that their processes do not involve a potential provider with whom they are connected. In my judgment, this makes the IMTC process *less* robust than general practice.

54. In that context, drawing from a panel of 10, as opposed to Samantha Hamilton's general use of three providers, adds nothing of substance, particularly since IMTC only in fact uses "three or four" from that panel for each beauty parade [**41**, **396**]. As was explained to Mr. Mann [**429**], there is no significant filter in the selection of participants from the larger panel: "they were rotated and sometimes it would depend on their availability to

attend…" It is not suggested that a wider field was deployed if IMAM was to be of the participants. Given that IMAM may be one of the firms selected from the panel but Samantha Hamilton's three cannot include a related firm because she does not have one, in any IMTC beauty parade of three, there must actually be *fewer* completely independent advisers invited to tender.

55. Neither am I persuaded that there is anything intrinsically more robust in IMTC "always making the choice of investment manager from a list of candidates that have been asked to provide proposals" [**ps para 18(2)**], in contrast to Mr. Terrell who "only holds beauty parades where family members are involved" but is otherwise "willing to use [his] own judgment in choosing the right adviser who is suited to the case." Mr. Terrell went on to explain that he "can take account of the adviser's understanding of the nature of the work and the needs and interests of the individuals who lack capacity….service levels offered and rates charged… service levels and the quality of advice and documentation." Whether in a formalised panel or from knowledge garnered in the course of wider experience, it is clear from Mr. Terrell's statement that he chooses from a range of advisers. In line with Mr. Jones' observation that there is often little to differentiate paper proposals, there seems to be very little difference to the approach taken by Mr. Terrell and the approach taken by IMTC *where IMAM is not a contender;* and where IMAM *is* a contender, Mr. Terrell's approach is more robust because it does not contemplate appointment of a linked entity.

<u>The position of the OS for PW (supported by the Public Guardian)</u>

56. The position taken on behalf of PW is clear and unambiguous [**ps para 2**]:

> "The appointment [of IMAM] involved a stark conflict of interest. The use of a connected asset management firm is not justified as being in the interests of P and there is no other good reason for Deputies to be appointing asset management firms in which they are interested. In PW's case there are doubts about the independence of the process used and nothing to show that retaining the appointment is in her best interests."

57. Mr. Dew posits that the reasons for a law firm creating and operating an asset management firm are clear from Irwin Mitchell's annual report and accounts. Having an asset management firm means that profits which would otherwise accrue elsewhere instead remain 'in-house' [**ps para 3**]. Herein lies an *actual* conflict of interest [**ps para 28**]:
    a. IMTC's deputyship fiduciary duties include the duty to appoint the investment manager who would be best for PW;
    b. IMTC, Irwin Mitchell LLP and Irwin Mitchell Holdings Company Ltd are all better off if IMAM is appointed for PW than if it is not;
    c. accordingly IMTC's duties conflict with its interests.

58. Putting values to that conflict in the particular case of PW, Mr. Dew pointed out that IMAM's fees were 1.89% per annum [**54**]. On a "rough average" of the sum invested overtime, that equates to fees of around £9 450 per annum.

59. PW's representatives assert that IMTC's process(es) are not capable of excluding "inevitable biases" [**ps para 32**] involved in appointing a connected asset manager. The

process(es) include "a considerable degree of subjective considerations" and, being so regularly exposed to it, IMAM will - unlike its competitors - know very well which boxes it needs to 'tick'. The views of family members are relevant to best interest decision making but they have no application to existence or otherwise of a conflict of interest. The OS's concern is that what IMTC has attempted to do - wrongly - is to treat members of the family as if they were the person for whom it is appointed, capable of consenting to the conflict of interest.

60. The *actual* conflict of interest would only be "wholly extinguished" in the following circumstances [**ps para 42**]:

    a. where IMTC was not responsible for the appointment, for example because it was made before IMTC had been appointed as deputy (and even so, the subsequent reviews would be problematic, giving rise to concern as to whether a subsequent appointment of IMTC would be in P's best interests);

    b. the appointment process was conducted in a wholly independent way unconnected to IMTC (the independent expert identifies the possibility of using an external adviser but again the reviews would be problematic);

    c. the Court approved the appointment.

