Neutral Citation Number: [2020] EWCA Civ 352

Case No: A3/2019/1348, 1552 & 1708

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM 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)**
**[2019] EWHC 1258 (Ch)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/03/2020

**Before :**

**LORD JUSTICE FLOYD**
**LORD JUSTICE NEWEY**
and
**LORD JUSTICE ARNOLD**

**Between :**

| | |
|---|---|
| **MRS ASHLEY JUDITH DAWSON-DAMER** | **Appellant/ Claimant** |
| **- and -** | |
| **MR PIERS DAWSON-DAMER**<br>**MS ADELICIA DAWSON-DAMER** | **Claimants** |
| **-and-** | |
| **TAYLOR WESSING LLP** | **Respondents/ Defendant** |
| **And between:** | |
| **TAYLOR WESSING LLP**<br>**-and-** | **Appellant/ Defendant** |
| **(1) MRS ASHLEY JUDITH DAWSON-DAMER**<br>**(2) MR PIERS DAWSON-DAMER**<br>**(3) MS ADELICIA DAWSON-DAMER** | **Respondents/ Claimants** |

**Mr Antony White QC and Mr Richard Wilson QC** (instructed by **McDermott Will & Emery UK LLP**) for **Mrs Ashley Dawson-Damer, Mr Piers Dawson-Damer and Ms Adelicia Dawson-Damer**
**Mr Timothy Pitt-Payne QC, Mr Simon Taube QC and Mr James MacDougald** (instructed by **Taylor Wessing LLP**) for **Taylor Wessing LLP**

Hearing dates: 29-30 January 2020

# Approved Judgment

**Lord Justice Floyd, Lord Justice Newey and Lord Justice Arnold:**

1. There are two appeals before us, both from a judgment which Mr Andrew Hochhauser QC, sitting as a Deputy High Court Judge, handed down on 17 May 2019. The underlying claim is for relief in respect of subject access requests under the Data Protection Act 1998 ("the 1998 Act") with which the claimants, Mrs Ashley Dawson-Damer ("Ashley") and her children Piers and Adelicia, contend that the first defendants, Taylor Wessing LLP ("Taylor Wessing"), have not complied. In the judgment under appeal, Mr Hochhauser ("the Judge") concluded (amongst other things) that certain paper files held by Taylor Wessing constituted a "relevant filing system" for the purposes of the 1998 Act, and that Taylor Wessing could claim legal professional privilege ("LPP") in respect of some of the data covered by the requests. Taylor Wessing now challenge the Judge's decision on the "relevant filing system" point, Ashley his conclusion as regards LPP.

## Basic facts

2. The trust funds to which these appeals relate derive from the fortune of a Mr George Skelton Yuill, who died in 1917. In 1973, a Bahamian settlement ("the 1973 Settlement") was established for the benefit of legitimate descendants of Mr Skelton's grandson, Viscount Carlow, who had himself been killed during the Second World War, and their spouses. The beneficiaries of that trust included Viscount Carlow's two sons, George, now the Seventh Earl of Portarlington ("Lord Portarlington"), and John ("Mr John Dawson-Damer"), who died in 2000, as well as Lord Portarlington's wife, their four children, his three daughters-in-law and his 11 grandchildren and Ashley, Mr John Dawson-Damer's second wife. In contrast, the adopted children of Mr John Dawson-Damer and Ashley, Piers and Adelicia, did not qualify as beneficiaries.

3. Between 1988 and 1992, the trustee of the 1973 Settlement, Arndilly Trust Company Limited, instructed Mr Robert Walker QC and Taylor Garrett (later Taylor Joynson Garrett) to advise on a possible restructuring of the 1973 Settlement and other family trusts. In 1992, a resettlement was effected under which four new discretionary trusts were established: the Willards Settlement, which was for the benefit of Mr John Dawson-Damer and his family; two trusts for the benefit of Lord Portarlington and his family; and the Glenfinnan Settlement, which was originally for the benefit of Lord Portarlington, Mr John Dawson-Damer, their spouses and their legitimate children. In each case, the trustee was initially Grampian Trust Company Limited ("Grampian"), a Bahamian company, although new trustees were subsequently appointed in respect of the Willards Settlement. Taylor Joynson Garrett and its successor, Taylor Wessing, have acted for Grampian ever since its incorporation in 1992.

4. In 2006 and 2009, Grampian appointed funds from the Glenfinnan Settlement to be held in four new discretionary trusts in favour principally of Lord Portarlington's children and remoter issue. However, in a letter to Grampian dated 18 February 2014 solicitors for Ashley and her children asserted that the appointments were invalid and also challenged the validity of the 1992 restructuring. Later in 2014, Grampian applied in The Bahamas for a "put up or shut up order" against Ashley. In March of the following year, Ashley herself issued proceedings in The Bahamas challenging the 2006 and 2009 appointments. The trial of that claim is pending.

5. The present proceedings concern subject access requests which Ashley and her children made to Taylor Wessing under the 1998 Act on 4 August 2014. Taylor Wessing having responded that LPP applied to the data they held, Ashley and her children brought this claim, for relief under section 7(9) of the 1998 Act. In a judgment dated 6 August 2015 ([2015] EWHC 2366 (Ch)), Judge Behrens, sitting as a Judge of the High Court, dismissed the application, but on 16 February 2017 the Court of Appeal allowed an appeal (see [2017] EWCA Civ 74, [2017] 1 WLR 3255).

6. In paragraph 18 of her judgment, Arden LJ, with whom David Richards and Irwin LJJ agreed, identified the issues which arose on the appeal as these:

> "*Issue 1: Extent of the Legal Professional Privilege Exception* : whether the Legal Professional Privilege Exception [i.e. the exemption for which paragraph 10 of schedule 7 to the 1998 Act provides] 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').
>
> *Issue 2*: *Disproportionate effort* : whether, if the narrow view is correct, any further search would involve 'disproportionate effort' for the purposes of section 8(2) [of the 1998 Act] so that (as the judge held) it is excused from doing so.
>
> *Issue 3*: *Section 7(9) discretion* : whether (as the judge held) the judge would have been entitled to refuse to exercise the section 7(9) discretion [i.e. the discretion conferred by section 7(9) of the 1998 Act] in favour of the claimants because their real motive was to use the information in legal proceedings against the trustee."

Arden LJ gave her conclusions on these issues as follows in paragraph 23:

> "*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.
>
> *Issue 2*: [Taylor Wessing] 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.
>
> *Issue 3*: The judge was wrong to decline to enforce the Request because the claimants intended to use the information obtained pursuant to it in their Bahamian proceedings."

In the circumstances, the matter fell to be remitted to the Chancery Division. Arden LJ had referred to the need for remittal in paragraph 17:

> "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 [Taylor Wessing] holds data on a filing system of the kind to which the [1998 Act] 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 of the [1998 Act] to examine the material."

7. In the course of her discussion of Issue 1, Arden LJ explained in paragraph 46 that a question arose as to "whether the Legal Professional Privilege Exception extends to documents which are not subject to legal professional privilege as conventionally understood (that is to say, the privilege of withholding evidence about legal advice) but which are subject to a right of non-disclosure, here the trustee's right of non-disclosure which, as it happens, is recognised both in England and in The Bahamas". Arden LJ noted in paragraph 52 that it had been submitted on behalf of Taylor Wessing that "there should be a purposive interpretation of 'legal professional privilege' in the Legal Professional Privilege Exception so that it includes documents within the trustee's right of non-disclosure". Arden LJ, however, did not accept the argument. She said in paragraph 54:

> "in my judgment, the [1998 Act] 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."

8. Further, Arden LJ considered the fact that Taylor Wessing were Grampian's solicitors to be of little relevance. In that connection, she said:

> "55. There is no conceptual difficulty under the [1998 Act] arising from the fact that [Taylor Wessing] is an agent. The critical point is that [Taylor Wessing] is a data controller. As a firm of solicitors, [Taylor Wessing] can and must claim privilege to which the client is entitled. The trustee has not waived its privilege, and [Taylor Wessing] cannot (unless instructed to waive privilege) properly do so for them when acting on the Request. It could do so in legal proceedings brought against them.
>
> 56. It follows that [Taylor Wessing] is in no special position so far as the Legal Professional Privilege Exception is concerned because it is an agent for the trustee, even though the trustee is not before the court and a similar order could not be obtained in The Bahamas."

