

THE DEMISE OF THE SEAL AND THE VALIDITY OF CERTAIN DEEDS*

In Ireland, the rule of law which required an individual to seal a deed to ensure its valid execution was abolished by s.64(1)(a) of the Land and Conveyancing Law Reform Act 2009 (the “2009 Act”).¹ From December 1, 2009 a deed shall be validly executed provided it is signed by the individual in the presence of a witness; or it is signed by a person at the individual’s direction, given in the presence of a witness; or the individual’s signature is acknowledged by him or her in the presence of a witness. The witness must also attest that signature.² As these new formalities operate only from the commencement date, an interesting question arises in relation to the validity of thousands of deeds executed before December 1, 2009. Many deeds executed since the 1970s bear no obvious evidence of having been sealed (such as a red sticker next to the signature of the grantor) and it could be argued that they have not been validly executed and are therefore legally ineffective.

It is perhaps unfortunate, although not in this writer’s view critical, that the drafters of the 2009 Act did not take the opportunity, in this particular context, to retrospectively clarify the effectiveness of such deeds. Such an approach was taken by s.64(4) of the 2009 Act, which provides that a deed, “whenever created”, has the effect of an indenture, although not indented or expressed to be an indenture. A retrospective curative approach was taken in relation to deeds which did not comply with certain technical requirements which the 2009 Act abolished. For example, s.67(4) provides that a conveyance of unregistered land without words of limitation “executed before commencement” passes the fee simple or the largest estate or interest which the grantor had the power to convey. Also, the abolition of the rule against perpetuities is stated to apply to any interest in property “whenever created”. Although these changes in the law operate in respect of older deeds, this retrospectivity is subject to certain limitations designed to protect a person who has relied on the defect in the deed to their detriment, or where an interest was disposed of or acquired as a result of the defect.³ An equivalent position could have been adopted to cure any perceived defect in deeds executed before December 1, 2009 arising from the absence of evidence that they had been sealed at the time of execution. In the absence of such a statutory provision, this article examines whether such

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1. A company registered in the State must continue to execute deeds under the seal of the company in accordance with its Articles of Association, see s.64(2)(b)(ii) of the 2009 Act.
2. See s.64(2)(b)(i) of the 2009 Act. The deed must also be delivered as a deed by the person executing it or by a person authorised to do so on that person’s behalf: see s.64(2)(c). Section 64(1)(b) abolishes any rule of law which requires authority to deliver a deed to be given by deed.
3. See ss.17 and 67(4) of the 2009 Act.

deeds have been validly executed in light of the relevant case law, academic commentary and prevailing conveyancing practice. As mortgagors increasingly run into difficulties in making loan repayments and mortgagees seek to enforce their security, it is easy to imagine a challenge being made to the validity of certain mortgage deeds on this basis.

THE COMMON LAW REQUIREMENT FOR A SEAL

In Ireland, the requirement for the personal seal of the parties to a deed to ensure its proper execution was imposed by the common law. As was set out in *Goddard's case*,

“There were [by the common law] but three things of the essence and substance of a deed, that is to say, writing on paper or parchment, sealing and delivery, and if it had these three ... the deed was sufficient.”⁴

This requirement for a seal was unsurprising in medieval times, as it was the only way of effectively authenticating a document before handwriting became common. Originally, molten wax was put on the deed and affixed by a piece of ribbon to keep the wax on the parchment. The individual impressed on the hot wax his own crest or coat of arms, often by using a signet ring. Other methods of sealing were, however, permissible, for example, by using “a stick or any such like thing which doth make a print”, or even by “biting the wax with the foretooth”.⁵ In more recent times, a small red circular sticker was used. These red stickers or wafers were mass-produced and generally affixed by a solicitor or a secretary and not by the grantor himself. As Dankwerts J. noted in *Stromdale & Ball Ltd v Burden*:

“Time was when the placing of the party’s seal was the essence of due execution; signature was not indeed necessary to make a deed valid ... But with the spread of education, the signature became of importance for the authentication of documents ...”⁶

Although it has long been the practice to include the signatures of the parties to the deed (or, at least, the signature of the grantor) and to have these signatures attested, this was not a legal requirement in Ireland until s.64 of the Land and Conveyancing Law Reform Act 2009 made it so.

