

OVERHAULING CONVEYANCING IN IRELAND: IS A COMPLETELY ELECTRONIC PROCESS FEASIBLE?

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A INTRODUCTION

The present system of conveyancing or transferring an interest in property from one individual or corporate entity to another encompasses three main constituent phases. The first is the pre-contract phase, which typically involves the finding of a purchaser, the engagement of a solicitor, the issuing of draft contracts for sale and the exchange of pre-contract enquiries. The second phase comprises of the signing and exchange of contracts, together with closing of the sale. Finally, the third, post-contractual phase involves the registration of the transfer with the relevant public body, and in certain cases, the furnishing of a Certificate of Title to the mortgagor bank.¹ The final stage is arguably the most crucial considering that a transfer is of little legal value until the property has been officially registered in the name of the purchaser, even though the creation of a contract may confer upon the purchaser an equitable interest in the property.² Registration has been administered by the Registry of Deeds and Land Registry since 1707 and 1891, both of which have come under the remit of the Property Registration Authority (PRA) since the enactment of the Registration of Deeds and Title Act 2006.³ This development in conveyancing law was followed by the pivotal Land and Conveyancing Law Reform Act 2009. The 2009 Act made many substantial changes to property law in Ireland by abolishing the historical fee farm grant system in favour of a streamlined system of interests in property and by overhauling rules regarding co-ownership and prescription of easements.

This modernisation of Irish conveyancing has coincided with the emergence of a pertinent new area of law: electronic commerce. Electronic contracts have risen in prevalence in recent times, considering the myriad industries which now rely heavily on electronic commerce as a means of conducting business, for example, internet shopping and auction sites such as eBay or the availability of airline tickets online. The significance of electronic commerce in the modern commercial landscape has led to international acknowledgement of the law of electronic commerce. For example, the United Nations Commission on International Trade Law (UNCITRAL)⁴ and the

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¹ For a more detailed outline of the steps of a conveyance, see Law Society of Ireland, *Conveyancing*, (5th edn, Oxford University Press 2011) 22.

² John Mee and Robert Pearce, *Land Law* (3rd edn, Thomson Reuters/Round Hall 2011) 133.

³ Registration of Deeds and Title Act 2006 s 10.

⁴ The United Nations Commission on International Trade Law (UNCITRAL), *Model Law on Electronic Commerce* (1996).

EU Electronic Commerce Directive 2000/31/EC,⁵ which was adopted into Irish law by the Electronic Commerce Act 2000. A conveyance is a contract governed by a unique set of regulations and formalities thus it seems entirely plausible that the principles of electronic commerce could be applied to a conveyance. This would allow the various stakeholders therein to conduct the transaction partially, mostly or even entirely by electronic means of communication. With the growing ubiquity of electronic commerce, the utilisation of electronic means in conveyancing contracts may even appear inevitable. Moreover, given the widespread dissatisfaction with the protracted nature of property transactions under the present system and the inflated costs arising therefrom,⁶ E-Conveyancing has been widely extolled, for example by former Taoiseach, Bertie Ahern.⁷ Indeed, it has been identified as a key objective of the Government's Construction 2020 plan⁸ and has been encouraged by the European Commission.⁹

The herein essay aims to examine the feasibility of a wholly electronic system (and consequently paperless) of conveyancing and to consider those elements of e-conveyancing already instituted, such as conveyancing contracts in the context of electronic commerce, electronic signatures, and miscellaneous issues which require redress if an efficient system of eConveyancing is to be successfully introduced.

B E-REGISTRATION AND E-LODGEEMENT: DEVELOPMENTS SO FAR

Considering the aforementioned significance of registration as the decisive step of a conveyance, it is no surprise that it is the first aspect of a conveyance to have received attention from relevant authorities.¹⁰ Further to the establishment of the Property Registration Authority's landdirect.ie web portal, which allowed for the inspection and provision of Land Registry records including folios and maps,¹¹ the PRA allowed for the electronic lodgement of registration applications since late 2002. This is done through the eForm 17 facility,¹² the electronic counterpart to the physical Form 17. However, this form of eLodgement appears to be only an interim measure, as it nonetheless requires the furnishing of paper documents. These include a physical

⁵ Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/01.

