

“No more waiting for the ink to dry”

Electronic Signatures in Property Transactions

by

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Law Commission No 386: Electronic execution of documents

1. On 3 September 2019, the Law Commission published its report entitled *“Electronic execution of documents”* (Law Com No 386). It is a report that is of interest to all lawyers, but is of particular interest to property lawyers, given the extent to which formality requirements apply in the context of property transactions.
2. The background to the Law Commission’s project is explained in the introduction to its 2018 Consultation Paper (CP 237), which preceded the report:

“The law relating to signatures and other formal requirements has a history spanning centuries. As far back as 1677, the Statute of Frauds required documents to be in writing and signed. It is still in force today. But the documents executed in today’s world are no longer the same as those used over 400 years ago. Individuals, consumers and businesses demand modern, convenient methods for entering into binding transactions. Technological documents have changed the ways in which these transactions are made and will continue to do so at an ever-more-rapid pace.

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.”

3. In the glossary to the Law Commission’s report, references to words such as *“deed”*, *“escrow”* and *“delivery”* sit alongside more modern concepts, such as *“asymmetric cryptography”*, *“signing platform”* and *“public key infrastructure”*, with which we will all have to become increasingly familiar. As the Law Commission says, there is currently increased focus on the electronic execution of transactions due to interest in the use of blockchain and automated *“smart”* contracts to execute contracts. The law needs to keep up and be capable of accommodating technological developments.

4. Back in 1954, in his dissenting judgment in *Goodman v J Eban Ltd.* [1954] 1 QB 550 Denning LJ said that:

“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.”

5. However, even then, Denning LJ was in the minority. The majority (Evershed MR and Romer LJ) held that it was sufficient, in order to “sign” a bill of costs under s.62 of the Solicitors Act 1932, for the solicitor to apply his signature by way of a stamp which imprinted a copy of his signature on it. Denning LJ’s objection to the use of a stamp, as opposed to a “wet ink signature”, referenced concern as to the reliability of a stamp in satisfying both the evidential and cautionary objects of the requirement for a signature:

“The virtue of a signature lies in the fact that no two persons write exactly alike, and so it carries on the face of it a guarantee that the person who signs has given his personal attention to the document. A rubber stamp carries with it no such guarantee because it can be affixed by anyone. The affixing of it depends on the internal office arrangements with which the recipient has nothing to do. This is such common knowledge that a “rubber stamp” is contemptuously used to denote the thoughtless impress of an automation, in contrast to the reasoned attention of a sensible person.”

6. The imposition of formality requirements in respect of certain transactions fulfils important evidential, cautionary and labelling aims. The requirement for a signature promotes an evidential aim, but only so far as the signature is not a forgery. Even if the signature is “real”, it may have no legal effect if procured by fraud, undue influence or duress or in the event that the signatory lacks capacity. The need for a signature also fulfils a cautionary role, in seeking to ensure that the maker does not enter into a transaction without realising what she is doing and as such guards, to some degree at least, against thoughtless acts that may have binding and serious consequences. Lastly, we must not forget the importance of the labelling aim in property transactions, since contracts can give rise to estates and other interests in land. A person acquiring an interest in land will want to know, to a high degree of certainty, whether the seller has title or has previously bound itself by an earlier disposition.
7. So has the law kept up with the need, identified by Government, to ensure that organisations and individuals can use electronic signatures with confidence? In the Law Commission’s view the law does accommodate the use of electronic signatures, but is not contained in a single source, making the law inaccessible to many. It recognises that a definitive legislative statement might be beneficial to quell any doubts that might exist as to the validity of an electronic signature, but says that such statement would need to be drafted so as to have broad reach, beyond the remit of the Law Commission’s project (which was restricted to documents used by commercial parties and consumers).
8. As a consequence the Law Commission’s report includes a short, referenced, high-level Statement of the Law, by way of a series of eight propositions, at pages 2-3. The Consultation

Paper is a very useful additional resource, since it contains a more detailed account of the relevant statutory materials and case law.

