Informalities: Execution of documents in the time of Covid-19

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Little seems to change in the law as to formalities. The courts regularly refer to the Statute of Frauds Act 1677 (in relation to guarantees) or the Law of Property Act 1925 (in relation to dispositions of equitable interests), pieces of legislation which pre-date most, if not all, practitioners. Of course, there is more recent legislation, such as the Law of Property (Miscellaneous Provisions) Act 1989 (in relation to the sale of land) and the Companies Act 2006 (in relation to companies executing documents), but they are few and far between and largely repeat the formality requirements from earlier equivalent legislation.

So the comparative flood of guidance and case law in the run up to and during the lockdown is a good excuse to familiarise practitioners with what the rules are and give an indication of where legislation may go and what issues are likely to lead to litigation.

The current rules on formalities for certain documents

Below are some of the most common types of documents which practitioners will come across (but this is not an exhaustive list):

Contracts that need to be in writing:

- The sale of land or disposition of an interest of land or an equitable mortgage or charge of a legal estate in land (if applicable), pursuant to section 2 of the Law of Property (Miscellaneous Provisions) Act 1989;
- Assignment of a contractual right, pursuant to section 136 of the Law of Property Act 1925;
- Guarantees, pursuant to section 4 of the Statute of Frauds Act 1677; and
- A transfer of certified shares, pursuant to section 770 of the Companies Act 2006 and section 1 of the Stock Transfer Act 1963.

Contracts that need to be by deed:

- **Transfers of land** or the creation of an interest in land, pursuant to section 52 of the Law of Property Act 1925;
- **Leases** pursuant to section 52 of the Law of Property Act 1925, unless they are for a term not exceeding three years at the best rent reasonably obtainable without a fine or relevant social housing tenancies;
- **Legal mortgage** or charge by way of legal mortgage over land, pursuant to section 52(2), 85(1) and 86(1) of the Law of Property Act 1925;
- Any mortgage or charge of land or other property if the mortgagee or chargee has a **statutory power of sale**, insurance, appointment of a receiver and forestry, pursuant to section 101 of the Law of Property Act 1925. Any subsequent sale by the mortgagee or chargee must be by deed if it is to overreach subsequent mortgages and charges, pursuant to section 104 of the Law of Property Act 1925;
- **Power of Attorney**, pursuant to section 1 of the Power of Attorney Act 1971;
- **Appointment of a trustee**, where there is no separate transfer of the trust property into trustee's name, pursuant to section 40 of the Trustee Act 1925; and
- By common law, a deed can only be varied or discharged by a deed and a release of a debt, liability or obligation must be effected as a deed.

Other miscellaneous formalities:

- The Land Registration Rules 2003 provide that prescribed forms must be used to register transfers of land etc. In the lockdown, the Land Registry has updated Practice Guide 8 and now accepts Mercury signatures, dealt with below under the heading "What are the recent changes?".
- Section 8 Notice using Form 3 (or equivalent wording).
- Section 21 Notice using Form 6A for tenancies commencing after 1 October 2015.

What are the formalities for deeds?

Deeds must: (1) be in writing; (2) state on the face of the document that it is intended to take effect as a deed; (3) be executed; and (4) be delivered.

The stumbling block in many cases is in relation to execution:

- For individuals, the requirements are as set out in section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989;

- For companies incorporated in England and Wales, the requirements are set out in sections 43-47 of the Companies Act 2006;
- For limited liability partnerships, the requirements are set out in Regulation 4 of the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009;
- For charitable incorporated organisations, the requirements are set out in Regulations 19-25 of the Charitable Incorporated Organisations (General) Regulations 2012; and
- For co-operative and community benefit societies, the requirements are set out in sections 50-56 of the Co-operative and Community Benefit Societies Act 2014.

Across these execution provisions, there is a provision for a signature in the presence of a witness who attests the signature.

What are the recent changes?

