LITIG Limited
Re: Disclaimers and Legal Notices in Emails

OPINION

1. I am asked to advise LITIG Ltd[1] in relation to the problems posed by the increasing tendency towards the inclusion of voluminous legal notices within emails. Specifically, LITIG are interested in the question of whether such legal notices can be replaced by a hyperlink to a website containing the relevant material. LITIG's interest is primarily in relation to emails sent out by firms of solicitors but are also interested in the question whether this solution could be adopted by clients of solicitors' firms.

2. As a frequent reader of emails containing voluminous legal notices, I can certainly see the practical advantages of LITIG's proposed solution. Such legal notices are voluminous and time-wasting. When emails are replied to, creating email chains, these legal notices are often repeated a number of times within the body of one email. The content of such notices is rarely of interest to readers of emails in the ordinary course of communicating by email.

3. If these notices are replaced with a hyperlink, on the rare occasions when the content of the notices is of interest to the reader of the email, the reader can, assuming he or she has access to a browser, click the hyperlink and read the notices. In a normal scenario where emails are

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

opened and read on an office computer with a broadband internet connection, it is hard to see any practical disadvantages to LITIG's suggestion.

4. However, legal notices also have to serve their function in other scenarios which may be less often encountered but which are still realistic. I will therefore consider these possible scenarios before coming to the specific regulatory and legal requirements against which the effectiveness or permissibility of a hyperlink notice needs to be tested.

Practical and technical considerations

5. There are two basic scenarios to consider in which legal notices associated with an email may need to be read. The first is when the email is read contemporaneously - on or shortly after it is received. The second is when an email is read at a later date - possibly months or years later.

Emails read contemporaneously

6. As I have already said, there is normally little difficulty in a person who is reading an email on a desktop computer clicking a hyperlink in order to read legal notices referred to in an email. Nevertheless, there are a number of realistic scenarios where this could be difficult or impossible:-

- *Emails read when offline:* The reader might download emails into his email client and then read them offline. This was a common scenario in the days when modem based internet access via telephone line was in widespread use: users would log on, download messages, and then drop the connection in order to avoid call charges. Whilst this will in practice be rarer under

present day conditions where 'always on' internet connections are much more widely used, I do not think that a scenario where emails are read offline can be discounted. For example, PDAs or smartphones may have intermittent internet connection and the user may read through downloaded emails when out of signal.

- *Email links prohibited or discouraged by software or policy:* Links in spam emails are a known source of danger to computer users. They may link to phishing websites or to websites which will introduce malicious software into the user's system. For these reasons some companies may impose security policies under which email hyperlinks are disabled, either in extreme cases across the board or e.g. when the email is from an unknown sender. Even if software is not configured to disable such links, users may be trained not to click on links in emails unless they positively know the sender and know that the link is safe. The "unknown sender" scenario is of particular relevance to confidentiality notices, one of whose main purposes is to give warning to persons to whom an email is sent by accident. If such a recipient is either prevented or deterred from clicking a hyperlink in an email from an unknown sender, then such notices may fail to achieve their purpose in the very scenario where they are necessary.

- *Browser not available or problematical to use:* The use of hyperlinks in emails to convey information assumes that the user has a browser installed and configured to display the webpage when the link is clicked. This will not always be the case. For example if emails are read on a PDA or smartphone, either there may be no browser

installed or it may be cumbersome or costly to use. A user who is charged by the byte for browsing access to the internet may be deterred from clicking on a link and bringing up a webpage which he may fear could be loaded with large graphics files. This could make it both costly and slow to load over a narrow band internet connection (e.g. GSM GPRS).

7. The above considerations indicate that there is a real difference of substance between using a hyperlink to point to a legal notice on a webpage, when one is simply linking from one html page to another within the same website on an already open browser, and a hyperlink in an email. Further and more fundamental differences arise when one considers the scenario when a stored email is read at a later date than the date when it is first received.