9. Paragraph 1 of the Law Commission's Statement of the Law confirms that 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.
10. There are a number of other useful propositions of law set out at paragraphs 2 to 8 of the Statement of the Law as follows (in summary):
 - (i) Additional formality requirements may be required by legislation or under a contract or private law instrument (such as the need for attestation or hand writing) (para. 2);
 - (ii) An electronic signature is admissible in evidence in legal proceedings to prove or disprove the identity of a signatory and or her intention to authenticate the document (para. 3);
 - (iii) Save where the contrary is expressly provided for in legislation, case law or contractual requirements, the common law does not prescribe any particular form of signature and in determining whether the method of signature adopted demonstrates an authenticating intention the courts adopt an objective approach considering all of the surrounding circumstances (para. 4);
 - (iv) Methods permitted by the courts include signing with an "X", signing with initials of a stamp of a handwritten signature, printing of a name, signing with a mark or by the inclusion of an unambiguous description (para.5);
 - (v) Electronic equivalents have been and are likely to be recognised as legally valid, including a name typed at the bottom of an email, clicking an "I accept" tick box on a website, and the header of a SWIFT message (paras. 6 and 7); and
 - (vi) 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 (para. 8).
11. The Statement of the Law is of broad application and applies both where there is a statutory requirement for a signature and where there is not. It covers the need for a signature in deeds and contracts for the sale or other dispositions of interests in land under s.2 of the Law of Property (Miscellaneous) Provisions Act 1989 ("the 1989 Act"). However, the Statement does not cover registerable dispositions under the Land Registration Act 2002 ("LRA 2002"), on the basis that nothing in the Law Commission's project was intended to disrupt the work being undertaken by the Land Registry in relation to electronic conveyancing under s.91 of the LRA 2002. It also has no application to wills.
12. The Law Commission's report, at paras. 2.25 to 2.37, makes the critical point that it is important to distinguish between the legal validity of an electronic signature and its evidential weight. It is for the parties to adopt a method of executing documents that they consider will give adequate protection in the event of future dispute. In other words, to misquote George Orwell, "*all signatures are equal, but some are more equal than others*". Parties will also need to

consider the requirements of any public registry in respect of documents which must or may be registered (such as the Land Registry or Companies House).

13. The Law Commission recognises that it is not only legal uncertainty which impedes the use of electronic signatures for some types of transactions; concerns as to the reliability and security of electronic execution can also do so. To that end the Law Commission has recommended that an industry working group should be established and convened by Government to consider practical and technical issues associated with the electronic execution of documents and to produce best practice guidance. The industry working group should have an interdisciplinary membership, including members who represent the interests of individuals (including vulnerable individuals), members who have an insight into cross-border transactions, lawyers, technology experts, insurers and businesses.

Neocleous v Rees [2019] EWHC 2462 (Ch.)

14. Just two weeks after the Law Commission published its report, HHJ Pearce, sitting in the Manchester County Court, delivered judgment in *Neocleous v Rees* [2019] EWHC 2462 (Ch)¹, holding that an automatically generated email footer constituted a valid signature for the purposes of section 2 of the 1989 Act, with the consequence that a section 2 compliant contract for the sale of land was held to arise by an email exchange between solicitors acting for parties in the course of litigation.
15. The case was argued before the Law Commission issued its report, although the contents of the Consultation Paper, which referenced the Law Commission’s provisional view that an electronic signature was capable of meeting a statutory requirement for a signature if an authenticating intention could be demonstrated, was referred to by the judge in the course of his judgment. It is an interesting example of how views expressed by the Law Commission can actually influence the outcome of a case.

