Neutral Citation Number [2019] EWHC 1258 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

MR ANDREW HOCHHAUSER QC
(Sitting as a Deputy Judge of the Chancery Division)

7, Rolls Building,
Fetter Lane
London
17 May 2019

B E T W E E N:

(1) MRS ASHLEY JUDITH DAWSON-DAMER
(2) MR PIERS DAWSON-DAMER
(3) MS ADELICIA DAWSON-DAMER

Claimants

- and –

(1) TAYLOR WESSING LLP
(2) MICHAEL MORRISON
(3) JAMES BURNS

Defendants

Antony White QC and Richard Wilson QC (instructed by McDermott Will &Emery UK LLP) for the Claimants
Timothy Pitt-Payne QC and Simon Taube QC (instructed by Taylor Wessing LLP) for the First Defendant

Hearing dates: 6, 7 and 10 December 2018

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

ANDREW HOCHHAUSER QC

17. V. 2019

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Introduction

1. This is the remitted hearing of the Claimants' Part 8 claim under s.7(9) of the Data Protection Act 1998 ("**the DPA 1998**") seeking declarations that the First Defendant, Taylor Wessing LLP ("**TW**"), has failed to comply with data subject access requests ("**DSARs**") made on 4 August 2014 and orders requiring them to do so. The claim against the Second and Third Defendants (who were represented by TW) was dismissed by consent on terms following the disclosure (and subsequent re-disclosure in revised form) by them of certain information which constituted or contained the Claimants' personal data. The claim against TW was heard and dismissed by HHJ Behrens, sitting as a judge of the Chancery Division, on 6 August 2015 ([2016] 1 WLR 28), but an appeal by the Claimants was allowed by the Court of Appeal on 16 February 2017 (Arden, David Richards and Irwin LJJ), reported at [2017] 1 WLR 3255 ("**the Appeal Decision**"). The Court of Appeal decided a number of issues in favour of the Claimants, but the case was remitted to the Chancery Division for the resolution of certain other issues, which I have to consider now. Stated shortly, the Claimants' position is that TW have still not complied with their obligations under s.7 of the Act. TW maintain that they have.

2. At the hearing before me, the Claimants were represented by Antony White QC and Richard Wilson QC and the First Defendant was represented by Timothy Pitt-Payne QC and Simon Taube QC. I thank them for their helpful written and oral submissions.

The Background to the Claimants' Part 8 claim

3. I derive a great deal of this section from the judgments of HHJ Behrens and Arden LJ (as she then was) in the Appeal Decision, for which I am grateful.

4. The Claimants are Mrs Ashley Dawson-Damer and her two children, Piers Dawson-Damer and Adelicia Dawson-Damer, who are the adopted children of Mrs Dawson-Damer and her late husband, Mr John Dawson-Damer ("**John D-D**"). TW is a firm of solicitors who act (and have acted for a number of decades together with its antecedent firms, Taylor Garrett and Taylor Joynson Garrett) for the trustee of a number of Bahamian trusts, which hold wealth derived originally from the will of the late George Skelton Yuill, a Scottish industrialist who settled in Australia and died there on 10 October 1917. It has never acted as solicitor for any of the Claimants.

5. Mr. Yuill had a daughter, Winnifreda. She married Lionel Arthur Sixth Earl of Portarlington and by him had one child, Viscount Carlow. The latter died in 1944, leaving two sons: George, Seventh Earl of Portarlington ("**George**"), who is still alive; and John D-D, who died in 2000. George and his wife have four children and a number of grandchildren. John D-D was married twice, the second time to the First Claimant.

6. The various family trusts were extensively restructured between 1988 and 1992. This resulted in:

   (1) About 25% being held on discretionary trusts for the benefit of George and his issue and their spouses;

   (2) About 25% being held on discretionary trusts for the benefit of John D-D and his family including adopted children (including "**the Willards Settlement**"); and

   (3) About 50% being held on discretionary trusts for the benefit of the issue of Viscount Carlow and their spouses, but excluding adopted issue ("**the Glenfinnan Settlement**").

   The First Claimant (but not the other Claimants) is a discretionary beneficiary of the Glenfinnan Settlement.

7. Grampian Trust Company Limited ("**Grampian**"), a company incorporated and resident in the Bahamas acted from 1992 as trustee of the Willards and Glenfinnan Settlements, and also of the trusts for the benefit of George and his family. In 2003 Grampian ceased to be trustee of the Willards Settlement. Grampian remains sole trustee of the Glenfinnan Settlement. TW no longer act for the trustee of any trust of which the Second and Third Claimants are beneficiaries.

8. In late 2013, the Claimants learnt that, in 2006 and 2009, the trustee of the Glenfinnan Settlement had appointed some US$402m from the Glenfinnan Settlement to new trustees to hold on new discretionary trusts for the benefit of the other discretionary beneficiaries, namely the children of George. The First Claimant did not benefit from the 2006 and 2009 appointments. This left roughly US$9m in the Glenfinnan Settlement. On 18 February 2014, the Claimants' solicitors, McDermott Will & Emery

LLP ("**MWE**"), challenged the validity of these appointments. It is common ground that the trustee was entitled to rely on litigation privilege.

9. It is the Claimants' case that these appointments may have been influenced by a history of animosity and distrust towards the Claimants and the First Claimant shown by "trust advisors" or "family advisors" to the trustee, which the trustee took into account and allowed itself to be influenced by.

10. On 14 August 2014 the Claimants' solicitors made the DSARs, seeking all data of which the Claimants were the data subjects, enclosing the requisite fee. On 11 September 2014, TW sent two letters in reply. On their own behalf as data controller they stated, that after searching the records held by them, that all of the Claimants' personal data it held was covered by legal professional privilege, and therefore exempted from disclosure under paragraph 10 of Schedule 7 to the DPA ("**the Legal Professional Privilege Exception**"). On behalf of the Second and Third Defendants, who are separate data controllers, TW disclosed some data contained in records "processed by [the Second and Third Defendants] in connection with their role as family advisors to the Yuills/Dawson-Damer Trusts", but claimed that other information was exempt from the subject access provisions because it was not held as part of a "relevant filing system".

11. After some further correspondence between the parties' respective solicitors, on 19 January 2015, the Claimants began these proceedings, seeking a declaration that TW had failed to comply with their DSAR, and requesting an order requiring it to do so.

12. On 20 March 2015, the First Claimant also commenced proceedings in the Supreme Court of The Bahamas against Grampian, the sole trustee of the Glenfinnan Settlement ("**the Bahamian Proceedings**"). In those proceedings she challenged (among other matters) the validity of the 2006 and 2009 appointments. That litigation is ongoing. It is an important part of the background that under s.83(8) of the Bahamian Trustee Act 1998 ("**the BTA**"), no trustee can be compelled to disclose to any beneficiary or other person a variety of documents specified in sub-paragraphs (a)-(c) therein, relating to any letter of wishes, deliberations of trustees and any other documents relating to the trustees' exercise of discretion, and the Bahamian court would similarly not be able to order any such disclosure.

13. There were three issues before HHJ Behrens, namely:

(1) **Issue 1: The extent of the Legal Professional Privilege Exception:** whether the Legal Professional Privilege Exception is limited to documents to which any privilege which attached was legal professional privilege under English law, so that those documents were exempt from disclosure in legal proceedings in England as against the appellants ("the narrow view") or whether that exception also includes any documents which the trustee could refuse to disclose to the beneficiaries under Bahamian trust law ("the wide view").

(2) **Issue 2: Disproportionate effort:** whether, if the narrow view is correct, any further search would involve "disproportionate effort" for the purposes of s.8(2) of the DPA 1998 so that it is excused from doing so.

(3) **Issue 3: The discretion under s.7(9) of the DPA 1998:** whether the Court was entitled to refuse to exercise its discretion under this subsection in favour of the Claimants because their real motive was to use the information in the Bahamian Proceedings.

14. On Issue 1, the judge held that the Legal Professional Privilege Exception should be interpreted purposively so as to include all the documents in respect of which the trustee would be entitled to resist compulsory disclosure in the Bahamian Proceedings.

15. On Issue 2, the judge held that it was not reasonable or proportionate to expect TW to carry out any search or to expect TW to be able to determine which documents were privileged. The claim to privilege was a matter for the trustee and a matter of Bahamian law, which might have to be resolved in the Bahamian Proceedings. It would be a time-consuming and costly exercise.

16. On Issue 3, the judge held that he would not have exercised his s.7(9) discretion because:

(1) It was not a proper use of the DPA 1998 to assist the appellants in the Bahamian Proceedings.

(2) It was not a proper use of the DPA 1998 to enable the appellants to obtain documents which they could not obtain by disclosure in the Bahamian Proceedings.

The Appeal Decision [2017] 1 WLR 3255; [2017] EWCA Civ 74

17. The only reasoned judgment was given by Arden LJ, with whom both Richards and Irwin LJJ agreed. The judge was overturned on all three issues. The Court of Appeal held:

    (1) On Issue 1: The Legal Professional Privilege Exception applies only to documents which carry legal professional privilege for the purposes of English law. This does not include documents by virtue only of the fact that a trustee may refuse to disclose to a beneficiary.

    (2) On Issue 2: TW has not shown that to comply with the request would involve "disproportionate effort" as all it has done so far is to review its files.

    (3) On Issue 3: The judge was wrong to decline to enforce the DSARs because the Claimants intended to use the information obtained pursuant to it in their Bahamian Proceedings.

18. An application by TW for permission to appeal to the Supreme Court was refused by the Court of Appeal. No application was made thereafter to the Supreme Court.

The remaining issues to be determined at this hearing

19. At paragraph 17 of her judgment, Arden LJ stated:

> *"It is common ground that certain issues are outside this appeal, and that if this appeal succeeds they will have to be remitted to the High Court. Those issues include the questions whether TW holds data on a filing system of the kind to which the DPA gives access, and whether any particular document(s) carry legal professional privilege under English law. At that stage, if there was a dispute as to whether any document(s) carried legal professional privilege, the court would have power under section 15 DPA to examine the material."*

20. This is reflected in paragraph 2 of the Court of Appeal Order dated 16 February 2017. In addition, certain other issues have arisen in correspondence or out of the tranches of disclosure provided by TW since January 2018.

21. The issues can therefore be summarised as follows:

    (1) Whether the paper files maintained by TW before it moved to electronic files in

2005-2008 are a relevant filing system for the purposes of s.1(1) of the DPA 1998.

(2) Whether TW can rely on the legal professional privilege exemption contained in paragraph 10 of schedule 7 to the DPA 1998 in respect of any particular documents containing the Claimants' personal data. There is a sub-issue about waiver of privilege.

(3) Whether TW has breached its obligations under s.7 of the DPA 1998 by failing or refusing to carry out reasonable and proportionate searches for the Claimants' personal data.

(4) Whether TW has breached its obligations under s.7 of the DPA 1998 by redacting or withholding the Claimants' non-exempt personal data.

22. I shall consider each in turn. Before doing so I set out the evidence which was before me.

23. The Claimants' evidence consisted of the first, second, third and fourth witness statements of Ziva Robertson, a partner at MWE, dated 19 January and 26 February 2015, 1 November and 29 November 2018 respectively. I shall refer to each of them as Robertson 1, 2, 3 and 4. Reference was also made to a witness statement of the Second Defendant dated 11 February 2015.

24. The First Defendant's evidence consisted of the first, second, third and fourth witness statements of Kirstie McGuigan, a partner at TW, dated 11 February and 22 June 2015, 14 July 2017 and 16 November 2018 respectively and the first witness statement of Caroline Tayler, a senior associate at TW, dated 15 November 2018. I shall refer to each of them as McGuigan 1, 2, 3 and 4 and Tayler 1.

Issue 1: Are the paper files maintained by TW before it moved to electronic files in 2005-2008 a "relevant filing system" for the purposes of s.1(1) of the DPA 1998?

25. I turn first to the relevant provision of the DPA 1998, which was enacted to give effect to EU Directive 95/46/EC ("**the Directive**"). It applies to the **processing** of **personal data** by **data controllers**: it imposes various obligations on data controllers, and confers rights on the individuals whose personal data is processed

("**data subjects**"). The terms set out in bold are specifically defined in s.1 of the DPA 1998.

26. Since the present proceedings were commenced, there has been a fundamental change in the data protection regime in the UK. It is now to be found in the General Data Protection Regulation 2016 ("**GDPR**"), together with the Data Protection Act 2018 ("**DPA 2018**"). The DPA 1998 was repealed by DPA 2018 with effect from 25 May 2018, subject to transitional provisions. Notwithstanding these changes, the present claim remains governed by DPA 1998; the provisions of the GDPR and of DPA 2018 are not relevant for present purposes.

27. By s.1(1) of the DPA 1998, a "*data controller*" means a person who determines the purposes for which and the manner in which any personal data are processed. A "*data subject*" is an individual who is the subject of personal data.

28. Further, under s.1(1) of the DPA 1998:-

> *"personal data" means data which relate to a living individual who can be identified*
>
> *(a) from those data, or*
>
> *(b) from those data and other information which is in the possession of, or is likely to come into the possession of the data controller.*
>
> *and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.*

It is common ground that, to the extent that TW holds personal data about any of the Claimants, it is a data controller in relation to such personal data, with the Claimants being data subjects.

29. If, however, information is not *data* then it cannot be *personal data* and therefore cannot come within the scope of the DPA 1998. The DPA 1998, s.1(1) defines "*data*". For present purposes limb (c) of that definition of data is material. This refers to "*information which is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system*". "*Relevant filing system*" is defined in s.1(1) of DPA 1998 as:

"any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

30. This issue relates only to the paper files maintained by TW before it moved over to electronic files. In McGuigan 3 at paragraph 32, she explains that TW introduced its electronic filing system in 2005, and that by sometime in 2008 it had become standard practice to file everything electronically.

31. This issue in relation to paper files was not decided by HHJ Behrens. At the hearing before him the evidence relating to TW's filing system was not detailed. The Claimants' criticisms of the filing system, however, were taken for the first time in Counsel's skeleton argument served only a short time before that hearing. In those circumstances, had it been relevant to his decision, he would have adjourned that aspect of the application so as to give TW the opportunity to give more detailed evidence in relation to it (see [2016] 1 WLR 28 at [70]-[71]). At [72], however, he went on to express the provisional view that, in the light of Auld LJ's observations in *Durant v Financial Services Authority* [2004] FSR 573 at [48], further evidence by TW might well have satisfied him that their paper files did not fall within the definition of a "relevant filing system" in s.1(1) of the DPA 1998.

32. At [48] of the *Durant* decision, Auld LJ stated:

"It is plain from the constituents of the definition considered individually and together, and from the preface in it to them, "although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose", that Parliament intended to apply the Act to manual records only if they are of sufficient sophistication to provide the same or similar ready accessibility as a computerised filing system. That requires a filing system so referenced or indexed that it enables the data controller's employee responsible to identify at the outset of his search with reasonable certainty and speed the file or files in which the specific data relating to the person requesting the information is located and to locate the relevant information about him within the file or files, without having to make a manual search of them. To leave it to the searcher to leaf through files, possibly at great length and cost, and fruitlessly, to see whether it or they contain information relating to the

person requesting information and whether that information is data within the Act bears, as Mr. Sales said, no resemblance to a computerised search. It cannot have been intended by Parliament – and a filing system necessitating it cannot be "a relevant filing system" within the Act. The statutory scheme for the provision of information by a data controller can only operate with proportionality and as a matter of common-sense where those who are required to respond to requests for information have a filing system that enables them to identify in advance of searching individual files whether or not it is "a relevant filing system" for the purpose."

