And who shall guard the guards themselves?

Can/should trustee members profit from a windfall (and other scenarios)?

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Overview

- The duty not to profit is a fundamental principle of equity and trusts. Liability is strict and historically has not been based on causation
- The duty to avoid conflict is also strict but subject to caveats
- In pensions matters, these duties have rarely been invoked in the courts or before the ombudsman since 1997.
- What is the scope for not paying a trustee member / beneficiary their full benefits (intended or otherwise) because of their conduct as a trustee

The fall of mankind, robbing Peter to pay Profyt and the duty not to [profyt]

- In c.1393, a priest, Thomas Profyt, promised a parishioner Peter Atmore that he would hold property for Peter's wife.
- Proftyt disposed of the property
- The wife turned to the courts

"and who shall patrol the priests themselves?"

Rules of universal application

Aberdeen Railway v Blaikie, 1854

"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"

Hopcraft v Close Brothers Ltd , 2005

" a duty of single-minded loyalty to his principal"

Rukhadze & Ors v Recovery Partners GP Ltd

- Background facts – claimant companies incorporated to undertake asset recovery services on behalf of deceased billionaire's family
- Defendants resigned from senior positions in claimants and entered into direct agreements with family
- Split liability & quantum hearings. Unappealed findings of breach of duty
- Question for the UKSC: Whether the current test for an account of profits should be varied so that the question is: 'Could the same profit have been made but for the breach of fiduciary duty'?

Deterrence and the principal agent problem

"The essential purpose of the rule that a fiduciary must not without his principal's consent keep for himself a profit from his position as such, and the related rule that a fiduciary must avoid placing himself in a position where his interest and his duty may conflict (usually called the conflict rule), is to protect or deter those who have undertaken an obligation of single-minded loyalty to someone else from being tempted by human frailty to fall short of that obligation".

Rukhadze at [16]

Rukhadze – fundamental disagreements

- 7 JJSC, 4 judgments, 106 page judgment, agreement in outcome & little else
- Is the duty not to profit a self-standing right or a remedy?
- Duty to account is different from, but related to, duty to avoid conflict
- What is the test of causation?
  - "*ow[ing] its existence to*"
  - "*a cause*"
  - "*but for*", but counterfactual is no breach not same acts but with consent
- How to explain the equitable allowance if self-standing right?
- Difference between account of profits and equitable compensation?

Lord Briggs – self-standing right, no mere remedy

"the fiduciary duty to account for profits is a rule governing the conduct of fiduciaries which exists in its own right. It is a duty or obligation imposed by equity on all fiduciaries, as an inherent aspect of their undertaking of single-minded loyalty to their principals. It is not just a discretionary equitable remedy for the breach of some other duty, such as the conflict rule, nor is it necessarily triggered by some other breach, although it very often is." [20]

Lord Briggs – "fundamental conceptual error" if court agrees to ameliorate the remedy

"in treating an order for an account of profits merely as a remedy for some other type of breach of fiduciary duty, such as the conflict duty…it is not just a remedy, so that the introduction of the proposed but-for test would strike at the essence of the duty itself, as enshrined in the profit rule. An order for an account of profits is an order for the specific enforcement of a basic duty of trustees and fiduciaries, to treat any profit arising out of their fiduciary role as belonging to their beneficiaries." [47]

Lord Leggatt – duty not to use property, information or opportunity improperly

"Indeed, the very label "profit rule" is something of a misnomer. It treats a consequence (in some cases) of a breach of a fiduciary duty as if it were itself a breach. There is nothing wrong in making a profit. To do so is not in itself a wrongful act; indeed, it may not involve any act by the fiduciary at all in so far as it simply consists in receiving money. " [94]

Lord Leggatt – continuing duty not to exploit property

"Once it is recognised that the duty not to exploit property, information or opportunities is distinct from the duty to avoid conflicts of interest, there is no difficulty in explaining why the former duty continues after the fiduciary has stopped acting as such".

