The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 19 August 2014

Session 4

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DELEGATED POWERS AND LAW REFORM COMMITTEE
25th Meeting 2014, Session 4

CONVENER

*Nigel Don (Angus North and Mearns) (SNP)

DEPUTY CONVENER

*Stuart McMillan (West Scotland) (SNP)

COMMITTEE MEMBERS

Richard Baker (North East Scotland) (Lab)
*Mike MacKenzie (Highlands and Islands) (SNP)
*Margaret McCulloch (Central Scotland) (Lab)
*John Scott (Ayr) (Con)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Mary Fee (West Scotland) (Lab) (Committee Substitute)
Warren Gordon (Law Society of England and Wales)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 19 August 2014

[The Convener *opened the meeting at 10:00*]

Decision on Taking Business in Private

The Convener (Nigel Don): I welcome members to the 25th meeting in 2014 of the Delegated Powers and Law Reform Committee and ask members to switch off any mobile phones. We have apologies from Richard Baker, in whose place I welcome Mary Fee.

Under agenda item 1 it is proposed that the committee takes in private item 6, which is consideration of the committee's approach to the delegated powers in the Community Empowerment (Scotland) Bill at stage 1. Does the committee agree to take that item in private?

Members *indicated agreement.*

Legal Writings (Counterparts and Delivery) (Scotland) Bill: Stage 1

10:01

The Convener: Today's session on the bill allows us to take evidence from the Law Society of England and Wales, which, along with the City of London Law Society, is responsible for the practice note outlining the modern English law on execution in counterpart, which informed the bill.

Joining us via videoconference is Warren Gordon, member of the conveyancing and land law committee at the Law Society of England and Wales and head of real estate know how at Olswang LLP. I welcome Mr Gordon and invite him to make an opening statement.

Warren Gordon (Law Society of England and Wales): Thank you. Olswang LLP is a law firm in London and we have other offices in England and around the world. As the convener said, I am also a member of the Law Society of England and Wales's conveyancing and land law committee and will become chair of that committee from September. As a member of the conveyancing committee, I had some involvement in the production of the Law Society's practice note in February 2010, "Execution of documents by virtual means".

My specialism is in real estate, and my experience of execution of documents, virtual signings and counterparts is in that context. However, I am happy to comment on its application in other areas.

I thank the committee for the opportunity to provide some information about our experience in England, which I hope will be of use to the committee as it formulates the legislation. Without further ado, I am happy to take questions.

The Convener: Thank you for that introduction. We will go slightly slowly because our cameras need to be able to move.

Margaret McCulloch (Central Scotland) (Lab): Good morning, Mr Gordon. My question is on the background to the English law of counterparts. Will you explain the extent to which counterparts are used in commercial settings in England and the role that law firms play in the process?

Warren Gordon: The doctrine of counterparts in English law has a couple of meanings, which I will explain. The first relates to deeds. In our interpretation, counterparts are deeds executed as duplicates or identical documents. When a deed is executed in duplicate, there might be separate parts, but all of them are regarded as one deed.

Each part is equally effective. I am talking about written documents as opposed to virtual electronically signed documents, which I will talk about shortly.

The concept of the original deed and the duplicate counterpart constituting one deed, and each part being equally effective, is at the heart of the English law of counterparts in relation to written documents. That is certainly the case in a real estate property context, which is the one with which I am most familiar. The biggest example of that would be something like a lease, where the two parts of the lease—the part executed by the landlord and the part executed by the tenant—are identical. The part that the landlord executes is called the original or the principal deed, and the part executed by the tenant and any guarantor is called the counterpart. The counterpart does not have to be signed by all the parties to be valid. It has to be signed by only the tenant and any guarantor to the tenant. The landlord signs a separate part, or the original.

The original deed is usually the part executed by the party doing the disposition. I guess that it would be similar in the corporate context. The party who is selling or letting the property—the one who is carrying out what we call in legal terms the disposition—will always execute the original document. That is the document that is sent to and registered at the Land Registry.

The Land Registry does not need to see the counterpart, which is in effect evidence that the tenant executed the document. The landlord could use that counterpart if it wanted to sue the tenant. Indeed, the landlord would need to have that document in order to go to court and bring proceedings.

The counterpart has a role but, ultimately, the original prevails over the counterpart if they are not identical. Clearly, they should be identical but, for example, sometimes the word processing systems do not work properly and they are slightly different. In that scenario, the part executed by the landlord would prevail as the original over the counterpart. However, if, for example, you had the unlikely scenario in which the original was unavailable, the counterpart would still have a role to play in the situation, because it could be used as evidence that the document existed.

The committee asked what the advantage is of having an original and a counterpart. I will speak later about the separate concept of counterparts generally in commercial agreements, which has similar advantages.

The key benefit of having the original and the counterpart separately executed by the parties is fairly obvious: if the parties execute separate identical parts, the speed of execution is much quicker, which must improve the efficiency of the transaction. If you have to get all the parties—the landlord, the tenant and a guarantor—to execute both parts of the document, that would slow up the transaction, particularly if the parties were based overseas. In that case, it might be much more difficult and time consuming to get the documents executed, especially if you were executing with a wet ink signature, as we call it. In a real estate context relating to deeds, having an original and a counterpart is a much more effective way of executing documents.