Conclusion

61. The Court of Protection is no stranger to conflicts of interest. It has been said that they are ubiquitous to mental capacity jurisdictions – see Senior Judge Lush in *Re JW; GGW v. East Sussex County Council* [2015] EWCOP 82 as cited by me in *Re ACC* [2020] COPLR 424 at 40.

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.

67. Taking into account all the evidence in respect of IMTC processes, in my judgment there remained 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, and did not extinguish, that conflict.

68. So the next questions for determination are:
    a. has the appointment already been ratified, as IMTC contends?
    b. if not, should it now be ratified?

I. THE ARGUMENT OF EXISTING AUTHORISATION

69. IMTC asserts that, when the decision to appoint IMAM as investment manager for PW was taken, it understood that *both* the Court of Protection *and* the Public Guardian were satisfied that the theoretical potential for conflict of interest could be appropriately managed and did not operate as an absolute bar to its engagement of IMAM [**ps para 21**] ie that such appointment *could* be made without breaching any rules of conflict of interest. (I assume that this contention includes the inference that such understanding was reasonable.)

70. IMTC's assertion rests on a number of pillars:

    a. Historical development

        i. Before the implementation of the Mental Capacity Act 2005, funds of protected persons were generally managed, conservatively and restrictively, by "panel brokers" authorised by the Public Guardianship Office; and court authority was required to sell investments.

        ii. Since implementation of the Mental Capacity Act 2005, property and affairs deputies have been given wider powers. The standard deputyship order now includes authority to "exercise the same powers of management and investment" as the protected person has as beneficial owner. The current guidance of the Office of the Public Guardian (13th February 2023 at paragraph 4d) is that a deputy "must manage P's investments to maximise returns while minimising risks." In practice, this means that it is often necessary for a deputy to take investment advice, and it is common practice to use financial advisers and investment managers.

    b. Specialist nature of investment

        i. The specialist nature of the investment stems from the practical reality that funds being invested must be managed to ensure that the protected persons needs are met. As set out in Ms. Nicol's statement [**396**] "more traditional investment managers will tend to take higher risks with portfolios or try to undertake tax planning, which is simply not suited or appropriate for our clients." Or, as put by Hugh Jones [**219**]: "managing the investment of a personal injury damages award for a protected party is an entirely different prospect from managing an investment portfolio for a private client with capacity who may have acquired their wealth through employment, business interests, and inheritance or other means. For protected parties with personal injury damages awards, these funds are, in most cases, the only funds that the client will ever have. These clients will not have the opportunities to earn income from employment or business interests and these funds need to provide for their often complex needs for the rest of their lives. It therefore requires a specialist approach to investment."

        ii. Accordingly, the investment of personal injury awards, such as PW's, is a specialist concern with only a relatively small number of experienced firms, shrinking as firms merge or move out of the market. In 2020 the Applicant

Deputy maintained a "panel" of 12 such firms [**41**]; at present, that panel has only 10 firms on it [**398**].

iii. Given the small number of specialist firms operating, the Applicant deputy contends that excluding IMAM from consideration would not have promoted PW's best interests but would simply have denied her the opportunity to have an experienced and capable investment manager considered.

c. <u>The decision in *Re MWS* and subsequent communications</u>

i. The decision of Senior Judge Lush is now published [**154**], although in accordance with requirements at the time, it was not published when it was handed down. The hearing date is stated to have been 2nd October 2015; the judgment is dated 11th March 2016.

ii. Irwin Mitchell LLP acted for MWS in his personal injury claim. IMTC was appointed as property and affairs deputy for MWS. There was no family member or other closely related third party with an interest in P's welfare. IMTC obtained "an independent verification as to the suitability of their requirements" and then applied *both* for authority to instruct IMAM "as independent financial adviser" for MWS *and* for an order giving *general* authority to adopt the same procedure where IMTC or named Irwin Mitchell LLP partners are appointed as deputy and there is no family input.

iii. The Public Guardian was joined as a party and agreed to the appointment in the specific matter of MWS but (as IMTC acknowledges [**40**]) opposed any *general* authority in the same vein.

iv. In a succinct, ten-page judgment, Senior Judge Lush said:

"*22. … both the Court of Protection and the OPG are prepared to allow IMTC to instruct IMAM to manage P's investments provided they are satisfied that it is in P's best interest and there are effective safeguards in place to prevent abuse. This means that there should be a level playing field when selecting of investment managers for persons for whom IMTC acts as deputy.*

23. In MWS's case, the Public Guardian is satisfied that, notwithstanding the conflict of interests between his deputy, IMTC, and IMAM, it would be in his best interests for IMAM to manage his investments.

