Disclosure: Trustees, advisers, and data protection

Adam Carvalho and **Richard McDermott** discuss the implications of the decision in *Dawson-Damer* for trust law principles

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Readers will be aware that individuals may obtain the disclosure of information relating to trusts of which they are beneficiaries by invoking the inherent jurisdiction of the courts (*Schmidt v Rosewood* [2003] 2 AC 709). It may come as a surprise, however, that the Data Protection Act 1998 (DPA) provides an alternative – and potentially wider – route to obtaining disclosure.

The Court of Appeal's decision in *Dawson-Damer v Taylor Wessing* [2017] EWCA Civ 74 clarifies the applicable principles. This summary will focus upon aspects of the judgment of particular interest to private client lawyers. Although a full account is not possible in this article, it is necessary first to summarise certain provisions of the DPA:

- The DPA enables a person ('data subject') to make a 'subject access request' (SAR) for 'personal data' which is in the possession of a 'data controller'. Law firms are, for these purposes, data controllers.
- 'Personal data' means data relating to an individual who can be identified from it. It includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

Once a data controller has received an SAR it must comply within 40 days. If a data controller fails to do so, the courts may order compliance. The data controller is not entitled to its costs for complying with an SAR; the data subject must only pay a £10 fee (which may be abolished next year).

Inevitably, complying with an SAR will involve a considerable amount of work. It has been suggested that the cost of compliance is the price that data controllers pay for processing data (though this may not provide much comfort). The claimants in *Dawson-Damer* are beneficiaries of Bahamian trusts. Taylor Wessing act (or acted) for the trustees. There is currently litigation regarding certain appointments made in relation to the trusts. The claimants sought disclosure of trust documentation.

It is important to note that the Bahamian Trustee Act enhances Bahamian trustees' discretion to refuse the disclosure of trust documents. It also removes from the Bahamian courts any inherent discretion to order disclosure.

Faced with this statutory obstacle the claimants made SARs to Taylor Wessing (as the trustees' advisers). Taylor Wessing refused to provide the requested information and the claimants applied to court for an order to compel compliance.

Taylor Wessing resisted the SAR on three grounds:

- Complying with the SAR would involve 'disproportionate effort';
- The purpose of the request was to obtain material to use in the Bahamian litigation; and
- The documents it held were subject to legal professional privilege (LPP).

Compliance with SAR

Lady Justice Arden concluded that Taylor Wessing had failed to comply with the SAR (and should be ordered to do so).

First, while the DPA exempts compliance with SARs if this 'would involve disproportionate effort', the bar in this respect is high. Taylor Wessing had not given any explanation of the steps it had taken and had not therefore discharged its obligations under the DPA.

Second, a data subject's motivation will not usually be a basis for withholding disclosure.

An application may be refused if it is an abuse of process, but the mere fact that there may be a collateral purpose (e.g. obtaining documents for litigation) is not sufficient.

Third, the DPA provides that data controllers can refuse to disclose personal data if it is subject to LPP. Therefore, the starting point is that legal advice provided to a client is exempt from disclosure under the DPA. However, legal advisers will often hold in their records documents which are not subject to LPP but still would not normally be disclosed to a beneficiary.

For example, it is usually taken as read by private client lawyers that records of trustees' deliberations regarding the exercise of their discretions, letters of wishes, and other such documents are not *prima facie* disclosable to beneficiaries, but LPP may well not attach to such documents.

The question before the court was: should a beneficiary be able to obtain, via the DPA, disclosure of such documents, even though this would appear to allow beneficiaries to circumvent trust law principles by making an SAR? Or, as Taylor Wessing argued, should the DPA be subject to a purposive interpretation such that documents within a trustee's 'right of non-disclosure' are also exempt from disclosure under the DPA?

Arden LJ concluded that the purposive interpretation cannot be justified: 'The DPA does not contain an exception for documents not disclosable to a beneficiary of a trust under trust law principles.' In other words, unless LPP can be established (or there is another exemption available under the DPA), documents which beneficiaries would not be able to obtain from trustees under trust law principles may have to be provided to them by the trustees' advisers if an SAR is made.

This decision clearly has wide-ranging consequences and it will be interesting to see how the industry reacts in the coming weeks and months.

Increased probate fees

A more short-term (but equally important) concern is the forthcoming rise in probate fees. Readers will no doubt be aware of the extent of the new fees, the highest of which (£2,000 for estates worth over £2m) represents an increase of 9,202 per cent, and will also be aware of (and may have contributed to) the efforts to lobby against the changes. To our great dissatisfaction those efforts appear to have been in vain.

The changes are due to come into effect in May, although the exact date is still unclear, and practitioners will no doubt urgently be putting the finishing touches to probate applications with a view to beating the hike. It is at least of some comfort that the Probate Registry has said that it will treat a probate application as having been lodged even if the receipted HMRC form IHT421 is still to follow. Such applications should benefit from the current flat fee.

The original consultation and conclusion (which contains a summary of industry stakeholders' responses) can be found here: *www.gov.uk/government/consultations/fee-proposals-for-grants-of-probate*.

Ilott case

Readers will also have seen that the Supreme Court has now given its judgment in *Ilott v The Blue Cross and others* [2017] UKSC 17. Our reflections on the judgment will be the focus of the next article in this series. **SJ**

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