The courts, the Law Commission and HM Land Registry have all been grappling with these issues recently in light of the rise of electronic communications, the Covid-19 lockdown and a general trend towards *"fairness"*. This guide will be dealing with the following issues:

- What constitutes signature?
- What amounts to attesting?
- What happens if a deed fails to meet the formality requirements?
- What about formalities for notices and section 44 of the Companies Act 2006?
- What is HM Land Registry's response to the Covid-19 lockdown?
- What about the formalities for wills?

What constitutes signature?

The traditional method of signing a piece of paper presents few problems for practitioners. However, with the rise of technology and electronic means of communication, there are new challenges for practitioners.

One line of cases centres on where deeds are pre-signed before a final version is produced. The signature must be on the final version of the deed and a pre-signed page cannot be affixed to the document after material changes have been made (see *R (on the application of Mercury Tax Group and another) v HMRC* [2008] EWHC 2721 and the recent decision in *Bioconstruct GmbH v Winspear and another* [2020] EWHC 7 (QB)).

Another line of cases revolves around electronic signatures. An electronic signature can take many forms, from typing a name (for example, at the bottom of an email) through to clicking a button to confirm an order or a biodynamic version (for example, when signing for a parcel). In cases involving simple contracts (as opposed to deeds), the court will determine whether the electronic signature demonstrated an authenticating intention. To this end, in the recent case of *Neocleous v Rees* [2019] EWHC 2462 (Ch), the court held, when adopting an objective approach, that an automatic email signature was sufficient to demonstrate an authenticating intention as the recipient of the email would not know whether an email signature was automatically or manually entered. For the position in relation to guarantees in an email context, see *Metha v J Pereira Fernandes SA* [2006] EWHC 813 (Ch) and *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd & anor* [2011] EWHC 56 (Comm).

In September 2019, in light of the prevalence of electronic communications, the Law Commission prepared a report on Electronic Execution. In it, the Law Commission summarised the law as follows:

> *1. An electronic signature is capable in law of being used to execute a document (including a deed) provided that (i) the person signing the document intends to authenticate the document and (ii) any formalities relating to execution of that document are satisfied.*
>
> *2. Such formalities may be required under a statute or statutory instrument, or may be laid down in a contract or other private law instrument under which a document is to be executed. The following are examples of formalities that might be required: (i) that the signature be witnessed; or (ii) that the signature be in a specified form (such as being handwritten).*
>
> *3. An electronic signature is admissible in evidence in legal proceedings. It is admissible, for example, to prove or disprove the identity of a signatory and/or the signatory's intention to authenticate the document.*
>
> *4. Save where the contrary is provided for in relevant legislation or contractual arrangements, or where case law specific to the document in question leads to a contrary conclusion, 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.*

5. The courts have, for example, held that the following non-electronic forms amount to valid signatures: a. signing with an 'X'; b. signing with initials only; c. using a stamp of a handwritten signature; d. printing of a name; e. signing with a mark, even where the party executing the mark can write; and f. a description of the signatory if sufficiently unambiguous, such as "Your loving mother" or "Servant to Mr Sperling".

6. Electronic equivalents of these non-electronic forms of signature are likely to be recognised by a court as legally valid. There is no reason in principle to think otherwise.

7. The courts have, for example, held that the following electronic forms amount to valid signatures in the case of statutory obligations to provide a signature where the statute is silent as to whether an electronic signature is acceptable: a. a name typed at the bottom of an email; b. clicking an "I accept" tick box on a website; and c. the header of a SWIFT message.

8. Our view is that the requirement under the current law that a deed must be signed "in the presence of a witness" requires the physical presence of that witness. This is the case even where both the person executing the deed and the witness are executing / attesting the document using an electronic signature.

In March 2020, the Lord Chancellor accepted the Law Commission's recommendations to convene an industry working group to consider practical and technical issues involved with the electronic execution of documents (including video witnessing of signatures) and a wider review of the law of deeds. Given the Covid-19 lockdown and the Brexit deadline, it is highly unlikely that we should anticipate some new legislation sooner rather than later.

