SHEPHERD+WEDDERBURN

Consultation Response

Scottish Law Commission
11th Programme of Law Reform

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We are pleased to offer the following responses to the Eleventh Programme of Law Reform Consultation.

Shepherd and Wedderburn

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Questions

1. Do you have any suitable law reform projects to suggest?

1.1 We recommend a review of the **Requirements of Writing (Scotland) Act 1995 (RoWSA)**, together with fresh consideration of some of the provisions of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 and the Electronic Documents (Scotland) Regulations 2014.

1.2 There are a considerable number of practical issues in the common law relating to **Servitudes** that we consider would benefit from a statutory clarification.

2. If suggesting a new project:

(a) Please provide us with information about the issues with the law that you have identified:

2(a).1 There are numerous issues encountered on an almost daily basis with the provisions of **RoWSA**. We have set out some of these in the attached Appendix. Our views reflect some of the comments contained in the paper attached to the Law Society of Scotland's response to this consultation, of which we are aware, as we worked closely with LSS to produce that paper. We strongly support the Law Society's submission.

There are particular problems with the provisions relating to electronic signatures, both in RoWSA and in the Electronic Documents (Scotland) Regulations 2014. The Commission will be aware that Regulation 4 of the 2014 Regulations (relating to annexations to electronic documents) and Regulation 5 (relating to authentication of electronic documents) were recently amended by The Registers of Scotland (Digital Registration etc.) Regulations 2022. One of the problems with the way Regulation 4 was originally couched was that the concept of "annexation" in the digital environment is illogical. Once an "annexation" is attached to an electronic document, it becomes part of the document, and so in effect ceases to be an "annexation". The provisions relating to electronic documents generally suffer from the approach that concepts relating to traditional documents have been directly converted into digital equivalents, whereas they are fundamentally conceptually different.

2(a).2 Being based almost entirely on the common law, the law of **Servitudes** is often complex, obscure or contradictory. This makes it difficult to apply in practice when problems arise. Examples of this are the effect of the "Irvine Knitters Rule" often breached by the actual users of the servitude, who are usually oblivious to such technical niceties; "increasing the burden" on a servitude is often poorly understood, and can lead to unnecessary time and expense, for example in obtaining indemnity insurance, or in obtaining new servitude rights, which may not be necessary; adequate identification of the burdened and benefited properties; the rules of prescriptive acquisition would benefit from being clarified, as would the issue of what constitutes a benefited property in a pipeline servitude. We have also found there is confusion among practitioners about the distinctions between servitude conditions and real burdens. This sometimes results in what should properly be constituted as a burden, but is badged as a servitude condition, not being validly constituted.

(b) Please provide us with information about the impact this is having in practice:

2(b).1 See statements on "Impact in practice" in the Appendix in connection with **RoWSA**.

2(b).2 The uncertainty and obscurity of some of the common law in relation to **Servitudes** often results in considerable time and effort being spent on interpreting and establishing the nature of many existing servitude rights. There is a lack of consistency in drafting such rights (although PSG styles have helped to improve that in recent years) and this often adds to the difficulties. While appreciating that servitude law is a vast area, we think there is potential for legislative intervention that could simplify and clarify some of the problematic areas.

(c) Please provide us with information about the potential benefits of law reform:

2(c).1 Removing some of the transactional obstacles around **execution of documents** through clarification, simplification and updating of the law will simplify procedures and reflect in particular the appetite, particularly in the commercial sphere, for being able to transact effectively in the digital environment.

2(c).2 Clarification of some of the more obscure and problematic areas of the law of **servitudes** will provide greater certainty and reassurance to parties requiring these subordinate rights for the proper enjoyment of their property. Servitudes are used extensively in national infrastructure and renewables projects and clarity and certainty about the constitution and validity of such rights will be of considerable benefit to the risk profile of players in that sector.

3. Do you consider that your suggested law reform project would be suitable for the law reform process in the Scottish Parliament; or, in relation to reserved matters, for the House of Lords procedure for Commission Bills?

Yes. Neither of our suggestions should impact on reserved matters.

Any Other Comments

We believe that a comprehensive review of the law relating to execution of documents, both traditional and electronic, leading to modernisation of the law, will greatly improve Scotland's position in the commercial and domestic spheres, removing barriers to, and placing Scotland in the forefront of, swift and effective methods of transacting. Reviewing the requirements for execution of documents in a digital environment benefits commerciality, sustainability and inclusion, making it simpler and more inclusive for the citizens of Scotland, and those who wish to invest in our beautiful country, to contract and acquire rights and property. The current law is arthritic and creaking at the seams, as well as being ambiguous and contradictory, and a review of it has the potential to make Scotland a market leader in providing an accessible and workable framework within which to do business swiftly, efficiently and effectively.