24. In all other cases, I would suggest that IMTC has three options:

(1) It can work with the wider profession in the form of the Law Society with the OPG by consulting on and negotiating a protocol on using connected investment companies, advisers and third party verifiers to ensure that the best interests of persons with disabilities are safeguarded from conflicts of interest. This would be my preferred option, but in the event that such a protocol could not be agreed with the OPG and the Law Society within 6 months from the date of this judgment, then the following options would apply.

(2) It can follow the Solicitors Regulation Authority's guidance and recuse itself. In terms of reputation, this would be the best course of action for the Irwin Mitchell Group to follow. There would certainly be public confidence in this approach.

(3) It can let the Court of Protection manage the conflict of interests. This means that an application would need to be made to the court in every case for permission to instruct IMAM to manage the investments of a person who lacks capacity to manage their own assets. On receiving such application, P would be joined as a party and the court would then appoint a panel deputy to act as P's litigation friend for the purpose of conducting a beauty parade or otherwise ensuring that P's interests can be properly secured. This would be an expensive option, but the choice of a suitable investment manager is a decision of such fundamental importance and its potential impact on P is so great that it warrants a rigorous procedure and the additional costs that this entails.

25. Accordingly, I dismiss IMTC's application for an order giving Irwin Mitchell LLP the general authority it seeks regarding its existing procedure for instructing external verifiers."

v. After the judgment in *Re MWS*, Irwin Mitchell sought further clarification from Senior Judge Lush. The full e-mail exchange is as follows:

I.Michael Knott to SJ Lush, copying in Julia Lomas, at 14.24 on 29th March 2016:

Dear Denzil,
I have now received the order in this matter. Thank you for your time in hearing this case and providing your judgment in what is clearly a complex area. The IMTC will progress with the specific case of [MWS] as directed.
In relation to the second, and wider IMTC/IMAM point we would welcome the opportunity of reviewing the judgement with you in order to obtain clarification on certain parts as we feel that, on a practical level, we need to be sure we have accurately interpreted your judgment. I note that there is no specific authority in the order for review – which we would have anticipated – and in the circumstances could you confirm how we might progress this?

Kind regards,

II. SJ Lush to Michael Knott, copying in Julia Lomas, at 10.42 on 4th April 2016

Dear Michael,
Could I come back to you on Friday 8th April or next week please.
I am speaking to the OPG Supervision Team in Nottingham on Thursday and may get a chance to speak with Alan Eccles or Sally Jones about how it would be best to take this forward.
Kind regards,

III. Michael Knott to SJ Lush, 13.52 on 11th April 2016

Dear Denzil,
Thanks for your e-mail. I understand that you have, in the meantime, spoken with Julia and have confirmed to her that it was your intention that the order and supporting judgment was intended to relate only to cases where there is no family (or relevant third party) involvement. And that you had kindly agreed to clarify this for us in writing. To that end, I look forward to hearing from you.
Kind regards,

IV. SJ Lush to Michael Knott, 13.57 on 11th April 2016

Dear Michael,
I confirm that the judgment relates only to situations in which there is no one other than the deputy to be consulted pursuant to section 4(7) of the Mental Capacity Act 2005 as to what would be in a person's best interests.
Kind regards,

vi. In the light of this exchange IMTC developed its approach to the selection of investment managers in a way which distinguished between cases which had, and did not have, a family member or similar individual available to participate [**40**] because IMTC "understood that it was permissible to include IMAM within a beauty parade provided that there were family members (or other suitable individuals) able to participate within that process and express views which could be taken into account under section 4(7) MCA when making the best interests decision on behalf of P." [**ps para 25**]

d. Subsequent acceptance by the Public Guardian

IMTC has not been secretive about its appointments of IMAM for PW (or other persons for whom it acts as deputy.) On the contrary, IMTC declared the appointment

of IMAM for PW in its 2017/2018 deputy report and identified that the appointment was made after a beauty parade [**73**]. The OPG raised no issue then, nor at any of its audit visits.