The evidence as to TW's paper filing system

33. Before me the evidence as to TW's paper filing system is contained in the following witness statements: on behalf of TW, paragraphs 7-22 of McGuigan 3 and paragraphs 18-24 of McGuigan 4. That evidence is addressed on behalf of the Claimants by Ms Robertson in paragraphs 93-95 of Robertson 3 and paragraphs 18-22 of Robertson 4. I shall address the detail of that evidence when considering the parties' respective submissions. Suffice it to say at this stage, to give some idea of the scale of the exercise under consideration, there are two small paper correspondence files labelled with the name of the First Claimant and four paper correspondence files and two paper documents files in the name of John D-D, entitled "Trust & Personal Advice" and one paper file which has been discovered entitled "The Trustees of the Glenfinnan Settlement – Trust Advice". The records management system indicated there were two such files, bearing the name "The Trustees of the Glenfinnan Settlement – Trust Advice", but only one has been found. TW has agreed to review these nine files to see if there is any personal data relating to the Claimants. In addition there are some 35 paper files under the client description, "Yuills Trusts", the client being the trustee of those trusts. Those paper files are held in chronological order. TW also holds numerous other paper files for individuals or entities that are in some way related or connected to the Yuills group or the Portarlingtons, George's family. Those TW refused to search on the grounds they fall outside the definition of a "relevant filing system".

The Claimants' submissions on a relevant filing system

34. The Claimants contend that TW's paper files are "a relevant filing system" and TW has breached its obligations under s.7 of the DPA 1998 by failing or refusing to carry out a reasonable and proportionate search of that filing system (with the exception of the nine

files which are referred to at paragraphs 13, 16 and 20 of McGuigan 3 and which TW have agreed to search).

35. Mr White submits that the correct legal analysis of this issue is as follows:-

(1) The concept of a "relevant filing system" in s.1(1) of the DPA 1998 implemented in domestic law the concept of a "personal data filing system" in Article 2(c) of the Directive, which was defined as "*any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis*". Also relevant is Recital 15 which provides: "*Whereas the processing of such data is covered by this Directive only if it is automated or if the data processed are contained or are intended to be contained in a filing system structured according to specific criteria relating to individuals, so as to permit easy access to the personal data in question.*",

and Recital 27, which provides:

"*Whereas the protection of individuals must apply as much to automatic processing of data as to manual processing; whereas the scope of this protection must not in effect depend on the techniques used, otherwise this would create a serious risk of circumvention; whereas, nonetheless, as regards manual processing, this Directive covers only filing systems, not unstructured files; whereas, in particular, the content of a filing system must be structured according to specific criteria relating to individuals allowing easy access to personal data; whereas in line with the definition in Article 2(c), the different criteria for determining the constituents of a set of personal data, and the different criteria governing access to such a set, may be laid down by each member State, whereas files or sets of files as well as their cover pages, which are not structured according to specific criteria, shall under no circumstances fall within the scope of this Directive.*"

(2) The more elaborate definition of a "relevant filing system" in s.1(1) of the DPA 1998 must be interpreted consistently with the Directive. The definition in the 1998 Act is "*any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating*

automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible".

(3) *Durant v Financial Services Authority* was an early case on the DPA 1998, decided before the right to the protection of personal data was enshrined as a fundamental right in EU law by Article 8 of the Charter of Fundamental Rights of the European Union ("**the Charter**"), which was given full legal effect by the entry into force of the Treaty of Lisbon on 1 December 2009. Since the right to the protection of personal data has been enshrined as a fundamental right of EU law in the Charter, the level of protection that right has received in the English courts has markedly increased. He points to the difference in approach in *Johnson v Medical Defence Union* [2008] Bus LR 503, where the Court of Appeal held, obiter, that the restriction of compensation in s.13(2) DPA 1998 was not incompatible with the Directive, compared to *Vidal-Hall v Google Inc (Information Commissioner intervening)* [2016] QB 1003, where the Court of Appeal held that the restriction of compensation in s.13(2) DPA 1998 was incompatible with EU law and therefore dis-applied it under the Charter.

(4) In certain respects *Durant* has already been departed from – see the judgment of Arden LJ in the present case at [110] declining to apply the statement in *Durant* at [27] that the purpose of s.7 of the DPA 1998 was not "*to obtain discovery of documents that might assist [the data subject] in litigation against third parties*". Further in *Ittihadieh v 5-11 Cheyne Gardens RTM Co Ltd* [2018] QB 256 at [104]-[105] the Court of Appeal declined to follow the statement in *Durant* at [74] that the Court's discretion under s.7(9) of the DPA 1998 was "*general and untrammelled*".

(5) The Court of Appeal in *Durant* at [45]-[51] applied a restrictive interpretation to the concept of a relevant filing system, expressing concerns as to the burden in time and costs falling on data controllers (a factor mentioned twice – at [45] and again at [48]). Since the right to protection of personal data has become enshrined as a fundamental right of EU law, the perspective is different. The focus is on the need for protection of the data subject, as opposed to the burden

on the data controller.

(6) The Court of Appeal held in *Durant* at [50] that this restrictive interpretation required that a system could only amount to a relevant filing system if it satisfied two requirements: (1) "*the files forming part of it are structured or referenced in such a way as clearly to indicate at the outset of the search whether specific information capable of amounting to personal data of an individual requesting it under s.7 is held within the system and, if so, in which file or files it is held*"; and (2) it "*has, as part of its own structure or referencing mechanism, a sufficiently sophisticated and detailed means of readily indicating whether and where in an individual file or files specific criteria or information about the applicant can be readily located*".

(7) The Claimants submit that neither the need for a restrictive interpretation of "a relevant filing system", nor the requirement for an internal structure or referencing system within each file, is founded in the Directive.

(8) On the contrary, Mr White placed strong reliance on the recent decision of the Grand Chamber of the CJEU in Case C-25/17 *re Tietosuojavaltuutettu* 10/7/18. That case concerned a prohibition on Jehovah's Witnesses from collecting or processing personal data when taking notes in the course of their door-to-door preaching unless the requirements of Finnish legislation relating to the processing of personal data were observed. One of the questions referred to the CJEU by the Finnish Supreme Administrative Court was:

> *"Must the definition of a "filing system" in Article 2(c) of the Directive, examined in the light of recitals 26 and 27, be interpreted as meaning that, taken as a whole, the personal data (consisting of names and addresses and other information about and characteristics of a person) collected otherwise than by automatic means in connection with the door-to-door preaching described above*
>
> > *(a) does not constitute such a filing system, because the data does not include specific lists or data sheets or any other comparable search method as provided for in the definition contained in the relevant Finnish statute, Law No 523/1999, or*
> >
> > *(b) does constitute such a filing system, because, taking account of its intended purpose, the information required for later use may in*

practice be searched easily and without unreasonable expense in accordance with the relevant Finnish statute?"

(9) In its judgment, the Court held at [56] that Article 2(c) of the Directive "*broadly defines the concept of 'filing system', in particular by referring to 'any' structured set of personal data*", in order to serve the objective set out in paragraph 53 of the present judgment. The objective referred to in paragraph 53 is "*the scope of the protection it confers on data subjects does not depend on the techniques used and avoids the risk of that protection being circumvented*". At [57], the Court stated: "*As is clear from recitals 15 and 27 of the Directive the content of a filing system must be structured in order to allow easy access to personal data. Furthermore, although Article 2(c) of that directive does not set out the criteria according to which the filing system must be structured, it is clear from those recitals that those criteria must be 'related to individuals'. Therefore, it appears that the requirement that the set of personal data must be 'structured according to specific criteria' is simply intended to enable the personal data to be easily retrieved.*" And at [61] the Court held that the specific criterion and specific form in which the data was structured is irrelevant, so long as the data relating to a particular person can be "*easily retrieved*".

(10) At [62] the Court answered the question as follows: "*...Article 2(c) of the Directive 95/46 must be interpreted as meaning that the concept of a 'filing system', referred to by that provision, covers a set of personal data collected in the course of door-to-door preaching, consisting of names and addresses and other information concerning the persons contacted, if those data are structured according to specific criteria which, in practice, enable them to be easily retrieved for subsequent use. In order for such a set of data to fall within that concept, it is not necessary that they include data sheets, specific lists or other search methods.*" The Court did not, however, rule that Finnish law was incompatible with the Directive and remitted the case to the Finnish court.

(11) Mr White submits that the restrictive approach in *Durant* is impossible to reconcile with the approach of the CJEU in *re Tietosuojavaltuutettu*, and that the latter must now be followed. The second requirement in *Durant* at [50] that there must be a structured referencing mechanism, containing a sufficiently sophisticated and detailed means of readily indicating whether and where in an

individual file specific criteria or information about the applicant can be readily located, is flatly inconsistent with the Finnish case.

(12) Furthermore he relied upon the *Vidal-Hall* decision at [125], where Article 2(a) of the Directive was being considered, the Court of Appeal there stated: "*the starting point must be the wording of article 2(a) itself. Ms Proops submits that its (wider) wording cannot be cut down by the wording of the recital, on the general principle of EU law that the terms of a recital cannot be used to give a narrow construction to the substantive provisions of a measure, which its wording would not otherwise bear: see Societe d'Importation Edouard Leclerc-Siplec v TFI Publicite SA (Case C-412/93) [1995] All E R (EC), [45]-[47]. In any event, recital (26) should be given an expansive interpretation in the light of the purpose of the Directive as a whole, which is to provide a high level of protection to the right of privacy in respect of the management of personal data by data controllers. To the extent therefore that article 2(a) and the recital are inconsistent, we think it arguable that, as Ms Proops submits, the (wider) language of the provision must prevail.*" Mr White relies upon this, in order to prevent reliance by TW on the provisions of those parts of Recital 15 and 27 to restrict what he says is the broad construction of Article 2(c).

(13) He submits that the issue to focus on is therefore whether the paper files held by TW allow the personal data of the Claimants to be "*easily retrieved*". The evidence put forward by TW does not focus on this question (it appears to be aimed at the more restrictive test in *Durant*). By relying on the restrictive *Durant* approach TW have erred and failed to comply with their obligations under s.7 of the DPA 1998.

(14) Although contending that TW appear to have applied the wrong test, the Claimants submit that it seems from paragraphs 13 and 16 of McGuigan 3 that the filing system does enable TW to identify which files within that system are likely to contain the Claimants' personal data. It is clear from paragraphs 16, 19 and 20 of McGuigan 3 that each paper file has a "matter description", and from paragraph 19 that such matter descriptions are recorded on TW's records management system. It seems that these "matter descriptions" allowed TW to identify certain files from which they could retrieve the Claimants' personal data.

McGuigan does not set out the matter descriptions of the paper files which have not been searched, but paragraph 18 of McGuigan 4 states that "*these paper files are held in chronological order*" and it seems likely that these matter descriptions will include date ranges and some indication of the nature of the advice provided sufficient to indicate whether the Claimants' personal data are likely to be contained in them. Paragraph 93 of Robertson 3 and paragraph 9 of Robertson 4 explain that the system of filing data by reference to date and subject matter, enables TW easily to identify which files were likely to contain the Claimants' personal data. At paragraphs 10-11 of Robertson 4, it is contended that it would be a simple and proportionate matter for TW to identify and search their paper files for periods of time when key events were taking place (which are identified in paragraph 11) and they can expect the Claimants' personal data to have been considered.

(15) Mr White submits that the words "*criteria relating to individuals*" to be found in Recitals 15 and 27 of the Directive and the DPA 1998 definition of Article 2(c) includes an identified event in which the data subject is concerned. That provision must be read expansively so as to protect a fundamental right. Insofar as a file is labelled with the name of a trust, the Claimants are within a small number of discretionary beneficiaries of the Willards Settlement and the First Claimant is one of a number of discretionary beneficiaries of the Glenfinnan Settlement. The reference to a trust is sufficient to relate to the underlying individuals who are potential beneficiaries.

(16) Within a particular file it seems that personal data relating to the Claimants is sufficiently easy to identify and retrieve for TW to delegate this task initially to a trainee in relation to six of the files, relating to the First Claimant and John D-D – see McGuigan 4 paragraph 22. In this regard, the Claimants referred me to guidance issued by the Information Commissioner's Office ("**the ICO**"), the statutory regulator under the DPA 1998, which suggested a "rule of thumb" for identifying a relevant filing system is to apply the "temp test". The ICO Data Protection Frequently asked questions and answers about relevant filing systems (May 2011) at A2 states:

> ***"Is there any rule of thumb I can apply to establish whether I have a relevant filing system?***
>
> *If you employed a temporary administrative assistant (a 'temp'), would they be able to extract specific information about an individual from your manual records without any particular knowledge of your type of work or the documents you hold? The 'temp test' assumes that the temp in question is reasonably competent, requiring only a short induction, explanation and/or operating manual on the particular filing system in question for them to be able to use it."*

(17) In addition, Ms McGuigan appears to have been able to consider the documents in the paper files and depose that the "*majority*" of documents that contain the Claimants' personal data are "*communications which are legal advice communications subject to legal professional privilege*" – see McGuigan 3 paragraph 23. If TW can sufficiently identify the personal data relating to the Claimants within the paper files to advance a claim for legal professional privilege in relation to the majority of documents which contain it, the retrieveability of the data must be a feature of the filing system.

36. For these reasons the Claimants submit that TW's paper files amount to a relevant filing system and TW has breached its obligations under s.7 of the DPA 1998 by failing or refusing to carry out a reasonable and proportionate search of that filing system (with the exception of the nine files which are referred to in McGuigan 3 at paragraphs 13, 16 and 20).

TW's submissions on a relevant filing system

37. TW's case is that information held in its paper files does not constitute "data" within the meaning of DPA 1998, and hence cannot constitute "personal data". Consequently, any duty to search for or disclose information in response to the DSARs cannot extend to information in TW's paper files. This issue turns on whether the information in those paper files comes within limb (c) of the definition of "data", set out above.

38. Limb (c) cross-refers to the definition of a "relevant filing system", set out above. Two points about this definition are important.

(1) It applies only where information is structured by reference to individuals or by reference to criteria relating to individuals.

(2) Even where this is the case, the set must be structured in such a way that *specific information* relating to a particular individual is readily accessible. It is not sufficient if the set allows information that – in some general sense – relates to a particular individual, to be readily accessed. The set must be structured so as to allow *specific information* – i.e. particular kinds of information – to be readily accessed. Hence a set of information consisting of files that are labelled by reference to individual names would not, of itself, constitute a relevant filing system. One needs to go further, and ask whether the system is structured so that particular kinds of information relating to each such individual can readily be accessed.

39. Reliance is placed by TW on *Durant*, which it is submitted contains assistance in applying the definition of a "relevant filing system", in particular the following passages at [46]-[48] and [50] (emphasis supplied):

> *"46. As to the 1998 Act, to constitute a "relevant filing system" a manual filing system must: 1) relate to individuals; 2) be a "set" or part of a "set" of information; 3) be structured by reference to individuals or criteria relating to individuals; and 4) be structured in such a way that specific information relating to a particular individual is readily accessible. That seems to me entirely consistent with the Directive, in particular in the latter's emphatic emphasis in Article 2(c) and Recital (27) on a file so structured by reference to "specific criteria" about individuals as to provide "easy access" to "the personal data in question" When considered alongside the narrow meaning of personal data in this context and when read with Recital (15) indicating that the required "easy" access to such data must be on a par with that provided by a computerised system, the need for a restrictive interpretation of the definition "relevant filing system" is plain. It is not enough that a filing system leads a searcher to a file containing documents mentioning the data subject. To qualify under the Directive and the Act, it requires, as Mr. Sales put it, a file to which that search leads to be so structured and/or indexed as to enable easy location within it or any sub-files of specific information about the data subject that he has requested.*
>
> *47. As both parties acknowledge, the Directive is an important aid to construction of the Act. Its primary focus, as that of the Act, is on computerised data (see Articles 3-9 in the context of its ready facilitation of the free movement of personal data, and 11 in its concern for the right to privacy). And it is only to the extent that manual filing systems are broadly equivalent to computerised systems in ready accessibility to relevant*

information capable of constituting "personal" data that they are within the system of data protection... Returning – and more specifically – to the Directive, the definition in section 1(1) of the Act of "a relevant filing system" accords with the Directive in its equally restrictive definition in Article 2(c) of "a personal data filing system" as a "structured set of personal data which are accessible according to specific criteria ...", and also with Recitals (15) and (27), which emphasise that it is intended to cover only files "structured according to specific criteria relating to individuals"

48. [This has already been recited at paragraph 32 above].

