

## **HOW ABSOLUTE A RULE?**

**By Fenner Moeran, 3 Stone Buildings**

1. It is easy to gain the impression that the rule against conflicts of interest is an absolute one - where there is a conflict, the trustees cannot and should not act, and if they do so then their actions will be voidable *ex debito justitiae*.

Certainly this is the sense one gains from the judicial pronouncements in such cases as Aberdeen Railway Company v. Blakey (1854) 1 Macq. 461 at 471 and Bray v. Ford (1896) A.C. 44 at 51 where the judiciary use such choice phrases as:

*“It is a rule of universal application...”*; and

*“It is an inflexible rule...”*

2. Indeed, there are a number of well known examples where the rule against conflicts of interest does act as an absolute prohibition. The classic examples are:

- (i) The prohibition on a trustee purchasing trust property - the ‘self-dealing’ rule.
- (ii) The prohibition on a trustee benefiting from the exercise of a dispositive discretionary power - possibly an example of the self-dealing rule.
- (iii) The prohibition on a trustee taking a renewal of a lease originally held by the trust - the rule in Keech -v- Sandford.
- (iv) The prohibition on a trustee making an unauthorised or ‘secret’ profit from his office.

3. However, there are equally a number of situations which do not fall within these rules, where the existence of a conflict of interest does not prohibit the trustees from acting. The best known of these is what is commonly called ‘the fair dealing rule’, when a trustee purchases a beneficiary’s interest in the trust from the beneficiary. So this raises two important questions:

- (i) First - when is it an absolute rule?
- (ii) Secondly - when it is not an absolute rule, what is it?

4. As I will show, given the paucity of authority on this issue, and the fact that even the terms of some of the ‘rules’ are unclear, there is no absolutely certain answer to these questions. However, my best hypothesis at present is this:
- (i) When the situation does not fall within an established category of absolute prohibition, then a conflict of interest will in general merely place the burden on the trustees to show that they in a fair and honest manner, and without the conflict adversely affecting the exercise of their powers. If they cannot show this, then the transaction is voidable at the behest of the beneficiaries.
  - (ii) The fair dealing rule is a special application of this principle.
  - (iii) When the situation does fall within one of the established categories then it will be subject to what can in practice be viewed as an absolute prohibition.
  - (iv) However, this absolute prohibition is itself subject to express or implied authority from the trust deed itself.

**THE GENERAL PRINCIPLE - BURDEN OF PROOF:**

5. The problem with analysing the rule against conflicts of interest in English law is that there are not that many authorities on the point. This is the result of a historical procedural quirk, that cases relating to them were traditionally heard in chambers with the result that the judgments were not public or reported. That has changed with the imposition of the Civil Procedure Rules, whereby most applications in chambers will still be open to the public and reportable. We should, therefore, begin to see a greater body of authority on this matter over the next few years, but for now the principles are still somewhat hazy.
6. This point comes right to the forefront in Hart J’s judgment in The Public Trustee -v- Paul Cooper [2001] WTLR 901 at 933. Having briefly set out a non-exhaustive list of examples of absolute rules he then went on to consider the matter more generally:

*“One must, however, beware of supposing, simply because of the principle as bred in these particular rules, that on every occasion on which the principle can be invoked in areas outside the ambit of the specific rules some similarly rigid rule either exists or should be crafted. There is in fact a surprising lack of English authority on the*

*consequences of trustees acting or purporting to act in situations to which the developed rules do not in terms apply, but where actual or potential conflicts are alleged to exist.”*

7. From this lack of authority Hart J came to a conclusion which is perhaps not entirely logically justified by the preceding passage, but which I think is entirely correct none the less:

*“The relative absence of authority certainly suggests that there is no iron rule that, where such action has taken place, a beneficiary is entitled *ex debito justitiae* to have it set aside. Equally one would expect to find, in the absence of such an iron rule, that, where such action is challenged on such grounds, the onus would be thrown upon the trustees to demonstrate that **the conflicting interest or duty has not in fact operated in a vitiating way.**”* (emphasis added).