Although the court will accept an electronic signature as amounting to complying with the formality requirements, the issue of what weight will be given to an electronic signature remains to be seen. For example, whether there was a forgery in the electronic signature or there are issues as to the circumstances in which the signature was made.

What amounts to attesting?

The Law Commission has stated that a *"deed must be signed 'in the presence' of a witness [which] requires the physical presence of that witness".* Accordingly, the act of signing by the executing party must be witnessed by a person in their physical presence who is attesting the signature ("the attesting witness"). The Law Commission's position requiring *"physical presence"* has been approved by the First Tier Tribunal decision in *Yuen v Wong* [2020] Case Ref: 2016/1089, in which the Tribunal held that there was *"a realistic prospect of success"* in arguing that a transfer deed witnessed via Skype is not validly executed because

the attesting witness was not physically present when it was signed. However, the Tribunal did state that there was uncertainty in this area of law and it is a policy decision that will need to be made in the future.

However, the attesting witness need not sign the deed contemporaneously with the execution of the deed, see *Wood v Commercial First Business Ltd (In Liquidation)* [2019] EWHC 2205 in which the Judge held that: *"while there is a requirement for the witness 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 anybody else)"*. Accordingly, a mortgage deed can be signed by the attesting witness at a later date to the executing party. However, it remains good practice for the attesting witness to sign the deed contemporaneously with the executing party, not least because it may be difficult to get the attesting witness to sign the deed at a later date. There may also be arguments in the future as to what is an acceptable delay in attesting a deed (see *obiter* comments in *Yuen v Wong* at [60]).

What happens if a deed fails to comply with the formality requirements?

In the recent decision in *Signature Living Hotel Limited v Sulyok* [2020] EWHC 257 (Ch), the court was concerned with what happens if a deed is not properly executed. The court, at [34], held that: *"if an otherwise complete contract of guarantee is intended to be embodied in a deed but the formalities have not been complied with, the creditor can still enforce the agreement"*. In that case, the guarantee was held to be *"otherwise complete"* in that it was in writing, executed in accordance with section 43 of the Companies Act 2006 and supported by consideration. Accordingly, the guarantee was enforceable as a simple contract.

For practitioners, this may offer some relief where the formalities have not been complied with. However, the *Signature Living* case does not offer complete protection for defective deeds in that for a simple contract, limitation runs for 6 years from the date on which the cause of action accrued (section 5 of the Limitation Act 1980), whereas limitation for a deed is generally 12 years (sections 8, 19 and 20 of the Limitation Act 1980).

What about formalities for notices and section 44 of the Companies Act 2006?

A distinct line of cases in the context of section 8 and section 21 Notices has arisen as to whether they need to comply with the formality requirements of section 44 of the Companies Act 2006 ("section 44").

In the decision of *Hilmi & Associates Ltd v 20 Pembridge Villas Freehold Ltd* [2010] EWCA Civ 314, the Court of Appeal held that notices under section 13 and 42 of the Leasehold Reform Housing and Urban Development Act 1993 were defective in that they were not properly executed in compliance with section 44 (i.e. they were signed by a single director and therefore, fell foul of section 44). Since the decision of *Bali v Manaquel Company Ltd* [2016] (unreported), the courts have been applying that judgment in the context of section 8 and section 21 notices and refusing to grant possession orders if section 44 is not complied with. This decision forms part of a trend in residential landlord possession claims towards reaching *"fair"* decisions favouring tenants, in particular in preventing residential landlords from recovering possession under the section 21 procedure.

This matter has not been determined at appellant level. However, it appears that the standard Form 3 and 6A do not encourage compliance with section 44 and therefore residential landlords should be aware of the need to ensure proper compliance with section 44 when completing those forms.

What is HM Land Registry's response to the Covid-19 lockdown?