50. Accordingly, I conclude, as Mr. Sales submitted, that "a relevant filing system" for the purpose of the Act, is limited to a system:

(1) in which the files forming part of it are structured or referenced in such a way as clearly to indicate at the outset of the search whether specific information capable of amounting to personal data of an individual requesting it under section 7 is held within the system and, if so, in which file or files it is held; and

(2) which has, as part of its own structure or referencing mechanism, a sufficiently sophisticated and detailed means of readily indicating whether and where in an individual file or files specific criteria or information about the applicant can be readily located."

40. Mr Pitt-Payne also relied upon the "temp test" contained in the Guidance issued by the ICO, referred to at paragraph 35(16) above. He submitted that this is a practical, common-sense way of giving effect to the approach set out in *Durant*.

41. He submitted that *Durant* was a binding Court of Appeal authority on this court and the *re Tietosuojavaltuutettu* decision of the CJEU does not require a departure from it. In the alternative, if, which is denied, that case does require a different approach to be taken, its application leads to the same result, namely that there is no obligation on TW to search the remaining paper files referred to in the evidence, because they fall outside of the ambit of the DPA 1998 .

42. Mr Pitt-Payne relies heavily on the final part of Recital 27 of the Directive, which provides: "*whereas in line with the definition in Article 2(c), the different criteria for determining the constituents of a structured set of personal data, and the different criteria governing access to such a set, may be laid down by each member State, whereas files or sets of files as well as their cover pages, which are not structured*

according to specific criteria, shall under no circumstances fall within the scope of this Directive."

43. In *re Tietosuojavaltuutettu,* whilst the focus may be on 'easy accessibility' one does not look at that matter in the abstract. Unlike *Durant* and the present case, there is nothing in the judgment to indicate whether there were paper files named in a particular way. If one looks at [57] and [62] of *re Tietosuojavaltuutettu,* what is required contains three separate and cumulative elements:

    (1) The data must be structured by reference to specific criteria;

    (2) That criteria must be "related to individuals";

    (3) The specific criteria must enable the data to be easily retrieved.

    Each of those requirements must be satisfied in order to have a filing system.

44. Turning to TW's evidence in relation to the paper files, in summary, TW started to phase out the use of paper files in 2008. The firm moved offices in November 2008 and from that date fee-earners were supposed to operate paperless offices; though in fact some individuals maintained some form of paper filing after that date.

45. TW's paper files are organised (a) by reference to each client, and (b) for each client, by reference to each piece of advice (or matter) on which TW is instructed to act. Paper files will usually consist of: (a) correspondence files, ordered chronologically as correspondence is received; and (b) paper sleeve document files in which copies of documents are bundled together, in no particular order.

46. TW relies upon the following points as material, when determining whether the information in the paper files constitutes "data" and is therefore capable of constituting "personal data".

47. First, the paper files are organised by reference to each client. Some of these clients would be individuals, but many would not: for instance, TW has numerous client files under the description "Yuills Trusts", for which the client is the trustee.

48. Secondly, in relation to the paper files held by TW relating to the Yuills family trusts, the client is *not* recorded by reference to any specific matter, individual or trust that would enable one readily to ascertain which of the files might contain the personal data

of any of the Claimants. The client is recorded as Grampian (or as the corporate trustee of the earlier family trusts). See paragraph 18 of McGuigan 4.

49. Thirdly, regardless of how any file is labelled, the only way in which it is possible to locate any particular type of information in that file about any specific individual – whether this is the individual whose name appears on the file label, or some other individual – is by going through the file page by page, and examining each page individually. That is not easy accessibility.

50. Fourthly, none of the Claimants has ever been a client of TW, and so ordinarily one would not expect to find any paper files that are identified by reference to the name of any of the clients. In fact there are two small paper files labelled with the First Claimant's name, which TW has searched. There are no files labelled with the names of the Second or Third Claimants.

51. Fifthly, the fact that the files are arranged chronologically does not mean that they are "related to individuals". Even if one were to single out specific events within the chronology, the period suggested in paragraph 4 of Robertson 4 covers identified events starting in 1989 and ending in 2009.

52. Applying the principles set out above, the paper files do not constitute a relevant filing system:

    (1) They are not structured by reference to individuals or criteria relating to individuals. Rather, they are structured by reference to clients (who may or may not be individuals), and then by reference to matters (which may or may not relate to individuals).

    (2) The specific files in relation to the Yuills trusts are structured by reference to the corporate trustee client, not by reference to any individuals (e.g. individual beneficiaries). A trust is not to be equated with its discretionary beneficiaries, for the purpose of satisfying the requirement of "relating to individuals".

    (3) It is not possible for *specific* information about individuals to be readily located. In order to locate specific information about any individual, it would be necessary: (a) to identify the files where such information might be found; and (b) to go through those files page by page. Even if some files were labelled

by reference to the individual in question: (a) in order to locate *specific* information about that individual, it would be necessary to review those files page by page; and (b) it might well also be necessary to review other files (not so labelled) page by page, in order to locate specific information about the individual. That does not amount to easy accessibility.

(4) In any event, as regards the Claimants, TW's files are not labelled by reference to their names (subject to a minor exception in relation to the First Claimant).

53. The principles set out in *Durant*, *re Tietosuojavaltuutettu* and the ICO's rule of thumb "temp test", all point to the same conclusion: this is not a relevant filing system.

54. Notwithstanding the points made above, TW have in fact reviewed some nine of their paper files as part of their work done in response to the DSARs, in order to identify any information which would constitute personal data of any of the Claimants (if, contrary to TW's view, the information in these files constitutes "data"). In doing so, they have gone beyond their legal obligations, in an attempt to address matters pragmatically and reduce the scope of any dispute between the parties. Details of the way in which TW has searched for information in these paper files is set out at paragraphs 22-24 of McGuigan 4.

55. Otherwise, TW has not reviewed its paper files in order to locate information that is responsive to the DSARs. For the reasons set out above, it is not obliged to do so.

Discussion and conclusion on Issue 1

56. I have come to the conclusion that the 35 paper files under the client description, "Yuills Trusts", arranged in chronological order, are a "relevant filing system" for the purposes of s1(1) of the DPA 1998 and TW are required to search these for personal data of the Claimants. That does not however apply to the numerous other paper files for individuals or entities that are in some way related or connected to the Yuills group or the Portarlingtons, George's family.

57. I have reached this conclusion for the following reasons:

(1) I accept the Claimants' submission that it is significant that the *Durant* case was decided before the right to the protection of personal data was enshrined as a fundamental right in EU law by Article 8 of the Charter, which was given full

legal effect by the entry into force of the Treaty of Lisbon on 1 December 2009.

(2) As Lord Dyson and Sharp LJ made clear in the *Vidal-Hall* case at [125] the purpose of the Directive as a whole, is to provide a high level of protection to the right of privacy in respect of the management of personal data by data controllers.

(3) Since the right to protection of personal data has become enshrined as a fundamental right of EU law in the Charter, the perspective is different. The focus is on the need for protection of the data subject, as opposed to the burden on the data controller. The level of protection that right has received in the English courts has increased, as can be seen by the difference in approach in *Johnson v Medical Defence Union* [2008] Bus LR 503, where the Court of Appeal held, obiter, that the restriction of compensation in s.13(2) DPA 1998 was not incompatible with the Directive, compared to *Vidal-Hall*, where the Court of Appeal held that the restriction of compensation in s.13(2) DPA 1998 was incompatible with EU law and therefore dis-applied it under the Charter.

(4) I note that the Claimants contend that in the present case the Court of Appeal departed from *Durant* at [110] declining to apply the statement in *Durant* at [27] that the purpose of s.7 of the DPA 1998 was not "*to obtain discovery of documents that might assist [the data subject] in litigation against third parties*". In my judgment this puts the matter too high. [110] must be read in conjunction with [111], where Arden LJ stated that HHJ Behrens misunderstood the sentence and it had been taken out of context. "*The context was that Auld LJ was emphasising the limited nature of personal data, which was the principal issue in the Durant case. A person could not claim that something was personal data because it would assist him in obtaining discovery or in litigation or complaints against third parties.*" In my view that is not a departure from, but an explanation of, the statement of Auld LJ.

(5) The approach of the CJEU in *re Tietosuojavaltuutettu*, in relation to the Directive, however, must now be followed. In [53] of that case the Court stated "*the scope of the protection it confers on data subjects does not depend on the techniques used and avoids the risk of that protection being circumvented*". The second requirement in Durant at [50] that there must be a structured referencing

mechanism, containing a sufficiently sophisticated and detailed means of readily indicating whether and where in an individual file specific criteria or information about the applicant can be readily located is inconsistent with *re Tietosuojavaltuutettu*. It is unduly restrictive and should no longer be a requirement, which could otherwise create a serious risk of circumvention of what is now a fundamental right (see Article 27). I reject TW's submission that the ratio of Durant is unaffected by the *re Tietosuojavaltuutettu* decision.

(6) However, I also reject the submission of Mr White that as a result of *re Tietosuojavaltuutettu*, the sole criterion is whether the personal data relating to a particular person can be "easily retrieved". That issue is not to be examined in isolation. I accept the submission of Mr Pitt-Payne that if one looks at [57] and [62] of *re Tietosuojavaltuutettu*, there are three separate and cumulative elements required:

(i) The data must be structured by reference to specific criteria;

(ii) The criteria must be "related to individuals";

(iii) The specific criteria must enable the data to be easily retrieved.

(7) I apply that approach to the 35 paper files under the client description, "Yuills Trusts" and the client is recorded as Grampian (or as the corporate trustee of the earlier family trusts). In my judgment that clearly relates to trusts in which the Claimants, or at least the First Claimant, were potential beneficiaries. That description of the files is a criterion which allows access to personal data. Is, however, that description one which "*relates to individuals*" for the purposes of Recitals 15 and 27? I note that Article 2(c) itself makes no reference to the specific criterion having to relate to "individuals". It merely states that they can be "*centralized, decentralized or dispersed on a functional or geographic basis.*" In this respect the *Vidal-Hall* decision is of assistance. I rely on the passage in the judgment of Lord Dyson and Sharp JJ at [125], where Article 2(a) of the Directive was being considered. I have referred to it above, but for ease of reference I set it out again here: "*the starting point must be the wording of article 2(a) itself. Ms Proops submits that its (wider) wording cannot be cut down by the wording of the recital, on the general principle of EU law that the terms of a*

recital cannot be used to give a narrow construction to the substantive provisions of a measure, which its wording would not otherwise bear: see Societe d'Importation Edoaurd Leclerc-Siplec v TFI Publicite SA (Case C-412/93) [1995] All E R (EC), [45]-[47]. In any event, recital (26) should be given an expansive interpretation in the light of the purpose of the Directive as a whole, which is to provide a high level of protection to the right of privacy in respect of the management of personal data by data controllers."

(8) Giving the words, "relating to individuals" an expansive interpretation in the light of the purpose of the Directive as a whole, in my judgment the fact that the files relate to trusts in which one or all of the Claimants are potential beneficiaries is sufficient to satisfy that requirement.

(9) That leaves the last limb – do the specific criteria enable the data to be "easily retrieved"? The files in question are arranged in chronological order. It will require someone to turn the pages of the file in order to locate the personal data. That is the exactly the exercise which has already been performed by TW in relation to the files they have already examined in the name of the First Claimant or John D-D, with the description "Trust & Personal Advice". It was carried out initially by a trainee (which is resonant of the ICO "temp test" referred to and relied upon by both parties) and then reviewed by a senior associate. In my judgment that is not unduly onerous and enables any personal data relating to the Claimants to be easily retrieved. Further at paragraph 35(17) above Mr White makes a point which in my view has some force. Ms McGuigan appears to have been able to consider the documents in the paper files and depose that the "*majority*" of documents that contain the Claimants' personal data are "communications which are legal advice communications subject to legal professional privilege" – see McGuigan 3 paragraph 23. If TW can sufficiently identify the personal data relating to the Claimants within the paper files to advance a claim for legal professional privilege in relation to the majority of documents which contain it, the retrieveability of the data must be a feature of the filing system.

58. For the above reasons I decide Issue 1 in favour of the Claimants in that I find that the 35 paper files under the client description, "Yuills Trusts", arranged in chronological

order are a "relevant filing system" for the purposes of s1(1) of the DPA 1998 and TW are required to search these for personal data of the Claimants.

Issue 2: Can TW rely on the Legal Professional Privilege Exception contained in paragraph 10 of schedule 7 to the DPA 1998 ("the LPP Exception") in respect of any particular documents containing the Claimants' personal data? There is a sub-issue about collateral waiver of privilege.

Background

59. Part IV of the DPA 1998 provides for a number of exemptions. Some of these applied to exempt data processing from "the subject information provisions" defined in s.27(2), which included s.7 under which the DSARs were made. S.37 of the DPA 1998 provides that "*Schedule 7 (which confers further miscellaneous exemptions) shall have effect*". Paragraph 10 of Schedule 7 was headed "Legal professional privilege" and provides as follows:

> *"10. Personal data are exempt from the subject information provisions if the data consist of information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications, could be maintained in legal proceedings."*

60. Legal professional privilege ("**LPP**") includes both litigation privilege and legal advice privilege. It is common ground that TW can rely on litigation privilege following MWE's letter dated 18 February 2014, challenging the validity of the 2006 and 2009 appointments by the trustees of the Glenfinnan Settlement (see the judgment of Arden LJ at [5]), although TW now argues that it should be entitled to claim litigation privilege on an earlier date, namely 1 October 2013. I deal with that point at paragraph 63 below. The issue before the Court remitted by the Court of Appeal is whether TW can rely on the LPP Exception at paragraph 10 of Schedule 7 to the DPA 1998 in relation to any data within the scope of the DSARs other than data covered by litigation privilege after 18 February 2014.

61. In their application to the Court of Appeal for permission to appeal to the Supreme Court, TW indicated at paragraph 7 that "*the majority of the documents in its possession relating to the Glenfinnan Settlement, which were the subject of the SAR, were legal advice communications subject to LPP within the ordinary English meaning of that phrase*". This is reinforced by Ms McGuigan in McGuigan 3 where at

paragraph 23, she states: "*The majority of the documents in [TW's] possession relating to the Claimants are held in our capacity as the legal advisers to the trustees of the Glenfinnan Settlement and are communications which are legal advice communications subject to legal professional privilege.*" Ms Tayler has now exhibited to Tayler 1 a list of 72 documents or categories of documents containing the Claimants' personal data, which have been withheld in reliance on the LPP Exception ("**the List**"). They are divided into four sections: section 1 – Litigation Privilege, section 2 – Legal Advice Privilege, section 3 Second and Third Claimants' Personal Data only and section 4 – Legal Advice Privilege (not belonging to Grampian).