8. That point about the onus of proof is an important one, and support for it can even be found in other authorities. One particularly fruitful source of pre-CPR authorities on conflicts of interest is the world of pensions, and this is no exception. In Hillsdown Holdings plc -v- Pensions Ombudsman [1997] 1 All ER 862 Knox J held at 895:

*“I accept that, unless there is an express provision in the relevant trust deed permitting a trustee to act in negotiations with the employer under the scheme notwithstanding that the trustee is a director or employee of the company, the fact that negotiations have been conducted by persons one of whom had a conflict of duties puts upon those who say the transaction in question should be upheld the onus of proving that it was indeed **reasonable and proper.** That of course involves an investigation of the facts.”* (emphasis added)

Admittedly that is a case of conflict of duties, rather than conflict of duty and interest. However, the principle is possibly beginning to shine through.

9. You then look to the older cases and see equivalent statements. In Farrar v. Farrars Ltd (1880) 40 Ch D 395 a mortgagee in possession sold mortgage property to a company of which he was a promoter and shareholder and for which he acted as solicitor. The Court of Appeal held that

*“Mr. Farrar was not a trustee selling to himself, or to others for him, nor was he buying directly or indirectly for himself, and **although a sale by a mortgagee to a company promoted by himself, of which he is the solicitor, and in which he has shares, is one which the company must prove to have been bonâ fide, and at a price at which the mortgagees could properly sell, yet, if such proves to be the fact, there is no rule of law which compels the**”*

*Court to set aside the sale. Ex parte Lacey (1802) 6 Ves. 625 does not require the Court to hold the sale invalid, however fair and honest it may be, although **the judgment in that case does throw upon the company the burden of shewing that the sale was fair and honest.***” (emphasis added)

10. So in conclusion, it appears to me that the authorities lead to a general proposition that in the absence of one of the established categories of absolute prohibitions applying then where there is a conflict of interests the trustees can act, but if the beneficiaries challenge their actions then they will be under the burden of proving that their actions were “*fair and honest*” / “*reasonable and proper*” / “*not vitiated by the conflict of interests*”. If they fail to do so, then the beneficiaries can have the transaction set aside.

#### **The Fair-Dealing Rule - Special application of the general principle?**

11. The fair-dealing rule is something of an odd creature.

*“The fair-dealing rule is (again putting it very shortly) that if a trustee purchases the beneficial interest of any of his beneficiaries, the transaction is not voidable ex debito justitiae, but can be set aside by the beneficiary unless the trustee can show that he has taken no advantage of his position and has made full disclosure to the beneficiary, and that the transaction is fair and honest.”*

per Megarry VC in Tito v Waddell (No 2) [1977] Ch 106 at 241.
12. However, there have been other definitions of the fair-dealing rule which are not quite as simple as Megarry’s. Lewin on Trusts (17<sup>th</sup> edition) defines it as:

*“...while the purchase is not voidable ex debito justitiae, it can be set aside by the beneficiary unless the trustee can show that he has taken no advantage of his position and has made full disclosure to the beneficiary, and that the transaction is fair and honest.”*
13. Professor Oakley (not a stupid man) in Parker & Mellows Modern Law of Trusts (8<sup>th</sup> edition) says at page 349:

*“... the courts have always been prepared to uphold such purchases provided that the trustee is able to establish that he obtained no advantage by reason of his position; in particular, he must be able to show that he did not abuse his position as trustee, that he concealed no material facts, that the price was fair, and that the beneficiary did not rely solely on his advice.”*

14. And Underhill & Hayton's Law of Trusts and Trustees (16<sup>th</sup> edition) defines it as follows:

*"A trustee may purchase or accept a mortgage of the equitable interest of a beneficiary in the trust property, but if the transaction be impeached, it is incumbent on the trustee to prove affirmatively and clearly (the 'fair-dealing' rule):*

*"(a) that he and the beneficiary were at arm's length and that no confidence was reposed in him;*

*"(b) that the transaction was for the advantage of the beneficiary; and*

*"(c) that full information was given to the beneficiary of the value of the property, of the nature of his interest therein and of the circumstances of the transaction."*

