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Circumventing *Schmidt v Rosewood*: a beneficiary's right to disclosure under Data Protection legislation

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Abstract

This article considers the Court of Appeal's decision in *Dawson-Damer and others v Taylor Wessing LLP* [2017] EWCA Civ 74 regarding a beneficiary's right to obtain disclosure of information in relation to a Bahamian trust from the trust's English lawyers. It will address the extent to which this decision erodes *Schmidt v Rosewood* principles of disclosure to beneficiaries and aims to provide some practical guidance to trustees faced with a subject access request under Data Protection legislation.

Introduction

The Court of Appeal's decision in *Dawson-Damer and others v Taylor Wessing LLP* [2017] EWCA Civ 74 gives beneficiaries an alternative route to disclosure of information relating to trusts. The extent to which this decision departs from established *Schmidt v Rosewood* principles of disclosure may cause concern to trustees and their lawyers.

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Dawson-Damer v Taylor Wessing

In *Dawson-Damer v Taylor Wessing* the Court of Appeal held that an English firm of solicitors acting for a Bahamian trustee was required to give disclosure of information relating to a trust governed by Bahamian law to a beneficiary of the said trust under the Data Protection Act 1998 (DPA). It was no answer to the request for information to say that under Bahamian trust law (section 83 of the Bahamian Trustee Act 1998) the trustee could not be compelled to provide such disclosure to the beneficiary.

The case concerned a discretionary trust (the Glenfinnan settlement, the 'Trust'), the sole trustee of which, Grampian Trust Co Ltd, was resident and incorporated in the Bahamas (the 'Trustee').

One of the beneficiaries of the Trust, Mrs Dawson-Damer, sought to challenge the validity of appointments of approximately $402 million out of the Trust to be held on new discretionary trusts for the benefit of the other discretionary beneficiaries of the Trust.

In August 2014, Mrs Dawson-Damer and her two children served a subject access request (SAR) under section 7 of the DPA on Taylor Wessing, the Trustee's solicitors.

Section 7 of the DPA gives persons (referred to as 'data subjects') the right to access personal data held by the 'data controller' (in this case Taylor Wessing). The data subject has the right to be informed whether

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personal data are being processed and if so, to be provided with a description of the personal data, the purposes for which they are being processed, and the recipients or classes of recipients to whom they are or may be disclosed. The data subject then has the right to have communicated to him/her in an intelligible form the information constituting the personal data and the source of those data, subject to section 8(2) of the DPA which is discussed further below.

A request under section 7 of the DPA must be complied with provided the request is made in writing and the fee of £10 is received (section 7(2) of the DPA).

Taylor Wessing refused to comply with the SAR on the basis of the legal professional privilege exemption contained in Paragraph 10 of Schedule 7 to the DPA (the 'Legal Professional Privilege Exemption').

In January 2015, Mrs Dawson-Damer and her two children commenced proceedings in England for an order compelling Taylor Wessing to comply with the request.

In March 2015, Mrs Dawson-Damer commenced proceedings in the Supreme Court of the Bahamas against the Trustee challenging, *inter alia*, the appointments.

At first instance HHJ Behrens dismissed Mrs Dawson-Damer's application to compel compliance with the SAR for three primary reasons:

- HHJ Behrens construed the Legal Professional Privilege Exemption purposively to include all documents in respect of which the Trustee would be entitled to resist compulsory disclosure in the Bahamian proceedings, in this respect section 83 of the Bahamian Trustee Act 1998 was of significance.
- HHJ Behrens took the view that it would involve 'disproportionate effort' within the meaning of section 8(2) of the DPA to determine which documents fell within the Legal Professional Privilege Exemption, and for that reason Taylor Wessing was relieved of its obligation to comply with the SAR.
- HHJ Behrens had a discretion under section 7(9) of the DPA to refuse to make an order compelling compliance with the SAR if the request was made for an improper purpose of assisting Mrs Dawson-Damer in the Bahamian proceedings. In reaching this conclusion, HHJ Behrens relied on paragraph 27 of the judgment of Auld LJ in *Durant v Financial Services Authority* [2004] FSR 573.

