

Coronavirus and executing documents remotely

1. We have received a number of queries concerning the sealing and signing of formal document in the current remote working period, including:
 - the kinds of documents that have to be legally sealed;
 - whether the law allows local authorities to electronically seal legal agreements;
 - whether there are any protocols/procedures in place for electronic sealing and signing of documents which need to be observed.
2. This note considers the legal position generally as to the electronic execution of formal documents, and also specifically addresses some of the particular challenges in the real property context and land registration.

A. THE GENERAL RULES ON THE ELECTRONIC EXECUTION OF DOCUMENTS

Overview

3. The common law has been flexible as to what constitutes a 'signature'. Section 4 of the Statute of Frauds 1677 requires a memorandum or note of a guarantee to be 'signed', while section 30(1) of the Limitation Act 1980 required an acknowledgement to be 'signed'. There are numerous cases dealing with what constitutes a 'signature'. The test is whether the name of a party has been applied with the intent of authenticating the instrument.¹ A name applied to a telex² or an email³ has been held, on the facts of each case, to constitute a signature. In the *Good Challenger*, the Court of Appeal endorsed the following statement made by the judge at first instance:

As a matter of general principle, in my view a document is signed by the maker of it when his name or mark is attached to it in a manner which indicates, objectively, his approval of the contents. How this is done will depend upon the nature and format of

¹ *Caton v Caton* (v 1867) LR 2 HL 127; *Mehta v J Pereira Fernandes SA* [2006] 1 WLR 1543.

² *Good Challenger Navagante SA v Metaleexportimport SA* ('*The Good Challenger*') [2003] EWCA Civ 1668, [2004] 1 Lloyd's Rep 67,

³ *Golden Ocean v Salgoacar* [2012] EWCA Civ 265, [2012] 1 WLR 3674.

the document. Thus in the case of a formal contract which prints the names of the parties and leaves a space under each name for the parties to write their names, the document will not have been signed by a party until he writes his name in the space provided. Conversely, with a telex, where there is no such facility, the typed name of the sender at the end of the telex not only identifies the maker but leads to the inference that he has approved the contents: the typed name, therefore constitutes his signature. Thus in my judgment each of the telexes relied on by the Claimant was signed by the sender typing in its name, or his name, at the foot of the document.

4. The leap from telexes and emails to electronic signatures is a short one. An electronic signature is capable in law of being used to execute a document, including a deed, as long as: (i) the person signing the document intends to authenticate the document and (ii) any formalities relating to execution of that document are satisfied.⁴ An electronic signature is admissible in evidence in legal proceedings.⁵ The Law Commission has also recently reported on the electronic execution of documents.⁶ As they pointed out, there is a distinction between something being just sufficient to be a signature, and its potential evidential weight if there is a dispute about the identity of the party signing the document or its content.⁷ In that respect, some of the reported cases serve as much as cautionary tales as to wisdom of providing an unimpeachable signature as they do authorities for what lies on one side or the other of validity.

5. In *Bassano v Toft* [2014] EWHC 377 (QB), Popplewell J observed (at para 42) that:

*Generally speaking a signature is the writing or otherwise affixing of a person's name, or a mark to represent his name, with the intention of authenticating the document as being that of, or binding on, the person whose name is so written or affixed. The signature may be affixed by the name being typed in an electronic communication such as an email: see *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] 2 All ER (Comm) 978 at [32]. Section 7 of the Electronic Communications Act 2000 recognises the validity of such an electronic signature by providing that an electronic signature is admissible as evidence of authenticity.*

⁴ 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 Directive 1999/93/EC ("eIDAS") Article 25(1), Article 3(10) and Recital 49.

⁵ Electronic Communications Act 2000, s 7.

⁶ 'Electronic execution of documents', (2019, Law Com. No. 386). On 3 March 2020, the government welcomed the findings of their report: 'Government response to the Law Commission report Electronic Execution of Deeds: Written statement' (3 March 2020, HCWS143).

⁷ *Ibid*, para 2.28.