Appendix

Some issues with the Requirements of Writing (Scotland) Act 1995

The following are examples of some of the issues frequently encountered with execution of document under Scots law. It is not an exhaustive list, and we would encourage the Commission, if it takes up this proposal to consider a root and branch review of the RoWSA and related legislation.

1 "Mixed media" signing[1]

The 1995 Act does not expressly refer to a contract signed by a combination of traditional and electronic signatures: Section 2(2) only refers to traditional documents and section 9B only refers to electronic documents.

Although these sections may be regarded as permissive, and there is no express *prohibition* of a mixture of signing types in the 1995 Act, there are concerns expressed by some members of the legal profession that the absence of specific provision casts some doubt on the competence of "mixed media" signing.

It seems clear that it was the policy intention of Scottish Government to permit this: the Explanatory Notes to Part 10 of the Land Registration etc. (Scotland) Act 2012 (which introduced the sections dealing with electronic signatures) states: “Subsection (3) [of section 9B] allows a contract mentioned in section 1(2)(a) of the 1995 Act to be constituted by *a mix of electronic and traditional documents*.”

However, since section 9B(3) makes no mention of traditional documents, the conservative approach is that section 2(2) only permits a contract to be constituted by one or more *traditional* documents and section 9B only permits a contract to be constituted by one or more *electronic* documents.

The wording in sections 2(2) and 9B respectively is causing this issue, each appearing to be self-contained provisions that do not cross-refer to the other.

There is support for the argument that mixed media contracts are permitted in section 1(2)(a) of the 1995 Act. It states "a written document which is a traditional document complying with section 2 or an electronic document complying with section 9B of this Act shall be required for the constitution of a contract … for the creation, transfer, variation or extinction of a real right in land". The rules on interpretation of statutes[2] provide that in any Act words in the singular include the plural, meaning that section 1(2)(a) of the 1995 Act can also be interpreted as saying "a written document *or documents* which is *or are* a traditional document complying with section 2 or an electronic document complying with section 9B of this Act shall be required for the constitution of a contract … for the creation, transfer, variation or extinction of a real right in land". Many contracts for the sale of land consist of more than one document (i.e. missives) and the application of the rules of statutory interpretation would therefore mean that section 1(2) does authorise mixed media contracts.

Impact in practice: The mixed views held by the profession about the competence of mixed media is inhibited the wider adoption of electronic signatures. However, the absence of an express statement in the words of the Act is causing reluctance among some practitioners to accept mixed media contracts.

2 Company signing under power of attorney from another company

We would welcome clarification of the provisions of RoWSA in relation to the use of powers of attorney.

We are aware that there is a view that the effect of section 12(2) is to apply the 1995 Act rules governing how the granter must sign to the attorney, so that the same type of signature as is needed for the granter is all that is required for the attorney when they sign. We struggle with this interpretation, as it would appear to override the special cases signing requirements for the granter set out in Schedule 2 (authorised signatories), but we can also see how the view could be arrived at, and so clarification of the law would be extremely useful.

Impact in practice: When this view is presented it results in protracted debate, unhelpful and time consuming, and with potentially unfortunate consequences for the validity of the documentation if the view is adopted, but is incorrect.

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1 1995 Act section 2(2) and section 9B

2 Section 6(c) of the Interpretation Act 1978 and section 22(a) of the Interpretation and Legislative Reform (Scotland) Act 2010.

3 Probative signing by corporate directors or secretary of a corporate granter

This is an issue that crops up frequently and repeatedly, and the two schools of thought that prevail have never been satisfactorily resolved.

The issue is whether a corporate director (for example) can sign a deed granted by a corporate granter merely by the corporate director signing in accordance with the provisions of paragraph 3 of Schedule 2 of RoWSA for the director company, or whether that is merely equivalent to a single director, who is a natural person, signing, and is therefore valid but not self-proving. If the latter the view is that an additional witness would be necessary to make the document self-proving.

Ideally, Schedule 2, paras 3 and 3A of the 1995 could be amended to make it clear that the first approach is sufficient for the document to be self-proving.

Impact in practice: This issue crops up frequently. Often the deed may have to be re-signed, to be on the "safe side" of ensuring that it is self-proving, which can result in delays and acrimony.

4 Counterparts – whether two or more signatories signing on behalf of one single entity can sign separate counterparts

This is another area of the law relating to execution of documents where there are two diametrically opposed (and strongly held) views.

The uncertainty arises from the fact that section 1 of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 refers to “parties”, but that word is not defined and so is open to different interpretations. One argument is that each signatory is a "party"; the contrary argument being that the entity is the "party" and the signatories are simply signatories of a single “party”. If the latter view is preferred, the view is that this prevents them from each signing separate counterparts.

The argument often crops up in relation to whether directors of a company can sign separate counterparts of a document and also in relation to trustees.