9. The case next came before the Judge. He summarised the issues that he had to decide in these terms in paragraph 21 of his judgment:

> "(1) Whether the paper files maintained by [Taylor Wessing] before it moved to electronic files in 2005-2008 are a relevant filing system for the purposes of s.1(1) of the [1998 Act].
>
> (2) Whether [Taylor Wessing] can rely on the legal professional privilege exemption contained in paragraph 10 of schedule 7 to the [1998 Act] in respect of any particular documents containing the Claimants' personal data. There is a sub-issue about waiver of privilege.
>
> (3) Whether [Taylor Wessing] has breached its obligations under s.7 of the [1998 Act] by failing or refusing to carry out reasonable and proportionate searches for the Claimants' personal data.
>
> (4) Whether [Taylor Wessing] has breached its obligations under s.7 of the [1998 Act] by redacting or withholding the Claimants' non-exempt personal data."

10. The Judge decided the first of these issues in favour of Ashley and her children and the second in favour of Taylor Wessing. He held in paragraph 56 of his judgment 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 [1998 Act] and [Taylor Wessing] are required to search these for personal data of the Claimants". He further concluded that "under English trust law, joint privilege would arise", with the result that, aside from the Bahamian Trustee Act 1998 ("the BTA"), Taylor Wessing would not be able to assert LPP as against Ashley in relation to information pre-dating the letter of 18 February 2014 in which the 2006 and 2009 appointments were challenged. On the other hand, the Judge agreed with Taylor Wessing that section 83(8) of the BTA means that, "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" (paragraph 153). The Judge, moreover, rejected an argument advanced on behalf of the claimants to the effect that privilege had been waived in relation to certain documents: there had, the Judge held, been "no collateral waiver of privilege" (paragraph 213). The result was that Taylor Wessing could claim LPP over documents "if they were subject to legal advice privilege between [Taylor Wessing] and their client, Grampian, the trustee of the Glenfinnan Settlement" (paragraph 213). Taylor Wessing were "entitled to rely on the [LPP exemption] even as against [Ashley] because [Ashley] does not have any trust law rights which cut across, limit or qualify the trustee's claim to legal professional privilege" (paragraph 156).

11. So far as the remaining issues were concerned, the Judge concluded that Taylor Wessing should carry out certain additional searches and review the redacted passages in documents that had already been provided to Ashley and her children.

12. On 7 June 2019, Ashley filed an appellant's notice in which she sought to challenge the Judge's decision on the second of the issues identified in paragraph 9 above (LPP). On 21 June, Taylor Wessing disclosed data to Ashley in compliance with the order that the Judge had made. On 3 July, Taylor Wessing filed an appellant's notice of their own, seeking to dispute the Judge's conclusion on the first issue (viz. that the paper files Taylor Wessing had kept under the description "Yuills trusts" were a "relevant filing system" for the purpose of section 1(1) of the 1998 Act). It is the two appeals which are now before us.

13. At a hearing in The Bahamas on 17 September 2019, Grampian agreed to a limited waiver of LPP and the protection of the BTA, but only in favour of Ashley, for the purpose of the Bahamian proceedings, as regards documents relevant to those proceedings and subject to a confidentiality regime.

## The 1998 Act

14. The 1998 Act was passed to give effect to Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("the Directive"). The 1998 Act has now been superseded by the Data Protection Act 2018 following the enactment of the General Data Protection Regulation (Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data). It is the 1998 Act, however, which governs the present proceedings.

15. Section 7 of the 1998 Act conferred a right of access to personal data. Section 7(1) provided that, subject to specified exceptions, an individual was:

> "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) where the processing by automatic means of personal data of which that individual is the data subject for the purpose of evaluating matters relating to him such as, for example, his performance at work, his creditworthiness, his reliability or his conduct, has constituted or is likely to constitute the sole basis for any decision significantly affecting him, to be informed by the data controller of the logic involved in that decision-taking."

16. By section 7(2) of the 1998 Act, a data controller was not obliged to supply any information under section 7(1) unless he had received a request in writing and any required fee, but a data controller who had failed to comply with a request in contravention of the section could be ordered to do so under section 7(9).

17. Part IV of the 1998 Act contained exemptions. Section 37, which fell within Part IV, provided for schedule 7 to the Act ("Miscellaneous Exemptions") to have effect, and paragraph 10 of schedule 7 ("the LPP exemption") was in these terms:

> "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."

18. "Basic interpretative provisions" were to be found in section 1 of the 1998 Act. Section 1(1) stated:

> "In this Act, unless the context otherwise requires—
>
> *'data'* means information which—
>
> (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
>
> (b) is recorded with the intention that it should be processed by means of such equipment,
>
> (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system,
>
> (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68; or
>
> (e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d);
>
> *'data controller'* means, subject to subsection (4), a person who (either alone or jointly or in common with other persons)

determines the purposes for which and the manner in which any personal data are, or are to be, processed;

*'data processor'*, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;

*'data subject'* means an individual who is the subject of personal data;

*'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;

*'processing'*, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

(a) organisation, adaptation or alteration of the information or data,

(b) retrieval, consultation or use of the information or data,

(c) disclosure of the information or data by transmission, dissemination or otherwise making available, or

(d) alignment, combination, blocking, erasure or destruction of the information or data;

…

*'relevant filing system'* means 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."

## The issues

19. The appeals before us give rise to two principal issues:

    i) Are Taylor Wessing entitled to rely on the LPP exemption for which paragraph 10 of schedule 7 to the 1998 Act provides? ["The LPP Issue"]

    ii) Do Taylor Wessing's paper files constitute a "relevant filing system" within the meaning of section 1(1) of the 1998 Act? ["The Data Protection Issue"]

## The LPP Issue

20. There are two species of LPP: litigation privilege and legal advice privilege. It is common ground that Taylor Wessing can invoke litigation privilege as regards the period since 18 February 2014, when the letter challenging the 2006 and 2009 appointments was sent. The issue before the Judge was whether Taylor Wessing could rely on LPP in relation to data to which litigation privilege did not attach. Ashley argued that they could not, on the basis that there was "joint privilege" as between herself as a beneficiary of the Glenfinnan Settlement and Taylor Wessing's client, Grampian, as the trustee of the trust. Taylor Wessing, on the other hand, maintained that the availability of "joint privilege" depended on Ashley's rights as a beneficiary of the Glenfinnan Settlement and that, the governing law of the Glenfinnan Settlement being Bahamian, the BTA was in point. Section 83(8) of that Act states:

> "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)."

The BTA thus provides that a trustee is not to be compelled by any process of discovery or inspection or under any equitable rule or principle to disclose or produce to any beneficiary any document (including legal advice) relating to the exercise of any discretion of the trustee.

21. As already mentioned, the Judge considered that "joint privilege" would arise under "English trust law" but that section 83(8) of the BTA meant that, in the circumstances of this case, there could be no "joint privilege".

*The parties' positions in outline*

22. Mr Antony White QC, who appeared with Mr Richard Wilson QC for Ashley, summarised his case on the LPP Issue in propositions to the following effect:

    i) There is a rule in English law that in legal proceedings between a beneficiary and a trustee (and similarly in other analogous situations) the trustee cannot rely on LPP as against the beneficiary, save in relation to legal advice relating to the trustee's personal position (in particular, where obtained in the context of a claim brought by a beneficiary);

    ii) This rule is part of the English law of procedure and evidence and is separate and distinct from any rule about disclosure by trustees "in the air" under the law of trusts;

    iii) It is this English law rule which applies when considering the exemption conferred by paragraph 10 of schedule 7 to the 1998 Act. In this connection, Mr White cited paragraph 7-022 of Dicey, Morris and Collins on the Conflict of Laws, 15th. ed., to establish that "In the context of English proceedings, whether or not a document is privileged is to be determined by English law";

    iv) The English law rule is unaffected by section 83(8) of the BTA.