⁶ Joint Committee on Justice, Defence and Equality Deb 25 June 2014, 10, 14.

⁷ Bertie Ahern Taoiseach, Speech at 30th Anniversary of Law Reform Commission, Farmleigh, Co. (Farmleigh, Dublin, June 2005)

<<http://www.lawreform.ie/fileupload/Speeches/30th%20Anniversary%20Taoiseach%20speech%20final%2023%20June%202005.pdf>>.

⁸ *Construction 2020 A Strategy for a Renewed Construction Sector* (The Stationery Office, 2014) 59.

⁹ European Commission, 'Assessment of the 2014 national reform programme and stability programme for Ireland' COM (2014) 408 final, 33.

¹⁰ This includes not only the registration of a new owner of a property on the folio, but also the registration of burdens such as mortgage charge, judgment mortgages, rights of ways and covenants.

¹¹ John O'Sullivan, 'eRegistration and eConveyancing in Ireland – The Story so Far...' (Registering the World Conference, Dublin Castle, September 2007).

¹² *ibid* 4.

copy of the eForm 17, together with the relevant registration documents such as Deed of Transfer duly executed, mortgage charges etc. This requirement of paper documentation is entirely contrary to the purpose of eConveyancing as a paperless system of conveyancing, as envisioned by the Law Society of Ireland¹³ and the Law Reform Commission.¹⁴

The necessity to submit documents relevant to the registration in question poses myriad issues. For example, in order to make redundant the need to submit a Deed of Transfer, the document required to ultimately exhibit the change in ownership of a property in paper form, the purchaser and vendor would have to execute the Deed electronically. This process is greatly complicated by the need for a reliable electronic signature, not only of the purchaser and vendor, but of the required witnesses thereto. Issues relating to electronic signature in the context of eConveyancing will be examined later.

In addition to the problems of the electronic signature, the difficulty in circumventing the need to submit paper documents in order to complete registration acts as a microcosm for an issue prevalent in all phases of the eConveyancing process, assuring the seamless and efficient cooperation of the various stakeholders therein. Indeed, the Law Reform Commission's 2006 Report notes the wide range of individuals and bodies, public and private, to whom information must be furnished, and from whom information must be retrieved, as the greatest complication to the process.¹⁵ For example, the execution of a Deed of Transfer requires the signatures of both vendor and purchaser, which, although not required to be provided simultaneously, each require the signature of an attesting witness. Furthermore, the paperless execution of a mortgage charge would require the collaboration of the registered owner (or the solicitor acting on his/her behalf) and the lending institution. Indeed, the issue of ensuring the cooperation of all stakeholders is one which is ubiquitous in eConveyancing, from the furnishing of a sales advice notice from the auctioneer or estate agent to the purchaser's solicitor, to the payment of outstanding Local Property Tax (LPT), Non-Principal Private Residence Tax (NPPR) and Stamp Duty, as well as the signing of contracts and ultimately, the registration of transfers and mortgage charges. Further exacerbating this complication is the potential incompatibility of the manner in which each of these stakeholders receive and dispense information.¹⁶

This issue has thus far been addressed in two realms; namely the discharge of mortgage charges and partially the payment of Stamp Duty on a transfer. The former is a matter between the PRA and lending institutions. The electronic release of

¹³ Law Society of Ireland, 'eConveyancing: Back to Basic Principles; Vision of an Electronic System of Conveyancing ('eVision')' <https://www.lawsociety.ie/Documents/Media/eVision.pdf> accessed 5 May 2014.

¹⁴ Law Reform Commission, *eConveyancing: Modelling of the Irish Conveyancing System* (LRC 79 - 2006) 1 <<http://www.lawreform.ie/fileupload/Reports/reConveyancing.pdf>> accessed 3 May 2014.

¹⁵ *ibid* 8.