In England, by way of contrast, the common law requirement for a seal was bolstered by legislative references. Section 73 of the Law of Property Act 1925 provided that sealing alone was no longer sufficient to execute a deed and made

4. (1584) 2 Co. Rep. 4b, 3 Leon. 100. See also, *Blennerhassett v Day* (1813) Beat. 468 at 470 (per Lord Manners L.C.).

5. D.C. Hoath, “The Sealing of Documents—Fact or Fiction” (1980) 43 *Modern Law Review* 415.

6. [1952] 1 Ch. 223 at 230.

it essential to include the disponent's signature or mark on the deed. Similarly, to create a valid power of attorney in England pursuant to s.1(1) of the Powers of Attorney Act 1971, the instrument had to be signed and sealed by (or by the direction of and in the presence of) the donor. Attestation, although not a requirement until the commencement of the Law of Property (Miscellaneous Provisions) Act 1989 (the "1989 Act"), was common conveyancing practice.⁷

In 1985, the Law Commission of England and Wales provisionally recommended the abolition of the seal as a necessary requirement for the execution of a deed by an individual. It commented as follows:

"Invalidating a document because of the lack of a small circle of red paper may well seem to laymen, if not to lawyers, to be a clear illustration of the antiquated state of some areas of the English law. The seal is a redundant formality without substantive purpose and easily overlooked."⁸

Others had previously referred to the doctrine of the seal as a "legal fiction"⁹ and "mumbo jumbo".¹⁰ Quite apart from any substantial reason for requiring a seal, the Law Commission also referred to the need to resolve the uncertain state of the law as to what constitutes a valid seal.¹¹ This uncertainty had arisen due to certain case law that adopted a very lenient approach in this respect and which shall be discussed below. The Commission's recommendation to abolish the requirement for a seal was implemented by s.1(3)(a) of the Law of Property (Miscellaneous Provisions) Act 1989, which provides that a deed is validly executed by an individual if it is signed by him in the presence of a witness who attests his signature, or if it is signed at the individual's direction in his presence, and in the presence of two witnesses, who each attest his signature.¹² The 1989 Act also amended the Powers of Attorney Act 1971 by requiring a

7. K. Gray and S. Gray, *Elements of Land Law* (Oxford: Oxford University Press, 2009), para.8.1.91.

8. Law Commission, *Transfer of Land—Formalities for Deeds and Escrows* (Working Paper No. 93, 1985), p.15. The Law Commission's final recommendation for abolition was made in its Report on *Deeds and Escrows* (Law Com. No. 163, 1987), p.4.

9. As per Goddard J. in a memorandum concerning contracts under seal incorporated into the Sixth Interim Report of the Law Revision Committee on *Statute of Frauds and the Doctrine of Consideration* (Cmd 5449, 1937), p.35.

10. As per Lord Wilberforce in the Parliamentary debate on the Powers of Attorney Bill 1971: Hansard HL Vol.315, Col.1213, February 25, 1971.

11. See Law Commission, *Transfer of Land—Formalities for Deeds and Escrows* (Working Paper No. 93, 1985), p.6; Law Commission, *Deeds and Escrows* (Law Com. No. 163, 1987), p.3.

12. Note that the deed must also be delivered by the individual or a person authorised to do so on his behalf, see s.1(3)(b) of the Law of Property (Miscellaneous Provisions) Act 1989. Section 1(5) of the 1989 Act provides that where a solicitor, duly certified notary public, licensed conveyancer or an agent or employee of a solicitor, duly certificated notary public or licensed conveyancer, in the course of or in connection with a transaction involving the disposition or creation of an interest in land, purports to deliver an instrument as a deed on behalf of a party to the instrument, it shall be conclusively presumed in favour of a purchaser that he is authorised so to deliver the instrument.

power of attorney to be executed by the donor “as if it was a deed”.¹³ Thus, the requirement for sealing was abolished and the requirement for attestation was introduced.¹⁴

*FIRST NATIONAL SECURITIES LTD v JONES*¹⁵

In the absence of any reported Irish case law dealing with the sealing requirement in modern deeds, it is helpful to consider the English case law which governed the matter prior to the reforms introduced by the 1989 Act. As shall be discussed, the significance of these authorities has to be considered against a backdrop of certain differences between the jurisdictions in relation to legal context and prevailing conveyancing practices.