15. This is clearly not an absolute prohibition on purchases by trustees from beneficiaries. The academic tests have described it as 'regulatory' as opposed to 'prohibitory'; (Hon. Mr Justice McPherson, 'Self-dealing Trustees' in Trends in Contemporary Trusts Law cited in G. Watt on Trusts and Equity p.331.) Equally though, at first sight it is not simply an application of the general principle because there is something more - the requirement that they be able to show they made 'full disclosure to the beneficiary' and, possibly, the additional requirements set out in Oakley's and/or Underhill's definition.

16. However, once you go back to the origin of the rule it appears that it might well simply be a particular application of the more general rule. In *ex parte Lacey* (*supra*) Eldon LC explained the fair dealing rule at 626 to 627:

*"The Cestuis que trust may [sell their beneficial interest to the trustee] but even then that transaction, by which they dismiss him, must according to the rules of this Court be watched with infinite and the most guarded jealousy; and for this reason; that the Law supposes him to have acquired all the knowledge a trustee may acquire; which may be very useful to him; but the communication of which to the Cestuy que trust the Court can never be sure has made, when entering into the new contract, by which he is discharged."*

17. To put this in modern English:

- (i) The law presumes a trustee to have certain knowledge, by reason of their trusteeship.
- (ii) If there is to be a fair deal between trustee and beneficiary then the beneficiary should have that information too.

(iii) The burden in proving this rests on the trustee - hence full information must be provided.

18. The other early cases on the Fair Dealing rule also support this. In Coles -v- Trescothick (1804) 9 Ves . 234 Eldon LC (again) said:

*“[244]...a purchase by a trustee from the cestui que trust I agree, the cestui que trust may deal with this trustee, so that the trustee may become the purchaser of the estate. But , though permitted, it is a transaction of great delicacy, and which the Court will watch with the utmost diligence... [246]... at trustee may buy from the cestui que [247] trust, provided that there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, proving, that the cestui que trust intended, the trustee should buy, and **there is no fraud, no concealment, no advantage taken, by the trustee of information, acquired by him in the character of trustee.**”*

19. In effect, the fair dealing rule is simply an application of the general principle of the burden of proving that the transaction was “**fair and honest**” / “**reasonable and proper**” / “**not vitiated by the conflict of interests**” where the circumstances of the transaction inherently arouse the court’s suspicion and in order to placate those concerns you have certain specific examples of the evidence you need to overcome the burden of proof.

20. Once this is borne in mind, to my mind at least the specific requirements (including those in Underhill’s and Oakley’s definitions of the rule) come clearly into focus as merely particular examples of the evidence a court will need to be persuaded the fairness of the transaction. This is why I think the different cases end up with different statements of the rule - they are all the same rule, with the judges merely emphasising different specific, factual applications of it.

#### **THE SPECIFIC CATEGORIES OF ABSOLUTE PROHIBITION:**

21. I have already set out the generally recognised categories of an absolute rule. However, they are all subject to reams of authority, and as such each of them inevitably has its own foibles, peculiarities and exceptions. I will deal with the

two rules which are best known and which one is most likely to come across in practice, viz:

- (i) The Self-Dealing Rule;
- (ii) The prohibition on a trustee benefiting from the exercise of a dispositive discretionary power.

### **The Self Dealing Rule:**

22. In principle this rule is simplicity itself:

*“The self-dealing rule is (to put it very shortly) that if a trustee sells the trust property to himself, the sale is voidable<sup>1</sup> by any beneficiary ex debito justitiae, however fair the transaction.”*

per Megarry VC in Tito v Waddell (No 2) [1977] Ch 106 at 241.

23. So this is an example of an absolute prohibition because of a conflict of interest. The only ways around it usually are:

- (i) Ensuring that the trust instrument includes provisions sanctioning such a purchase, either express or implied.
- (ii) Obtaining the sanction of the Court.
- (iii) Obtaining the informed consent of all beneficiaries.

