Dawson-Damer for trustees: What to know and how to cope

The decision of the Court of Appeal in *Dawson-Damer v Taylor Wessing LLP* [2017] EWCA Civ is a landmark case establishing that the principles of data protection, to an extent, supersede those of trust confidentiality as between trustees and beneficiaries. This article examines the possible effects on the trust industry and how trustees might adapt to the change in the landscape.

What's the issue?

Under case law established over hundreds of years, trustees have been entitled, under what is known as the *Londonderry principle* (*Re Marquess of Londonderry's Settlements* [1965]), to refuse to disclose to beneficiaries most sensitive trust information or documentation. This rule was developed in the case of *Schmidt v Rosewood Trust Ltd* [2003], where the Court held that beneficiaries hold no possessory right to receive trust documentation, though they may request either the trustee or, failing that, the Court, to order delivery of the documents.

Trustees have therefore enjoyed confidence to administer trusts without concern that beneficiaries would be able to obtain sensitive trust information. This was of considerable benefit to trustees who would often not wish for beneficiaries to be privy to the reasoning behind their decision-making, given the sensitivities that can be involved in such matters.

However, the decision of the Court of Appeal in *Dawson-Damer* will detract from trustees' confidence. Mrs Dawson-Damer began proceedings in the Bahamas against the trustee of a trust of which she was a beneficiary. Mrs Dawson-Damer wanted access to certain information that was protected under Bahamian law from disclosure in the Bahamian proceedings. To get around this, she served a data subject access request (DSAR) on the London-based solicitors for the trustee, Taylor Wessing LLP (TW).

A DSAR is a creature of the Data Protection Act 1998 (DPA 1998) – a statute that now been superseded by the General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (DPA 2018). This body of legislation gives "data subjects" (such as a beneficiary) certain rights to access any "personal data" (for example a name, address, employment status or medical condition) which are processed by a "data controller" (e.g. a trustee).

In this case, at first instance, the High Court had to determine how broadly to apply the exemption in the DPA 1998 (which is replicated in the DPA 2018) that protects documents that attract legal professional privilege (the LPP Exemption). TW argued that the LPP Exemption was intended to encapsulate all the rights of a trustee to resist disclosure, including its rights to withhold documentation under Bahamian law and under *Londonderry*.

At first instance, the High Court agreed with TW's argument on the broader application of the LPP Exemption to include the trustee's documentation, on the ground that it was privileged under Bahamian law.

However, on appeal the LPP Exemption was interpreted more narrowly to include only that which strictly attracts privilege under English law. The Court of Appeal overturned the High Court decision and ordered TW's compliance with the DSAR.

In practical terms, this decision suggests that, where a trustee has a record of the fact that one beneficiary might be more or less suitable to receive a distribution than another for a particular reason relating to that beneficiary, upon service of a valid DSAR, the trustee will be obliged to disclose to the beneficiary (at least some of) this information and the purpose for its processing. In headline terms, the subject access rights of individuals are now considered superior to the rights of trustees to withhold sensitive trust information from beneficiaries.

Some residual protection for trustees

Despite the potential seismic impact of *Dawson-Damer* on the trust industry, there are still a number of protections available to trustees to shield them from total transparency.

Don't disclose absolutely everything

The decision in *Dawson-Damer* was almost immediately approved in the same court by two cases heard together, *Ittihadieh v Cheyne Gardens RTM Company Ltd* [2017]. However, *Ittihadieh* did provide some commentary that is arguably helpful to trustees in this situation.

— For example, the DPA provides a right of access to *information*, not *documents*. This means that, while it may be cheaper and easier simply to hand over copy documents that contain personal information,

there is no strict legal obligation to do so. The judge in *Ittihadieh* further commented that, in some cases, it may be sufficient to provide the data subject with an extract of the personal data that is known, along with the date range and frequency with which that information is processed.