It must be said that people sometimes like all the parties to execute each part, just to make them feel more comfortable, but in a property context that does not usually happen.

That is the position in relation to property. I will broaden out to the concept of counterparts that is more applicable to virtual signing and to the bill: commercial agreements.

In commercial agreements there are often counterpart provisions: a clause in the document relating to counterparts. It is similar to what I have just been talking about, but slightly different, as you will see. We do not have a concept of an original and a counterpart in that context; rather, we have the concept of counterparts that are identical parts of the document. They are exactly the same, but each one is signed by a different party; you do not have all the parties signing one document.

Signed, separate counterparts have the same effect as if all the signatures on the counterparts had been on one document, so although the parties are physically signing separate documents, legally, you treat them together as one document. Each counterpart is an original, which can be taken to court and sued upon. All the counterparts together, similar to an original and a counterpart, constitute one document.

That is particularly relevant to the concept of virtual signings as dealt with in the Law Society practice note and also in relation to your bill. It highlights the efficiency of each party being able to do their own electronic and virtual signing. Ultimately, once that has been done, all the counterparts together constitute one document. Each party being able to sign by themselves, without everyone having to sign one document, provides much greater flexibility, which can be utilised in an electronic virtual signing context.

Those are the benefits. Does anyone have any questions on what I have said so far? My next comments relate to question 2.

The Convener: Stewart Stevenson had an observation.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): Thank you very much, convener. I have listened carefully to what has been said and I hope that I have understood it. I am looking at a submission from the Faculty of Advocates. It may be that there is a difference between English and Scots law that accounts for my not hearing you say anything about the delivery of documents, which is part of the bill.

You seemed to suggest that, particularly in relation to property, there is not necessarily a delivery to the primary signer—that is my term. You clearly differentiated between the status of the version of a document that is signed in counterpart and that of the other version. Is the junior document—that is my phrase—delivered, so that the two versions can be compared and so that it can be confirmed that they are identical? You mentioned difficulties that would arise if the versions differed. Does what you do include a delivery process?

Warren Gordon: There is a concept of delivery, but I understand—although I am not an expert on Scots law—that one form of delivery in Scots law is physically delivering the document. Is that right? That concept is not a necessary corollary of what we do. In practice, one firm of solicitors produces both documents and gets the parties to execute. Ultimately, one party ends up with each part of the document. As for comparison, the solicitors will check that the documents are the same, but the physical delivery is not integral to the legal effect.

In English law, the concept of delivery—as I will come on to with virtual signings—is that, if a party signs a document, our interpretation is that they are legally bound at that point by virtue of having signed the document, unless the parties agree otherwise. Normally, we agree otherwise and we do not want a party to be bound merely at the point of execution. We say that they will be bound only when the document is dated. The dating takes place after the respective parties have executed.

The concept of physical delivery binding the parties is not relevant in English law, but we have a concept of delivery whereby, if a party signs, they will be bound unless the solicitors and the parties agree otherwise, when they will normally be bound when the document is dated.

Stewart Stevenson: Forgive me—I want to be as clear as a layperson can be. The concept of dating is that the legal effect of the two signed copies starts only when the documents are dated. Will you describe how dating happens? Who is party to it? Have there been cases in which the absence of dating or a question about dating has led to difficulties in how you do things in your jurisdiction?

Warren Gordon: The parties execute the documents and do not want to be legally bound until the documents are dated, so the documents are undated. My experience of transactions is that, normally, the respective solicitors speak on the phone and agree on a specific time in the day and a date when the document will be dated. From that date and time, the parties are legally bound.

Contracts, which are not under deed, are executed. As there is no concept of delivery in the concept of non-deeds, the parties are not necessarily bound when they sign. The documents go to the solicitors, who use a Law Society formula to exchange the contracts, and that has various elements. The parties are bound from when the document is specifically dated.

The comparison is with a deed, which—as I said—involves the danger that a party can be bound merely by virtue of signing the document, even if it has not been dated at that point. That could create quite a lot of uncertainty, so any well drafted document—although I am not saying that every document is written in this way—will have a statement that specifically says that delivery, as we understand it, is to take place on the date of the deed. That means that the fact that the parties have signed the document does not mean that they are bound. Sometimes, a party signs something and then has second thoughts and decides not to proceed, or a party might sign something but have a three-month gap until completion.

Parties sign the documents but are not legally bound until they are dated. All that that means is that there is a gap on the front page for the date to be put in. The solicitors agree on the date when they will complete—that is the word that we use—the deed. The parties are legally bound from the moment that it is dated.

10:15

Stewart Stevenson: So there is a contract, either implicit or explicit, between the signatories and the lawyer acting on their behalf, because the lawyer is giving effect to the dating.

Warren Gordon: That is correct. The lawyer is, in effect, acting as the agent of the client to bring effect to the legal completion and the dating.

Stewart Stevenson: I am sorry to be so pernickety—I am kind of known for it—but if I have understood you correctly, we are talking about a third lawyer who has a responsibility to both sets of parties to the contract. Is that correct?

