

Courtroom Alert

WAIT A MOMENT!

Are you sure that you want to delete permanently the selected item?

However long it takes to type an email (whether a moment, an hour or even a day) it can only take seconds to delete. Even though safeguards exist to prevent accidental deletion of emails, inevitably important emails can and do get accidentally deleted. The same is true with other types of electronic files, be they Word documents or spreadsheets, for example. Ordinarily this may pose no problem at all, but sometimes the permanent loss of an email or other electronic file might represent the difference between winning or losing a piece of litigation.

In this article we examine:

- the obligation upon parties to litigation to preserve and disclose electronic material; and
- the steps which should be taken to reduce the risk of permanent loss of electronic material.

The obligation to preserve and "disclose" documents in litigation

All parties to civil litigation will ordinarily find themselves obliged to give "disclosure" of documents as a natural part of the litigation process. This process is

encapsulated in the physical exchange of documents between litigants and is designed to enable each side to see at a relatively early stage in the litigation process the quality of the other side's documentary evidence.

Although the duty of disclosure is couched in terms of the production of "documents", the rules which regulate civil litigation define this term very broadly. It encompasses not just paper documents, audio recordings or photographs, but also electronic documents, whether held on a database, computer hard drive or any other electronic device or media. The definition also includes backup systems and, very importantly, deleted material. As a result, litigants have a duty to disclose not just paper items but electronic items too.

In view of the ever growing importance of electronic documents in the commercial world, disclosure is fast becoming centred around electronic disclosure. Therefore any litigant, or potential litigant must give proper consideration to the steps it proposes to take to preserve electronic data from permanent loss so it can be searched for relevant disclosable items. Preservation of documentary evidence is of such crucial importance to the litigation process that penalties apply to reinforce the rule. For example, once Court proceedings have

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started, a litigant who destroys documents which might have to be disclosed, risks an adverse inference being drawn from this conduct by the trial judge. If the destruction is found to have been carried out to conceal evidence deliberately then criminal sanctions might apply.

The duty to preserve disclosure material can cause very practical problems in respect of the preservation of electronic documents. For example, even if a computer has had relevant electronic material deleted from its hard drive, the data can sometimes be retrieved by a forensic expert. However, the continued use of the computer before examination by an expert can increase the chance of the deleted data being "overwritten" which in turn may result in a greater risk that the deleted data cannot be recovered. Even if the original deletion was carried out innocently, it is quite possible that the (innocent) continued use of a computer could put a litigant in breach of its duty to preserve documents.

Reducing the risk of permanent loss of electronic material

No systems for the preservation of electronic data are fail safe, but there are various steps which might be taken to help reduce the risk of losing important electronic documents as follows:

1. Awareness and office protocols

By necessity, most organisations have to adopt sensible deletion/retention policies to save themselves from being swamped by the vast and multiplying quantities of electronic material which can be generated daily. Anyone operating without such a policy ought to consider implementing one and keep it under periodic review. A balance has to be struck but a good first step is making staff aware of the need to retain copy documents and the options available which allow them to do this without clogging computer systems. Consideration also needs to be given to:

- whether a paper file of important 'core' material is kept and for how long;
- what material can easily be stored on disc rather

than servers and for how long it will be kept;

- the extent to which one person in a group becomes responsible for maintaining a copy of the material so other recipients do not have to; and
- the application of appropriate "stop" procedures suspending normal deletion protocols once relevant notification has been given to staff following the commencement of litigation or once litigation is being contemplated.

2. Backing up

Regular back-ups are now very much routine practice. It is difficult to gauge how long such items should be stored but the longer the period the lower the risk of lost data. Solicitors usually keep their paper files for a minimum period of 7 years from the closing of the file and this is ordinarily a sensible storage period.

3. Data migration

When redundant computers are replaced, consider whether any data upon the hard drive ought to be migrated across to the new computer. Should any information which is not migrated be stored elsewhere (for example on disc)?

4. Use of forensic experts

Use of a forensic computer expert to recover lost data is usually a last resort and in view of the costs which may be involved, lost data must be worth the search before a forensic expert is employed. In the litigation process, forensic experts are often used to help conduct "key word" searches for relevant data (as otherwise the mass of electronic data through which a search must be made becomes unmanageable). Forensic experts can also take an "image" of a hard drive to prevent the risk of loss of data for continued use of the computer concerned.

Commonly the importance of a document will not be apparent at the time when consideration is given to whether it should be kept, especially if there is no hint of any relevant litigation. In view of this it is far better to have systems in place to store electronic data on a daily basis rather than to try to recover the data possibly years after it was first deleted.