¹⁶ *ibid*.

charges (eRelease or eDischarge) allows for the discharge of a charge registered as a burden on a folio upon receipt by the lending institution of the appropriate redemption figure. This is achieved solely through correspondence between the PRA and the relevant lending institution. The introduction of the discharge facility was envisioned to be implemented in March 2008 as the first component of the PRA's eRegistration Programme¹⁷ and was ultimately introduced in April 2009.¹⁸ It marks the first element of conveyancing, the paperless execution of which has been successfully been facilitated.

In addition to the quandaries created by the numerous stakeholders in a conveyance, the successful implementation of eConveyancing is further hindered by the existence of the Registry of Deeds system. The Registry of Deeds system which is based on the amassing of successive deeds primarily relating to the transfer, mortgage and lease of a property is entirely incompatible with the ultimate goal of a paperless system of electronic conveyancing.¹⁹ Presently, ten percent of all land in the jurisdiction remains unregistered.²⁰ This issue has been pre-empted somewhat by the enactment of the 2009 Act insofar as it abolishes all remaining feudal interests in land and the various statutory instruments which now compel conveyancing solicitors to complete first registration of all unregistered land with the Land Registry.²¹ Although these developments have circumvented the hurdle unregistered land posed to eConveyancing, their intention may not be fully realised for a considerable period of time. Indeed, notwithstanding the hypothetical development of an eForm3, the PRA form required for mandatory first registrations, the transfer of unregistered land would still necessitate the receipt by the purchaser's solicitor of Title Deeds, in order for him/her to complete the necessary investigation and certification of title.

C CONVEYANCING AND THE ELECTRONIC SIGNATURE

Having considered the developments to date in eConveyancing, we must now examine an issue which potentially demands the most urgent consideration: the electronic signature. The significance of the signature in the conveyancing process cannot be overstated as it plays a role of pivotal effect in both the second and final stages of the standard conveyancing process outlined above, giving legal effect to

¹⁷ O'Sullivan (n 11) 7.

¹⁸ Property Registration Authority, 'eDischarges - over 20,000 applications lodged!' (4 June 2009) <http://www.prai.ie/eng/News/News%202010/eDischarges_-_applications_lodged!.html> accessed 5 May 2014.

¹⁹ Mee and Pearce (n 2) 152.

²⁰ Joint Committee on Justice, Defence and Equality Deb (n 6) 11.

²¹ Registration of Title Act 1964 (Compulsory Registration of Ownership) (Cork and Dublin) Order 2010, SI 2010/516; Registration of Title Act 1964 (Compulsory Registration of Ownership) (Cavan, Donegal, Galway, Kerry, Kildare, Leitrim, Limerick, Mayo, Monaghan, North Tipperary, Offaly, South Tipperary and Waterford) Order 2009, SI 2009/76; Registration of Title Act 1964 (Compulsory Registration of Ownership) (Clare, Kilkenny, Louth, Sligo, Wexford and Wicklow) Order 2008, SI 2008/81; Registration of Title Act 1964 (Compulsory Registration of Ownership) (Longford, Roscommon and Westmeath) Order 2005, SI 2005/605.

