

Exchanging contracts by email

Signing off

The Electronic Communications Act 2000 includes provisions to amend existing legislation to facilitate electronic conveyancing. Eleven years later, no amendments have been made, nor are they likely to be in the near future. This summer, the Land Registry announced that its plans for full electronic conveyancing have been put on hold, in the light of stakeholders' reservations about e-signatures and the potential for fraud.

In the meantime, we have section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. This section, enacted before the advent of email as a habitual means of correspondence, was intended to reduce fraud and prevent parties from unintentionally entering into land contracts. It sets out specific statutory requirements for the creation of an enforceable land contract, namely, that the contract must:

1. incorporate all the terms agreed by the parties,
2. be in writing, and
3. be signed by all the parties.

In a recent High Court case, *Green (Liquidator of Stealth Construction Ltd) v Ireland (2011)*, the judge suggested that these requirements do not necessarily exclude the creation of a land contract by email.

What happened?

Mrs Ireland had a legal charge granted in December 2008 over a property owned by Stealth Construction Ltd, a company part-owned by her sister. Mrs Ireland had lent Stealth £300,000 to buy the property. When Stealth went into liquidation in June 2009, the liquidator claimed that the charge was a preference which should be set aside under the Insolvency Act 1986. A company gives a preference to one of its creditors by doing something which puts that person into a better position than he or she would have been in had that step not been taken, and the company is either insolvent at the time of the preference, or becomes insolvent as a result.

Mrs Ireland argued that the charge had been entered into pursuant to an agreement made in October 2007, which was contained in an exchange of emails between

her and her sister, at a time when the company was not insolvent. The charge was therefore not a preference, but the perfection of a previously-agreed security.

What the court said

The judge ruled that the creation of the charge was a preference. There had been no contract, but this was because the exchange of emails did not refer to all the terms which had been orally agreed between the parties, and the emails did not suggest binding obligations on the parties, not because the alleged 'contract' had not been signed.

Although it wasn't necessary to the outcome of the case, the judge went on to consider the requirements in section 2 for signature by both parties. Had this been satisfied by the sisters inserting their names at the end of their emails? They had only included their first names, but the liquidator had accepted that the emails had been signed, and the judge did not disagree. He said that an email and its reply, when taken together, could constitute a single document for the purpose of section 2, where, as in this case, the second email is sent as a reply and creates a string of emails, in contrast with the position where the recipient creates a new email to type a reply. The former, he said, was the electronic equivalent of a hard copy letter signed by both sender and recipient.

In an earlier case, *J Pereira Fernandes SA v Mehta (2006)*, the High Court had ruled that if a party sends an electronically created document, then he or she will be treated as having signed it to the same extent as having signed a hard copy of the same document. The judge in that case said that the appearance in an email of the name of the sender did not amount to a signature if had been automatically generated - it must be placed so as to show that it was intended to give authenticity to the whole document.

What does this mean in practice?

Although no enforceable contract was found to exist in this case, the decision is one more in a series of cases suggesting judicial recognition of electronic contracts. To some extent, this reflects the reality of business in the 21st century, which is often conducted by means of a lengthy chain of email correspondence.

However, section 2 of the 1989 Act was designed to prevent parties from inadvertently entering into land contracts. Green suggests that an exchange of emails may, in some cases, satisfy the requirement for signature in section 2, but the judge made some very

fine distinctions that may not stand up to scrutiny. With many email systems, replying to an existing email involves choosing 'reply with history', whilst sending a new email requires you to select 'reply without history'. Most people do not give much thought to which method they select, but if this distinction catches on, a typed name at the end of an email chain may one day be construed as a signature for the purposes of entering into a land contract.

Think before hitting 'SEND'

There hasn't yet been a case where parties have been found to have exchanged land contracts by email, but nevertheless, you should take care when negotiating by email, as the courts are starting to imply that it is possible.

- Mark emails subject to contract.
- Try to avoid creating a string of emails.
- Don't type your name at the end of emails.

If you would like to discuss this with us, please contact:



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This briefing note is intended merely to provide a summary of the law in this area and is not a comprehensive guide. It is not intended to provide legal advice for specific cases. The law and practice in this note is stated as at October 2011.