23. The thrust of Mr White's submissions was that the Judge was correct that, under English law, "joint privilege" would arise as between Ashley (as beneficiary) and Grampian (as trustee), but mistaken in viewing that as a matter of trust law. The "joint privilege" of trustee and beneficiary, Mr White argued, is not an aspect of trust law, but part of the law of procedure and evidence, where the *lex fori* is applicable. In the present context, the Court of Appeal has already held that the LPP exemption applies only to documents which carry LPP for the purposes of English law and so the BTA is immaterial.

24. In contrast, Mr Timothy Pitt-Payne QC, who appeared with Mr Simon Taube QC and Mr James MacDougald for Taylor Wessing, maintained that the "joint privilege" on which Ashley relies is properly seen as an incident of trust law. Ashley is seeking to go behind the LPP to which English law entitles Grampian by asserting a beneficiary's rights under trust law. Since the proper law of the Glenfinnan Settlement is that of The Bahamas, Ashley's rights as a beneficiary fall to be determined on the basis of Bahamian trust law and so by reference to the BTA. Mr Pitt-Payne stressed that Taylor Wessing are not contending that paragraph 10 of schedule 7 to the 1998 Act imports any foreign species of privilege. The position is instead, it was suggested, that Bahamian trust law is relevant when assessing the *content* of English LPP.

25. In the alternative, Mr Pitt-Payne argued that, even as a matter of English law, a beneficiary can nowadays be seen to have no automatic right to inspect a trustee's privileged documents, let alone a "joint privilege". In this connection, Mr Pitt-Payne

placed particular reliance on the decision of the Privy Council in *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709.

*The development of "joint privilege"*

26. The "joint privilege" for which Ashley contends would involve Grampian being able to assert LPP against third parties, but not against her. Thanki, "The Law of Privilege", 3rd. ed., says this about such situations in paragraph 4.84:

> "There exist relationships within which the parties will be unable to claim privilege in certain communications as against each other. More specifically, privilege cannot be claimed in circumstances where the parties to the relationship have a joint interest in the subject matter of the communication at the time that it comes into existence."

27. What has been termed by some "joint privilege" (or "joint interest privilege") has its origins in cases concerned with the extent to which a beneficiary could insist on seeing trust documents.

28. The earliest of the authorities to which we were taken were *Devaynes v Robinson* (1855) 20 Beav 42, *Wynne v Humberston* (1858) 27 Beav 421 and *Talbot v Marshfield* (1865) 2 Dr & Sm 549. In *Wynne v Humberston*, Romilly MR said at 423-424:

> "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."

In *Talbot v Marshfield*, Kindersley V-C distinguished between advice which the defendant trustees had taken as to whether they should exercise a power of advancement and advice which they had obtained following the institution of proceedings. He said at 550-551:

> "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. It was contended that it was not taken for the benefit of all the *cestuis que trust;* but all the *cestuis que trust* have an interest in the due administration of the trust, and in that sense it was for

> the benefit of all, as it was for the guidance of the trustees in their execution of their trust. Besides, if a trustee properly takes the opinion of counsel to guide him in the execution of the trust, he has a right to be paid the expense of so doing out of the trust estate; and that alone would give any *cestuis que trust* a right to see the 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. It appears to me that the *cestuis que trust* have no right to see this case and opinion, unless they can make out that the trustees can charge the expense thereof on the trust funds. As to this there is no proof; the trustees may themselves have to bear the expense of this case and opinion, as having been stated and taken by them as litigant parties with the *cestuis que trust.*
>
> The trustees must be ordered to produce the first case and opinion; but not the second."

29. Beneficiaries were thus said to be entitled to the production of documents because, in essence, the documents related to advice taken for the purpose of administering the trusts and their expense was to be borne by the trusts. The same approach can be seen in, for example, *Thomas v Secretary of State for India* (1870) 18 WR 312 and *Re Mason* (1883) 22 Ch D 609. In *Re Mason*, Fry J ordered documents to be produced in the course of an action for breach of trust on the basis that they were "communications by and to the trustees and their solicitors in relation to the trust estate, made before the action was brought". In *Thomas*, in contrast, trustees were held not to be bound to produce to beneficiaries materials relating to advice which the trustees had obtained when litigation was already underway. James V-C observed:

> "There is a difference between an opinion taken by a trustee on his own behalf, and one taken on behalf of the trust estate. In this case the opinion was taken by the trustees on their own behalf, after litigation had been commenced, and with a view to resisting future litigation. It is absurd to say that that is taken by a trustee on behalf of his *cestuis que trustent*."

30. There was reference to cases such as *Wynne v Humberston* and *Talbot v Marshfield* in *O'Rourke v Darbishire* [1920] AC 581. In that case, the plaintiff sought production of documents on the basis that he was a beneficiary, but relief was refused on the ground that it had yet to be established that he had that status. Lord Parmoor noted at 619 that "A cestui que trust, in an action against his trustees, is generally entitled to the production for inspection of all documents relating to the affairs of the trust", but he went on to say at 619-620:

> "It is not material for the present purpose whether this right is to be regarded as a paramount proprietary right in the cestui que trust, or as a right to be enforced under the law of

> discovery, since in both cases an essential preliminary is either the admission, or the establishment, of the status on which the right is based."

For his part, Lord Wrenbury explained at 626-627:

> "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."

On the facts, however, "this plaintiff cannot as matters stand say that he is a beneficiary" and so "cannot assert a proprietary right to the documents on the footing that they are his, and cannot enforce inspection on that ground" (see 627).

31. Similar principles had by then long been applied as between a company and its shareholders. Thus, in *Gourard v Edison Gower Bell Telephone Co of Europe Ltd* (1888) 57 LJ Ch 498 Chitty J referred in the context of an action brought by a shareholder to a "general principle that obtains in partnership actions, and also in actions by a *cestui que trust* against a trustee – namely, that a party cannot resist production of documents which have been obtained by means of payment from the moneys belonging to the party applying for their production" and said that that principle also applied "as between a shareholder and the directors who manage his property, when the documents are paid for out of his property". Again, in *Woodhouse & Co Ltd v Woodhouse* (1914) 30 TLR 559, where a shareholder litigating against the company asked for production of opinions that the latter had obtained, Phillimore LJ said that:

> "the principle was that if people had a common interest in property, an opinion having regard to that property, paid for out of the common fund, i.e., company's money or trust fund, was the common property of the shareholders, or *cestui que trust*. But where the parties were sundered by litigation such an opinion obtained by one of them was privileged."

Likewise, Lush J said that:

> "Where a company obtained advice in the common interest and paid for it out of the common fund, undoubtedly the shareholder would have a right to see it. But that did not apply where the interests of the company and the shareholder were adverse."

32. Rather more recently, Norris J summarised the relevant law in these terms in *BBGP Managing General Partner Ltd v Babcock & Brown Global Partners* [2010] EWHC 2176 (Ch), [2011] Ch 296 at paragraph 58:

> "the shareholder is entitled to see all documents obtained by a company in the course of the administration of its affairs (including legal advice obtained by the company on behalf of all shareholders, though not legal advice obtained by a company in response to an actual or contemplated claim by the shareholder against the company) in which it has a common interest: see *Woodhouse & Co Ltd v Woodhouse* (1914) 30 TLR 559; *In re Hydrosan Ltd* [1991] BCLC 418, *CAS (Nominees) Ltd v Nottingham Forest FC plc* [2002] 1 BCLC 613 and *Arrow Trading and Investments Est 1920 v Edwardian Group Ltd (No 2)* [2005] 1 BCLC 696".