Warren Gordon: No. Some parties will not even be represented by a lawyer, in which case we would advise them to seek independent legal advice. In commercial transactions, each party has

its own lawyer—there is no third lawyer involved—and between them they work out the arrangements for exchange in the case of contracts or completion in the case of deeds and how and when those matters will be dated.

Stewart Stevenson: Thank you.

Margaret McCulloch: I can see the advantage to businesses in different parts of the country or internationally of being able to sign the documents in this way. Does going down this route have any other advantages?

Warren Gordon: At the moment, people are a little bit cautious about it and are reluctant to go down the electronic route. I will come to the Land Registry's change of practice, which might mean completing deeds through virtual signings, but I think that people still feel slightly uncomfortable with virtual transactions. Indeed, the advantage that I have highlighted is one of the main advantages—indeed, the only advantage—that I can think of at the moment with regard to virtual signings.

As for different parties executing different parts of the document, we who practise English law have been familiar with that concept for decades if not for hundreds of years, so we do not really think of it as an advantage. However, in practice, it is a bit of hassle if you cannot take advantage of the counterpart arrangement and if, as sometimes happens with our large commercial transactions, you have to get five or six parties to execute the same document. It is a total nightmare; people are not around when you need them to be and, given how the typical commercial transaction goes, everything needs to be done yesterday.

Not being able to use the counterpart arrangement is a real disadvantage—and I stress that that, for me, is the main advantage of separate execution by counterpart and original. I cannot think of any other particularly obvious advantage, but that one advantage is well merited and I hope that its benefit will be seen in virtual signings.

Margaret McCulloch: Are there any practical difficulties with the English law of counterparts, and have you identified any areas where improvements could be made?

Warren Gordon: The main disadvantage is, I would argue, a corollary of the main benefit. Because each party executes its own part of the document, if a part were to be lost—these things happen; documents get lost—problems could arise if that part had to be used, for example, to bring proceedings in court. If all parties had executed each part of the lease, that would not be a problem, because you could get a certified copy of the document that showed that both parties had executed it for the other party. That said, it is quite rare for parties to lose their documents. It happens, but the rarity of such an occurrence does not make it a significant enough disadvantage to outweigh the benefits of the efficiencies of having separate execution.

Another disadvantage, which we have already mentioned, might arise if the documents are not in identical form. I have to say that one might have seen that as more of a disadvantage in the olden days—before my time—when people used to scribe these documents together. What with modern technology and information technology processing, it would be pretty negligent for a solicitor producing the counterpart and original or the counterpart documents not to put different copies of the documents into identical form. One might argue that it only stands to reason that if you were getting three parties to execute each part of an agreement in counterparts you would have three documents because you would want each party to have a copy. In that case, what if, when it came to the IT processing, the three parts were not identical? Even if all the parties execute each part, there is always a danger that, if there is more than one copy of a document, the various copies could differ.

I put forward the concern about documents not being identical simply because you asked me about the disadvantages. In practice, using information technology, that should not be an issue because one would literally push the print button and say, "I'll have two copies of that, please," rather than having to go through a different process to create the second copy. If one is concerned about that, one would be concerned about knocking out more than one copy of any document when one pushes the print button.

As I said, those are disadvantages, but they are very minor and are outweighed by the greater efficiencies that we gain by executing separately.

The Convener: That takes us back to Stewart Stevenson, who has a point on the subject before he moves on.

Stewart Stevenson: Yes. I just wanted to ask whether consideration had been given to the use of electronic signatures that relate to the document—in other words, electronic signatures that validate that the document is a particular version. That would allow a quick comparison of electronic signatures rather than someone having to compare the detail dot by dot and crossed t by crossed t.

Warren Gordon: I am not aware of that, certainly in a real estate context; personally, I think that it is probably unnecessary. A lot of the documents are negotiated online and there are different versions. When a version is agreed and we are ready to push the button to engross the

document, the solicitors for each party should look at the final version. The final version of the document should be circulated to the respective solicitors, and they can then come back and say that they are happy with it.

One of the lawyers will produce the final version of the document and email it to the other side. Any lawyer who is doing their job properly will then check the document. I use a tool in the office called PDF comparison, which is a technical device that shows any differences between two versions of a document.

I agree that, in this context, locking down the agreement with an electronic signature—we will come to the issue again in later questions—would probably be more effective. However, I am guessing that it would probably involve more administration and would probably cost more. The solicitors would have to liaise on whether there was any incompatibility in their technology.

In answer to your question, I note that the technology that we have at present gives sufficient protection to solicitors and their clients, bearing in mind the cost pressures on transactions; what clients are prepared to pay in the real world; and what firms are prepared to spend and can afford to spend. Firms will do the things that they need to do, and if the technology is sufficient to protect them to a reasonable degree, I think that people will perceive that to be enough.

Stewart Stevenson: Right. I am available on consultancy at about £1,000 a day, so there we are.

I move on to the case of Mercury Tax Group v HM Revenue and Customs, and the Law Society's practice note, which you indicated in your introductory remarks that you were party to.

To what extent are you satisfied that the practice note addressed the issues that were raised by that case?

Warren Gordon: The case, of which I am sure the committee is aware, is from 2008. As often happens with such cases, it is very specific to its particular facts. In that sense, one could say that it is therefore not that significant. However, the case is important because it highlighted areas that the profession had perhaps not focused on closely enough, with regard to pre-signed signature pages and the practice of exchanging signature pages for contracts by email.

