LITIG Limited
Re: Disclaimers and Legal Notices in Emails

FURTHER OPINION

1. Following my opinion of 14 July 2009, I am asked to advise LITIG Ltd[1] further in relation to the problems posed by the increasing tendency towards the inclusion of voluminous legal notices within emails. I will assume that readers of this opinion have the earlier opinion available to them and will not repeat it.

2. Despite my personal sympathy with the objectives pursued by LITIG in this present initiative, for the reasons explained in the earlier opinion, my view is that a number of the key regulatory requirements cannot be satisfied by incorporation of information via a hyperlink. The follow-up questions which I am asked are:-

What is the absolute minimum information that must be appended to an email to satisfy the various statutory and regulatory requirements?

3. For a solicitors' firm which is an LLP, I consider that the minimum information for general use on all emails is as follows:-

> "John Smith & Co LLP is a limited liability partnership registered under No. OC****** in England and Wales, and is regulated by the Solicitors Regulation Authority. Registered office: [postal address of reg office]"

4. This satisfies the requirement of the SRA's Code of Conduct Rule 7.0.7 to show the firm's registered name and number if it is an LLP (or

1. Any other parties reading this opinion should note the disclaimer at the end.

company) and to show the words "regulated by the Solicitors[2] Regulation Authority". Rule 7.0.7 was amended on 31 March 2009 to the form quoted at para 17 of my previous opinion.

5. This wording also satisfies the requirements of Regs 6 and 7[3] of the Companies (Trading Disclosures) Regulations 2008 (SI 2008 No 495), as applied to LLPs by The Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009 (SI 2009 No 1804). Reg 14 modifies the application of section 82 of the 2006 Act to LLPs as follows:-

> **"Requirement to disclose LLP name etc**
>
> 82.—(1) The Companies (Trading Disclosures) Regulations 2008 (S.I. 2008/495) apply to LLPs.
>
> (2) As they apply to LLPs—
>
> (a) read references to a company as references to an LLP;
>
> (b) read references to a director as references to a member of an LLP;
>
> (c) read references to an officer of a company as references to a designated member of an LLP;
>
> (d) in regulation 7 (further particulars to appear in business letters, order forms and websites), for paragraphs (2)(d) to (f) and (3) substitute—
>
> "(d) in the case of an LLP whose name ends with the abbreviation "llp", "LLP", "pac" or "PAC", the fact that it is an LLP or a partneriaeth atebolrwydd cyfyngedig".";
>
> (e) in regulation 8 (disclosure of names of members)—
>
> (i) at the beginning of paragraph (1) insert "Subject to paragraph (3)," and
>
> (ii) after paragraph (2) insert—

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2. The ungrammatical omission of an apostrophe after "Solicitors" comes from the wording of the Rule itself.

3. Quoted at para 24 of my previous opinion.

"(3) Paragraph (1) does not apply in relation to any document issued by an LLP with more than 20 members which maintains at its principal place of business a list of the names of all the members if the document states in legible characters the address of the principal place of business of the LLP and that the list of the members' names is open to inspection at that place.

(4) Where an LLP maintains a list of the members' names for the purposes of paragraph (3), any person may inspect the list during office hours.";

(f) omit regulation 10(3) (offences: shadow directors)."

6. This is an appalling spaghetti-like drafting technique, where one set of regulations cross-refers to and modifies another set of regulations and sections of the Act in relation to LLPs. This technique makes it extremely difficult to follow the actual requirements of the law. However, by piecing together the 2009 Regulations with the 2008 Regulations, we get the following relevant text of Regs 6 and 7 as they apply to LLPs:-

"Registered name to appear in communications

6.—(1) Every LLP shall disclose its registered name on—

(a) its business letters, notices and other official publications;

(b) its bills of exchange, promissory notes, endorsements and order forms;

(c) cheques purporting to be signed by or on behalf of the LLP;

(d) orders for money, goods or services purporting to be signed by or on behalf of the LLP;

(e) its bills of parcels, invoices and other demands for payment, receipts and letters of credit;

(f) its applications for licences to carry on a trade or activity; and

(g) all other forms of its business correspondence and documentation.

(2) Every LLP shall disclose its registered name on its websites.

Further particulars to appear in business letters, order forms and websites

> 7.—(1) Every LLP shall disclose the particulars set out in paragraph (2) on—
>
> (a) its business letters;
>
> (b) its order forms; and
>
> (c) its websites.
>
> (2) The particulars are—
>
> (a) the part of the United Kingdom in which the LLP is registered;
>
> (b) the LLP's registered number;
>
> (c) the address of the LLP's registered office;
>
> (d) in the case of an LLP whose name ends with the abbreviation "llp", "LLP", "pac" or "PAC", the fact that it is an LLP or a "partneriaeth atebolrwydd cyfyngedig"."

