

## LANDMARK CHAMBERS CASE STUDY

Toby Watkin

A landlord company (L Corp Ltd) seeks to exercise a break clause in a lease which states that the lease may be terminated by the service of a “written notice signed by a director of the landlord company.” D, a director of L Corp Ltd, instructs his assistant (Andrew Agent) to serve notice upon the tenant (T Corp Ltd). T Corp Ltd, which is wholly owned by its sole director, T, has previously agreed with L Corp Ltd to accept service of notices by email, and so Andrew sends the following email:

*From:* [AndrewAgent@LCorpLtd.com](mailto:AndrewAgent@LCorpLtd.com)

*To:* [T@TCorpLtd.com](mailto:T@TCorpLtd.com)

*In accordance with the terms of the lease LCorp Ltd, your landlord, hereby gives you notice that your lease will come to end on 9<sup>th</sup> July next.*

When the notice arrives in T’s inbox it is shown as being:

*From: Andrew Agent [AndrewAgent@LCorp.com]*

The notice is served at the appropriate time in order to take effect on 9 July, and otherwise complies with the requirements of a valid notice, but T asserts that the notice was not validly signed, since:

- A is not a director.
- It is not signed by A either.

Is T correct that the notice is not validly signed? Would it make a difference if A had typed his name at the bottom of the email, or his usual email footer had included his name?

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***Can Andrew sign such a notice at all?***

As a general proposition, anything which can be done by an individual can also be done by his duly authorised agent. At common law a person can ‘sign’ a notice himself, or can authorise another to sign it. However, the common law rule may be displaced by the specific contractual (or statutory) terms under which the notice is served. For example, if the terms of the lease in question provide for some notices to be signed by ‘a director of the company’ and others to be signed by ‘a director of the company *or his agent*’ a court might

construe the lease as requiring D himself to sign the break notice. In St Ermins Property Co Ltd v. Tingay [2002] EWHC 1673 a statutory requirement that a notice be signed by each of the tenants by whom it was given was held to impose an obligation for the tenants to sign individually. In contradistinction, the same statute required that other statutory notices be signed 'by or on behalf of each of the tenants'.

However, assuming that there is nothing within the constitution of L which prevents its directors instructing agents to act for them, and assuming the terms of the lease do not suggest that the common law rule has been displaced, Andrew could properly have signed the notice as agent for D.

### ***Did Andrew 'sign' the notice?***

Historically, the requirement to 'sign' a document did not always necessitate the placing of the signatory's usual signature on the document. The placing of initials on a document can be a sufficient signature (Wife v. Cobb (1866) 14 LT 433), and in Goodman v. J Eban Ltd [1954] 1 QB 550 the requirement of the Solicitors Act that bills must be signed was held to have been fulfilled where a solicitor had stamped a bill with a rubber stamp bearing a facsimile of the name of the firm in his own handwriting.

However, a meaning of the word 'signed' more recognisable to a layperson was adopted by the court in Firstpost Homes Ltd v. Johnson [1995] 1 WLR 1567. In that case it was argued that a party who had typed his own name as the addressee of a letter had 'signed' the letter for the purposes of s. 2(3) of the Law of Property (Miscellaneous Provisions) Act 1989, so that the letter (which was later signed by the other party) fulfilled the requirements of a valid contract for the sale of land. The court declined to follow the "*ancient baggage*" of the earlier authorities in relation to the Statute of Frauds 1677 and s. 40 of the Law of Property Act 1925. Peter Gibson LJ stated that the typing or printing of the name of an addressee in the header of a letter could not amount to the 'signing' of that letter by the addressee, in any sense recognisable to a layman: "*ordinary language does not... extend so far.*"

The question of the nature of a 'signature' in the context of email communications has arisen directly in two first instance decisions: Firstly, in J Pereira Fernandes SA v. Mehta [2006] 1 WLR 1543, which concerned a guarantee contained within an email. One of the issues which arose was whether the appearance of the guarantor's name within the email address (Nelmehta@aol.com) constituted a signature for the purposes of the Statute of Frauds 1667. Although the court in that case was bound by the "*ancient baggage*" relating to the meaning of 'signature' under the 1667 Act, the court still reached a common-sense conclusion that the term 'signature' did not extend so far. The judge concluded that there is no magic in the use of handwriting, or the writing of a name. However, whatever the form the alleged 'signature' takes the court held (relying the House of Lords decision in Caton v. Caton (1867) LR 2 HL 127) that, in order for it to constitute a 'signature', it must be placed so as to show that it was intended to give authenticity to the whole instrument. The

appearance of the alleged signatory's name on the document for some incidental reason (for example, because it happened to form part of the email address from which the email was sent) is not enough to amount to a 'signature'.

On the basis of the Mehta case, it therefore seems clear that the notice was not signed by Andrew.

***What if Andrew had typed his name at the end of his email?***

Although he rejected the suggestion that the incidental presence of an email address within an email amounted to a 'signature', the judge in J Pereira Fernandes SA v. Mehta [2006] 1 WLR 1543 was in no doubt that an appropriately worded email was capable of constituting a 'signed' document, just as much as a typed hard-copy document. In a subsequent decision, Orton v. Collins [2007] 2 EGLR 147, the court considered an email ending with the words "Yours faithfully" followed by the deliberate typing, by the solicitor, of his firm's name. The court had no difficulty in finding that the email had been 'signed', on the basis that any recipient would understand that the solicitor was "signing off on the document" with the intention of authenticating it.

It should be noted that Orton is a case on the 1989 Act, in which explicit reference was made to Firstpost, but in which a typed signature was held to be sufficient. Although the discussion of the 'signature' issue in Orton is arguably *obiter dicta*, it may still be unsafe to conclude that a handwritten signature is always required in cases concerning s. 2 of the 1989 Act (cf Emden para 2.041 relying upon Firstpost).

On the basis of Orton, and consistent with the pre-Firstpost authorities, it seems that if Andrew had typed his name at the end of the email, the notice would have been validly signed.

***What if Andrew's name had appeared in his email footer?***

It is less clear whether the appearance of Andrew's name within an email footer automatically created by his computer would have amounted to a 'signature'. However, my view is that it would. Although in Mehta the court placed some reliance upon the fact that the sender's email address had been added automatically, the ratio of both Mehta and Orton is that the issue of whether any particular mark or writing amounts to 'signature' is to be decided on an objective basis. In Mehta the test was expressed to be "*whether the conduct of the would-be signatory [in placing his mark] indicates an authenticating intention to a reasonable person.*"

As we have seen from Orton, the appearance of the sender's name at the end of the body of an email, when manually typed by the sender, can sufficiently convey to a reasonable recipient the intention of the sender to authenticate the email, and can therefore amount

to a signature. It is not obvious why a court would reach any other conclusion just because the sender had caused his name to appear in the same form automatically through his email footer, and does so in the case of every email he sends. The fact that the name has been automatically added may not be apparent to the theoretical objective recipient, and the existence of a signature on a document is not normally capable of being undermined by the evidence that the document was signed by the signatory without thinking about it.

As email becomes more and more prevalent perhaps we can expect that the courts will be less and less receptive to technical arguments based upon the difference between an email and a hard copy.

TOBY WATKIN

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