In the commercial context in particular, and in the residential context to a degree, there are increasing numbers of overseas purchasers. We act for a lot of people who are abroad, and it is too fiddly to send an overnighter to somebody to get a document signed with wet ink and then have them send it back.

Lawyers have always attempted to come up with their own solutions for how they can go about effecting an exchange legally that would properly bind the parties. There has been great uncertainty about how they could go about doing that, and whether the clients would be properly protected in such situations.

The Mercury case was not of great relevance to what practitioners do, but it highlighted an issue that the Law Society needed to address in its guidance. As you mentioned, that involved not only the Law Society but the City of London Law Society, which was arguably more involved because a lot of its transactions involved clients overseas.

We have the guidance, which was in the practice note. My particular interest was in relation to real estate documents and deeds. The Law Society came up with three options. Is the committee fully au fait with the contents of the practice note, or should I reiterate the key points on the three options?

Stewart Stevenson: I suspect that we may know as much as we need to, but if you can briefly make a few bullet points I would be better informed.

Warren Gordon: Okay. I will make a couple of introductory points. Virtual signings mainly occur in a property context in relation to real estate contracts. In English law we usually have a contract, which is the agreement to sell the land. At a subsequent point there will usually be the disposition: the actual transfer of the legal interest.

In a real estate context, virtual signings normally occur in relation to the contracts to sell. It is at that point that the parties are initially bound to transfer the property at a later date. The urgency usually arises when the clients want to get the contractual commitment. The legal transfer itself will happen later, but the urgency is to get the contractual commitment, which is why they need to do an electronic signing. This is normally for property sale contracts.

Until recently, we would never do a disposition—the transfer of the legal interest—by virtual signings. The key reason for that was that dispositions had to be registered at the English Land Registry. Until about two months ago, the English Land Registry required wet-ink signatures: it would not have been happy with a PDF copy. However, the Land Registry changed its practice from 30 June and it no longer wants to see original documents, unless it is a first registration situation. For the vast majority of property transfers the Land Registry does not need to see the original document.

I do not know what the Scottish land registry's practice is, but that is quite an interesting practice.

What is very interesting about it is that it opens up virtual signings to a much wider group of documents, which now includes not only contracts but transfers, leases and any other disposals. That is relevant to the options because it means that they can be much more widely used. The guidance is very helpful to practitioners.

There are three options. The strictest option—option 1—relates to deeds, because in England deeds have the greatest technical requirements under the Law of Property (Miscellaneous Provisions) Act 1989, and to real estate contracts, which also have technical requirements. Documents such as guarantees and simple contracts have less strict requirements, and options 2 and 3 deal with them. I will come to those options shortly.

Each option contains a series of steps that need to be taken by the clients—the parties—and their solicitors. The committee will be delighted to know that I will not go through all the steps for all three options, but I will go through the main steps for option 1, then highlight the two or three small changes for options 2 and 3.

I remind you that option 1 is for deeds and real estate contracts. I think that most of the documents that you are talking about in your context are deeds. The parties' solicitors have to agree the arrangements for the virtual signing, which you would expect. The document is then agreed and finalised between the parties. One person will be in control of the production of documents, in the same way as if it were a paper completion—as I mentioned, for paper completions the solicitor will physically produce the paper document. In this scenario, the solicitor will email to the parties overseas the final version of the document—which, as we discussed, will not be under public key infrastructure or digital signature protection, but it will still be the final version of the document that the parties have agreed—and, separately, a signature page. Those are emailed to parties who are overseas or who are unable to give a wet-ink signature.

I will explain why we have a separate signature page. Let us say that a client is lying on the beach in the south of France and we have a 500-page document and a one-page signature page. In theory you might think that the person would need a good printer to print out his 500-page document and signature page, and that he would need to sign it all, then scan it all and send it back. In practice we think that quite often clients are not going to want to print out lengthy documents. All that we are requiring them to do is print out the signature page and sign it with a wet-ink signature. They then need to have a handy scanner somewhere near them so that they can scan the signature page, which they email back to the solicitor with the final version of the document.

10:30

Immediately, you can see a slight wart in that because it is dependent on a client attaching the right document. Let us say, for example, that the client manages to scan the signed page correctly but then goes to the wrong email and attaches the previous version of the document. The solicitor controlling the whole arrangement would receive back from one party the scanned version of the signature but version 4 of the document. If the other party has done it correctly and sent back the scanned signature and version 5, we have a problem because if we have documents in a different form we will not have a contract—we will not have a legally binding document. Therefore, somebody somewhere has to make sure that those documents match.

That comes back to the question about the extent to which we could have some kind of certification to make the process more foolproof. The danger is that we are depending on a layperson client to get it right—doing what they have to do, printing out the page, signing it, scanning it and returning it together with the document that they were sent by the solicitor. That is not difficult from a technical perspective even for people who are not into IT, but you can still see a potential issue: if they mess it up and send the wrong version of the document back with the scanned signature page, there could be a problem with achieving legal effect, unless it is picked up by one of the solicitors.

