

## WHEN IS A SIGNATURE NOT A SIGNATURE? THE LAW COMMISSION REPORT ON THE ELECTRONIC EXECUTION OF DOCUMENTS

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In early September the Law Commission reported on the electronic execution of documents. This wide-ranging review considered electronic signatures generally, and deeds in particular, and so encompasses a wide variety of documents frequently drafted by private client practitioners, such as trust deeds and powers of attorney (though not wills, or dispositions of registered land).

The full report can be found [here](#).

### **Electronic signatures**

The Law Commission considers that, in general, English law already accommodates the use of electronic signatures. Where an electronic signature is used, the person signing the document intends to authenticate the document, and any further prescribed formalities (e.g. that the document be witnessed) are satisfied, the electronic signature will be as effective as a "wet ink" signature – even where the requirement for a "signature" is prescribed by statute e.g. to create a valid Lasting Power of Attorney pursuant to regulation 9 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007/1253. The electronic signature may amount to no more than typing the signing party's name, or even just clicking on a button: in *Bassano v Toft* [2014] EWHC 377 (QB) Popplewell J accepted that clicking "I accept" could amount to signing a loan agreement for the purposes of the Consumer Credit Act 1974.

Whilst it is likely that the common law would reach this conclusion in any event, it is confirmed by article 25(1) of EU Regulation No 910/2014. This provides that "[a]n electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form..." (and pursuant to the European Union (Withdrawal) Act 2018, s 3(1), will remain part of English law after the United Kingdom's withdrawal from the EU). In addition, electronic signatures are admissible in evidence pursuant to section 7 of the Electronic Communications Act 2000.

### **Deeds**

The Law Commission takes the view that its understanding of electronic signatures extends to the signing of deeds. But deeds give rise to a further difficulty, because under section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 a deed must be signed in the presence a witness who attests the signature. Does this mean that deeds cannot be executed in purely electronic form? The Law Commission's view is that whilst the deed may be signed electronically, the physical presence of the witness cannot be dispensed with: even where the person executing the deed signs it electronically, the witness must be present in person to be able to attest the signature in compliance with section 1(3).

Furthermore, Underhill J said in *R (Mercury Tax Group Ltd) v HMRC* [2008] EWHC 2721 (Admin) that for a deed to be valid under section 1(3) "the signature and attestation must form part of the same physical document". Where signature pages are exchanged by e-mail, it can be unclear whether Underhill J's dictum is complied with.

### **Recommendations for reform**

Law Commission reports typically make recommendations for legislative reform in the form of a draft statute, but in this case the Law Commission has proceeded more tentatively, proposing a possible amendment to the Electronic Communications Act 2000 to make clear that an electronic signature "has

*the same legal effect as a handwritten signature*", leaving practical and technical questions (including whether it should be possible to witness the electronic signature of a deed by video link) to a proposed industry working group, and suggesting that it be asked to carry out a more wide-ranging review of the law of deeds generally.

### **Comment**

This Law Commission report reflects the lack of certainty which permeates this topic. Whilst many practitioners are content to rely on electronic signatures, and the law appears to support them in doing so, other are more naturally cautious about the lack of a clear statutory basis for doing so, and the risk that what appeared to be a signature might subsequently transpire not to count as such e.g. when a signature is automatically added by an e-mail system. Deeds cause particular difficulty, and some consultees considered that an electronically signed deed could not be properly witnessed in accordance with section 1(3).

There are also questions, especially in the private client arena, which are not concerned merely with certainty and practicality. Some consultees rightly pointed out that electronic signatures could give rise to concerns when dealing with vulnerable individuals, for example in connection with Lasting Powers of Attorney. Others pointed out the risk of fraud, particularly when dealing with property held in trust. The Law Commission has not fully resolved these issues, and it may be that, if electronic signatures become more commonly used, there will be good reason for the law to prescribe certain instances where a "wet ink" signature should nevertheless be required.

Doubtless it will be helpful for further work to be done as the Law Commission proposes, whether by the Law Commission itself, by government or by the industry working group proposed in the report. But it may be that a clear statutory footing is required before electronic signatures are universally treated as having precisely the same validity and effect as a "wet ink" signature.

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