THE STATUTE OF FRAUDS IN THE EMAIL AGE: *DRUET V GIROUARD*

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Introduction

It is still too early to compose the final obituary for the *Statute of Frauds.*[1] Notwithstanding its repeal in whole or in part in some common law jurisdictions, this late 17th century legislation has once again proven its adaptability, this time to the age of the Internet, and to the making of contracts for the sale of land by email communications. Commercial parties have operated for much of the last decade on the assumption that enforceable agreements relating to land can be made by email. However, several recent English and Canadian decisions demonstrate that there are legal issues which must be resolved when using email to make contracts for the sale of an interest in land or for guarantees. *Druet v Girouard*,[2] in particular is a salutary reminder that the underlying reasons for the *Statute of Frauds* continue, *mutatis mutandis*, to justify why certain types of agreements ought to be in writing and authenticated by the signature of the person against whom they are to be enforced. This commentary will focus on these cases within the larger context of the reasons for the *Statute of Frauds* and suggest that those reasons continue to resonate even in the modern Internet age.

Some Historical Background

When first enacted in 1677, the *Statute of Frauds* applied to six types of contracts. Section 4 covered contracts by executors or administrators of estates to cover damages out of their own estates, contracts in consideration of marriage, contracts to be performed more than a year after their formation, contracts for the disposition of interests in land, and contracts of guarantee. Section 17 covered contracts for the sale of goods with a value of at least £10. The preamble to the Act proclaimed its purpose to be the "prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury." The reason these were problematic is explained partly by then recent changes in the substantive law of contract and the lingering of older rules relating to evidence. The medieval action in covenant had required a sealed writing for enforceability but after *Slade's Case*[3] in 1602, the King's Bench permitted actions in assumpsit to be enforced. However, two

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[1] *Statute of Frauds*, (1677), 29 Car II, c 3 [*Frauds*].

[2] *Druet v Girouard*, 2012 NBCA 40, 386 NBR (2d) 281 [*Druet*].

[3] *Slade v Morley*, (1602), 4 Co Rep 91a, 76 ER 1074 (KB).

procedural rules made the enforcement of oral agreements difficult. Neither parties to the action nor their spouses could give evidence, even when the action was to enforce an oral promise against a party, and juries were still permitted to decide cases on the basis of their own knowledge. The possibility of dishonest witnesses being used to perpetrate fraud was considerable. In light of the extreme litigiousness following the turbulent period of the English Civil War (1641-1649) and the Commonwealth (1649-1660), Parliament enacted the *Statute of Frauds*, the first statute ever to deal with contract, to provide greater certainty for agreements relating to particular economically significant categories of contracts, and to restore the older requirement of writing for enforceability.

Some 70 years ago, Professor Fuller suggested that the writing requirement served three main functions: (i) an evidentiary function in relation to significant transactions; (ii) a cautionary function to warn against precipitous or ill-considered agreements; and (iii) a channelling function to signal that a contract has now resulted from the negotiations.[4] While it may be debated whether the Act fulfils each of these functions completely, it cannot be doubted that it was intended to do so. The Act has therefore been subjected to a number of criticisms over the three centuries of its operation, these include: (i) the use of the Act as a defence for non-compliance with the writing and signature requirements to avoid liability when there was a promise to enter an agreement; (ii) the multiple problems of statutory interpretation which have resulted in thousands of cases over the centuries; (iii) the disappearance of the prevailing legal and social conditions of the 17th century, such as the procedural rules stated above, the subsequent admission of parol evidence to prove oral agreements, the increasing experience and skill of courts in adjudicating large financial transactions, and more stable socio-economic conditions in comparison to 17th century England; (iv) the growing divergence over time with actual contract making by oral agreement even for high value transactions; (v) the ambiguous nature of an unenforceable agreement that is still valid, which facilitated the equitable part performance exception undercutting the writing requirements; and (vi) the doubts that the Act ever served cautionary or channelling functions because it requires only a note or memorandum, and not a full contract in writing.[5]

[4] Lon Fuller, "Consideration and Form" (1941) 41:5 Colum L Rev 799.

