Joint Privilege: A matter of procedure or substantive trust law? *Dawson-Damer v Taylor Wessing LLP* [2020] EWCA Civ 352

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Introduction

Dawson-Damer concerned the right of a beneficiary of a Bahamian discretionary trust, Ashley Dawson-Damer ("**Ashley**"), to obtain certain documents containing her personal data. Ashley had requested the documents from the solicitors ("**Taylor Wessing**") for the trustee (the "**Trustee**") of a Bahamian settlement (the "**Trust**") under a "*subject access request*" ("**SAR**") pursuant to section 7 of the Date Protection Act 1998 (the "**DPA 1998**")[1].

Summary

This is the second time these legal proceedings have reached the Court of Appeal. On both occasions the Court of Appeal has made determinations regarding the duty of a trustee's solicitors to comply with a SAR made by a beneficiary. Both Court of Appeal judgments stem from the long running dispute between Ashley and the Trustee over the latter's exercise of its powers to appoint funds from the Trust, of which Ashley is a beneficiary, to new Bermudian discretionary trusts favouring other beneficiaries[2].

This appeal was concerned with Ashley's right to use a SAR as a means of obtaining the legal advice provided by Taylor Wessing to the Trustee regarding the latter's exercise of its powers, in circumstances where the relevant Bahamian trust legislation provided that a trustee could not be compelled to disclose to a beneficiary any document relating to the exercise of its discretion.

The Court of Appeal considered whether or not the Bahamian legislation removed the joint privilege that could otherwise be said to exist between Ashley, as a beneficiary of the Trust, and the Trustee, such that Taylor Wessing, as the Trustee's solicitors, was entitled to rely on the Legal Professional Privilege exemption (the "**LPP Exemption**") to a SAR under paragraph 10 of schedule 7 to the DPA 1998[3]. For the reasons set out below, the Court of Appeal determined that the Bahamian legislation did not affect the question of joint privilege, holding that this was a matter of practice and procedure rather

The Court of Appeal determined that the Bahamian legislation did not affect the question of joint privilege, holding that this was a matter of practice and procedure rather than substantive trust law.

1. The DPA 1998 has now been replaced by the Data Protection Act 2018 (the "**DPA 2018**"). The right to a SAR can now be found under section 45(1)(b) of the DPA 2018.
2. The dispute has also led to proceedings in The Bahamas, see, for example, *Dawson-Damer v Grampian Trust Co Ltd* 20 ITELR 722, and Bermuda, see, for example, *Dawson-Damer v Lyndhurst Limited* [2019] SC (Bda) 72 Civ.
3. The LPP exemption, importantly differently worded, can now be found under paragraph 19 of schedule 2 to the DPA 2018.

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than substantive trust law. Accordingly, relying on well-established legal principles that a beneficiary enjoys joint privilege with a trustee, the Court of Appeal ruled that Taylor Wessing could not withhold the data sought under a SAR on the grounds of the LPP Exemption.

The progress of the English proceedings

A potential obstacle to Ashley being able to obtain the documents she sought lay in the fact that, since the Trust was governed by Bahamian law, section 83(8) of the Bahamian Trustee Act 1998 (the "**BTA 1998**") applied. In material terms, this provides that a trustee of a Bahamian trust cannot be compelled to disclose any document to any beneficiary (including legal advice) relating to the exercise of any discretion of the trustee.

The first round of English proceedings also concerned the application of the LLP Exemption to the provision of data held by Taylor Wessing. However, the issue in the first round was framed differently. There, the issue was whether the LPP Exemption was merely limited to documents which enjoyed privilege under English law (the so-called "**Narrow View**") or whether the LPP Exemption also included documents which a trustee could refuse to disclose to beneficiaries as a matter of Bahamian trust law (the so-called "**Wide View**"). In a well-publicised judgment the Court of Appeal[4] ultimately favoured the Narrow View[5]. However, the Court of Appeal did not decide whether any of the specific documents to which Ashley was seeking access, enjoyed privilege under English law in any event, such that Taylor Wessing could still rely on the LPP Exemption.

The High Court held that, since the BTA 1998 provided that a beneficiary had no automatic right to see the legal advice, no joint privilege could be said to exist as a matter trust law.

4. Arden LJ, as she then was, giving the Court's judgment.
5. *Dawson-Damer v Taylor Wessing LLP* [2017] 1 WLR 3255.
6. *Dawson-Damer v Taylow Wessing LLP* [2019] WTLR 1111.

The High Court's judgment

The determination of this issue was remitted to the High Court[6]. In the High Court, Ashley argued that legal advice provided by Taylor Wessing to the Trustee in connection with certain appointments of the Trust's funds was subject to joint privilege as between herself, as a beneficiary of the trust, and the Trustee, as trustee. The existence of joint privilege meant, she submitted, that, in legal proceedings between a beneficiary and a trustee, the trustee cannot rely on LPP as against a beneficiary save in relation to legal advice relating to the trustee's personal position. The effect of this was, as Ashley argued, that Taylor Wessing could not rely on the LPP Exemption under the DPA 1998 as against her.