71. The position of the Public Guardian: in written evidence for these proceedings the Public Guardian broadly accepts IMTC's description of the position taken by her office over time. Adam Lawson, Head of the OPG's professional supervision team, acknowledges [**245**] that "[w]hen a deputy has wanted to appoint an independent adviser who has a link to their firm, it has previously been the position that the Public Guardian would expect there to be a beauty parade carried out, so as to limit the impact of any potential conflict of interest. Previous Public Guardians have been satisfied that this mitigates the risk." It is not possible to give data about the number of cases where a connection has been identified between a deputy and an investment manager because records are not kept in a format which is searchable by that criteria. However Mr. Lawson makes reference to one previous case (which I recall) where there was a personal relationship between the deputy and the investment manager: an application to discharge the deputy was made, and the deputy agreed to step down in all cases.

72. In February 2023 in the wake of *Re ACC,* a new guidance document was published by the OPG, which provides that:

> "You must manage P's investments to maximise returns while minimising risk. You may seek professional or expert advice if P's investments are complex. However, if financial advice is provided by a member of your own firm, you must consider potential conflicts of interest as described in section 1f 'Adhering to fiduciary duties.' You must consider your fiduciary duty when managing investments and act in P's best interests. Where your own interests and the interests of P are linked, such as an investment in your business, you must apply to the court for authorisation."

73. In all respects the Public Guardian now supports the Official Solicitor's position.

74. The Official Solicitor's position is that neither the decision in *Re MWS* nor the communications which followed can reasonably bear the interpretation for which IMTC contends:

    a. the actual decision - that a particular single appointment of IMAM was capable of being and should be ratified - is founded on the assumption that the appointment was liable to be set aside unless ratified. Senior Judge declined to give any wider authority. Three options were set out, with a clear preference for seeking contemporary approval from the Court of Protection in each individual case [**ps para 34**]. IMTC chose not to adopt *any* of those options. It should therefore not come as a surprise that neither the OS nor the PG is willing to support a second application [**ps para 35**].

    b. the e-mail exchange could not possibly give rise to a binding *res* given its informality and particularly that none of the other parties were involved. In any case, IMTC's interpretation of it is wholly misplaced: the judge's statement was

only to the effect that the decision was confined to cases where there was no other person who could be consulted. He did not say and did not rule that in those cases the appointment of IMAM would be valid. [**ps para 36**]

75. Moreover, insofar as the OPG made no interventions when engagement of IMAM featured in an annual report about an IMTC deputyship, the Official Solicitor notes that this "does not confer any kind of ratification or blessing and does nothing to override the underlying conflict of interest. It does not affect the fundamental analysis." [**ps para 39**]

Conclusion

76. I accept that there has been development over time of the approach of the Court of Protection to investment practices. The implementation of the Mental Capacity Act 2005 fundamentally altered the landscape. I also accept that management of damages awards is a specialist expertise, significantly different to the management of earned or inherited wealth, with a relatively small pool of firms offering such expertise and experience. However, there is a limit to the impact of these accepted points: fiduciary duties are well settled, as demonstrated by the age of the authorities cited above as fundamental propositions, and the pool of specialist firms is not so small that IMTC cannot maintain a standing panel more than twice the size of the numbers considered appropriate to engage in a beauty parade.

77. The written judgment in *Re MWS* is unequivocal (at paragraph 23) that there *is* a conflict of interest in appointment of IMAM by IMTC as deputy.

78. The written judgment in *Re MWS* is unequivocal (at paragraph 25) in its rejection of the general authority which was sought in that matter. It must be inferred that IMTC understood this because the system there proposed, namely engaging an independent verifier, is not part of the processes on which IMTC relies in these proceedings.

