Part V of the 'Staying Virtually Up-to-date' Series delivered by 3PB's Commercial Team

INFORMALITIES: EXECUTING DOCUMENTS IN THE TIME OF COVID-19

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THIS GUIDE

This guide is intended to act as an aide-memoire to Part V of the 'Staying Virtually Up-to-Date' Series delivered by 3PB's Commercial Team on 3 June 2020. Thank you for joining us!

Whilst every effort has been taken to ensure the accuracy of the contents of this guide, the position in relation to Covid-19 is rapidly changing. This document should not be used as a substitute for obtaining legal advice.

The discussion during the webinar concerned the law in England and Wales. Therefore, this guide does not detail any jurisdictional issues.

If you have a particular query, please contact David Fielder (Email - david.fielder@3pb.co.uk), who will be happy to direct your enquiry to the relevant person.

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Formalities: The basics

1. 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:

a. 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;

b. Assignment of a contractual right, pursuant to section 136 of the Law of Property Act 1925;

c. Guarantees, pursuant to section 4 of the Statute of Frauds Act 1677; and

d. 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:

a. **Transfers of land** or the creation of an interest in land, pursuant to section 52 of the Law of Property Act 1925;

b. **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;

c. **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;

d. 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;

e. **Power of Attorney**, pursuant to section 1 of the Power of Attorney Act 1971;

f. **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

g. 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:

a. 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.

b. Section 8 Notice using Form 3 (or equivalent wording).

c. Section 21 Notice using Form 6A for tenancies commencing after 1 October 2015.

2. 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.

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

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

b. For **companies** incorporated in England and Wales, the requirements are set out in sections 43-47 of the Companies Act 2006;

c. For **limited liability partnerships**, the requirements are set out in Regulation 4 of the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009;

d. For **charitable incorporated organisations**, the requirements are set out in Regulations 19-25 of the Charitable Incorporated Organisations (General) Regulations 2012; and

e. 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.

Formalities: The recent updates on signature and attestation

4. Recently, there has been a rush of cases dealing with signature, attestation and also what happens when things go wrong.

Signature

5. 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.

6. 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)).

7. 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).

8. 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.

Attestation

9. 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.

10. 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 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)."* 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]).

When things go wrong

11. 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.

12. 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).

Section 44 of the Companies Act 2006 and property notices

13. Prior to the Companies Act 1867, a company entering into a contract or a deed could only do so by applying the company's seal to a document. The Companies Act 1867 changed that, permitting an agent with express or implied authority to enter into a contract on the company's behalf, orally or in writing. That remains the case today, and is set out in section 43 of the Companies Act 2006.

14. The 1867 Act did not change deeds however, which still required the affixing of the company's common seal. In 1989, the passing of the Law of Property (Miscellaneous Provisions) Act 1989 changed that. Seals, whether of a company or personal, were no longer mandatory when executing a deed, and instead we have the procedure that Charles discussed earlier.

15. The Companies Act 1989, passed around the same time, amended the Companies Act 1985 by inserting a new section 36A, which stated:

    a. A company *could* still execute a document by affixing its common seal; but

    b. A company did not need to have a common seal, and it could execute documents in an alternative way;

    c. That is either 2 directors, or a director and a secretary could sign a document, and if it stated it was executed by the company, it would be executed by the company.

16. The current law, set out in s.44 Companies Act 2006 is slightly more relaxed, allowing execution of a document that is signed either by two authorised signatories (that is 2 directors, or a director and secretary) or a sole director whose signature is attested to by a witness.

17. Therefore, a company can enter into a contract through an agent, but execution of documents requires either two authorised signatures or a director's signature attested by a witness.

18. Unfortunately, as with most legal matters, there have been a number of edge cases where other legislation has clashed with the above provisions, in particular in relation to when legislation requires a company to *"execute"* a particular document, and so comply with the more stringent rules in relation to signatures.

19. The first and only time this issue came to the Court of Appeal was in the case of *Hilmi and Associates Ltd v 20 Pembridge Villas Freehold Ltd* [2010] EWCA Civ 314, a case

relating to s.36A Companies Act 1985, the precursor to s.44. The case related to leasehold enfranchisement, and the validity of a tenants' notice in the process when one of the tenants was a company.