Scenario when a stored email is read later

8. A further difficulty with the use of hyperlinks arises when a stored email is read at a later date. In order for a hyperlink to be effective, the webpage to which it links must be up and running on a server. Quite apart from issues arising from intermittent service interruptions, there is no guarantee that a webpage containing legal notices will be kept up and running for the indefinite future, or that it will be in the same form as on the date when the email was sent.

9. This scenario is of particular relevance when, for example, a firm or entity which sends an email has closed down, and the recipient of the email then wants to find out the corporate entity information. It is true that in many cases it may be possible to recover information on the past state of

a webpage from services such as www.archive.org or possibly sometimes from a Google cache. However I do not consider that the potential availability of such services can be regarded as equivalent to the direct provision of the information contained in the webpage. Apart from requiring the reader of the email to carry out detective work, these services spider webpages only intermittently and do not always render them accurately. Further, in the case of www.archive.org there is a period of many months between the date of spidering and the date when the archived page becomes available on the server.

10. Because of the problems which arise in guaranteeing that a website containing legal notices will be kept up and running in unchanged condition, care needs to be taken with legal or regulatory requirements where the purpose, or one of the purposes, is to put the recipient of the email in possession of a permanent record of the information required to be provided. If this is one of the purposes of a particular legal or regulatory requirement, it is hard to see how the hyperlink solution can satisfy it.

E-commerce Directive and regulations

11. I will deal with this issue first because its answer is fairly straightforward, although I am afraid it is not the answer my clients might wish to hear. Directive 2000/31/EC 'on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)' provides in Article 5(1):-

> **"General information to be provided**
>
> 1. In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:"

The Article then lists information including name, address, VAT number and trade body or regulated professional information in the case of a regulated profession.

This Directive has been transposed into UK law by the The Electronic Commerce (EC Directive) Regulations 2002 (SI 2002 No. 2013). Reg 6 simply reproduces Article 5(1) of the Directive nearly verbatim.

In Case C-298/07 *Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV v. deutsche internet versicherung AG* (16 Oct 2008), the ECJ interpreted the requirement in Article 5(1) that a service provider must make available details "which allow him to be contacted rapidly and communicated with in a direct and effective manner". Paras 21 to 25 of the judgment were as follows:-

> "21 In the event that they were unable to make use of another type of communication if necessary, in a situation where after making contact electronically with the service provider they were temporarily deprived of access to the electronic network, the recipients of the service might find themselves unable to conclude a contract and, thereby excluded from the market. Such exclusion is likely to undermine and cut off the sector concerned from the rest of the market and, therefore, is liable to constitute an obstacle to the functioning of the internal market, depriving the Directive of part of its effectiveness.
>
> 22 Second, the Directive, as is clear in particular from Article 1(3) and the 7th, 10th and 11th recitals in the preamble, also intends to guarantee the protection of consumer interests. Such protection must be ensured at all stages of contact between the service

provider and recipients of the service.

23 It follows that, in so far as the information communicated by the service provider enables recipients of the service to evaluate the extent of their future commitments, protecting them in particular against the risk of errors which might lead to the conclusion of an unfavourable contract, an additional means of communication may also be necessary prior to the conclusion of a contract.

24 Offering the recipients of the service an additional non-electronic means of communication where necessary cannot be regarded as a heavy financial burden for service providers which offer their services on the internet. Such service providers usually offer their services to consumers who have easy access to the electronic network and are familiar with that type of communication. Therefore, it is only in exceptional circumstances that electronic communication will have to be supplemented by non-electronic means.

25 It is clear from all those considerations that under Article 5(1)(c) of the Directive the service provider is required to offer recipients of the service a rapid, direct and effective means of communication in addition to his electronic mail address."

The Court then went on to rule:

"35 It is true that an electronic enquiry template may be regarded as offering a direct and effective means of communication within the meaning of Article 5(1)(c) of the Directive, where, as is clear in the case in the main proceedings from evidence in the file, the service provider answers questions sent by consumers within a period of 30 to 60 minutes.