6. Recently, in *Neocleous v Rees* [2019] EWHC 2462 (Ch), HHJ Pearce granted an order of specific performance of an alleged contract of compromise which involved a disposition of an interest in land. The Defendant argued that the contract failed to comply with section 2 of the 1989 Act, as the putative contract was contained in a string of emails. The purported signature of the solicitor on behalf of the Defendant was by "automatic" generation of his name, occupation, role and contact details at the foot of an email. HHJ Pearce concluded as follows (at paras 55 to 57):

55. In such circumstances, it is difficult to distinguish between a name which is added pursuant to a general rule set up on an electronic device that the sender's name and other details be incorporated at the bottom from an alternative practice that each time an email is sent the sender manually adds those details. Further, the recipient of the email has no way of knowing (as far as the court is aware) whether the details at the bottom of an email are added pursuant to an automatic rule as here or by the sender manually entering them. Looked at objectively, the presence of the name indicates a clear intention to associate oneself with the email – to authenticate it or to sign it.

56. It is important to bear in mind the policy behind the 1989 Act, as set out by Peter Gibson LJ in the passage cited at paragraph 43 above. There is good reason to avoid an interpretation of what is sufficient to render a document "signed" for the purpose of Section 2 where that interpretation may have the effect of introducing uncertainty and/or the need for extrinsic evidence to prove the necessary intent.

57. In my judgment, no such difficulty arises if the email footer here is treated as being a sufficient act of signing:

i) It is common ground that such a footer can only be present because of a conscious decision to insert the contents, albeit that that decision may 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.

ii) The sender of the email is aware that their name is being applied as a footer. The recipient has no reason to think that the presence of the name as a signature is unknown to the sender.

iii) The use of the words "Many Thanks" before the footer shows an intention to connect the name with the contents of the email.

iv) The presence of the name and contact details is in the conventional style of a signature, at the end of the document. That contrasts with the name and contact address of Mr Hale, the person alleged to have signed the letter in Firstpost, whose name and address appeared above the text of the letter, in the conventional manner of inserting the addressee's details.

Electronic seals

7. A seal can also be executed electronically. Section 7A(1) of the Electronic Communications Act 2000 provides that, in any legal proceedings:⁸

(a) an electronic seal incorporated into or logically associated with a particular electronic communication or particular electronic data, and

(b) the certification by any person of such a seal,

shall each be admissible in evidence in relation to any question as to the authenticity of the communication or data, the integrity of the communication or data, or both.

8. What constitutes an ‘electronic seal’ is left broadly defined as follows:

(2) For the purposes of this section an electronic seal is so much of anything in electronic form as –

(a) is incorporated into or otherwise logically associated with electronic communication or electronic data; and

(b) purports to ensure the origin and integrity of the communication or data.

9. For example, providers of electronic signature software services, such as ‘DocuSign’ also offer electronic seal abilities. As such, electronic seals could be used relatively straightforwardly, with the right software. To ensure certainty and minimise the risk of challenge, electronic seal software is preferable, as they generally work by encoding data which itself attests to its origin and integrity.⁹

10. An electronic seal incorporated into or associated with a particular electronic email (such as an email) or particular electronic data must be certified (whether before or after the making of the communication) by a statement confirming that: (a) the seal, (b) a means of producing, communicating or verifying the seal, or (c) a procedure applied to the seal, is (either alone or in combination with other factors) a valid means

⁸ Inserted by the Electronic Identification and Trust Services for Electronic Transactions Regulations 2016 SI No 696.

⁹ European Union Agency for Network and Information Security (“ENISA”), *Security guidelines on the appropriate use of qualified electronic seals: Guidance for users* (December 2016).

of ensuring the origin of the communication or data, the integrity of the communication or data, or both.¹⁰

B. EXECUTION OF DEEDS

Overview

11. Deeds are less straightforward to execute under quarantine conditions due to the requirement of a witness. Under section 1(3)(a)(i) of the Law of Property (Miscellaneous Provisions) Act 1989, an instrument may only be validly executed as a deed if it signed by the individual *'in the presence of a witness who attests the signature'*.

12. In its recent report on the electronic execution of documents, the Law Commission has concluded that this requires a witness to be physically present at the signing of the deed.¹¹ There is *dicta* in a Court of Appeal authority which suggests otherwise. Pill LJ explained (in a case concerning the operation of an estoppel of real property (at para 30):

I can detect no social policy which requires the person attesting the signature to be present when the document is signed. The attestation is at one stage removed from the imperative out of which the need for formality arises. It is not fundamental to the public interest, which is in the requirement for a signature.