24. Of course, one has to be very careful to ensure that your case actually falls within the ambits of the rule in question. So the self-dealing rule does not apply:

- (i) Where there is a sale by a trustee to his wife; see, for example, Burrell v. Burrell’s Trustees 1915 SC 333 and Tito v Waddell (No 2) (*supra*) at 240.
- (ii) Where there is a sale by a trustee to a company in which he has an interest; Farrar v. Farrars Ltd (*supra*).
- (iii) Where there is a sale by a corporate trustee to another corporation, both of which have a common director; Hillsdown Holdings plc -v- Pensions Ombudsman (*supra*).

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<sup>1</sup> Strictly speaking a sale by a trustee on his own to himself by himself is void rather than voidable, as a person cannot sell to themselves under any circumstances. However, since the Law of Property Act 1925 s.82 allows for sales so long as one person is different between the parties this is generally not an issue today. This point is worth bearing in mind though, as it explains some of the *ratios* and *dicta* in the earlier judgments.

25. Rather, in all such cases the more general principle of the burden of proof shifting will apply; again, see Farrar -v- Farrars Ltd and Tito -v- Waddell (No 2) at 240, where Megarry VC made the lovely statement:

*“Again one must regard the realities. If the question is asked: “Will a sale of trust property by the trustee to his wife be set aside?”, nobody can answer it without being told more; for the question is asked in a conceptual form, and manifestly there are wives and wives. In one case the trustee may have sold privately to his wife with whom he was living in perfect amity; in another the property may have been knocked down at auction to the trustee's wife from whom he has been living separate and in enmity for a dozen years.”*

26. Megarry’s point really gets to the hearts of this problem - identifying whether ‘with regard to the realities’ one falls within the rules. So taking Farrar -v- Farrars Ltd on its own, on a strictly legal interpretation one would think you could avoid the rule simply by purchasing through a company. Unsurprisingly the authorities show this is far from the case. The self-dealing rule applies:

- (i) Where there is a sale by a trustee to a ‘one man’ company which is in effect his alter ego; Silkstone & Haigh Moor Coal Co -v- Edey [1900] 1 Ch 167;
- (ii) Where there is a sale by a trustee to a company where he and his wife are majority shareholders and he is a director; re Thompson’s Settlement [1986] Ch 99.

27. Incidentally, re Thompson’s Settlement was decided on the basis that as a director of the purchasing company the trustee would be under a conflict of duties rather than simply a conflict of duty and interest. Whilst not quite within Megarry’s formulation of the self-dealing rule, this is undoubtedly correct; see Lewin on Trusts (17<sup>th</sup> edition) at paragraph 20-76.

28. Even assuming that your case does *prima facie* fall squarely within the ambit of the self-dealing rule, there might just be an exception to it in exceptional circumstances. The case is Holder -v- Holder [1968] 2 WLR 237. In that case an executor named in a will purported to renounce his executorship, was believed by everybody to have done so, and thereafter bid on and purchased

trust property. However, it turned out that this renunciation was invalid. The Court of Appeal held that the purchase was not avoidable. The reasons given by each Lord Justice were slightly different:

- (i) Harman LJ simply said that in this case the reasons for the rule applying (i.e. needed for the protection of the beneficiaries' interests) were not present, so he did not feel obliged to apply it.
- (ii) Dankwerts LJ said that none of the cases were close to this one, and then appears to have decided the matter on the basis of acquiescence by the beneficiaries.
- (iii) Sachs LJ said that he agreed with Harman LJ that the rule did not apply where the purchaser "*was in practice 'moribund' qua executor and was affirmatively established to have gained no helpful knowledge from his position as executor before he executed the deed which was intended to effect a renunciation*"; at 257.

29. There was, though, one general point which can be drawn out of the judgments of the Court of Appeal which is interesting:

- (i) If the court can authorise a trustee to bid on trust property in advance, even when a beneficiary is opposed to this, then the rule is not absolute.
- (ii) This means that it is really a rule of practice, at least when the application is made prior to the sale.
- (iii) If this is so, then why the court not have the jurisdiction to authorise a purchase of trust property by a trustee *ex post facto*?