The facts

16. *Neocleous v Rees* concerned the compromise of a paradigm right of way dispute. The underlying issue between the parties was as to whether the defendant, Ms. Rees, enjoyed a right of way over Mr. and Mrs. Neocleous’ land in order to reach a small plot with an adjacent jetty on Lake Windermere (“the Landing Plot”) which formed part of her registered title. The right of way dispute was proceeding in the First-tier Tribunal and both parties were represented by solicitors. A final hearing had been listed in late March 2018. In the lead up to the tribunal hearing, settlement discussions had taken place between the parties’ solicitors which had raised the possibility of the dispute being resolved by Mr. and Mrs. Neocleous acquiring the Landing Plot from Ms. Rees. As the hearing approached, discussions become more focussed,

¹ It is not clear why the case has been given a High Court citation as the judgment appears to have been handed down by the judge sitting as a judge in the county court at Manchester (not as a Deputy High Court judge in the Business and Property Court)

not least because Mr. and Mrs. Neocleous' solicitor was coming under pressure to agree counsel's brief for the hearing. Terms of settlement were agreed on the telephone by solicitors (with their respective clients' authority) on a Friday afternoon. Ms. Rees' solicitor, Mr. Tear, said that he would send an email to confirm the terms of settlement and Mr. and Mrs. Neocleous' solicitor, Mr. Wise, agreed that he would confirm the terms of settlement in writing the following Monday when he returned to his office.

17. Mr. Tear (for Ms. Rees), then sent an email to Mr. Wise (for Mr. and Mrs. Neocleous), as he had said he would, in which he set out the terms of settlement which had been agreed that afternoon, which included a sale of the Landing Plot to Mr. and Mrs. Neocleous for £175,000 and the release of the right of way. Mr. Tear asked Mr. Wise for an acknowledgement of receipt to confirm agreement to the terms set out in the email, in order that the tribunal could be advised. He signed off his email as follows:

"Many thanks

David Tear
Solicitor and Director
For and on behalf of AWB Charlesworth Solicitors.
[There followed contact details]"

18. On the following Monday, Mr. Wise responded to Mr. Tear's email in the following terms:

"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]"

19. In each case the words highlighted in bold were generated automatically by Microsoft Outlook as a result of the application of settings activated by each firm of solicitors. Microsoft Outlook describes this as "*a signature*" but the parties and court referred to it as a "*footer*"².
20. Ms. Rees subsequently sought to resile from this agreement and have the tribunal proceedings re-listed, on the alleged basis that the above email exchange did not comply with section 2 of the 1989 Act. Mr. and Mrs. Neocleous brought proceedings against Ms. Rees seeking to enforce the settlement agreement by specific performance. By the time of trial the only issue remaining between the parties was whether the signature requirement of section 2(3) had been met. It appears to have been conceded that the two emails amounted to a "single document" for the purpose of section 2 - certainly no argument to the contrary was run by Ms. Rees' counsel.

² Mr. Tear accepted in cross examination that the use of the words "*Many thanks*" above the footer was giving his authority to the email and that he had his client's authority to settle on the terms set out in the email.

21. By way of recap, section 2(1) of the 1989 Act provides, so as material:

“(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 signed³ by or on behalf of each party to the contract.”

22. The issue for decision was whether the “automatic” generation of Mr. Tear’s name, occupation, role and contact details at the foot of his email was sufficient to render the document “signed” by him on behalf of Ms. Rees.

23. In *Goodman v J Eban Ltd.*, Evershed MR had left open the question whether a typed or printed representation of the solicitor’s name or firm would suffice. However, there have subsequently been a number of cases in which the courts have accepted that a typed name (including merely a given name) at the bottom of an email amounts to a sufficient “signature” for statutory purposes: *J Pereira Fernandes SA v Mehta* [2016] 1 WLR 1543; *Golden Ocean Group Ltd v Salgocar Mining Industries Ltd* [2012] 1 WLR 3674 (s.4 Statute of Frauds 1677); *Re Green v Ireland* [2012] 1 BCLC 297 (s. 2 of the 1989 Act). Mr. and Mrs. Neocleous’ argument was that the footer to Mr. Tear’s email was capable of rendering the document “signed” for the purpose of s.2 of the 1989 Act as his name had been included to authenticate the document.

