Out in the open

DISCLOSURE OF TRUST INFORMATION BY MEANS OTHER THAN THROUGH TRUST-LAW PRINCIPLES IS A FUNDAMENTAL ISSUE OF OUR TIME, WRITES **DAVID DORGAN**

> **KEY POINTS**
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> **WHAT IS THE ISSUE?**
> Can a beneficiary obtain trust information where trustees have decided not to disclose that information, and perhaps a court has agreed with the trustees? Are trustees required to disclose trust information to non-beneficiaries?
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> **WHAT DOES IT MEAN FOR ME?**
> Whether you are a trustee or an advisor to a trustee, be aware that beneficiaries potentially have other avenues of opportunity to obtain trust information pursuant to data-protection requests or registers.
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> **WHAT CAN I TAKE AWAY?**
> The potential for disclosure of trust information by means other than trust-law principles is something all trustees and trust advisors should be aware of and note.

DISCLOSURE OF TRUST information by trustees to beneficiaries is fundamental in permitting beneficiaries to assert their right to hold trustees to account in the administration of a trust. In parallel, the EU has decided that disclosure of trust information is crucial in the fight against money laundering and terrorist financing. Therefore, two questions arise about the interaction of the two regimes regarding disclosure of trust information: can a beneficiary still obtain trust information where the trustees have decided not to disclose that information, and perhaps a court has agreed with them? And are trustees required to disclose trust information to non-beneficiaries?

BENEFICIARIES AND DATA PROTECTION

In the UK, a beneficiary could use a subject access request (SAR), pursuant to s7 of the *Data Protection Act 1998* (DPA), to obtain disclosure against either the trustee (if resident in the UK) or, more importantly for trustees resident in the Crown Dependencies (CD trustees), legal advisors resident in the UK and holding trust information as part of their instructions. The latter was confirmed by the English Court of Appeal case of *Dawson-Damer* v *Taylor Wessing LLP*.[1] This case may have consequences for any non-UK resident trustee who instructs the services of UK lawyers.

CD trustees might instruct UK resident lawyers to advise on, for example, a transaction involving London realty. As part of those instructions, CD trustees are likely to provide the legal advisor with copies of trust documentation, including, perhaps, trustees' minutes and other information that might not otherwise be disclosable to beneficiaries. Pursuant to the aforementioned case, that trust information held by the legal advisor could be exposed to disclosure pursuant to a SAR.

But hang on – the DPA contains a specific exemption from a SAR for legal advice and proceedings. Although this is true, and was argued by Taylor Wessing in *Dawson-Damer*, the Court of Appeal held that this exemption should be narrowly construed and applied to documentation that could be withheld as a matter of English law. The trust was governed by Bahamian law and the Court of Appeal rejected the argument that the exemption should extend to restrictions under foreign-law principles. The DPA does not contain an exemption mirroring applicable trust-law principles on disclosure, and the Court of Appeal made it clear that parliament would need to include such an exemption if that was the intention. In this regard, the Court of Appeal knew that the purpose of the SAR was for the beneficiary to obtain information to use in Bahamian litigation against the trustee, but held that this was not a ground to prevent compliance with the SAR. Therefore, a SAR under the DPA can circumvent well-established trust-law

principles, including the disclosure of trustees' deliberations not ordinarily disclosable, if held by the legal advisors. Consequently, 'fishing' SARs could be used as a litigation tactic.

However, all is not entirely lost. The Court of Appeal did not make any findings about legal privilege in documents, and the SAR must relate to the data subject's personal data. There is no obligation to provide a document that does not contain personal data or provide other data within that document – especially if it would unavoidably disclose a third party's personal data.

It is common for CD trustees to instruct UK-resident legal advisors. It is also common for those legal advisors to hold confidential trust documentation for a period of at least six years. Therefore, CD trustees should be aware, and so perhaps exercise a degree of caution, that such advisors are data controllers who can be exposed to a SAR under the DPA by a beneficiary allowing them to circumvent trust-law principles on disclosure.