Stewart Stevenson: Let me develop a little point from that. You are clearly discussing the legal link between the signed page—pre-signed, in some cases—and the document. How is that legal link created? It sounded to a layperson a little haphazard, potentially. Has it been tested by any case law thus far?

Warren Gordon: Following the Mercury case, we had to produce some guidance. We were concerned about whether the legal links that you mention stack up under English law.

I am not aware of there being any recent cases testing whether a virtually signed document in that format works as a matter of English law. Whenever we—the Law Society and the City of London Law Society—have an extremely difficult legal point that is fairly novel, we go to senior counsel. We went to a chap called Mark Hapgood, who gave a big opinion on it. Through the City of London Law Society real estate committee, we were concerned about the specific technical issues for real estate documents and deeds, so we went to a couple of our own senior counsel—

one of whom I think co-wrote the Land Registration Act 2002, so he is fairly knowledgeable—and got from them about 80 pages of opinion on whether or not it works.

We wanted those counsel to tell us whether the way in which documents are executed by the email arrangement was consistent with the legislation for the execution of documents in the manual context. They had to examine the legislation and determine whether it could be interpreted as encompassing executions by virtual signings. The clear response that we got from our real estate counsel and also from Mark Hapgood QC was that, yes, a virtual signing using the steps set out in the Law Society formula would equate to a manual signature in accordance with the legislation.

As I say, as far as I am aware, that has not been tested in the English courts so I cannot give you a definitive answer that it absolutely 100 per cent works but, because we knew that the profession wanted guidance on the matter, we were very careful to get some very detailed opinions. That gave us the assurance to put out the guidance note, which we felt would at least give practitioners and their clients greater comfort that doing virtual signings had some legal basis, although there was no case law that said 100 per cent that worked.

Stewart Stevenson: Forgive me for asking this question—I may regret asking it. We are talking about the communication method being electronic. When it was all paper and wet ink, how was it possible to know that the page that held the signature, which was part of the contract, related to the contract if, for the sake of argument, it was sitting in a looseleaf binder out of which I could take an individual page and into which I could put another one? When everything was on paper, was there no process of initialling all the pages that were being authorised by the full signature page, so that there would be that link? Is there an issue there?

Warren Gordon: That is an excellent point. You might call me and most of my fellow practitioners naive, but I think that we assumed that, once a document had been physically bound with a binder on the side—we call it engrossed—one must never unbind it. I always knew that and was brought up in practice in that way. That probably gave the reassurance. The solicitor would physically engross the document and send it to the other party's solicitor, who would check it and send it to their client. It would all be bound, with the signature paper bound in at the end. The client would physically sign that and return the bound document to their solicitor. It is possible that the client could have unbound the document, taken out a few pages, put a few more in and messed it around, but it did not tend to happen that way. Generally, law-abiding citizens would probably not go into that and they would have no reason to start interfering with the document. The client relies on the solicitor to have got the document right.

My point is that that scenario was probably a little more foolproof. I realise that the potential issues that I raised were not necessarily brought out in the Law Society practice note, but they occurred to me as we were speaking. That approach is perhaps a bit more foolproof than a virtual signing scenario, where there is a danger. A client might be asked to send back the right part, but if he has a number of emails in his system, he might accidentally attach the wrong document. That is more likely to be an issue than somebody unbinding a physical document. With a bound physical document, we know that it is the same document.

Stewart Stevenson: In moving to the electronic world, we are seeking to replicate that physical relationship that requires a positive action to disrupt it, as was the case prior to the electronic world. As yet, there has been no legal challenge on that.

We have probably done that issue to death, and I know that my colleagues have other questions.

John Scott (Ayr) (Con): What are the Law Society's views on the likely impact of the bill on businesses that are operating in Scotland and the competitive position of Scottish law firms?

Warren Gordon: Unfortunately, I am not an expert in Scots law and I do not have the arrogance to think that I could tell you about that. However, it is worth pointing out an analogy with the English law context and the virtual signing scenarios that I talked about. With option 1, which we have just discussed, the view that we have from counsel and the position that we adopt is that, if someone sends to the solicitor a page that has been signed by the client together with the document, that counts as a legally effective and binding virtual signature. As I discussed in relation to delivery, unless it is made clear that delivery takes place at a date other than the date of signature, it will take place on the date on which the signature page and document are emailed to the solicitor. Therefore, in our context, with delivery, it needs to be made clear that, even though a virtual signature has been sent, the document does not have legal effect until the date that is on it.

The analogy with the bill is that it talks about a copy of a signed traditional document being transmitted by electronic means, such as email. From what I have seen, that is the heart of the bill and it seems quite similar to our option 1, which is when the client has signed the page and sends it and the document by email. We have counsel's

opinions and we have produced a note that says that, if the relevant option steps are followed, the party is legally bound by the virtual signature unless, as I say, delivery is to be on the date of the document. For your purposes, however, the client will be legally bound by that virtual signature.

To me, that is analogous with the bill's proposal, whereby a copy of a signed traditional document would be transmitted by email and would have binding legal effect. As I said, I cannot comment on the Scots law element because I am not a Scottish lawyer and I am sure that I would say the wrong thing. However, in the context of English law, I see an analogy between the heart of the proposal and what we have in option 1.