both the contract and deed. This importance was recognised in the Law Reform Commission's 2006 Report,²² which in particular notes the existing legislative foundation for the facilitation of electronic signatures in conveyancing. It was also recognised by the PRA,²³ which designated electronic signing of documents as the sole subject of Phase 2 of its eRegistration programme. However, the aim of introducing electronic signatures in conveyancing has not yet been realised. Previously realised aims of both the LRC and PRA, while considerable, have not encompassed e-signatures. For example, the eLodgement, in addition to remaining optional, does not require an electronic signature but requires the furnishing of corresponding paper documentation, as addressed above. Furthermore, although the facility which allows financial institutions to register eDischarges involves a username, password and Personal Account Number (PAN), it does not encompass an electronic signature on the part of the submitting party and does not utilise encryption technology or Public Key Infrastructure (PKI). The relevance of encryption technology and PKI to electronic signatures will be discussed later in this article. We must first examine the issues surrounding the legislative basis of the electronic signature in Ireland before considering the function of signatures in electronic commerce, and finally, whether it is possible to introduce a form of electronic signature that both fulfils this function and is satisfactory in the context of conveyancing. Although electronic signatures are provided for in the 2000 Act,²⁴ section 10(1)(b) of that Act expressly precludes electronic communication in the context of 'the manner in which an interest in real property (including a leasehold interest in such property) may be created, acquired, disposed of or registered.' However, the relevant Minister is empowered to amend this provision by Ministerial Order, as per section 3. Another impediment to electronic conveyancing signatures arises from section 51 of the 2009 Act, which necessitates conveyancing contracts being in writing. This regulation is similarly amendable, as per section 5 of the 2009 Act. Indeed, although the legislative framework exists to facilitate completely electronic signatures in most other elements of electronic commerce, the extension of this to electronic conveyancing contracts will require significant ministerial and legislative input, which may provide a hurdle to electronic conveyancing.

Notwithstanding the difficulties posed by the establishment of a legal foundation for electronic signatures, it is also crucial to consider the technical requirements necessitated by their abstract nature. First, an electronic signature must adhere to the same purposes and form as a manuscript signature. Noted American legal philosopher, Lon L Fuller, outlined three functions of the manuscript signature in his article 'Consideration and Form.'²⁵ The first of these is the evidentiary function, which holds the signature as evidence of the existence and force of the signed document. The second is the cautionary function, cautionary insofar as the unique

²² LRC (n 14) 34.

²³ O'Sullivan (n 11) 7.

²⁴ 2000 Act s 13.

²⁵ Lon L Fuller, 'Consideration and Form' (1941) 5 Columbia Law Review 799.

formality to which the signatory must conform may deter against rash or ill-informed action on their part. Finally, the third function, referred to as the ‘channelling function’ by Fuller, aims to provide the judiciary with a ‘simple and external test of enforceability’. Fuller noted that all three of these functions correlate considerably, while also noting the individual significance of each. Whilst the issue of ensuring the fulfilment of each of these functions will be examined later, it is noteworthy that an overarching theme of these functions appears to be the need to identify both the identity of the contracting party and their clear intention to engage in a contractual relationship. Mason notes that these too are the primary aspirations of modern legislation governing electronic signatures.²⁶ In practice, however, verifying the authenticity of an electronic signature understandably requires the use of encryption technology, likely PKI. A PKI is a broad set of hardware, software and people which creates and administers digital certificates and electronic documents that attest to the identity of an electronic signatory. It is comprised of a Certificate Authority which is responsible for issuing and verifying certificates, a Registration Authority, which verifies the identity of signing party, a central database and a certificate management system and policy.²⁷ Irish legislation acknowledges the need for such systems, as section 13(2) of the 2000 Act requires electronic signatures to ‘be in accordance with particular information technology and procedural requirements.’ PKI poses its own issues in relation to verification of identity, insofar as the involvement of third parties, ie Certificate and Registration Authorities, in a legal process of such gravity would undoubtedly require independent regulation. Although such regulation could potentially be administered by the PRA, it could instead feasibly require the establishment of a dedicated and adequately equipped body. Regardless, PKI may simply be a convenient interim measure, rather than a mainstay of the electronic conveyancing process. As Hedley notes, the constantly evolving nature of technology makes the legislative endorsement of one particular system inadvisable.²⁸ The 2000 Act indeed embodies this opinion, simply including the use of particular technologies rather than mandating it,²⁹ as does its forerunner, the United Nations Commission on International Trade Law.³⁰

Although a framework for verifying the authenticity of an electronic signature may be implemented, albeit not without addressing serious issues, it is important also not to

²⁶ Stephen Mason, *Electronic Signatures in Law* (3rd edn, Cambridge University Press 2012) 1.

²⁷ Tom Austin, *PKI: A Wiley Tech Brief* (John Wiley & Sons 2001) [3]-[21], [39]-[62].

²⁸ Steve Hedley, *The Law of Electronic Commerce and the Internet in the UK and Ireland* (Cavendish 2006) 253.

