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Practice and Precedents Editor's Notes

Electronic signatures and contracts for the sale of land

One of the side effects of the coronavirus pandemic has been an increase in the use of electronic signatures in legal documents. Whilst many conveyancers remain wary of the legal and practical issues involved in executing documents electronically, it has become apparent that the demand for the use of electronic signatures is increasing. Research in 2018 revealed that more than half of adults in the UK rarely sign their name, one in five admit they do not have a proper signature, instead just writing out their name when required to give a signature, and 15% of under-24s cannot remember the last time they signed their name.¹

In July 2020 HM Land Registry began to start accepting dispositive deeds, for example transfers, leases and mortgages, that have been signed with a witnessed electronic signature. Guidance on how to use witnessed electronic signatures and HM Land Registry's requirements was published at the same time.² This move came shortly after HM Land Registry began accepting deeds that have been signed using the 'Mercury signing approach', which will remain as another way of completing a deed. This approach was put forward by the Law Society in 2009³ and was subsequently endorsed by the Law Commission in 2019.⁴ The Law Society advocated this approach as a "prudent" one to be taken in the execution of deeds (whether by an individual or on behalf of a company) where the parties were not all present on completion of a transaction. The form of signature involved was a scanned manuscript signature being added to the final version of the deed. In *R (Mercury Tax Group Ltd) v Her Majesty's Commissioners of Revenue and Customs*⁵ Underhill J (as he then was) set out Law of Property (Miscellaneous Provisions) Act 1989 s.1(3) and expressed his agreement with Counsel "that that language necessarily involves that the signature and attestation must form part of the same physical document" being signed.⁶

So, what is an electronic signature and can a contract for the sale of land be signed electronically?

What is an electronic signature?

An electronic signature is defined as "any data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign".⁷ In other words, an electronic signature involves a person using electronic data to sign

¹ Sign of the Times - one in five adults don't have their own signature, <https://www.onlinespyshop.co.uk/blog/sign-of-the-times-one-in-five-adults-dont-have-their-own-signature> [Accessed 30 March 2021].

² See <https://www.gov.uk/government/publications/execution-of-deeds> [Accessed 30 March 2021].

³ *Execution of documents by virtual means*, <https://www.lawsociety.org.uk/topics/business-management/execution-of-documents-by-virtual-means> [Accessed 30 March 2021].

⁴ Law Commission, *Electronic execution of documents* (Law Com No 386, 2019) para 5.49.

⁵ *R (Mercury Tax Group Ltd) v Her Majesty's Commissioners of Revenue and Customs* [2008] EWHC 2721 (Admin).

⁶ *R (Mercury Tax Group Ltd) v Her Majesty's Commissioners of Revenue and Customs* [2008] EWHC 2721 (Admin) at [39] to [40].

⁷ Art 3(10) of Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing

or otherwise signify their agreement or consent to a document. Article 3(9) of eIDAS defines ‘signatory’ as a natural person who creates an electronic signature. A company cannot therefore use an electronic signature and so execution by a company of a document or deed must be carried out in accordance with either Companies Act 2006 ss43 or 44, as appropriate, by one or more signatories, each of whom signs with their own electronic signature.

There are three main types of electronic signatures:

- Simple electronic signatures;
- Advanced electronic signatures; and
- Qualified electronic signatures.

The most basic form is the simple electronic signature which is in effect just a replacement for a wet ink signature. Examples include:

- using a finger or stylus to sign on a pad when a parcel is delivered;
- clicking an onscreen button such as “I agree”, “Submit” or ticking a box saying “I accept the terms and conditions”;
- typing a name into an email;
- electronically pasting a signature (e.g. in the form of an image) into an electronic version of a contract; and
- an electronic signature on an e-signing platform with audit trail capability.

There are a number of commercially available e-signing platforms which give users the ability to share documents electronically for them to be signed and thus eliminating the need for physical documents.⁸ The standard functionality provided by most e-signing platforms is a simple electronic signature.

Advanced and qualified electronic signatures have their own requirements and are more secure than a simple electronic signature as they each have a process which identifies the signatory and the document is encrypted so it cannot be subsequently altered once it has been signed.