John Scott: Do you envisage that any competitive advantage will accrue to Scottish law firms as a result of the bill? I understand that Scottish legal firms think that that will happen. I would be interested to hear your opinion.

Warren Gordon: If the consequence of the bill is that Scottish law firms do a lot more virtual signings, firms might perceive that their executions are more efficient. If they are doing more of those executions than English firms are doing virtual signings, they might perceive there to be a competitive advantage.

However, as I said, given the way in which things are going, with the Land Registry saying that it does not require wet-ink signatures and with so many transactions being cosmopolitan and based overseas, there is a great chance that there will be a lot more virtual signings in the English jurisdiction. If there is an advantage in that there are more virtual signings in Scotland than in England, I think that, ultimately, the situation will balance itself out.

John Scott: Does the Law Society of England and Wales have comments to make on the bill's not requiring parties to include an express counterpart clause, in contrast with the normal practice in England?

Warren Gordon: In my experience, we do not have counterpart provisions in our real estate documents. We simply say that the part that was executed by the landlord is the original and the part that was executed by the tenant is the counterpart. We do not need a four or five-line clause in the document that says that it is a counterpart—it is just called a counterpart.

Usually, in commercial agreements there is a four or five-line counterpart provision, which basically says that each part counts as the original, and the documents are in identical form. However, as I understand it, in English law we do not need to have a counterpart clause in a commercial agreement provided that the documents are in identical form.

John Scott: Thank you. That is clear.

Does the Law Society have any other comments to make on relevant differences between the English law on counterparts and the approach that is envisaged in the bill?

Warren Gordon: I have no comments to make about that. My great interest is in the concept of giving a document legal effect merely by physically delivering it, which is a concept that we do not really have in English law. That highlights the great and interesting differences between our jurisdictions. I have nothing further to add on your question.

Margaret McCulloch: Warren Gordon said that the signature page can be sent electronically to all parties for them to sign, print, scan and send back. Does that page have a header or footer that ties the page to the document to which the parties are agreeing, or is it a blank page?

Warren Gordon: It will not be a blank page. I cannot confirm that every document that I have seen has had page numbers—some do not—but it is usually the case that, if the final page of the main document is page 56, the signature page will be page 57. The footer will be the document number, which I suppose also ties the page into the rest of the document. There will be no header; there will simply be the execution clause—the wording, which might say, "Signed as a deed by X in the presence of Y"—to enable the client to sign in the relevant place. The only things that tie the signature page into the rest of the document are the page number and the document number.

That is probably not as crystal clear as you might want it to be. It would be clearer if there were a heading that identified the page as the signature page for the document to which it related, but I suspect that our current approach is not as clear as that.

Margaret McCulloch: Is there any reason why that has not been done? Would such an approach make the document more secure, by tying the signature to a particular document so that it could not be used for anything else?

Warren Gordon: I think that it has not been done because people do not perceive that to be a concern. If people have lawyers who are acting for them, they trust their lawyers to get it right. Clearly if there is a fraud going on, that is a different scenario, but that rarely happens. In most normal scenarios, the party would have their solicitor acting for them and they would trust their solicitor to get it right.

10:45

In answer to your question, I believe that having the words at the top would probably make the

document more secure. What situations are we concerned about? One of the key concerns with virtual signing that we have not really touched on is the possibility that it makes fraud more likely. If fraud is going to be perpetrated, the fact that there are two lines at the top of the page saying, "This is the document to which this relates" will not necessarily prevent a fraud from being perpetrated. People can just manipulate the legislation to suit their own nefarious purposes.

I think that people trust the system. I am not sure that the suggestion about having the lines at the top of the page would take off in our jurisdiction, as people would just think that it was fiddly. It is the first time that I have heard that suggestion made; I have not heard it made in the English jurisdiction. From your perspective, starting afresh and looking at things anew, why not try it? It is a good idea. It would not stop a fraud, but it would tie the signature page in better with the rest of the document, so it is a good suggestion.

Margaret McCulloch: Thank you very much.

Stuart McMillan (West Scotland) (SNP): Good morning, Mr Gordon. My question follows on from the comments that you made a moment ago. How prevalent has fraud been with this particular practice in England and Wales?

Warren Gordon: I have not been provided with any statistics by the Law Society or anybody else to show the regularity of fraud. It is a new practice. The problem is that, if frauds were taking place, one would not necessarily get to hear of that publicly. Although we have had these types of signature for some time, it is probably too early doors to say how prevalent fraud is. It has not been highlighted in the press as an issue, although it is a concern. It is a concern because, as we see in the press every day, with anything that is done electronically there is a greater chance of hacking or of fraud. Call me a Luddite, but, when I have physical documents such as the land certificates that we used to have, I feel that I have more security than I would have if I relied on someone amending the register, for example, with nothing to prove it. I still believe that physical documents give a greater degree of security. In that sense, there is a greater chance of fraud, but I do not have the statistics to show that fraud is happening more often in relation to virtual signings than in relation to manual signings.

Stuart McMillan: Have there been many reports of fraud cases in the media?

Warren Gordon: I have not heard of any in relation to virtual signings in this area. That does not mean that there have not been any, but none has been reported. I presume that, if there was such a scenario, the police would be involved and such cases might not even be made public for a time because of the investigations that would be going on.

