Can the law keep up with the pace of change?

Miri Stickland and Connor Morrison examine two recent cases in which the interplay between technology and ss1 and 2 of the 1989 Act is considered directly by the courts

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The Law of Property (Miscellaneous Provisions) Act 1989 came at what turned out to be the start of the most dramatic period of change in business practice since the industrial revolution. Despite being fairly young in property law statute terms, the Act can therefore on occasion appear markedly more dated than the mere 30 years since its enactment might otherwise suggest. Rapid advances in technology and the commensurate impact on both working practices and general telecommunication have spawned areas of uncertainty in statutory interpretation, particularly regarding formalities requirements. One such area requiring clarity is the execution of deeds and documents in the context of electronic signing.

With its drafting having taken place in a pre-internet age, the extent to which the first two sections of the Act are able to accommodate 21st century ways of working has formed the subject of surprisingly little judicial attention so far.

Section 1(3) and *Yuen*

Section 1(3) of the Act, as any property lawyer would likely be able to tell you in their sleep, states that an individual executing a deed must do so in the presence of a witness who attests the signature in order for that execution to be valid. The case of *Yuen v Wong* [2020] tasked the First-tier Tribunal with the question of whether, at law, it is possible for someone to validly witness the execution of a deed remotely via electronic means.

The case centred on the transfer of a property from two joint proprietors (the applicant (Y) and respondent (W)) to just one of them (W). It was alleged by Y that his signature had been forged by W and that in any case, even if it had not been a forgery, it had not been validly witnessed. This second limb centred around W's claim that the transfer had been signed by both parties at a meeting in Hong Kong, with Y's signature having been witnessed by W's solicitor, who dialled in via Skype from London and thus witnessed execution remotely. W claimed that the signed transfer was then posted to London, where the witness added her attestation upon the document's arrival on her desk several days later.

In its 2019 *Report on the Electronic Execution of Documents* (see box on p8 for further details), the Law Commission expressed the provisional view that s1(3) necessitated the physical presence of a witness in order for a deed to be validly executed. Despite Y's claim failing on separate grounds, and in the absence of judicial precedent, the tribunal in *Yuen* came to the same conclusion, holding

Mehta v J Pereira Fernandes SA [2006] EWHC 813 (Ch)
Neocleous & anor v Rees [2019] EWHC 2462 (Ch)
Wood v Commercial First Business Ltd [2019] EWHC 2205 (Ch)
Yuen v Wong [2020] First Tier Tribunal (Property Chamber) ref 2016/1089

What is an electronic signature?

The Law Society Practice Note on the execution of documents using an electronic signature (see box on p8) explains that e-signatures can take a number of different forms, beyond a person signing a hard-copy document in wet ink and converting the document and signature into electronic form. This includes the following:

- a person typing their name into a contract or into an email containing the terms of a contract;
- a person electronically pasting their signature (eg in the form of an image) into an electronic (ie soft copy) version of the contract in the appropriate place (eg next to the relevant party's signature block);
- a person accessing a contract through a web-based e-signature platform and clicking to have their name in a typed or handwriting font automatically inserted into the contract in the appropriate place (eg next to the relevant party's signature block); and
- a person using a finger, light pen or stylus and a touchscreen to write his or her name electronically in the appropriate place (eg next to the relevant party's signature block) in the contract.

that there was indeed an arguable case for invalidity given that the witness was only 'present' via Skype.

It should be noted that this case was considered from the perspective of Y's reasonable prospect of success and did not, therefore, decide explicitly on the legal point. While *Yuen* may not constitute binding authority, it does provide useful judicial direction on an important point on which there was previously no authority at all. It would seem that, as drafted, s1(3) may not stretch to allow for standard execution processes to be streamlined through the use of modern audio-visual technology.

The position as regards attestation does seem to be clearer – in a judgment handed down just six days before the *Yuen* hearing, the High Court in *Wood v Commercial First Business Ltd* [2019] held that a witness adding their attestation at a later date does not pose a problem in terms of validity of execution. As Mr James Pickering, the judge in *Wood*, put it:

> ... while there is a requirement for the person executing the deed to sign in the presence of a witness, it is not a requirement for the witness to sign in the presence of the person executing the deed (or indeed of anybody else).

A key tenet of the Law Commission's reasoning in supporting the need for the physical presence of a witness was to ensure that the said witness can then immediately attest the signature. The decisions in *Wood* and *Yuen* leave the legal position as regards both general principle and detail rather uncertain: how long a gap between signing and attestation is too long, for example?

Section 2 and *Neocleous*

The 2019 High Court case of *Neocleous v Rees* was also indicative of the tensions between the Act and its modern practical application, this time as a result of a dispute as to whether or not a contract had been validly signed pursuant to s2.