30. This comes out best from the judgment of Sachs LJ at 402-403:

*"It is moreover a matter which may well be open to argument as to whether the above rule is, in any event, nowadays quite as rigid as was postulated by Mr. Francis, It is clear that the court has jurisdiction to allow a trustee to bid for trust property (Tennant v. Trenchard) and in addition it was conceded at the bar that procedure exists by which a trustee or an executor can obtain the leave of the court in appropriate circumstances to purchase such property: and I understand that such leave has been given even where a beneficiary had objected."*

*"Moreover I agree with Danckwerts L.J. in his comments on that part of the foundation of the rule which stems from the alleged*

*inability of a court to ascertain the state of mind of a trustee: and am inclined to the view that an irrebuttable presumption as to the state of his knowledge may no longer accord with the way in which the courts have now come to regard matters of this type. Thus the rigidity of the shackles imposed by the rule on the discretion of the court may perhaps before long be reconsidered as the courts tend to lean more and more against such rigidity of rules as can cause patent injustice - such as was done in Cockerell v. Cholmeley. The rule, after all, appears on analysis to be one of practice as opposed to one going to the jurisdiction of the court.”*

31. However, whilst I think Sachs LJ makes an excellent point there, nobody has followed him up on it. In terms of commentary Underhill & Hayton’s Law of Trusts and Trustees (16<sup>th</sup> edition) goes the furthest, and actually formulates the self-dealing rule as:

*“A disposition of trust property to a trustee is automatically voidable by a beneficiary ex debito justitiae, however fair the transaction may be (the ‘self-dealing’ rule) unless... (f) exceptional circumstances exist and it is proved by the party seeking to uphold the transaction that it was a fair and reasonable one not vitiated by any conflicting interest or duty.”*

32. The problem with this as a general statement of principle is that the only example Underhill gives other than Holder -v- Holder itself is Hillsdown Holdings plc -v- Pensions Ombudsman [1997] 1 All ER 862. However, that case was expressly decided on the basis that it was a case where trustees were also directors of a company which negotiated with the trustees and as such, applying Farrars -v- Farrars Ltd (*supra*), the self-dealing rule did not apply to the transaction in the first place; see at page 895-896. And again, as noted above, the result was not that the transaction was automatically voidable but that the burden of proof that it should not be avoided fell on the trustees.

33. As such, whilst of academic interest, I think that Holder -v- Holder can in fact be consigned to its own facts. In practice, therefore, where the self-dealing rule applies it is effectively an absolute one. There is no issue of burden of proof - regardless of fairness of the transaction it will be set aside unless the trustees actions were authorised by the trust deed, the court or the beneficiaries themselves.

### Trustees Exercising Dispositive Powers in Favour of Themselves:

34. Again, this rule is superficially simplicity itself:  
*“A trustee is not, generally speaking, able to exercise a power of appointment in his own favour unless expressly or implicitly authorised to do so.”*  
per Hart J in The Public Trustee -v- Cooper (*supra*) at 933a.
35. Perhaps unsurprisingly the difficult questions arise out of the exceptions to this rule. In particular, these come from the ubiquitous situation of:
- (i) X settles property on trust on Y, with discretionary powers to appoint to a class which includes Y.
36. It is this inclusion of Y within the class of objects of the power that raises a number of issues:
- (i) Does the rule apply in these cases **at all**?
  - (ii) If it does apply, then does the inclusion of the trustee within the objects of the power imply:
    - (a) That the power is a personal or beneficial power, rather than a fiduciary power, and therefore the rule against conflicts of interest does not apply?
    - (b) That the power is a fiduciary power, but that they are authorised to exercise in their own favour?