An advanced electronic signature is more secure than a simple electronic signature as the signatory has a greater level of control over its use and any change to the signature is detectable. An advanced electronic signature is defined by Article 26 of eIDAS as an electronic signature that is:

- uniquely linked to the signatory;
- capable of identifying the signatory;
- created using means that the signatory can maintain under their sole control; and
- linked to the data to which it relates in such a manner that any subsequent change in the data is detectable.

Directive 1999/93/EC (“eIDAS”). Following the UK’s withdrawal from the EU, eIDAS remains part of UK law as a result of European Union (Withdrawal) Act 2018 s.3(1) and the Electronic Identification and Trust Services for Electronic Transactions (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/89).

⁸ Examples of e-signing platforms include DocuSign, Adobe Sign and Yoti Sign.

A qualified electronic signature is the highest standard of electronic signature. It is an electronic signature which meets all the requirements of an advanced electronic signature together with two additional requirements.⁹ These are that it:

- is created by a qualified electronic signature creation device; and
- is based on a qualified certificate for electronic signatures issued by a qualified trust service provider.

As it involves the signatory's identity being verified by a qualified trust service provider before the qualified electronic signature is issued, it is the most secure type of electronic signature. A qualified electronic signature has the same legal effect as a handwritten signature.¹⁰

An often-asked question is whether there is difference between an electronic signature and a digital signature as the two terms are often used interchangeably. The term “digital signature” is usually used to refer to an electronic signature where advanced cryptography¹¹ is used and so a simple electronic signature cannot be a digital signature. A good example of the everyday use of digital signatures is the use of chip and pin bank cards. Whenever they are used to withdraw money from an ATM or pay for goods, a digital signature is used.

Both advanced and qualified electronic signatures are available though some e-signing platforms. The qualified electronic signature device has usually been a physical smartcard or USB token though emerging technology is now enabling signatories to create and validate digital signatures in the cloud with a mobile device such as a tablet or smartphone.

In 2014 the Law Society of Scotland introduced a smartcard for its members which provided them with a secure digital signature and acted as a professional identity card.¹² The intention was that this would allow solicitors to sign documents electronically on behalf of a client. The smartcard is used with a card reader and is protected by a PIN code to ensure that only the named solicitor, whose identity has been verified by the Law Society of Scotland, may use it. Alongside this innovation, legislation was amended to allow electronic signatures for all purposes except the signature of a will.¹³ Anecdotally though it appears that the use of these smartcards is low as smartcards lack flexibility and there are also concerns over a solicitor's liability, the need to obtain authority from clients to sign documents on their behalf and the integration of the smartcard into a solicitor's case management software. Cloud based qualified electronic signatures may overcome the lack of flexibility of the smartcards.

Contracts for the sale of land

Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 provides that a contract for the sale or other disposition of an interest in land must be in writing and signed by or on behalf of each party.¹⁴ Will a contract executed using an electronic signature satisfy these

⁹ eIDAS art 3(12).

¹⁰ eIDAS art 25(2).

¹¹ This involves the use of a private/public key pair to create and verify a digital signature.

¹² See <https://www.lawscot.org.uk/members/professional-support/smartcard/about-the-smartcard> [Accessed 30 March 2021].

¹³ See for example, Electronic Documents (Scotland) Regulations 2014 (SSI 2014/83); Land Register of Scotland (Automated Registration etc. Regulations 2014 (SSI 2014/347).

¹⁴ Similar requirements also apply to dispositions of an equitable interest under Law of Property Act 1925 s.53(1) and statutory assignments under Law of Property Act 1925 s.136.

statutory requirements? Whilst it appears that in 2017¹⁵ e-signatures were used for an exchange of contracts for the first time, the practice does not appear since then to have been universally adopted.

The first requirement to be satisfied is that the contract must be in writing. The Interpretation Act 1978 defines ‘writing’ to include ‘typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form’.¹⁶ Technology has moved on rapidly since the Act came into force on 1 January 1979 and in its 2001 advice to Government, the Law Commission concluded that the requirement for ‘writing’ could now be satisfied electronically.¹⁷ This was on the basis that the definition included both its natural meaning as well as the specific forms referred to.¹⁸ The natural meaning will include technological developments.¹⁹ Whilst the phrase ‘words in a visible form’ might limit the definition, the Law Commission took the view that emails and websites would satisfy the definition as they can be viewed on screen.²⁰