7. As mentioned in my previous opinion, I consider that the effect of Reg 1(2)(d)[4] relating to electronic documents is to make it clear that the references to "business letters" apply to emails (or other electronic documents analogous to letters) as much as to hard copy letters. The wording I propose in para 3 above fulfills the requirement to mention the part of the United Kingdom in which the LLP is registered, the LLP's registered number, the address of the LLP's registered office, and the fact that it is a "limited liability partnership" which is an additional requirement to using the letters LLP as part of its registered name.

8. The above formulation assumes that Reg 8 does not apply. Reg 8 (as modified in relation to LLPs) requires that if an LLP's business letter includes the name any member of the LLP, other than in the text or as a signatory, then it must disclose the name of <u>every</u> member of the LLP. This in turn is subject to a further exemption in the case of LLPs with 20

4. Quoted at para 23 of my previous opinion.

or more members "which maintains at its principal place of business a list of the names of all the members if the document states in legible characters the address of the principal place of business of the LLP and that the list of the members' names is open to inspection at that place."

9. Since the effect of falling within Reg 8 is to add either the above cumbersome wording to the email notice, or to require all the names of the partners to be listed in the case of an LLP with 19 or fewer partners, my advice is to avoid mentioning any names of individual partners as part of the standard headings or footings in emails. Only the actual registered name of the LLP should be used. Optional information such as names of partners can be placed on the website where space is not at a premium. Whilst I do not think that LITIG's original objective of using a hyperlink to substitute for all legal notices within emails is achievable as things stand, it is still a good idea to include in standard emails a hyperlink to a webpage with more extensive information about the firm than the limited amount that must be put in the email itself.

10. Unincorporated solicitors' firms with 20 or more partners need the following minimum information:-

> "John Smith & Co is regulated by the Solicitors Regulation Authority under number ****. A list of the partners' names is available for inspection at the firm's principal place of business at [postal address]."

11. The number to be inserted is the number allocated by the SRA. The requirement to refer to the list of partners' names and the address of the office where it may be inspected arises from section 1203 in Part 41 of the

Companies Act 2006.[5] Unlike in the case of companies and LLPs, it is not totally clear that an email is a "business letter" to which these requirements do apply: I can find no explicit provision in the law relating to unincorporated firms which mirrors Reg 1(1)(d) above. However it would be anomalous if the requirement to put this information into an email were to apply to companies and LLPs but not to unincorporated partnerships, and in my view it is prudent to assume that Part 41 of the 2006 Act might well be interpreted to include emails within the phrase "business letters".

12. As regards partnerships of under 20 partners and sole practitioners, the minimum information would be:-

> "John Smith & Co is regulated by the Solicitors Regulation Authority under number ****. Partners:[6] A Smith, B Jones and C Bloggs. Documents may be served at [postal address]."

13. The SRA requirement is the same; the requirement to state the names of the partners and their address for service of any document relating in any way to the business of the firm arises from sections 1201 and 1202 of the 2006 Act.

14. I should make it clear that the above in my view amounts to the minimum information for general use on emails by solicitors' firms (and businesses generally). I have not attempted the Herculean task of looking at sector specific regulatory requirements such as e.g. requirements relating to firms engaged in regulated financial services

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5. Replacing a similar provision of the repealed Business Names Act 1985.

6. Where it is a sole practitioner, the word "proprietor" should be used here.

activities, or requirements under the E-Privacy Regulations[7] as to what has to be put in marketing emails.

Confidentiality notices

15. In my view, confidentiality notices do have some value in the event of misdirection of the email or indeed within a client organisation where an email from a solicitor may be circulated internally. Whilst English law will fairly readily imply obligations of confidence arising from the nature of the content, this is not necessarily the case in other jurisdictions where emails might end up by accident. Further, non-lawyers may genuinely not appreciate that there is anything wrong in disclosing or sending on something which does not have any explicit notice that it is confidential.

16. On the other hand, many confidentiality notices are extremely verbose. I have sought to limit such a notice as much as possible to the following:-

> "This email is CONFIDENTIAL and LEGALLY PRIVILEGED. If you are not the intended recipient of this email and its attachments, you must take no action based upon them, nor must you copy or show them to anyone. Please contact the sender if you believe you have received this email in error."

17. Optionally, a return email link, or a website link to a page reinforcing the confidentiality message, could be provided.