²⁹ 2000 Act s 13(2)(a) reads ‘where the signature is required or permitted to be given to a public body or to a person acting on behalf of a public body and the public body consents to the use of an electronic signature but requires that it be in accordance with particular information technology and procedural requirements (including that it be an advanced electronic signature, that it be based on a qualified certificate, that it be issued by an accredited certification service provider or that it be created by a secure signature creation device) — if the public body's requirements have been met and those requirements have been made public and are objective, transparent, proportionate and non-discriminatory...’ (emphasis added).

³⁰ UNCITRAL (n 5).

ignore the overall purpose of the said signature. As such, we must revisit Fuller's functions of the signature and examine whether an electronic signature, however secure or authentic, can fulfil them. With regard to the evidentiary function, evidencing the existence and purpose of a document are accomplished in much the same way as a manuscript signature albeit, as Fuller notes,³¹ with the attestation of a witness, which is indeed common practice with manuscript signatures in conveyancing contracts.³² Transposing this requirement to electronic contracts appears to pose the same issues as are initially posed by electronic signatures, regarding the authentication of the witness. However, addressing this issue is not without precedent as the 2000 Act legislates for the witnessing of electronic signatures by 'advanced electronic signature, based on a qualified certificate'.³³ Although this can be accomplished by the use of a PKI, it is worth noting that such a specific definition of the requirements for authenticity is at odds with the technological neutrality of previous sections of the Act, as well as the UNCITRAL. Furthermore, the application of this legislation to electronic conveyancing is not yet permissible and it requires ministerial input as mentioned above. A possible solution may be to dispense entirely with the requirement of witnessing and instead designate the task of ensuring the fulfilment of the evidentiary function solely to PKI, or whichever system of authenticating an electronic signature may be in favour at a future date. This however makes the external regulation of PKI providers even more imperative. While it does appear that the witnessing of electronic deeds and conveyancing contracts, or the delegation of same to a PKI, is entirely achievable, it would undoubtedly necessitate the issuance of a second electronic certificate to the witness thereto, or alternatively, intense scrutiny of the reliability of PKI providers.

The second of Fuller's functions outlined above, the cautionary function, upholds the inherent formality of a signature as a deterrent to inconsiderate entry to a contract. Fuller notes that although the original procedure of embossing a wax seal fulfilled this function seamlessly, any form of writing or attestation shall successfully cultivate an appropriate wariness in the signatory.³⁴ Although the abstract nature of an electronic conveyancing documents may contradict the intended formality of a signature, it is likely offset by the personalised electronic signature which the party affixes thereto. The requirement of independent witnessing appears to further buttress the sense of gravity the formality of a signature aims to instill.

Finally, the channelling function requires the formality of a signature to provide the judiciary with an uncomplicated external test of enforceability (by adhering to an established 'channel' by which to express intention), and as Mason notes,³⁵ clarifies

³¹ Fuller (n 25) 800.

³² Indeed, attesting witnesses are a ubiquitous element of the conveyancing process from the witnessing of contracts to the swearing of statutory declarations by a Commissioner for Oaths.

³³ 2000 Act s 14(2) (a).

³⁴ Fuller (n 25) 800.

³⁵ Mason (n 26) 10.

the point at which the document becomes legally effective. As Mason and Fuller³⁶ both assert, the channelling function is intrinsically linked to the evidentiary function. Indeed, so closely related are the two functions in evidencing the existence of binding terms, as well as the signatory's intention to be bound thereto, that the channelling function is only precariously independent of the evidentiary function. Regardless, a fulfilment of any individual function is likely to fulfil the other two.³⁷ It appears that the previously discussed methods of regulating electronic signatures are sufficient to fulfil the channelling function.

D ELECTRONIC CONTRACTS AND THE COMMUNICATION OF ACCEPTANCE

An agreement for the sale, purchase or lease of land is in essence a contract, albeit one with its own unique idiosyncrasies.³⁸ As such, we must examine the ramifications of introducing electronic conveyancing through the joint scopes of contract law and the nascent area of electronic commerce law. We must thus consider the problematic transposition of traditional elements of contract law into the electronic context and paying especial heed to their respective application in the context of conveyancing.