62. Further, in his oral submissions to me, Mr Pitt-Payne on behalf of TW, made clear for the first time that section 3 of the List covers both (a) documents in relation to which Grampian as the trustee of the Glenfinnan Settlement claims legal professional privilege, and (b) documents in relation to which Grampian as the former trustee of the Willards Settlement claims legal professional privilege.

63. I mentioned above that there is now a controversy as to whether the date from which litigation privilege can be claimed should in fact be an earlier one. In Tayler 1 at paragraph 6, she states that "*I am advised that litigation was in reasonable prospect from at least 1 October 2013, when following a call from Ms Ziva Roberston, the First Claimant's litigation lawyer to Stephen Kempster, then head of TW's contentious trusts team, TW first made contact with Grampian about the First Claimant's grievances.*" Only if that was the correct date would eight of the ten documents listed in section 1 of the List be covered by LLP. That new date is contested by the Claimants: see Robertson 4 at paragraph 52(g), where she refers to the common ground between the parties, as recorded in [5] of the Appeal Decision, that the relevant date is 18 February 1 2014 and states that "...*The communications by [MWE] to TW prior to the [MWE] letter of 18 February 2014 were requests for information, and not threats of litigation.*" It is unclear whether the "communications" referred to paragraph 52(g) were all oral or whether there were any letters or emails sent by MWE. I was shown none and Ms Tayler simply refers to one call on 1 October 2013. Mr Pitt-Payne accepted that the present argument was not advanced when the matter was considered by HHJ Behrens [see [47] of his judgment] and the Court of Appeal [see [5] of the Appeal Decision] and there was no reservation of any right to claim an earlier date when the date of 18 February 2014 was agreed as the date from which litigation privilege should run. In

such circumstances I am not willing to accept that a basis has been made out for TW now to depart from that date. Accordingly the first eight references in time in section 1 should be removed from the List, and they should be disclosed as part of the Claimants' personal data, subject to the matters raised in the final three sentences of paragraph 213 below.

The bases for TW's claim to the LPP Exception

64. In McGuigan 3 at paragraphs 24-30, four separate reasons are relied upon in support of the claim to the LPP Exception. They are as follows:

    (1) First, (at paragraph 25) because TW does not accept that under English law "*the trustee might not be able to maintain legal professional privilege as against a beneficiary because of a supposed joint or common interest in the privileged material*".

    (2) Secondly, (at paragraph 26) because TW can rely on s.83(8) of the BTA which "*cuts down the rights under Bahamian trust law of a beneficiary to inspect the trustee's legal advice*".

    (3) Thirdly, (at paragraphs 28-9) because there would be some documents in which legal professional privilege could be asserted (the only example given being written advice on a matter which was contentious as between the trustee and the beneficiary), and the time and cost involved in identifying these would be "*substantial*".

    (4) Fourthly, (at paragraph 30) because even if the First Claimant is entitled to disclosure of the data, the Second Claimant and the Third Claimant are not (as they are not beneficiaries of the relevant trust).

65. The Claimants' position, stated shortly, is that the first point is wrong as a matter of English law and the second to fourth points are not open to TW in the light of the Court of Appeal's earlier ruling, and are in any event unsustainable.

The Claimants' submissions on the LPP Exception and Waiver

66. When looking at the disclosure of information between a trustee and a beneficiary, the Claimants draw my attention to the opinion of Lord Walker in *Schmidt v Rosewood*

Trust Ltd [2003] 2 AC 709 at [50], where he drew a "basic distinction" between two different situations, namely:

(1) "The right of a beneficiary arising under the law of trusts (which most would regard as part of the law of property)"; and

(2) "The right of a litigant to disclosure of his opponent's documents (which is part of the law of procedure and evidence)".

67. Although disclosure pursuant to a DSAR under s.7 of the DPA 1998 does not arise in either of these two situations, Parliament in enacting the LPP Exception used the latter situation, but not the former, as the basis for the exception. It is clear from the wording of paragraph 10 of Schedule 7 to the DPA 1998 that the test is whether LPP could be maintained in legal proceedings, and in the present case the Court of Appeal has held that the exception is not concerned with disclosure under the law of trusts: see the Judgment of Arden LJ at [54], where she stated: "*Accordingly, in my judgment, the DPA does not contain an exception for documents not disclosable to a beneficiary of a trust under trust law principles…*".

68. In relation to the maintaining of LPP by trustees against beneficiaries in legal proceedings the law has been clear since the middle of the 19th century. In Halsbury's Laws of England Vol 12 (2015) para 659 the position is stated as follows: "*When a fiduciary relationship exists, such as between a trustee and a beneficiary of the trust ... legal professional privilege cannot be claimed by the trustee, except in respect of communications and documents brought into existence by the trustee for the purpose of litigation against him by the beneficiary*". In Matthews and Malek on Disclosure 5th edn (2016) at para 11.88-11.91 a similar statement of the law appears. In Thanki on The Law of Privilege 3rd edn (2018) at para 4.84 the authors state that a trustee and beneficiary situation is one where joint interest applies such that neither party can assert privilege as against the other in respect of communications coming into existence at the time the joint interest subsisted.

69. In *Wynne v Humbertson* (1858) 27 Beav. 421 Sir John Romilly MR stated the rule in the following terms at 423-4:-

> *"There can be no question that the rule is that, where the relation of trustee and cestui que trust is established, all cases submitted and opinions taken*

by the trustee to guide himself in the administration of his trust, and not for the purpose of his own defence in any litigation against himself, must be produced to the cestui que trust. They are taken for the purpose of administration of the trust, and for the benefit of the persons entitled to the trust estate, who will have to pay the expense thereby incurred."

70. The same rule was applied in *Talbot v Marshfield* (1865) 2 Dr & Sm 549 by Sir R. T. Kindersley VC who ordered production of a case and an opinion of counsel taken by trustees before proceedings were commenced or threatened against them by certain beneficiaries, but not a later case and opinion taken after proceedings had been commenced against them. At 550-551 the Vice-Chancellor stated:-

"The first case and opinion, the production of which is sought, were respectively stated and taken by the defendants to guide them in the exercise of a power delegated to them by the trusts of the will, and which, if exercised, would affect the interests of the other cestuis que trust. The opinion was taken before proceedings were commenced or threatened, and in relation to the trust. Under these circumstances it appears to me that all the cestuis que trust have a right to see that case and opinion. ... The other case and opinion, however, stands on a totally different footing. This was not to guide the trustees in the execution of their trust; but, after proceedings had been commenced against them, they took advice to know in what position they stood, and how they should defend themselves in the suit."

71. Some consideration was given to the nature of the beneficiaries' right to production of such documents in the speeches of Lords Parmoor and Wrenbury in *O'Rourke v Darbishire and ors* [1920] AC 581 at 619-20 and 626-7. Although the case was primarily concerned with whether the claimant could establish to the requisite standard that a fiduciary relationship existed, the passage in Lord Wrenbury's speech is important because it distinguished between the two situations identified in paragraph 63 above, namely the right of a beneficiary arising under the law of trusts and the right of a litigant to disclosure of his opponent's documents. Lord Wrenbury said:-

"If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action, he is entitled to access to them. This has nothing to do

with discovery. The right to discovery is a right to see someone else's documents. The proprietary right is a right to access to documents which are your own. No question of professional privilege arises in such a case. Documents containing professional advice taken by the executors as trustees contain advice taken by trustees for their cestuis que trust, and the beneficiaries are entitled to see them because they are beneficiaries. The first case in Talbot v. Marshfield is an instance."

72. In *In re Londonderry's Settlement* [1965] 1 Ch. 918, which was not an application for disclosure made in proceedings brought against trustees, but a claim by trustees for a negative declaration about what documents they were obliged to disclose under the law of trusts, further consideration was given to the basis upon which the VC ordered production in *Talbot v Marshfield*. At p.931G Harman LJ emphasised that the application before the court in *Talbot v Marshfield* was an application for discovery, and he explained at 932B:-

"The case and opinion were, of course, trust papers, having come into existence ante litem motam. Counsel was advising the trustees as to their rights and duties and every beneficiary must be entitled to see advice of that sort."

73. In the same case at p.938A-C Salmon LJ explained:-

"The position is quite different where the beneficiary seeks disclosure of documents from the trustees in the air, as in this case, from the position where the beneficiary seeks discovery of documents in an action in which allegations are being made against the bona fides of the trustees. If the documents in question are in the possession or power of the trustees and are relevant to the issues in the action, they must be disclosed whether or not they are trust documents. In some instances, however, the fact that they are trust documents may nullify the privilege that would otherwise exist, as for example if the document consists of counsel's opinion taken before the issue of the writ, clearly the beneficiary is entitled to see any opinion taken on behalf of the trust. In the present case there is no suggestion of any kind, and certainly not a shred of evidence, that the trustees acted otherwise than with the utmost propriety. In my judgment Talbot v. Marshfield has very little, if anything, to do with the case we are now considering." (emphasis added)

74. In *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, which concerned the position of discretionary beneficiaries, Lord Walker considered at [43]-[50] the passage from

Lord Wrenbury's speech in *O'Rourke v Darbishire* set out above and the judgments in *In re Londonderry's Settlement*. At [50] he observed:-

> *"The Board does not find it surprising that Lord Wrenbury's observations have been so often cited, since they are a vivid expression of the basic distinction between the right of a beneficiary arising under the law of trusts (which most would regard as part of the law of property) and the right of a litigant to disclosure of his opponent's documents (which is part of the law of procedure and evidence). But the Board cannot regard it as a reasoned or binding decision that a beneficiary's right or claim to disclosure of trust documents or information must always have the proprietary basis of a transmissible interest in the trust property. That was not an issue in O'Rourke v Derbyshire."*

75. Lord Walker's Advice in *Schmidt v Rosewood Trust Ltd* clarified the basis of the beneficiary's right to seek disclosure of trust documents under the law of trusts. See [51] where he stated: "*Their Lordships consider that the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts*". However, it did not alter the rules applicable to the right of a litigant to disclosure of his opponent's documents, nor the position concerning the assertion of privilege as between trustee and beneficiary in legal proceedings.

76. In the recent case of *Lewis v Tamplin* [2018] WTLR 215 HHJ Matthews sitting as a judge of the High Court explained at [59]:-

> *"Secondly, and similarly, the claimants are not entitled to production to them of any documents protected by legal professional privilege of the trustees in any capacity other than as trustees of the Tamplin Trust. Originally, the trustees sought to claim legal professional privilege for all the communications with their lawyers: see Mr Feakes' second witness statement at [24]. This untenable position has wisely been abandoned. There is a clear distinction to make. In general, where trustees seek legal advice for the benefit of* ***themselves personally***, e.g. *in relation to possible breach of trust liability, or of another trust of which they are trustees, and pay for it themselves, or out of the funds of that other trust, without recourse to the funds of the Tamplin Trust, that advice may well be privileged in favour of those trustees as against these beneficiaries. But, where the advice is sought for the benefit of the Tamplin Trust as a whole, and the trustees pay for that advice out of Tamplin Trust funds, then such advice, even though it may be privileged* ***as against third parties***, *is not privileged*

> ***as against the beneficiaries**, and is liable to be ordered to be produced." (emphasis in original)*

77. The distinction between the beneficiary's right to seek disclosure of trust documents under the law of trusts, and the right of a litigant to disclosure of his opponent's documents was expressly recognised by and relied on in the reasoning of Arden LJ in the decision of the Court of Appeal in the present case. In her judgment at [18] Arden LJ identified the issue in relation to the LPP Exception as being:-

> *"whether the Legal Professional Privilege Exception is limited to documents to which any privilege which attached was legal professional privilege under English law, so that those documents were exempt from disclosure in legal proceedings in England as against the claimants ("the narrow view") or whether (as the judge held) that Exception also includes any documents which the trustee could refuse to disclose to the beneficiaries under Bahamian trust law ("the wide view")"*

78. At [23] Arden LJ summarised her conclusion on this issue, stating that the exception only applies to documents which carry LPP for the purposes of English law, and does not include documents by virtue only of the fact that a trustee may refuse to disclose to a beneficiary. At [25]-[26] Arden LJ recorded the Claimants' submission that the exception only covered LPP. This was contrasted at [32] with the submission on behalf of TW that "If the material is subject to legal professional privilege *or is privileged on the basis of the trust relationship*, there is a good answer to the claim for production of the document." (emphasis in original.) At [54] (read together with [39] and [45]) Arden LJ's conclusion expressly rejected the submission that the exemption applied to "*documents not disclosable to a beneficiary of a trust under trust law principles*", as opposed to documents in respect of which the trustee could maintain LPP in legal proceedings in the UK under the law of the relevant part of the UK.

79. For the above reasons, the Claimants submit that TW is not entitled to rely on the LPP Exception beyond the litigation privilege following MWE's letter dated 18 February 2014 challenging the validity of the 2006 and 2009 appointments by the trustees of the Glenfinnan Settlement.

S.83(8) of the Bahamian Trustee Act 1998

80. Mr White submits that TW's reliance upon the LPP Exception is based upon the fact that the Glenfinnan Settlement is governed by the law of the Bahamas, and

consequently s.83(8) of the BTA, "*cuts down the rights under Bahamian trust law of a beneficiary to inspect the trustee's legal advice.*" [McGuigan 3 paragraphs 26-7] is simply an attempt to re-argue a point TW lost in the Court of Appeal.

81. In her judgment at [34] Arden LJ recorded the following submission made on behalf of TW:-

> *"Mr Taube also develops the submission to show that the content of the right is different under the governing law of the trusts. He submits that the documents that Mrs Dawson-Damer seeks fall within section 83(8)(c) of the BTA, and that the Legal Professional Privilege Exception applies to them. The Exception should cover advice which is subject to legal professional privilege under the governing law of the trust. The substantive effect of section 83(8) of the BTA is the same as legal professional privilege even if it is not strictly legal professional privilege."*

82. Arden LJ addressed and rejected that submission at [51] and [54], and (in relation to the exercise of discretion) at [113]. Crucially at [51] Arden LJ held that s.83(8) of the BTA is part of Bahamian trust law and is "*not about legal professional privilege*". And she concluded at [54] "*the DPA does not contain an exception for documents not disclosable to a beneficiary of a trust under trust law principles. The fact is that they are not within the Legal Professional Privilege Exception, and no other exception has been suggested.*" In the circumstances it is not open to TW to seek to re-argue the point based on s.83(8) of the BTA at this remitted hearing. That this is exactly what TW is seeking to do, can be seen from the arguments it advanced in paragraph 4-12 in its written submissions in support of its application to appeal the Appeal Decision to the Supreme Court. Those arguments, which did not succeed, are indistinguishable from those presently advanced now.

83. Further, TW's submissions would apply in a blanket fashion to all the communications by which the trustee sought or received legal advice, whereas it is clear from the judgment of Arden LJ at [17] that the only issue remitted by the Court of Appeal was whether "any particular document(s) carry legal professional privilege under English law".

84. In any event, an attempt to rely on the provisions of a Bahamian statute to establish that documents are privileged from production in English proceedings would be contrary to the well-established rule that "*In the context of English proceedings, whether or not a*

document is privileged is to be determined by English law" – see Dicey, Morris & Collins on The Conflict of Laws 15th edn (2012) para 7-022 and Fourth Cumulative Supplement. For a full review of the authorities see *In re RBS Rights Issue Litigation* [2017] 1 WLR 1991 at [140]-[174].

85. Moreover, in litigation before the Bahamian courts between the First Claimant and the trustee of the Glenfinnan Settlement, Winder J recognised that disclosure in litigation is a procedural matter and that the rules are determined by the particular jurisdiction in which the litigation takes place – see *Dawson-Damer v Grampian Trust Co Ltd* (2017) 20 ITELR 722 at [31]. The report of the First Claimant's expert, of Sir Michael Barnett at paragraphs 20(a), 30 and 31(b) establishes that s.83(8) of the BTA has nothing to do with LPP (see also Arden LJ at [51]) and that the law of LPP between trustee and beneficiary is the same under English and Bahamian law.