[123]

Lord Leggatt – there *is* a "but for" causation test

"…applying the "but for" test to the facts of this case does not produce the answer they want. The defendants breached fiduciary duties owed to the claimants by exploiting for themselves the business opportunity of providing the recovery services and negotiating a contract with the family to supply those services from which they made substantial profits. They also breached duties of confidentiality owed to the claimants by using for that purpose information which was confidential to the claimants. But for these breaches of duty, the defendants would have made none of the profits which they in fact made and which the judge assessed." [201]

Lord Burrows – failure to pay across profits is objectionable

"The fiduciary may or may not be committing a breach of fiduciary duty by making the profit out of its position as a fiduciary but what the fiduciary must always do is to comply with its (primary) duty to pay across that profit once made. And once viewed in that way, there can be no rational reason for cutting back from the scope of the court's enforcement of the (primary) duty—by the application of causation rules—any of the profits made by the fiduciary out of its fiduciary position". [259]

" the defendant must disgorge all the unauthorised profits obtained by reason of, or out of the position of, being a fiduciary". [269]

Lady Rose

- Purported to disagree with all three other judgments but kept powder dry on some of the fundamental issues
- Rejected argument that the time had come to depart from the strict application of established rules given evolution of business reality
- If common law test to be amended, so do the statutory provisions of the Companies Act 2006

Interesting Psychological Test

Can even the most respected and reliable people in authority succumb to temptation?

Pensions: conflicts are "endemic" / "inevitable"

- §4.5.54 of the ***Goode Report***

  "It is inevitable that there will be some conflict of loyalties. Trustees appointed by management frequently hold key positions within the company, whilst trustees appointed by members may feel obligations to those who appointed them. It is unrealistic to imagine that individual trustees will be able to leave behind entirely their other roles while acting as trustees. In the modem world, conflicts of interest cannot be avoided. They can, however, be managed".

s39 Pensions Act 1995

Exercise of powers by member trustees

No rule of law that a trustee may not exercise the powers vested in him so as to give rise to a conflict between his personal interest and his duties to the beneficiaries shall apply to a trustee of a trust scheme, who is also a member of the scheme, exercising the powers vested in him in any manner, merely because their exercise in that manner benefits, or may benefit, him as a member of the scheme.

Pensions – contributory/unique features

- Trustees and others can wear >2hats - possibility of duty/interest conflict and duty/duty conflict and even duty/duty/interest conflict
- Requirement for MNTs
- Conflict are endemic and not always of the trustee's making
- Who has locus?
- Under the general law, the relevant transaction is voidable by a beneficiary
- Whose consent should the trustee/member seek? All the members? The relevant members? The trustees? Might it vary?

Pensions – scope for exclusion/modification

- There may be an express provision in the trust deed and rules
- Rule may be modified by implication - ***Sargeant -v- National Westminster Bank*** - prohibition against conflict of duty does not apply to trustees who have not put themselves into a position of conflict.
- There is statutory override in s.39.
- Ability of pension scheme trustees to act by majority
- Implied consent
- Express consent by beneficiaries theoretically possible

Pensions – escape/management routes

- Surrender of discretion to the court
- Resignation of trustee members to be replaced by professional independent trustees
- Seek blessing order
- Conflicted trustee/member recuses himself from decision
- s61 – relief of trustee from personal liability

Scenarios to be considered

- Trustees seek to increase benefits for membership generally – can trustee members benefit?
- Trustee member enjoys a generous buy out/transfer/unreduced pension
- Intention to reduce benefits fails for formality &/or other reasons – can trustee members enjoy a windfall?
- Can conflicts be reflected in exercise of forfeiture power?
- Vulnerability of blessing applications

Key points in 1990s authorities

- Wariness of importing pure trusts concepts into pension
- Some judges possessed by possibility of conflict
- Others remarkably indifferent
- Either way, they expressed themselves with force…
- …As did the editors of the PLR and OPLR

William Makin & Son, 1992

- Company in liquidation was trustee
- Ability of liquidator to apply surplus
- Vinelott J – fiduciary power incapable of being exercised by liquidator because of head-on conflict - court could assume duty of directing how surplus should be applied
- Rep ben directors "*must, of course, accept that they themselves will have to be excluded from any benefit under the scheme.*"
- PLR comment "*outrageous*"

William Makin & Son, Vinelott J's last word

"My answer to that observation is that I find the idea that a person who has a power to distribute a fund amongst a class which includes himself should be able to apply the fund or any part of it for his own benefit equally outrageous. This does not rest on any technical rule of trust law; commonsense dictates that no man should be asked to exercise a discretion as to the application of a fund amongst a class of which he is a member. He cannot be expected fairly to weigh his own merits against the merits of others".

