

***“No more waiting for the ink to dry”***

## **Electronic Signatures in Property Transactions**

**Camilla Lamont**

## Law Commission No 386. Electronic execution of documents

2018 Consultation Paper:

*“We have been told that issues around the electronic execution of documents are hindering the use of technology where legislation requires a document to be “signed”. The purpose of this project is to ensure that the law governing the electronic execution of documents, including electronic signatures, is sufficiently certain and flexible to remain fit for purpose in a global, digital, environment.”*



## *Goodman v J Eban Ltd [1954]*

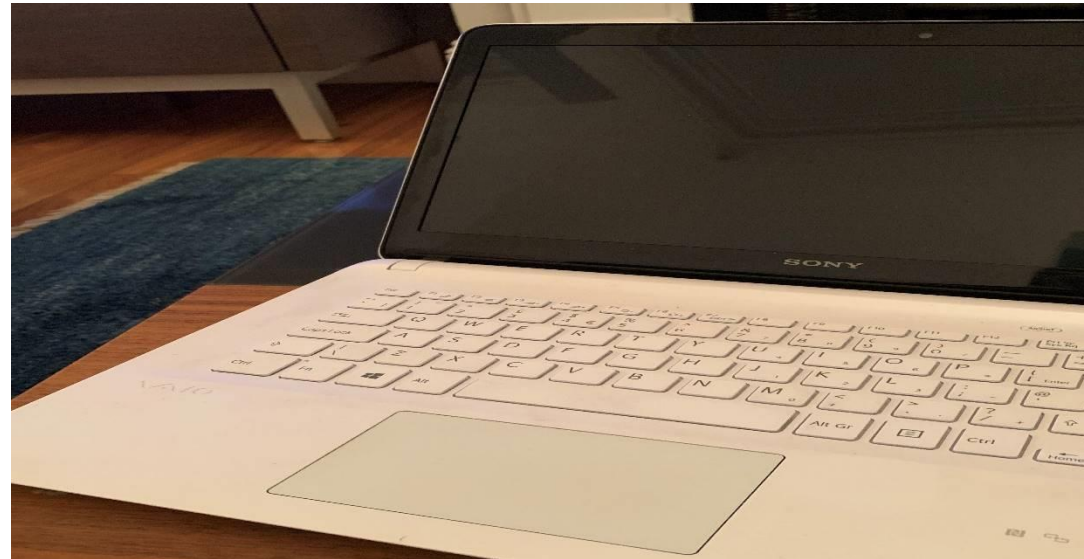
*“In modern English usage, when a document is required to be “signed by” someone, that means that he must write his name with his own hand upon it.... If a man cannot write his own name, then he can sign the document by making his mark, which is usually the sign of a cross; but in that case, he must write the mark himself, and not use a typewriter, or rubber stamp, or even a seal”.*

(per Denning LJ in dissent)



## Law Commission 2019 - Statement of the Law

An electronic signature is capable 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.



# Neocleous v Rees [2019]



## The email footers

...

*Many thanks*

**David Tear**

**Solicitor and Director**

**For and on behalf of AWB**

**Charlesworth Solicitors.**

**[There followed contact details]**

...

*Thank you for your email and I  
confirm my agreement with its  
contents.*

*Kind regards*

*Daniel*

**Daniel Wise – Associate**

**Dispute Resolution for and on  
behalf of Slater Heelis LLP**

**[There followed contact details]**

## Section 2 of the 1989 Act

(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 of the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.

...

(3) The documents 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.”

## What *Neocleous* decides

- The test to be applied is that identified by the Law Commission namely **whether the name was applied with authenticating intent**
- The inclusion of the footer to Mr. Tear's email was applied with authenticating intent and it did amount to a signature for the purposes of section 2 of the 1989 Act



## What lessons can we learn?

- Potentially a useful decision for busy litigators wanting to conclude binding agreements with minimal formality
- Increased risk of inadvertent contract making
- Need to keep abreast of technological advances - What is a valid signature will change over time as Law tech advances
- Just because one can execute property documents electronically does not mean one necessarily should ...

## What questions remain unanswered?

- What is the test for demonstrating authenticating intent?
- Does/ should “a signature” have a single meaning regardless of context?
- Will the appellate courts adopt the Law Commission’s Statement of Law/ follow the decision in *Neocleous*?
- Should the law require digital signatures for property transactions?

# The elephant in the room? Email chains as a single document

*“Section 2(3) requires also that the document incorporating the terms be signed by or on behalf of each party. The liquidator accepts that Miss Gillis’ email to Mrs. Ireland and Mrs. Ireland’s reply constitutes a single document for these purposes. In my view that is right where, as here, the second email is sent as a reply and so creates a string, as opposed to being simply a new email referring to an earlier email. It is the electronic equivalent of a hard copy letter signed by the sender being itself signed by the addressee.”*

(Per David Richards J)



# Deeds – Law Commission recommendations

- Industry working group to give best practice guidance on electronic execution of document and deeds
- Government should consider using section 8 of the ECA 2000 to allow for video witnessing after industry working group has reported
- Law Commission disagrees with the Land Registry's view that a single comprehensive and consistent system dealing with the electronic execution of deeds would be the preferable approach
- Law Commission should be asked to carry out a review of the law of deeds, to consider whether the concept remains fit for purpose