The Willards Settlement

86. Grampian is no longer the trustee of the Willards Settlement. The Claimants submit that Grampian as the former trustee of the Willards Settlement cannot maintain a claim for LPP in relation to communications by which it sought or received legal advice on behalf of the Willards Settlement. It is for the present trustee of the Willards Settlement, Yuills Investments Australia Pty Limited ("**Yuills**") a company owned and controlled by the Claimants, to decide whether to claim privilege in relation to such communications.

87. Under s.47(1) of the BTA all trust property (which includes documents containing legal advice) vests in the new trustee. By a letter dated 7 December 2018 sent after Mr Pitt-Payne raised this point, Yuills informed TW that insofar as there is personal data of the Claimants which may be withheld on the basis of LPP in respect of the Willards Settlement, Yuills waives such privilege to the extent necessary to enable disclosure of that data to the Claimants, including by way of full, unredacted documents.

88. Insofar as TW relies on *Schlosberg v Avonwick Holdings* [2017] Ch 210, that authority is simply not on point, it deals with the situation where a person obtains privileged advice as an individual (for his or her own benefit) and then as a result of the insolvency legislation, his property becomes vested in a trustee in bankruptcy. The

case decides that under the relevant insolvency legislation, the benefit of the legal advice privilege does not pass as property to the trustee.

89. The situation in the context of an express trust is different. As is made clear in the cases relied upon by the Claimants in support of the submission that legal advice privilege cannot be asserted by a trustee against a beneficiary, where a trustee obtains legal advice in respect of the administration of the trust and it is paid for out of the trust fund, the benefit of the advice belongs to the beneficiaries. In that situation, the trustee only has any interest in the advice (and the privilege that attached to it) *qua* trustee. When the trustee retires in favour of a replacement, he ceases to have any role in relation to the trust and all property, rights and interests in relation to the trust vest in the new trustee.

90. In those circumstances, it is submitted that following the change of trustee, any privilege pertaining to advice belonging to the trust passes from the outgoing trustee to the new trustee. This is consistent with the terms of s.47 of the BTA which provides for the vesting of a wide variety of rights and interests in the new trustee.

91. Following retirement and vesting it would be absurd if, as TW contends, the former trustee continued to be in a position of joint privilege arising out a relationship which no longer exists and as a consequence had a right to prevent its replacement from sharing advice relating to (and belonging to) the trust with the beneficial owners without its consent.

92. In the circumstances insofar as any section of the List contains documents in relation to which Grampian as the former trustee of the Willards Settlement claims legal professional privilege, the Claimants' personal data in such documents is not covered by the LLP Exception and must be disclosed.

The time and cost involved in identifying particular documents in relation to which legal professional privilege could be asserted

93. This is the third point taken in McGuigan 3 at paragraphs 28-9. It is said that there must be "some documents" in relation to which LPP could be asserted, and that the time and costs involved in identifying these would be substantial.

94. The only documents put forward by way of example are a hypothetical category "*written advice on a matter which was contentious as between the trustee and the beneficiary*". However, as noted by Arden LJ at [5] the Claimants only found out about the 2006 and 2009 appointments in late 2013, and it is common ground that TW can rely on litigation privilege following the letter from MWE challenging the validity of those appointments dated 18 February 2014. It is unclear from McGuigan 3 that there are any documents in this hypothetical category that would not be covered by litigation privilege.

95. Secondly, the Court of Appeal remitted the issue of legal professional privilege for this Court to determine "*whether any particular document(s) carry legal professional privilege under English law*" (see the judgment of Arden LJ at [17] – emphasis added). In advancing this objection in McGuigan 3, TW are not seeking to identify any particular document(s) covered by legal professional privilege, but merely to speculate impermissibly that there must be some such documents which they have not searched for.

96. Thirdly, insofar as this amounts to a claim that it would be disproportionate to search for and identify those documents which TW asserts would (if and when identified) be covered by legal professional privilege, the evidence in McGuigan 3 falls far short of what is required to discharge the onus upon them set out in the judgment of Arden LJ at [75] and [83]-[84]. TW has not even tried to identify the particular steps it might need to take to search for and identify the documents, and the Court is unable to assess whether any particular step would be disproportionate.

The Position of the Second and Third Claimants

97. The last of the points taken in relation to LPP in McGuigan 3 is that even if privilege cannot be maintained as against the First Claimant, it can be maintained as against the Second and Third Claimants, who are not beneficiaries of the Glenfinnan Settlement. The Court of Appeal has held that the purpose for which the First Claimant has requested the data does not provide TW with an option of not providing the data (see the judgment of Arden LJ at [107]-[113]), and the First Claimant can introduce and refer to the data in evidence in the Bahamian Proceedings and, since there is no confidentiality order, the data would potentially become public knowledge and viewable by the Second and Third Claimants.

98. Insofar as TW relies upon *Twin Benefits Ltd v Barker* [2017] 4 WLR 42 for the proposition that if joint privilege applies one holder of the joint privilege cannot waive it in relation to third parties, this would not be an obstacle to disclosure to the First Claimant. Nor would it be an obstacle to the First Claimant deploying it in the Bahamian Proceedings where the only other parties are the trustee and its successor in title to certain of the assets. The position in the present case is unlike that in *Twin Benefits* where the applicant wished to deploy the joint privilege material in litigation against parties who did not share the joint privilege – see [31]-[33].

Waiver

99. This only arises if TW are right that they can otherwise rely on the LPP Exception. The Claimants submit that the First Claimant has in her possession, to the knowledge of the trustee, various documents containing instructions to and advice from Mr Robert Walker QC (as he then was) sought and received by the trustee between 1988 and 1992. The relevant facts were first set out in Robertson 2 at paragraph 14(1)(d) and no issue was taken with those facts in McGuigan 2. The relevant facts were set out again in MWE's letter of 20 March 2018 and Robertson 3 paragraphs 20 and 90-92. TW have not challenged Ms Robertson's factual evidence in relation to this issue. Instead at paragraph 84 of McGuigan 4 states "*However, this issue of waiver of privilege is not an issue in these proceedings under the Act. Instead it is a point which Ashley has raised in the Bahamian proceedings. It appears that for tactical reasons she is trying to incorporate that issue into these present proceedings under the Act following the Court of Appeal's decision.*" At paragraph 85, she states that Grampian does not accept that it has waived privilege and "*TW simply does not accept that Grampian has waived privilege.*"

100. In the circumstances it is submitted that Ms Robertson's unchallenged evidence establishes that any privilege in these documents which could have been maintained against the Claimant has been waived – compare *Birdseye and anor v Roythorne & Co and ors* [2015] WTLR 961 at [46] where a similar situation arose.

101. The waiver of privilege in relation to these documents would prevent TW from maintaining privilege in relation to the "transaction" in respect of which the disclosure has been made. See *Fulham Leisure Holdings Ltd v Nicholson Graham & Jones* [2006] 2 All ER 599 at [11]-[20] and the cases there cited. Ms Robertson has identified the

relevant transaction at paragraph 90 of Robertson 3, namely "*the proper interpretation, tax treatment, and re-settlement options in respect of various settlements ultimately funded from the estate of the late Mr George Skelton Yuill*".

102. This point on waiver has been upheld by the Bahamian Supreme Court in the litigation between the First Claimant and Grampian Trust Co Ltd – see *Dawson-Damer v Grampian Trust Co Ltd* (2017) 20 ITELR 722 at [43]-[52]. It ought equally to be upheld in these proceedings, if TW would otherwise be entitled to rely on the LPP Exception.

103. TW's position that the issue should not be entertained in these proceedings because it is also raised in the Bahamian Proceedings and is a re-run of its argument in relation to discretion which failed in the Court of Appeal (i.e. that they should not be required to produce the Claimants' personal data because the Claimants could seek it on disclosure in the Bahamas). It overlooks the fact that this is a claim against TW as data controller under s.7(9) of the DPA 1998, independently of any application against the trustee in the Bahamian Proceedings. See Robertson 4 paragraph 49.

TW's submissions on whether they can rely on the LPP Exception and Waiver

104. One of the questions remitted to the High Court by the Court of Appeal was whether TW could rely on the LPP Exception so as to withhold information from the Claimants. TW has now carried out extensive searches of its data. TW's present case is that some of the personal data contained in its files falls within the scope of the LPP Exception. This data has, accordingly, been withheld from the data produced to the Claimants. The relevant communications are contained in the List exhibited to Tayler 1. Ms Tayler is a solicitor at TW, who reviewed the documents and has satisfied herself that the relevant documents are subject to LPP.

105. Certain of the documents contain information in respect of which a claim for LPP could be maintained in legal proceedings in England, since legal advice privilege would apply. TW has long acted as the solicitor to Grampian, the trustee of the Glenfinnan Settlement. TW has also acted as solicitor for other trustees of connected family settlements in the Bahamas. TW therefore holds a large number of documentary communications created in the course of the trustee seeking, and TW giving, legal advice, to which LPP attaches.

106. Accordingly, there is no doubt that the documents in respect of which TW seek to rely on the LPP Exception are *prima facie* documents "*in respect of which a claim to legal professional privilege ... could be maintained in legal proceedings*" in England.

107. In the Appeal Decision at [55], the Court of Appeal stated: "*TW can and must claim privilege to which the client is entitled. The trustee has not waived its privilege, and TW cannot (unless instructed to waive privilege) properly do so for them when acting on the Request*".

108. TW's client Grampian, the trustee, does not consent to the waiver of its privilege. None of the adult beneficiaries of the Glenfinnan Settlement apart from the First Claimant has authorised Grampian to waive privilege.

109. TW submits that the Claimants' contentions that:

(1) the LPP Exception cannot be invoked against the Claimants as beneficiaries of the Glenfinnan or Willards Settlements, because of a "*joint privilege*"; and

(2) the Court of Appeal has already ruled against TW on this issue,

are wrong. In any event both Grampian and TW are entitled to rely on the LPP Exception as against the Second and Third Claimants, who are not beneficiaries of the Glenfinnan Settlement.

110. When Grampian instructs TW to provide legal advice to Grampian and receives legal advice, those communications are subject to LPP as a matter of the English law of LPP. As already noted, the LPP belongs to the client, so TW cannot waive LPP on Grampian's behalf. There was no joint retainer of TW by Grampian and the First Claimant and Grampian was not the First Claimant's agent. Therefore such communications fall within the LPP Exception. TW submits that this point is determinative.

111. The First Claimant's claim to "joint privilege" is based upon English trust law based on *Talbot v Marshfield* (1865) 2 Dr & Sm 549 and recent *obiter dicta* of HHJ Matthews in *Lewis v. Tamplin* [2018] EWHC 777 (Ch) (at para 59). Those cases stated the historical position as a matter of English trust law and, in particular, the rights of beneficiaries of an English law trust. The cases proceeded on the express or implied premise that, as a matter of English trust law, the trustee's documents, which had

been paid for out of trust funds, were the equitable "property" of the beneficiaries; and therefore a beneficiary had a right to inspect trust documents as an incident of his or her equitable proprietary interest in those documents.

112. However, the English Court has now rejected the old "proprietary" analysis, which underlies the authorities like *Talbot v Marshfield*, in the decision of the Privy Council in *Schmidt v. Rosewood* [2003] 2 AC 709. (The English courts have followed *Schmidt*.[4]) Therefore, the old authorities and *dicta* now require reassessment. In *Schmidt v Rosewood*, "*much of the debate before the Board addressed the question whether a beneficiary's right or claim to disclosure of trust documents in the possession of the trustee should be viewed as a proprietary right*": paragraph 43 of Lord Walker's Advice. But the Privy Council decisively rejected the "proprietary" analysis: see [44] – [67] of his Advice. Lord Walker concluded [67]: "*no beneficiary (and least of all a discretionary object) has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document.*"

113. Therefore, in an appropriate case, the English Court will in future need to reconsider the old authorities which suggested that, as a matter of English trust law, a trustee of an English trust cannot, as against a beneficiary in hostile litigation, rely on the trustee's undoubted LPP attached to a document in its possession. At para 6-024 in Passmore on Privilege 3rd edition (2013), after discussing the decision in *Schmidt*, the editors state:-

> *"The decision in Schmidt was not concerned with and does not directly affect the privilege position when a beneficiary seeks access to trust documents, but the decision at least brings to bear a different approach to access requests which may well mean that in particular circumstances a beneficiary's right of access even to privileged material in litigation may be curbed."*

114. In the present case TW submits the Court does not need to reassess the principles for two reasons. First, if the Court accepts that Grampian (and thus TW as its agent) is justified in its contention that the material listed in Ms Tayler's schedule is subject to LPP, the LPP Exception applies. The second ground is based on the fact that the law of the Bahamas governs the Glenfinnan Settlement, and that brings into play s.83(8) of the Trustee (Bahamas) Act 1998.

S.83(8) of the BTA

115. This subsection provides as follows:

> *Notwithstanding anything to the contrary in this section (but subject, nonetheless, to subsection 11), no person shall 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 of the following documents, that is to say*
>
> *(a) 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;*
>
> *(b) 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*
>
> *(c) 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)" (emphasis added).*

116. In the Bahamian Proceedings between the First Claimant and Grampian, the Bahamian Court has interpreted s.83(8) "*as primarily relating to the automatic discovery process in ordinary civil litigation*", but it has also found that in limited exceptional cases (e.g. where fraud or bad faith is alleged), s.83(8) does not prevent the Court from making an order for specific disclosure: see *Dawson-Damer v. Grampian Trust Co Ltd* (March 2017) at [34]-[42]. In the Bahamian Proceedings the First Claimant does not allege fraud or bad faith against Grampian, so those limited exceptions are not relevant here.

117. The LPP Exception requires the Court to consider a hypothetical question: whether the LPP which the data controller claims over personal data "*could be maintained in legal proceedings.*" The Court of Appeal held at [42]: "*So when paragraph 10 refers to legal professional privilege which may be recognised in legal proceedings, it means proceedings in any part of the UK. That is the only form of privilege which the domestic rules of the law of any part of the UK recognise.*"

118. If, in legal proceedings in England, the trustee of a trust governed by English law claimed LPP in its privileged documents as against a beneficiary of the trust, the beneficiary would seek to oppose the claim on the basis that, as a matter of English

trust law, the trust relationship meant the trustee could not rely on LPP against its beneficiary.

119. In the present case though, the First Claimant cannot rely on English trust law. The First Claimant seeks to oppose the claim to English legal professional privilege of Grampian (and its agent TW) on the ground that she is a beneficiary of the Glenfinnan Settlement. However, the trust law of the Bahamas governs the Glenfinnan Settlement and the legal relations between Grampian and the First Claimant.

120. Under the trust law of the Bahamas, the trustee can maintain its claim to English LPP against the First Claimant. Similarly, let us assume the First Claimant sued Grampian in England. Grampian could maintain its claim to English LPP against her. The First Claimant could not invoke her status as a beneficiary of this settlement to argue that, as a matter of the governing trust law, there is a "joint privilege": s.83(8) of the governing Bahamian trust law of the Glenfinnan Settlement prevents such an argument succeeding against the trustee.

121. TW does not contend that the LPP Exception in Schedule 7 paragraph 10 of the DPA 1998 imports any foreign species of privilege. Grampian and TW rely on the fact that, as a matter of the English law of LPP, the documents set out in the List are subject to English LPP.

