



# Bahamian law on disclosure of trust information



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- 🔍 Introduction
- 🔍 Decision
- 🔍 Comment

## Introduction

The case of *Dawson Damer v Taylor Wessing* ([2015] EWHC 2366 (Ch)) arose out of a dispute between a beneficiary of trusts governed by Bahamian law and a Bahamian trustee. The beneficiary made subject access requests under the UK Data Protection Act 1998 to the trustee's London solicitors who refused to provide the information. This resulted in the beneficiary applying to the High Court for an order requiring the law firm to comply with the subject access requests.

## Decision

Proceedings were ongoing in the Bahamas Supreme Court between the beneficiary and the trustee and counsel for the claimants conceded that one of the motives for making the subject access requests may have been to obtain documents which might be of use in the Bahamian litigation.

The law firm resisted the application on various grounds, including that the personal data in the possession of the firm was held only in the law firm's capacity as legal advisers to the trustee and therefore fell within the exemption under the UK Data Protection Act relating to an organisation's right to maintain legal professional privilege, meaning that the High Court should permit the Bahamian court to determine which documents (if any) were disclosable.

Counsel for the claimants argued that the exemption under the act relating to an organisation's right to maintain legal professional privilege should be construed narrowly and that the exemption does not extend to the rules of equity in England and Wales, under which trustees are not required to disclose trust documents to beneficiaries. The exemption does not extend to local Bahamian rules, which apply to disclosure in respect of trust litigation in the Bahamian courts.

The law firm was successful. Judge Behrens concluded that the right provided by the act is to:

*"protect the Claimants' right to privacy and accuracy of the information held by [the law firm]. It is no part of its purpose to provide the Claimants with information or disclosure of documents which may assist them in litigation against [the Trustee] whether in England or The Bahamas.*

*I have great difficulty in following the concept that the principles of disclosure in relation to trustees and beneficiaries can in some way be separated from legal professional privilege."*

In dismissing the application, the court gave judicial notice to the case of *Re Londonderry's Settlement* ([1965] Ch 918). It accepted the law firm's argument that in hostile English litigation concerning an English trust, a trustee may be compelled under the Civil Procedure Rules to disclose confidential legal advice to a claimant beneficiary and thus the trustee would be unable to claim legal professional privilege against the beneficiary if the beneficiary seeks to challenge the validity or good faith of the trustee's subsequent decision about the exercise of its power.

By way of contrast, the court considered the special provisions under Section 83 of the Bahamian Trustee Act 1998, which limit disclosure in relation to hostile litigation against trustees.

Sections 83(8) and 83(10) provide:

*"83(8) Notwithstanding anything to the contrary in this section, trustees shall not be bound or compelled by any process of discovery or inspection or under any equitable rule or principle to disclose or produce to any beneficiary or other person any one of the following documents, that is to say*

- 1. any memorandum or letter of wishes issued by the settlor or any other person to the trustees, or any other document recording any wishes of the settlor;*
- 2. any document disclosing any deliberations of the trustees as to the manner in which the trustees should exercise any discretion of theirs or disclosing the reasons for any particular exercise of any such discretion or the material upon which such reasons were or might have been based; or*
- 3. any other document relating to the exercise or proposed exercise of any discretion of the trustees (including legal advice obtained by them in connection with the exercise by them of any discretion).*

*83(10) No such prohibition or restriction, and nothing in this section shall prejudice the validity of any trust or the entitlement of any beneficiaries who have in any manner become aware of any trusts to obtain orders from the court for administration or accounts, or for the execution of the trusts or any other order of the court not being an order for the discovery, inspection, disclosure or production of such documents as are described in subsection (8)."*

The court further stated that if it was wrong on the point of legal professional privilege, having regard to Section 7(9) of the UK Data Protection Act, it would have declined as a matter of discretion to order compliance with the subject access requests based on the fact that using them to obtain information for use in proceedings is not a "proper purpose". The court went on to state:

*"if and in so far as the documents discoverable under English law are more extensive than those under Bahamian law it does not seem to me a proper use of the [UK Data Protection Act] to enable the Claimants to obtain documents that they could not obtain in the Bahamian proceedings".*

## **Comment**

The decision is under appeal, but the affirmation of the protection afforded to Bahamian trustees under Section 83 of the Trustee Act highlights an advantage that the Bahamas has over other jurisdictions where the common law rules as exemplified by *Re Londonderry's Settlement* and *Schmidt v Rosewood Trust* ([2003] 3 All ER 76) apply.

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