However, the High Court held that, since the BTA 1998 provided that a beneficiary had no automatic right to see the legal advice, no joint privilege could be said to exist as a matter trust law. This meant that Taylor Wessing could rely on the LPP Exemption as against Ashley.

The Court of Appeal's judgment

On appeal, Ashley argued that, in holding that the BTA 1998 ousted the joint privilege that existed between herself and the Trustee, the High Court had erred in viewing the

ultimately the Court of Appeal concluded (at [43]; emphasis added):
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issue of joint privilege as a matter of trust law (which was concerned with the principles of disclosure by trustees) rather than as a matter of procedure and evidence which was governed by the *lex fori*. In response, Taylor Wessing's primary argument was that joint privilege should be viewed as an incidence of trust law. As Bahamian law was the governing law of the Trust, it was that law that should determine any issues relating to LPP in the context of communications between the Trustee and Taylor Wessing.

The Court of Appeal accepted that the concept of joint privilege was certainly born in the trust cases of the mid-19th century, as opposed to cases involving other areas of law (at [41]). Those early cases included *Devaynes v Robinson* (1865) 20 Beav 42, *Wynne v Humberston* (1858) 27 Beav 421 and *Talbot v Marshfield* (1865) 2 Dr & Sm 549. The Court of Appeal further accepted that some of the earlier authorities on disclosure by trustees, including the well-known *In re Londonderry's Settlement* [1965] Ch 918, had not always necessarily distinguished between what a trustee was obliged to disclose in hostile litigation as opposed to what a beneficiary was entitled to see on demand in other circumstances (at [41]). These points certainly supported the proposition that joint privilege was a matter of substantive trust law rather than procedure and evidence in litigation.

However, ultimately the Court of Appeal concluded (at [43]; emphasis added):

The Court of Appeal was unanimous in concluding that the issue of joint privilege was not simply confined to trust law principles but rather to be determined on the basis of English law of procedure and evidence. Therefore, the BTA was of no relevance to this issue and the High Court had been wrong to make such a finding

"[T]he question whether 'joint privilege' exists is correctly characterised as one of procedural law rather than trust law. It seems to us that, whilst 'joint privilege' may have its origins in authorities concerned with trusts, it does not represent part of trust law. A principle of procedure and evidence has evolved."

In reaching this conclusion the Court of Appeal relied on two primary factors:

- Although earlier authorities potentially created some confusion, *"more modern authorities"* plainly distinguished disclosure in litigation from a beneficiary's rights of disclosure under trust law (at [44]). This distinction had been clearly recognised by Lord Walker in his seminal judgment in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, and by Briggs J, as he then was, in *Breakspear v Ackland* [2008] EWHC 220 (Ch).
- The concept of joint privilege had also been recognised in contexts other than trusts, particularly as between a company and its shareholders (at [45]).

Given those earlier authorities, the Court of Appeal was unanimous in concluding that the issue of joint privilege was not simply confined to trust law principles but rather to be

determined on the basis of English law of procedure and evidence. Therefore, the BTA was of no relevance to this issue and the High Court had been wrong to make such a finding (at [47]).

Accordingly, given that the BTA was of no relevance, the Court of Appeal found that there was "*no reason to doubt*" that joint privilege existed as between Ashley and the Trustee in respect of legal advice received by the latter in its capacity as trustee concerning the administration of the trust (see [53]). As such, Taylor Wessing was not entitled to rely on the LPP Exemption as against Ashley, and, provided the other requirements of the DPA 1998 were met, Taylor Wessing was obliged to disclose the legal advice containing Ashley's personal data[7].

Conclusion

Aside from providing a useful summary of the relevant authorities on joint privilege, this judgment highlights the alternatives available under the Data Protection legislation to a beneficiary who is seeking information in respect of the trust's affairs. More particularly, it provides an alternative avenue for transparency where the trust is governed by the law of a jurisdiction that has curtailed the right of a beneficiary to seek information in respect of the trust.

However, care must be taken if requesting documents pursuant to a SAR under the DPA 2018 rather than the DPA 1998. Paragraph 19 of Schedule 2 to the DPA 2018 expands the scope of the LPP Exemption so as to apply not only to material protected by legal professional privilege but also "*information in respect of which a duty of confidentiality is owed by a professional legal adviser to a client of the adviser.*"

The addition of this second limb suggests a request for documents pursuant to a SAR can be resisted where those documents fall within the scope of the duty of confidentiality owed by a firm of solicitors to its client even if legal professional privilege cannot be maintained. This remains untested in the Courts. However, given the debates in the House of Lords preceding the enactment of the DPA 2018, the second limb may well include the types of documents that were at issue in *Dawson-Damer*.

Accordingly, although beneficiaries may well seek to make greater use of the Data Protection legislation, requests for documents are similarly likely to be resisted more vigorously by trustees' advisors. ■

READ THE JUDGMENT

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7. The case also concerned the interpretation of a "relevant filing system" for the purposes of s.1(1) of the DPA 1998. That issue is not explored in this Note, although it was highly important for ascertaining the scope of the copy documents which Ashley was likely to be given pursuant to her SAR.