20. Section 99 of the Leasehold Reform Housing and Urban Development Act 1993 required that the particular notice was *"signed by each of the tenants"*: it is insufficient for it to be signed by someone else on behalf of the tenant. One of the tenants in this case was a company, and its signature had been provided by a director. As the signature was not attested to by a witness, and as there was not another director's signature, the notice was not *"executed"* by the company.

21. The question for the Court of Appeal was, as stated by Lord Justice Lloyd *"is this notice one which was signed 'by' the company or was it only signed 'on behalf of' the company"*?

22. He went on to say the following: *"In relation to a corporate entity which cannot itself hold a pen and apply it to a piece of paper, this may seem a somewhat metaphysical inquiry. But it is one which the law requires to be considered, on occasion, although perhaps only very rarely. This is such an occasion"*.

23. In fact, counsel in the case could only find one other piece of legislation that required a company to personally sign a document, which was s.53 Law of Property Act 1925, which relates to the creation of interests in land being created by writing of the person *"creating or conveying the same"*. So, in other words, most legislation had been drafted to take into account companies and the fact that they couldn't personally sign documents, and it was only two pieces of legislation that required answering this slightly odd question.

24. Lord Justice Lloyd ultimately found that section 36A of the Companies Act 1985 did prescribe how a company registered under the Companies Act could itself sign a document which was required for some legal purpose, and the tenants' notice was ultimately invalid.

25. This argument also popped up in *Bali v Manaquel Company Limited*, a County Court appeal before HHJ Hand QC in Central London in April 2016 in relation a section 21 notice, and compliance with the requirement to provide prescribed information about a tenancy deposit. One of the requirements at the time of the Housing (Tenancy Deposits)(Prescribed Information) Order 2007 was a certificate signed by the landlord confirming certain matters to be accurate to the best of his knowledge and belief. That,

of course, is different from the CPR, which sets out specifically who can sign a statement of truth on a company's behalf.

26. The certificate was signed by the Landlord company's solicitor, and so did not comply with s.44 Companies Act 2006. The judge found that the purpose of the certificate was certification of the accuracy of the information provided for *"a formal legal purpose"*, and so needed to comply with s.44. As such, the certificate wasn't valid.

27. I've also seen a report that such an argument was tried at first instance in respect of the prescribed notice required when giving notice under section 8 Housing Act 1988. That failed, I think rightly, because the legislation does not require the landlord to sign the notice. There is a signature space on the prescribed form, but the legislation does not say the landlord has to sign it – as such, s.44 does not come into play.

28. Turning to deeds, in respect of companies, s.46 of the Companies Act 2006 states that a deed is validly executed by company if it is duly executed and delivered as deed. There is also a presumption of delivery upon execution.

29. We have seen what happens if certain statutory documents that require execution have not been properly executed – they do not take effect. However, let's return to the case of *Signature Living v Sulyok*, which is mentioned above. This was an application to restrain a winding up petition on the basis that the guarantee upon which the petition was based purported to be a deed, but was not witnessed. It was common ground that it was not therefore a valid deed, and also did not comply with s.44. Signature Living therefore claimed the guarantee had no effect.

30. Judge Hodge did not agree. He found that whilst the guarantee was not a deed, it was still a contract, as it contained all the necessary elements for a contract, including consideration. Further, being a contract rather than a deed, it fell under s.43 Companies Act 2006, not s.44, and so didn't need to comply with any formalities in relation to execution. The application to restrain the petition was dismissed.

31. That result was perhaps unsurprising, but it is worth remembering that an improperly executed deed can potentially be rescued as a contract as long as:

    a. There is no requirement that the transaction be by deed – for example, property transactions, although in that case there are of course arguments in relation to equitable interest;

    b. There is consideration.

32. The other downside would be that, absent provisions in the document, the shorter limitation period of 6 years would apply to the document rather than 12 years.

33. So to conclude:

    a. Some badly drafted legislation requires companies to personally sign or execute documents. If that is the case, s.44 applies. If they don't comply with s.44, they will have no effect.

    b. Deeds also need to be executed in accordance with s.44. However, if they are not, and they still meet the requirements of a contract, they will take effect as a simple contract.

