

RESPONSE OF THE CLLS LAND LAW COMMITTEE TO THE DRAFT PRACTICE GUIDANCE ON ELECTRONIC SIGNATURES PUBLISHED BY HM LAND REGISTRY ON 9 JULY 2020 ("DRAFT GUIDANCE")

The City of London Law Society ("CLLS") represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The City of London Law Society Land Law Committee ("the Committee") welcomes HM Land Registry's announcement on 9 July 2020 that it will soon accept electronic signatures. The Committee has considered the proposed requirements set out in HM Land Registry's Draft Guidance and it has a number of reservations. The Committee is concerned that, if the Draft Guidance is not changed to reflect the processes currently used by the leading e-signing platforms, the scope for using electronic signatures with registrable documents will be quite limited. The Committee's key concerns are set out below.

Requirement for conveyancer to include details of signatories and witnesses in platform

For the conveyancer to populate the platform with the name, email address and mobile phone number of the signatories and witnesses, the signatories must know in advance and inform the conveyancer who will be the witnesses. In many cases, this will not be possible and it will potentially prevent the use of e-signatures where witnesses are involved. The requirement for the conveyancer to include at the outset the details of the signatories will also prevent the use of functionality available on certain platforms that enable e-signatures to be used when the specific identity of the signatory is unknown when the platform is populated. For example, an envelope can be sent to a company's signing administrator, who will then allocate the deed for signing to one or two signatories out of a pool of signatories.

Requirement for authentication for witness

The witness is required by the Draft Guidance to input a one-time password sent to them by text message by the platform to access the deed. Such 2 factor authentication for witnesses is not possible on many platforms. While to overcome this limitation, a witness may be treated as a signatory, this would mean that the witness will automatically receive a copy of all completed documents in the envelope, which may be inappropriate from a confidentiality perspective. Such advance verification of the identity of a witness does not occur with wet-ink or Mercury signatures.

In the Committee's view, the need for extra authentication for a witness, when taken together with the requirement to specify the identity of a witness at the point of envelope creation, is likely significantly to curtail the use of electronic signatures for registrable documents. This is especially in view of the need for witnesses for all individual purchasers etc, individual attorneys and sole directors etc signing a deed.

Conveyancer's certificate

The Committee is also concerned about the conveyancer's certificate that will be required by the Draft Guidance. The conveyancer lodging the application to HM Land Registry for registration of the electronically signed deed must provide the certificate: "I certify that, to the best of my knowledge and belief, the requirements set out in Practice Guide 8 for the execution of deeds using electronic signatures have been satisfied."

The Committee has concerns about the extent of due diligence that conveyancers will be required to undertake in order to enable them to provide the certificate. This would extend beyond what is currently required in the wet-ink/Mercury world. Of particular concern is that the conveyancer will need to verify that the witness was physically present when the signatory signed, when the conveyancer will not know whether that was so. The Committee considers it would be preferable for the certificate to relate to the factual aspects of the envelope set up on the basis that this is something that is likely to be within the actual knowledge of the conveyancer – perhaps coupled with a requirement that confirmation is given by the witness themselves in the deed or a separate confirmation document that they were physically present when the signatory signed (see the final paragraph of section 13.2 which currently suggests, but does not mandate this). Alternatively would HM Land Registry accept an amendment to the wording of the actual execution clause itself to read:

Sign as a deed by [full name of individual] in the **physical** presence of:

Signature:

Signature of witness:

Name of witness (in BLOCK CAPITALS):

The wording of the certificate refers to "the requirements set out in Practice Guide 8". What happens if HM Land Registry changes those requirements between the point in time that the envelope is sent out for signing and the deed is completed, or indeed the application lodging the deed is submitted to HM Land Registry? The certificate should reference the requirements at the point in time that the envelope is sent.

The certificate's wording should also reflect the fact that while a conveyancer will "be responsible for" setting up the process and will "control" the process, it should be able to be either a conveyancer or someone under the supervision of a conveyancer who actually performs the uploading, populating, etc. PAs and other staff often set up the envelope at the direction of and under the supervision of the conveyancer. The current wording expressly requires certification that a conveyancer has done it, which often would not be the case.

To which deeds do e-signatures apply?

Paragraph 13.4 of the Draft Guidance sets out the deeds that can be signed electronically. The Committee considers that HM Land Registry's permitted e-signature should be acceptable for all deeds submitted to HM Land Registry. If the principle of e-signing is accepted for deeds that effect dispositions such as leases/transfers/charges and most powers of attorney, then it should also be acceptable for deeds such as deeds of priority in relation to registered charges, deeds of variation of a lease etc. It would be logical and avoid confusion formally to confirm acceptance of the permitted e-signatures across the board.

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