24. Ms. Rees’ counsel submitted that a more exacting standard applied under section 2 of the 1989 Act than under section 4 of the Statute of Frauds, citing various dicta to that effect in an earlier decision of *Firstpost Homes Ltd v Johnson* [1995] 1 WLR 1567, in which it was held that the inclusion of the proposed buyer’s name as addressee of a letter typed up by him for the proposed seller to sign confirming her agreement to the said sale, was not a signature for the purposes of section 2⁴. It was argued that the question of whether the contract was signed should be capable of determination by looking at the document without the need to consider matters extrinsic to the document, such as the subjective intention of the parties. The test, it was said, was whether an “ordinary man” would have understood the document to have been signed and that in modern English usage, signing a document requires the writing of one’s name or mark in one’s own hand, albeit that the writing may be inserted electronically, e.g. by a hand written signature being scanned and the digital document thereby produced being deliberately inserted in the document. An ordinary person would not consider the inclusion of

³ Emphasis added

⁴ Parts of Denning LJ’s dissent in *Goodman* to the effect that a signature must be handwritten were cited by Peter Gibson LJ at 1575G and as a result it has been said that *Firstpost* is authority for the proposition that a wet ink signature is required by section 2 of the 1989 Act. However, the majority in *Goodman* did not agree with Denning LJ’s dissenting opinion that the signatory must write his name with his own hand on the document. Evershed MR actually held that what was required was the application of a mark in such a way as to demonstrate an authenticating intention, such that the use of a stamp there was sufficient. There is considerable force in what the judge held in *Neocleous*, namely that the ratio of *Firstpost* is confined by reference to its facts (and potentially by reference to then prevailing attitudes). There is the additional point, however, that so far as Peter Gibson LJ was treating *Goodman* as authority for the proposition that only a wet ink signature applied by hand would do, he was wrong, since the dissenting statement of Denning LJ was actually contrary to the decision of the majority (including Evershed MR who expressly left open the question of whether typing a name would suffice).

Mr. Tear’s signature in printed type at the foot of an email as a signature, particularly where it had been automatically generated.

The decision

25. The judge held, contrary to those submissions, that the inclusion of the footer to Mr. Tear’s email did amount to a signature for the purposes of section 2 of the 1989 Act and that therefore the compromise agreement was valid and enforceable.
26. In coming to that conclusion, the judge placed reliance on a number of different authorities/arguments as follows:
 - (i) He accepted that *Firstpost* was binding on him and, as such, a court dealing with the formality requirements of section 2 of the 1989 Act should treat with caution authorities under earlier statutes;
 - (ii) However, *Firstpost* was not authority for the proposition that the word “signature” has any particular meaning beyond that which an ordinary person would understand it to bear. Its ratio went no further than a finding that the inclusion of the buyer’s name as addressee in a letter drafted to be signed by the seller was not a signature at that time;
 - (iii) The understanding of the ordinary person would have been different in both 1954 and in 1995. In modern usage, the inclusion of a name generated by an electronic signature function would be capable of amounting to a “signature”;
 - (iv) The sounder guide was the test identified in *Metha v J Pereira Fernandes* and adopted by the Law Commission in its Consultation Paper, namely “*whether the name was applied with authenticating intent*”⁵;
 - (v) The firm’s policy or decision to rule that such a footer be added to every email sent by its members involved a conscious action at some stage of a person to enter the relevant information and settings in Microsoft Outlook. Mr. Tear knew that his name was added to the email and his inclusion of the words “Many thanks” at the end of the email strongly suggested he was relying on the automatic footer to sign off his name. It was potentially misleading to describe the inclusion of the footer as “automatic”;
 - (vi) It was difficult to distinguish between a name added manually and one added pursuant to the settings in an electronic device and the recipient would have no way of distinguishing between the two. Looked at objectively, the presence of the name indicated a clear intention to associate oneself with the email – to authenticate or sign it; and
 - (vii) Whilst there was good reason to avoid an interpretation of what is sufficient to render a document “signed” for the purposes of section 2 where that interpretation might

