



# Electronic Signatures in the Context of the Coronavirus Pandemic



## Introduction

The "Stay Home" instruction given by the UK Government to reduce the spread of the coronavirus, whilst entirely necessary, presents significant challenges for professional firms and others engaged in the construction arena.

We have received queries from broker clients on behalf of policyholders engaged in the construction industry as to whether they can validly execute documents with electronic signatures, that is Appointments, Building Contracts, Sub-Contracts, Collateral Warranties and Novation Agreements, which are often required to be deeds.

**Therefore, we have prepared a high-level note on the subject, which includes some practical illustrations which hopefully may prove useful.**

## Can an electronic signature be used to validly execute a legal document?

In short, the answer, in our view, is "yes" which will no doubt be welcome given the current situation. That is also the case in respect of deeds which are particularly important given their extensive use in the construction industry. This answer can be derived from different sources. For example:

- a. The UK courts have stated that electronic signatures will be valid. For example, in **J Pereira Fernandes v Mehta [2006] EWHC 813 (Ch)** His Honour Judge Pelling QC stated:
- "I have no doubt that if a party creates and sends an electronically created document then he will be treated as having signed it to the same extent that he would in law be treated as having signed a hard copy of the same document. The fact that the document is created electronically as opposed to as a hard copy can make no difference."*

Then in **Lindsay v O'Loughnan [2010] EWHC 529 (QB)** Flaux J considered the decision in the **J Pereira Fernandes** case and stated in relation to agreements by email:

*"It seems that it is not enough that the email comes from a person's email address without his having "signed" it in the sense of either including an electronic signature or concluding words such as "regards" accompanied by the typed name of the sender of the email"*

Here the court regarded a mere email as being insufficient to amount to a signature but that an electronic signature or typed name in an email would be sufficient.

- b. The eIDAS Regulations<sup>1</sup>, which are European Regulations made in 2014, provide that electronic signatures are valid if certain criteria are met. Of course, Britain has now left the European Union, but the Regulations continue to apply as they are subsumed within domestic law by section 3(1) of the European Union (Withdrawal) Act 2018. Specifically, article 25(1) of the Regulations provides that an "electronic signature" (even if it does not amount to a "qualified electronic signature") cannot be denied legal effect solely because of its electronic nature. This is consistent with the UK case law. Article 25(2) goes on to provide that a "qualified electronic signature...shall have the equivalent

<sup>1</sup> REGULATION (EU) No 910/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC

*legal effect of a handwritten signature*". What constitutes a "*qualified electronic signature*" is defined in the Regulations. It is an electronic signature which by technical means satisfies various requirements including in relation to confidentiality. One example of a technical requirement is that the data used for the creation of the signature can only occur once. There are other requirements but they are complex and beyond the scope of this note.

- c. There are other relevant sources of legislation that concern electronic signatures such as the Electronic Communications Act 2000 albeit that to a large part now supplements the eIDAS Regulations.
- d. On 4 September 2019, the Law Commission prepared a report concluding that electronic signatures were a valid way of executing legal documents including deeds.

Overall, we consider that electronic signatures which are used on an everyday basis are sufficient to validly execute legal documents including deeds.

## The need to comply with other formalities

Whilst electronic signatures are a valid way to legally execute contractual documents such as Appointments, Building Contracts and Collateral Warranties etcetera, it is important that any other relevant formalities are complied with. Policyholders will generally trade as either a limited company, an LLP, a sole trader or a partnership. Given the extensive use of deeds in the construction industry, we set out below some examples and some potential practical illustrations as to how the requirements for execution of deeds by signature may be complied with by policyholders in light of the "*Stay Home*" instruction.

### Companies & LLPs

Section 46 of the Companies Act 2006 ("the Act"), provides that a document is validly executed as a deed by a company incorporated under that Act "*if it is duly executed by the company and it is delivered as deed*". Regulation 4 of The Limited Liability Partnerships (Application of Companies, Act 2006) Regulations 2009 amended the Companies Act 2006 so that sections 44 – 47 of the Act also applies to LLPs. As to the requirement that the document be "*duly executed*" by the company (incorporated under the 2006 Act) or the LLP, section 44 of that Act provides that a document may be validly executed by the company or the LLP:

- a. By "*two authorised signatories*", in the case of a company, and by "*two members*", in the case of an LLP. We suggest this could be complied with by each of the two authorised signatures of the company or two members of the LLP signing a deed using an electronic signature in counterpart or one adding their electronic signature to the document after the first has already done so. In our view, the latter option would be most desirable so there is one complete signed document.
- b. Alternatively, by a director of the company or a member of the LLP and in either case "*in the presence of a witness who attests the signature*".

The witness is required to be physically present and witness the electronic signature.

We do not consider it sufficient for the witness to witness the signature on a deed virtually by, say, Skype. Indeed recently, the First-Tier Tribunal Property Chamber took that approach in the case of **Man Ching Yuen v Landy Chet Kin Wong (Ref No. 2016/1089)**. In that case a transfer deed was witnessed by a solicitor via Skype. The deed was found to be invalidly executed because the solicitor was not physically present. That decision is not binding on the courts, but it is useful as an illustration of how courts and tribunals could deal with the issue.

Typically, it would be best if a witness was not a spouse or cohabitee. It is best practice if the witness is independent. However, there is no statutory restriction on the witness being a spouse or cohabitee. Indeed, given the Coronavirus Pandemic and the "Stay Home" instruction a spouse or cohabitee may well be the only option for a witness. Therefore, in relation to this option we believe the witness could be someone the director / member resided with (provided they are not a party to the deed) and that the witness' signature could be electronic. In our view, the witness should be 18 years of age or over.

We would suggest the safest way to execute deeds would be in accordance with (a) above as it avoids the need for a witness which complicates matters.

As to the requirement that the document be "*delivered as a deed*" delivery itself could be effected by the deed stating it is delivered when dated. That is particularly in relation to deeds executed on behalf of companies and LLPs in accordance with the Companies Act 2006 because section 46 (2) provides "*a document is presumed to be delivered upon its being executed, unless a contrary intention is proved*". In the event of a deed executed by counterpart, it is advisable from a practical purpose to circulate a complete copy of the deed with all signature pages to the all signatories.

### Sole Traders

Of most significance for sole traders is section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989. That provides that a document is validly executed as a deed by an individual if, and only if:

- a. it is signed by an individual with standing to sign the document in the presence of a witness who attests the signature; or
- b. it is signed by another at the direction of the individual with standing to sign the document in his/her presence and the presence of two witnesses who each attest the signature; and
- c. it is delivered as a deed.

Again, it would be best if the witness was independent. However, that is probably not possible given the need for them to be physically present and witness the signature. Again, there is no statutory provision stating the witness cannot be a spouse or cohabitee. Therefore, we consider the witness could be a spouse or cohabitee (provided they are not a party to the deed). We would suggest the witness should be 18 years of age or over.

### Partnerships

Generally, if a partnership is to execute a deed such as an Appointment it should be done so in accordance with the requirements of the partnership deed and witnessed. If the partnership deed is silent on the issue, then a deed such as an Appointment should be signed by all the partners with each signature being witnessed. Our comments on witnessing documents above apply.

## Further Information

Given the generality of the note it should not be treated as specific advice in relation to a particular matter as other considerations may apply. Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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