33. "Joint privilege" has also been recognised in the context of a joint venture company. In *CIA Barca de Panama SA v George Wimpey & Co Ltd* [1980] 1 Lloyd's Rep 598, the defendant had agreed to buy the claimant's interest in a company which they had formed for the purposes of a joint venture on the basis that, if the company's operations proved to have resulted in a loss, the plaintiff would make a contribution in respect of it. The defendant having agreed a settlement of claims arising out of the company's operations, there was litigation between the plaintiff and the defendant in which the plaintiff applied for discovery of documents relating to the settlement which the defendant argued were subject to LPP. The application succeeded. Stephenson LJ endorsed as "accurate in laying down a principle which is exemplified in different authorities" the following passage from Phipson on Evidence, 12th. ed.:

> "No privilege attaches to communications between solicitor and client as against persons having a *joint interest* with the client in the subject matter of the communication, e.g. as between partners; a company and its shareholders; trustee and *cestui que trust* ..."

Having cited *Talbot v Marshfield*, Stephenson LJ said at 614:

> "So here, it seems to me, however you define the relationship which their joint interest creates, it is enough to entitle the plaintiffs whether as beneficiaries, cestui que trust, or as partners in a joint venture, or as principals, to the same inspection of documents relating to the Aramco claims as the defendants themselves had."

For his part, Bridge LJ stressed the parties' "common interest", formulating a "general principle" to this effect:

> "If A. and B. have a common interest in litigation against C. and if at that point there is no dispute between A. and B. then if subsequently A. and B. fall out and litigate between themselves and the litigation against C. is relevant to the disputes between A. and B. then in litigation between A. and B. neither A. nor B. can claim legal professional privilege for documents which came into existence in relation to the earlier litigation against C."

The third member of the Court, Cumming-Bruce LJ, agreed with both Stephenson LJ and Bridge LJ.

34. Returning to the trust cases, *Talbot v Marshfield* was considered in *In re Londonderry's Settlement* [1965] Ch 918. In that case, a beneficiary having asked for copies of documents relating to an appointment which the trustees had made, the trustees applied for a determination as to the extent of their disclosure obligations. Harman LJ noted that there was at least an apparent conflict between two principles: first, that "trustees exercising a discretionary power are not bound to disclose to their beneficiaries the reasons actuating them in coming to a decision" (see 928) and, second, that it is open to beneficiaries to inspect documents which "came into existence for the purposes of the trust and are in the possession of the trustees as such and are, therefore, trust documents, the property of the beneficiaries" (see 929). He concluded at 933 that certain documents were, "in the absence of an action impugning the trustees' good faith, documents which a beneficiary cannot claim the right to inspect" since, if the beneficiary were allowed to examine these, she would "know at once the very matters which the trustees are not bound to disclose to her, namely, their motives and reasons": "even if documents of this type ought properly to be described as trust documents, they are protected for the special reason which protects the trustees' deliberations on a discretionary matter from disclosure". However, "very different considerations apply when it comes to a question of discovery in an action where a beneficiary is impeaching the validity of the trustees' actions", Harman LJ said at 934.

35. The second member of the Court, Danckwerts LJ, expressed a similar view. He said at 935-936:

> "It seems to me that where trustees are given discretionary trusts which involve a decision upon matters between beneficiaries, viewing the merits and other rights to benefit under such a trust, the trustees are given a confidential role and they cannot properly exercise that confidential role if at any moment there is likely to be an investigation for the purpose of seeing whether they have exercised their discretion in the best possible manner. Of course, if a case is made of lack of bona fides, that is an entirely different matter. In that case I agree it becomes necessary to examine exactly what has happened because that is in an action and not in a theoretical application for directions, as the present case appears to me to be. It appears to me that the documents are confidential and the trustees' duty would become impossible and the execution of the trust would become impossible if the trustees were bound to

> disclose to any beneficiary any information or other matters in regard to beneficiaries that they had received."

36. The third member of the Court, Salmon LJ, drew a distinction between disclosure "in the air" and in the context of an action for breach of trust. He said at 938:

> "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."

37. In *Schmidt v Rosewood Trust Ltd*, Lord Walker, giving the Privy Council's judgment, discussed both *In re Londonderry's Settlement*, the judgments in which he said at paragraph 49 "are not easy to reconcile", and *O'Rourke v Darbishire*. Lord Walker explained at paragraph 50 that the Board did "not find it surprising that Lord Wrenbury's observations [in *O'Rourke v Darbishire*] 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)". However, the Board did not regard *O'Rourke v Darbishire* 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 trust property" and rather considered 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" (see paragraphs 50 and 51). A proprietary right, Lord Walker said at paragraph 54, "is neither sufficient nor necessary". In paragraph 51, Lord Walker explained:

> "The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion: see Lord Wilberforce in *Gartside v Inland Revenue Comrs* [1968] AC 553, 617-618 and in *In re Baden* [1971] AC 424, 456-457, Templeman J in *In re Manisty's*

> *Settlement* [1974] Ch 17, 27-28 and Warner J in *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, 1617-1618."

38. Briggs J considered some of the implications of *Schmidt v Rosewood Trust Ltd* in *Breakspear v Ackland* [2008] EWHC 220 (Ch), [2009] Ch 32. In that case, beneficiaries of a discretionary trust issued proceedings for, among other things, disclosure of a non-binding "wish letter" which the settlor had written. In paragraph 10 of his judgment, Briggs J noted that an issue as to disclosure of a wish letter by trustees to beneficiaries could arise in "at least three distinct contexts, to which different legal principles apply". Briggs J continued:

> "10. … In its simplest form, the problem may arise because a beneficiary asks the trustees for disclosure, without threat of litigation, or even because, in the absence of any request, a trustee is uncertain whether to include a wish letter with the settlement deed, when initially appraising beneficiaries of their status as such….
>
> 11. The second typical circumstance in which the issue may arise is indeed that in which the court has been invited to resolve the question, as a discrete issue between trustees and beneficiaries. This may occur either because the trustees have, on their own initiative, sought directions from the court, or because, as in the present case, the beneficiaries have responded to a refusal by issuing a CPR Pt 8 claim for disclosure. In such a case disclosure is not said to be justified on the grounds of its relevance to some other pleaded issue between the trustees and the beneficiaries, such as the question whether a particular purported exercise of a discretionary power was invalid….
>
> 13. The third category of case in which the question of disclosure may arise is in the context of existing litigation about an issue in respect of which the wish letter is alleged to be a relevant document. In that context, disclosure of wish letters is merely an aspect of the general law and practice as to disclosure. Generally speaking, relevance and necessity are the governing criteria and confidentiality plays a very subordinate role. It is tempting to think that, because a determined beneficiary might circumvent the obstacle of confidentiality by litigating an issue to which the wish letter was said to be relevant, confidentiality could in truth be nothing but a temporary rearguard to cover a slow retreat by the trustees. But English law has developed a robust approach to 'fishing' litigation of that kind."

Briggs J went on to say this about the third category in paragraph 72:

> "The third stage (where disclosure is sought from the court to facilitate the determination of an issue to which the wish letter

> is alleged to be relevant) gives rise to different considerations, governed by the law and practice as to disclosure in civil proceedings. For those purposes, the relevance of the foregoing detailed analysis of the status of a wish letter is that identified by Danckwerts LJ in the *Londonderry* case [1965] Ch 918, 936B, namely that if the document in question does no more than illuminate the trustees' reasons for the making of a discretionary decision, it may be simply irrelevant, unless the trustees by a partial disclosure of their reasons have put into play the issue as to their rationality. Since the present case is not an example of this third category, I say no more about how the questions of that kind may in due course be decided."

*Can Taylor Wessing rely on the BTA?*

39. Ashley asserts "joint privilege" on the basis that she is a discretionary beneficiary of the Glenfinnan Settlement. Her status as such is founded on Bahamian law. That being the governing law of the Glenfinnan Settlement, it is that system of law which determines that the trust is valid and that Ashley is a beneficiary of it.

40. It is Mr Pitt-Payne's case that the relevance of Bahamian law does not stop there. He points out that "the relationships between the trustees and the beneficiaries" of a trust are also a matter for its governing law (see article 8(g) of the Hague Convention on the law applicable to trusts and their recognition, which has the force of law in the United Kingdom pursuant to the Recognition of Trusts Act 1987). Ashley, Mr Pitt-Payne argues, is asserting that the relationship between herself as beneficiary and Grampian as trustee is such as to entitle her to access to documents which, at least as against third parties, are protected by LPP. In essence, she is relying on trust law, and, the governing law of the relevant trust being Bahamian, her rights must be assessed on the basis of Bahamian law. The BTA is therefore in point and precludes "joint privilege".

