

Execution of deeds and other real estate documents during increased working from home (and can electronic signatures assist?)

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Please note: the information contained in this legal update is correct as of the original date of publication

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- **Is an original 'wet ink' hard copy document required (one which is physically signed in pen)?**

There are three categories of real estate documents to consider here:

- **Deed and wet ink required:** Land Registry rules require that a wet ink original deed must be submitted for the registration of transfers, leases of more than 7 years, leases of less than 7 years but which contain registrable easements, charges, and other deeds that need to be substantively registered with the Land Registry. Therefore electronic signature is currently not possible for these documents.
- **No need for deed or wet ink:** Other documents which do not need to be by deed and do not require a wet ink signature, can be executed using electronic signature and these include: licences to occupy, a short lease of 3 years or less (where there are no easements to be registered), or a landlord's consent for example. These documents can therefore be drafted as simple contracts (not deeds), or can be adjusted to be executed as simple contracts since they are often prepared as deeds in the first draft. But bear in mind that even a short lease of 3 years or less may contain easements that the tenant must register at the Land Registry, and the requirements for a valid consent may be set out in the lease itself – in which case such documents should still be executed as a deed with wet ink execution, see below.
- **Deed required, but no need for wet ink:** Some documents must be executed as a deed, but they don't need a wet ink signature since they don't need to be registered with the Land Registry. These documents could be executed using electronic signature, and include leases not exceeding seven years with no easements, and landlord's consent where the lease does require the consent to be by deed.

- **Who can witness a deed?**

A family member of a signatory witnessing the signature of a document has always been discouraged since the whole point is that a witness can give independent evidence as to what happened if the signatory should ever challenge it. However there is no law against it and in difficult circumstances such as increased working from home during the Covid-19 pandemic accepting a document witnessed by a family member could be an acceptable way to proceed.

- **Is a witness really necessary?**

- If the other party is a corporate entity with more than one director (or has a director and a company secretary) the execution clause could be adjusted for signature by two directors (or by a director and company secretary) instead of a director in the presence of a witness.
- Consider whether the document really needs to be a deed. See the three categories described in the first answer, and in particular remember that broadly speaking leases for 3 years or less (and with no registrable easements) can be signed 'under hand' as a simple contract with no need for a witness, and if these were initially prepared as a deed they can be adjusted for signature as a simple contract.
- **Can a deed be 'witnessed' remotely?**
 - No. The recent Law Commission report on the electronic execution of documents said it was not confident that the current law would allow this and this is an area where a change in the law is being considered.
 - However, there of course is nothing preventing parties (in addition to correctly executing and physically witnessing the document if required) having a another party view that proper execution by video link if this may provide some comfort depending on the circumstances, though it is likely to be over the top in most cases.
 - To be clear as things stand a witness can sign using electronic signature tools, but that witness must have physically witnessed the signature that they are saying they witnessed, which would mean being in the same room to see the person signing apply their electronic signature (that may seem counterintuitive and indeed the Law Commission recommended further consideration of potential solutions and legal reforms for remote witnessing as it seems to be an area where the potential usefulness of electronic signatures is currently being held back).
- **Can a party return only the signature page of a deed or real estate contract to their solicitor?**
 - With regard to the leading 2008 Mercury Tax case (where the judge said that the signature and attestation must when the deed is signed form part of the same physical document) it is widely considered that the final version of the document as well as the pdf of the signed signature page (both attached to the same e-mail and returned to that party's solicitor) will constitute an original signed document and will equate to the "same physical document". At a push a photograph of the signature page taken on a mobile device could suffice.
 - So the whole document does not have to be printed by a party in order to sign and return the execution page, but when returning the signature page to their solicitor that e-mail should also attach the full engrossment document which was originally sent to them so as to be clear as to the full document that the signature page relates to. Practical issues like the size of large attachments can usually be worked around by facilities within e-mail like Mimecast which allow the upload of documents which are then sent as links, or the upload of documents to a firm's secure data room.
 - But to be clear if a wet ink signature is required because of Land Registry requirements (see the categories in the first answer) then this option is not available.

- **Can someone else sign on behalf of a party to a document?**

In terms of executing either a wet ink document or an electronic document as an agent, usual agency rules are relevant in both cases. It should always be made clear to other parties to the transaction if someone is signing on behalf of a party to a document, and the other parties will expect to see evidence of that authority. Such authority may be limited to the execution of a single document or transaction, or be of wider scope. In the case of a simple contract this authority may be demonstrated by e-mail correspondence but in the case of a deed the authority to execute deeds on behalf of another must itself be set out in a deed (a power of attorney). Further, where the relevant party to the deed is a corporate entity it is the company that needs to enter into the power of attorney with the agent, the director themselves cannot delegate that power (to execute on behalf of the company) to an agent.

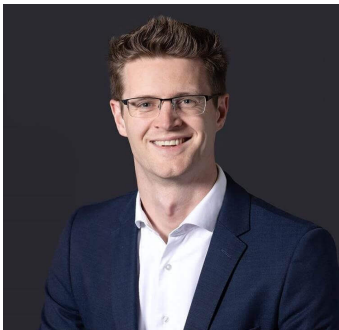
- **1954 Act Statutory Declarations – what if a tenant can't easily visit an independent solicitor or commissioner for oaths?**

Many commercial leases are 'contracted out' of the security of tenure provisions of the Landlord and Tenant Act 1954 which means that a tenant does not have a statutory right to request a renewal lease at the end of the contractual term. The procedure for this requires a landlord to serve a warning notice on a tenant and for the tenant to sign a declaration confirming that they have read the notice and accept a contracted out lease. This procedure must be followed carefully to ensure that a lease is contracted out as intended, there are a number of things that a solicitor will check to ensure that a declaration is sent to the correct address and that the declaration has been properly sworn, however a few things to consider are:

- If the tenant can't easily visit an independent solicitor or commissioner for oaths in order to make the statutory declaration but the tenant's solicitor can, the tenant's solicitor could obtain their client's authority to attend and make the statutory declaration on the tenant's behalf. Evidence of this authority would need to be provided to the landlord's solicitor.
- There has been some discussion recently as to whether a statutory declaration can be conducted remotely by video link, it seems this may be possible but the position is not certain and not all solicitors may be keen to proceed in this way. So while further guidance on this is awaited from the Law Society by contrast the alternative set out below is tried and tested and may assist.
- If no one could easily visit an independent solicitor or commissioner for oaths in order to make a statutory declaration, an alternative process is to use what is known as a simple declaration. A simple declaration can be signed by a tenant without the need for an independent solicitor or commissioner for oaths. The difference for a simple declaration (as compared to a statutory declaration) is that the warning notice must have been received by a tenant at least 14 days before the tenant committed itself to the lease (by completing the lease or exchanging an agreement for lease). But as long as the options are considered early in the transaction a simple declaration may still be the quicker route if there are practical issues with the statutory declaration procedure.

We think electronic signature (like other aspects of home working such as video conferencing) is an area where change and increased usage will initially be driven due to the Covid-19 response but which are likely to result in lasting adjustments and hopefully improvements when a balance can return, particularly in light of the areas for further review and reform highlighted by the Law Commission report.

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