HM Land Registry have confirmed that, in light of the Covid-19 lockdown, from 4 May 2020 until a date to be determined, they will accept deeds using the "Mercury signing approach". HM Land Registry summarise this approach in Practice Guide 8 as follows:

> *STEP 1 - Final agreed copies of the transfer are emailed to each party by their conveyancer.*
>
> *STEP 2 - Each party prints the signature page only.*
>
> *STEP 3 - Each party signs the signature page in the physical presence of a witness.*
>
> *STEP 4 - The witness signs the signature page.*
>
> *STEP 5 - Each party sends a single email to their conveyancer to which are attached the final agreed copy of the transfer (see STEP 1) and a PDF/JPEG or other suitable copy of the signed signature page.*
>
> *STEP 6 - The conveyancing transaction is completed.*
>
> *STEP 7 - The conveyancer applies to register the disposition and includes with the application the final agreed copy of the transfer and the signed signature page or pages in the form of a single document.*
>
> *STEP 8 - The application is processed by HM Land Registry following standard operating procedure.*

But what about the formalities for wills?

They say that "*two is company; three is a crowd*" but in the present circumstances it is more accurate to say that "*two is company; three is not allowed*". For some people wanting to change an existing will or make one for the first time, this may pose a problem, as will be set out below.

The Law Society in Scotland has *temporarily* "relaxed" the rules regarding the execution of wills. Not so here (yet). For the time being, in England and Wales the law remains as set out in section 9 of the Wills Act 1837 (as amended), which provides:

"**Signing and attestation of wills**

No will shall be valid unless—

(a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and

(b) it appears that the testator intended by his signature to give effect to the will; and

(c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(d) each witness either—

(i) attests and signs the will; or

(ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness),

[but no form of attestation shall be necessary.]"

A failure to adhere to these requirements means that no will has been created. The estate in question will then pass under the previous will or, if none, the rules of intestacy. These rules, which are set out in section 46 of the Administration of Estates Act 1925, prescribe the strict hierarchical order in which certain persons will inherit. Of worthy note is the fact that cohabitants or partners, no matter what the length of cohabitation or relationship, do not feature in this list.

What is required?

- **In writing:** To take effect as a will the testator's wishes must be committed to writing. Oral wills and those not requiring witnesses (known as "privileged wills"; s.11 Wills Act 1837) remain the domain of those persons serving in active military service;

- **Testator's signature:** The person whose will it is must sign the will in the presence of at least two witnesses present at the same time *or* he/she must direct somebody else to sign it on his/her behalf (again, in the presence of at least two witnesses present at the same time) BUT a will can be signed before the witnesses attend provided that the person making it then acknowledges his/her signature to both witnesses at the same time that it his/her signature;

- **Witnesses' signatures:** The general advice given is to have everyone in the same room and signing at the same time but there could be a situation, for example, where the person making the will signs it in front of both witnesses, only one of whom then signs it and then leaves before the second person signs it. Providing that the second witness then signs in front of the person whose will it is, the will is valid even though the other witness was not present;

- **What does "signature mean"?:** Ideally, this means a manuscript signature but this is not always feasible. Initials, crosses and thumb-prints have all been accepted as valid signatures. Electronic signatures are not valid;

- **Who can be a witness?**: Section 15 of the Wills Act 1837 provides that the witnesses to a will must not be beneficiaries under it and must not be married to/in a civil partnership with any beneficiaries. Whilst the will would still be valid, the gift to the beneficiaries would fail. Further, they must be over 18, of sound mind and not blind -or significantly partially-sighted;

- This is potentially an issue whilst households remain restrained and the permitted socialising extends (in theory at least) to one other person only. What if you are living alone and want to make a will? What if the only people in your house are the people you want to make the beneficiaries under your will? What if you do not have access to two independent people?;

- Provided that social distancing can be respected, wills can be (and have been) executed through a downstairs open window, on the bonnet of a car, over a garden fence (provided everyone can see each other!) and no doubt in even more

Imaginative ways over the coming weeks and months, or until Parliament legislates otherwise.

This is a difficult time for all but the importance of compliance cannot be overstated; if a testator dies leaving a non-compliant will then as matters stand there is no common-law, statutory or equitable way to save the will; "fairness" does not come into it.

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