— Furthermore, not all references to individuals will necessarily be the kind of information that amounts to data that must be disclosed by trustees / data controllers. Previous case law has suggested that, for data to be truly personal, it must affect the individual's privacy, whether in his personal or professional capacity; it must be *"biographical in a significant sense"* (*Durant v Financial Services Authority* [2003]). This should be cause for some comfort to trustees, who can take a narrow view of whether the data is "biographical" and therefore can be subject to disclosure under a DSAR.

Consider the costs and time involved

Practically speaking, deciding what information can be excluded is a more lengthy and costly process, which will also require redactions where documents contain the personal data of other individuals. However, in a situation where the process of complying with the DSAR becomes particularly onerous and costly, a trustee may be able to resist disclosure on the grounds that what has been provided is proportionate and that to search and provide further would be disproportionate. There is authority for this in *Ittihadieh* and this could prove to be a helpful tool to trustees, as discussed further below.

Appeal to the Court's discretion

There is some further protection for trustees / data controllers in the form of the wording of the statute: under the DPA a court *may* order a data controller to comply with the request. The use of the word "may" suggests that the Court may be persuaded not to enforce a DSAR where there are good reasons not to, and there is some case law to support this proposition.

As an example, trustees might argue that, in refusing disclosure to one beneficiary, they are considering the best interests of other beneficiaries.

Consider Parliamentary discussions in relation to the GDPR

The introduction into law of the GDPR has brought with it some further changes to interaction of the data protection regime and trust law. Discussions in the House of Lords over the DPA 2018 during its drafting indicate that the rights of trustees (e.g. to not disclose sensitive trust information) should be protected from disclosure under a DSAR. While Parliamentary discussions are not authority, there are grounds for trustees to argue that their deliberations should remain confidential.

For more information on this development, please see our further article here.

Practical recommendations to trustees

Though the decision in *Dawson-Damer* is unlikely overall to be a positive one for the trustee industry, as discussed above, there remains much uncertainty in the scope of what precisely a trustee data controller should and should not do. These grey areas disclose a degree of leeway that can be explored until the uncertainty is resolved.

In addition, trustees may wish, given the competing impact of fiduciary duties, to make various short-term changes to their operational methods to improve the chances that sensitive material is outside the scope of a DSAR, such as those set out below.

— When considering and discussing discretionary events such as distributions of income or capital, trustees could refrain from recording either on paper or electronically, the most sensitive details of their rationale. While these details can be communicated orally and understood to be part of a decision, keeping the information unrecorded (or perhaps unrecorded in a structured filing system) will make it less likely to be caught by a DSAR.

— As mentioned above, a data controller should avoid simply handing over entire copy documents to data subjects where such documents contain relevant information to which the DPA 2018 rights alone do not give access. The preferable option (discussed above) is merely providing the information that is known of

the data subject and the frequency and timing of the processing of that information. One way to do this would be to ensure that more than one beneficiary / data subject's personal information is contained in a given document, which would cause that document to be non-disclosable.

- In response to a DSAR, trustees should strongly consider providing only as much information as they are strictly obliged to (see above discussion on this) and with which they feel comfortable, and consider whether disclosing any further information would be beyond what is proportionate. If significant costs and time have been expended by this point, it may provide grounds to consider the disclosure obligation discharged.
- Trustees should in general hold in their minds the knowledge that beneficiaries now have greater potential access to the trust's records. This will act as a check on the exercise of trustees' discretion and help ensure their actions are not the subject of litigation and DSARs.
- The final adjustment that trustees may consider is to use the LPP exemption in a way that would apply in the English courts. TW failed in *Dawson-Damer* because there was no legal advice privilege that could be asserted by the trustee against the beneficiaries given that the legal advice, paid for out of the trust fund, was property of the trust. However, where the advice attracts litigation privilege, this can be asserted by trustees against beneficiaries. Therefore, in any circumstance where lawyers have been instructed and litigation privilege may be applicable, it should be asserted to shield the documents from beneficiaries' view.

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August 2018

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