79. IMTC's professed understanding of any general 'ratification' at all must therefore stem from the e-mail exchange. I agree with Mr. Dew that such informal communications, without input or even awareness of the other parties to proceedings, are not capable of establishing any binding authority. That they took place at all is probably best put down to a lingering cultural hangover from a time when the Court of Protection was an Office of the Supreme Court, as opposed to the independent court of record which it is now. In any event, I do not accept that these e-mail communications can bear the interpretation which IMTC places on them:
    a. the final e-mail does nothing more than confirm the factual basis of the case actually decided. There is nothing in it which can reasonably be construed as any kind of 'authorisation' or 'ratification' of a general process in any other circumstances;
    b. I note the earlier references in the e-mail chain to conversations but the only evidence of the substance of such conversations (in the third e-mail) is indirect and limited to a statement of the obvious – that the judgment relates only to a situation where there is no family member or relevant third party involvement. The final e-mail does confirm this but it does not go on to say that any particular process is acceptable where there is such third party involvement. Such interpretation looks, in my judgment, like determination to understand *Re MWS* as narrowly as possible so as to continue with instruction of IMAM as widely as possible.

80. Although IMTC's 'understanding' is unjustified on the basis of the evidence now before the Court, it is also fair to acknowledge that Mr. Lawson's evidence does not sit comfortably with the written judgment in *Re MWS*. In so far as "previous Public Guardians have been satisfied that" a beauty parade "mitigates the risk" where a deputy has wanted to appoint an independent adviser who has a link to their firm, I note that this is quite different to - considerably less robust than - the third option proposed by Senior Judge Lush, which expressly envisaged an application to the Court and independent representation of the protected person (by 'a panel deputy to act as P's litigation friend') in that parade. I further note however that the OPG has now rethought this position, and in any event I agree with Mr. Dew that non-intervention by the OPG is not sufficient to confer ratification or override the underlying conflict.

81. As to the three options proposed by Senior Judge Lush:

    a. As far as I am aware no attempt was ever made to negotiate a protocol on using connected investment companies. We are now approximately 8 years since his judgment, and no such protocol exists.

    b. Effectively IMTC's processes do "recuse itself" in circumstances equivalent to *Re MWS* – as set out in paragraph 38(1) above, if the protected person has no family member available to participate in the beauty parade, then IMAM will not be included in the beauty parade [**39**]. However it does <u>not</u> recuse itself where the protected person has a family member available. For the reasons I have set out at paragraphs 41(a) and 64 above, I am not satisfied that this is sufficient. It does not satisfy option 2.

    c. IMTC has brought the current application only retrospectively, because a concern was raised by the Official Solicitor and District Judge Grosse so directed. Its own evidence is that there are many other cases where it has appointed IMAM without making any application to the Court for ratification. IMTC has manifestly not adopted the approach of option 3 either for PW or generally.

82. I reject IMTC's contention that the appointment of IMAM for PW has somehow been pre-authorised by Senior Judge Lush. In my judgment there is nothing in the judgment in *Re MWS*, or in any subsequent e-mails, which did or could confer such ratification. And there is nothing in the Public Guardian's position to date which did or could do so either.

J. SHOULD THERE BE RATIFICATION NOW?

83. As Mr. Rees puts it [**ps para 38**]:

> "The appointment of IMAM as PW's investment adviser by IMTC was an *intra vires* exercise of the decision-making powers conferred on IMTC by section 16 MCA 2005 and its deputyship order. It was a best interests decision made having regard to section 4 MCA and properly documents as such by IMTC. Its validity does not depend upon whether the decision is the same one that the Court itself would have made had it been taking the decision; section 4(9) MCA 2005 provides:

> "In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned."

There is therefore no question of the appointment of IMAM being *void ab initio.*"

84. Having determined that the appointment of IMAM was made in breach of the self-dealing rule, the appointment of IMAM for PW could, however, be set aside. Instead, IMTC asks the Court to exercise the power that PW could exercise if she had capacity to do so, to authorise a prior self-dealing.

85. Mr. Dew points out that the fundamental problem with ratifying the appointment of IMAM for PW is the absence of any evidence showing that to do so would be in her best interests. It seems to me that this is a consequence of the way IMTC has so far framed its case, namely that ratification would not be required, either because it has already been given on a general basis or because any potential for breach of the self-dealing rule was extinguished. Having found against IMTC on both those points, where does the Court go next to identify where PW's best interests lie?

