KEY POINTS

- A flexible approach to electronic communications under English law in the context of statutory assignments would be expected.
- The widespread use of online platforms to give notice of assignment to debtors by email is not, however, universally supported by existing jurisprudence.
- There is, however, no good reason why emailed notices of assignment ought not to be effective, though uncertainties remain as to timing and what constitutes receipt.

Feature

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Notices of assignment and electronic communications

It is well established that the requirement of a signature may be satisfied by electronic means of authentication, and electronic signatures are commonplace. The use of email and other electronic communications to give notice to a debtor of the fact of a statutory assignment under s 136 of the Law of Property Act 1925 is also widespread, but is it valid? Caselaw does not universally support the notion it is. It is questioned whether this caselaw would be followed, and the better view is that it should be valid. However, uncertainties remain as to timing and what constitutes receipt.

INTRODUCTION

Receivables finance in the UK is big business. In 2019 the volume of such finance was in excess of €329bn,[1] much of which will have involved the assignment of debts. The principal focus of this article, which is confined to the legal position in England and Wales, is whether notices of assignment required to effect legal (or statutory) assignments under s 136 of the Law of Property Act 1925 may validly be given by electronic means. This issue has assumed somewhat sharper focus given the COVID-19 pandemic and potential interruptions to deliveries by process servers and through the post. We conclude by considering some of the issues which remain in relation to receipt and timing, assuming electronic notice is valid.

SECTION 136 LPA

The assignment of debts or other choses in action (intangibles) may be effected in two different ways. The first is by compliance with s 136 of the Law of Property Act 1925 (what is known as a legal or statutory assignment). The second is by way of assignment taking effect only in equity (an equitable assignment). A legal assignment does away with the need to join the assignor to any proceedings for enforcement of the rights attaching to the debt or other chose in action. Section 136(1) of the Law of Property Act 1925 (1925 Act) is in these terms:

> "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice-
>
> (a) the legal right to such debt or thing in action;
> (b) all legal and other remedies for the same; and
> (c) the power to give a good discharge for the same without the concurrence of the assignor:
>
> Provided that, if the debtor, trustee or other person liable in respect of such debt or other thing in action has notice-
>
> (a) that the assignment is disputed by the assignor or any person claiming under him; or
> (b) of any other opposing or conflicting claims to such debt or other thing in action; he may, if he thinks fit, either call upon the persons making the claim thereto to interplead concerning the same, or pay the debt or other thing in action into court under the provisions of the Trustee Act 1925."

Among the conditions for compliance with s 136, therefore, are:

- the need for the assignment to be in writing under the hand of the assignor; and
- the giving of express notice in writing to the debtor etc of the assignment.

Section 196 of the 1925 Act (headed "Regulations respecting notices") provides (so far as is relevant):

> "(1) Any notice required or authorised to be served or given by this Act shall be in writing.
> (2) . . .
> (3) Any notice required or authorised by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served . . .
> (4) Any notice required or authorised by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned [by the postal operator (within the meaning of Part 3 of the Postal Services Act 2011)] concerned undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered."

IN WRITING AND UNDER THE HAND OF THE ASSIGNOR

The words "under the hand of" mean signed by the assignor (and not executed as a deed): *Trustee Solutions Ltd v Dubery* [2006]

EWHC 1426 (Ch); [2007] ICR 412 at [21-33] per Lewison J (as he then was).[2]

The use of electronic signatures in this and other statutory contexts has been the subject of significant comment and consideration by the Law Commission[3] and others. It is sufficient for present purposes to record that most forms of electronic signature will suffice providing they evidence an intention by the relevant individual to authenticate the document in question. Authorities where electronic signatures have been recognised as sufficient compliance with statutory requirements for signing include *Neocleous and anr v Rees* [2019] EWHC 2462 (Ch); [2019] 2 P & CR 4; *Bassano v Toft and ors* [2014] EWHC 377 (QB); [2014] ECC 14; *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd* [2012] EWCA Civ 265; [2012] 1 WLR 3674 at [31]-[39] per Tomlinson LJ; *Orton v Collins* [2007] EWHC 803 (Ch); [2007] 1 WLR 2953. None of these cases involve assignments, and s 136, but there is no reason to doubt that they would and should be followed.