Section 2(1) states that a contract for the disposition of land must be made in writing, with s2(3) providing that the documents containing the terms of said contract must be signed by each party. The case in question involved a claimant (N) and defendant (R), two sets of neighbours, who had been in dispute over rights of way over a small piece of land. In a series of emails, solicitors for the parties attempted to settle, with N's solicitor eventually offering £175,000 for the purchase of the land in question (a boat landing point on the shore of Lake Windermere) from R.

The parties gave instructions for their respective solicitors to proceed with settlement on this basis. The solicitors then spoke

The relevant legislative provisions

Section 1 Law of Property (Miscellaneous Provisions) Act 1989 – Deeds and their Execution

(2) An instrument shall not be a deed unless—

(a) it makes it clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise); and

(b) it is validly executed as a deed

(i) by that person or a person authorised to execute it in the name or on behalf of that person, or

(ii) by one or more of those parties or a person authorised to execute it in the name or on behalf of one or more of those parties…

(3) An instrument is validly executed as a deed by an individual if, and only if—

(a) it is signed—

(i) by him in the presence of a witness who attests the signature; or

(ii) at his direction and in his presence and the presence of two witnesses who each attest the signature; and

(b) it is delivered as a deed…

(4) In subsections (2) and (3) above 'sign', in relation to an instrument, includes

(a) an individual signing the name of the person or party on whose behalf he executes the instrument; and

(b) making one's mark on the instrument, and 'signature' is to be construed accordingly.

(4A) Subsection (3) above applies in the case of an instrument executed by an individual in the name or on behalf of another person whether or not that person is also an individual.

Section 2 Law of Property (Miscellaneous Provisions) Act 1989 – Contracts for sale etc. of land to be made by signed writing

(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.

(2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.

(3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract…

Section 44 Companies Act 2006 – Execution of Documents

(1) Under the law of England and Wales or Northern Ireland a document is executed by a company–

(a) by the affixing of its common seal, or

(b) by signature in accordance with the following provisions.

(2) A document is validly executed by a company if it is signed on behalf of the company–

(a) by two authorised signatories, or

(b) by a director of the company in the presence of a witness who attests the signature.

(3) The following are 'authorised signatories' for the purposes of subsection (2)–

(a) every director of the company, and

(b) in the case of a private company with a secretary or a public company, the secretary (or any joint secretary) of the company…

by phone and agreed that emails outlining the terms of settlement and confirming agreement would then be exchanged. R's solicitor duly set out the terms in an email and requested confirmation, to which N's solicitor responded with confirmation of agreement on behalf of N.

N sought specific performance of the contract (which took the form of one continuous email chain), with R countering that the firm's automatically generated footer detailing his name, occupation, role and contact details did not constitute a signature for the purposes of s2 of the Act and that there was therefore no valid contract.

The court held that this reasoning was incorrect and that an email 'signature' does in fact constitute a formal, legally binding signature under s2. The court once again agreed with the Law Commission's 2019 report in deeming the appropriate test in this instance not to be one of the 'ordinary understanding' of the word 'signature', but instead the test identified in *Mehta v J Pereira Fernandes SA* [2006]; that is, was the name, whatever its precise form, applied with authenticating intent?

The fact that the footer had been automatically generated by software without any recurring action on the part of R's solicitor was deemed to be irrelevant. The court held that the inclusion of the information within the 'signature' function on Outlook had required conscious thought and action, and the details would not have been present on the email were it not for this conscious action. The court decided that there was no way for the recipient of the email to distinguish between a signature added manually and one added automatically. A natural, objective conclusion would therefore be that the name and other details had been included for the purpose of associating the solicitor with the email in such a manner as to authenticate or sign it.

This case is very fact specific, as it was clear that the parties had intended to contract with each other and there was evidence of telephone calls confirming the terms of the settlement. It is, however, a decision that is certain to divide the crowd, given the ubiquity of emails with automatically generated signatures at every level of both professional services and the wider business community. On the one hand, it feels conceptually sound that the inclusion of the sender's name on a written exchange of terms in the usual place one would expect to find a conventional handwritten signature should constitute valid authentication. On the other hand,

Guidance and reports

Law Society practice note on the execution of documents using an electronic signature

Published in July 2016, the practice note was developed 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. Its purpose is to assist parties (and their legal advisers) who wish to execute commercial contracts using an electronic signature or enter into a commercial contract with other parties that intend to execute using an electronic signature.

