

Witnessing Deeds in the age of Social Distancing

Picture the scene. A document is resting on a table near the entrance of a property. The occupant steps forward to sign it while a man lurks two meters outside the house silently observing. The signatory then retreats to an appropriate distance, pen in hand. The witness, using a different pen, then steps forward to attest by signing the same document. In the wake of Covid-19, this may be the new normal when witnessing signatures. But why not simply view the act of signing online? In the wake of online video streams, meetings and indeed court hearings this would seem to be a practical solution. The question is whether such electronic forms of witnessing would be recognised in law.

The Problem

With the need to practice social distancing comes many challenges for those attempting to keep calm and carry on. One issue which will arise in a variety of circumstances is the problem of how documents can be signed and witnessed while observing the two-meter rule in accordance with government guidelines. Of course, not all documents need to be witnessed in order to be validly executed. Furthermore, if the execution of a document is witnessed by a member of the same household as the signatory, the potential problems caused by social distancing do not arise.

However, where a document is witnessed this will provide evidential support for its validity in the event of a dispute about who signed the document or its enforceability. The witness to the signature does so to verify that the signature shown on the document belongs to the person named as the signatory. It is an important form of protection against forgery. It follows that family members will be less credible witnesses than a detached third party, given their likely familiarity with the signatory and the possibility of having some vested interest in the transaction.

It is therefore useful and often best practice for a witness to be a person outside of the signatory's household. This raises the question of how a person can practice social distancing while having their signature witnessed. One seemingly easy solution would be to carry out the transaction via an online platform. However, this would seem to be a less satisfactory way of safeguarding the public policy reasons

which underpin the witnessing of documents. Technology can, for example, be manipulated in ways that would be impossible with the physical presence of a witness to a signature.

This issue becomes even more problematic in the context of deeds which, under s.1(3) Law of Property (Miscellaneous Provisions) Act 1989, must be signed in the presence of a witness who attests the signature. Given the current restrictions on movement and physical interaction with others, should members of the public and professionals resort to the use of applications such as Skype, Facetime, WhatsApp and the like in order to witness documents, we are likely to see disputes arising in the future as to whether documents witnessed in this manner are valid as deeds. This may well be an extensive problem given the plethora of documents which, by law, must be executed as deeds (i.e. mortgages, long leases, wills and transfers of land).

Recent consideration

So what counts as presence? Is a signatory in the presence of a witness if said witness views the execution of the document via video link? Does it matter whether the two individuals are within the same jurisdiction at the time? Does one have to be in the same room? Would viewing the execution through a window suffice? One would assume that the law is flexible enough to allow for degrees of removability. But how far is too far? When is the witness so remote as to offend against the requirements of s.1(3) of the 1989 Act?

This issue has been given some consideration in the recent past. The Law Commission's project called 'Electronic execution of documents' resulted in its report of 3 September 2019 (LAW COM 386). The Law Commission concluded that although the s.1(3) of the 1989 Act (and also the Companies Act 2006) does not specify 'physical' presence, "*it is not clear that the requirement may be satisfied by remote forms of witnessing, such as by video link or other types of technology.*"

This is in keeping with the conclusions reached in the Law Commission's Consultation Paper on Electronic Execution (dated 21 August 2018). The Consultation Paper highlighted the fact that the signature of the witness must be affixed at the time of execution, citing the appellate court authority *Wright v Wakeford*

[1803–13] All E.R. Rep 589, 591 and 128 E.R. 310, 315 and the Australian case of *Netglory Pty Ltd v Caratti* [2013] WASC 364 at [148] to [169] (which reviewed the English case law in this area), in support. The need for the signature of the witness to be affixed at the time execution was said to support the conclusion that a witness must be physically present when the document is signed.

Further consideration of s.1(3) of the 1989 Act was given in November 2019 in *Wood v Commercial First Business Ltd (In Liquidation)* [2019] EWHC 2205 (Ch). The Court considered whether the witness to the signature was required to attest at the time of the signing. However, it does not appear that Mr James Pickering sitting as a Deputy Judge of the High Court, was referred to the Law Commission’s consultation paper which had been published at the time or two authorities mentioned above. This led a finding at paragraph 48 that the proper interpretation is that “*while there is a requirement for the person executing the deed to sign in the presence of a witness, it is not a requirement for the witness to sign in the presence of the person executing the deed (or indeed of anybody else).*”

This outcome has not gone without criticism. In the Emmet and Farrand on Title Bulletin December 2019, Number 91 it was said that “*the statute does not require the witness to “sign” but to “attest” – and does so in the present tense. In practice and in law, witnesses attest signatures on instruments by signing attestation clauses at the time.*”. There is plainly a tension between the outcome in *Wood v Commercial First* and the earlier decision in *Wright v Wakeford*.

In *Man Ching Yuen v Landy Chet Kin Wong*, First Tier Tribunal (Property Chamber), 2020 (ref 2016/1089), further consideration was given to whether the law in relation to deeds requires physical presence or whether virtual presence is enough. At the heart of the dispute was an allegedly forged transfer of property. The Tribunal was tasked with deciding whether one of the two, previously joint, owners of the property had signed a transfer into the single name of the current proprietor. It was held that the applicant did so sign. This gave rise to an interesting legal question as to the remote witnessing of deeds.

The Respondent's case was that the document was signed in Hong Kong while her London based solicitor observed via skype and several days later purported to attest to that witnessing by recording, on the document itself, that she observed the execution of the document. This was accepted by the Judge and as such, the key

legal issues which arose from this finding were twofold: whether the execution of the transfer was (1) witnessed and (2) attested, within the meaning of s.1(3) the 1989 Act.

In relation to attestation, it was held that following *Wood v Commercial First* attestation need not be contemporaneous with the execution of a deed. The Tribunal did not, however, express a view as to the permissible time gap, leaving the door open for arguments on this point in future cases. In relation to the first question, it was noted that the outcome in *Wood v Commercial First* that attestation need not be contemporaneous with execution undermined one of the Law Commissions justifications for the view that presence via video-link would likely not suffice. However, the Tribunal went on to state, without finally determining the point, that whether the words of s.1(3) "*in the presence of a witness*" were satisfied by video link, under the present law, permitted more than one conceivable answer.

The Current Position

It would appear therefore that even in the digital age, made even more virtual given the advent of social distancing, practitioners and laypeople cannot be assured that remote forms of witnessing a document will satisfy the law in relation to the creation of deeds. Traditional physical presence is the only safe basis on which to conduct oneself notwithstanding the ease and physical safety with which less formal and more technical modes of witnessing can be carried out. That said, physical presence carries with it a certain degree of formality and safeguards for the signatory and also those who might later rely on the deed, appropriate to the elevated legal status of deeds as compared with other written instruments. For the time being at least, one can be sure that presence includes physical presence but not necessarily virtual presence. As such, physically observing the execution of a document (from an appropriate distance), may well be the only legally certain mode of witnessing a deed.

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