122. TW submits that if the English form of LPP is asserted by a trustee and a beneficiary tries to defeat the privilege by invoking her rights under trust law as a beneficiary of the trust, the Court must examine the governing law of the trust to see whether the relevant beneficiary actually has any such rights under that system of trust law.

123. The First Claimant contends that her status as a beneficiary of the Glenfinnan Settlement is relevant to her DSAR. She must therefore accept that the governing law of the Glenfinnan Settlement is relevant to ascertaining her trust law rights. The LPP Exception does not require the Court to pretend that the parties' trustee-beneficiary relationship is governed by English law, when that is plainly not the case.

124. In conclusion, TW is entitled to rely on the LPP Exception even as against the First Claimant because the First Claimant does not have any trust law rights which cut across, limit or qualify the trustee's claim to legal professional privilege.

The Court of Appeal did not decide this issue

125. TW submit that the Court of Appeal did not decide the issue. They rely upon [18] of the Court of Appeal's judgment, where it formulated Issue 1 (and the answers it gave to Issue I). The Court of Appeal defined the issue as follows:-

> *"**ISSUE 1: Extent of the Legal Professional Privilege Exception**: whether the Legal Professional Privilege Exception is limited to documents to which any privilege which attached was legal professional privilege under English law, so that those documents were exempt from disclosure in legal proceedings in England as against the appellants ("the narrow view") or whether (as the judge held) that Exception also includes any documents which the trustee could refuse to disclose to the beneficiaries under Bahamian trust law ("the wider view")."*

126. On Issue 1, the Court of Appeal held that the LPP Exception was limited to LPP as understood by English lawyers and that, therefore, TW could not rely on any foreign species of privilege to withhold documents which would not attract LPP in the English sense.

127. It is important to understand why the Court of Appeal defined Issue 1 in this manner. S.83(8) of the Bahamian Trustee Act permits a trustee to refuse to disclose a wider range of documents than just its documents containing material to which LPP attaches (e.g. confidential communications which are not subject to LPP but which may fall within the *Londonderry* principle can be withheld). At [63] of the judgment of HH Judge Behrens at first instance (in *Dawson-Damer v. Taylor Wessing* [2015] EWHC 2366 (Ch)) he had concluded: "*paragraph 10 of schedule 7 should be interpreted purposively so as to include all the documents in respect of which Grampian would be entitled to resist compulsory disclosure in Bahamian proceedings.*" This was the reason for the Claimants' main ground of appeal: see [26] of the Court of Appeal's judgment.

128. In the present application TW is not relying on a foreign species of privilege. It is relying on English LPP. Instead, it is the First Claimant who seeks to "pierce" the trustee's claim to English legal professional privilege by praying in aid her status as the beneficiary of a trust applying principles of English trust law. However, the Glenfinnan Settlement is regulated by a foreign system of law. Insofar as the First Claimant seeks to rely on her status as beneficiary of the Glenfinnan Settlement in that way, she must accept that her trust law rights as a beneficiary are governed by Bahamian trust law.

129. For the avoidance of doubt, it is not TW's position that the LPP Exception applies to the wider class of documents mentioned in s.83(8) which are not eligible for LPP. In responding to the Claimants' DSARs, TW has only withheld personal data on the basis of English LPP.

The Willards Settlement

130. TW submits that the Claimants' assertion that Yuills is entitled unilaterally to waive privilege in legal advice received by the former trustee, Grampian, so far as it concerns the Willards Settlement is unsupported by authority and wrong in law.

131. The legal advice in question was obtained by Grampian for itself as trustee, so the LPP continues to belong to Grampian. There is no special exception to LPP rules where a trustee takes legal advice. Grampian and Yuills are separate legal persons. Yuills, as the successor trustee of the Willards Settlement, is not the same person as Grampian. Grampian has a continuing right to assert its right to LPP. This point is reflected in the common law principle that a trustee is and remains personally liable for its own acts and omissions – including contractual liabilities – that it undertook whilst it was a trustee, even after it has retired as trustee: see Lewin on Trusts 19th edn. §21-010

132. On the basis of s.47 of the BTA, the Claimants contend that all trust property vests in the new trustee, and this includes trust documents containing legal advice. TW submit that LPP is not trust property or an asset which invests in a new trustee along with the trust property and documents. LPP "*does not arise out of, nor is it incidental to, property in the documents containing the privileged information. It is a right in respect of the information which arises out of the confidential relationship between the client and the lawyer, and it has nothing to do with the status of the documents as chattels.*" See *Schlosberg v. Avonwick Holdings Ltd* [2017] Ch. D. 210 (per Arnold J at [121], whose decision was upheld by the Court of Appeal at [68] – [70] and [86]).

133. Grampian is therefore entitled to continue to claim LLP in relation to legal advice it maintained as trustee of the Willards Settlement.

The time and cost involved in identifying particular documents in relation to which legal professional privilege could be asserted

134. In relation to the third point made in paragraphs 28-29 of McGuigan 3, referred to at paragraph 63 above, namely the time and cost involved in identifying particular documents in which LPP could be asserted, Mr Pitt-Payne submits that even if, contrary to TW's primary case, it is correct Grampian as trustee cannot generally assert legal advice privilege against a beneficiary, there is undoubtedly *some* material in which LPP could be so asserted (e.g. where advice is provided on a matter which is contentious as between trustee and beneficiary). The costs of establishing what information would be disclosable on this analysis would be substantial. It would be disproportionate to require TW to carry out that exercise.

The position of the Second and Third Claimants

135. TW relies upon the decision of Arnold J in *Twin Benefits Ltd v Barker* [2017] 4 WLR 42 for the proposition that if joint privilege applies one holder of the joint privilege cannot waive it in relation to third parties. In that case in proceedings alleging that an agreement settling earlier proceedings regarding a trust had not taken account of the interests of minors, the claimant applied for disclosure against a non-party.

136. The respondent, a solicitor, had acted as litigation friend to a minor ("**E**") in respect of the earlier proceedings. E was the representative of a class of beneficiaries of the trust which included his half-siblings ("**the Twins**"), also minors. The proceedings were settled. The claimant, a company to which the Twins had assigned their rights, brought proceedings against the settlor of the trust and its trustee, alleging that the settlement agreement had not properly taken account of their interests. It applied for disclosure from the litigation friend of several classes of documents: including communications between the litigation friend, her firm and counsel.

137. The communications between the litigation friend and the legal representatives were covered by LPP. The litigation friend conceded, for the purposes of the instant application, that there was a common interest between E and the Twins such that they were jointly entitled to LPP. Accordingly, E could not rely on LPP to deny the Twins, or the claimant as their successor in title, inspection of the documents, but the Twins could not waive LPP so as to permit inspection of the documents by the defendants without E's consent. The litigation friend did not consider it in E's best interests to

waive LPP. Prima facie, LPP would prevent the claimant deploying the documents in the proceedings.

138. It was not necessary, however, in order for CPR r.31.17(3)(a) to be satisfied, for the applicant for disclosure to show that the documents themselves could be deployed as part of its case. The structure of r.31.17 envisaged that an order could be made for disclosure on the basis that the documents were likely to support the applicant's case or adversely affect another party's case (r.31.17(3)(a)) even though the respondent might have a right or duty to withhold inspection of the documents (r.31.17(4)(b)(ii)). At [35]-[37], the Judge held that the disclosure and inspection of the communications was necessary fairly to dispose of the claim or to save costs. They were likely to give a strong indication of the extent to which the Twins' interests had been taken into account. Whether they supported or contradicted the claimant's beliefs, early disclosure and inspection was likely to promote the speedy, just and efficient resolution of the dispute, and could avoid the need for a trial. He ordered disclosure subject to the parties agreeing a confidentiality club in respect of the documents.

139. Based on the above authority, if joint privilege did apply, in relation to the Glenfinnan Settlement, the First Claimant alone could not waive it in relation to disclosure to the Second and Third Claimants, who are not beneficiaries. There would have to be a protocol agreed in relation to the personal data relating to the First Claimant, because Grampian could still claim LLP against the Second and Third Claimants.

Waiver

140. TW's primary case is that the First Claimant has raised similar arguments in the proceedings against Grampian in the Bahamas, which have not yet been adjudicated. It is the Bahamian court, not this court, which is the correct forum for determining it. See paragraphs 84-86 of McGuigan 4.

141. TW accepts that the First Claimant is in possession of some documents containing or referring to legal advice provided by Robert Walker QC to Arndilly Trust Co Ltd, another Bahamian trustee, ("**Arndilly**") between 1989 and 1992. The First Claimant contends that, at some time before the death in 2000 of her late husband John D-D, Mr John Duff, who performed a consultancy role for the trustees of various family trusts, family companies and the family gave these documents to John D-D; and there

has therefore been a collateral waiver by the trustee of its legal professional privilege in "*any related documents forming part of the same transaction.*"

142. TW's (and Grampian's) position is that there has been no collateral waiver. The law of collateral waiver is clear. The guiding principle is fairness. The Court will not allow a party to "cherry pick" or "show his hand in part". The classic statement of the principle was given by Mustill J in *Nea Karteria Maritime Co v. Atlantic and Great Lakes Steamship Corp* [1981] Com. L. R. 132 at 139:-

> *"Where a party deploys in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue."*

143. The essential ingredients of this test are that:

(1) the material said to trigger a collateral waiver is deployed in court or, at the very least, disclosed in contemplation of court proceedings; and

(2) it would be unfair to allow the deploying party to "cherry pick", i.e. to litigate in reliance on the disclosed documents but to withhold other documents which may also be relevant to the same transaction.

144. The principle of collateral waiver does not apply to the disclosure which the First Claimant alleges was made. Even if certain privileged documents were voluntarily disclosed to John D-D, it is not admitted that Mr Duff was an agent of Arndilly for this purpose.

145. In any case, there is no basis for the First Claimant's contentions that Mr Duff was thereby selectively waiving the trustee's privilege in those documents as against not only John D-D but also the First Claimant, or that this would have effected a *collateral* waiver of other documents. Prior to John D-D's death in 2000 there was no litigation, whether actual or in prospect, so the documents disclosed were not being deployed in litigation.

Discussion and conclusion on Issue 2

146. In my judgment, when considering Issue 2 there are a number of important passages in the judgment of the Court of Appeal in the present case.

147. The starting point is [54] of Arden LJ's judgment in the present case. She stated there: "*Accordingly, in my judgment, the DPA does not contain an exception for documents not disclosable to a beneficiary of a trust under trust law principles. The fact is that they are not within the Legal Professional Privilege Exception and no other exception has been suggested*". Earlier at [42], she stated: "*So when paragraph 10 refers to legal professional privilege which may be recognised in legal proceedings, it means proceedings in any part of the UK. That is the only form of privilege which the domestic rules of the law of any part of the UK recognise.*" And at [45] "*Therefore, the Legal Professional Privilege Exception relieves the data controller from complying with a SAR only if there is relevant privilege according to the law of any part of the UK.*"

148. The second important passage is at [51] in relation to s.83(8) of the TBA 1998, where Arden LJ stated: "*... This provision is an enhancement of the Trustee's discretion to refuse disclosure... It thus seems clear, although the judge made no finding about this, that section 83 is not about legal professional privilege (as conventionally understood) but about the right of the trustee to refuse disclosure of documents or other information.*" In my view it clearly follows from this, that non-disclosure provisions of the s83(8) of the BTA relating to a trustee's right of non-disclosure is not included within the LPP Exception and Arden LJ expressly so found at [54].

149. As Mr White and Mr Wilson recognise in their Outline Submissions at paragraph 15, "legal professional privilege includes both litigation privilege and legal advice privilege." At [55], Arden LJ stated: "*TW can and must claim privilege to which the client is entitled. The trustee has not waived its privilege, and TW cannot (unless instructed to waive privilege) properly do so for them when acting the Request*". If therefore the personal data is contained in documents which attract legal professional privilege, including legal advice privilege, those documents would fall within the LPP Exception and would not have to be produced.

Is the claim of "joint privilege" available to a beneficiary of a Trust under English trust law?

150. In relation to the List exhibited to Tayler 1, insofar as those documents belonging to the Glenfinnan Settlement are subject to LPP, neither the sole trustee, nor any of the potential adult beneficiaries, apart from the First Claimant consent to TW waiving privilege. I accept the analysis of Mr Pitt-Payne and Mr Taube in paragraph 66 of their

skeleton argument, that when Grampian instructs TW to provide legal advice and receives it, those communication are subject to LPP as a matter of the English law of LPP. The LPP belongs to the client and TW cannot waive LPP on Grampian's behalf. There was no joint retainer of TW by Grampian and the First Claimant. Where I part company with their analysis is where they contend that this is determinative of the point.

151. It is necessary to go on to consider the submission made by the Claimants that, whilst that material may be privileged against a stranger, on the basis of the authorities governing English trust law, the privilege is a "joint privilege". Having considered the authorities relied upon by the Claimants set out at paragraphs 68-76 above, I accept that the Claimants' submission that under English trust law, joint privilege would arise. I reject TW's submissions to the contrary.

The effect of s. 83(8) of the BTA

152. That gives rise to the second question within issue 2 – what is the effect, if any, of s.83(8) of the BTA? In my judgment, whilst the Court of Appeal did rule categorically that this statute could form no part of LPP for the purposes of the LPP Exception, it did not consider whether, there was any aspect of Bahamian law which would affect the entitlement of a beneficiary to prevent the normal application of LPP on the basis of "joint privilege". That matter has not been decided and remains open for argument.

153. It is common ground that the law of the Bahamas governs the Glenfinnan Settlement and in my judgment that is the relevant law upon which to consider whether the First Claimant has a "joint privilege". I accept the submissions made on behalf of TW that looking at the provisions of s83(8) of the BTA, where Bahamian law applies to a trust, a beneficiary has no automatic right to see the legal advice to a trustee prior to any threatened litigation and no proprietary right to documents containing that advice, and so no "joint privilege" can exist under that law.

154. Such an analysis is quite consistent with the authorities relied upon by the Claimants referred to at paragraph 83 above, namely the passage in Dicey, Morris & Collins at para 7-022 and *In re RBS Rights Issue Litigation* [2017] 1 WLR 1991 at [140]-[174], and in particular [169], where Hildyard J said: "*To conclude my review of the relevant English cases, it seems to me clear that whether described as a rule, a convention or*

practice, it is the approach of the English court to apply the lex fori to issues of privilege." TW is not relying on a foreign species of privilege. It is relying on English LPP. It is the First Claimant that is trying to overturn the privilege that would otherwise exist, and she has to do so by reference to the substantive law of trusts and whether the relationship between a beneficiary and a trust and its trustee overrides the LPP, which would otherwise exist. That, in my view, must be determined by reference to the relevant law of the trust.

155. Nor do I accept that TW are attempting impermissibly to argue a point they lost before the Court of Appeal. The point being contested before me is a different one, and one which was not decided by the Court of Appeal. The fact that TW deployed a similar argument unsuccessfully before the matter under consideration by the Court of Appeal (as is indeed apparent from their written submissions for permission to appeal the Appeal Decision to the Supreme Court), does not prevent their reliance upon it for present purposes.

156. The result is that TW is entitled to rely on the LPP Exception even as against the First Claimant because the First Claimant does not have any trust law rights which cut across, limit or qualify the trustee's claim to legal professional privilege.

The Willards Settlement

157. In relation to whether Grampian, as a former trustee of the Willards Settlement, is still entitled to rely upon LPP, despite the waiver by its successor, Yuills in its letter dated 7 December 2018, I prefer the submissions of the Claimants set out at paragraphs 86-91 above. In my judgment, one can distinguish the *Schlosberg* decision for the reasons advanced by the Claimants at paragraphs 88-89 above.