NOTICE IN WRITING TO DEBTOR

The requirement for notice to be given to the debtor serves the obvious aim of ensuring that he or she knows to pay someone other than the assignor (who in most cases will be the person with whom the debtor has had all relevant dealings). For that reason, a legal assignment is said[4] only to take effect when the debtor etc has received the relevant notice. Yet, insofar as s 196 of the 1925 Act applies to notices of assignment under s 136 of that Act, there is the possibility that valid notice will be deemed to have been given even if it does not actually come to the attention of the relevant debtor.

First then, does s 196 of the 1925 Act apply to notices of assignment to be given under s 136? Section 136 refers to notice being "given" to the debtor rather than "served". The only reference in s 196 to a notice being given is in sub-s (1) which provides that any notice required or authorised to be served or given by the 1925 Act shall be in writing. The deeming provisions in sub-ss (2),[5] (3) and (4) refer only to notices required or authorised under the Act to be "served". The argument that the draftsman of s 196 was (through his choice of wording) intending to draw a distinction between "given" and "served" was, however, rejected by Plowman J in *In re 88 Berkeley Road*, NW9 [1971] Ch 648 at 652F to 653A.[6] References in sub-ss (2), (3) and (4) of s 196 to "served" also include "given".

It would follow that a notice of assignment left at the last known abode of the debtor would appear to be treated as validly given even if it did not come to the debtor's actual notice.

The view of most commentators is that the requirement under s 136 of the 1925 Act for written notice of assignment will be satisfied by an electronic communication (see, for example, Sir Marcus Smith and N Leslie, *The Law of Assignment* (3rd ed OUP) at para 16.44 applying, by analogy, the principles for the assignment itself, and see also Dr Ying Khai Liew, *Guest on the Law of Assignment* (3rd ed Sweet & Maxwell) at 2-16).

Advice from the Law Commission in 2001 – *Electronic Commerce: Formal Requirements in Commercial Transactions* – was to the effect that email could be used to effect and give notice of a statutory assignment.[7] That view was proffered on the basis of their earlier conclusion (in Pt 3 of the advice[8]) that the ability of an electronic message to satisfy a requirement of "writing" did not depend on its actually being read by the recipient. It might be said this appears to conflate the separate requirements of "by writing" under the hand of the assignor, and "express notice in writing". Such, admittedly limited, authority as there is, however, does not universally support the conclusion that the use of electronic communications to give written notice of legal assignments is effective.

In *E.ON UK plc v Gilesports Ltd* [2012] EWHC 2172 (Ch); [2013] 1 P & CR 4; [2013] 3 EGLR 23 various questions arose for determination by Arnold J in connection with the purported assignment of a sub-lease. Having held that the sub-lease contained an obligation on the sub-lessee (imported from the head lease) not to assign without the prior written consent of the head-lessees, the next question was whether service of an application for consent by email was a method of service permitted under the sub-lease. That was resolved by a consideration of s 196 of the LPA which had been expressly incorporated into the sub-lease.

At [54] Arnold J rejected a submission that the methods of service expressly provided for in s 196 were sufficient for good service but not required and that the emailed application was validly served because it was in fact received by the relevant agent. In Arnold J's judgment, s 196 required service by one of two methods: either delivery to (in the case of a landlord) the landlord's last known place of abode or business or by registered post. As neither method had been used, the relevant application had not been served.

If that decision (which is not referred to in the Law Commission's subsequent report *Electronic Execution of Documents* (HC 2624) 3 September 2019) is correct, it could be said to preclude the giving of notice by any electronic means, albeit it may be said that it is authority on s 196, as opposed to s 136.

Having regard to the wording of s 196, it is, however, difficult to see why the sub-lessee's argument to the effect that the relevant sub-sections about sufficient service were permissive not mandatory was rejected.

In *Achieving Perfection Ltd v Gray and ors*,[9] His Honour Judge Coltart, sitting in the Brighton County Court, had before him an application for permission to appeal out of time against an order of the District Judge that a notice under s 13 of the Leasehold Reform (Housing and Urban Development) Act 1993 (LRA) had been validly served by email. Refusing permission to appeal, the judge held that the applicant had not acted with the required promptitude but also expressed the view, after referring to the Law Commission's advice in 2001 that emails would generally satisfy any statutory requirement for writing,[10] that service by email was valid. That approach again appears to treat "writing" as synonymous with the giving of notice.

The judge did not refer to ss 99(1) of the LRA which is headed "Notices" and provides:

> "Any notice required or authorised to be given under this Part –
> (a) shall be in writing; and
> (b) may be sent by post."

That provision arguably makes clearer that the giving of notice under that Act need not be by post but might validly be effected in any other way.