Law Commission's report on the electronic execution of documents

Following a consultation process, the Law Commission published its report *Electronic Execution of Documents* (Law Com No 386) on 4 September 2019. While the project applies to (among others) deeds executed pursuant to s1 LP(MP)A 1989 or ss44-46 Companies Act 2006 and contracts for the sale or other disposition of an interest in land under s2 of the LP(MP)A 1989, it should be noted that the report expressly excludes registered dispositions under the Land Registration Act 2002 (see further in the box on p9) and wills. The high-level conclusions reached can be summarised as follows:

- Electronic signatures are capable in law of being used to execute both simple contracts and deeds. This is provided that the person signing the document (or on whose behalf it is being signed) intends to authenticate the document and that any formalities relating to execution of that document (such as the witnessing of a signature) are satisfied.
- Electronic signatures are admissible in legal proceedings.
- Unless statute, case law or the specific contractual arrangements provide to the contrary, the common law adopts a pragmatic approach and does not prescribe any particular form or type of signature. In determining whether the method of signature adopted demonstrates an authenticating intention, the courts adopt an objective approach considering all of the surrounding circumstances.
- There is no reason, in principle, to think that where the courts have found a non-electronic method of signature to be legally valid, they would not apply the same reasoning to its electronic equivalent.
- A deed must be signed in the physical presence of a witness who attests the signature. This applies even where both the person executing the deed and the witness are executing/attesting the document using an electronic signature.

The Law Commission concludes by recommending that an industry working party be set up to consider the practical implications of electronic signatures. While the current law allows for electronic signatures, given that it is not contained in a single source, it is suggested that the government may wish to consider codifying the law in statute in order to improve the accessibility of the law.

such reasoning sits uncomfortably with the practical usage of these software functions. Whether or not one considers the original input of information to be of sufficient 'authenticating intent', does it really hold that such intent can survive numerous repetitions until such a time as it appears on an email chain that would otherwise constitute a valid contract but for the all-important final step of signing?

Conclusion

It is hard not to acknowledge a certain degree of inconsistency in judicial attitudes on the subject of electronic signatures and the use of technology: an automatic signature function as part of an email chain is enough to legally validate a contract, yet 'presence' through universally utilised audio-visual technology for witnessing purposes is insufficient? How this sits in terms of law's accessibility to the public and its alignment with society's perception of technology and the way it is used is questionable. While differences between legal and more general understandings of terms and concepts are not uncommon, when the subject of such divergence is something that fundamentally underpins the public's view of contractual relations (ie the process and act of signing) this is perhaps not a distinction with which we as practitioners should feel entirely comfortable. A legislative statement on electronic signing may well go some way to addressing such concerns, while also providing certainty to solicitors.

It was the Law Commission's tentative view in its 2019 report that legislative intervention on matters such as those raised by the aforementioned cases was not strictly necessary, but that statutory codification may assist in improving the accessibility of the law to all. In the meantime, the courts will have to conduct a balancing act, weighing up the convenience of using technology to streamline formal legal processes against the now somewhat dated statutory requirements. Until legislative changes are made, signatories will need to exercise some caution when embracing modern technology in connection with the execution of documents. ■

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Position of HM Land Registry

Generally, any document which effects a registerable disposition, and therefore requires to be completed by registration at HM Land Registry pursuant to s27 of the Land Registration Act 2002, cannot be signed electronically. This includes transfers, charges, registerable leases, the grant or reservation of easements and releases (s205(ii) Law of Property Act 1925). Companies House will accept certified copies of charges executed using electronic means where they are submitted for registration via the Companies House webfiling service, but this does not alter HM Land Registry's position.

The exception to this is the creation of digital mortgages (which is currently only available on a very limited basis) and the electronic discharge of mortgages (e-DS1).

If a contract signed electronically is sent to HM Land Registry to be noted on the title register by way of UN1 or AN1, HM Land Registry has confirmed (in a blog post published in February 2017 – see www.legalease.co.uk/hmlr-electronic) that it will enter such a notice, provided that any other requirements for the entry of a notice are satisfied. This is because the entry of a notice simply protects the priority of the relevant interest – it does not guarantee that the interest itself is valid.

It will be interesting to see what approach HM Land Registry adopts in respect of other supporting documentation which is required to be submitted in order to complete registration of a disposition. The scope of the documents within the Law Commission's report expressly includes powers of attorney granted under the Powers of Attorney Act 1971. However, practitioners may be somewhat cautious in respect of electronically signed powers of attorney in light of the significant increase in requisitions raised by HM Land Registry over the last few years on transactions where one or more of the parties has opted to execute documents under a (wet ink) power of attorney.

Often such requisitions are raised citing r17 of the Land Registration Rules 2003, which provides that:

> … [i]f the registrar at any time considers that the production of any further documents or evidence or the giving of any notice is necessary or desirable, he may refuse to complete or proceed with an application, or to do any act or make any entry, until such documents, evidence or notices have been supplied or given.

While the exercise of caution is understandable where the power of attorney is granted by a potentially vulnerable individual, the blanket approach being adopted by HM Land Registry in relation to powers of attorney granted by institutional investors leads to unnecessary delay in the registration process. Given that the Law Commission's report was only published in the latter part of last year, it currently remains a case of 'watch this space'.