158. In those circumstances, I find that following the change of trustee, any privilege pertaining to advice belonging to the trust passes from the outgoing trustee to Yuills, the new trustee, which can waive and in this case, have waived any LPP. This approach in my judgment is consistent with the provision of s.47 of the BTA, which provides for the vesting of a wide variety of rights and interests in the new trustee.

159. Given my findings above in relation to the effect of s83(8) of the BTA, it is therefore not necessary to determine the other two points raised in McGuigan 3 at paragraphs 28-

30. In case the matter goes further, however, I shall shortly state my decision in relation to them.

The time and cost involved in identifying particular documents in relation to which legal professional privilege could be asserted

160. In relation to Ms McGuigan's contention that the time and cost involved in identifying particular documents over which LPP could be asserted would be "*substantial*", in my judgment there is nothing in this point. Arden LJ made clear at [83]-[84] of the Appeal Decision that the onus is squarely on the data controller and TW has not come close to discharging the onus on it. I accept the Claimants' submissions recorded at paragraphs 93-96 above in this regard.

The position of the Second and Third Claimants

161. In relation to the position of the Second and Third Claimants, I find the fact that they themselves are not potential beneficiaries of the Glenfinnan Settlement, and therefore LPP could be claimed against them, does not prevent disclosure to the First Claimant of her personal data under the DPA 1998, if LPP did not apply to her because of "joint privilege". In fact I do not believe that the submissions made on behalf of TW go that far. They are looking for some form of restriction being placed on the Second and Third Claimants being entitled to see such data being disclosed to the First Claimant.

162. If one looks at [107]-[113] of the Appeal Decision, the Court of Appeal held that the purpose for which the First Claimant has requested the data does not provide TW with an option of not providing the data. The First Claimant can therefore introduce and refer to the data in evidence in the Bahamian Proceedings and the data would potentially become public knowledge and viewable by the Second and Third Claimants. This could not form a basis for refusing to provide to the First Claimant personal data to which she would otherwise be entitled.

163. In my view, this does amount to an attempt by TW indirectly to re-argue a point on which they did not succeed before the Court of Appeal. Therefore, had the First Claimant's "joint privilege" argument succeeded in overriding the LPP Exception, I would not have found it necessary to put in place any protocol or confidentiality club.

Waiver

164. I turn first to whether this matter has been determined by the Bahamian Supreme Court. Looking at [43]-[52] of *Dawson-Damer v Grampian Trust Co Ltd*, it seems to me that what in fact was determined by Winder J in that case was whether or not collateral waiver can be raised in relation to the trustee's right to withhold documents under s.83(8) of the BTA. At [52], he stated that "*he was satisfied that notwithstanding the provisions of s.83(8) the question of waiver is a live one and that any rights conferred by s.83(8) are capable of being waived..*" He went on to say that he "*was not satisfied however that pleading reliance on a document is enough to waive protection afforded under s.83(8), albeit it is difficult to conceive how at trial any reliance can truly be had on such a document, which the defence contends formed the basis of its decision-making. It goes without saying that if any document is sought to be relied upon at trial it* ***must*** *be disclosed at the discovery stage.*" [emphasis in the original]. That is the extent of his decision.

165. This is a claim against TW as data controller under s.7(9) of the DPA 1998 made independently of any application against the trustee in the Bahamian Proceedings. I have to determine the issue of collateral waiver on the material before me in relation to the LPP Exception to the DPA 1998, applying English law, the *lex fori*. In my judgment, the fact that the point has been raised in relation to the Bahamian Proceedings in the context of s.83(8) of the BTA does not dispense with the need for this court to consider whether collateral waiver has been made out in relation to compliance with a DSAR, nor does the decision of Winder J prevent it from doing so. I accept the Claimants' submissions in this respect.

166. The evidence relied upon by the Claimants referred to at paragraph 98 above is not materially challenged. In my judgment, for present purposes, Mr Duff is to be regarded as an agent of Arndilly for present purposes, in relation to the provision to John D-D of some documents containing or referring to legal advice provided by Robert Walker QC to Arndilly between 1989 and 1992.

167. There were, however, no proceedings on foot or contemplated at the date of John D-D's death in 2000, and I accept TW's submission that, applying the dictum of Mustill J in the *Nea Karteria Maritime* case, referred to at paragraph 142 above, the material said to trigger a collateral waiver has to be deployed in court or, at the very least,

disclosed in contemplation of court proceedings. That requirement has not been satisfied here, and that is the context in which, the second element, namely that it would be unfair to allow the deploying party to "cherry pick" falls to be considered. Nothing in the *Fulham Leisure Holdings* case relied upon by the Claimants detracts from that requirement. In that case, in proceedings for professional negligence against a firm of solicitors, the claimant voluntarily disclosed an attendance note of a consultation with counsel, its instructions to counsel and a presentation made by solicitors at a time when it was taking advice in relation to its position after the matter in which it claimed the defendant firm had been negligent had taken place. At [20] Mann J cites Auld LJ's judgment in *R v Secretary of State for Transport ex p Factortame* (1997) 9 Admin LR 591, in which he cited with approval the dictum of Mustill J in the *Nea Karteria Maritime* case, referring to it as the "*classic judicial statement of principle.*" In my judgment that principle is not satisfied here.

168. In the *Birdseye* case, Newey J (as he then was) was not considering an issue of collateral waiver but whether, under English law, privilege could be asserted against a beneficiary and whether confidentiality in the allegedly privileged documents in question had been lost, confidence being a precondition for privilege. In my view it does not assist the Claimants in relation to the fundamental requirement that the material already disclosed, at the very least must have been disclosed in contemplation of court proceedings.

169. I therefore accept TW's submission that there has been no waiver in documents, which would otherwise be subject to LPP on the basis of legal advice privilege. For completeness, had I so found, I would have accepted the Claimants' submission that the relevant transaction is that identified by Ms Robertson at paragraph 90 of Robertson 3, namely "*the proper interpretation, tax treatment, and re-settlement options in respect of various settlements ultimately funded from the estate of the late Mr George Skelton Yuill*".

Issue 3: Has TW breached its obligations under s.7 of the DPA 1998 by failing or refusing to carry out reasonable and proportionate searches for the Claimants' personal data?

Background

170. S.7(1) of the DPA provides as follows:

"Subject to the following provisions of this section and to sections 8, 9 and 9A, an individual is entitled –

(a) to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller,

(b) if that is the case, to be given by the data controller a description of-

(i) the personal data of which that individual is the data subject,

(ii) the purposes for which they are being or are to be processed, and

(iii) *the recipients or classes of recipients to whom they are or may be disclosed,*

(c) to have communicated to him in an intelligible form –

(i) the information constituting any personal data of which that individual is the data subject, and

(ii) any information available to the data controller as to the source of those data, and

(d) [not material for present purposes.]

171. By s.7(9) of the DPA 1998, if a court is satisfied on the application of any person who has made a request under s.7 that the data controller has failed to comply with the request then the court may order him to comply.

172. S.8(2) of DPA 1998 provides:

"The obligation imposed by section 7 must be complied with by supplying the data subject with a copy of the information in permanent form unless –

(a) the supply of such a copy is not possible or would involve disproportionate effort..."

173. The judgment of Arden LJ in the present case has held that TW are obliged to carry out reasonable and proportionate searches, and that the onus of establishing that any particular step required to identify and disclose the Claimants' personal data is disproportionate lies on them. At [79] of the Appeal Decision, Arden LJ stated that:

"...it is clear from the recitals to the Directive that there are substantial public policy reasons for giving people control over data maintained about them through the system of rights and remedies contained in the Directive,

which must mean that where and so far as possible, SARs should be enforced. Moreover, most data controllers can be expected to know of their obligations to comply with SARs and to have designed their systems accordingly to enable them to make most searches for SAR purposes."

And at [83]-[84], she concluded:

"83. ...I have no doubt that TW have not made good its claim that it would involve disproportionate effort to take any further steps to identify personal data. The court is not yet at a stage when it could say that any particular steps would be disproportionate.

84. TW must produce evidence to show what it has done to identify the material and to work out a plan of action. It has singularly failed to do this and so has not discharged the onus on it."

174. The Claimants maintain that they have made a number of requests for reasonable and proportionate searches which are very likely to contain their personal data, but TW have not complied with any of them. They submit that TW have singly failed to discharge the onus of providing specific evidence in relation to each of the steps requested that it would be disproportionate, and that its general appeals to proportionality are inadequate. TW deny that it is in breach of s.7 and maintain that no further searches should be ordered to be conducted because this would involve disproportionate effort, and that it should not be required to do anything further.

The Claimants' case in relation to its allegations of non-compliance in relation to their obligation under s.7 of the DPA 1998.

175. The further searches sought by the Claimants are set out at paragraph 87(iv)-(vii) of their Outline Submissions and are as follows:

(1) A search for the Claimants' personal data in:-

a. documents setting out or recording the reasons given to John D-D as to why it was not considered appropriate to make a distribution to his family, following his letter dated 8 July 1999 to John Duff;

b. documents referred to in documents containing the Claimants' personal data which have been disclosed as listed in the schedule sent to TW by MWE on 29 March 2018 ("**the cross-referenced documents**");

c. the categories of documents generated by the trust advisors or family

advisors and trust protector which TW are likely to hold identified in Robertson 4 at paragraphs 16(b) and (c), 30 and 32; and

d. documents relating to the board meetings of Grampian held on 21 December 2006 and 23 March 2009 referred to in Robertson 3 paragraph 28 and Robertson 4 paragraphs 28-29.

(2) A search for the Claimants' personal data in their electronic documents using the seven additional search terms listed in MWE's letter to TW dated 16 August 2017.

(3) A search for the Claimants' personal data stored on the Mimecast platform.

(4) A search for the Claimants' personal data in the personal spaces in which TW employees can save documents and emails of (a) currently employed relevant fee earners, and of (b) those former partners and employees in the list exhibited to Robertson 4 referred to at paragraph 52(c) thereof.

I set out below the Claimants' position in relation to each of them in turn.

176. In relation to the cross-referenced documents, the Claimants submit that TW have not discharged the onus upon them in relation to establishing that the requested search would be disproportionate. TW have simply refused to conduct this search. They have not served any evidence setting out the time and cost which would be involved in conducting such a search. If, as seems likely, the cross-referenced documents contain the Claimants' personal data, they fall within the scope of the DSARs and TW should conduct the search. It is nothing to the point that there might be 60 or 99 such documents. The Claimants have requested a targeted search of identified documents and TW has not shown (or even attempted to show) that it would be disproportionate.

177. In relation to the categories of documents set out at paragraph 175(1)(a), (c) and (d) above, the Claimants submit that beyond a general contention by TW that their existence were sufficient and proportionate to comply with their obligations under s.7 of the DPA 1998, no further submissions were made by TW relating to those documents. This is insufficient to discharge the burden placed on a data controller.

178. In relation to the further search terms requested, until the third day of the hearing TW's position was simply that it would not search using these terms because they were all

"too wide". No evidence was before the Court to show the number of hits or the proportions of new and potentially relevant documents. On the morning of the third day, Mr Pitt-Payne informed the Court that TW had now run the search terms and the searches have yielded 132 new documents for "Dawson-Damer", 589 for "Glenfinnan", 192 for "'s issue". No new documents were returned for the other search terms. The Claimants submit that far from establishing that the requested search terms are too wide this demonstrates that they were not. No indication of the cost or time involved in reviewing the new documents was given. In the circumstances TW should be ordered to review the new documents responsive to the Claimants' requested search terms and to disclose any personal data found.

179. In relation to the requested search of the Mimecast platform, Mr Pitt-Payne informed the Court on the second day of the hearing that personal data contained in nine documents returned by the search term "Adelicia" had not been disclosed because the data in question had been disclosed in other documents. But this is no answer because the data will appear in different contexts in different documents and the DSARs extend to the Claimants' personal data wherever it is contained (subject to any applicable exemption). The Claimants submit that therefore TW have not made out their case that a search of the Mimecast platform would be disproportionate.

180. In relation to personal spaces, the Claimants request targeted searches of the personal spaces of current and six former employees of TW. The evidence the Claimants rely on is set out at McGuigan 3, paragraph 35, Robertson 3 paragraphs 74 and 85(c)(ii) and Robertson 4, paragraph 52(c) and the witness statement of the Second Defendant dated 11 February 2015, which revealed that most of the personal data ultimately disclosed by Mr Morrison was retrieved from personal spaces on his/his secretary's computers. TW resist searching the personal spaces of current employees without any evidence that taking this step would be disproportionate. Ms Robertson makes the points (a) that the proportionality of searching the personal spaces of particular fee-earners who have left TW must depend upon who they were and what their roles were in relation to the Claimants and in what periods, and (b) that there is no evidence that TW has searched the personal spaces of currently employed relevant fee-earners. There has been no response by TW to Ms Robertson's evidence. There is some limited evidence in McGuigan 3 that searching the personal spaces of former employees would be more

difficult, but no actual evidence has been produced about the cost or time involved in doing so.

TW's response to the allegations of non-compliance in relation to their obligation under s.7 of the DPA 1998.

181. TW place great store on the provisions of s.8(2) of the DPA 1998. It submits that the issue under this provision is whether requiring TW to conduct any further searches, or to carry out any further work in response to the DSARs, would involve disproportionate effort. TW's case is that this would involve disproportionate effort, and that it should not be required to do anything further.

182. The Appeal Decision at [74]-[85] discusses the scope of s.8(2) and makes it clear that s.8(2) is not simply about whether the provision of documents in hard copy form (as opposed to in some other form) would involve disproportionate effort. S.8(2) also requires consideration of whether any necessary prior steps would involve disproportionate effort. For instance, if searching for a particular type of information would involve disproportionate effort, then the data controller is not obliged to carry out such a search. The relevant passage in the Court of Appeal's judgment is at §§74-85. The Court's approach is summarised by Arden LJ at [77]:

> *"In my judgment, the word "supply" is used [i.e. in section 8(2)] so that what is weighed up in the proportionality exercise is the end object of the search, namely the potential benefit that the supply of the information might bring to the data subject, as against the means by which that information is obtained. It will be a question for evaluation in each particular case whether disproportionate effort will be involved in finding and supplying the information as against the benefits it might bring to the data subject."*

183. In assessing what is proportionate, it is relevant to consider the *kind* of benefit that the supply of information might bring to the data subject. The purpose of the right to make a DSAR is to protect individual privacy, by enabling individuals to ascertain whether their personal data is being processed in a manner consistent with DPA 1998. The purpose of the right is *not* to provide individuals with an additional route to obtaining disclosure for the purposes of litigation. The Court of Appeal considered whether the appellants were unable to enforce the request because of their collateral

intention to use the information to assist in their litigation against the trustee – see [86]-[115] of the Appeal Decision.

184. This is in the context of deciding whether the remedial discretion under s.7(9) should be exercised against the Claimants. The Court of Appeal concluded that there was not a "no other purpose" rule which was an automatic bar to the exercise of the s.7(9) discretion: [105]-[114]. It does not follow, however, that the nature of any benefit to be conferred on the Claimants is to be disregarded when assessing proportionality. If the potential benefit to the Claimants is not the kind of benefit that the DSAR was established in order to confer, then this should form part of the balancing exercise that is involved in relation to proportionality. A major concern for TW in the present proceedings is that the Claimants' demands and expectations in relation to what TW should do in compliance with the DSARs goes beyond what is proportionate, precisely *because* the Claimants are seeking to use the DSARs as an additional disclosure exercise in connection with the Bahamian Proceedings.