British Coal Staff Superannuation Scheme

- The rules prohibited an amendment which made any of the moneys of the scheme payable to the employer.
- Could £100m of further contributions due be set off against surplus? No, as a matter of construction
- Rep ben raised more fundamental objection - conflict
- Vinelott J – danger of importing trust concepts

  "The employer, if he has a power of amendment, is entitled to exercise it in any way which will further the purposes of the pension scheme to ensure that the legitimate expectations of the members and pensioners is met without, so far as possible, imposing any undue burden on the employer or building up an unnecessary large surplus".

Manning v Drexel Burnham

- Company in liquidation, surplus, one problem with trustees' proposal

  "All four of the trustees whose proposals are put before me and whose discretion is being exercised are, as I have mentioned, themselves beneficiaries whose benefits under the Scheme are thereby augmented. I would expect any intelligent layman interested enough to have read so far to say "So what?"".

- Relevance of fact that trustees not put themselves in position of conflict

Edge v Pensions Ombudsman

- Allocation of part of an actuarial surplus - whether trustees could reduce contributions and provide benefit for members in service but not pensioners.
- The Ombudsman held there was a conflict
- Sir Richard Scott disagreed - there should be implied an exoneration in favour of member trustees as against any prohibition on their taking any benefit:

> *"The logic of the Pensions Ombudsman's premise would be that if the Members' contribution rate were reduced, the Member Trustees would have to continue paying contributions at the higher rate. Otherwise they would be benefitting from a conflict of interest and duty and would have to account to the trust for the benefit".*

Board of the PPF v N, A (British Diamalt) PO-557

- Mr N, director, chairman of trustees and member for 40 years
- Largest entitlement in scheme
- Historic issues with Equitable Life
- Mr N indicated intention to retire
- Flurry of meetings - 1 of 4 trustees resigns before crucial meeting
- At crucial meeting, Mr N, Mr A and Mr T considered pension entitlements of Mr N and Mr X
- Unanimous decision to grant Mr X his benefits

British Diamalt

- Mr T abstained from decision on Mr N's position, thinking he should have a buy-in
- Mr N and Mr A decide to buy out Mr N's benefits via a guaranteed annuity (50% of scheme assets)
- Increase of contribution rate from 41.5% to 41.9%
- Benefits to scheme and employer
- Ultimate question was whether the annuity upon which the Trustees decided amounted to a fair share of the Scheme assets

British Diamalt – 4 preliminary issues

- whether complaint was out of time (the **Time Limit Issue**);
- whether Scheme provisions permit a buy-out (the **Buy-Out Issue**);
- whether decision to buy out Mr N's benefits amounts to an "investment function" for the purposes of s.33 Pensions Act 1995 (the **Investment Issue**); and
- whether Ombudsman had jurisdiction to hear the allegation that Mr N is liable to assign the annuity back to the PPF – is that a claim against him as trustee or beneficiary (the **Assignment Issue**).

British Diamalt – role of conflict

- Could / should more have been made of conflict?
- Especially once focus was on return of annuity, rather than equitable compensation
- Was Mr N conflicted on any decision in relation to him?
- Presumably, if he and Mr A agreed with Mr T to buy in his pension or take a transfer, there would have been no complaint (but does not remove the conflict)
- What should Mr N (and the Trustees) have done?

British Diamalt – role of conflict

- Is this qualitatively different from surplus cases &/or scheme-wide or class-wide augmentations?
- Does 39 Pensions Act resolve conflict concerns?
- What should Mr N have done?
- What if person retiring were not Mr N, but Mrs N? Does the "no conflict" duty apply to spouses? See ***Burrell v Burrell Trustees*** (1915)

Ineffective and failed amendments

- What defects might give rise to complaint against trustees?
- Distinguish ones where advisers solely to blame from ones where trustees &/or directors might have some responsibility
- Simple failure to sign the deed
- Is that a breach of trust or breach of director's duty under Companies Act 2006?
- Is it relevant?
- Are there circumstances where that is compounded? Eg trustee certifies subsequently that he did sign the deed.