The practice note has been out for some time and the Land Registry will now accept certified copy documents. You must remember that virtual signings are probably less of an issue in relation to sale contracts than they are in relation to the actual transfers of the properties—that is where the fraudsters would really be interested. It is only since 30 June that the Land Registry has said that we can have certified copy signatures, which lays open the possibility of having virtually signed leases or transfers being sent to the Land Registry. The process went live only seven weeks ago, so it is probably too early to judge whether a fraud will happen. However, over the next year or so, it will be interesting to see whether we get more such cases coming out in the press. That will really highlight whether there are serious pitfalls with the virtual signing process, particularly when it relates to dispositions of land.

The Convener: Stewart Stevenson has questions on the particular issue of electronic signatures.

Stewart Stevenson: I have just been reminded of a gentleman called George Scovell, who, 200 years ago, broke Napoleon's grand chiffre and thus laid the groundwork for his ultimate defeat at Waterloo. Maybe the lawyers are correct to stay away from anything electronic that requires encryption and encoding.

Warren Gordon: We just need caution.

Stewart Stevenson: Indeed. What worked 200 years ago might still be a danger today.

I am really interested to know about other work that the Law Society or other people in the English legal system have planned or are undertaking to promote the use of electronic signatures and create an infrastructure to allow the system to be more easily and cheaply introduced.

Warren Gordon: As far as I am aware, the Law Society is not actually involved in the promotion of true digital signatures. We have looked at the issue at length over the years, and many firms have written about it.

To my mind, the best iteration of digital signatures came from the Land Registry's earlier iterations of e-conveyancing. I was actually doing a bit of research on the matter last night, because I thought that the question might come up, and I found an interesting *ComputerWeekly* article from 2008 that examined the role of public key infrastructure—PKI—systems in guaranteeing the authenticity of property transaction documents. If you look online, you will find it.

I also noticed some Land Registry documents from the same time setting out some of the technical parameters for PKI. In a nutshell, if the Land Registry's proposals had gone ahead—which, ultimately, they did not—authorised parties would have been able to exchange information quickly between each other and the Land Registry; the documents would have been encrypted and signed with a digital certificate. I think that that is perhaps the sort of thing that you have in mind. To get into and read those documents, people would have needed a secure token, a username and a password. Under the Land Registry's original plans, up to 300,000 documents a day would have been affected, and up to half a million security certificates would have been supported. In the arrangement, the Land Registry would have managed a central authority issuing the certificates to enable parties to sign electronically documents such as transfers and mortgages, and law firms would have appointed administrators to ensure that the people at their end were acting securely and properly utilising the certificates, with security to enable access.

The system never saw the light of day in an e-conveyancing context, but the committee might find it worth its while to speak to the Land Registry for England and Wales about its experiences, if it has not done so already. If you do not want to do that, you will find, if you do an online search for "PKI" and "Land Registry", a 10-page document that might be of interest explaining some of the project's technical aspects.

As far as English legislation is concerned, there is the Electronic Communications Act 2000, which makes quite wide-ranging provision with regard to electronic signatures. For example, it makes all electronic signatures, no matter whether they are simple or advanced—I will explain the difference in a moment—admissible in UK legal proceedings. However, the evidential weight of the signature depends on whether it is simple or advanced. A simple electronic signature is, for example, a typed signature at the end of an email; frankly, that sort of signature does not carry much evidential weight because it is not very secure. The more advanced signatures are those certified by some kind of certification authority and are more akin to the Land Registry PKI-protected signatures that I have just mentioned.

The other problem with electronic signatures is that, although the 2000 act is an umbrella piece of legislation, it is not entirely clear whether every other bit of English legislation enables that act to be used to effect electronic signatures in that context. In relation to property legislation, we specifically went to counsel to get a view on virtual signings. The point is that one cannot definitively say whether every bit of English legislation allows for the application of PKI or its equivalent to electronic signatures, perhaps because of the incomplete incorporation of the 2000 act into other pieces of legislation.

Stewart Stevenson: That was very interesting and helpful. I close with the simple observation that the banks in the clearing house automated payment system—or CHAPS—have been using this technology since 1982, so there is a bit of evidence that it actually works. I know a bit about that, because I happened to be the project manager of that particular project.

The Convener: It occurs to me that there might be a need for an internationally agreed protocol, given that the route that we are going down does not seem to be reversible. From where you are sitting, is there any indication of that sort of thing happening?

Warren Gordon: From where I am sitting in a real estate context, the answer is no. Of course, that does not mean that it will not happen in future, particularly with the transatlantic and cosmopolitan nature of transactions. Such a development would not surprise me, but I have not been involved in such work and I am not aware that the Law Society has discussed the matter with law societies in other jurisdictions. I agree with you, though, that that would be an important step.

The Convener: Thank you very much. We will now return to Stuart McMillan, who has a question about electronic document repositories.

Stuart McMillan: What benefits could a dedicated electronic document repository bring to the system envisaged in the SLC report?

Warren Gordon: Can you clarify what you mean by "electronic document repository"?

Stuart McMillan: The SLC recommends such a repository on page 63 of its report, but the issue has not been dealt with in the bill. I suppose that it means a facility where all the electronic documents could be collected.