⁵ The provisional view had been expressed by the Law Commission in its Consultation Paper that “*the combination of EU law, statute and case law means that, under the current law, an electronic signature is capable of meeting a statutory requirement for a signature if an authenticating intention can be demonstrated*”. This provisional conclusion has subsequently been confirmed in the Law Commission’s report. The judge also referred to the definitions of “electronic signatures” in the E-Signatures Directive 1999, art. 2(1), the Electronic Communications Act 2002, s.7 and the Electronic Identification, Authentication and Trust Services (eIDAS) Regulation 2014, art. 3(10), all of which emphasised not the form of the signature (e.g. facsimile of handwriting or typed form) but its purpose, namely to authenticate or to sign.

have the effect of introducing uncertainty and/ or the need for extrinsic evidence to prove the necessary intent, no such difficulties arose— the inclusion of the footer was the subject of a conscious decision by the firm, the sender knew his name was being applied at the footer (and there was no reason for the recipient to think otherwise), the use of the words “many thanks” showed an intention to connect the name with the contents of the email, and the presence of the name and contact details was in the conventional style of a signature, at the end of the document.

What lessons can we learn?

27. In one sense the decision is an imminently sensible one that will be welcomed by busy litigators conducting settlement negotiations at the door of the court insofar as it confirms (albeit in a non-binding county court decision) that a valid compromise can be effected by a simple exchange of emails. Such conclusion will prevent parties subsequently renegeing from agreements they have voluntarily entered into and which have been clearly documented in writing. As the judge said, there was an unattractive aspect to the position taken by Ms. Rees. However, it is often said that hard cases make bad law: is the decision in *Neocleous* a possible example of this?
28. The insertion of a signature by way by use of a general setting in a firm’s email management software is potentially vulnerable to the criticism that it is merely the “*thoughtless impress of an automation, in contrast to the reasoned attention of a sensible person*”, to quote Denning LJ in *Goodman*. There must surely be a considerable risk that parties might enter into section 2 compliant contracts inadvertently without the requirement for a signature playing any effective cautionary role. There is also potential for a consequential increase in the amount of litigation as to whether contracts for the sale or other dispositions of interests in land have been validly made and if so as to their terms, which itself is likely to lead to greater uncertainty in the wider market.
29. Solicitors and clients will need to be conscious of the risk that they might be signing a binding contract by sending an email, particularly where responding to an incoming email. It no longer likely to be enough to head email correspondence as being “*Subject to Contract*” in order to avoid the risk of such inadvertent contract making. In litigation the phrase “*Subject to Tomlin/ Consent Order*” might be more appropriate to protect against inadvertent compromises and to ensure that any compromise agreement can only be concluded by a formal consent order drawn up subsequently. In transactions, lawyers will need to find new expressions but perhaps “*Subject to Contract Executed by Wet Ink Signature*” will become the new norm. Avoiding the use of email chains (by generating a new email for each piece of email correspondence) would also avoid the risk of inadvertent contract making.
30. It is important to appreciate that the answer to the question what amounts to a valid signature will change over time, as society changes. The requirement for a signature has been held to be satisfied by a variety of means including the use of a stamp, the marking with a cross, the use of a given name, initials or even a pseudonym (whether typed or hand written). As technology develops, other means of execution will become available and the law will be able to respond accordingly. For example, it has been held that the pressing of an “I accept” button on a screen

on line was held to be a signature for the purposes of the consumer credit legislation: see *Bassano v Toft* [2014] EWHC 377 (QB). As lawyers we need to be alive to and keep up with technological changes in this respect. The Law Commission's report is "technology neutral". It does not recommend any form of execution over another.