86. Mr. Dew contends that the decision has to be taken "as of *now*" [**ps para 46**] – the question is not whether the Court would have ratified the appointment of IMAM for PW in 2017, but whether it is in her best interests to do so more than six years after the event. Relevant considerations include that PW "has a potential claim to repayment of the charges levelled by IMAM for managing the funds" [**ps para 46.2**] and "whether some other asset manager (or adviser) could have better invested the funds during the period of time over which the assets were invested as well as the expectations going forwards" [**ps para 46.3**].

87. Such considerations are far from straightforward but the Court *could* begin to address them *if* there was evidence on such points. On one level, the absence of it now is surprising, given the issues as agreed between the parties set out in the schedule to the 30th August 2023 order, particularly 4(c). However, I acknowledge, that at the time that order was made, the parties had actually sought a *directions* hearing, whereas I considered it more appropriate to list this hearing. Before determining whether further directions are now required, it is necessary to consider Mr. Dew's submissions about "ratification more generally" [**ps paras 51 – 54**].

88. Mr. Dew submits that IMTC has failed to show why "more generally" it is in P's interests "to have appointed a connected asset manager." Unlike the limited circumstances of instructing a connected law firm which were approved in *Re ACC,* "a single, one-off approval from the Court at the time of appointment [of a linked asset manager] will not safeguard P's financial interests in the long term and so exposes P to the conflict for, potentially, the whole of their lifetime." It seems to me that the regular reviews of arrangements which are a conventional aspect of investments generally would, in circumstances amounting to a conflict of interest, require ratification just as much as the original appointment.

89. To put it another way, the unavoidable consequence of rejecting IMTC's arguments in this matter is that each and every occasion of IMTC appointing IMAM amounts to a breach of self-dealing rule unless and until it is ratified by the Court. This is in accordance with well-established principles of agency and was recognised in Senior Judge Lush's third option in *Re MWS*. It seems to me that there is nothing novel or surprising in it. However, that process of seeking court ratification itself incurs costs – cost which are completely avoidable simply by excluding a connected asset manager from consideration. Consequently, as a matter of generality, there is material *dis*advantage to any protected person for whom IMTC is appointed deputy in considering IMAM as a potential investment manager. (Given my conclusion at paragraph 65 above, the only *dis*advantage of *ex*cluding IMAM is to the Irwin Mitchell group. Therein lies the conflict of interest.)

90. Given the agreement as to costs so far in this litigation, it might be said that the 'general' ratification problem does not apply to PW. That would be correct to this point, but would depend on further extension of the agreement to cover continuation of these proceedings.

91. I come to the conclusion that I do not presently have sufficient evidence before me to be satisfied that ratification of the appointment of IMAM for PW is in her best interests but the parties ought to be given an opportunity to take stock in the light of this judgment. Therefore, no such ratification is presently granted and I invite the parties to seek to reach agreement as to further directions (at least as far as listing a hearing to consider further directions if they cannot be agreed) *if* IMTC wishes to pursue its application for ratification further.

K. SUMMARY AND CONCLUSIONS

92. I am grateful to counsel for the clarity and courtesy with which the competing arguments have been set out.

93. In my judgment the appointment by IMTC of IMAM to manage the assets of PW clearly conflicts with the rule against self-dealing. There is *actual* conflict of interest in that the Irwin Mitchell group gains financially. There is nothing in *Re MWS* or subsequent e-mail communications which can reasonably be understood as approval of appointment of IMAM if it follows a beauty parade in which a family member of a protected person participates. The processes adopted by IMTC do not and could not extinguish that conflict. In my view, that these proceedings have been necessary at all is a paradigm example of Lord Herschell's wise recognition of the tendency of human nature to be swayed by interest rather than duty.

94. Having determined the wider arguments, I am not satisfied that there is presently sufficient evidence before the Court to determine whether the appointment of IMAM for PW should now be ratified. I invite the parties to agree such further directions as they can, at least as to the listing of a further directions hearing if they do not agree anything more substantive, and to file a COP9 application with a draft order within 21 days of this judgment being handed down.

HHJ Hilder