41. The fact that, as we have indicated, the roots of "joint privilege" lie in trust cases lends support to Mr Pitt-Payne's submissions. That is especially so since the Courts have not always distinguished between what a trustee must disclose in hostile litigation and what a beneficiary can insist on seeing in other circumstances. Mr Pitt-Payne's contentions might also be said to chime with Salmon LJ's remark in *In re Londonderry's Settlement* that "In some instances … the fact that they are trust documents may nullify the privilege that would otherwise exist" (see paragraph 36 above).

42. Further, we agree with the Judge that Mr Pitt-Payne is not barred from advancing his case by the previous Court of Appeal decision in these proceedings. As mentioned in paragraph 6 above, the Court of Appeal's answer to the first of the issues before it was that the LPP exemption for which paragraph 10 of schedule 7 to the 1998 Act provides "applies only to documents which carry legal professional privilege for the purposes of English law" and that this "does not include documents by virtue only of the fact that a trustee may refuse to disclose to a beneficiary". It is reasonable to assume that the Court would not have expected there to be further argument as to the impact of the BTA. However, Mr Pitt-Payne puts his case on the basis that the BTA is relevant to the content of English LPP and so that there is no inconsistency with what

was decided in the earlier appeal. In the circumstances, Mr White fairly accepted that he could not point to any particular passage in Arden LJ's judgment which would preclude Mr Pitt-Payne's contentions.

43. Even so, we have in the end concluded that the question whether "joint privilege" exists is correctly characterised as one of procedural law rather than trust law. It seems to us that, whilst "joint privilege" may have its origins in authorities concerned with trusts, it does not represent part of trust law. A principle of procedure and evidence has evolved.

44. In the first place, the Courts have distinguished disclosure in litigation from a beneficiary's rights under trust law in a number of the more modern authorities. In *O'Rourke v Darbishire*, Lord Wrenbury said that a beneficiary's "proprietary right" to see trust documents "has nothing to do with discovery". In *Schmidt v Rosewood Trust Ltd*, Lord Walker saw Lord Wrenbury's observations as "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)". In *Breakspear v Ackland*, Briggs J said that, where disclosure of a wish letter is sought from the Court in existing litigation to facilitate the determination of an issue to which it is alleged to be relevant, "different considerations" arise which are "governed by the law and practice as to disclosure in civil proceedings".

45. Secondly, it is significant that "joint privilege" has been recognised in contexts other than trusts. The fact that it applies as between shareholder and company is especially important. As Mr Taube accepted in submissions, the fact that a company engaged in litigation with a shareholder must disclose documents which, as against third parties, would attract LPP cannot be explained as merely a reflection of a right which a shareholder would have anyway. Absent litigation, a shareholder's rights to access any company documents, let alone those within the scope of LPP, are extremely limited (compare e.g. *R v Masters and Wardens of the Merchant Tailors* (1831) 2 B & Ad 115). That strongly suggests that the "joint privilege" which has long been held to exist between shareholder and company should not be regarded as an aspect of company law. It is more plausibly seen as one emanation of a wider principle of procedure to the effect that "privilege cannot be claimed in circumstances where the parties to the relationship have a joint interest in the subject matter of the communication at the time that it comes into existence" (to use the formulation in Thanki, "The Law of Privilege" – see paragraph 26 above). That view is also supported by Stephenson LJ's endorsement in *CIA Barca de Panama SA v George Wimpey & Co Ltd* of the passage from the then-current edition of Phipson on Evidence reading:

> "No privilege attaches to communications between solicitor and client as against persons having a *joint interest* with the client in the subject matter of the communication, e.g. as between partners; a company and its shareholders; trustee and *cestui que trust* ..."

46. It follows from the previous Court of Appeal decision in this case that the LPP exemption in the 1998 Act will be available to an English data controller only if the data controller could resist disclosure on the ground of LPP under English law

principles were there to be legal proceedings to which it was a party in England. Had Ashley been seeking to defeat Taylor Wessing's LPP by, say, claiming that she had ownership rights in respect of the relevant information, or even that she was entitled to invoke the jurisdiction of the Court to supervise, and if necessary to intervene in, the administration of trusts recognised in *Schmidt v Rosewood Trust Ltd*, the issue before us might correctly have been characterised as one of trust law and so governed by the law of The Bahamas. A claim founded in trust law might have had implications for Taylor Wessing's ability to rely on LPP, but the dispute would essentially have been about trust law, not procedure or evidence. As it is, however, it seems to us that Ashley is relying, not on trust principles, but on a facet of the law relating to privilege whose application is not even limited to trusts. In the circumstances, what is at issue is appropriately characterised as procedure and so governed by English law as the (hypothetical) *lex fori*.

47. In short, we have arrived at a different conclusion to the Judge. In our view, "joint privilege" arises as a matter of procedural law rather than trust law and its scope therefore falls to be determined on the basis of domestic principles rather than Bahamian law. It follows that the BTA is of no significance.

*The English law position*

48. By way of respondent's notice, Taylor Wessing seek to uphold the Judge's decision on the alternative ground that, as a matter of English domestic law, there is no general principle that, in the absence of a joint retainer, a beneficiary has a joint privilege in legal communications between a trustee and its legal advisers. It is said that, where a trustee is not alleged to have acted fraudulently or in bad faith, the trustee is entitled to maintain LPP as against a beneficiary in respect of communications which would otherwise attract LPP.

49. Taylor Wessing's case was summarised in this way in their skeleton argument:

> "the pre-*Schmidt* decisions which assumed *a priori* that beneficiaries had a 'proprietary right' to inspect all so-called 'trust documents', are not good law: even as a matter of English trust law, a beneficiary has no automatic right to see the trustee's privileged documents and no 'joint privilege' in them".

50. In the light of the conclusions we have arrived at above, this contention might be said to be directed at the wrong target. We have differed from the Judge, not on the basis that "joint privilege" is a function of English trust law rather than Bahamian, but because we consider that "joint privilege" is an aspect of procedural law, not trust law. To say, therefore, that a beneficiary has no automatic right to see a trustee's privileged documents "as a matter of English trust law" is beside the point, particularly when Mr Pitt-Payne did not propose a synthesis of trust law and procedural law. There was reference in the course of argument to the possibility of post-*Schmidt* trust principles being assimilated with the "joint privilege" which we see as a feature of procedural law, but Mr Pitt-Payne did not espouse the idea, which was not in any event one put forward in the respondent's notice.

51. Mr Pitt-Payne suggested that, were disclosure of documents relating to Grampian's decision-making to be sought in litigation challenging it, the Court would not necessarily order it. That, he said, indicates that "joint privilege" might not extend to such documents. However, the authorities refer to the possibility of disclosure being refused for reasons *other than* LPP. Thus, in *Breakspear v Ackland* Briggs J spoke of English law's "robust approach to 'fishing' litigation" and observed that "if the document in question does no more than illuminate the trustees' reasons for the making of a discretionary decision, it may be simply irrelevant, unless the trustees by a partial disclosure of their reasons have put into play the issue as to their rationality". Considerations such as these can have no bearing on whether the LPP exemption for which paragraph 10 of schedule 7 to the 1998 Act provides is applicable.

52. Mr Pitt-Payne also relied on LPP's status as a human right. In this connection, he referred us to *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563, where Lord Hoffmann said at paragraph 7 that "LPP is a fundamental human right long established in the common law". In our view, however, the fact that LPP has been recognised as a fundamental human right does not assist Mr Pitt-Payne. The question in this case is not whether LPP exists, but whose LPP is it.

53. In the end, we did not understand Mr Pitt-Payne to advance a positive case to the effect that developments in English law have served to negate or limit Ashley's "joint privilege" in a material respect. His position was essentially that the law is now uncertain. In our view, however, there is no relevant uncertainty. There is no reason to doubt that "joint privilege" applies in the circumstances of this case.