One of the most pressing issues to be considered is the matter of offer and corresponding acceptance, without which no contract can be deemed to exist. An offer, defined as 'an expression of willingness to contract on certain terms, made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed',³⁹ must be met with an unequivocal acceptance of the terms of the offer.⁴⁰ In the context of a conveyance, this exchange is realised upon the exchange of signed contracts by solicitors acting for the vendor and purchaser, as most communication prior to the contractual stage is nowadays carried out strictly 'subject to contract', with the caveat that no representation therein should be construed as comprising an offer.⁴¹ Indeed, so reluctant is the prudent purchaser to commit prematurely to the acquisition of a property that the payment of a booking deposit to an intermediary such as an estate agent is not considered to amount to any more than a refundable statement of interest.⁴² This stage appears to be the first chronological element of a conveyance to pose a significant hurdle to the institution of electronic conveyancing and requires significant consideration. First, we must consider the matter of acceptance, and more specifically, the communication thereof. The first of two constituent parts of acceptance is the simple fact of acceptance. Acceptance in this sense may take the form of performance of an act in compliance with the terms of the offer, for example, the English case of *Carlill v Carbolic*

³⁶ Fuller (n 25) 803.

³⁷ *ibid.*

³⁸ 2009 Act s 51. A contract for land cannot be agreed orally, and must be evidenced in writing.

³⁹ Guenter H Treitel, *The Law of Contract* (10th edn, Sweet & Maxwell 1999) 8.

⁴⁰ Robert Clark, *Contract Law in Ireland* (6th edn, Thomson/Round Hall 2008) 14.

⁴¹ Pearce and Mee (n 2) 132.

⁴² *ibid.*

*Smokeball*⁴³ and the Irish case of *Billings v Arnott*.⁴⁴ In the aforementioned examples, the contracts in question were unilateral in nature and dispensed with the need to communicate acceptance thereof. However, a distinction must be established between contracts of this nature and those characterised by an offeror requesting a promise from the offeree.⁴⁵ The Irish case of *Brennan v Lockyer*⁴⁶ held that a bilateral contract, ie one requiring a reciprocal promise by the offeree, universally demands valid communication of acceptance. As a contract for the sale of property requires the promise of the purchaser to furnish the vendor with the balance purchase price upon closing, it can be considered to constitute a bilateral contract. We must therefore examine the ramifications of such a categorisation on the manner in which acceptance may be communicated.

Hedley notes that contract law typically adopts a stance of indifference regarding the manner in which contracting parties communicate.⁴⁷ Furthermore, Irish legislation assures the right of a contracting party to communicate offer and acceptance electronically.⁴⁸ As such, no radical alteration is required to accommodate electronic means of communication into existing principles of contract law. It is thus sufficient to examine the merits of the existing rules regarding communication of acceptance and their applicability to electronic conveyancing contracts. Generally speaking, acceptance is only effective once successfully brought to the attention of the offeror. This rule is especially applicable in the realm of electronic commerce and consequently, electronic conveyancing, considering the lack of physical proximity of the parties to the contract. Indeed, it is with the advent of modern technological means of communication that the onus shifted from the sending of communication to receipt thereof. Long-distance communication of acceptance was originally governed wholly by the so-called 'Postal Rule', which considered acceptance effective as of the posting of a letter to that effect.⁴⁹ Of English conception, the postal rule was accepted by the Irish courts in *Sanderson v Cunningham*⁵⁰.

Though the postal rule is still in effect, its scope has not expanded to encompass modern forms of communication. For example, the English cases of *Entores Ltd v Miles Far East Corporation*⁵¹ and *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft GmbH*,⁵² both of which dealt with international communication of acceptance via telex, firmly establish that a contract is formed when communication of acceptance is received by the offeror. Although there is little

⁴³ [1893] 1 QB 256.