36 However, in exceptional circumstances where a recipient of the service, after making contact by electronic means with the service provider, is, for various reasons, such as a journey, holiday or a business trip, deprived of access to the electronic network, communication by an enquiry template can no longer be regarded as effective within the meaning of Article 5(1)(c) of the Directive.

37 Since that template is also a means of electronic communication, the need to use a form on the internet would not, in such situations, enable fluid and therefore effective communication to be maintained between the service provider and the recipient of the service, contrary to Article 5(1)(c) of the Directive.

38 In the circumstances described in paragraph 36 of this judgment, offering only an electronic enquiry template is also

> incompatible with the intention of the Community legislature, which, as stated in paragraph 20 of this judgment, was to encourage the development of electronic commerce without, however, wishing to isolate it from the rest of the internal market.
>
> 39 Therefore, in those circumstances, on request by the recipient of the services, the service provider must provide the latter with access to a non-electronic means of communication, enabling him to maintain effective communication."

In that case the ECJ was not directly dealing with the point presently at issue. However, it is significant that in interpreting the purposes of the Directive, the ECJ placed weight on the position of service recipients in exceptional circumstances where they are out of contact with the internet.

12. The presently relevant question under this Directive is whether information provided via a hyperlink in an email can satisfy the requirement of Article 5(1) of the Directive that the required information is made "easily, directly and *permanently* accessible to the recipients of the service". I consider that the required information will in most cases be "easily and directly" provided by this method. However, it is far from clear that provision of a hyperlink to a website will satisfy the requirement that it be <u>permanently</u> provided.

13. If, in the example I have already given, the service provider were to cease operations or at least to shut down its website, it would then become impossible for recipients of the service to retrieve information about the identity of the service provider, its regulated status and its address.

14. I am not aware of any direct authoritative guidance on the interpretation of the word "permantly" in this provision, but some assistance by analogy is provided by the Consumer Protection (Distance Selling) Regulations 2000, which transpose the EC's distance selling Directive

97/7/EC.

15. It is necessary for a business engaged in distance selling to supply certain specified information. That information is specified in regs 7(1)(a)(i) to (vi) and 8(1) and (2) of the 2000 Regulations. Regs 8(1) and (3) state:-

> **"Written and additional information**
>
> 8. - (1) Subject to regulation 9, the supplier shall provide to the consumer in writing, or in another durable medium which is available and accessible to the consumer, the information referred to in paragraph (2) ...
>
> (3) Subject to regulation 9, prior to the conclusion of a contract for the supply of services, the supplier shall inform the consumer in writing or in another durable medium which is available and accessible to the consumer that, unless the parties agree otherwise, he will not be able to cancel the contract under regulation 10 once the performance of the services has begun with his agreement."

16. This raises the question of whether the reference to a "durable medium" in reg 8(1) would be satisfied by information given via a hyperlink to a website in an email, or whether it is necessary that the information is provided in an email, either in the text body or at least in an attachment. The OFT's published guidance on this point is as follows:-

> "Durable medium is not defined in the DSRs. Our view is that it means a form in which information can be retained and reproduced but cannot be edited, such as an email that can be printed or a letter, fax or brochure that can be kept for future reference. We do not consider that information on a website is durable as it can be changed at any time after the consumer has accessed it. Technological advances may change what we regard as durable in the future."

17. In my view the OFT's guidance on this point is well reasoned. Providing a hyperlink to a website gives rise to the intrinsic problem, even assuming that the reader of the email has ready access to a browser, that

what is said on the webpage is only accessible as long as the web site is operational and can be changed at any time by the operator of the website. In the context of regulations whose purpose is to put consumers in possession of a durable copy of the required information which is not at risk of being made inaccessible or being altered in favour of the supplier at a later date (whether fraudulently or otherwise), it seems to me that material referred to via a hyperlink cannot be regarded as having been provided to the consumer on a 'durable medium'.

