IN FOCUS

Electronic execution of documents: where have we got to, and where might we be heading?

By Joseph Steadman

Questions around whether documents have been validly executed crop up in many areas of legal practice, and the administration of pension schemes has been a fertile source of caselaw considering those questions.

A recurring theme in the cases has been whether a deed is required for the exercise of a particular power – such as a power of amendment – and, if so, whether it has been properly signed and witnessed.[1] The consequences of defective execution can be dire: tens or hundreds of millions of pounds-worth of additional liabilities might arise from a failed attempt to change the rate of revaluation, to reduce future accrual rates, or to equalise retirement ages so as to close the *Barber* window.

And when a pension scheme trustee comes to consider the potential recipients of death benefits, the validity of a member's will – or of one or more competing wills – may be of vital importance when it comes to determining who is in the class of discretionary beneficiaries and how the trustee wishes to exercise its powers to distribute benefits amongst them.

[1] By way of just three amongst many other examples: *HR Trustees v Wembley* [2011] EWHC 2974 (Ch), *Briggs v Gleeds* [2014] EWHC 1178 (Ch), *Safeway Ltd v Newton* [2017] EWCA Civ 1482.

Those questions have taken on a fresh dimension as technology continues to develop and working practices change. It is now much more common to transact important business by e-mail, to sign important documents using e-signatures, and – especially following the restrictions imposed in response to COVID-19 – to hold important meetings virtually by Zoom or Teams.

The law is, slowly, starting to catch up and to respond to those developments and changes. This short article considers a pair of recent cases – from outside the pensions context – which highlight the ways in which the law is responding flexibly to strict execution requirements, and then goes on to consider what more might be on the horizon in the coming years.

Electronic signature: *Hudson v Hathaway* [2022] EWCA Civ 1648

Since the turn of the millennium, the English courts have considered and affirmed the general validity of electronic signatures on numerous occasions. The possibility of signing electronically has become so uncontroversial that in 2019, the Law Commission felt able to begin its report on the electronic execution of documents with a "statement of the law" that:[2]

> *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*.

That is consistent with the common law's approach to signatures more generally: rather than prescribing a particular form or type of signature, the courts adopt an objective approach in order to determine whether the method of signature adopted demonstrates an "*authenticating intention*".

In the 19th and 20th century cases, for example, signing with an 'X' or with initials[3], using a stamp of a handwritten signature[4], or even signing with a description such as "Your loving mother"[5] were all held to satisfy signature requirements.

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[2] Law Com No 386 "Electronic execution of documents".

[3] *Jenkins v Gaisford & Thring* (1863) 3 Sw & Tr 93 (Wills Act 1837); *Phillimore v Barry* (1818) 1 Camp 513 (Statute of Frauds 1677); *Chichester v Cobb* (1866) 14 LT 433 (Wills Act 1837).

[4] *Goodman v J Eban LD* [1954] 1 QB 550 at 557 (Solicitors Act 1932 s.65(2)).

[5] *In re Cook* [1960] 1 All ER 689 (Wills Act 1837).

The 21st century cases – in keeping with that flexibility – have found statutory signature requirements to be satisfied by a name typed at the bottom of an email[6] or within an email chain[7]; a clicked "I accept" box on a webpage[8]; and the header of a SWIFT message.[9]

The Court of Appeal's decision in *Hudson v Hathway* [2022] EWCA Civ 1648 is a further recent and authoritative illustration of the law's approach to statutory formalities.

- Section 53(1)(a) of the Law of Property Act 1925 provides "*no interest in land can be created or disposed of except by* *writing signed by the person creating or conveying the same*" (emphasis added), and section 53(1)(c) similarly provides "*a disposition of an equitable interest or trust subsisting at the time of the disposition must be in* *writing signed by the person disposing of the same*" (emphasis added).
- Lewison LJ recognised (at [67]) that there is "*a substantial body of authority to the effect that deliberately subscribing one's name to an email amounts to a signature*" and that it was "*entirely appropriate that the law should recognise that technological developments have extended what an ordinary person would understand by a signature*".
- The Court of Appeal therefore found the statutory signature requirements to have been satisfied by two emails sent by the appellant (Mr Hudson) by which he released his beneficial interest in a co-owned property to the respondent (Ms Hathway).

However, and importantly for pensions practitioners, the proviso in the Law Commission's statement remains: "*any formalities relating to execution of that document are satisfied*".

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[6] *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265 at [32] (Statute of Frauds 1677).

[7] *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch) at [30] (Statute of Frauds 1677, *obiter* on the facts); *Orton v Collins and others* [2007] 1 WLR 2953 at [21] (Law of Property (Miscellaneous Provisions) Act 1989, s2), *Lindsay v O'Loughnane* [2010] EWHC 529 (QB) at [95] (Statute of Frauds (Amendment) Act 1828, s6); and *Green (Liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1305 (Ch) at [44] (Law of Property (Miscellaneous Provisions) Act 1989, s2).