These three conclusions were challenged on appeal, in which the Information Commissioner intervened.

The Court of Appeal decision

Legal Professional Privilege Exemption

The Legal Professional Privilege Exemption provides that personal data are exempt from disclosure:

> if the data consist of information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications, could be maintained in legal proceedings.[1]

There were two questions for the Court of Appeal: (i) should legal professional privilege be determined in accordance with English or Bahamian law; and (ii) should the Legal Professional Privilege Exemption be interpreted purposively to include documents exempt from disclosure under trust law principles.

The Court of Appeal interpreted 'legal proceedings' to refer to those taking place in the UK. The Court of Appeal reasoned that Parliament does not, ordinarily, intend to legislate for events which occur outside the UK. The Legal Professional Privilege Exemption was enacted pursuant to Article 13(1)(g) of the Directive which gives Member States the option to safeguard rights and freedoms of others. Arden LJ held at paragraph 42 of the judgment that those rights and freedoms must relate to rights and freedoms recognized

1. Para 10 of sch 7 to the DPA.

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by the member state's own law and given that the English courts will apply English law to questions of privilege, the Legal Professional Privilege Exemption had to be construed as referring to privilege under English law.

The interaction between the Legal Professional Privilege Exemption and trust law principles, namely those explained in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, was examined at paragraphs 46–54 of the Court of Appeal's judgment.

The Court of Appeal held that legal professional privilege did not extend to include trust law principles (those stated in *Schmidt v Rosewood* and enacted in section 83 of the Bahamian Trustee Act 1998) permitting trustees to withhold disclosure. This conclusion is perhaps not that surprising given the wording of the DPA: section 27(5) of the DPA expressly provides that the right to disclosure under section 7 of the DPA applies notwithstanding any rule of law prohibiting disclosure other than where covered by an exemption in the DPA. While it may be possible to characterize trust law principles enabling trustees to withhold disclosure as a type of privilege, those principles do not constitute legal professional privilege as required by the relevant exemption.

No other exemption was suggested to apply, and it is doubtful that any other exemptions could have been applied. The 'personal, family and domestic use exemption',[2] which it is sometimes suggested could apply to trusts, can only be invoked by individuals, not by companies (and therefore not by trust companies). Furthermore, if a trustee acts in the course of business the exemption will not apply since 'that exception must . . . be interpreted as relating only to activities which are carried out in the course of private or family life of individuals' (Case C-101/07 *Bodil Lindqvist* ECJ November 2003).

The personal, family and domestic use exemption may, however, apply to administrators of deceased estates.[3]

The Court dismissed the fact that Taylor Wessing was the Trustee's agent as being of '*little relevance*'. Arden LJ said that 'As a firm of solicitors, Taylor Wessing can and must claim privilege to which the client is entitled'. Given that the client (the Trustee) was entitled to privilege as a matter of Bahamian law, arguably as the Trustee's agent Taylor Wessing ought to have been able to claim privilege according to Bahamian law. That said, before an English court the Trustee would have been limited to claiming privilege under English law.[4]

The extent to which Taylor Wessing can claim privilege on behalf of its client is likely to be limited given that ordinarily privilege is held for the benefit of the beneficiaries of the trust and is not, therefore, an answer to a beneficiary's demand for disclosure against a trustee.[5] Whether particular documents were subject to legal professional privilege under English law was outside the scope of the appeal and is to be remitted to the High Court.

The outcome of *Dawson-Damer v Taylor Wessing* is alarming for trustees and trust lawyers. It seems inherently wrong that data protection legislation could be used to circumvent privilege (both legal professional privilege and privilege under trust law) belonging to a party to foreign litigation. At first instance, HHJ Beherns held that in reality proceedings against the Trustee could only take place in the Bahamas. It was, therefore, sensible to have regard to Bahamian law preventing disclosure. It is doubtful that Parliament intended to circumvent a party's right to claim privilege in foreign proceedings, or to circumvent trust law principles of disclosure.

