Litigation

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Beware the Blessings of Technology: Email Exchange May Create a Binding UK Contract

by Raymond L. Sweigart

Recent remarks by the English High Court in the insolvency case Green (Liquidator of Stealth Construction Limited) -v- Ireland *[2011] EWHC 1305 (Ch) suggest that in some circumstances, and at least in the context of fast-moving real property transactions, an exchange of emails may well satisfy the requisite formalities for creation of a binding and enforceable contract.*

It has long been considered that Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 purposefully protects the naïve or unadvised from unintentionally entering into a contract without realizing they had done so. It sets forth specific statutory formalities required for the creation of an enforceable contract, to wit, that the contract must be in writing, incorporate all terms agreed and be signed by the parties. However, as indicated by the discussion in *Green,* this does not necessarily exclude creation of a contract by email on the premise that a typed name at the end of an email may be the "signature" required by the statute.

In the *Green* case, the defendant Mrs. Ireland held a legal charge over property owned by Stealth Construction Ltd. Mrs. Ireland was the sister of one of the owners of Stealth and she had made loans to the company for the purpose of purchasing the property which was the subject of the charge. Stealth subsequently entered into liquidation and the liquidator sought to avoid the encumbrance, claiming that the charge was a preference that should be set aside under Section 239 of the Insolvency Act 1986. Mrs. Ireland countered that the charge had been executed pursuant to an agreement to create the charge that was contained in an exchange of emails between her and her sister prior to the insolvency.

The charge was ultimately ruled a preference and set aside, as the High Court found that the chain of emails relied upon did not incorporate all of the terms agreed by the parties and therefore did not fulfill the statutory requirements under Section 2. However, in considering the underlying issue of whether a contract to create a charge could be created by an exchange of emails, the court looked at all the elements of Section 2. The parties did not dispute the premise that Section 2 applies to a contract for the grant of a charge on land. The liquidator also accepted that an exchange of emails could constitute a writing for the purposes of Section 2 and the court accepted that as correct, noting specifically:

> " . . . where, as here, the second email is sent as a reply and so creates a string, as opposed to simply a new email referring to an earlier email. It is the electronic equivalent of a hard copy letter signed by the sender being itself signed by the addressee".

In its analysis, the Court accepted the reasoning in the Statute of Frauds case, *J Pereira Fernandes SA -v- Mehta,* 1 WLR 1543 [2006] EWHC 813 (Chancery) that the senders' insertion of their names at the end of the respective emails constituted "signing" by them for purposes of Section 2. The court then went on to note, however, that the emails were not expressed in terms which suggested binding obligations on the parties, nor did they state the terms of any contract, and it was clear to the court that the parties had intended that a further document would be drawn up.

Whilst Mrs. Ireland was not successful in this case and no enforceable contract was found to exist, the decision appears one more in a trend towards the judicial recognition in England of electronic contracts, and the need for care in pre-contract email correspondence. See our Client Alert—King Charles II Meets the Digital Age: Can an Email Chain Satisfy the Statute of Frauds? 31 January 2011, discussing the case of *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd ("SMI")*, [2011] EWHC 56 (Comm), which analysed, amongst other things, whether 21st-century methods of communication can constitute an "agreement, memorandum or note in writing and signed" under section 4 of the Statute of Frauds 1677 and more specifically, whether a guarantee might be "agreed" upon in a lengthy chain of email correspondence.

The distinction fastened upon by the courts in *Green* and in the *J Pereira Fernandes SA* case between merely having the sender's name in the header or "from" line of an email, as opposed to purposefully affixing one's name to the foot of the message, or the apparent distinction between a chain of emails and separate but clearly related communications, may be useful as representing the current state of this progression. However, as the exercise appears to be to interpret the statutory requirements regarding signature in light of what the ordinary "tech-savvy" person in the street today would consider to be a signature, it remains crucial that pre-contract email be carefully considered in this light before hitting the "SEND" key.

If you have questions, please contact the Pillsbury lawyer with whom you regularly work, or the author:

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