Contract: rights of third parties

One of the traditional pillars of contract law is the doctrine of “privity of contract”. This establishes that, as a general rule, a contract cannot confer rights or impose obligations on any person who is not a party to it. Therefore, third parties cannot ordinarily sue under the terms of a contract to which they themselves are not a party.

However, the rules of privity of contract were reformed by introduction of the Contracts (Rights of Third Parties) Act 1999 (the “Act”). The Act sets out the circumstances in which a third party can have rights to enforce a term of the contract even though it is not a party. Under the terms of the Act, a person who is not a party to a contract may enforce a term of the contract in his own name if the term in question purports to confer a benefit on him unless, on a proper construction of the contract, it appears that the contracting parties did not intend the term to be enforceable by a third party.

There are specific criteria which must be fulfilled before the rights granted in the Act apply. The third party must be “expressly identified in the contract by name, as a member of a class or as answering a particular description” (section 1(3) of the Act). Therefore, a person who is not a party to a contract may enforce a term of the contract only if the contract expressly provides that he may.

When the Act first received Royal Assent, many commentators feared that it would have far reaching consequences. However, those fears have not been substantiated. On the contrary, a recent case in which Goodman Derrick LLP was involved demonstrates the very limited circumstances in which the Act will apply.

The Court of Appeal has ruled that the Act does not allow a third party to enforce the terms of a business transfer agreement in circumstances where that third party is not sufficiently identified to satisfy the requirement for “express” identification. Specifically, it was held that the word “express” is an essential requirement and does not allow for a process of construction or implication.

The facts of the case were:

The Claimants brought an action against two individuals, (C and M), seeking to hold them personally liable for failures in the refurbishment of two bathrooms. The court found that the Claimants had contracted with a limited company (BTC) and that all the refurbishment work had been BTC’s responsibility. However, during the course of the proceedings C and M disclosed the existence of a transfer agreement under which all the assets of BTC had been purchased by C and M as partners who had also assumed BTC’s liabilities.

The agreement was between the shareholders of BTC and the partnership. It contained an obligation that the partnership would “complete outstanding customer orders...”, and to pay in the normal course of time any liabilities properly incurred by the company”.

The trial judge found that the Claimants were third parties on whom the agreement had purported to confer a benefit and so they were entitled to enforce the agreement under the Act. The effect of this decision was that C and M were held personally liable for the damages suffered by the Claimants as a result of the installation and supply of defective bathrooms. C and M appealed.

Decision

The Court of Appeal, rather reluctantly, held that the Claimants were not entitled to sue C and M personally under the Act because:

- nothing in the relevant clause of the Agreement limited “liabilities properly incurred” to liabilities to customers; the phrase encompassed all normal business liabilities. Therefore the second part of the clause, which the Claimants were seeking to rely upon, did not identify any third party or class of third parties;

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- despite the fact that “customers” were expressly identified, the Claimants could not imply that they were identified beneficiaries. This is because section 1(3) of the Act uses the word “express”. This precludes the court from attempting to identify beneficiaries by a process of contractual construction or implication; and
- the fact that the Agreement was made not by BTC but by its shareholders, plus the failure to identify beneficiaries, meant that it was doubtful whether the agreement had intended that people with rights against BTC would be able to enforce them against C and M directly.

Consequences

As a result, the Claimants were not entitled to pursue C and M personally for losses incurred. Instead, their effective remedy was against BTC, the limited liability company, albeit that the company’s assets had been transferred to the partnership as a result of the business transfer agreement. The Court acknowledged that it was tempted to try and find a route which would render C and M personally liable in order to find a means of redress for the Claimants. This was particularly

so given C and M’s acknowledgement that the works were of a poor standard and the Court’s recognition that BTC had no assets. However, the Court was unable to interpret the wording of the business transfer agreement to satisfy the strict and limited wording of the Act.

It is perhaps unsurprising that the Act is a rarely used piece of legislation in the commercial arena. Most commercial contracts now contain a boilerplate clause deliberately contracting out of the provisions of the Act. This case serves to highlight the Act’s limited application. Even where it is found to apply, a third party will only benefit from it provided that he/she is expressly identified as an intended beneficiary. This affords the Act a very narrow construction.

It is worth noting that this is the first case which has turned upon the requirements of section 1(3) of the Act. This case also highlights the importance when drafting commercial contracts of ensuring any third party to whom it is intended to afford the right to enforce its terms is expressly satisfied.

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