Relevance of past conduct in subsequent litigation/administration exercise

- Is a trustee member's prima facie entitlement to enhanced benefits affected by their involvement/culpability?
- What is the legal mechanism for this?
- Do current trustees need to pursue former trustee/member?
- Can the point be raised as a defence?
- Analogy with ability to rectify as a defence to individual claim
- Is it relevant to level of compromise reached/individual s.67 consent exercise?

Forfeiture clause

- Is the fact that a member was a trustee and/or company officer at the time of the failed amendment a good reason why the trustees should decide to exercise a forfeiture clause?

  See ***Axminster*** at [264]:

  "As to the legal position, I consider that the absence of fault on the part of beneficiaries and/or the presence of fault on the part of the Trustees are capable of being relevant factors when PSGS comes to consider how to exercise its discretion under rule 36".

- Can it be said that trustee members or director members are at fault for the ineffective amendment?
- If so, can or should that be reflected in the incorrect payment of benefits

Public Trustee v Cooper, category 2

Brass Trustees Limited v Goldstone at [50]:

- *"Court's limited role re proposed exercise of the powers.*
- *(a) & (b) Have the trustees formed an opinion? Is it a reasonable opinion?*
- *(c) The opinion was not vitiated by any conflict of interest under which any of the trustees was labouring".*

How to manage conflict between trustee and employer – see *Gleeds*

> *"The trustees now comprise three partners in Gleeds, two employees in Gleeds and a professional trustee. Since the trustees who are also partners have an obvious conflict of interest, the present proceedings are being conducted on behalf of the trustees by a sub-committee made up of the employee-trustees and the professional trustee."* [19]

- The partners disclaimed any benefit from Newey J's decision and the CA approved compromise

Concluding thoughts and questions?

Thank you

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List of statutory provisions

- Trustee Act 1925, s61
- Pensions Act 1995 s39, s91
- Companies Act 2006, ss170-177

List of cases

- *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461, HL(Sc)
- *Burrell v Burrell's Trustees* [1915] SC 333
- *Sargeant v National Westminster Bank plc* (1990) 61 P&CR 518
- *William Makin & Son Ltd, Re* [1992] PLR 177
- *British Coal Corporation v British Coal Staff Superannuation Scheme* [1995] 1 All ER 912
- *Manning v Drexel Burnham Lambert* [1995] 1 WLR 32
- *Edge v Pensions Ombudsman* [2000] Ch 602
- *Public Trustee v Cooper* [2001] WTLR 901

List of cases

- *The Board of the Pension Protection Fund (as successor to Capital Cranfield Trustees Ltd) v N, A* (British Diamalt) 2013, PO-557
- *Briggs v Gleeds* (Head Office) [2014] EWHC 1178 (Ch)
- *Punter Southall Governance Services Ltd v Jonathan Hazlett* [2021] EWHC 1652 (Ch)
- *Brass Trustees Limited v Goldstone (Re Biwater Retirement and Security Scheme)* [2023] EWHC 1978 (Ch)
- *Rukhadze & Ors v Recovery Partners GP Ltd* [2025] UKSC 10
- *Hopcraft v Close Brothers Ltd* [2025] UKSC 33

List of Codes, Consultations and Articles

- The Report of the Pension Law Review Committee, (1993) Cm 2342 (the Goode report)
- The Pensions Regulator Code of Practice: Conflicts of Interest
- David Pollard, *The Law of Pension Trusts*, ch 6:Conflict Issues for Pension Trustees
- Malcolm Fitzsimmons, *Managing Scheme Trustee Conflicts of Interest,* APL Summer Conference 2006
- Philip Bennett, *Coping with Conflict*, (2004) The Treasurer 27 (May)
- Julius Grower, *Causation, account of profit, and the content of the fiduciary duty of loyalty* LQR 2025, 141 (Oct) 499-504
- Graham Virgo, *Fiduciary Law in the Supreme Court: equitable orthodoxy (generally) prevails,* Butterworths Journal of International Banking and Financial Law 2005

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