Warren Gordon: The nearest things that we have to that in the property context are extranets, which are usually for completed documents. I would therefore define an extranet as an electronic document repository, because it allows us to have all our electronic documents in one place so that clients can access them and so that they can be used for transactions. After all, as we move further into the virtual world, we will not want to send the other parties in transactions a tonne of paper documents.

As for any wider application, there have been discussions—they might even have involved the Land Registry; I am not sure how far they have progressed—about the extent to which the Land Registry could hold a series of different documents in context. Ultimately, people are seeking to

improve the efficiency of property transactions in our jurisdiction—and, I am sure, in other jurisdictions—and having ease of access to all relevant electronic documents in one electronic document repository would be very helpful to all parties. I do not think that the issue has been progressed at all in a public sector context with the various agencies but, as I have said, we use it in a private context in our transactions and as a means of holding documents. Indeed, it is a big issue for law firms, particularly the larger ones, which deal with big properties and therefore lots of documents that they will want to make it as easy as possible for people to access.

Stuart McMillan: I note that, only two or three years ago, the Scottish Parliament passed the Land Registration etc (Scotland) Act 2012 to improve the efficiency of Registers of Scotland and bring it more into the electronic age, and the SLC's proposal is for that organisation to be the main body for collecting these documents.

Warren Gordon: Has that system gone live?

Stuart McMillan: Yes.

Warren Gordon: I am sure that if the Land Registry of England and Wales chose to go down the same route, there would be some very interesting conversations to be had.

The Convener: I am grateful to you for your responses, Mr Gordon. I think that that concludes our questions, but do you think that we have missed anything? I know that that seems unlikely, given that we have been at this for an hour now, but was there anything that you expected to come up that we have inadvertently missed?

Warren Gordon: The only point that we did not cover was options 2 and 3 on the Law Society practice note with regard to documents that are not real estate contracts or deeds. Those options take a more adventurous approach to the execution of documents with, in option 3, the use of a pre-signed signature page. What happens is that you get a client to sign a separate page, let the parties go away and agree the document and then attach the page to the finished version of the document. Speaking as a real estate lawyer, I have to say that such an approach does not fill me with great comfort—and if I were a client, I would not be filled with great comfort either, because I like to look at what I am being asked to sign. Although option 3 caters for that scenario, I would not recommend it to people, because I think that signing a page up-front before you actually see the document itself is a very dicey form of execution. I am not sure how many members of the committee would be happy doing that, but I certainly would not be.

Apart from that, convener, I think that we have covered all the points.

The Convener: What you have outlined seems to be where the law of agency and the law of trust bump into each other, and I would suggest that it is commercial nonsense.

Stewart Stevenson has another question.

11:00

Stewart Stevenson: Is there a defined process for attaching the pre-signed signature page that involves the person in question, who might have provided the signature many months earlier?

Warren Gordon: Solicitors would be authorised to attach the page to the document. I might have overstated the adventurousness of the process that is set out in option 3—although I still think that it is adventurous—but what would happen is that, once the final document was agreed, it would be transmitted electronically to the party who signed it at the beginning. They would be able to look at the final version and they would then email back to say, "I'm happy for the signature page to be attached."

That party would physically sign the page at the beginning of the process, but the final document would still be sent to them. The sending of the document and their approval would constitute the legal affixing or attachment of the original pre-signed page. However, the more the signature and the signed page are physically and electronically separated from the actual document, the more the risk or the possibility of fraud enters the scenario and the more I get hesitant about the process.

Stewart Stevenson: So we come back to the need for a legally identifiable process that connects the signature page to the document. I see Mr Gordon nodding, so I have clearly understood him correctly.

The Convener: That brings us to the end of this evidence-taking session, which has taken more than an hour, as I have said. We very much appreciate your evidence, Mr Gordon. Every word that you have said will be found in the *Official Report*, and we will ensure that we send you a copy of it.

Warren Gordon: Thank you for the opportunity to speak to the committee.

11:02

Meeting suspended.

11:08

On resuming—

Instruments subject to Negative Procedure

Building (Scotland) Amendment Regulations 2014 (SSI 2014/219)

Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment (No 2) Order 2014 (SSI 2014/220)

The Convener: No points have been raised by our legal advisers on the instruments. Is the committee content with them?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

Marriage and Civil Partnership (Scotland) Act 2014 (Commencement No 2 and Saving Provisions) Amendment Order 2014 (SSI 2014/218)

Anti-social Behaviour, Crime and Policing Act 2014 (Commencement) (Scotland) Order 2014 (SSI 2014/221)

11:08

The Convener: No points have been raised by our legal advisers on the instruments. Is the committee content with them?

Members *indicated agreement.*

Small Business, Enterprise and Employment Bill

11:08

The Convener: Under item 5, the committee is invited to consider the powers to make subordinate legislation that are conferred on the Scottish ministers in the Small Business, Enterprise and Employment Bill. A briefing paper has been provided that sets out the relevant aspects of the bill and comments on their effect. Does the committee agree to report to the lead committee that it is content with the delegated powers that are conferred on the Scottish ministers in the bill and with the procedure to which they are subject?

Members *indicated agreement.*

11:09

Meeting continued in private until 11:42.

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