The most persuasive authority, in this writer’s opinion, is the decision of the English Court of Appeal in *First National Securities Ltd v Jones* (the “*Jones* case”). Not only is it the most recent and directly relevant authority, it also provides a helpful overview of earlier case law¹⁶ and explains and distinguishes certain cases which adopted a more stringent approach in relation to the requirement for a seal.¹⁷ In the *Jones* case, the plaintiff bank agreed to lend the defendants money to be secured by a legal charge on property owned by the defendant. The charge was in the bank’s standard form, which included the standard testimonium: “In witness whereof the mortgagor has hereunto set his hand and seal the day and year first before written”. Underneath was a circle printed on the document containing the letters “LS” (for *locus sigilli*, the place of the seal). The form also included the standard execution and attestation clause, “Signed, sealed and delivered by the above-named mortgagor in the presence of ...”, with a space for the witness’s name and address. The signature of the first defendant appeared across the printed circle. There was no wax seal, wafer or any impression on the deed. When the plaintiff brought an action for possession after the defendant fell into arrears with his repayments of the loan, the action was dismissed at first instance on the ground that the legal charge was not under seal. In allowing the appeal, the Court of Appeal held that in modern practice, documents intended to be executed as deeds frequently bore no wax or wafer seal, but had a *printed circle* sometimes inscribed with the letters “LS” where formerly the seal would probably have been placed, which *was intended to serve the purpose of a seal* if the document was delivered as the deed of the party executing it. The court was satisfied that there was sufficient evidence that the document had been executed by the defendant as

13. Law of Property (Miscellaneous Provisions) Act 1989 Sch.1.

14. Note that similar reforms were introduced in Northern Ireland by art.3 of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005.

15. *First National Securities Ltd v Jones* [1978] 1 Ch. 109.

16. Including *Re Sandilands* (1871) LR 6 CP 411 and *Stromdale & Ball Ltd v Burden* [1952] Ch. 223.

17. Namely, *Re Balkis Consolidated Co Ltd* (1888) 58 LT 300; and *National Provisional Bank of England v Jackson* (1886) 33 Ch D 1.

his deed.¹⁸ The comments of Sir David Cairns arguably went further in his respect, by omitting any reference to the printed circle:

“I am sure that many documents intended by all parties to be deeds are now executed *without any further formality than the signature opposite the words ‘Signed, sealed and delivered’* usually in the presence of a witness, and I think it would be lamentable if the validity of documents so executed could be successfully challenged.”¹⁹ (emphasis added.)

The court relied on two authorities: *Re Sandilands*²⁰ and *Stromdale & Ball Ltd v Burden*.²¹ The deed in the former case had pieces of green ribbon attached to the places where the seals should have been. It included the standard execution and attestation clause, “signed, sealed and delivered ... in the presence of ...” and the signatures were duly attested. There was also a certificate of two commissioners stating that the ladies who had executed the deed had appeared personally before them and produced the deed, acknowledging it to be their deed. No physical seal was ever put on the deed. Bovill C.J. said that there was *prima facie* evidence that the deed was sealed at the time of its execution and acknowledgement by the parties. He noted: “To constitute a sealing, neither wax nor wafer, nor a piece of paper, nor even an impression is necessary.”²² The view expressed by Montague Smith J. in *Re Sandilands* was described by Buckley L.J. in the *Jones* case as authority for the proposition that the attestation of the execution of the deed as being “signed, sealed and delivered” as the party’s deed is *prima facie* evidence that the deed was sealed.²³

Stromdale & Ball Ltd v Burden concerned the execution of a deed of licence which conferred an option on the plaintiff to buy a leasehold premises. The plaintiff took steps to exercise the option and sought specific performance of the agreement to sell the premises. The defendant denied that she had sealed the document containing the option and claimed that it never had the legal effect of a deed. Danckwerts J. noted that the defendant’s evidence was very vague on whether the wafer seal was on the document when she signed it, but he thought it likely that it had been. He concluded that if it was there when she signed, the document was effectively executed as a deed. He noted that the signature had replaced the seal in importance for the authentication of documents and continued as follows:

“Meticulous persons executing a deed may still place their finger on the wax seal or wafer on the document, but it appears to me that, at the present day, if a party signs a document bearing wax or wafer or other

18. Fn.15 above at 118.

19. Fn.15 above at 121.

20. *Re Sandilands* (1871) LR 6 CP 411.