The Law Commission’s conclusions are further supported by the 2016 practice note on the execution of a document using an electronic signature which was issued by a joint working party of the Law Society Company Law Committee and the City of London Law Society Company Law and Financial Law Committees.²¹ This note put forward that an electronic document would be sufficient to satisfy a statutory requirement for a contract to be in writing. The joint working party said that:

“Where the contract is represented on a screen (including a desktop, laptop, tablet or smartphone) in a manner which enables a person to read its terms properly, it will be “in writing” at that point.”²²

The Law Commission’s 2019 Report echoes the Law Society’s conclusion. It states that an electronic signature is capable in law of being used to validly execute a document (including a deed) subject to two important caveats:

“The person signing the document must have intended to authenticate the document. Any formalities relating to execution of that document must be satisfied.”²³

¹⁵ <https://www.lawgazette.co.uk/practice/e-conveyancing-first-as-digital-signature-used-to-exchange-contracts/5060677.article> [Accessed 30 March 2021].

¹⁶ Interpretation Act 1978 Schedule 1.

¹⁷ Electronic commerce: formal requirements in commercial transactions advice from the Law Commission (2001), <https://www.lawcom.gov.uk/project/electronic-commerce-formal-requirements-in-commercial-transactions> [Accessed 30 March 2021].

¹⁸ Electronic commerce: formal requirements in commercial transactions advice from the Law Commission (2001), para 3.7 <https://www.lawcom.gov.uk/project/electronic-commerce-formal-requirements-in-commercial-transactions> [Accessed 30 March 2021].

¹⁹ Bennion, Bailey and Norbury on Statutory Interpretation (8th ed 2020) paras 14.1 and 14.2.

²⁰ Electronic commerce: formal requirements in commercial transactions advice from the Law Commission (2001), para 3.23 <https://www.lawcom.gov.uk/project/electronic-commerce-formal-requirements-in-commercial-transactions> [Accessed 30 March 2021].

²¹ *Execution of a document using an electronic signature*, <https://www.lawsociety.org.uk/en/topics/business-management/execution-of-a-document-using-and-electronic-signature> [Accessed 30 March 2021].

²² Para 4.2.

²³ Law Commission, *Electronic execution of documents* (Law Com No 386, 2019) para 3.6 and Paragraph 1, Statement of Law.

The Law Commission based its conclusion on the provisions of eIDAS, the Electronic Communications Act 2000 and on case law. For example in *Golden Ocean Group Limited v Salgaocar Mining Industries PVT Ltd*²⁴, the Court of Appeal found that the exchange of emails could satisfy the requirement for an agreement in writing for the purposes of the Statute of Frauds 1677.

The other requirement which must be satisfied is that the contract must be signed. Unlike 'writing' there is no statutory definition of 'signature'.²⁵ The common law takes a pragmatic approach as to what will satisfy the requirement for a signature.²⁶ The test to be applied is whether the signature which appears in the contract was inserted in order to give, and with the intention of giving, authenticity to it. Thus an electronic signature in the signature block of a document with the intention of authenticating the document will satisfy the requirement. It will not matter how the signatory inserted the electronic signature into the document, nor what form the signature took. So, a name typed at the bottom of an email will be acceptable.²⁷ The courts have also said that, in principle, an electronic signature in an email chain would satisfy the requirement.²⁸ The emails in the chain must suggest binding obligations on the parties and include the relevant contractual terms.²⁹

The case-law

Whilst, there is no judicial authority specifically confirming that an electronic signature will satisfy Law of Property (Miscellaneous Provisions) Act 1989 s.2, the courts have considered the point indirectly.

One of the difficulties with adopting the use of electronic signatures for contracts for the sale of land has been the decision in *FirstPost Homes Ltd v Johnson*³⁰ where the Court of Appeal considered whether a typed signature would satisfy Law of Property (Miscellaneous Provisions) Act 1989 s.2. The parties had orally agreed the sale and purchase of a piece of land. The buyer prepared a typed letter, which was addressed to the buyer, setting out the agreement to purchase the land which was shown on an attached plan. The seller signed the letter but the buyer only signed the attached plan. Following the seller's death, the buyer brought an action for specific performance of the contract. The Court of Appeal held that there was valid contract. It was the letter which had to be signed, and the typed buyer's name as addressee of the letter did not constitute a signature for the purposes of section 2. For support Lord Justice Peter Gibson referred to Lord Denning's dissenting judgment in *Goodman v J Eban Ltd*³¹ where he said:

²⁴ *Golden Ocean Group Limited v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265. See also *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch).