18. The requirement of Article 5 of the E-Commerce Directive is of course somewhat differently worded, in that it refers to "permanently" rather than to a "durable medium". However from a purposive point of view the analysis is similar. In my view the likelihood is that this requirement would be interpreted in a similar way to the OFT's interpretation of the Distance Selling Regulations for similar reasons, and accordingly provision of the required information via a hyperlink to a website would not satisfy the requirements of the Directive.

19. Whilst the Distance Selling Regulations themselves are likely to have limited application to law firms, the E-Commerce Regulations (which apply to "information society services") may arguably apply to at least some activities of some firms.

Companies Act requirements

20. The Companies (Registrar, Languages and Trading Disclosures) Regulations 2006 (SI 2006 No. 3429) amended sections 349 and 351 of the Companies Act 1985 to extend the obligation to disclose company names and certain other information to documents in electronic form in the same

as paper documents. Section 351 as amended stated:-

> "Every company shall have the following particulars mentioned in legible characters in all business letters and order forms of the company, and on all the company's websites, that is to say -
>
> (a) the company's place of registration and the number with which it is registered,
>
> (b) the address of its registered office,
>
> (c) in the case of an investment company [i.e. a species of public company defined in section 266 of the Act] the fact that it is such a company, and
>
> (d) in the case of a limited company exempt from the obligation to use the word 'limited' as part of its name, the fact that it is a limited company."

21. When read literally, the wording of this provision appeared to require that the particulars must be included *in* the document concerned, whether it be a paper document or an email.

22. The above section of the 1985 Act has been superseded with effect from 1 Oct 2008 by the Companies (Trading Disclosures) Regulations 2008. These Regulations are made under section 82 of the Companies Act 2006. They replace the provisions of the Companies Act 1985 and Business Names Act 1985 relating to trading disclosures, whilst implementing Article 4 of EC Directive 2003/58/EC and introducing new provisions in their own right.

23. Under reg 1(2)(d):-

> "(d) a reference to any type of document is a reference to a document of that type in hard copy, electronic or any other form;"

24. Reg 6(1) provides that the company must disclose its registered name on (inter alia) its "business letters" and "all other forms of its business

correspondence and documentation." Reg 7 additionally requires disclousure "on" its business letters, order forms and websites of:-

> "(2) The particulars are—
>
> (a) the part of the United Kingdom in which the company is registered;
>
> (b) the company's registered number;
>
> (c) the address of the company's registered office;
>
> (d) in the case of a limited company exempt from the obligation to use the word "limited" as part of its registered name under section 30 of the Companies Act 1985(a) or article 40 of the Companies (Northern) Ireland Order 1986(b), the fact that it is a limited company;
>
> (e) in the case of a community interest company which is not a public company, the fact that it is a limited company; and
>
> (f) in the case of an investment company within the meaning of section 833 of the Act, the fact that it is such a company."

25. The literal wording of this provision, like that of its predecessor in the amended 1985 Act, requires that the particulars be provided "in" or "on" the document itself, not merely that the document refers to another document or website where they may readily be found.

26. If a website hyperlink were for all practical purposes the same as including the information within an actual email, then there would be a purposive argument that the requirements of this section would be satisfied by this method. However, for the reasons I have already explained, I do not believe that a hyperlink to a website is purposively equivalent to the inclusion of the information in an email itself. For this reason I conclude that it is very unlikely that the the requirements of these regulations will be satisfied by the use of a hyperlink.

Regulatory requirements

27. Rule 7.0.7 of the SRA's Code of Conduct requires that:-

> "(1) The letterhead, website and e-mails of a recognised body or recognised sole practitioner must show the words "regulated by the Solicitors Regulation Authority", and either
>
> (a) the firm's registered name and number if it is an LLP or company, or
>
> (b) if the firm is a partnership or sole practitioner, the name under which it is recognised by the Solicitors Regulation Authority, and the number allocated to it by the Authority."