21. *Stromdale & Ball Ltd v Burden* [1952] Ch. 2.

22. Fn.20 above at 413.

23. Fn.15 above at 115.

indication of a seal, with the intention of executing the document as a deed, that is sufficient adoption or recognition of the seal to amount to due execution as a deed.”²⁴

He added that, as the document which had been sent by the defendant’s solicitors to the plaintiff’s solicitors contained the standard testimonium, execution and attestation clauses and bore a red wafer seal, he was unable to see how the defendant could now be allowed to say she did not seal the document. He noted: “It seems to me the clearest case of estoppel possible.”²⁵ This estoppel argument shall be discussed below.

In the *Jones* case, Buckley L.J. also discussed two cases, *Re Balkis Consolidated Co Ltd*²⁶ and *National Provisional Bank of England v Jackson*²⁷ (the *Jackson* case), which adopted a more stringent approach to the requirement for a seal. *Re Balkis Consolidated Co Ltd* concerned a deed of transfer of shares which had been signed by a shareholder, named Arnott, at his stockbroker’s office and witnessed by a clerk of the office as having been “signed, sealed and delivered” by him. There was no seal on it or wafer, just a circle with the words “place for seal” printed within it. The application before the judge was to rectify the register to remove the registration of the name of the person into whose name the shares had been transferred. Arnott swore an affidavit that he had never sealed the deed. However, the stockbroker gave evidence that he had sealed it in his presence and the presence of his clerk, and that whenever Arnott signed a transfer form, he invariably put his finger on the printed seal. This latter point was denied by Arnott. The judge refused to make an order rectifying the register, saying that he was not satisfied that he had sufficient materials before him to enable him to decide whose name ought to be on the register. He said that the evidence as to whether any form of sealing was gone through was conflicting, and that he was not satisfied that any document which was complete on the face of it was delivered to the applicant. In the *Jones* case, Buckley L.J. pointed out that the judge in *Re Balkis Consolidated Co Ltd* “was not then reaching a final conclusion that the document in the form in which it was could not be found to have been duly executed by Arnott”.²⁸

In the *Jackson* case, a solicitor obtained his sisters’ signatures to two deeds by which they conveyed their shares in a property to him. The deeds were not explained to them and they relied on their brother’s statement that he was going to clear off the mortgage and send the deeds to the mortgagee. The next day, the solicitor deposited the deeds with the plaintiff bank as security for a loan, saying that his sisters were assisting with the deeds but that nothing would be paid to them. He absconded with the money and the property was claimed by the bank as an equitable mortgagee. The claim was resisted by the sisters on the ground that the conveyances had been obtained by fraud

24. Fn.21 above at 230.

25. Fn.21 above at 230.

26. *Re Balkis Consolidated Co Ltd* (1888) 58 LT 300.

27. *National Provisional Bank of England v Jackson* (1886) 33 Ch D 1.

28. Fn.15 above at 116.

and misrepresentation and were therefore void. They also relied on deeds which purported to be reconveyances of the property by their brother to them, executed the day before the equitable mortgage was created. These deeds were attested by one of their brother's clerks, but did not bear a seal, just a piece of ribbon. Although the claim that the deeds were void did not succeed, the court held that the statements made by the solicitor to the bank should have put the bank on inquiry, and such an inquiry would have led to the detection of the fraud and to a refusal of the advance. Therefore, the bank was fixed with constructive notice of the fraud and so its interest had to be postponed to the interests of the sisters. In relation to the deeds of reconveyance, Cotton LJ stated:

"In my opinion, the only conclusion we can come to is that these instruments were never in fact sealed at all ... It is said, and said truly, that neither wax nor wafer is necessary in order to constitute a seal to a deed ... It is true that if the finger be pressed upon the ribbon that may amount to sealing, but no such inference can be drawn here where the attesting witness who has given evidence recollects nothing of the sort, and when Jackson had already committed one fraud in the matter and perhaps then intended another."²⁹