In *Cowthorpe Road 1-1A Freehold Ltd v Wahedalley* [2017] L & T R 4, however, His Honour Judge Dight, though finding s 99 was permissive, went on to find service by email as invalid. There the question for determination was whether or not a landlord's counter-notice purportedly served under s 21 of the LRA was served in time.

The tenants' notice under s 13 of the LRA was served under cover of solicitors' letter dated 8 April 2013. The relevant letter expressly recorded that the tenants' solicitors did not accept service by email. The date by which the counter-notice had to be served on the tenants' solicitors was 15 June 2013 (which was a Saturday). The counter-notice was purportedly served under cover of letter dated 13 June 2013 (though the notice itself seems to have been dated 14 June 2013). The hard copies (originals) of the letter and enclosed notice were received by the tenants' solicitors on 17 June 2013. At 16.47 on 14 June 2013, the landlord's solicitors emailed the tenants' solicitors with unsigned copies of the letter and the notice. Later the same day, the landlord's solicitors emailed the tenants' solicitors again, this time with signed copies of the letter and s 21 notice. Recourse to attempted service by email had been adopted because, it appears, of difficulties with the fax machine used by the tenants' solicitors. There was evidence to suggest that the second email had been read by the intended recipient at 17.25 on 15 June 2013. The landlord's solicitors also asserted that a hard copy of the counter-notice was pushed through the tenants' solicitors' letter box on 15 June 2013 but a promised certificate of service to that effect was never produced.

On behalf of the tenants it was contended that there had not been valid service of the counter-notice by the required deadline of 15 June 2013. The landlords submitted that there was nothing which expressly prevented service of notice by email, and prayed in aid, in particular, the definition of "writing" in Sch 1 of the Interpretation Act 1978, which states:

> "'Writing' includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form … ."

Judge Dight observed (at [44]) in respect of s 99 of the LRA that the use of "may" meant that service by post was permissive and that service of the notice may be effected by other methods (but the notice had to be in writing). He went on, nonetheless, to conclude that the attempted service by email was not valid.

Using s 99 as his starting point, Judge Dight observed (at [48]) that the fact that provision contemplated service by post suggested to him that what was required was a hard rather than digital version of the relevant notice. He noted (at [49]) that the definition of "writing" in the Interpretation Act might be said to be capable of referring to an electronic document which has no physical form, but he formed the view that this was not the answer to the situation in that case.

After referring to the decision in *Achieving Perfection* (supra) and another County Court decision to the effect that service of a notice by fax was not authorised under s 99 of the LRA (neither of which was, as Judge Dight observed, binding on him), he went on (at [52]) to approach the matter as one of principle (seemingly on the basis the Interpretation Act did not assist him).

As to that, he repeated his observation that the use of post as a permitted form of service suggested a hard copy document was required. Second, he concluded it was not possible to sign a digital document with an original signature, holding that that was necessary to comply with the requirement in s 13 for the notice to be signed. It is not clear, but it appears that the judge considered that nothing short of a "wet-ink" signature was sufficient compliance.

This decision is described in the Law Commission's 2019 report as "unfortunate"[11] on the basis that the provision about service (s 99 of the LRA) was permissive rather than mandatory. That is true, and it may be said that the notion that for something to be in writing it must be in "hard copy" simply because a permitted method of service is in hard copy is something a modern reader who has been working remotely for the past few months may rail against, but the learned judge reached that conclusion. He arguably fell into error in doing so, having regard to the wide definition of "writing" in the Interpretation Act, and also in concluding, contrary to authorities such as *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd* referred to above, that the relevant notice had to bear an original (wet-ink) signature.

In *Mailbox (Birmingham) Ltd v Galliford Try Construction Ltd* [2017] EWHC 67 (TCC); [2017] BLR 180 notice of (re) assignment was given by, it appears email, which the court evidently treated as effective, though the judgment does not contain any argument or discussion about this point. Similarly, HHJ Hand QC, in the context of notice of termination of employment in *Wang v University of Keele*, Appeal No. UKEAT/0223/10/CEA [2011] 1 I.C.R. 1251 (Employment Appeal Tribunal), treated as within the concept of written notice modern methods of communication such as the SMS text message, internet based so-called instant messaging and email.