Outside data protection legislation, the use of the English courts to circumvent foreign restrictions on disclosure is guarded against by section 3 of the Evidence (Proceedings in Other Jurisdiction) Act 1975. It is regrettable that as matters stand the DPA allows foreign litigants to use the English courts as a means of obtaining disclosure in support of foreign

2. s 36 of the DPA.
3. Williams, Mortimer and Sunnucks on Executors, Administrators and Probate (30th edn, 2015) 49A-64 and 49A-65.
4. *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, 2016) 7-022.
5. *Lewin on Trusts* (19th edn, 2016) 23-048.

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proceedings, which they could not have otherwise obtained in the foreign litigation.

Disproportionate effort

Section 8(2)(a) of the DPA provides that a data controller's obligation to communicate personal data to the data subject must be complied with by supplying the data subject with a copy of the information in permanent form unless the supply of such a copy is not possible or would involve disproportionate effort.

The Court of Appeal confirmed that section 8(2)(a) of the DPA would be invoked if the process of searching for the information involved disproportionate effort: section 8(2)(a) was not confined to the process of producing copy documents.[6] It is a welcome confirmation to data controllers that the requirement of proportionality applies at every stage of the disclosure process.

Despite the persuasive submission that compliance by Taylor Wessing would involve disproportionate effort because a legally qualified person would need to review each of the documents relating to Mrs Dawson-Damer to determine whether privilege applied, the Court of Appeal was not convinced that Taylor Wessing had discharged the burden of proving that compliance with the SAR would require disproportionate effort. The Court of Appeal said that Taylor Wessing 'must produce evidence to show what it has done to identify the material and to work out a plan of action'. It was not permissible to claim that it was too difficult to provide disclosure, without trying. What amounts to disproportionate effort will be an issue to be determined on the facts of every case. Undoubtedly, further guidance on this issue would be welcome to practitioners faced with SARs.

The volume of documentation that Taylor Wessing will be required to review was not capable of determination at the time of the Court of Appeal hearing, since it was unclear whether Taylor Wessing's paper files constituted a 'relevant filing system' for the purposes of section 1 of the DPA.[7] If those files did not fall within the definition of a 'relevant filing system' there would be no obligation on Taylor Wessing to search those files since the information contained therein is outside the definition of 'data' under the DPA. This issue is to be remitted to the High Court. If Taylor Wessing's paper files do not constitute a 'relevant filing system' this may significantly limit the scope of the exercise Taylor Wessing is required to carry out. As more firms and companies switch to electronic filing systems this limitation to the DPA may be of little practical assistance.

Collateral intention

The court has a discretion under section 7(9) of the DPA to order a data controller that has failed to comply with a SAR in accordance with the DPA, to comply with the request.

The issue on appeal was whether the court could exercise its discretion under section 7(9) of the DPA to refuse the application because Mrs Dawson-Damer's real motive was to use the information obtained for legal proceedings against the Trustee in the Bahamas.

The Court of Appeal rejected the possibility of a 'no other purpose' rule: a data controller is obliged to comply with a SAR even if the SAR is made for an ulterior purpose (some purpose other than verifying or correcting data held about him/her). Arden LJ left open the possibility of the court refusing to make an order under section 7(9) if it could be established that the application was an abuse of the court's process, to be established according to settled principles.

Less than a month after the Court of Appeal handed down its judgment in *Dawson-Damer v Taylor Wessing*, this conclusion was reinforced by a second Court of Appeal decision: *Ittihadieh v 5-11 Cheyne Gardens RTM Co Ltd* [2017] EWCA Civ 121 at [85]–[89]. The second Court of Appeal decision of 2017 on this issue gives a little more scope for

6. *Dawson-Damer and others v Taylor Wessing LLP* [2017] EWCA Civ 74 at [76].

7. A relevant filing system is defined as 'any set of information . . . structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible'.

