

Digital Signatures and Conveyancing Practice

With the inexorable rise of digital communication Professor Stewart Brymer argues that legally binding electronic signatures and secure electronic document exchange protocols can only be positive for Scottish conveyancing.

The term “digital” or “electronic” signature is in many ways a convenient tag for the authentication of a document by electronic means. There are many variations including machines that allow a signature to be traced which then appears on a screen. That is not what would be regarded as a digital signature in a technological sense however.

The crucial element is not the digital signature itself but the digital certificate which provides the security for the adhibition of the signature and which thus underpins the same. In strict technological terms, the certificate is used to create the digital signature which is a product of the actual document and the digital certificate together.

As a general rule, the longer the length of cryptographic keys, the stronger the encryption. A 20-bit key is twice as strong as a 19-bit key and so on. It is worth remembering that in the not so recent past, a digital certificate with a key length of over 56 bits was classed as a military weapon for export purposes and special licences were required.

What is important is the strength of the digital certificate and not the fact that someone has a digital signature. Put simply, a cheap digital signature obtained on the internet on a credit card payment is never likely to be acceptable for the processes envisaged by Part 10 of the Land Registration etc. (Scotland) Act 2012 which came into force in May this year, because the digital certificate which is used to create the digital signature is simply not secure enough.

A significant step forward for the Law of Scotland was made on 11 May 2014 when the Electronic Documents (Scotland) Regulations 2014 (“the Regulations”) came into force. The Regulations are a small but very important step that will allow conveyancing in Scotland to be carried out electronically.

The Regulations were made under powers that were inserted into the 1995 Act by the 2012 Act. The Regulations allow legal documents that the Requirements of Writing (Scotland) Act 1995 specifies must be in writing (other than wills and other testamentary writings at present) to take an electronic form and be legally valid.

The Regulations provide that electronic versions of legal documents governed by the 1995 Act can be legally valid if they are signed by using what is termed an “advanced electronic signature”. For a document to obtain the presumption that it has been signed by the granter, and to become self-proving, it must be signed using an advanced electronic signature, and that signature must be certified using a “qualified certificate”.

The terms “advanced electronic signature” and “qualified certificate” used in the Regulations are defined in the Electronic Signatures Regulations 2002, a piece of Westminster legislation that adopted into UK law Directive 1999/93EC of the European Parliament and Council on a Community framework for electronic signatures.

For an electronic signature to become an advanced electronic signature it must be:

uniquely linked to the signatory;

- capable of identifying the signatory;
- created using means that the signatory can maintain under their sole control; and
- linked to the data to which it relates so that any subsequent change of the data is detectable.

An advanced electronic signature has more significant value than an electronic signature: it guarantees the integrity of the text, as well as the authentication. The juridical value it has is for integrity: one is sure the text received is the same that was sent, and that no hacker has changed it. Advanced electronic signatures are issued by what is termed a “certification authority.”

The Law Society of Scotland is currently in the process of introducing an electronic practicing certificate which will contain within it a secure digital signature that will meet the requirements for an advanced electronic signature that is certified using a qualified certificate.

These smartcards will give Scottish solicitors the ability to benefit from the Regulations and sign legal documents electronically knowing they are legally valid. This is being achieved by way of a phased roll-out which commenced in Summer 2014. The roll-out will involve a face to face certification process – and that is exactly as it should be in order to ensure that public confidence in the system is maintained.

As far as general practice is concerned, it might well be prudent to incorporate authority from clients in Terms of Business to the effect that the client authorises the solicitor to sign missives and any other permitted document, electronically on his/her behalf. No such authority is given under current practice when adjusting missives, of course, but it is good practice at the moment to seek authority from one’s client before issuing an offer or formal missive. It therefore makes sense to add a simple provision to this effect in Terms of Business.

The full effects of the change to digital signatures will not be harnessed until a secure electronic document exchange facility is available. That has been talked about for some time. The reality, however, is that such document exchange facilities already exist. The stockbroking community, among others, is well versed at dealing in this way.

This is a natural progression for conveyancing and the sale/purchase of heritable property generally. Now we need to adopt a single national missive and standard styles of common conveyancing documents.

That will allow solicitors to focus on being a trusted adviser in the process which, in time, will hopefully see the Scottish system of conveyancing retain its uniqueness. There is, at present, a trend towards us having a system that is, to all intents and purposes, the same as that which operates in England & Wales, with exchange of contracts and chains of transactions becoming the norm. There is an opportunity now to reverse this trend. People want to communicate electronically – and many do it already. They also want secure email exchange so that their transactions are safe.

The e-commerce-using public willingly transacts by email and assumes that all is well, but it is not – as we discover when systems are hacked into. It is therefore imperative that commercial solutions are robust in order that they can then assist in smoothing the bumps in the sale and purchase process and hopefully help minimise delay and loss.

This will be achieved by removing uncertainty with regard to undelivered or intercepted emails; missing deeds; delay in conclusion of missives etc. In what way is that not a good thing?

Change will happen. It makes logical sense for the entire sale and purchase transaction to be able to be completed electronically from start to finish. Conveyancing Case Management systems are now widely used and it is envisaged that changes to these systems will increasingly make use of the technological developments that exist, especially when these are underpinned by legislation.

It is essential however that all new systems are introduced with care and attention especially with regard to the importance of client confidence therein. It is this that gives the solicitor an opportunity to remain central to the sale and purchase process as a “trusted adviser”.

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