²⁵ Though Law of Property (Miscellaneous Provisions) Act 1989 s.1(4) provides that 'sign' in the context of a deed includes 'making one's mark on the instrument'.

²⁶ Electronic commerce: formal requirements in commercial transactions advice from the Law Commission (2001), para 3.25 <https://www.lawcom.gov.uk/project/electronic-commerce-formal-requirements-in-commercial-transactions> [Accessed 30 March 2021].

²⁷ *Golden Ocean Group Limited v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265.

²⁸ *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch) at [30]; *Orton v Collins* [2007] EWHC 803 (Ch) at [21]; *Lindsay v O'Loughnane* [2010] EWHC 529 (QB) at [95].

²⁹ *Re Stealth Construction Ltd* [2011] EWHC 1305 (Ch) at [44].

³⁰ *FirstPost Homes Ltd v Johnson* [1995] 1 W.L.R 1567.

³¹ *Goodman v J Eban Ltd* [1954] 1 Q.B. 550.

“In modern English usage, when a document is required to be ‘signed by’ someone, that means that he must write his name with his own hand upon it.”

The decision in *FirstPost Homes Ltd v Johnson* is now regarded as being confined to its facts. Support for this comes from *Emmet & Farrand on Title*³² which was noted by the Law Commission in their 2019 Report ‘Electronic execution of documents’.³³ In addition, the Court of Appeal said its decision was:

“... of course limited to a case where the party whose signature is said to appear on a contract is only named as the addressee of a letter prepared by him. No doubt other considerations will apply in other circumstances.”³⁴

In *J Pereira Fernandes SA v Mehta*³⁵ a party’s name in an email address automatically included in the email header did not amount to a signature as there was no evidence that the party intended to authenticate the document. The court did, however, accept that in principle an electronic signature can satisfy a statutory requirement for a signature and it also reiterated the principle that a signature must demonstrate an intention of the party to authenticate the document. According to the Law Commission:

“It is therefore reasonable to infer that this case is about a lack of evidence of an intention to authenticate rather than questioning the principle of the legal validity of electronic signatures.”³⁶

Another case involving such a lack of evidence is *Lindsay v O’Loughnane*³⁷ where the High Court considered whether an email containing a typed signature of the party was sufficient for the purpose of Statute of Frauds (Amendment) Act 1828 s.6. This requires a representation or assurance to be made in writing and signed by the person to be charged with it. The court took the view that:

In a modern context, the section will clearly be satisfied if the representation is contained in an email, provided that the email includes a written indication of who is sending the email. It seems that it is not enough that the email comes from a person’s email address without his having “signed” it in the sense of either including an electronic signature or concluding words such as “regards” accompanied by the typed name of the sender of the email: see the decision of HHJ Pelling QC (sitting as a High Court Judge) in *Pereira Fernandes v Mehta* [2006] 1 WLR 1543.³⁸

On the facts in *Re Stealth Construction Ltd*³⁹ the High Court held that a chain of emails did not satisfy the requirements of Law of Property (Miscellaneous Provisions) Act 1989 s.2 as they did not evidence binding obligations on the parties nor did they state any contractual terms. Instead, the emails suggested that a further contractual document would be prepared. However, the court did accept the principle that a string of emails containing the typed signatures of the

³² *Emmet & Farrand on Title* vol 1 para 2.041.01.

³³ Law Commission, *Electronic execution of documents* (Law Com No 386, 2019) para 3.51.

³⁴ *FirstPost Homes Ltd v Johnson* [1995] 1 W.L.R 1567 at p.1576E.

³⁵ *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch).

³⁶ Law Commission, *Electronic execution of documents* (Law Com No 386, 2019) para 3.54.

³⁷ *Lindsay v O’Loughnane* [2010] EWHC 529 (QB).

³⁸ *Lindsay v O’Loughnane* [2010] EWHC 529 (QB) at [95].

³⁹ *Re Stealth Construction Ltd* [2011] EWHC 1305 (Ch).

parties could create a contract satisfying Law of Property (Miscellaneous Provisions) Act 1989 s.2.