*Conclusion*

54. We would allow Ashley's appeal on the LPP Issue. The significance of that decision will be affected to some extent, however, by on the outcome of the Data Protection Issue, to which we now turn.

## The Data Protection Issue

55. The Data Protection Issue is concerned with whether the 35 paper files held by Taylor Wessing under the description "Yuills Trusts" (referred to at paragraph 10 above) are "a relevant filing system" for the purposes of section 1(1) of the 1998 Act. The Judge held that they were, and by paragraph 1 of his order he so declared. By paragraph 2, he ordered Taylor Wessing to carry out a search of the 35 files, complying with their obligations under section 1 of the 1998 Act in relation to personal data of the claimants contained in those files, and to do so by 4 pm on 21 June 2019. Paragraph 11 of his order entitled Taylor Wessing to claim privilege over documents considered to be subject to legal advice privilege but required such documents to be listed by reference to date and described.

56. A preliminary question is whether Taylor Wessing should be granted an extension of time for filing their Notice of Appeal. The grant of an extension was opposed by Ashley.

57. The Judge gave Taylor Wessing permission to appeal in respect of the question of what constitutes a relevant filing system under the 1998 Act. He required any

Appellant's Notice to be filed with this court by 4 pm on 31 May 2019, an abridgement to 14 days of the normal 21 day time limit for filing a Notice of Appeal. In addition, he refused a stay of the provisions of his order pending the determination of any such appeal.

58. Taylor Wessing did not file a Notice of Appeal by the specified date. Indeed, on 31 May 2019, the last day on which the Notice of Appeal could be filed in accordance with the Judge's order, Taylor Wessing wrote to the claimants' solicitors confirming that they would not be appealing. We note that, at this stage Taylor Wessing were facing a deadline for compliance with their obligations under the 1998 Act of 21 June 2019, but compliance was subject to the right to rely on the LPP exemption.

59. On 13 June 2019 Ashley made an application to this court for permission to appeal in relation to the LPP Issue. On 21 June Taylor Wessing wrote to the claimants' solicitors enclosing "*details of your clients' personal data in accordance with our obligations under [the 1998 Act], which we located following completion of the searches ordered by paragraphs 2 [and others] of the Order*" and "*In accordance with paragraph 11 … the schedule detailing the documents which have been withheld on the basis of [LPP]*."

60. On 3 July 2019 Taylor Wessing filed a Notice of Appeal on the Data Protection Issue, including their application for an extension of time for appealing. (The application sought, in the alternative, permission to appeal out of time from this court, but it is not suggested that anything turns on that.) Lewison LJ directed that the application for an extension of time be listed together with the appeal, with the appeal to follow if the application were to be granted.

61. It is common ground that, as Taylor Wessing had not complied with the time limit imposed by the Judge's order, they need to show a good reason why an extension of time should nevertheless be granted, particularly as they had initially confirmed that they were not going to appeal. Mr Pitt-Payne submitted that Taylor Wessing did have a good reason, namely the change of position by the claimants in deciding to ask for permission to appeal. Before that change of position, although the search would have to be performed, they could be confident that they could rely on the LPP exemption. After the change of position, by contrast, there was a risk that permission to appeal on the LPP Issue would be granted and the appeal would succeed. If the position on the Data Protection Issue then remained as the Judge had declared it to be, then the personal data in the documents uncovered by the search and for which legal advice privilege was claimed would have to be disclosed. He submitted, further, that the appeal was not academic, despite Taylor Wessing's compliance with the order made by the Judge, at least in circumstances where there was the possibility of the Judge's order on the LPP Issue being reversed. Finally, he submitted that the meaning of the term "relevant filing system" was an important issue which justified consideration at this level, given the state of the English and CJEU authorities on the topic.

62. Mr White submitted that Taylor Wessing did not have a good reason for obtaining an extension of time. He drew attention to the fact that during the period between 13 June (when Ashley's Notice of Appeal on the LPP Issue was served) and 21 June (when Taylor Wessing complied) Taylor Wessing sought neither a stay of the order nor an extension of time. Instead, they simply went ahead and complied. He did not suggest in his oral submissions, however, that the appeal was necessarily academic.

He very fairly accepted, in addition, that the claimants could not point to any prejudice if an extension of time were granted and the appeal allowed to go ahead.

63. We consider that in all these circumstances we should grant the extension of time which is sought. The issue which we must address is whether Taylor Wessing had a good reason for not appealing initially, and within the time limited by the Judge's order, but then changing their position. Subject to the fact that Taylor Wessing decided to comply with the order notwithstanding receipt of Ashley's Notice of Appeal, we consider that they did have a good reason. It was a matter for Taylor Wessing's judgment whether they thought that an appeal was worthwhile when there appeared to be no intention on the part of the claimants to disturb the findings on LPP. It is clear that Taylor Wessing took the view that, in these circumstances, an appeal was not worthwhile. Ashley's Notice of Appeal was a material change in circumstances amounting to a valid reason for changing tack.

64. When Ashley's Notice of Appeal on the LPP Issue arrived, Taylor Wessing were no doubt heavily engaged on the task of complying with the order. Whilst it might have been possible to make an emergency application for a stay in the period of just over a week between 13 and 21 June, there was no guarantee that it would succeed. The decision to comply was, in those circumstances, an understandable and pragmatic one, taken in circumstances where the LPP exemption still operated to protect personal data in the documents to which it applied. The decision to comply should not in our judgment weigh heavily against the grant of the extension of time.

65. If compliance with the order had rendered the appeal on the Data Protection Issue academic, then we would have considered that a powerful reason for not granting the extension of time, notwithstanding the undoubted potential importance of the meaning of the term "relevant filing system" in the 1998 Act. The point is not academic, however. It had relevance in the event that the Judge's decision on the LPP Issue turned out to be incorrect.

66. We turn, then, to the merits of the appeal on the Data Protection Issue.

67. The relevant recitals of the Directive were the following:

> "(10) Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognized both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the general principles of Community law; whereas, for that reason, the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community;
>
> (11) Whereas the principles of the protection of the rights and freedoms of individuals, notably the right to privacy, which are contained in this Directive, give substance to and amplify those contained in the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data;

> (15) 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;
>
> (26) Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable; whereas codes of conduct within the meaning of Article 27 may be a useful instrument for providing guidance as to the ways in which data may be rendered anonymous and retained in a form in which identification of the data subject is no longer possible;
>
> (27) 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 the personal data; 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."

68. Article 2 contained definitions. Article 2(a) defined "personal data" to mean "any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity". Article 2(c) defined "personal data filing system" to mean "any structured set of personal data which are accessible according to specific criteria, whether centralized, decentralized or dispersed on a functional or geographical basis". Then Article 3, headed "Scope", provided:

> "(1) This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system."

69. Article 8 of the Charter of Fundamental Rights of the European Union (which has full legal effect from 2009) provides:

> "1. Everyone has the right to the protection of personal data concerning him or her.
>
> 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
>
> 3. Compliance with these rules shall be subject to control by an independent authority."

70. The 1998 Act applied to the processing of "personal data" relating to "data subjects" by "data controllers". Personal data was defined by section 1(1) of the 1998 Act as:

> ""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"

71. There was also a definition of "data", which also had to be satisfied if data was to come within the Act:

> ""data" means information which—
>
> (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
>
> (b) is recorded with the intention that it should be processed by means of such equipment,
>
> (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
>
> (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68"

72. It is limb (c) of this definition, which derives from Article 3 of the Directive, into which it is contended the 35 files properly fall.

73. In *Durant v Financial Services Authority* [2003] EWCA Civ 1746; [2004] FSR 28, the appellant made requests to the respondent in its role as financial services regulator seeking disclosure of personal data held by it, both electronically and in manual files. The respondent refused access to the information held on manual files on the ground, amongst others, that the information was not "data". The respondent's case was that their filing system did not contain any indexing mechanism enabling ascertainment of specific information about an individual other than by physically examining an individual file and reading through it.

