

**Conflicts and Confidentiality Are you culpable? . And what about your clients**

Conflicts from a Legal Perspective

Ian Greenstreet

Nabarro Nathanson



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**What will be covered?**

Acting for employer and trustees with informed consent.

Informed consent.

Addressing conflicts contractual terms and information barriers.

Professional standards/Morris/the Regulator.

Two actuaries?

Client conflicts.

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**Acting for both sponsoring employer and Trustees**

Terms of engagement

scheme actuary

Trustee appointment

Company appointment

June 11 2003 and SFO pressures.

Common staff/Chinese Walls.

Separate Appointments?

Ian Gault letter.

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## The Double Employment Rule

Actuary Fiduciary

undivided loyalty

Not put himself in position where duty to one client may conflict with other.

Informed consent

no inhibition

no actual conflict

Example Actual conflict

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## What is informed consent? (1)

Informed consent means consent given in the knowledge that there was a conflict between the parties and that as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of another. If the parties are content to proceed on this basis the solicitor may continue to act

*Clark v- Mouat*

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## What is informed consent? (2)

*Clarke v- Mouat*

Support for circumscribed expert role?

Need to obtain consent before conflict arises.

Morris/Regulator changes good opportunity to obtain informed consent.

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### Duty of Confidentiality (1)

Duty to keep confidential information gained during retainer confidential.

Not absolute

Whistle blowing/money laundering

Reconciling

Duty to keep affairs confidential

Duty to disclose all relevant information

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### Duty of Confidentiality (2)

Not relieved of duty to disclose merely because of conflicting duty to another client.

Information to one member of staff imputed to firm? Probably not position not clear.

Only information available to team disclosed?

Information taken to move within the firm?

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### Duty of Confidentiality (3)

Ian Gault solution change engagement letter.

May be circumstances when cannot disclose all information.

Actual conflict?

Actuary obliged to disclose information material to Trustees.

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## Information Barriers (1)

Use Information barriers specific situations

Mergers

Benefit re-design

Deals?

Prince Jeffri Bolkiah case

Former client entitled not to be exposed to any risk?

Will barriers work? (*Young v- Robson*

*Rhodes*)

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## Information Barriers (2)

Information Barriers should ideally be:

Established as part of structure

Physical separation of teams/teams small

Procedures for crossing barrier/records

Compliance officer monitoring

Disciplinary sanctions

No access to others files. Separate computer servers/passwords

Social contact?

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## Actual Professional Guidelines

Being updated? Law also applies.

5.2 must consider nature and extent of conflict of whether improper to advise one or both.

5.2 does not state should not act without informed consent.

5.3 Is 5.3 compatible with no inhibition principle?

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### Morris Report

- 1) All parties agree explicitly perceive no conflict before dual appointment accepted.
- 2) If any parties (employer, trustees, actuary) perceive material conflict, trustees have option to retain adviser.
- 3) The profession should develop Guidance when considering materiality of conflicts.

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### Regulator s Draft Funding Guidance (1)

SFO

Big issue for profession

June 11<sup>th</sup> 2003 and SFO shift balance power:

Employer to stand behind scheme (annuity buy-out basis)

Trustees and Employer agree funding rate regulator default

Right to fix retain that right

Prudent Funding

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### Regulator s Draft Funding Guidance (2)

Alternatives to complete separation of advice

- 1) Scheme actuary and team calculation service employer and advises employer but:

All advice oral and written to be disclosed

Role actuary restricted to independent expert

Cannot recommend different things to each parties

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### Regulator s Draft Funding Guidance (3)

- 2) As in 1) but colleague of actuary provides advice around scheme actuary s calculations  
Calculations to Trustees;  
But not the advice.
- 3) Actuary from a different firm appointed by employer to provide advice. Scheme actuary s team provides calculation service.

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### Regulator s Draft Funding Guidance (4)

Query whether actuary can perform expert role in (1) without breaching no inhibition principle .

OK if all parties agree explicitly performing a circumscribed role.

Trustees happy?

Employer happy?

Employers will drive charge.

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### Are your clients culpable?

Worse for your clients. Multiple Hats

But don t forget

Purpose of Fund to provide benefits for employees of undertaking

Common interest

Duties of Employees:

Wider view

Narrow view

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### Edge To the Rescue

must, for example, always have in mind the main purpose of the scheme to provide retirement and other benefits for employees of the participating employers. They must consider the effect that any course which they are minded to take will have on the financial ability of the employers to make the contributions which that course will entail.

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### Edge To the Rescue (cont )

They must be careful not to impose burdens which imperil the continuity and proper development of the employer's business or the employment of members who work in the business. The main purpose of the scheme is not served by putting the employer out of business .

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### Methods Dealing with Conflicts

Hat box (still ok?)  
Hat box and advice (still ok?)  
Hat box and advice and independent trustee.  
Delegation to sub-committee.  
Delegation power of attorney independent trustee.  
Resignation as trustee.  
Court directions.

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## The New Pro-active Trustee

### Opra Note 10

Avoid conflicts

Senior Executives cannot disregard information

Legal advice

Declare interest and consider position

Opt-out of decision

Clearance    Actively negotiate    FRS17

Funding.

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## Conclusion

Finance Directors will resign Trusteeship  
on Mass.

Pro-active role for Trustees makes it  
more difficult Advisers to act for both  
employer and Trustees.

Same applies to Solicitors.

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