There is academic commentary (Gretton & Reid: Conveyancing 5th Edition, paragraph 18-41) that the law is unclear on this point.

Impact in practice: The impact is similar to the issue with corporate directors; because the law is unclear and there are different interpretations of it, the same arguments arise repeatedly and one side or the other has to back down. This is unsatisfactory for many reasons – time is wasted and clients should not be expected to experience delays or additional costs over uncertainty in such a fundamental component (how to sign) of a transaction.

5 Prescriptive requirements for signatures

Most persons signing a document, particularly one with legal consequences, will expect to sign their "usual signature". This is important from the point of view of deterring forgery, and for a simple and logical approach to execution of documents.

However section 7 of RoWSA presents problems: for example where a signatory's "usual signature" is insufficiently legible to determine that they have signed in accordance with section 7; where it is the custom of the signatory to sign their name by a means other than a surname preceded by at least one forename (or an initial or abbreviation or familiar form of a forename) e.g. where it is customary to sign the family name first; and signatures using non-Roman characters, such as Chinese or Arabic characters, which are not expressly dealt with.

Impact in practice: The requirement to sign “with his (sic)[3] surname preceded by at least one forename (or an initial or abbreviation or familiar form of a forename” may discriminate against those whose custom it is to sign in some other manner. It could be regarded as inappropriate in a multi-cultural and inclusive society.

It is not always possible for a solicitor to know whether someone’s signature will meet the requirements of section 7 until the signed document is returned or delivered to them. If the signatory’s signature is judged to be insufficiently legible to be clear that these requirements have been met, this can lead to the signatory being asked to re-execute in a manner that clearly meets those requirements. On a very simple level this causes issues for transactions relating to timings and generally makes Scottish signing requirements more

3 We suggest consideration might also be given to using gender neutral language.

onerous than other jurisdictions. Signatories (and their solicitors) in other jurisdictions are surprised to learn that they cannot use their usual signature to sign the document where it could be or has been judged to be insufficiently legible to meet the requirements of section 7.

In some situations, it will be important that it is the granter's usual signature, and if their usual signature is not acceptable, and they have to re-sign in a more legible way, this could lead to other issues including (1) inconsistency with other documents signed, and (2) inconsistency with specimen signatures. It is of some concern that forgery can potentially be made easier by requiring a person to sign in way which is not their "usual signature" as it is likely to be simpler to forge a signature using a "legible" signature rather than a signature which others would find difficult to replicate.

In addition, if the granter's usual signature cannot benefit from the presumption of validity under section 3 of the 1995 Act, this would seem to undermine the purpose of having a witness to attest to their signature.

6. The requirement to print the full document before signing and counterpart issues

The Commission will be aware that in England there is a signing process known as "Mercury signing" (see Law Society of England & Wales Practice Note Execution of documents by virtual means) by which a party signing the deed needs only to print the signing page, sign and return it.

There is a body of opinion among solicitors that it would be helpful if Scots law permitted a "Mercury" Option 1 type signing/completion mechanism, coupled with suitable processes for ensuring that the signatories have read and understood the document they are signing.

Not all solicitors are in favour of this change as there are concerns that this could increase the potential for mistakes, fraud, and litigation. On the other hand commercial clients in particular would be in favour of this approach.

There is also the issue of inconsistency between the requirements of RoWSA and the ability, when counterpart execution is employed, to deliver part only of the document – including the signature pages, provided what is delivered "is sufficient in all the circumstances to show that it is part of the document".

We suggest that consideration should be given to the viability and advisability of allowing only the signature page to be printed, signed and returned, provided adequate protections are in place, and what, if appropriate, those protections should be.

Impact in practice: There are again two different views, but the issue of having to print off the full document came into sharp relief during lockdown. This caused considerable practical issues, for clients in particular but also for solicitors, working from home without adequate printing facilities.

While such restrictions are hopefully a thing of the past, there is also the sustainability consideration of printing out lengthy documents, particularly when, from a registration perspective, pdfs of documents are now acceptable. While we believe that any change in the law here must take account of validity and security considerations, we are also of the view that the current requirements are out of step with the modern way of transacting, and that an overhaul of the whole approach to how to sign transactional documents effectively and validly in a digital world needs to be given active but careful consideration.

7. Defining what is the "last page" of a document

Section 7(1) requires the granter to sign on the "last page" of the document. Arguments frequently occur about whether this means the last page must include any operative text; or would it be competent if it consists of all or part of the testing clause only? There are varying views among solicitors as to the most suitable approach here.

Impact in practice: This requirement is interpreted by many as requiring the signature to appear on a page which contains some operative text (and not just some or all of the testing clause). This requirement is a common pitfall particularly in cross-border/multi-jurisdictional transactions and, if it is not complied with, may necessitate re-signing of the document. Clarification of this would be welcome.