There appears to be no good reason why notice of assignment cannot validly be given by electronic means, having regard to the wide definition of "writing" in the Interpretation Act, and the case law in the context of electronic signatures. It is anticipated that should the point be litigated again in the future courts may be reluctant to be constrained by some of the reasoning displayed in some of the above cases. Indeed, it would appear that the use of online platforms for effecting assignments of large volumes of debts and notification to the affected debtors is commonplace.[12]

RECEIPT AND TIMING ISSUES

As, however, the Law Commission observed in its 2001 advice, issues remain as to:

- the time at which any notice sent by email is regarded as received.[13] The Law Commission's initial view (in 2001) was that the transmission process was complete when the communication reached the recipient's Internet Service Provider (ISP). Such an approach would

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have the benefit of certainty, but short of legislation on this point (which could be effected under s 8 of the Electronic Communications Act 2000), it is doubted whether this approach would necessarily be adopted. It may be that the court will conclude "express notice in writing" is not received until the recipient opens the email;[14]

- use by debtors of more than one email address, an issue which does not arise where a notice is sent to the last known place of abode or business.[15] Adoption by a statutory presumption as to effective receipt based on prior routine or habitual use of a particular email address may be too ambiguous. However, given that it is easy to send a communication to more than one address, if known, this should not be an insurmountable technical problem;
- the risk that an email may not arrive or is corrupted upon receipt[16] or is received into a "spam" folder. It is questionable whether this is any different from where other forms of deemed notice work against the recipient, but as there are no deemed notice provisions in the context of electronic communications it is possible that a rejected or unread email may not suffice.

Depending on the nature of the email address used, even a read receipt facility may not be conclusive as to the date or fact of receipt by the intended recipient. Of course, the efficacy of a read receipt facility generally depends on the co-operation of the recipient. The reliability of a read receipt facility may be increased by emailing the recipient to the effect that a message is waiting for him or her and providing unique access credentials. When those credentials are used, the sender is sent an immediate notice confirming that fact.

Ultimately, the question of whether or not notice of assignment has been validly given will generally have been determined prior to the issue of any proceedings for recovery of the relevant debt. Assuming any claim has been preceded by a properly worded pre-action protocol letter which contains appropriate detail as to the circumstances in which notice was given, any claim of non-receipt ought to be advanced in the letter in response (assuming one is provided). Where the claim is subject to imminent expiry of the applicable limitation period, those acting for assignees may be well advised to give notice of the fact of assignment in accordance with the methods expressly recognised in s 196 of the 1925 Act, as well as relying on any prior notice by email, at least until legislation is brought in to provide greater clarity on the subject, or more decisive case law emerges. ■

1 https://www.tradefinanceglobal.com/posts/news-global-factoring-industry-grows-5-pc-2bn-in-2019-fci/
2 Although this decision was the subject of a successful appeal ([2007] EWCA Civ 771; [2008] ICR 101) this aspect was unaffected.
3 See specifically the Law Commission's advice in 2001 – Electronic Commerce: Formal Requirements in Commercial Transactions (https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/09/electronic_commerce_advice.pdf) and the Law Commission's Report dated 03.09.19 (No. 386) – Electronic Execution of Documents (https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2019/09/Electronic-Execution-Report.pdf)
4 See, for example, Sir Marcus Smith and N Leslie, *The Law of Assignment*, Smith & Leslie (3rd ed OUP) at para 16.42 (citing at footnote 93, *Holt v Heatherfield Trust* [1942] 2 KB 1, at p 6).
5 Not relevant to this article as it applies only to notices served on lessees and mortgagors.
6 In *Holwell Securities Ltd v Hughes* [1974] 1 WLR 155 (CA) Russell LJ referred (at p 158F) to Plowman J's rejection of the distinction between "given" and "served" as "undisputed" by the parties before him.
7 At para 8.4.
8 At paras 3.21-3.22.
9 Unreported, delivered 18.05.15.
10 Paragraph 3.9 of the advice.
11 See para 3.68.
12 See *Legal Formalities for agreements used by online platforms for financing trade receivables*, Freedman, Stainthorpe (2018) 2 JIBFL 79.
13 Paragraph 3.56(1) of the advice.
14 This is the view offered by Dr Ying Khai Liew, *Guest on the Law of Assignment* (3rd ed Sweet & Maxwell) at 2-16.
15 Paragraph 3.56(2).
16 Paragraph 3.56(3).

Further Reading:

- Legal formalities for agreements used by online platforms for financing trade receivables (2018) 2 JIBFL 79.
- Electronic signatures are valid: so what's the catch on finance transactions? (2020) 1 JIBFL 24.
- LexisPSL: Banking & Finance: Electronic signatures.