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flexibility. Lewison LJ said that when exercising the court's discretion under section 7(9) of the DPA there was a balance to be struck between the rights of the data subject to have access to his/her personal data, and the interests of the data controller. Lewison LJ at paragraph 110 went on to consider some of the factors that the court may take into account when exercising its discretion under section 7(9), including:

- Whether there is a more appropriate route to obtaining the requested information, such as disclosure in legal proceedings.
- The nature and gravity of the breach.
- The reason for making the SAR.
- If the application is abusive, eg if the SAR is intended to impose a burden on the data controller or is procedurally abusive.
- If the personal data is of no real value to the data subject.

As matters stand, there is a risk that an influx of SARs will grind law firms to a halt as they divert resources to search for and review personal data held on behalf of their clients. Perhaps, following Lewison LJ's remarks, the most welcome next step would be for the court to readdress the balance between the data controller's rights and the rights of the data subject.

A costly request

Dawson-Damer v Taylor Wessing demonstrates that complying with a SAR is likely to be a costly exercise; but refusing to comply could be even more costly. If a data controller incorrectly objects to provision of information and the matter comes before the courts, the data controller will not only have to incur the expense of complying with the SAR but they will also shoulder their own legal costs and the other side's legal costs.

There may, however, be a glimmer of hope. In *Ittihadieh*, the Court of Appeal fired a warning shot to litigants that engage in 'low-level attritional warfare'[8] against the relevant data controller: 'If the court considers that what has been achieved by the litigation is out of all proportion to the costs of achieving it' the court will be entitled to reflect that in a costs order. Accordingly, the Court of Appeal upheld a 25 per cent reduction of the successful party's costs. The data controller argued that the first instance costs order did not go far enough and that the applicant ought to have been ordered to pay the data controller's costs. The Court of Appeal acknowledged that the reduction was a matter of discretion, but said that it would be 'a very strong thing to order the successful party to pay the unsuccessful party's costs'.

Compliance with a SAR: what are beneficiaries entitled to?

The Privy Council decision in *Schmidt v Rosewood*, to a large extent, settled the principles concerning disclosure by trustees to beneficiaries on demand, but what remains of such principles following *Dawson-Damer v Taylor Wessing*?

Trustee's reasons

The general rule is that trustees are not bound to give reasons for their decisions, as established in *Re Londonderry's Settlement* [1965] Ch 918. Trustees are, therefore, entitled to withhold disclosure of their deliberations as to the manner in which they should exercise their powers and discretions; their reasons for the exercise of their powers and discretions; and more contentiously, material upon which such reasons were or might have been based and internal documents such as correspondence created during the course of administration.[9]

The DPA entitles individuals to access their '*personal data*' which is defined in section 1(1) of the DPA as including:

8. *Ittihadieh v 5-11 Cheyne Gardens RTM Co Ltd* [2017] EWCA Civ 121 at [164] quoting HHJ Harris QC, [29].
9. *Re Londonderry's Settlement* [1965] Ch 918, 939–40.

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any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of that individual.

The definition of 'personal data' gives rise to real concern that beneficiaries will be able to obtain disclosure of trustees' deliberations and reasons for their decisions.

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In Joined Cases C-141/12, C-372/12 *YS v Minister voor Immigratie* [2015] 1 CMLR 18 the European Court of Justice held that legal analysis does not constitute personal data for the purposes of the DPA. The Court of Justice's reasoning at [40], [45] and [46] was as follows:

> . . . such a legal analysis is not information relating to the applicant for a residence permit, but at most. . .is information about the assessment and application by the competent authority of that law to the applicant's situation, that situation being established inter alia by means of the personal data relating to him which that authority has available to it.
>
> In contrast to the data relating to the applicant for a residence permit which is in the minute and which may constitute the factual basis of the legal analysis contained therein, such an analysis, as the Netherlands and French Governments have noted, is not in itself liable to be the subject of a check of its accuracy by that applicant and a rectification under article 12(b) of Directive 95/46.
>
> In those circumstances, extending the right of access of the applicant for a residence permit to that legal analysis would not in fact serve the Directive's purpose of guaranteeing the protection of the applicant's right to privacy with regard to the processing of data relating to him, but would serve the purpose of guaranteeing him a right of access to administrative documents, which is not however covered by Directive 95/46.