185. The exercise that has now been carried out by TW, following the Court of Appeal's Order, and has resulted in the disclosure of various tranches of personal data to the Claimants (summarised in McGuigan 4, paragraph 28). The exercise of locating information, reviewing it, and disclosing it to the Claimants to the extent that it constitutes their personal data, has taken significant time and work. The time and costs involved have added up to more than 17 hours of partner time, 155 hours of senior associate time, and 144 hours of trainee time (McGuigan 4, [74]). In these circumstances it would not be proportionate to require TW to conduct any further searches or to carry out any further work in response to the DSARs. This is especially the case, as lists of disclosure in the Bahamian Proceedings were due to be exchanged on 28 February 2019 – see McGuigan 4, paragraph 76.

186. The first main issue that arises under the s.8(2) heading is whether TW is required to carry out any further searches of its electronic documents, in addition to the searches that it has already conducted. The electronic documents themselves, and the steps that have been taken to search them, are described in McGuigan 3 paragraphs 31-40; and McGuigan 4, paragraphs 51-72. These are extensive.

187. TW have identified three repositories of electronic data that might contain personal data of the Claimants:-

(1) The document management system ("**DMS**"). This is the system on which TW now saves all electronic data created or received by the firm.

(2) Mimecast. Emails that are not saved to the DMS can be retrieved through this program.

(3) Archive. This is a folder share on a file server. Its contents are a mixture of personal and client related files that were not imported into the DMS when this was set up.

188. In order to search the relevant information within the DMS, all of the electronic files held in relevant matters have been uploaded to the Relativity processing and hosting facility. Separate searches have been carried out in relation to Mimecast and the Archive.

189. After running search terms against the documents held on Relativity, 1,291 documents were returned (or 1,597 including so called "family members" such as emails and attachments): McGuigan 3, paragraph 33. These have been reviewed in order to identify personal data that is responsive to the DSARs. For the purposes of this exercise, 25 search terms were used (being the same terms that had previously been agreed by the Claimants in respect of their DSARs against the UK Family Advisers): McGuigan 4, paragraph 51.

190. Likewise, electronic searches have been run for the period 1 January 2007 to 18 February 2014 for emails held on Mimecast: McGuigan 3, [36]-[38]. The search terms used, and the number of returns generated for each term, are exhibited to McGuigan 3. TW reviewed the results of the search terms that had returned up to 1,000 results, and also reviewed the results of the search term "Willard" (even though it returned more than 1,000 results) as this was likely to be more relevant to the Claimants: McGuigan 4 paragraphs [65]-[66]. The detailed and careful process by which the search results were reviewed is set out at McGuigan 4, paragraphs [67]-[68].

191. TW's case is that the searches of electronic data that it has carried out (as explained in McGuigan 3 and 4) go well beyond what is reasonable and proportionate, and that TW ought not to be required to carry out any further searches. That is to say the time and costs incurred in such searches could not be justified by reference to any benefit or advantage to the Claimants of a kind contemplated by DPA 1998.

192. TW's response to the various criticisms made in Robertson 3 at paragraphs [65]-[85] of its searches is addressed in detail at McGuigan 4 paragraphs [51]-[72].

193. In relation to searching TW's electronic files held in the DMS and uploaded to Relativity, the Claimants complain that TW ought to have used a further seven search terms when searching Relativity (see McGuigan 4, paragraph 51). Each of these terms would have been unreasonably wide, and would have returned a vast number of results not containing any personal data of the Claimants: see McGuigan 4, paragraphs 51-61.

194. In relation to the search of Mimecast, there is an issue between the parties as to whether TW was required to review the results of those search terms that returned more than 10,000 results (as the Claimants have suggested) or whether it was sufficient for them to review those terms that returned more than 1,000 results (the approach that TW have taken). The approach taken by TW goes well beyond what is reasonable and proportionate: see McGuigan 4, paragraphs 62-72. The Claimants make the point that very little information was disclosed as a result of the Mimecast search: this is unsurprising, given that Mimecast is a backup system and all emails relating to a particular client, matter or fee-earner should already be saved in the DMS (McGuigan 4, paragraph 63). The Claimants suggest various further steps that could be carried out to search Mimecast (Robertson 3 paragraph 85(b)). It would be disproportionate to require TW to do this work, given that Mimecast is only a backup system and given the risks that the proposed searches would disclose confidential information or personal data about TW employees, or about other unrelated clients: see McGuigan 4, paragraphs 69-72.

195. In relation to searching personal spaces, McGuigan 3 at paragraph 35, identifies substantial difficulties of access in relation to ex-employees, after they have left the firm.

Discussion and conclusion in relation to Issue 3.

196. I begin by indicating that I do not accept TW's submission that the fact the Claimants are seeking to use the DSARs as an additional disclosure exercise in connection with the Bahamian Proceedings is a relevant factor to take into account when exercising the discretion under s.7(9), any more than the trustee's right to refuse disclosure under the

BTA would be – see the last sentence of [113] of the Appeal Decision in this regard, where Arden LJ said "*The exercise of the section 7(9) discretion does not, therefore , in my judgment have to make allowance for the trustee 's right to refuse disclosure.*"

197. After considering the respective submissions of the Claimants and TW, I find as follows in relation to the Claimants' further requests:

(1) **The cross-referenced documents** – I accept the Claimants' submission that TW have not served any evidence setting out the time and cost which would be involved in conducting such a search. If, as seems likely, the cross-referenced documents contain the Claimants' personal data, they fall within the scope of the DSARs and TW should conduct the search. The Claimants have requested a targeted search of identified documents and TW has not discharged its burden of showing it would be disproportionate. This search should be carried out.

(2) In relation to the remaining categories of documents set out at paragraph 175(1)(a), (c) and (d) above, I accept the Claimants' submissions that these have not been addressed specifically and in those circumstances, a search for the Claimants' personal data in these should be carried out.

(3) **The seven further search terms** – I accept the Claimants' submission that there was no evidence before the Court to show the number of hits or the proportions of new and potentially relevant documents were a further search to be carried out using the seven further search terms. Of the information provided by Mr Pitt-Payne during the hearing, TW had now run the search terms and those searches have yielded 132 new documents for "Dawson-Damer", 589 for "Glenfinnan", 192 for "'s issue". No new documents were returned for the other search terms. In my judgment, this does not establish that the requested search terms are too wide. No indication of the cost or time involved in reviewing the new documents was given. This search should be carried out for the Claimants' personal data.

(4) **Mimecast** – I agree with TW that it would be disproportionate to require TW to do this work, given that Mimecast is only a backup system and given the risks that the proposed searches would disclose confidential information or personal data about TW employees, or about other unrelated clients.

(5) **Personal spaces** – In relation to searching personal spaces, given the difficulties

identified in McGuigan 3 at paragraph 35, I do not regard it as proportionate to require TW to carry out searches of ex-employees contained in the list exhibited to Robertson 4. In my judgment, however, that search should be carried out in relation to currently employed relevant fee-earners.

Issue 4: Have TW breached its obligations under s.7 of the DPA 1998 by redacting or withholding the Claimants' non-exempt personal data.

198. One specific category of information which is included in the definition of personal data in s.1(1) of the DPA 1998 and which is material in the present case is any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

199. At paragraphs 31-54 of Robertson 3, Ms Robertson gives a series of examples of what are said by her to be inconsistent, unjustified and incorrect redactions. These are just a selection from a much larger number of instances many of which were complained of in a schedule provided by MWE to TW on 29 March 2018, following TW's first two tranches of disclosure on 26 January 2018 and 21 February 2018, but before the later tranches of disclosure were provided on 20 April 2018, 16 May 2018 and 10 August 2018. Ms McGuigan responds to these examples at paragraphs 29-42 of McGuigan 4 and Ms Robertson replies at Robertson 4, paragraphs 18-27.

200. The Claimants also complain about the inconsistent redaction by TW of authors and senders of documents containing the Claimants' personal data. Where (as in many cases) an opinion or intention is expressed the identity of the person so expressing it is part of the personal data as defined in s.1(1) of the DPA 1998. In other cases the Claimants contend it will be necessary context to make the personal data intelligible. Reliance was placed by the Claimants on the fact that Mr Pitt-Payne did not seek to justify the redaction of recipient or sender in any specific example identified by the Claimants.

201. The other main category of alleged excessive redactions are the inconsistent and unjustified redaction of the recipients of the data (in this regard see s.7(1)(b(iii) of the DPA 1998) Although Mr Pitt-Payne sought to defend TW's stance by reference to the words "a description of … the recipients or classes of recipients", the Claimants submit that it is plain that this is not a case where the personal data was disclosed to classes of

recipients (and TW have never suggested that it was). It is a case where the Claimants' personal data has been disclosed to specific recipients who TW are not always willing to identify. The Claimants contend that TW's stance has no foundation in the Act and is simply an example of hostility and lack of co-operation with the enforcement of the Claimants' rights.

202. This matter was addressed during the hearing when I considered a sample of four documents containing alleged excessive redactions, including examples A8, A9 and A10 and a letter dated 14 August 1989 from Mr Duff to George and John D-D to be found at Bundle 4, Tab 7, p801, in the absence of the Claimants – see paragraph 70 p21 of Claimants' Outline Submissions, which contains a number of documents which are the subject of complaint. I upheld some, but not all, of the complaints made by the Claimants and stated that I would order that certain parts of the documents considered be unredacted and provided to the Claimants in revised form.

203. In relation to withheld personal data, this includes both missing documents and documents said to be cross-referenced in documents disclosed by TW. I have dealt with the latter category as part of Issue 3 in paragraph 197(1) above. Insofar as the alleged missing documents are concerned, the evidence on this appears at paragraphs 56-60 of Robertson 3, under the category B1. Ms McGuigan responds to these points at paragraphs 43-47 of McGuigan 4 and Ms Robertson replies at Robertson 4, paragraphs 28-33.

TW's position

204. TW disputes that there has been excessive redactions or the withholding of non-exempt personal data. It makes the following general points in relation to the issues about redaction:

(1) The right conferred by DPA 1998 s.7 is a right of access to information, not documents. It is fundamentally different from litigation disclosure;

(2) A data controller is permitted to reply to a DSAR by disclosing documents, or redacted documents, but there is no obligation to reply in this form. For instance, it may be convenient to respond by providing a list or schedule of personal data;

(3) The requester is only entitled to disclosure of their own personal data (and this is subject to the various exceptions in the DPA 1998). To the extent that a document contains information that is not the requester's personal data, it is permissible for the data controller to redact that information. Indeed, in some circumstances the data controller may be obliged to do so (e.g. so as not to disclose information that does not constitute personal data of the requester, but that constitutes personal data about another individual).

205. The Claimants' case here relies heavily on alleged disparities between the disclosure made by the Family Advisers and by TW. The Family Advisers were independent data controllers (for whom TW acted in these proceedings, before the proceedings against the Family Advisers were discontinued). They made their own choices about disclosure, and in some cases decided to disclose information that went beyond the Claimants' personal data (see e.g. McGuigan 4 paragraph 31). No adverse inferences should be drawn from any alleged discrepancies between TW's disclosure and that of the Family Advisers.

206. The Claimants are seeking that TW should carry out further searches in relation to information generated by the Family Advisers (see Robertson 4, paragraphs 5-17). At the time of the request the Family Advisers and TW were separate data controllers, as explained above. Moreover, given that the Family Advisers have themselves given disclosure in response to the Claimants' DSARs, requiring TW to carry out further searches in this regard would be disproportionate.

207. To the extent that the Claimants are suggesting that, on the basis of their various criticisms, TW should be required to carry out any further searches or to disclose any further information, any such contention should be rejected. For the reasons set out above, TW have now done everything that is reasonable and proportionate by way of response to the DSARs.

Discussion and conclusion on Issue 4

208. From the small sample that I have inspected, it is clear that in some instances there has been more redaction than there should have been. In my judgment, the appropriate course would be for TW to review their other redactions and apply the principles arising from my examination of the samples, ensuring consistency of approach.

209. In relation to missing or withheld personal data, I note that in relation to MWE's request to any response (or written evidence any response) to John D-D's letter dated 8 July 1999 to Mr Duff, in paragraph 46 of McGuigan 4, Ms McGuigan states: "*This is also the most blatant example of the Claimants' use of these proceedings simply as a fishing exercise. If a response in fact exists, and is held by Grampian, the proper forum for discovery is in the Bahamian proceedings.*" In my view this misses the point entirely. John D-D's letter was found on one of TW's litigation files. If a response to that letter, containing any of the Claimants' personal data were in the possession of TW, it should be disclosed under the provisions of s.7(1) and s.8(2) of the DPA 1998. The availability (or otherwise) of obtaining such a document as part of disclosure in the Bahamian Proceedings is immaterial for present purposes. TW have now searched the litigation file in which the original letter from John D-D was located and have found no response there (see McGuigan 4 paragraphs 46-47). I accept the statement of Ms McGuigan at McGuigan 4 paragraph 47 that TW are not seeking to withhold any such response.

210. I note and accept the explanation given by Ms McGuigan at paragraph 44 of McGuigan 4 as to why little disclosure has been made in respect of the years 2006 to 2012. I also note the statement made by Ms McGuigan at paragraph 7 of McGuigan 4 that "*Following the Court of Appeal's decision we have conducted careful and thorough searches of the material we hold in accordance with the Act and have disclosed their personal data we are required to disclose.*" It is apparent from paragraph 49 of McGuigan 4, however, that this was on the basis that "*our hard copy files are not held in a relevant filing system.*" I have already addressed this under Issue 1.

211. In my judgment, having indicated that further searches need to be carried out by TW for the Claimants' personal data in relation to Issues 1 and 3 as identified above and the redacted materials reviewed, it is not necessary to require TW to do more.

Conclusion

212. I decide Issue 1 in favour of the Claimants in that I find that the 35 paper files under the client description, "Yuills Trusts", arranged in chronological order are a "relevant filing system" for the purposes of s1(1) of the DPA 1998 and TW are required to search them for personal data of the Claimants.

213. In relation to Issue 2 I find that TW are entitled to claim LPP over the documents exhibited to the schedule to Tayler 1, if they were subject to legal advice privilege between TW and their client, Grampian, the trustee of the Glenfinnan Settlement. In my judgment, there has been no collateral waiver of privilege. This does not apply, however, to the Willards Settlement, where Grampian has been replaced as a trustee by Yuills, which is entitled to and has waived privilege. Further I find that the date from which litigation privilege can be claimed remains 18 February 2014, which means that the documents in section 1 of the List, that are dated prior to that should be disclosed, insofar as they contain the Claimants' personal data. After the judgment was handed down in draft to the parties, Mr Pitt-Payne has sought to argue that those documents should not be disclosed to the extent that they can be withheld on the grounds of legal advice privilege, by reason of my findings set out earlier in this paragraph. In principle I accept that submission, but I note that those documents were not included in section 2 of the List, and it was not suggested in argument on behalf of TW that they could be withheld on this alternative ground. I therefore wish to examine those documents falling within section 1, which are dated prior to 18 February 2014, in relation to which legal advice privilege is claimed, in accordance with s.15 DPA 1998 [see also [17] of the Appeal Decision]. I will then make a ruling on them.

214. In relation to Issue 3, I direct that TW should carry out the following searches for the Claimants' personal data:

(1) a search of the documents set out at paragraph 175 above,

(2) a search using the seven further search terms;

(3) a search of the relevant current employed TW fee earners' personal spaces in spaces in which they can save documents and emails.

215. In relation to Issue 4, I direct that TW should review the redacted passages in the documents provided to the Claimants to ensure that those redactions are appropriate, consistent and in accordance with the points I made when considering the samples at the hearing.

216. I would be grateful if Counsel could prepare a draft Order embodying these conclusions, which can be considered when judgment is handed down on Friday

17 May at 2pm. At that time I will also deal with costs and any consequential applications.