[8] *Bassano v Toft* [2014] EWHC 377 (QB) at [43] and [44] (Consumer Credit Act 1974, s61).

[9] *WS Tankship II BV v Kwangju Bank Ltd* [2011] EWHC 3103 (Comm) at [155] (Statute of Frauds 1677).

In particular, the statutory formality requirements that a deed to must be signed *"in the presence of a witness"*[10] and that a will must be signed *"in the presence of two or more witnesses present at the same time"*[11] appear still to require physical presence (or at least to give rise to sufficient doubt that parties would not be confident of the contrary).[12]

In theory, that might still permit electronic signature, provided that all signatories and witnesses are in the same place at the same time. In practice, though, the need for in-person witnessing makes the electronic execution of deeds and wills unworkable – not to mention an unnecessary risk – for the time being.

Witnessing remotely: *Baker v Hewston* [2023] EWHC 1145 (Ch)

But what about remote witnessing? The case of *Baker v Hewston* [2023] EWHC 1145 (Ch) illustrates the lengths to which testators went to comply with the requirement for a will to be signed *"in the presence of two or more witnesses present at the same time"* while also complying with the restrictions imposed in response to COVID-19.

- The will was executed as follows. Two witnesses came to the driveway of the testator's house, where he was sitting in his car. He stayed in the car and they saw him sign the will through the window, which he then passed to then and they each witnessed.
- HHJ Tindal described this as an *"ingenious arrangement"* and held it to be a valid execution.

The question which this case raises is whether there is something legally significant about physical proximity. If a person can witness another's signature by watching through the glass of a window, why not the glass of a camera lens and – via electronic transmission – a computer screen? Applying Lewison LJ's dictum from *Hudson v Hathway*, ought the law to recognise that technological developments have now extended what an ordinary person would understand by presence?

[10] Law of Property (Miscellaneous Provisions) Act, s1, and Companies Act 2006, s 44(2)(b).
[11] Wills Act 1837, s9.
[12] In relation to wills, this has been subject to the temporary modification discussed below. That might lend weight to the argument that the statutory provision in relation to deeds implicitly excludes remote "presence".

In relation to wills, the legislature has already done just that. For wills made on or after 31 January 2020, the definition of "*presence*" includes "*presence by means of videoconference or other visual transmission*".[13] That extension, which was intended to be temporary, has now – pending consideration of wider reforms – been extended to apply to wills made until 31 January 2024.[14]

So why not also permit deeds to be witnessed remotely, and thereby open the door to them being signed electronically as well? Is there any reason to impose more onerous formality requirements for – say – a deed adopting new rules for a pension scheme?

On the one hand, it might be argued that will-making ought to be treated differently from deed-making, because wills are often made urgently and without legal advice—consistent with this, in 2013 the Lord Chancellor rejected a proposal to regulate will writers.[15] But on the other hand, the fact that the preparation of deeds is a reserved legal activity[16] – which will necessarily be undertaken following KYC and AML checks – might be thought to reduce the risk of fraud and so weigh against the need for onerous formality requirements.

Future reforms

Section 8 of the Electronic Communications Act 2000 provides a power to modify primary or secondary legislation to authorise or facilitate the use of electronic communications for certain purposes, including "*the doing of anything which under any such provisions is required to be or may be authorised by a person's signature or seal, or is required to be delivered as a deed or witnessed*".

This power – which was used to introduce the remote witnessing option for wills referred to above – could also be used to introduce a remote witnessing option for deeds, by amending section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 and section 44 of the Companies Act 2006.

[13] Wills Act 1837, s1(2), inserted by the Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020 (S.I. 2020/952).

[14] Wills Act 1837 (Electronic Communications) (Amendment) Order 2022 (S.I. 2022/18).

[15] House of Commons Library Briefing Paper 05683 "Regulation of will writers".

[16] Legal Services Act 2007, s12.

The Law Commission has recommended that an industry working group should be established to consider practical issues associated with the electronic execution of documents, and that – after the practical and technical issues have been considered further – the government should in particular consider using the power in section 8 to allow for video witnessing of deeds.[17]

Meanwhile, it appears that reforms to the law on making wills may continue to outpace the law on executing deeds. A supplementary consultation paper is due to be published in September 2023 which – judging from the contents of an earlier consultation paper[18] – will include a judicial power to dispense with formality requirements where it is clear what the deceased intended, and an enabling power to allow the legal recognition of electronically-executed wills by secondary legislation, as well as – presumably – whether to make permanent the existing temporary provision for video witnessing of wills.

In all of this, the tricky balance facing the legislature is to ensure that the law responds flexibly to modern ways of living and doing business while providing certainty for those who need to rely upon the validity (or indeed the plain invalidity) of formal documents.

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[17] Law Com No 386 "Electronic execution of documents".

[18] CP 231 "Making a will".