


A non-actuarial view of conflicts

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"Trustees appointed by management frequently hold key positions within the company, whilst trustees appointed by members may feel obligations to those who appoint 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 modern world, conflicts of interest cannot be avoided. They can, however, be managed. As long as trustees are aware of the potential for conflict and know what is required of them as trustees, they will be able to carry out their duties to the best of their abilities."

Professor Roy Goode 1993

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When will a conflict arise?

Broadly, where:

1. duties owed by the trustees to the members conflict with their duties to third parties –
 - trustees who are also company directors;
2. duties owed by the trustees to the members conflict with the trustees' personal interests –
 - trustees who are also members.

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Why are conflicts relevant in today's climate?

- Increased circumstances in which conflicts can arise and increased focus on those circumstances –
 - scheme specific funding;
 - trustees on the company's board may not be able to act in the best interests of scheme members and shareholders.
- Trustees are required to have greater knowledge and understanding of situations in which conflicts arise -
 - is part time trustee still appropriate?

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Defined benefit v defined contribution schemes

- trustees of both DB and DC Schemes need to be aware of conflict issues. However, the risk for trustees of DB schemes is greater.

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Examples of risk areas

- employer corporate transactions which affect the scheme and its members
- scheme specific funding
- changes to scheme's benefit structures with the effect of increasing member benefits
- changes to scheme's investment policies
- exercise of discretions as to early/late retirement
- merger of pension schemes
- allocation/refunds of surplus

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What does the Pensions Regulator say about conflict?

- Guidance from the Pensions Regulator for trustees:

"If a real conflict of interest about the Scheme occurs it may not be proper to take a decision about a scheme even though you have a duty to do so. It is important that you recognise a conflict of interest and take steps to deal with it, for example, by taking independent advice. In some cases, it may even be appropriate to absent yourself from the decision making process".
- TPR's clearance application form requires trustees to disclose conflicts of interest and explain how they will be dealt with.

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What are the consequences of acting when conflicted?

- The transaction entered into by the trustees may be voidable and liable to be set aside.
- Each trustee will be bound to account for any profit that he has received.
- A principal/beneficiary is entitled to equitable compensation for loss caused by the trustees acting in conflict of interest.

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What happens if the conflict is not adequately addressed?

- The trustees risk acting in breach of their fiduciary duty to act in the best interest of members.
- If the trustees are also directors, they also risk acting in breach of their fiduciary duties as directors.
- Breach of fiduciary duty will expose the trustees and directors to personal liability – but exemption clauses may apply.

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The exceptions: when is conflict allowed?

- Trustees obtain full consent of the person to whom the duty is owed – usually the members (difficult to achieve).
 - When obtaining consent, trustees need to provide full and frank disclosure of all material facts.
- The trust deeds and rules authorise trustees to act in conflict.

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The exceptions: when is conflict allowed?
Cont/d

- A trustee will not breach his fiduciary duty if the fiduciary position was created with the knowledge that the trustee will inevitably be placed in a position of conflict so there is an implied authorisation of the conflict. (Sargeant v National Westminster Bank Plc – not a pensions case.)
- Where the scope of fiduciary duties usually owed by the trustees is qualified or limited
- Court approval in respect of a transaction that would otherwise be entered into by the trustees in breach of their fiduciary duty.

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The exceptions: when is conflict allowed?
Cont/d

- Section 39 of the Pensions Act 1995, which provides:

"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".

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How should conflicts be managed?

1. Understand and identify when conflicts may arise
2. Review the trust deed and rules:
 - Consider whether the rules enable the trustee body to make decisions in the event that individual trustees cannot act due to conflict.
 - If no such provision exists – consider amending the trust deed and rules.
 - There may be difficulties with introducing such a provision.

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How should conflicts be managed? Cont/d

3. Consider being absent from a particular decision where actual conflict exists and such conflict is not authorised.
4. The trustees should consider establishing a formal set of protocols setting out how they will deal with potential and actual conflicts of interest.
5. Decisions and actions taken by trustees should be well documented, especially where any trustee has been in a position of conflict (should record how the conflict has been managed).


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How should conflicts be managed? Cont/d

6. When conflict issues arise take advice as to the best course of action.

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