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DawsonDamer v Taylor Wessing the end of the Londonderry principle?

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The Londonderry Principle

Trusteeship can be onerous, particularly within the context of family trusts with their attendant risk of strife between beneficiaries and trustees. It was judicial recognition of this fact which gave rise to what is now known as the Londonderry principle from *Re Londonderry's Settlement* [1965] Ch 918.

Here, it was held that even if documents ought properly to be described as trust documents, meaning that beneficiaries have a proprietary interest in them, they are protected from having to be disclosed to beneficiaries in order to preserve the confidentiality of trustees' deliberations on discretionary matters.

Salmon LJ explained (at 937): 'Nothing would be more likely to embitter family feelings and the relationship between the trustees and members of the family, were trustees obliged to state their reasons for the exercise of the powers entrusted to them'.

The Londonderry principle was affirmed in *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26. And in *Breakspear and others v Ackland and another* [2008] EWHC 220 (Ch) it was held that the Londonderry principle meant that trustees were not obliged to disclose Letters of Wishes to beneficiaries in the context of discretionary trusts.

Dawson Damer and others v Taylor Wessing LLP

The protection afforded to trustees by the Londonderry principle has been eroded by the decision recently handed down by the Court of Appeal in *DawsonDamer and others v Taylor Wessing LLP* [2017] EWCA Civ 74.

Here, the claimant appellants, beneficiaries under Bahamian law discretionary trusts, in parallel with ongoing breach of trust proceedings in the Bahamas, served a Subject Access Request ("SAR") under section 7(2) of the Data Protection Act 1998 ("the Act") seeking personal data relating to themselves held by Taylor Wessing as solicitors for the trustees.

Taylor Wessing declined to provide the information requested, relying on the legal professional privilege exemption in Schedule 10, paragraph 7, of the Act, and the fact that any search for material not subject to that exemption would require

disproportionate effort. The Court of Appeal has reversed the judge at first instance's decision, ruling that Taylor Wessing could not refuse to provide the information requested.

Impact on the Londonderry principle

There is nothing to prevent a beneficiary serving an SAR on a trustee, or his solicitor, to force disclosure of information. The data that must be disclosed is 'personal data' within the meaning of the Act, i.e. data which relates to an individual who can be identified from it and includes any expression of opinion about the individual and any indication of the intentions of the data controller (which would include a trustee) or any other person in respect of the individual (which could include a settlor).

This definition has a wide scope and could extend to Letters of Wishes, minutes of meetings, trustees' letters and records of decisions, producing exactly the situation that the Londonderry principle was designed to avoid.

A trustee or solicitor will not be compelled to provide personal data where this would unavoidably require the provision of a third party's personal data; but this will not help where a document can be redacted.

Data held on nonelectronic files is only 'data' within the meaning of the Act if it is structured so as to allow easy access to information specific to the data subject. In theory, therefore, so long as the files are not organised by reference to individual beneficiaries, paper records are unlikely to have to be disclosed. However, this offers little protection in an era where most documents are created electronically.

Data is excluded by the Act if its supply would entail 'disproportionate effort'. But DawsonDamer shows that a search (which the Court chose to include within the definition of "supply") will have to be quite extensive before it is considered thus.

The Court of Appeal made no findings about privilege in specific documents and any further dispute about these will be adjudicated by the Chancery Division, to which the case has been remitted.

Conclusion

The Data Protection Act appears to have provided disgruntled beneficiaries with additional weaponry with which to attack their trustees, and may well dissuade people from becoming trustees with all the 'embarrassment, arguments and quarrels that might ensue' when added to a trustee's already not inconsiderable burdens (per Salmon LJ in Londonderry at 937).