There may be scope for the reasoning in *YS v Minister voor Immigratie* to be applied by analogy to trustees' reasoning. If documents containing the trustee's deliberations could be characterized as administrative documents, arguably these fall outside the scope of the DPA. After all, the purpose of the DPA is not to enable beneficiaries to check the accuracy of a trustee's decision-making process, but to check whether the personal data on which a decision is based are accurate.

To argue the contrary, the Information Commissioner's Office (ICO) guidance on 'Determining what is personal data'[10] at pages 18–20 discusses whether minutes of meetings contain personal data and concludes that such documents may contain personal data of persons discussed at the meeting and of those persons attending the meeting. This, *prima facie*, applies to minutes of trustee meetings.

To what extent, if at all, trustees' deliberations are disclosable under the DPA will be a question that needs to be determined if the Court of Appeal's decision in *Dawson-Damer v Taylor Wessing* stands.

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Beneficiary confidentiality

In *Schmidt v Rosewood* the Privy Council at [49] endorsed the need to protect confidentiality of communications between the trustee and other beneficiaries. The right to protect the confidentiality of others remains intact under data protection legislation.

10. <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf> accessed 25 April 2017.

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Section 7(4) of the DPA permits a data controller to withhold information if disclosure would not be possible without disclosing information relating to another individual, unless that other individual consents or it is reasonable to comply without obtaining such consent. '*Information relating to another individual*' includes information identifying the individual as the source of the personal data sought by the SAR. If the information can be communicated without identifying the other person the data controller must do so.

The right to withhold such data is not an absolute right, if consent cannot be obtained for disclosure the data controller must conduct a balancing exercise to determine whether to disclose such information without consent.

Section 7(4) of the DPA will be of particular importance to trustees: it enables trustees to keep personal information relating to other beneficiaries confidential; to keep the source of data confidential; and to keep the identity of the recipient of the personal data confidential.[11] This may be particularly helpful to avoid disharmony between beneficiaries.

Section 7(4) of the DPA could also be relied on to withhold disclosure of settlor's letters of wishes[12] on the grounds that such letters contain the personal data of the settlor or the joint personal data of the settlor and the beneficiaries. Support for this proposition can be found in *R (on the application of Lord) v Secretary of State for the Home Department* [2003] EWHC 2073 in which it was common ground that disclosure of reports on prisoners would:

> necessarily involve disclosure of information about the authors of those reports – namely their identities and the opinions they hold about the claimant, thus invoking section 7(4) of the DPA.

Could such reasoning extend further to protect disclosure of trustees' deliberations and reasons for their decisions given that such documents contain the identity of individuals making decisions and their opinions? In *Ittihadieh*, the possibility of staff evaluations being the personal data of the evaluator was raised at paragraph 159 of the judgment. There may, however, be a distinction to be drawn between an individual giving the data controller's views (the trustee's views), and an individual giving his or her personal view. The latter may be protected but the former may not.[13]

Discretion to withhold disclosure

Under trust law principles, there are categories of documents that should ordinarily be disclosed (such as trust accounts) and those which ordinarily should not be (such as letters of wishes), but ultimately the trustee and the court have a discretion. For example, non-disclosure of information relating to trust assets may be justified if there is a hostile attack on the trust. A beneficiary's motive for requesting disclosure will not usually be relevant to the trustee's decision to make or withhold disclosure, but it can be taken into consideration as part of the exercise of discretion.

The DPA removes this discretion when answering SARs, instead the question is whether the court can be persuaded to exercise its discretion under section 7(9) of the DPA. In *Dawson-Damer* the Court of Appeal flatly rejected the submission that it could refuse to make an order under section 7(9) because such disclosure was not in accordance with the governing law of the trust. Given Lewison LJ's comments in *Ittihadieh* as to the factors relevant to consider under section 7(9) of the DPA, the Court of Appeal's decision in *Dawson-Damer v Taylor Wessing* may not be the last word on the subject.