13. At best, there is some uncertainty as to whether or not a witness needs to be physically present. It may be that, in the current circumstances, some flexibility as to who witnesses are is required (permitting witnesses to be spouses or family members). Equally, it may also potentially be sufficient to witness the execution of a deed if the entire process of signing the document is witnessed via videolink. It is suggested, however, that to avoid potential future disputes that the Law Commission's more

¹⁰ Electronic Communications Act, 2000 s 7A(3).

¹¹ The report did not consider registered dispositions under the Land Registration Act 2002, which is being dealt with by HM Land Registry's project on electronic conveyancing and registration.

conservative approach of actual physical presence (at an appropriate distance and with suitable precautions) might be preferred.

Land registration

14. In any event, HM Land Registry continue require a wet ink signature, and a conservative approach to compliance with witness attestations will also be required. The Law Society have recently issued guidance to solicitors in light of the current circumstances, and have expressed the following view that electronic signatures:

- *can be used to sign contracts to sell/buy unless the contract is being executed as a deed*
- *cannot be used for deeds*
- *probably cannot be used where a signature needs to be witnessed unless the witness was present when the electronic signature was affixed – in which case a wet ink signature could have been used*
- *cannot be used where a wet ink signature is required, for example, for documents for HM Land Registry and some lenders¹²*

15. Moreover, it is unlikely that HM Land Registry will adapt that their requirements, given that their insistence that a strict approach is designed to counter fraud. If a document is to be lodged at the Land Registry, it is advised that a wet ink signature or equivalent should be adopted so as to avoid it being rejected.

C. LOCAL AUTHORITIES

16. Section 234 of the Local Government Act 1972 provides that documents may be signed on behalf of the authority by the Proper Officer.¹³ Under subsection (2), any document purporting to bear the signature of the proper officer of the authority shall be deemed, until the contrary is proved, to have been duly given, made or issued by the authority

¹² Law Society – residential conveyancing and COVID-19 - <https://www.lawsociety.org.uk/support-services/advice/articles/covid-19-and-residential-conveyancing-transactions/> (dated 25 March 2020).

¹³ Usually under Delegated Powers this is the Head of Legal Services or the Director of Law and Governance.

of the local authority. It is specifically provided that '*the word "signature" includes a facsimile of a signature by whatever process reproduced.*'

17. There are no specific provisions in the Local Government Act 1972 which govern the use of a local authority's seal. However, a local authority's standing orders frequently require the affixing of its seal to be attested by the chairman, vice-chairman or other elected member, and also by the clerk or his or her deputy. As such, the procedure for the use of an electronic seal will be governed by each local authority's constitution. It may be that the individual person required to fix the seal is to be the person responsible for carrying out an electronic sealing of a document, but subject to delegated authority in accordance with a given constitution, it may also be possible to have others undertake the process of electronically sealing documents.
18. Finally, section 74(1) of the Law of Property Act 1925 makes specific provision for the execution of instruments by or on behalf of corporation aggregates, such as local authorities, in respect of instruments conveying a disposition in land. It states that:

In favour of a purchaser an instrument shall be deemed to have been duly executed by a corporation aggregate if a seal purporting to be the corporation's seal purports to be affixed to the instrument in the presence of and attested by —

(a) two members of the board of directors, council or other governing body of the corporation, or

(b) one such member and the clerk, secretary or other permanent officer of the corporation or his deputy.

19. A similar issue therefore arises here as with the physical presence of witness attesting deeds. A local authority's standing orders frequently require the affixing of its seal to be attested by the chairman, vice-chairman or other elected member, and also by the clerk or his or her deputy.¹⁴ A purchaser of land or property that must be effected by deed may well insist that the authority seal the deed in accordance with its

¹⁴ Local Government Act 1972, sections 135 and 234.

constitution.¹⁵ Before adopting any flexible approach to signatures and witnessing, it is advised that local authorities should carefully consider their own constitutions. In particular, a section 106 agreement must be executed by deed.¹⁶

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¹⁵ See also the Land Registry's Practice Guide 8, at paragraph 5.1.1.

¹⁶ Town and Country Planning Act 1990, section 106(9). They are not, however, usually registered at Her Majesty's Land Registry. A section 106 agreement is usually registered as a local land charge and must be entered on the planning register. They are occasionally, however, registered at the Land Registry by way of a notice under section 32 of the Land Registration Act 2002.