Check your email (signatures)!

Jamie Sutherland & **Imogen Dodds** consider electronic signatures & formality requirements

© iStockphoto/Peopleimages

IN BRIEF

- The High Court decides that an email footer can be a 'signature' creating a binding contract for sale of land.
- Its decision coincides with a Law Commission report recognising the legal effect of electronic execution of documents.
- The test is whether the 'signature' was inserted with the intention of authenticating the document.

As every property practitioner knows, s 2(3) of the Law of Property (Miscellaneous Provisions) Act 1989 (the 1989 Act) requires a contract for the sale or other disposition of land to be 'signed by or on behalf of each party'. *Neocleous v Rees* [2019] EWHC 2462 (Ch), [2019] All ER (D) 25 (Oct) was the first occasion on which the court was asked to determine whether an email footer satisfied the requirement for a signature in s 2(3). The issue arose in the context of an alleged compromise agreement between the parties to a property dispute, which was contained in an exchange of emails between their solicitors. Viewed in the wider context of the earlier authorities, and a recent Law Commission report, the decision encourages practitioners to consider how formality requirements in property transactions—and more generally—are now operating in an increasingly digital world.

The facts in *Neocleous*

The parties' initial dispute concerned the defendant's alleged entitlement to a right of way over the claimants' land. The right was necessary in order to access the defendant's own property (known as 'the Landing Plot'), which fronted on to Lake Windermere but was otherwise surrounded by the claimants' land: without a right of way, the Landing Plot would be accessible only by water. Following the defendant's application to the Land Registry, for registration of the right, the dispute was referred to the First-Tier Tribunal (Property Chamber) (the FTT).

In the run-up to the FTT hearing, the parties engaged in without prejudice negotiations. Over the course of these, it was suggested that the claimants might purchase the Landing Plot. Various proposals and counter proposals were exchanged via email between the parties' respective solicitors, Mr Wise for the claimants and Mr Tear for the defendants, until finally on 9 March 2019 Mr Tear emailed Mr Wise setting out the terms which had been agreed. The claimants would pay the defendant £175,000 for the Landing Plot and for the release of the right of way, in full and final settlement of the dispute. At the bottom of his email, Mr Tear typed 'many thanks', but did not type his name; instead, his standard footer was automatically added by his firm's email software, giving his name, role, occupation and contact details. Mr Wise responded by email confirming the claimants' agreement, and the FTT hearing was subsequently vacated, although the tribunal indicated that the parties would need to file a consent order.

A month passed, and the FTT wrote to the parties requesting confirmation as to what order was required, failing which the matter would be relisted. The defendant's solicitor then emailed the FTT requesting a further hearing. The claimants' solicitor replied stating that the matter had been compromised and that there was accordingly no need for the matter to be relisted. When the defendant's solicitor responded asserting that the settlement had not been finalised, the claimants commenced court proceedings for specific performance of what they alleged was a binding settlement agreement, contained in the 9 March email exchange.

The decision

The defendant asserted that there were essentially two reasons why Mr Tear's email footer did not comply with s 2(3).

First, in order to satisfy s 2(3), the defendant argued that a signature must be handwritten on the document, or at least be an electronic facsimile of an original handwritten signature. The defendant relied on *Firstpost Homes Limited v Johnson* [1995] 1 WLR 157. In *Firstpost*, the intending buyer of land typed a letter to be signed by the vendor, which set out the terms of the proposed sale, and included the buyer's typed name as addressee. The seller signed the letter by hand, but the Court of Appeal held that the buyer's typed name did not qualify as a signature for the purposes of s 2(3), with the result that the letter was not a binding contract. Lord Justice Peter Gibson, giving judgment in *Firstpost*, had cited the much earlier case of *Goodman v J Eban Limited* [1954] 1 QB 550, [1954] 1 All ER 763 in which all three members of the Court of Appeal considered that 'signature', in ordinary English usage, meant a signature written by hand.

Second, the defendant argued, Mr Tear's email footer was not a signature for the purposes of s 2(3) because it had been added automatically by the email programme, and was not deliberately included by the writer.

His Honour Judge Pearce, sitting as a High Court judge, rejected the defendant's submissions. Rather than looking for handwriting, he concluded that the 'sounder guide' when determining whether or not a signature had been provided was the test formulated by His Honour Judge Pelling QC in *J Pereira Fernandes SA v Mehta* [2016] 1 WLR 1543, [2006] 2 All ER 891: a requirement for a signature would be satisfied, 'provided always that whatever was used was inserted into the document in order to give and with the intention of giving authenticity to it'. While noting that the ordinary person at the time of the *Goodman* decision might have expected a signature to be handwritten, Judge Pearce noted that 'the ordinary usage of words has a tendency to develop', and many people today would consider an email footer to be a signature: indeed, he observed, the Microsoft Outlook software itself, used by Mr Tear's firm, refers to a footer as a 'signature'. Furthermore, Judge Pearce considered that the decision in *Firstpost* depended not on the buyer's name being typed, but rather on the fact that it had been included in the letter as addressee: no ordinary person would consider that to be a signature.