The most recent case is *Neocleous v Rees*⁴⁰ where it was decided that an automatically generated email footer containing the name, role, and contact details of the sender satisfied the requirement provided the inclusion of the name was to give authenticity to the document. The defendant had relied on *Firstpost Homes Ltd v Johnson*⁴¹ for the proposition that a signature for the purpose of Law of Property (Miscellaneous Provisions) Act 1989 s.2 must be in the hand of the author and deliberately applied to the specific document rather than automatically generated. However, the ordinary usage of words had a tendency to develop and the court said:

“Many an “ordinary person” would consider that what is produced when one stores a name in the Microsoft Outlook “Signature” function with the intent that it is automatically posted on the bottom of every email is indeed a “signature.””⁴²

The court went on to say:

“Unless one treats *Firstpost* as authority for the proposition that “signature” means what an ordinary person would have believed the word to mean at some point in the past, it is not authority for the proposition that the word has any particular meaning beyond that which an ordinary person would understand it to bear.”⁴³

In the current age, that would be capable of encompassing the wording in the footer of an email.

So, the automatically generated email footer was a sufficient act of signing as:

- Such a footer could only be present because of a conscious decision to insert the contents, albeit that that decision might have been made the subject of a general rule that automatically applied the contents in all cases. The recipient of such an email would therefore naturally conclude that the sender's details had been included as a means of identifying the sender with the contents of the email, since such a footer must have been added either as a result of a conscious decision in the particular case or a more general decision to add the footer in all cases.
- The sender of the email was aware that their name was being applied as a footer. The recipient had no reason to think that the presence of the name as a signature was unknown to the sender.
- The fact that the words “Many Thanks” had been used before the footer showed an intention to connect the name with the contents of the email.
- The presence of the name and contact details was in the conventional style of a signature, at the end of the document. That contrasted with the name and contact address of the person alleged to have signed the letter in *Firstpost Homes Ltd v Johnson*⁴⁴, whose name and address appeared above the text of the letter, in the conventional manner of inserting the addressee's details.⁴⁵

⁴⁰ *Neocleous v Rees* [2020] EWHC 2462 (Ch).

⁴¹ *FirstPost Homes Ltd v Johnson* [1995] 1 W.L.R 1567.

⁴² *Neocleous v Rees* [2020] EWHC 2462 (Ch) at [51].

⁴³ *Neocleous v Rees* [2020] EWHC 2462 (Ch) at [52].

⁴⁴ *FirstPost Homes Ltd v Johnson* [1995] 1 W.L.R 1567.

⁴⁵ *Neocleous v Rees* [2020] EWHC 2462 (Ch) at [57].

Conclusions

Despite a seeming reluctance amongst conveyancers to use electronic signatures for signing contracts for the sale of land, it is clear that there is no barrier to their use nor will an electronic signature invalidate a contract. The Law Commission has concluded that:

“The review of the case law demonstrates that electronic signatures have been found to satisfy a statutory requirement for a signature where there has been evidence of an intention to authenticate the document. Such findings have been made under the Law of Property Miscellaneous Provisions Act 1989, the Consumer Credit Act 1974 and the Statute of Frauds 1677. A finding of validity of an electronic signature does not appear to be limited to a particular type of signature – a typed name at the end of an email is sufficient, as is clicking an "I accept" button on a website. It has been suggested that an email header may not be sufficient. However, it is arguable that even this may function as a signature if there was sufficient evidence to demonstrate an intention to authenticate the document.”⁴⁶

Whilst it is clear that it is also not necessary to amend Law of Property Miscellaneous Provisions Act 1989 s.2 to allow for electronic signatures, the Law Commission has put forward a possible formulation of words which could be incorporated into the Electronic Communications Act 2000 in order to provide a statement of validity for an electronic signature where a signature is required by statute which would include Law of Property Miscellaneous Provisions Act 1989 s.2.⁴⁷

Whilst the coronavirus pandemic may have accelerated the development and use of electronic signatures, they are clearly here to stay and conveyancers need to start to utilise them where appropriate.

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⁴⁶ Law Commission, *Electronic Execution of Documents* (Law Com CP No 237, 2018) para 3.80.

⁴⁷ Law Commission, *Electronic execution of documents* (Law Com No 386, 2019) para 4.48.