He noted that it was perhaps right to hold that the deed had been sealed in the circumstances giving rise to the decision in *Re Sandilands*, due to the certificate of the commissioners, but in the present case it would be wrong to do so. Lindley L.J., on the other hand, described *Re Sandilands* "as a good-natured decision, in which I am not sure that I could have concurred".³⁰ He noted that it was unimportant what a seal was made of, but there had to be something in the nature of an impression on the deed to denote that it had been sealed. The reconveyances, in his opinion, were worthless for protecting the sisters' interests.³¹ In the *Jones* case, Goff L.J. commented on the *Jackson* case as follows:

"In my judgment, in this day and age, we can, and we ought to, hold that a document purporting to be a deed is capable in law of being such although it has no more than an indication where the seal should be. *National Provisional Bank of England v Jackson* (1886) 33 Ch D 1, which was a decision of this court, does not in any way preclude us from arriving at that conclusion, because it was a decision upon the facts. In that case the attesting witness gave evidence and was unable to recollect any execution of the document by the parties concerned. Moreover, there were grounds for suspecting fraud."³²

29. Fn.27 above at 11.

30. Fn.27 above at 14.

31. Fn.27 above at 14.

32. Fn.15 above at 119.

HOATH'S CRITIQUE OF THE JONES CASE

The decision in the *Jones* case was criticised in an article appearing in *Modern Law Review* in 1980.³³ The author, David Hoath, acknowledged that it was well worth considering whether the need for sealing should be removed completely, but pointed out that this was a task for Parliament and not the courts, as s.73 of the Law of Property Act 1925 recognises that a seal is a vital part of a deed.³⁴ As has already been mentioned, before the enactment of the Land and Conveyancing Law Reform Act 2009, Irish legislation made no reference to the requirement for a seal on deeds executed by individuals³⁵; the requirement was thus solely rooted in common law.

Hoath notes a judicial tendency to adopt a “commercial expediency” approach in relation to certain technical property law requirements. The courts, in adopting such an approach in cases of unorthodox sealing, acknowledge that sealing is of declining practical importance, and suggest that the validity of deeds should not depend on too rigid an approach towards sealing. He points out that in the *Jones* case, the court also purported to adopt a “conveyancing practice” approach in relation to the sealing requirement. Hoath explains that the courts have frequently emphasised the importance of the practice of conveyancers as a law-making source, and have been conscious of “the danger of doing anything which may imperil what has been going on for centuries among conveyancers”.³⁶ Hoath’s main bone of contention with the decision in the *Jones* case was the emphasis placed by the court on the assumption that it was then common business practice to treat a circle at the end of a document as being the seal itself. He argued that it was still normal conveyancing practice at the time to affix wafer seals to deeds. In his opinion, the presence of a circle with the letters “LS” was still commonly regarded as indicating that the document was still a draft, or a copy of an engrossed and duly executed deed, or the engrossment on which a formal seal would be affixed before or at the time of execution. He speculated that the deed in the *Jones* case could be described as falling within the third category and therefore ineffective as a deed, in the absence of other evidence of sealing. To support his argument in relation to the prevailing conveyancing practice, he quoted a 1963 editorial comment in *The Conveyancer* that the Bar and Bench appeared to be “no longer ... familiar with the ‘practice of conveyancers’, for this was ‘the almost exclusive province of solicitors and the Land Registry’”.³⁷ He also noted that in the *Jones* case, no expert evidence appeared to have been put before the court in relation to the

33. Fn.5 above.

34. Fn.5 above at 416.

35. Note, however, that s.38 of the Companies Act 1963 specifies that contracts which would be required to be made under seal if made between individuals, must be made under the seal of the company. Section 64(2)(ii) of the Land and Conveyancing Law Reform Act 2009 retains the requirement of sealing documents intended to be deeds for companies registered in the State.

