

Chancery Bar Association Seminar - 13th April 2005

“Electronic Evidence: Can the Lawyers Keep Up?”

**Presentation on Admissibility and the E-Signatures Directive
by Martin Howe QC**

Introduction

There is a need to distinguish between inter-related but distinct areas of law relating to electronic documents:-

- (1) The law of evidence: In what circumstances are electronic documents admissible to prove the truth or otherwise of themselves or of events described or referred to in them?
- (2) Requirements as to formalities: Certain categories of documents are required to be e.g. “in writing” or “signed” in order to be legally effective.

Requirements as to formalities are actually part of substantive law rather than of the law of evidence.

The Law of Evidence (Civil Proceedings)

Common law has never imposed any particular requirements as to the form of documents for the purposes of admissibility and there would have been no particular difficulty in electronic documents being admissible in circumstances where paper documents would have been. In some circumstances electronic documents would have been admissible where paper documents would not, if they counted as “real evidence”: (*R v. Wood*

(1983) 76 Cr App R 23, CA). One point which might have caused difficulty however is that electronic documents are often multi-generational copies, and it may even be debatable what is the “original” - so that strict application of the old “best evidence” rule could have caused difficulties.

The Civil Evidence Act 1968, in addition to widening the admissibility of hearsay evidence in documents, made specific provision for computers in section 5:

“5.--(1) In any civil proceedings a statement contained in a document produced by a computer shall, subject to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in subsection (2) below are satisfied in relation to the statement and computer in question.

(2) The said conditions are–

(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any body, whether corporate or not, or by any individual;

(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and

(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

(3) Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in subsection (2)(a) above was regularly performed by computers, whether--

- (a) by a combination of computers operating over that period; or
- (b) by different computers operating in succession over that period; or
- (c) by different combinations of computers operating in succession over that period; or
- (d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this Part of this Act as constituting a single computer; and references in this Part of this Act to a computer shall be construed accordingly.

(4) In any civil proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say--

- (a) identifying the document containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;
- (c) dealing with any of the matters to which the conditions mentioned in subsection (2) above relate,

and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this Part of this Act--

- (a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
- (b) where, in the course of activities carried on by any individual or body, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;
- (c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human

intervention) by means of any appropriate equipment.

(6) Subject to subsection (3) above, in this Part of this Act "computer" means any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process."

These long and complex provisions were written with mainframes rather than PCs in mind. Failure of a system to work properly in a relevant respect was a bar to admissibility and did not just go to weight; however e.g. a wonky clock would not affect reliance on the content (see *DPP v. McKeown* [1997] 1 WLR 295, HL, a criminal (breathalyser) case but a similar point.)

The Civil Evidence Act 1995 greatly simplified and relaxed this law, and encompassed electronic documents without mentioning either "documents" or "computers":-

"13. In this Act-

...

"document" means anything in which information of any description is recorded, and "copy", in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly;"

The substantive provisions allow the admission of copies of any degree of remoteness from the original:-

"8.--(1) Where a statement contained in a document is admissible as evidence in civil proceedings, it may be proved-

(a) by the production of that document, or
(b) whether or not that document is still in existence, by the production of a copy of that document or of the material part of it,

authenticated in such manner as the court may approve.

(2) It is immaterial for this purpose how many removes there are between

a copy and the original.

9.--(1) A document which is shown to form part of the records of a business or public authority may be received in evidence in civil proceedings without further proof.

(2) A document shall be taken to form part of the records of a business or public authority if there is produced to the court a certificate to that effect signed by an officer of the business or authority to which the records belong.

For this purpose--

(a) a document purporting to be a certificate signed by an officer of a business or public authority shall be deemed to have been duly given by such an officer and signed by him; and

(b) a certificate shall be treated as signed by a person if it purports to bear a facsimile of his signature.

(3) The absence of an entry in the records of a business or public authority may be proved in civil proceedings by affidavit of an officer of the business or authority to which the records belong.

(4) In this section--

"records" means records in whatever form;

"business" includes any activity regularly carried on over a period of time, whether for profit or not, by any body (whether corporate or not) or by an individual;

"officer" includes any person occupying a responsible position in relation to the relevant activities of the business or public authority or in relation to its records; and

"public authority" includes any public or statutory undertaking, any government department and any person holding office under Her Majesty.

(5) The court may, having regard to the circumstances of the case, direct that all or any of the above provisions of this section do not apply in relation to a particular document or record, or description of documents or records."