74. The argument advanced on behalf of the appellant was that the meaning of "relevant filing system", when considered in the light of Article 2(c) of the Directive read with Recital (27) was broad. Recital (27) prevented the data controller from relying on his techniques for control of manual data to defeat otherwise unobjectionable claims for access. For the respondent, it was argued that manual records were intended to be covered by the legislation only to the extent that such records are broadly comparable with computerised records in terms of ease of access to and retrievability of data. This approach was said to be supported by statements of government intention made in Parliamentary debates during the passage of the Bill giving rise to the Act.

75. Auld LJ (with whom Mummery and Buxton LJJ agreed) concluded at [50] that a "relevant filing system" was 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."

76. Paragraphs 45 to 49 contain the court's reasoning. Those reasons included consideration of the practical effect of the broad construction for which the appellant contended. The burden of complying with requests in relation to manual filing systems would often fall on administrative officers who may have little or no familiarity with a set of files. At [45] Auld LJ said:

> "Anything … which … requires the searcher to leaf through files to see what and whether information qualifying as personal data of the person who has made the request is to be found there, would bear no resemblance to a computerised search."

77. At [46] Auld LJ considered the relationship between the Act and the Directive:

> "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 Art. 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."

78. At [48] Auld LJ concluded that it was plain 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.

79. Guidance issued by the Information Commissioner's Office ("the ICO"), the statutory regulator under the 1998 Act, suggests a rule of thumb for identifying a relevant filing system, referred to as a "temp test". The ICO's "Frequently Asked Questions" of May 2011 explains:

> "*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."

80. Since the decision in *Durant*, the Grand Chamber of the CJEU has given guidance on the meaning of "relevant filing system" in Case C-25/17 *Tietosuojavatuutettu* ECLI:EU:C:2018:551. The referring court, the Korkein hallinto-oikeus, was concerned with the legality of a decision by the Finnish Data Protection Board prohibiting the Jehovah's Witness religious community from collecting or processing personal data in the course of their door-to-door preaching unless the requirements of the Finnish legislation relating to the processing of personal data were met.

81. Under the relevant Finnish law, a personal data filing system was one processed by automated means or "organised using data sheets or lists or any other comparable means permitting the retrieval of data relating to persons easily and without excessive cost." By its second question the referring court asked essentially:

> "… whether Article 2(c) of Directive 95/46 must be interpreted as meaning that the concept of a 'filing system' referred to in that provision covers a set of personal data collected in the course of door-to-door preaching, consisting of names and addresses as well as other information concerning persons contacted, if those data may, in practice, be easily retrieved for later use, or whether, in order to be covered by that definition, that set of data must include data sheets, specific lists or other search methods."

82. The court's reasoning and its answer are contained in paragraphs 53 to 62 of its judgment:

> "53. As is clear from Article 3(1) and recitals 15 and 27 of Directive 95/46, that directive covers both automatic processing of data and the manual processing of such data, so that 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. However, it is also clear that that directive applies to the manual processing of personal data only where the data processed form part of a filing system or are intended to form part of a filing system.
>
> 54. In the present case, since the processing of the personal data at issue in the main proceedings is carried out otherwise than by automatic means, the question arises as to whether the data processed form part of or are intended to form part of a filing system within the meaning of Article 2(c) and Article 3(1) of Directive 95/46.
>
> 55. In that connection, it is stipulated in Article 2(c) of Directive 95/46 that the concept of a 'filing system' is 'any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis'.
>
> 56. In accordance with the objective set out in paragraph 53 of the present judgment, that provision broadly defines the concept of 'filing system', in particular by referring to 'any' structured set of personal data.
>
> 57. As is clear from recitals 15 and 27 of Directive 95/46, 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 that filing system must be structured, it is clear from those

recitals that those criteria must be 'relat[ed] 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 personal data to be easily retrieved.

58. Apart from that requirement, Article 2(c) of Directive 95/46 does not lay down the practical means by which a filing system is be structured or the form in which it is to be presented. In particular, it does not follow from that provision, or from any other provision of that directive, that the personal data at issue must be contained in data sheets or specific lists or in another search method, in order to establish the existence of a filing system within the meaning of that directive.

59. In the present case, it is clear from the findings of the referring court that the data collected in the course of the door-to-door preaching at issue in the main proceedings are collected as a memory aid, on the basis of an allocation by geographical sector, in order to facilitate the organisation of subsequent visits to persons who have already been contacted. They include not only information relating to the content of conversations concerning the beliefs of the person contacted, but also his name and address. Furthermore, those data, or at least a part of them, are used to draw up lists kept by the congregations of the Jehovah's Witnesses Community of persons who no longer wish to receive visits by members who engage in the preaching of that community.

60. Thus, it appears that the personal data collected in the course of the door-to-door preaching at issue in the main proceedings are structured according to criteria chosen in accordance with the objective pursued by that collection, which is to prepare for subsequent visits and to keep lists of persons who no longer wish to be contacted. Thus, as it is apparent from the order for reference, those criteria, among which are the name and address of persons contacted, their beliefs or their wish not to receive further visits, are chosen so that they enable data relating to specific persons to be easily retrieved.

61. In that connection, the specific criterion and the specific form in which the set of personal data collected by each of the members who engage in preaching is actually structured is irrelevant, so long as that set of data makes it possible for the data relating to a specific person who has been contacted to be easily retrieved, which is however for the referring court to ascertain in the light of all the circumstances of the case in the main proceedings.

62. Therefore, the answer to Question 2 is that Article 2(c) of 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 the 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."

83. It can be seen from this analysis that the CJEU did not consider the Directive to be prescriptive as to the form of a relevant filing system. Instead the test is the functional one of whether specific criteria enable the data to be easily retrieved.

84. The Judge's findings as to the 35 paper files were that they were held under the description "Yuills Trusts", the client being the trustee of those trusts, and that the paper files were held in chronological order. The evidence of Ms McGuigan, a partner at Taylor Wessing, was that the files were not held with reference to any particular individuals or piece of advice which would directly concern the claimants as opposed to any other individuals who were also members of the class of beneficiaries. Extracting any personal data would require an individual to review every page of the 35 files.

85. The Judge explained his reasons for holding that the 35 paper files were a relevant filing system in paragraph 57 of his judgment. In summary these reasons were:

i) The *Durant* decision came before the right to protection of personal data became enshrined as a fundamental right in EU law by Article 8 of the Charter. The level of protection afforded by the English courts to the right had increased since the right became enshrined as a fundamental EU right.

ii) The purpose of the Directive as a whole was to provide a high level of protection for personal data.

iii) The approach of the CJEU in *Tietosuojavatuutettu* was to be followed in preference to *Durant*.

iv) The sole criterion was not, however, whether the data can be "easily retrieved". There were three separate requirements:

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

b) The criteria must be "related to individuals";

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

v) Applying that approach, the client description "Yuills Trusts" clearly relates to trusts in which the claimants, or at least Ashley, were potential beneficiaries. The description is a criterion which allows access to personal data. On an "expansive interpretation", that description also "related to individuals". The fact that the files relate to trusts in which one or all of the claimants were potential beneficiaries was enough.

vi) That left the last limb, whether the criteria enabled the data to be easily retrieved. Some files had already been examined, initially by a trainee solicitor and then reviewed by a senior associate. That was not unduly onerous and enabled any personal data relating to the claimants to be easily retrieved. It was resonant of the ICO "temp test" referred to above. Further, reliance could be placed on the fact that Ms McGuigan had been able to review the files and conclude that the majority of documents contained in them were subject to LPP:

> "If Taylor Wessing 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 the documents which contain it, the retrievability of the data must be a feature of the filing system."

86. Mr Pitt-Payne's first ground of appeal was that the Judge was in error in holding that the principles set out by the Court of Appeal in *Durant* required modification in the light of the decision of the CJEU in *Tietosuojavatuutettu*. He submitted that there was no inconsistency between the two decisions. Although the decision in *Durant* was concerned with how the definition of "relevant filing system" in section 1(1) of the 1998 Act was to be construed whilst giving effect to Article 2(c) of the Directive, the Directive itself recognised that there was scope for Member States to give effect to Article 2(c) in different ways. There was no suggestion that section 1(1) of the Act was inconsistent with the Directive in this respect.