36. Per Chitty J. in *Carritt v Real and Personal Advance Co* (1889) 42 Ch D 263 at 272.

37. Fn.5 above at 421, quoting the observation of the then editor of *The Conveyancer*, E.F. George, in (1963) 27 Conv. 318.

practice prevailing at the time in relation to sealing. Even if some solicitors had come to regard the circle with the letters “LS” as capable of amounting to a seal, Hoath submitted that such a practice was neither sufficiently common nor sufficiently ancient to be treated as a law-making source for this purpose. He also noted that as a result of the decision in *Jones*, a document purporting to be a deed but not bearing the usual red wafer would stand much more chance of being upheld as a deed if it happened to have been drawn up on a standard form with a printed circle. He continued,

“Yet it seems strange that the passage of the legal estate in ‘missing seal’ cases should depend on the chance of the vendor (or mortgagee, etc) having a sufficient turnover of business to warrant the use of printed documents (for in practice those purporting to execute deeds are most unlikely to draw their own circles thereon). The claims of ‘commercial expediency’ were surely outweighed by the disadvantage of producing such a capricious result.”³⁸

Hoath does, however, make the point,

“that a decision against the validity of a document as a deed on the ground of sealing does not mean that the document is devoid of effect: given the existence of consideration for the transaction, the document will normally operate in equity as an enforceable contract for the grant of the interest in question, so that ample justice can generally be done between the parties”.³⁹

The writer shall assess the relevance of Hoath’s views in the Irish context. However, first, it is necessary to consider one further decision, delivered in the aftermath of the *Jones* case, which is of relevance in considering the validity of deeds which bear no obvious evidence of having been sealed.

*TCB LTD v GRAY*⁴⁰

The decision in *TCB Ltd v Gray* considered the requirement for a seal on an instrument creating a power of attorney. In this case, the validity of an unlimited personal guarantee was challenged. The guarantee had been amended by the defendant’s solicitor, as his client’s attorney, to extend beyond the securities currently in the possession of the plaintiff bank. The defendant argued that the general power of attorney conferred on his solicitor was invalid as it was unsealed. It simply contained the standard testimonium and execution clause. Despite being pressed by the plaintiff’s counsel with a long line of authorities in which the courts adopted a benign approach in relation to the requirement

38. Fn.5 above at 422.

39. Fn.5 above at 419.

40. [1986] 1 Ch. 621.

for a seal, Browne-Wilkinson V.-C. noted that no case had been cited to him in which the court had gone as far as it would be necessary to go in this case. There was nothing in this case to indicate that something amounting to sealing took place beyond the fact that the words of the document refer to its having been sealed. He concluded on this point:

“If I were to hold that this document was in fact sealed, I would not only be flying in the face of what actually happened, but also disregarding the statutory requirement that the document should be sealed. I think it would be wrong to extend the legal fiction any further and I decline to do so. If it is open to Mr Gray [the defendant] to raise the point, I would hold that the power of attorney had not in fact been sealed.”⁴¹

THE IRISH CONTEXT

It is submitted that the decision in *TCB Ltd v Gray* carries little weight as an authority in the modern Irish context, for a number of reasons. First, s.1(1) of the Powers of Attorney Act 1971 specifically refers to the requirement for a seal. As has already been mentioned, no such requirement has ever been set out by Irish legislation in respect of the execution of deeds by individuals. Secondly, the solicitor who oversaw the execution of the power admitted that the absence of a seal or wafer on the document was an oversight on his part. As shall be discussed below, the practice of affixing such wafers in Ireland, although it was prevalent at one time, has long since been abandoned. A solicitor based in Ireland would not have regarded it as an oversight to fail to affix the red sticker before the commencement of the 2009 Act, as the prevailing conveyancing practice was to regard the standard testimonium and execution clause as acting as a seal. Thirdly, the absence of a seal was easily resolved in this case as the doctrine of estoppel was applied, rendering it unnecessary to further extend the earlier line of authority. Furthermore, the court accepted that the solicitor had, in any event, received express authority from his client over the phone to amend the deed, which meant it was unnecessary to rely on the power of attorney.

Given the uncertainty created by some of the English case law, it is perhaps unsurprising that Woods and Wylie’s third edition of *Irish Conveyancing Law* (published before the 2009 Act) advises solicitors to put “some mark or impression” on the deed, “even if only one caused by the end of a ruler, to act as the seal”.⁴² The text includes a footnote reference⁴³ to an article published in the *Dublin University Law Journal* in 1994.⁴⁴ Although the author of the article, Kearney, advises that under Irish law, “as a matter of prudence”, a

41. [1986] 1 Ch. 621 at 633.