31. In some other cases the inclusion of a name or other identifying mark on a document has been treated as not being a "signature" due to the lack of sufficient "authenticating intention". For example, the automatic inclusion of an email address in the header of an email was held to be insufficient in *Metha v J Pereira Fernandes* [2006] EWHC 813 (Ch.) and so was the inclusion of the buyer's name as addressee of a letter drafted for the seller to sign confirming her agreement to the sale of her land in *Firstpost*. The decision in *Metha* may itself already be out of date, given the acceptance of an electronically generated footer as a signature in *Neocleous*. If one can authenticate an email by an electronically generated signature by way of footer, why can one not equally do so by the inclusion of a similar signature mark (i.e. an email address) electronically inserted in the heading. In both cases the email is "marked" as being one sent by the sender, who is identified in it.
32. Just because one can execute property documents electronically does not mean one necessarily should. This is a point made by the Law Commission in its report. The onus is on the parties to choose (and their lawyers to advise upon) the most appropriate method of execution in any given case, taking into account security and other risks. As lawyers we will need to become familiar with the pros and cons of various forms of technology that could be used in order to effect the necessary signing of documents. The risk of fraud will clearly be a key consideration. The Law Commission has recognised the need for guidance to be made available in this respect and proposes the setting up of an industry working party to consider the practical ramifications of electronic execution. There is a useful note at Appendix 2 to the Law Commission's report that explains the various forms of technology currently available.
33. Further, the editors of *Emmet on Title* continue to express the opinion that conveyancers should be as cautious as practicable and prefer in practice "wet ink" signatures for contracts for the sale of land. They reference *Firstpost* and *Butts Park Ventures (Coventry) Ltd v Bryant Homes Central Ltd* [2004] BCC 207 as evidencing judicial rather than practitioner attitudes to signatures needing to be real rather than virtual⁶. Neither the Law Commission's Statement of Law nor *Neocleous* constitutes binding authority, although it seems likely that the reasoning within them will be followed/ applied by the higher courts. There is of course a potential danger of placing too much weight on these attempted expositions of the law, in the absence of either a decision by the appellate courts or the introduction of a definitive legislative statement.

What questions remain unanswered?

⁶ In *Ramsay v Love* [2015] EWHC 65 (Ch.), which concerned the application of Gordon Ramsay's signature to a lease as guarantor by the application of a signature writing machine operated by his father in law, Morgan J said at [7] whilst there were authorities that suggested that a document is only "signed" by an executing party when he signs it with a pen in his own hand, those statements were not designed to distinguish between signing by the use of a pen held in the executing party's hand, as distinct from the use of a signature writing machine.

34. One question that the decision in *Neocleous* raises is whether the necessary authenticating intention is required to be demonstrated objectively or subjectively (or by a mixed test incorporating both elements). The Law Commission's Statement of the Law says that authenticating intention is to be assessed objectively, and this seems right in principle. The policy of the 1989 Act would best be served by a wholly objective test. There is also reference to an objective approach in *Neocleous* at para. [55]. However, the judge also heard evidence as to Mr. Tear's subjective intentions, including as to the use of the words "Many thanks" to authenticate his email. It is unclear to what extent that evidence was taken into account by the judge in coming to his decision. If subjective intention is relevant, then that raises further questions: to what extent is such evidence relevant and what evidence do the parties need to call to prove (or disprove) authenticating intention? Given the need for certainty in property transactions the introduction of a subjective test would be a retrograde step.
35. It is also unclear, following *Neocleous*, to what extent the law relating to what amounts to a signature under section 2 of the 1989 Act is any different from that applied in other contexts. On the one hand, the Court of Appeal in *Firstpost* clearly thought that the policy behind section 2 justified a stricter approach than had been followed in relation to both its predecessor, section 40 of the LPA 1925, and section 4 of the Statute of Frauds 1677, and the judge in *Neocleous* expressed himself bound by that decision. On the other hand, the Law Commission has advocated for a single universal test which in depends on there being a sufficient "authenticating intention" and the judge in *Neocleous* has applied that test. It does seem sensible for the law to proceed on the basis that references to "a signature" in legislation will have a universal meaning and this is certainly the way things are going. In my view it will be difficult, if not impossible, to row back from that position to content that something more exacting is required in the context of section 2.
36. The Law Commission recognises that in some contexts the law might apply a higher standard or impose additional formalities, such as requiring a handwritten signature or attestation of a signature but there is no clear authority prescribing additional requirements for section 2 purposes. In future, legislation might conceivably require the adoption of a digital signature for certain purposes, including the formation of property contracts (namely an electronic signature produced using asymmetric or public key cryptography). Land Registration is an area in which a high degree of security and reliability will be required in terms of execution standards, once electronic conveyancing becomes a reality. At present section 2 of the 1989 Act simply requires a signature which does not really require very much, as this case demonstrates. Quite possibly, in future, there might be calls upon Parliament to impose stricter requirements if it thought that the necessary evidential and or cautionary objects were not being fulfilled by the existing law.