The upshot is that there is no legal bar to almost any kind of electronic document being used as evidence in civil proceedings: the real question

will be weight which will depend on common sense factors:-

- provenance and custody of the chain of electronic copies going back to the original
- opportunities for unintentional corruption
- opportunities for deliberate alterations to content, timing, authorship, or retrospective fabrication.

Whilst alteration or fabrication of electronic documents to pass superficial inspection is relatively easy, it is much harder to create a forgery which resists expert examination, e.g. examination of email headers, consistency of documents with copies of the same document retrieved from other sources such as backups.

The BSI has recently updated its “Code of practice for legal admissibility and evidential weight of information stored electronically” (BSI BIP 0008:2004). This provides for:

1. An information management policy, covering which documents are to be stored or discarded and when.
2. Confidentiality (can unauthorised persons access or even alter the information), integrity (will be altered by errors or even viruses), and availability (can it be recovered from backups if the live system falls down).
3. Documentation of procedures and processes for scanning, indexing and retrieval; importing documents from other systems.
4. Technology used, including data migration from system to system

(this is important since systems tend to be replaced every few years).

5. Audit trails, to allow it to be established when and by whom a document was put into a system, when it was altered, when it was deleted.
6. Was the system working correctly? Logging of faults will be needed.

This British Standard is now followed by many public and private sector organisations: e.g. the Code of Practice on Records Management issued by the Department for Constitutional Affairs under the Freedom of Information Act states that authorities should seek to follow the code.

The code as such is only suitable for large organisations. Compliance with the code is not a condition of the admissibility of electronic documents in civil proceedings; however, the points covered by the code are relevant to the weight of that evidence as a matter of common sense and logic. Therefore the greater the departure from the code (e.g. free access by Tom, Dick or Harry to alter the records with no audit trail created) the more reduced is their evidential value.

Certain common law rules permitting documents to be relied on are preserved by the CEA 1995. There is no reason to believe that the common law will not permit reliance on such documents in electronic form (e.g. web-based publications instead of books):-

“7. ... (2) The common law rules effectively preserved by section 9(1) and (2)(b) to (d) of the Civil Evidence Act 1968, that is, any rule of law whereby in civil proceedings--

- (a) published works dealing with matters of a public nature (for example, histories, scientific works, dictionaries and maps) are admissible as evidence of facts of a public nature stated in them,
- (b) public documents (for example, public registers, and returns made

under public authority with respect to matters of public interest) are admissible as evidence of facts stated in them, or
(c) records (for example, the records of certain courts, treaties, Crown grants, pardons and commissions) are admissible as evidence of facts stated in them,

shall continue to have effect.”

The law of formalities

A large number of statutes provide that documents must be “in writing” and/or “signed”. Whilst there is no problem in regarding an electronic document as being “in writing” (even if a disk drive and a computer is needed to convert the ‘document’ into legible form), a requirement for signature can cause more difficulty.

Firstpost Homes Ltd v. Johnson [1995] 1 WLR 1567, CA, concerned section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 which provides that land contracts must be “signed by or on behalf of each party to the contract.” An typed letter bearing the party’s name and address as addressee but with no handwritten signature was held not to satisfy this requirement. (Note that the current Act is narrower than the previous law which covered a “memorandum or note in writing”). Peter Gibson LJ at 1575G-H cited a dictum from Denning LJ in *Goodman v. J Eban Ltd* [1954] 1 QB 550 at 561:

“In modern English usage, when a document is required to be ‘signed by’ someone, that means that he must write his name with his own hand upon it.”

However, Denning LJ was dissenting in that case, and the majority decided that a rubber stamp bearing a facsimile signature of the name of the firm did count (on a solicitor’s bill).

These authorities suggest that merely typing a name at the end of an email may not be good enough,¹ but why shouldn't a scanned facsimile signature inserted into an electronic document count?

If a signed instrument satisfying the law has been brought into existence, and the original has been lost or destroyed, it can be proved by secondary evidence: *Springsteen v Masquerade Music Ltd* [2001] EMLR 25, CA, concerning s. 90(3) of the Copyright, Designs and Patents Act 1988 which requires assignments of copyright to be "in writing signed by or on behalf of the assignor." Per Jonathan Parker LJ:

"85 In my judgment, the time has now come when it can be said with confidence that the best evidence rule, long on its deathbed, has finally expired. In every case where a party seeks to adduce secondary evidence of the contents of a document, it is a matter for the court to decide, in the light of all the circumstances of the case, what (if any) weight to attach to that evidence. Where the party seeking to adduce the secondary evidence could readily produce the document, it may be expected that (absent some special circumstances) the court will decline to admit the secondary evidence on the ground that it is worthless. At the other extreme, where the party seeking to adduce the secondary evidence genuinely cannot produce the document, it may be expected that (absent some special circumstances) the court will admit the secondary evidence and attach such weight to it as it considers appropriate in all the circumstances. In cases falling between *681 those two extremes, it is for the court to make a judgment as to whether in all the circumstances any weight should be attached to the secondary evidence. Thus, the "admissibility" of secondary evidence of the contents of documents is, in my judgment, entirely dependent upon whether or not any weight is to be attached to that evidence. And whether or not any weight is to be attached to such secondary evidence is a matter for the court to decide, taking

1. *In Lazarus Estates Ltd v. Beasley* [1956] 1 QB 710, Denning LJ distinguished a rubber stamp bearing a company's printed name from the rubber stamp in *Eban*.

into account all the circumstances of the particular case.”
At an earlier point, he observed:-

“71 Holroyd J.'s references to "fair presumption" and "improper purpose" seem to me to do no more than reflect the inevitable suspicion with which the court will view a party who seeks to rely on secondary evidence where primary evidence is available. The "fair presumption" in such circumstances will be that the primary evidence will not support his case, and accordingly that he is proffering secondary evidence for an improper purpose. But, as it seems to me, that is not so much a rule of law as a fact of life.”

The extinction of the formal “best evidence” rule effectively completed the process begun in *R. v. Governor of Pentonville Prison, ex parte Osman* [1990] 1 WLR 277:

“this court would be more than happy to say goodbye to the best evidence rule. We accept that it served an important purpose in the days of parchment and quill pens. But since the invention of carbon paper and, still more, the photocopier and the telefacsimile machine, that purpose has largely gone. Where there is an allegation of forgery the court will obviously attach little, if any, weight to anything other than the original; so also if the copy produced in court is illegible. But to maintain a general exclusionary rule for these limited purposes is, in our view, hardly justifiable. So we would, if we could, be happy to accept Mr Nicholls' first submission. But although the little loved best evidence rule has been dying for some time, the recent authorities suggest that it is still not quite dead.”

The Electronic Signatures Directive

The Electronic Signatures Directive² is directed to the secure authentication of documents. It can be achieved by public/private key

2. Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures

cryptography. By Article 2:-

1. 'electronic signature' means data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication;

2. 'advanced electronic signature' means an electronic signature which meets the following requirements:

- (a) it is uniquely linked to the signatory;
- (b) it is capable of identifying the signatory;
- (c) it is created using means that the signatory can maintain under his sole control; and
- (d) it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable;

Most of the Directive is concerned with the regulation of certification services related to e-signatures. The substantive legal requirements are in Article 5:

Legal effects of electronic signatures

1. Member States shall ensure that advanced electronic signatures which are based on a qualified certificate and which are created by a secure-signature-creation device:

(a) satisfy the legal requirements of a signature in relation to data in electronic form in the same manner as a handwritten signature satisfies those requirements in relation to paper-based data; and

(b) are admissible as evidence in legal proceedings.

2. Member States shall ensure that an electronic signature is not denied legal effectiveness and admissibility as evidence in legal proceedings solely on the grounds that it is:

- in electronic form, or
- not based upon a qualified certificate, or
- not based upon a qualified certificate issued by an accredited certification-service-provider, or
- not created by a secure signature-creation device.”

The requirement of admissibility of documents as evidence has been

transposed into national law by the Electronic Communications Act 2000,
s. 7:

“7.--(1) In any legal proceedings–

- (a) an electronic signature incorporated into or logically associated with a particular electronic communication or particular electronic data, and
- (b) the certification by any person of such a signature,

shall each be admissible in evidence in relation to any question as to the authenticity of the communication or data or as to the integrity of the communication or data.

(2) For the purposes of this section an electronic signature is so much of anything in electronic form as–

- (a) is incorporated into or otherwise logically associated with any electronic communication or electronic data; and
- (b) purports to be so incorporated or associated for the purpose of being used in establishing the authenticity of the communication or data, the integrity of the communication or data, or both.”

The government has taken the view that there is no need to transpose the requirement of Art 5(1)(a) that an electronic signature should be legally equivalent to a handwritten signature because it considers that the law is already satisfactory.³

3. DTI transposition note: “No specific provision is needed to implement this as under the law in England and Wales, Scotland and Northern Ireland where there is a signature requirement in relation to data in electronic form this is already capable of being satisfied by an electronic signature including the type of electronic signature referred to in this article.”