A Beneficiary's Right to Disclosure under Data Protection Legislation

1. The Court of Appeal's decision in *Dawson-Damer v Taylor Wessing* [2017] EWCA Civ 74 gives beneficiaries an alternative route to disclosure of information relating to trusts, which may cause concern to trustees and their lawyers.

2. 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 beneficiaries of the trust pursuant to UK Data Protection Act 1998 ("**DPA**"). The beneficiaries requested the information in the context of a challenge by one of the beneficiaries to the trustee's appointment of approximately $402 million out of the trust.

3. Section 7 of the DPA gives persons (referred to as 'data subjects') the right to access personal data held by the 'data controller'. For a fee of £10 the data controller must inform the data subject whether their personal data are being processed and if so, for what purposes and identify the recipients of the personal data. Importantly, the data subject has the right to have the information constituting their personal data communicated to them in an intelligible form.

The DPA as an aid to hostile litigation

4. The decision in *Dawson-Damer* enables beneficiaries to obtain information not ordinarily available under *Schmidt v Rosewood* principles, or similar rules in the jurisdiction in which the trust is administered. The Court of Appeal held that litigation privilege did not include documents exempt from disclosure under trust law principles (at [54]) and expressly stated that it would not be correct to refuse to exercise the court's discretion to order compliance "*because this disclosure could not be obtained from the trustees under the governing law of the trusts*" (at [113])

5. The DPA entitles individuals to access their 'personal data' which is defined in section 1(1) of the DPA as including "*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 concerns that beneficiaries will be able to obtain disclosure of trustee's deliberations and reasons for their decisions contrary to the principles established in *Re Londonderry's Settlement*. In May 2018 the definition of 'personal data' will change when the General Data Protection Regulations (the "GDPR") come into force in England and Wales. The definition contained in Art 4(1) of the GDPR omits reference to opinions or intentions but is a more expansive definition than that contained in the DPA, and as such is likely to encompass intentions and opinions.

6. 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. There may be scope for the reasoning in *YS v Minister voor Immigratie* to be applied by analogy to trustee's 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.

7. Significantly, such information can be obtained in support of foreign litigation: a data controller is required to comply with a request under the DPA even if it is made for an ulterior purpose (*Dawson-Damer v Taylor Wessing* at [112]). This conclusion was reinforced in *Ittihadieh v 5-11 Cheyne Gardens RTM Co Ltd* [2017] EWCA Civ 121 at [85]-[89]. 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), which included the reason for making the request, the value of the information to the data subject, and the possibility that the request is abusive.

Limitations of the DPA

8. The most significant limitation of the DPA is that it entitles data subjects to information not documents. Beneficiaries seeking copies of documents have been warned that they are '*aiming at the wrong target*' by making a DPA request (*Ittihadieh v 5-11 Cheyne Gardens* per Lewison LJ at [93]).

9. The DPA itself contains exceptions to provision of information. In *Dawson-Damer*, Taylor Wessing argued that the litigation privilege exception applied. The Court of Appeal held that: litigation privilege did not include documents exempt from disclosure under trust law principles; litigation privilege had to be determined in accordance with English law despite the substantive proceedings taking place in the Bahamas; and Taylor Wessing had not discharged the burden of establishing that a privilege review by a legally qualified person would involve disproportionate effort so to relieve Taylor Wessing from the need to comply with the request.

10. 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.

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

12. In *R (on the application of Lord) v Secretary of State for the Home Department* [2003] 35 EWHC 2073 it was common ground that disclosure of reports on prisoners necessarily involved disclosure of information relating to the authors

of the reports and thus involved the exception in section 7(4) of the DPA. It could be argued that such reasoning extends to disclosure of trustee deliberations.

Data Protection Legislation in Jersey, Guernsey and the Cayman Islands

13. Various jurisdictions have enacted carve outs to restrict provision of information where it would be contrary to trust principles of disclosure. In Jersey, the Data Protection (Subject Access Exemptions) (Jersey) Regulations 2005 permit information to be withheld if such information could be withheld pursuant to Article 29 of the Trusts (Jersey) Law 1984 or similar rules contained in the proper law of the Trust. There is similar legislation in Guernsey: the Data Protection (Subject Access Exemptions) Guernsey Order 2015. The Data Protection Law 2017 in the Cayman Islands (not yet in force) provides a wide exemption which catches information in relation to a structure or arrangement that is an ordinary trust or a trust established pursuant to the Trusts Law (2011 Revision) (section 30 of Data Protection Law 2017).

The Future

14. As mentioned above, in May 2018 the GDPR will come into force in England and Wales.[1] The provisions which allow data subjects to access their personal data will remain largely the same. One notable difference, however, is that a data controller will be entitled to refuse to comply with a request or to charge a fee for compliance if the request is manifestly unfounded or excessive and, in particular, repetitive.

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[1] The Data Protection Bill can be found at: https://publications.parliament.uk/pa/bills/lbill/2017-2019/0066/lbill_2017-20190066_en_1.htm