The elephant in the room?

37. One aspect of the *Neocleous* case that did not receive any substantive consideration was the apparent concession that a string of emails could amount to a “single document” for the purposes of section 2 of the 1989 Act. I doubt very much that the draftsman of the 1989 Act would have intended that a contract for the sale of land could be concluded by an exchange of correspondence by email – email would have been in its infancy then and certainly an exchange of traditional written correspondence in the same terms would not have had that effect.
38. Section 2 of the 1989 Act does not define what it means by a “document”. In *Firstpost*, Balcombe LJ said “*Like the proverbial elephant, a document may be difficult to define but it is easy to recognise*”. However, it is extremely doubtful that Balcombe LJ would have recognised a course of correspondence by email as amounting to a “single document”; perhaps identifying the elephant is not so easy after all.
39. The idea that a chain of emails can amount to a single document appears to be based on certain obiter dicta⁷ of David Richards J in *Green v Ireland* at [45] as follows:
- “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.”*
40. It was accepted by Scott VC at first instance in *Bircham Co Nominees No 2 Ltd v Worrell Holdings Ltd* (2001) 82 P & CR 34 that a facsimile of an offer document which had been signed by or on behalf of an offeror would, if signed by or on behalf of the offeree, be sufficient for the purposes of section 2(3) of the 1989 Act and so it seems as though it is not a valid objection per se to say that the offeror has simply signed an offer, as opposed to the contract formed on its subsequent acceptance. It may be that in some cases an exchange of emails can be legitimately treated as nothing more than the electronic equivalent of the second party printing out the first party’s email, signing it and returning it. *Neocleous* itself could be categorised as just such a case. However, even there are some cases in which an email chain will suffice, is it right to say that all email chains will do so?
41. The difficulty with this “chain of emails” analysis is that it ignores the fact that the parties have not signed the same document, particularly if the return email contains additional text, as it did in the *Green v Ireland* case itself, where there was in fact no concluded contract evidenced by the emails under consideration. The party sending the first email has signed its email but it has not signed the document containing the reply which is yet to come. Even in the *Neocleous* case, Mr. Wise’s email contained written confirmation that he agreed with the contents of Mr. Tear’s earlier email. Without that confirmation having been made, it might be said Mr. Tear had not signed the same document as Mr. Wise.

⁷ It was accepted by the judge at [45] that the emails in question did not constitute or contain a contract at all and in any event did not incorporate all the terms agreed by the parties.