#### Does the rule apply at all?

37. The rule in general is often seen as described as a sub-rule of the self-dealing rule. Underhill & Hayton’s Law of Trusts and Trustees (16<sup>th</sup> edition) at page 659 describes the self-dealing rule in more general terms than Megarry did in Tito -v- Waddell; see above at paragraph 31. Similarly, Lewin on Trusts (17<sup>th</sup> edition) at paragraph 20-113 couches the rule against a trustee exercising dispositive powers in their own favour in terms of an application of the self-dealing rule.
38. If that is the case then we then come up against precisely what is the self-dealing rule. The authors of Lewin on Trusts state at paragraph 20-122:

*“The self dealing rule has been described in the context of dispositive powers as one under which a trustee cannot act if he finds himself in a position where he owes conflicting duties, or where his duty conflicts with his interest. But that is not the conventional description of the rule. Rather the rule is one under which a trustee is not allowed to place himself in a position where there is a conflict between his duty and interest, or his duty in different capacities. **The rule therefore does not apply where the trustee has not placed himself in a position of conflict and interest but has been placed in that position by the settlor or the terms of the trust.** This exception to the rule applies to the exercise of a dispositive power.”*

39. Whilst this is superficially extremely appealing, I am not sure it is correct. The three cases in support of it are as follows:
- (i) Sargeant -v- National Westminster Bank plc (1991) 61 P&CR 518.
  - (ii) re Drexel Burnham Lambert UK Pension Plan [1995] 1 WLR 32 at 40-41.
  - (iii) Edge -v- Pensions Ombudsman [1998] Ch 512 at 539-541.
40. The problem with these cases is that the two later ones are both expressly grounded on Sargeant and that is simply not a case about dispositive powers. The facts show this quite clearly.
- (i) The father had leased farms to his three children, who farmed them in partnership.
  - (ii) The father died, leaving his estate to his wife for life and to his children thereafter.
  - (iii) The wife died.
  - (iv) One of the three children, Charles, died.
  - (v) Charles’ executors sought to have the father’s executors (i.e. the other two children) realise the estate with the benefit of vacant possession. The argument was that as they were executors they were obliged to seek to realise the best value of the estate’s property, which in this case required vacant possession.

- (vi) In the face of this argument the fathers' executors sought a declaration that they were entitled to sell the property subject to their agricultural tenancies.
- (vii) Unsurprisingly the Court found that they were.

41. It was in this light that Nourse LJ held at 523:

*“It cannot be doubted that the trustees have ever since been in a position where their interests as tenants may conflict with their duties as trustees to the estate of Charles. **But the conclusive objection to the application of the absolute rule on which Mr Romer relies is that it is not they who have put themselves in that position.** They have been put there mainly by the testator’s grant of the tenancies and by the provisions of his will and partly by contractual arrangements to which Charles himself was a party and of which his representatives cannot complain. The administrators cannot therefore complain of the trustees’ continued assertion of their rights as tenants.”*

42. That is all well and good, but it does not assist where a trustee is faced with the exercise of a dispositive power which he can potentially use to benefit himself. The authorities on this point are overwhelming that even where the conflict is created by the settlor the trustees may be prohibited from exercising a fiduciary dispositive power in their own favour. For example:

- (i) re Edward’s Will Trusts [1947] 2 All ER 521 at 524 *“... a power of disposition to be exercised in a fiduciary capacity ... is not one which the person exercising it can exercise for his own benefit.”*
- (ii) in re Beatty [1990] 1 WLR 1503 at 1506 *“The rule that a trustee cannot profit from his trust would ordinarily exclude the trustees themselves from the ambit of the [dispositive] powers...”*.

43. In my view Sargeant is better understood as a case where the issue of conflicts of interest and duty simply did not arise because the trustees did not have any **powers** (*qua* trustees) which they could exercise which were conflicted. The only power the trustees had was of sale - and any exercise of that power could not be impeached on the grounds of their tenancies because the tenancies pre-

existed the power of sale. In reality Charles' executors were not actually complaining about the power of sale being exercised, but of the failure by the father's executors to give up rights - and those rights were held *qua* individuals rather than *qua* trustees. If the fathers' executors *qua* landlord could have forced the tenancies to end then I have no doubt the Court would have found them to be in breach of trust in failing to do so - and any action which might harm that right to force vacant possession would have been in breach of the duty to avoid conflicts of interest.