87. Mr White submitted to the contrary. He pointed out that the Court of Appeal had expressly rejected the argument that Article 2(c) read with Recital (27) was in broad terms, and that this breadth should be reflected in section 1(1) of the Act. Instead, the Court had adopted a restrictive interpretation which was now shown to be incorrect by the *Tietosuojavatuutettu* decision. The Court of Appeal in *Durant* was not purporting to interpret the definition in section 1(1) by making use of the margin of discretion afforded to Member States reflected in Recital (27). Rather it had concluded that its interpretation accorded with the Directive because Article 2(c) was "equally restrictive".

88. In our judgment, the CJEU's judgment in *Tietosuojavatuutettu* is not consistent with the interpretation of "relevant filing system" contained in paragraph 50 of *Durant*. Paragraph 56 of the CJEU's judgment explains that, in accordance with the objective set out in paragraph 53 of avoiding circumvention of the protection, Article 2(c) broadly defines the concept of "filing system", in particular by referring to "any" structured set of personal data. The Court of Appeal's conclusion in paragraph 50 is, in some respects, more restrictive and cannot be fully reconciled with the CJEU's interpretation. Thus, we do not see how, in the light of the CJEU's judgment, the requirement in paragraph 50(1) of *Durant* can be justified. That requirement is that files forming part of the system must be structured in such a way as clearly to indicate *at the outset of the search* whether specific information relating to an individual is held in the system and if so in which file or files it is held. If the structure is such that ready access to the information is in fact enabled, then, following paragraph 57 of *Tietosuojavatuutettu*, that is sufficient. Likewise, the requirement in paragraph 50(2) of *Durant* seems unduly restrictive when it requires 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". Again, if the structure is such that ready access to the information is in fact enabled, that is sufficient. Perhaps more fundamentally, the CJEU's broad interpretation does not sit happily with this court's conclusion in *Durant*, for example at [48], that the Act applies to manual records only if they are of sufficient sophistication to provide the same or similar ready accessibility as a computerised filing system.

89. We do not think that this difference in approach can be explained by reference to Recital (27). It is true that that Recital recognises that it is for Member States to lay down "the different criteria for determining the constituents of a structured set of personal data, and the different criteria governing access to such a set". A Member State making use of that margin of discretion would, it seems to us, define the scope of Article 2(c) of the Directive by some express words. The Court of Appeal did not conclude, however, that the 1998 Act had taken this approach. Instead, the court concluded that its narrow interpretation of section 1(1) of the 1998 Act "accords with the Directive in its equally restrictive definition in Art.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".

90. In the light of the judgment in *Tietosuojavatuutettu*, we think that the questions which must be asked are the following. First, are the files a "structured set of personal data"? Secondly, are the data accessible according to specific criteria? Thirdly, are those criteria "related to individuals"? Fourthly, do the specific criteria enable the data to be easily (or "readily" as the 1998 Act puts it) retrieved?

91. Mr White challenged the Judge's conclusion (relevant to the third question) that the specific criteria needed to be "related to individuals". We consider, however, that that requirement is implicit in Article 2(c). It is difficult to see how personal data could be accessible according to specific criteria unless those criteria are in some way related to individuals. That interpretation is consistent with Recitals (15) and (27) which expressly refer to "specific criteria relating to individuals". Moreover, in paragraph 57 of *Tietosuojavatuutettu*, the CJEU confirmed that the specific criteria must be related to individuals. The requirement in section 1(1) of the 1998 Act that the set of information is structured "by reference to individuals or by reference to criteria relating to individuals" is therefore entirely in conformity with the Directive as interpreted by the CJEU.

92. Posing the fourth question in terms of "easy" or "ready" retrieval is, again, a gloss on the literal words of Article 2(c). However, in paragraph 57 of its judgment the CJEU put the question in that way when stating the principle, and used the same phrase when suggesting how the principle might apply to the facts at paragraph 61. This way of putting the question also finds support in Recitals (15) and (27) ("easy access"). Again, therefore, the requirement in section 1(1) that the information is structured in such a way that specific information relating to an individual is readily accessible is entirely in accordance with the Directive as interpreted by the CJEU.

93. We do not consider, therefore, that the Judge was in error in approaching the matter on the basis of the judgment of the CJEU in *Tietosuojavatuutettu.*

94. It is convenient, next, to consider Taylor Wessing's fourth ground of appeal which is that the Judge was wrong to place reliance on the Charter in reaching his conclusion. For our part we do not think that anything is added by the reliance on the Charter. It is clear from Recital (10) to the Directive that the legislator had well in mind that the object of laws on the processing of personal data was to protect fundamental rights and freedoms recognised by EU law, and for that reason are entitled to "a high level of protection". It is notable, in that connection, that the CJEU was able to reach the conclusions on which we rely without the need to place reliance on the Charter. Given that the Judge correctly approached the matter in accordance with the CJEU's judgment, however, his reliance upon the Charter to support that approach does not undermine his judgment on this issue.

95. Taylor Wessing's second ground of appeal was that the Judge ought to have found that the 35 files were not structured by reference to criteria "related to individuals". Mr Pitt-Payne submitted that the files were held by reference to the corporate client, the trustee. They were not structured by reference to particular individuals. Mr White submitted that the Judge had been right to give the phrase an expansive construction.

96. Viewed in isolation there would not appear to be much force in this point. A criterion may be closely related to an individual (for example it might be his or her name or National Insurance number), or it may be remotely related to an individual (for example the street in which he lives). The degree of specificity of the criterion does not preclude a finding that the criterion relates to an individual. One needs to bear in mind, nevertheless, that a very general criterion may be less likely to enable easy or ready access to the data. The Directive and the Act are clear in requiring a causative link between the criterion and ease of access of the data.

97. That leads us naturally to the third ground of appeal which focuses on the fourth question posed above, namely whether the criterion by which the 35 files were structured *enabled* the relevant data to be easily or readily retrieved. Mr Pitt-Payne submitted that the files were not structured in any way that enabled the data to be easily retrieved. The only way that data could be retrieved was by physically examining the files page by page. The criterion "Yuills Trusts" was so unspecific as to be of little or no assistance in the retrieval of personal data relating to the individual beneficiaries.

98. Mr White submitted that the Judge asked himself the right question. The answer which he gave involved an evaluation of whether the criterion enabled easy retrieval of personal information about the beneficiaries, and his evaluation revealed no error of principle with which this court would be entitled to interfere.

99. We do consider that the Judge fell into legal error in answering the fourth question we have identified in paragraph 90 above. Having concluded that the criterion "Yuills Trusts" related to individuals in a very broad sense, he then formed an assessment of how easy he thought the process of recovery of the personal data would be, relying on evidence that a trainee lawyer and an associate solicitor had in fact been able to extract personal data from the files, as well as the ability of a senior lawyer to identify documents subject to legal professional privilege. That was an incorrect approach. The "ready access" required under the Directive and the Act must be enabled by the criteria, that is to say by the structure of the files. If access to the relevant data requires the use of trainees and skilled lawyers, turning the pages of the files and

reviewing the material identified, that is a clear indication that the structure itself does not enable ready access to the data. In fact, the 35 files were completely unstructured beyond their chronological compilation under the description "Yuills Trusts". The Judge lost sight of the need for the causative link between that criterion and the ease of retrieval of the data.

100. In that connection we consider the "temp test" to which the Judge referred to be of more assistance to Taylor Wessing than to Ashley. The temp is postulated to be "reasonably competent but without any particular knowledge of the type of work or the documents you hold". None of the evidence which the Judge relied on could sensibly be regarded as satisfying that test. Whilst this is no more than a rule of thumb, its application in this case did nothing to support a finding of ready access to personal data.

101. It follows, in our judgment, that Ashley did not establish that the 35 files were a relevant filing system within the meaning of the 1998 Act. On that ground, we would allow the appeal on this issue as well.

## Conclusion

102. For the reasons we have given, the appeals on the LPP Issue and the Data Protection Issue will be allowed.