Recent miscellaneous updates and future reforms

34. There have been updates during the lockdown for conveyancers and insolvency practitioners. The Government has also issued a statement supporting the Law Commission's recommendations following its report mentioned above.

HM Land Registry

35. 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.*

Statutory Declarations required under Section B1 of the Insolvency Act

36. There has also been an updated in respect of the method for dealing with Statutory Declarations required under Section B1 of the Insolvency Act, which relates to Administration orders. It is a sort of half-way house, but does give a pointer to what might be an acceptable way to deal with swearings in a time of Covid-19. Curiously, though, it does not cover other parts of the Insolvency Act, such as the need for declarations of solvency in Members Voluntary Liquidation.

37. The provision can be found in the Temporary Practice Direction supporting the Insolvency Practice Direction, at section 9. In short, the Insolvency Rules at 12.64 allow the Court to allow a formal defect, or irregularity so that it does not invalidate the process unless there is *"substantial"* injustice.

38. In normal times, that would be a substantial defect and unlikely to be waived. But where a statutory declaration is made under the revised provisions, no-one can rely merely on the lack of formality if the practice followed to the letter. There would have to be another substantial defence.

39. The procedure is this:

> *9.2.1 The person making the statutory declaration does so by way of video conference with the person authorised to administer the oath;*
>
> *9.2.2 The person authorised to administer the oath attests that the statutory declaration was made in the manner referred to in 9.2.1 above; and*
>
> *9.2.3 The statutory declaration states that it was made in the manner referred to in paragraph 9.2.1 above.*

40. It is a strange half-way house, because it does not say that the document is good, just that it is not bad. Given the swift way it was brought in, there is something of an air of desperation to it as without that document administrations simply cannot proceed. Strangely, though, it was not also applied to the declaration of solvency required for Members Voluntary Liquidation and a number insolvency practitioners have expressed real anxiety about what would happen if they used that procedure.

Other reforms

41. 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 new legislation will arrive anytime soon.

42. If there is legislation, is possible that the half-way house Temporary Insolvency Practice Direction might be a pointer to future legislation for attestation or witnessing, although without safeguards, it does raise real questions as to whether the attestation is of the same document. On the other hand, it might be thought so problematic or clunky that it will be dropped.

The Law Society – Tips on how to Operate in Practice

43. The Law Society has a useful web page on setting out its position on the use of virtual execution and e-signature during the coronavirus pandemic, which brings together all its practice notes and resources on the subject[1]. This was updated on 18 June 2020 to include tips on how to operate in practice.

44. This section has six tips, which are summarised below:

    a. Best practice – follow the best practice notes produced by the Law Society.

    b. Agree – speak to the lawyers on the other side of any transaction to ensure there is clear agreement as to how to manage the transaction.

    c. Verify - Consider what steps (if any,) you wish to take to verify the identity and authority of each person signing beyond that which is required by law.

    d. Evidence - Ensure that you have the evidence immediately to hand on file in a timely and accessible manner.

    e. Report - Use electronic means to report back to all parties that the transaction has closed.

    f. Understand - Make sure that you're aware of the legislative, regulatory or cultural requirements for virtual execution and e-signatures in the relevant legal area.

45. Hopefully, this handout will have assisted in respect of the relevant requirements for a virtual transaction or e-signature. Apart from the recommendation that best practice be followed, the other tips – agree, verify, evidence and report – all relate to setting up a clear transparent process that:

    a. all parties understand and consent to, and;

    b. for which clear evidence of every step taken in a transaction can be provided if the transaction is challenged at a later date.

46. It is these types of transactions, based on emerging processes and norms as to what is legally and culturally acceptable which often generate litigation arising from misunderstandings and poorly documented processes. Time spent setting the groundwork, including potentially developing *pro forma* templates for various different transactions and processes, is likely to be time well spent in mitigating challenges later.

[1] https://www.lawsociety.org.uk/support-services/advice/articles/position-on-virtual-execution-e-signature-during-coronavirus-covid-19-pandemic/

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