⁴⁴ [1945] 80 ILTR 50.

⁴⁵ Clark (n 40) 14.

⁴⁶ [1932] IR 100.

⁴⁷ Hedley (n 28) 243.

⁴⁸ 2000 Act s 19(2).

⁴⁹ The postal rule pre-dates most, if not all, other forms of long-distance communication, its genesis being *Adams v Lindsell* [1818] 1B & Ald 681.

⁵⁰ (1919) 2 IR 234.

⁵¹ (1955) 2 QB 327.

⁵² (1983) 2 AC 34.

development on the applicability of either the postal rule or *Entores* in terms of electronic commerce, the latter is conceived in the context of telex communication appears easily analogous with e-mail and other forms of computer-based communication.

Both the postal rule and the rule in *Entores* are, however, wrought with potential for injustice. Indeed, the precariousness of the postal rule is evidenced by the English case of *Household Fire Insurance v Grant*,⁵³ in which the defendant was held liable for an insurance premium on a policy the mailed acceptance of which was never delivered. The postal rule is likely predicated on the supposed agency of the postal service, ignoring the ignorance of the 'agent' regarding the contents of a letter.⁵⁴ The rule in *Brinkibon*, on the other hand, avoids the aforementioned pitfall of the postal rule. However, universally categorising receipt of acceptance as the creation of a contract is not without its own frailty. Hedley, for example, takes the view that this approach incentivises laziness in addressing correspondence.⁵⁵ Indeed, an offeror ignorant through laziness of his receipt of acceptance could potentially have greater legal recourse than the diligent offeror immediately aware of the offeree's acceptance. Hedley does, however, advocate the approach used in *Tenax Steamship Co v Owners of the Motor Vessel Brimnes*⁵⁶ and *The Pamela*⁵⁷ as a solution to this quandary. Both cases held that a communication could be considered effective on the basis that it could reasonably have been read, rather than whether it had actually been read.⁵⁸ As such, holding a communication of acceptance to be effective if sent during business hours appears to be a satisfactory solution, albeit a fallible one. The 2000 Act⁵⁹ allows for the sender of a communication to require confirmation of receipt from the addressee before the message is deemed legally to have been received. However, the significance of this provision is debatable as it may provide no benefit to a party indicating acceptance, instead allowing the offeror further opportunity to deny receipt of an unfavourable acceptance. Perhaps the preferable approach is to empower the judiciary to determine such cases of electronic communication of acceptance on a case-by-case basis, particularly considering the glut of litigation which may arise with growing commonness of electronic contracts. Indeed, as early as *Entores*, Lord Wilberforce acknowledged the potential for injustice in applying a universal rule to cases of this nature, saying '[n]o universal rule can cover all such cases; they must be resolved with reference to the intentions of the parties, by sound business practice and, in some cases, by a judgment where the risks should lie.'⁶⁰

⁵³ (1879) LR 4 Ex. 216

⁵⁴ Clark (n 40) 22.

⁵⁵ Hedley (n 28) 246.

⁵⁶ (1974) EWCA Civ 15.

⁵⁷ (1995) 2 Lloyd's Law Reports.

⁵⁸ Irish legislation appears to adopt a similar approach. The 2000 Act s21 considers a message sent when it enters the information system specified by the intended receiver, which places the onus on the said receiver to monitor said system. However, as a case in which no information system is specified, the said section requires the message to have been brought to the attention of the intended receiver.

⁵⁹ 2000 Act s 20.

⁶⁰ *Brinkibon* (n 52) 42.

E FACILITATING A CONCISE PROCESS

Considering that the very purpose of eConveyancing is to establish a paperless and efficient method for transferring property,⁶¹ it is insufficient to consider only the pivotal steps of contract formation and registration. Rather, consideration must be afforded to other miscellaneous steps required in the transfer of land which may be a hindrance to the implementation of a comprehensive eConveyancing system.