42. The point was made in *Orton v Collins* [2007] EWHC 803 (Ch) by Peter Prescott QC (sitting as a Deputy Judge). That was an interesting case concerning the question of whether a compromise effected under Part 36 of the Civil Procedure Rules 1998 needed to comply with section 2 or not. It was held that it did not, as Part 36 imposes a *sui generis* regime, such that it is possible for a binding agreement to be made by the acceptance of a Part 36 offer in accordance with the terms of the CPR. However, at [9] the judge expressed doubt as to whether it would be sufficient (assuming the 1989 Act did apply to the regime under Part 36) were the offeree to print off the Part 36 offer, and to include the words “I accept” before signing and sending it back to the offeror on the following basis:

“The document that contains the Part 36 offer does not contain the words “I accept”. Those words are added afterwards by the acceptor. Therefore the document that was signed by the offeror is not the same document as was signed by the acceptor. The latter is an amended version, and means to be. Furthermore, it may have omitted one of the essential terms, namely, the effective date of the contract. The acceptance is not effective until it is received by the offeror”.

43. *Bircham Co Nominees No 2 Ltd v Worrell Holdings Ltd* and *Orton v Collins* were not referred to in *Green v Ireland* or *Neocleous v Rees*, and in both of those later cases the point was either conceded or not in issue. There has accordingly been no proper consideration by the courts as to the correctness of this proposition or as to whether such interpretation would contravene the policy of the 1989 Act of ensuring that “*the questions of whether there was a contract and if so what the terms of that contract were*” should be “*readily ascertained by looking at the single document said to constitute the contract*”. It would be unfortunate if such an important proposition were simply accepted as a truism without being properly tested by the courts. There is a danger that such interpretation would run a coach and horses through the policy of the 1989 Act, certainly so far as it was not contained. The underlying policy behind the 1989 Act is arguably not threatened in the case of a single exchange of emails confirming the terms of an agreement, as in *Neocleous*. But matters are often not so straightforward. Litigants might be encouraged to trawl through realms of email chains in order to find one that might be said to contain enough material to comply with section 2? But what if there are “rival” email chains”? And why should this material suffice when exactly the same correspondence, if sent by traditional letter, would not? Is it really coherent or principled to find that a run of email correspondence can satisfy s.2 if it takes the form of a single document consisting of an unbroken chain of emails but not if the chain is broken at any point along its length? All interesting questions for another day perhaps.

Deeds

44. The Law Commission also considered the execution of deeds more generally. Having concluded that the current law requires the physical presence of witnesses who attest deeds, the Law Commission recommends that Government should consider using section 8 of the Electronic Communications Act 2000 to allow for video witnessing, after consideration of the practical, technical issues by the industry working group. Given that recommendation, the Law

Commission did not make any further recommendation as to how attestation should be achieved.

45. As to the execution of deeds more generally, the Law Commission disagreed 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. The Law Commission took the view, in light of consultees' responses, that it should not mandate any particular type of technology.
46. The Law Commission has recommended that the Government should ask it to carry out a review of the law of deeds, to consider whether the concept remains fit for purpose. It recommends that a future review of the law of deeds should include:
- (i) Consideration of whether the witnessing and attestation requirements of deeds executed electronically should be replaced with an approach based on a specific type of technology, such as Public Key Infrastructure;
 - (ii) Consideration of the potential for the introduction of a concept of acknowledgement, for both paper and electronic deeds;
 - (iii) An examination of the statutory requirement for delivery, including a consideration of whether it should be amended or removed, for both paper and electronic deeds;
 - (iv) Further consideration of whether the implications of the decision in *Mercury* should be codified, for both paper and electronic deeds;
 - (v) Consideration of whether there should be different requirements for deeds executed in a commercial context and those executed by individuals; and
 - (vi) Consideration of whether deeds should be abolished or limited to certain types of documents.
47. So what next? The likelihood is that the Government will now establish an industry group to consider the practical and technical issues associated with electronic execution of documents in line with the Law Commission's recommendations. Such a review will provide useful guidance on best practice for lawyers and clients. The Law Commission is likely to review the law of deeds more generally in future. In the meantime, the Government might potentially introduce legislation to confirm the effectiveness of an electronic signature and or to allow for attestation of deeds by video-link. This is certainly not the last word on the subject.

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14 October 2019

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