Although the footer had been added to Mr Tear's email automatically by the software, Judge Pearce considered that the requisite 'authenticating intent' was present to render it a signature:

- It was common ground that the footer could only be present because of a conscious decision to include its contents, albeit that the decision may have been taken previously and applied to emails as a general rule.
- Mr Tear was aware that the footer would be added.
- Mr Tear's use of the words 'many thanks' before the footer showed an intention to connect his name with the contents of the email.
- The presence of the footer is in the conventional style of a signature, at the end of the document.

Accordingly, the judge found that s 2(3) was satisfied and granted specific performance of the compromise agreement embodied in the email exchange.

The use of electronic signatures in wider contexts

Although *Neocleous* is the first decision on the status of electronic signatures in the particular context of s 2(3) of the 1989 Act, electronic signatures are of course widely used in all sorts of consumer and commercial contexts. Nevertheless, parties sometimes remain unsure of the legal status and effect of an electronic signature—hence perhaps the *Neocleous* dispute. Such uncertainty had prompted the Ministry of Justice to ask the Law Commission to review the law on the electronic execution of documents.

> *“New legislation could disrupt existing confidence in electronic signatures”*

The Law Commission's report on the *Electronic Execution of Documents* (Law Com No 386) was published on 3 September 2019 (the report), shortly before judgment was handed down in *Neocleous* but after arguments had been heard: the judgment refers to the preceding Law Commission consultation paper. The report notes that the concepts of 'in writing' and 'document' can be satisfied electronically, as explained in the Law Commission's 2001 'advice to government' (see https://bit.ly/3aE8aXr) and confirmed in cases including *Golden Ocean Group v Salgaocar Mining Industries PVT Limited* [2012] EWCA Civ 265, [2012] 1 ELR 3674, [2012] 3 All ER 842. However, the extent to which documents can be signed or executed electronically has caused parties more concern.

In fact, as noted in the report and by Judge Pearce in *Neocleous*, legislation dealing with electronic signatures is already in place. The domestic Electronic Communications Act 2000 (the 2000 Act) defines 'electronic signature' at s 7 as 'anything in electronic form… incorporated into or otherwise logically associated with electronic communication or electronic data' which 'purports to be so incorporated or associated for the purpose of… establishing the authenticity [and/or integrity] of the data or communication'. EU Regulation No 910/2014 on Electronic Identification and Trust Services (eIDAS) defines an electronic signature as 'attached to or logically associated with other data in electronic form and which is used by the signatory to sign'.

Based on eIDAS, the 2000 Act, and case law (including *J Pereira*), the report concludes that an electronic signature is already capable in law of being used validly to execute a document, including a deed, provided that (i) the person signing the document electronically intends to authenticate it and (ii) any other formalities relating to execution of that document are satisfied. (In the case of a deed, while a signatory and witness can sign electronically, the report confirms that—as the law currently stands—the witness must be physically present when the signatory signs in order to satisfy the statutory formality requirements for a deed under s 1 of the 1989 Act.)

Comment

The Law Commission appreciates that parties can be unsure as to the position, however, particularly given that the law is spread across different sources (and so could be particularly inaccessible to individuals or small businesses, who may not have ready access to legal expertise). While specific legislation clarifying the position 'for the avoidance of doubt' could assist with such concerns, the Law Commission stops short of conclusively recommending such legislative reform. New legislation could disrupt existing confidence in electronic signatures, and—if it were too prescriptive as to the form of electronic signatures—it could disrupt existing practices. Accordingly, the report concludes that government 'may wish to consider' codifying the law on electronic signatures. **NLJ**

Practical points

Neocleous and the Law Commission report, and the existing legislation and case law to which they refer, raise several important points which readers should bear in mind:

- The test for determining whether a document has been signed (electronically or otherwise) is whether the putative signature was inserted for the purpose and with the intention of authenticating the document.
- An email footer is *capable* of constituting a 'signature', if there is 'authenticating intent', although there may be room for argument as to whether that intent can be found in any given case in the absence of some form of specific 'sign-off': in *Neocleous*, the court put weight on Mr Tear's 'many thanks' as associating the footer with the email.
- If parties wish particular formality requirements to apply to any contract or notice, then they should expressly specify and agree those requirements in advance.
- If parties wish to avoid concluding a binding contract by email, then their communications should be made expressly 'subject to contract'.
- While electronic signatures can satisfy a simple 'signature' requirement, any other formality requirements will also have to be satisfied where applicable.
- Further decisions (and potentially legislation) may be expected in this area, so practitioners should keep abreast of developments – and certainly check their emails!

Jamie Sutherland and **Imogen Dodds,** barristers, Falcon Chambers (*www.falcon-chambers.com*).