11. *Durrant v Financial Services Authority* [2004] FSR 573 at [66] confirms that information relating to another person can include the identity of the person as the source, recipient or subject matter of the personal data.
12. Letters of wishes are generally not disclosable under English trust law: *Breakspear v Ackland* [2008] EWHC 220.
13. ICO's guidance '*Determining What is Personal Data*', 20: <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf> accessed 25 April 2017.

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Disclosure of documents

The DPA does not give persons the right to copies of documents in which their personal data is contained. In *Ittihadieh* at [93] Lewison LJ observed that many individuals that make SARs '*are, in truth, looking for copy documents*'. In his judgment, such individuals were '*aiming at the wrong target*' because the obligation on data controllers is an obligation to supply the information itself '*not an obligation to supply documents*'.

If beneficiaries want copies of documents relating to the trust they will be confined to usual trust principles. This is, perhaps, the most significant limitation on the scope of disclosure obligations under the DPA.

Offshore jurisdictions: statutory response

Jersey has enacted the Data Protection (Jersey) Law in much the same terms as the English DPA. Significantly, the Data Protection (Subject Access Exemptions) (Jersey) Regulations 2005 provide that, in the case of a trust the proper law of which is the law of Jersey, personal data which can be withheld pursuant to Article 29 of the Trusts (Jersey) Law 1984 is exempt from disclosure pursuant to Article 7 of the Data Protection (Jersey) Law 2005. In the case of a trust the proper law of which is the law of a jurisdiction other than Jersey, personal data which the relevant data controller is authorized by or under the law of that jurisdiction to withhold, or is prohibited from disclosing under the law of that jurisdiction, shall be exempt from disclosure pursuant to Article 7 of the Data Protection (Jersey) Law 2005.

If a request under Article 7 of the Data Protection (Jersey) Law 2005 had been made in relation to a trust governed by Bahamian law, section 83 of the Bahamian Trustee Act 1998 would have prevailed and entitled the trust's (Jersey) lawyers to withhold information contained in letters of wishes or any document disclosing the trustee's deliberations.

If a request under Article 7 of the Data Protection (Jersey) Law 2005 is made in relation to a trust governed by English law, will personal data be exempt from disclosure on the basis that the trustee is entitled to withhold disclosure under English trust law principles? Alternatively, will the trustee be compelled to give disclosure because according to *Dawson-Damer v Taylor Wessing* the DPA prevails over trust law principles? The DPA only applies to data controllers with an establishment in the UK or data processed within the UK (section 5 of the DPA). For that reason, it appears that applying English law, data controllers outside the UK can rely on any right to withhold disclosure under English trust law principles since these will not be qualified by the DPA.

A similar exemption applies in Guernsey: The Data Protection (Subject Access Exemptions) Guernsey Order 2015.[14]

As a result of the decision in *Dawson-Damer v Taylor Wessing*, Jersey and Guernsey trustees may be reluctant to engage English lawyers due to the risk that a SAR will be made under the DPA.

Conclusion

At first glance, *Schmidt v Rosewood* principles of disclosure to beneficiaries have taken a severe blow, but it must be remembered that trust law still governs a beneficiary's right to obtain documents, rather than information. Beneficiaries who seek disclosure of documents by making a SAR will be '*aiming at the wrong target*'.

Beneficiaries who seek disclosure of documents by making a SAR will be 'aiming at the wrong target'

In 2018 the Data Protection Directive will be replaced by the General Data Protection Regulation, but this is

14. Data protection legislation exists in the Bahamas and the Isle of Man. Bermuda has enacted the Personal Information Protection Act 2016. No such legislation exists in the BVI and although a Data Protection Bill has been proposed in the Cayman Islands it has not been enacted.

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set to be even more onerous than the current data protection legislation. Unless *Dawson-Damer v Taylor Wessing* is successfully appealed to the Supreme Court, the Court of Appeal's decision will have the effect of eroding English law restrictions on disclosure to beneficiaries and make the UK a less attractive forum for offshore trustees to take legal advice.

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