28. More onerous requirements apply to "letterheads" as distinct from "e-mails". Read literally, this rule suggests that the email itself must "show the words" and "show" the other required information. For similar reasons to those given above in relation to the company name requirements, I do not think that a "purposive" argument to the effect that this requirement is satisfied by a hyperlink to a website is likely to be successful.

Confidentiality notices and disclaimers

29. Confidentiality notices and disclaimers are generally inserted into emails not because of a legal or regulatory requirement to do so, but in order to protect the interests of a law firm and/or of its clients. Confidentiality notices apply if an email falls into the wrong hands in some way, possibly by being sent to the wrong email address.

30. In my view the effectiveness of the notice may be diminished or even negated if accessing the text of the notice is either impossible for the reader or imposes an undue or unreasonable burden. There are at least

some realistic circumstances outlined in the opening section of this opinion where this may be the case.

Evidential difficulties

31. It is obvious that to some extent it will be more difficult to prove the content of notices contained on website than the contents of notices included within an email. The text of an outgoing email will normally be stored, making it straightforward to prove what notices were in it. However, I do not regard evidential difficulties as insuperable, if changes to a website are properly logged and version-controlled. The substantive issues pose far greater difficulties.

Conclusions

32. For the reasons I have set out above, I consider that there are very serious and in some cases probably insuperable difficulties in using hyperlinks to websites in emails to replace the actual content of legal notices. The main problem is that this practice does not put the recipient in possession of a permanent record of the information contained in the legal notices, and access to this information at a later date when the email may need to be consulted is dependent on the continued operation of the website in its unamended form. This subjects the recipient of the email to the danger of either unintentional and innocent, or possibly intentional and fraudulent, alteration of the content of the notices.

33. For these reasons I consider that the provision of information via a hyperlink to a website is unlikely to satisfy the requirements of the E-

commerce regulations, the company name disclosure requirements, or the SRA requirements.

34. I also consider that there are a variety of realistic scenarios, where browser access is either impossible or difficult or expensive or discouraged by fear of linking to malicious websites, in which the effectiveness of a confidentiality notice or disclaimer may be diminished or negated by this practice.

35. Despite the obvious practical attractions of LITIG's proposal, for the above reasons I cannot recommend that its general adoption would be legally safe.

36. I have tried to think of constructive alternatives. Most of the objections might be overcome if legal notices were included in an attachment to an email even if not in the body of the email. Because attachments are sent with the email, that would satisfy the requirements of giving the recipient a permanent record of the required information which is not alterable by the sender. If the notices were included in a type of attachment which is not capable of contaning malicious code such as a simple 'txt' file, it would minimise (although perhaps not totally exclude) the possibility of security software or policies preventing the attachment from being opened.

37. Another alternative might be to delimit legal notices in the body of an email with standard markers. If such standard markers were widely used, it would then be possible to programme email clients to render such text in a less obtrusive type. This can be done in html format emails

to make type smaller.[2] Further, it might be possible to adapt email client software to omit standard legal text when constructing a reply to an email, to avoid multiplication of the text in the chain.

38. I am sorry that I have not been able to be more positive in my advice with regard to LITIG's proposal despite its obvious attractiveness and merits. I have tried to think of ways round the legal problems but, I am afraid only with limited success. I would be very happy to try to answer any further questions which arise.

Martin Howe

8 New Square
Lincoln's Inn
London WC2A 3QP

14 July 2009

This opinion is being given by Counsel to Litig Limited and its directors and officers. Counsel is happy to allow this opinion to be distributed to and within member firms, to be used in press articles, for lobbying for change and other related uses. If however any firm, company or individual wishes to rely upon it they need to make their own individual arrangements with Counsel. In the absence of any such arrangement Counsel shall not be liable in any way.

2. Although the company disclosure requirements explicitly state that the type must be visible to the naked eye.

LITIG Limited
Re: Disclaimers and Legal Notices in Emails

OPINION
of
Martin Howe QC

Hill Dickinson
Ref: PDW/SHT/CJ/1078580.1