42. (Dublin: Tottel Publishing, 2005), para.18.126.

43. Fn.42 above, see fn.505.

44. P. Kearney, “Execution of Commercial Documents” (1994) 16 *Dublin University Law Journal* 1.

wafer seal should be affixed to any document which is desired to be sealed, he also refers to the views of certain English writers and judges where a less stringent approach was taken.⁴⁵ In a footnote,⁴⁶ Kearney states: "Presumably the rationale of this approach would be equally valid in Ireland." This writer shall argue below that a less stringent approach to the matter of the seal is even more appropriate in the Irish context.

The arguments made by Hoath in his 1980 article are helpful when considering the validity of deeds bearing no obvious evidence of a seal in the Irish context. Although the demise of the practice of affixing red stickers to deeds was a gradual process, anecdotal evidence strongly suggests that it was no longer common by the mid- to late 1980s. Since then, deeds have, until very recently, included the standard testimonium and execution clause which simply refer to the fact that the deed has been sealed. Although the commentary on the testimonium in Laffoy's *Irish Conveyancing Precedents* (the pre-2009 version) refers to signatures and seals, it fails to specify how the sealing requirement should be met by individuals executing a deed.⁴⁷ In the pre-2009 editions of the Law Society's Conveyancing manual,⁴⁸ again, no mention is made of a requirement to use a red sticker to seal a deed executed by an individual. It is submitted that conveyancers regarded the red sticker as superfluous and were relying on the reference to the seal in the testimonium and execution clause as sufficient to seal the deed. Hoath's doubts about the prevalence and longevity of the practice described in the *Jones* case do not apply in the Irish context; the Irish practice has been universally adopted for well over 20 years.

ESTOPPEL

Recent English case law illustrates that where the legal requirements for the execution of a deed have not been complied with, a party may be estopped from denying that it was properly executed. It is necessary to preface the discussion of this case law by emphasising that this estoppel argument is subsidiary to the main argument made in this article, that the references to sealing contained in the deed are sufficient to seal it.⁴⁹ In the event that an Irish court rejected this argument, it is submitted that the party who had failed to seal the deed would, in most circumstances, be estopped from claiming that it was invalid on that basis.

45. Fn.44 above at 3.

46. Fn.44 above, see fn.38.

47. See *Irish Conveyancing Precedents* (Dublin: Butterworths, 1992), Division E, para.5.5, and precedent E.1.1.

48. See, for example, G. Brennan and N. Casey (eds.), *Law Society of Ireland Conveyancing*, Vol.1, 3rd edn (Oxford: Oxford University Press, 2005), para.8.2.4.14–15.

49. An alternative argument is that the requirement of sealing, being a creature of common law, could be discarded by the courts.

As was mentioned earlier, in *TCB Ltd v Gray*,⁵⁰ Browne-Wilkinson V.-C. ruled that it was not open to the defendant to raise the point that the power of attorney had not been sealed, since he was estopped from denying that it was sealed. The defendant had executed a document drafted as a deed which said that he had thereunto set his hand and seal. The document stated that it was signed, sealed and delivered in the presence of a witness. There was, therefore, a representation of fact that it was in fact sealed. Mr Gray executed the document with the intention that it should be relied on as a power of attorney and knowing that TCB Ltd were going to rely on it as such. TCB Ltd in fact relied on it to their detriment, since they advanced money in reliance on documents executed under the power. He concluded that the case had all the necessary elements of a classic estoppel. He agreed with Sir David Cairn's statement in the *Jones* case that it would be lamentable if the validity of documents which did not bear evidence of a seal could be successfully challenged. However, he preferred to hold that a person so executing a deed is subsequently estopped from denying that he has sealed it "rather than to find as a fact that something has occurred which we all know has not occurred".⁵¹

