

Recent guidance from the Irish Law Society has followed guidance previously issued by the Law Society of England in the aftermath of the *Mercury Tax Group Limited v. HMRC* case in 2009. That guidance creates additional hurdles for parties seeking to execute, in particular, deeds at an electronic or virtual closing. It also heightens the risk that the validity and enforceability of documents may be called into question if the relevant formalities are not satisfied.

What is the legal background?

The leading English case on the execution of documents prior to *Mercury v. HMRC* was *Koenigsblatt v. Sweet*. *Koenigsblatt* was authority for the propositions that:

- where the law requires a contract to be in writing or evidenced in writing (eg a guarantee) there is no legal requirement that it must be in the final form at the moment it is signed;
- a signature on a document which is later altered, either with prior authority or with subsequent ratification, is valid (eg a signature page which is affixed to a contract on behalf of the person who has signed and with his authority);
- a contract need not be a discrete physical entity at the time it is signed.

Koenigsblatt v. Sweet was a case dealing with the sale of two houses. *Koenigsblatt*, the buyer, had signed one version of the purchase contract while *Sweet*, the seller, had signed another. The seller's solicitor amended the seller's version of the contract to make it conform to the buyer's and – prior to exchange – the seller was both (a) told of the material change, and (b) approved it. The contract, as amended after the seller's signature but with his approval, was deemed to be valid.

Mercury v. HMRC, on the other hand, was a case dealing with an elaborate (and lawful) tax avoidance scheme involving the execution of a number of documents as deeds (no deeds were involved in *Koenigsblatt*). *Mercury* is particularly important guidance for situations involving the electronic or virtual signing of deeds. The judge in *Mercury* stated that:

- the document to be signed must exist as a discrete physical entity (whether in a single version or in a series of counterparts) at the moment of signing;
- a party signing an actual existing authoritative version of the contractual document gives some protection against fraud or mistake, and so implying that an actual authoritative version of the document must exist when the party is signing it; and
- signature and attestation must form part of the same physical document (on the basis that the statutory requirements for the execution of a deed by an individual refer to "it" being executed)



The strictest application of these statements can frustrate and make more difficult closings which are to take place by means of the electronic or virtual exchange of documents. The judge's statements apply to all virtual closings but they have particular force in relation to deeds.

What is the difference between a deed and a contract?

Not all contracts must be entered into as deeds. However nearly all contracts can be entered into as deeds (provided the relevant requirements are met and the parties wish to do so). Some contracts must be entered into as deeds in order for them to be effective (for example agreements for the conveyance of interests in land (including mortgages)). Where contracts are entered into as deeds special rules of construction and interpretation will apply, they may only be amended by further deeds and longer limitation periods will apply to claims under the Statutes of Limitations 1957 to 2000.

What are the practical implications?

The recent Law Society Guidance, although widely publicised, is not universally familiar to the legal profession so it is important to plan ahead to avoid last minute hitches on any transaction involving an electronic or virtual signing.

A one or two day delay in the signing of a deal at the end of a long and difficult negotiation can be extremely frustrating for all concerned and, of course, there is always the risk that a transaction may fall at the final hurdle before it is signed. Some administrative steps can be taken to mitigate some of the least practical implications of the Guidance but it's important to discuss and agree these in advance.

For further information, please contact [Peppe Santoro](#) at [Venture Legal Services](#) directly.

This briefing is correct as at 24 November 2011.

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