CD trustees should further note that other jurisdictions are not subject to the same SAR risk. For example, in Jersey, the *Data Protection (Subject Access Exemptions) (Jersey) Regulations 2005* provide a specific SAR exemption in respect of trusts and were introduced in response to industry concerns. The regulations stipulate that a trust is exempt from a SAR to the extent that the withholding of personal data is authorised by the *Trusts (Jersey) Law 1984* or by foreign law, or that disclosure of such data would be contrary to a prohibition or restriction under Jersey or foreign law. Therefore, unlike the DPA, Jersey law provides an intentional exemption for trust-law principles that cannot be circumvented by a SAR.

THIRD PARTIES, TRANSPARENCY AND REGISTERS

Transparency continues to be a tool in the fight against money laundering and terrorist financing. The EU's *Fourth Anti-Money Laundering Directive* (4AMLD) requires Member States to introduce registers of beneficial ownership in respect of express trusts. The UK has complied with 4AMLD by passing the *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017* (the Regulations), which came into force on 26 June 2017 and introduced the UK's register of trusts maintained by the Commissioners for HMRC.

The register of trusts will apply to UK resident trustees and to CD trustees who hold UK assets and are liable to pay UK taxes (which is widely defined). Such trustees will have to register and annually submit extensive information about the trust, including, for example: (a) the trust's full name, date of establishment, place of administration and country of tax residence; (b) trust accounts describing trust assets and their value; and (c) the full names, dates of birth, residential addresses and passport information of trustees, beneficiaries, potential beneficiaries, protectors and advisors to the trustees (e.g. lawyers and accountants). Trustees contravening a relevant requirement of the Regulations will be liable to imprisonment, a fine or both. In short, trustees to whom the Regulations apply are required to disclose trust information to third parties.

However, the Regulations do not require that such disclosed information be open to the public; the Commissioners are under an obligation to ensure that information on the register may only be inspected by any law-enforcement authority (e.g. the National Crime Agency). Therefore, although the register may be (strictly speaking) a circumvention of trust-law principles on disclosure, it is not a route anybody can use to seek trust information. The question is: will that last?

Under 4AMLD, such registers are required to be open to the public, and the Regulations do not adhere to that requirement. France introduced a register of trusts in 2016, but was forced to close it months later after a ruling of the French Constitutional Court. That Court held that the unrestricted, open nature of the register was unconstitutional, because the public access represented a manifestly disproportionate interference with the human right to respect of private life: public access to personal data must be justified by public interest and implemented proportionately. Hence, the UK's non-open approach appears reasonable and proportionate in light of the development in France. It remains to be seen whether open registers of beneficial ownership information result in an internal battle in the EU (i.e. the European Commission v the European Court of Human Rights, or transparency v privacy). Given that, at the time of writing, some 14 EU Member States had not implemented 4AMLD, and three had partially done so, the European Commission may have some other issues to address.

It should go without saying that open-sourced trusts registers will not only circumvent trust-law principles on disclosure, but could have severe ramifications for families using trusts.

OBSERVATIONS

It is particularly noteworthy that current legislation, particularly in the UK, is having extraterritorial consequences for CD trustees. In this regard, CD trustees should be alert to the UK's *Criminal Finances Act 2017*, which creates a new corporate offence of failing to prevent the facilitation of tax evasion. This statute has significant jurisdictional reach, operating against any company (wherever incorporated or formed) where UK taxes have been evaded, and also against any company with a nexus to the UK where foreign taxes have been evaded.

It is likely that registers of trusts will be introduced by other jurisdictions in time, but the key question is whether such registers will be open to the public. It will be interesting to see how jurisdictions deal with 4AMLD's requirement for public access to registers, particularly in light of the French Constitutional Court's decision in 2016.

What we can say is that disclosure of trust information (whether for beneficiaries' own needs or for regulatory purposes) by means other than through trust-law principles is something all trustees should be aware of and note. It must surely be a fundamental issue of our time.

1 [2017] EWCA Civ 74

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