More recently, in *Shah v Shah*,⁵² the validity of a deed in which the defendants jointly and severally agreed to repay a sum of money which had been advanced by the plaintiff was challenged on the basis that the witness who attested the defendants' signatures was not actually present when the document was signed. Instead, the signature of the witness was added shortly after the defendants had signed the deed. Section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 clearly specifies that the witness must be present at the time of the signature, and counsel for the defendants sought to rely on a statement in *Halsbury's Laws of England*: "The doctrine of estoppel may not be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted to be invalid."⁵³ Pill L.J., delivering the decision of the Court of Appeal, noted that the principle set out in *Halsbury's Laws* was qualified by a footnote reference to *Kok Hoong v Leong Cheong Kweng Mines Ltd*.⁵⁴ Viscount Radcliffe, delivering the opinion of the Privy Council in *Kok Hoong*, acknowledged that there are statutes which "though declaring transactions to be unenforceable or void, are nevertheless not essentially prohibitory and so do not preclude estoppels".⁵⁵ Pill L.J. also quoted the following statement from the judgment of Belham L.J. in *Yaxley v Gotts*: "The general principle that a party cannot rely on an estoppel in the face of a statute depends upon the nature of the enactment, the purpose of the provision and the social policy behind it."⁵⁶ Pill L.J. opined that this was an

50. Fn.40 above.

51. Fn.40 above at 634.

52. [2002] Q.B. 35.

53. 4th edn, reissue, Vol.16 (London: LexisNexis Butterworths, 1992), pp.849–850.

54. [1964] A.C. 993.

55. Fn.54 above at 1015.

56. [2000] Ch. 162 at 191.

accurate statement of the law of England and Wales. The court is therefore entitled to consider the particular statutory provision, its purpose and the social policy behind it when deciding whether an estoppel is to be allowed. He noted that the willingness of the court in *TCB Ltd v Gray*⁵⁷ to allow an estoppel when the requirement to establish that the deed had been sealed had not been satisfied, supports the view that neither before nor after the passing of the 1989 Act has there been any general social policy requiring the exclusion of estoppel in all circumstances when the validity of a deed is in issue. Pill L.J. acknowledged that the requirement for attestation serves a beneficial purpose, in that it limits the scope for disputes as to whether the document was signed and the circumstances in which it was signed. It confers some protection on other parties to a deed who can have more confidence in the genuineness of the signature. It is also a safeguard against a person alleging that he was induced to execute it by fraud, misrepresentation or duress. In addition, it gives some protection to a signatory who may be under a permanent or temporary disability. However, he concluded:

“... [T]here was no statutory intention to exclude the operation of an estoppel in all circumstances such as the present. The perceived need for formality in the case of a deed requires a signature and a document cannot be a deed in the absence of a signature. I can detect no social policy which requires the person attesting the signature to be present when the document is signed. The attestation is at one stage removed from the imperative out of which the need for formality arises. Failure to comply with the additional requirement of attestation should not in itself prevent a party into whose possession an apparently valid deed has come from alleging that the signatory should not be permitted to rely on the absence of attestation in his presence”⁵⁸

In the present case, the delivery of the deed involved a clear representation that it had been signed by the defendants in the presence of the witness and had, accordingly, been validly executed by them as a deed. The defendant signatories well knew that it had not been so signed, but they must be taken also to have known that the claimant would assume that it had been so signed and that the statutory requirements had accordingly been complied with so as to render it a valid deed. They intended the delivery of the deed to be relied on as such and it was relied on. In laying down a requirement of attestation in s.1 of the 1989 Act, Parliament did not, in Pill L.J.’s judgment, intend to exclude the possibility that an estoppel could be raised to prevent the signatory relying upon the need for the formalities required by that section.

57. Fn.40 above.

58. Fn.52 at 46.

CONCLUSION

The social policy behind the common law requirement for a seal was to authenticate documents before signatures were relied on for this purpose. It is submitted that the Irish courts, if asked to adjudicate on the validity of pre-December 1, 2009 deeds bearing no obvious evidence of a seal, would take a commercially expedient approach in their interpretation of what is sufficient to constitute a seal. Such an approach is facilitated by the fact that the requirement for a seal on deeds executed by individuals has never been enshrined in Irish legislation. This interpretation would recognise the conveyancing practice adopted in relation to the execution of deeds over the last 20 years or more, which was to regard the reference to the seal in the testimonium and execution clause of deeds as sufficient to seal the deed. In the alternative, the grantor would clearly be estopped from relying on the absence of a seal, if the deed was delivered and intended to be relied on as a properly executed deed.

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