*If the rule does apply, then what?*

44. The answer to this question is easier in principle, and more difficult in practice. The basic answer is that it all depends on the construction of the power in question. If on a proper construction the power was intended to be exercisable by the trustee in his own favour - i.e. there is implied authorisation, to use Hart J's words - then there is nothing wrong with doing so. As to when this will be the case, the best one can do is elucidate a few rules from the cases:
- (i) Where a power is exercisable in favour of a donee of the power, then this may tend to indicate that the power is a personal or beneficial power, rather than a fiduciary power; see, for example, re Penrose [1933] Ch 793 and re Wills' Trust Deeds [1964] Ch 219.
  - (ii) Where the power is clearly a fiduciary power, then the express inclusion of the donee in the class of objects of the power will almost inevitably have the effect of showing that the donor intended the power to be exercisable notwithstanding conflicts of interest. The power of this point is made by the fact that so many cases impliedly assume it without even debating it; see, for example, Karger -v- Paul [1984] VR 161 and re Saunders and Malon (1987) 32 DLR (4<sup>th</sup>) 503.
  - (iii) Courts have in the past been reluctant to conclude, in the absence of express inclusion as an object of the power, that the donor of a fiduciary power impliedly intended to include the donee as one of its objects; see, for example, re Edward's Will Trusts (*supra*) and re Beatty (*supra*).

45. That last position appears to be weakened in recent years, in particular in the area of pensions; see, for example, Edge -v- Pensions Ombudsman at first instance at [1998] Ch 512 at 540. Whilst this is now irrelevant as an issue for occupational pension schemes, having been overtaken by statute<sup>2</sup> it is worth bearing in mind when reading those cases.

*Amending the Trust Deed to permit conflicts?*

46. This is as good a place as any to raise one point which is on the minds of many practitioners at present - can you amend a trust deed so that conflicts of interest are excused? Whilst I would not wish to be the first to offer a definitive answer, I would highlight one problem:

- (i) Powers of amendment are almost inevitably fiduciary. As such, they must be subject to the rules governing conflicts of interest.

47. So, if I am correct in my statement of the general principle it may be possible to exercise the power of amendment so as to permit conflicts of interest but it may prove extremely difficult to prove that the exercise of the power was “*fair and honest*” / “*reasonable and proper*” / “*not vitiated by the conflict of interests*”. In particular I have one logical problem with the exercise:

- (i) The exercise of the power is necessarily triggered by the conflict of interests - if there were no conflict, there would be no need to exercise the power as such.
- (ii) Therefore, how can it ever be said to not have been vitiated by the conflict?

An analogous rule is that a trustee cannot use the power to enlarge the class of objects of a dispositive power so as to include himself, because of the potential for conflict of interest; see, for example, re Skeats' Settlement (1889) 42 Ch.D. 522 at 527.

48. Given this it strikes me that any such exercise of the power would in practice have to be authorised by the Court.

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<sup>2</sup> Pensions Act 1995 s.39.

**CONCLUSION:**

49. My conclusion on the question of how absolute is the rule against conflicts of interest, in a nutshell, is as follows:
- (i) In the established categories the rule is genuinely absolute - at least to all practical purposes, and subject to the express or implied exceptions provided by the trusts themselves. The academic texts have tried to find some obscure situations where it might not be absolute, but on the whole I find their arguments either unconvincing, or so extreme as to merit wholesale discounting in the real world of advising clients.
  - (ii) Outside the established categories, and in cases of the 'fair dealing rule' I think that Hart J had it right in The Public Trustee -v- Cooper. The rule only requires that the trustees prove the 'fairness' or 'reasonableness' of the transaction in question.
  - (iii) The big problem for practitioners will be the individual analysis of your case in question to be certain that you do genuinely fall within (or without) the category and whether there is some exception implied by your personal trust deed.
50. This in turn leads to my meta-conclusion:
- (i) If in doubt, check with the court first.
- It costs less, and nobody likes to have their name as the title of a reported authority.

FENNER MOERAN  
3 Stone Buildings  
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