Limitations of liability for virus transmission

18. I think that such an attempt to limit liability is pretty useless. Unless it forms part of a contract between the sender and the recipient, I do not

7. The Privacy and Electronic Communications (EC Directive) Regulations 2003.

see how it can be effective in excluding any liability which might otherwise arise. A routine virus disclaimer cannot amount to an effective warning which allows the recipient to avoid the danger of virus infection. For example, an email with attachments which said "you might get a virus if you click on these attachments" would be useless as a warning: if the recipient is not intended to open the attachments, why send them?

19. My impression is that many of these virus-related notices are generated and inserted by virus checking software or services as a means of free advertising without the email sending organisation actually asking for this to be done. My recommendation would be to configure the software or service to switch off such unwanted insertions.

Limitation on the ability of the sender to form a contract by email

20. I suspect that such a standard form disclaimer is very likely to be ineffective. If it is clear from the body of the email that the sender is intending to form a contract, by offering or accepting, it seems to me that a court would normally interpret the text in the body as over-riding a standard form disclaimer shoved routinely into every email. This seems to be the view of Lord Hodge in the Court of Session in the recent case of *Baillie Estates Ltd v Du Pont (UK) Ltd* [2009] CSOH 95 (30 June 2009) who held that a contract had been formed. At para 32 he recorded that Du Pont abandoned an argument set out in their defence based on a standard disclaimer that the email did not constitute a contractual offer or acceptance unless it was designated that an e-contract was intended, but indicated in passing that he did not think much of the argument.

21. I think that consciously inserting e.g. the words "Subject to Contract"

into the text of an email in accordance with conveyancing practice is a different matter. The very fact that it is done intentionally rather than routinely appended by software means that it is far more likely that the court would pay regard to it when assessing what were the real intentions of the parties.

Statement that service by email will not be accepted

22. I mention this because I have seen such disclaimers around. However it is not necessary to disclaim explicitly acceptance of service by email because such service is only valid if prior agreement is given to such mode of service. The relevant provisions of the Practice Direction supplementing Part 6 of the CPR state:-

> **"Service by fax or other electronic means**
>
> 4.1 Subject to the provisions of rule 6.23(5) and (6), where a document is to be served by fax or other electronic means –
>
> (1) the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving –
>
> (a) that the party to be served or the solicitor is willing to accept service by fax or other electronic means; and
>
> (b) the fax number, e-mail address or other electronic identification to which it must be sent; and
>
> (2) the following are to be taken as sufficient written indications for the purposes of paragraph 4.1(1) –
>
> (a) a fax number set out on the writing paper of the solicitor acting for the party to be served;
>
> (b) an e-mail address set out on the writing paper of the solicitor acting for the party to be served but only where it is stated that the e-mail address may be used for service; or
>
> (c) a fax number, e-mail address or electronic identification set out on a statement of case or a response to a claim filed with the court."

23. Thus, giving an email address as such does not amount to acceptance of service by email. As a matter of good practice, I would suggest that such a disclaimer does no harm if put onto the "Contact Us" or similar page of a firm's website, which may be linked to from emails to provide additional (voluntary) information; however, given LITIG's objective of minimising the amount of unnecessary material put into emails I would suggest that this particular disclaimer can usefully be omitted from the body of emails.

Origin of the practice of appending email disclaimers and notices

24. I am not able to recount the history of the growth of email disclaimers and notices. I suspect that it has to a large extent spread across the Atlantic, and that once a new form of email notice or disclaimer is originated by one firm, it is copied by others and spreads like a virus.

25. Why do such notices not proliferate on hard copy letters? Probably because there is a tangible physical cost[8] in terms of lost area available for text if comparable notices and disclaimers were printed on letters, quite apart from the unsightly effect. There are also practical reasons which make some of them less relevant or necessary: e.g. the danger of accidental misdirection of a letter is probably less than with an email, and it is more obvious to a recipient that he is doing something wrong if he opens up an envelope addressed to someone else.

26. I think that the reason such disclaimers are not included in SMS

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8. There is also, as LITIG have pointed out, a real cost of storing and processing voluminous email notices but this is less visible and tends to fall to a large extent on the recipient rather than the sender.

messages and instant messages is because of the practical limitations of space within a small message size. I think that an SMS message probably does not count as a "business letter" for company, LLP or partnership purposes because it is sufficiently different in its nature from a letter not to count as an electronic version of a letter; and the same can be said for instant messages.

27. I hope that these thoughts are of use to my clients and I would be very happy to try to answer any further questions which arise.

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LITIG Limited
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FURTHER OPINION
of
Martin Howe QC

Hill Dickinson
Ref: SJL/SHT/CJ/1078580.1