

Landmark decision over the rights of beneficiaries to information

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Guernsey already has in place legislation to offset the new danger to trustees and their advisers created by the Court of Appeal's recent decision in Dawson-Damer & Ors v Taylor Wessing LLP, handed down on 16 February 2107.

Guernsey trustees should ensure that information relating to their deliberations and the exercise of their discretion (including any legal advice they seek) remains in Guernsey in order to avoid the danger that such information may be disclosable under data protection legislation.

Summary

The English Court of Appeal has handed down its judgment in the case of *Dawson-Damer & Ors v Taylor Wessing LLP* (judgment was handed down on 16 February 2107).

That judgment upholds the statutory rights under data protection legislation of a beneficiary of a trust to request personal information held about them (in this case from the trustee's lawyers who advised them on the distributions).

Most importantly, those rights have been held to override the established principles of trust law that define what information a beneficiary is entitled to from their trustee.

This is a new and uncomfortable position for onshore trustees and legal advisers, who may find themselves receiving Subject Access Requests (**SARs**) from beneficiaries seeking disclosure of the details of the trustee's deliberations.

In Guernsey, the issue has been pre-empted by *the Data Protection (Subject Access Exemptions) Order, 2015* which exempts from the scope of a SAR any data concerning a trustee's deliberations as to: the exercise of its functions; the reasons for any decisions made; any material on which such decisions were based; and any letter of wishes.

This means that personal data concerning a trustee's deliberations about a beneficiary is exempted from a SAR served on the trustee in Guernsey. Since the Order also protects any such personal data "*in respect of a trust*" (and is not limited to data in the hands of the trustees themselves), the same data will be protected in the hands of lawyers from whom the trustee has sought advice.

Guernsey trustees should ensure that information relating to their deliberations remains in Guernsey and that any advice sought (e.g. legal advice to inform those deliberations) is also provided in Guernsey.

It is in any event important to seek advice before any decision is taken to provide information about a trust out of Guernsey. That importance is now heightened in order to ensure that such information cannot be caught by a SAR under the relevant data protection legislation in the UK or elsewhere. On the basis of the Court of Appeal's decision, it appears that could even encompass data in the hands of onshore law firms.

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The Case

Background

The claimant was Mrs Dawson-Damer, who together with her children, were beneficiaries of Bahamian trusts. The trustees of those trusts had, in the past, made certain significant appointments to other beneficiaries and Mrs Dawson-Damer was challenging the validity of those appointments in litigation in the Bahamas.

Taylor Wessing had acted as the adviser to the trusts and, as such, may have advised the trust in relation to those distributions. Given the nature of the trustee's likely considerations, it was highly likely that the trustees would have considered (and sought advice on) Mrs Dawson-Damer's potential interest under the trusts.

The statutory right to personal information

Under data protection laws, individuals generally have a right to request personal information held about them, which 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*" (Section 1(1) of the Data Protection Act 1998 (the **English DP Act**)). This is also replicated under Guernsey's own Data Protection (Bailiwick of Guernsey) Law, 2001 (the **Guernsey DP Law**).

That description should resonate with trustees. Their decision making process on distributions is likely to involve the creation of such information about beneficiaries and will be recorded in formal records and minutes. It may also have been the subject of advice from their lawyers in relation to more significant decisions.

As a matter of trust law, that type of information goes to the exercise of the trustees' discretion and would not be information that a discretionary beneficiary would ordinarily be entitled to receive. See the now well established principles set out in *Schmidt v Rosewood Trust Ltd* (Isle of Man) [2003] UKPC 26, and in *In re Londonderry's Settlement* [1965] Ch 918.

In this case, Dawson-Damer served a SAR under section 7(2) of the English DP Act. An identical SAR regime also exists at section 7(2) of the Guernsey DP Law, which follows the English Act closely.

The SAR was served on Taylor Wessing as, being based in England, they were subject to the English DP Act.

A SAR obliges a data controller to provide the requestor with the personal information which it holds about them and which is caught by the SAR.

There are various statutory exceptions under the data protection legislation to the need to provide certain categories of data in response to a SAR.

One such exception is where the data in question is subject to legal professional privilege (this exception is found at Schedule 7 para 10 of the English DP Act and is replicated identically in the Guernsey DP Law) (the **LPP exemption**).

The Court of Appeal's judgment

Taylor Wessing's argument was that the LPP exemption should be interpreted widely to include any documents which the trustee could refuse to disclose to the beneficiaries under Bahamian trust law. The wide interpretation of the LPP exemption was rejected by the Court of Appeal.

The judgment confirms two important principles:

- Firstly, that English law firms are not exempt from the scope of the English DP Act and, when faced with a SAR, English lawyers must comply the request by disclosing any personal information held that is not privileged. This is a reality check on the limitations that exist to the private nature of the communications between lawyer and client.
- Secondly, and arguably most importantly for trustees, the question of the interplay between the English DP Act and the beneficiaries' rights to information as a matter of trust law has been firmly resolved in favour of the statutory entitlement to information created by the English DP Act. This is therefore a 'data subject' friendly outcome and would seem to follow an ongoing trend in the courts to redress the rights and protections afforded to individuals.

This may result in a new route by which beneficiaries could attempt to seek information in relation to their interests in a trust where information on the trustee's deliberations is held onshore.

This route may be argued to override the restrictions on access to information by beneficiaries as a matter of trust law - catching the detail of the trustee's decision making process and the exercise of its discretion.

It remains to be seen whether Guernsey's statutory exemption will remain in place following the overhaul of Guernsey's data protection regime next year (which is in response to Europe's General Data Protection Regulation (known as the GDPR)).

However, Guernsey's legislature consults closely with industry and reacts proactively to address issues that might arise. This is a paradigm example of that in operation whereby Guernsey trustees should have the necessary statutory protections to offset the issue for trustees that now arise in England. That is, of course, provided their advice is given by Guernsey lawyers (and all such data remains in Guernsey).

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