First, as mentioned previously, steps must be taken to address the matter of the myriad stakeholders in a conveyance. Indeed, stakeholders can range from those with significant roles, such as solicitors, consumers, estate agents and the PRA, to those with a moderate level of input, such as the Revenue Commissioners, who administer Stamp Duty and property taxes such as LPT,⁶² and those with single-purpose roles, such as legal searchers.⁶³ The proposed solution to ensuring efficient co-operation thereof is the establishment of an online hub, accessible by so-called ‘participants’ and ‘information providers’ alike.⁶⁴ This hub would be centrally managed by a Hub Operator, which appears to be a satisfactory method of assuring expedient and clear collaboration between all stakeholders. Coincidentally, it adds an extra dimension of security to the conveyancing process, both in terms of creating an easily documentable time-line of events and correspondence, and privacy, the liability for which may fall on the state.⁶⁵

Notwithstanding the efficiency of the proposed system and the sweeping modernisation of the 2009 Act, efforts to streamline the conveyancing system may also benefit from further changes and importantly, abolitions. To this end, the Law Society proposes the abolition of section 72 of the Registration of Title Act 1964,⁶⁶ and potentially, section 3 of the Family Home Protection Act 1976,⁶⁷ which would eliminate the necessity for the corresponding declarations as part of a Certificate of Title, as well as the partition of risk in purchasing a property between purchaser and vendor, thus eliminating caveat emptor, and consequently the need for pre-contract enquiries to be raised.⁶⁸ However, the cavalier abolition of such legislative provisions in the name of electronic conveyancing is perilous and creates the undesirable possibility of a universal paperless conveyancing system being implemented at the expense of that system’s integrity.

⁶¹ LRC (n 14) 29.

⁶² Finance (Local Property Tax) Act 2012.

⁶³ Perhaps the most comprehensive appraisal of the stakeholders involved is offered by the Law Reform Commission (n 14) 41.

⁶⁴ LRC (n 14) 41.

⁶⁵ *Hanraho v Hussey* [1998] 3 IR 69.

⁶⁶ Registration of Title Act 1964 s 72.

⁶⁷ Family Home Protection Act 1976 s 3.

⁶⁸ Law Society of Ireland (n 13).

F CONCLUSION

Electronic conveyancing remains a viable alternative to the present system of conveyancing, and given the considerable developments in both electronic commerce legislation and conveyancing law examined above, may indeed be an inevitable and logical next step for conveyancing, not only in Ireland but globally.⁶⁹ However, the present situation outlined in paragraph two is unfortunately an unsatisfactory one, stagnated between the previous, wholly paper-based system and the expected paperless system widely proposed. For example, while the availability of electronic discharges is an encouraging step in the movement from previous system to new, such a facility is arguably manageable only due to the limited number of financial institutions party thereto. Indeed, the extension of paperless registration of deeds to, for example, deeds of transfer and mortgage shall require dramatic action in establishing an acceptable method of permitting purchasers, vendors and witnesses to electronically sign documentation. As discussed above, manifold issues arise therefrom, such as ensuring the reliability of PKI providers, if PKI is to be the technology of choice, and the fact that the use of electronic signatures in conveyancing shall require ministerial approval with regard to both the 2000 and 2009 Acts.

Furthermore, the successful creation of paperless conveyancing may give way to its own flood of litigation, concerning, for example, the rules relating to communication of acceptance and the creation of a contract. As such, eConveyancing as a distinct procedure may not take full form until it has been subjected to judicial scrutiny.

Finally, the incompatibility of the Registry of Deeds and unregistered land with paperless conveyancing may delay the institution of the envisaged system indefinitely, in the absence of concerted efforts to expedite the compulsory first registration of unregistered land.

Paperless, electronic conveyancing would constitute a considerable and positive overhaul of Irish conveyancing in terms of simplification, efficiency and accessibility. However it remains beset with uncertainty and poses many issues which require redress if it is to become a lasting mainstay of property law in Ireland.

⁶⁹ For example, for developments in eConveyancing in New Zealand, see Robbie Muir, 'E-conveyancing in New Zealand: Progress to Date and Future Developments' ('Registering the World' conference, Dublin Castle, September 2007).