[5] This list reflects the most widespread criticisms drawn from the many law reform reports on the Statute of Frauds over the years. In England: Law Revision Committee, *Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration)*, Cmnd 5447 (1937); Law Reform Committee, *The Statute of Frauds and Section 4 of the Sale of Goods Act*, Cmnd 8809 (1953); Law Commission, *Formalities for the Sale etc. of Land*, Law Com No 164 (1987). In Canada: Law Reform Commission of British Columbia, *Report on the Statute of Frauds* (1977); Alberta Institute of Law Research and Reform, Background Paper No 12, *Statute of Frauds* (1979) and Report No 44 *The Statute of Frauds and Related Legislation* (1985); Manitoba Law Reform Commission, Report No 41, *Report on the Statute of Frauds* (1980); Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (1987), ch 5; Law Reform Commission of Saskatchewan, *The Statute of Frauds* (1996) [Law Revision Committee].

In England, the *Statute of Frauds* has been subject to further additions, deletions and statutory reform over the centuries. In 1828, *Lord Tenterden's Act*[6] amended the *Statue of Frauds* by adding two new categories that were required to be in writing: ratification of infants' contracts on attaining the age of majority and representations as to the credit worthiness of another for which the representor was liable; and by adding sales of future goods to the categories required to be in writing. In 1856, the *Mercantile Law Amendment Act*[7] clarified that in contracts of guarantee, the consideration for the guarantor's promise did not have to be included in writing. In 1893, the *Sale of Goods Act*[8] (*SOGA*) removed the written requirement from s. 4 of the *Statute of Frauds* into *SOGA*, and in 1925, contracts for the sale of interests in land were removed from the *Law of Property Act*.[9] In 1954, the *Law Reform (Enforcement of Contracts) Act*, [10] repealed the *SOGA* provisions and the *Statute of Frauds* provisions relating to executors, marriage contracts and contracts to be performed after a year. In 1989 the *Law Reform (Miscellaneous Provisions) Act*[11] superseded the *Law of Property Act, 1925*, but retained the written requirement for transactions relating to land. The *1987 Law Commission Report* preceding the 1989 changes expressly rejected the abolition of the written requirement for contracts relating to land because of the need for certainty and protection of those making what are likely to be the most valuable transactions they will ever make.[12] Indeed, the 1989 changes are more rigorous than the original *Statute of Frauds*; s. 2(1) states that such contracts "can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each." Thus in England, it is now necessary to have the entire contract in one document or in exchanged documents and signed by both parties. Failure to comply renders the agreement void rather than unenforceable.[13] The operation of part performance is effectively eliminated, although contracts can still be rectified or subject to properly authenticated collateral agreements, and restitution remains as a remedy for the recovery of a deposit on the ground of total failure of consideration. Briefly, in England, of the original categories of the *Statute of Frauds, 1677*, only guarantees remain enforceable if there is a signed note or memorandum by the party to be charged, while contracts for an interest in land must now comply with the *1989 Act*.[14]

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[6] *Lord Tenterden's Act*, (1828), 9 Geo 4, s 14, ss 5-6; 17.

[7] *Mercantile Law Amendment Act* (1856), 19 & 20 Vict, c 97, s 3.

[8] *Sale of Goods Act*, (1893), 56 & 57 Vict, c 71, s 24.

[9] *Law of Property Act*, (1925), 15 & 16 Geo 5, c 20, s 40.

[10] *Law Reform (Enforcement of Contracts) Act*, (1954), 2 & 3 Eliz 2, c 34.

[11] *Law Reform (Miscellaneous Provisions) Act*, (1989) c 34 [*Miscellaneous Provisions*].

[12] Law Revision Committee, *supra* note 5.

[13] *Ibid* at s 2(1).

[14] *Miscellaneous Provisions*, *supra* note 11.

In Canada, the *Statute of Frauds* was originally in force in the common law jurisdictions by virtue of enactment prior to the specific provincial reception date for that jurisdiction. Four provinces have enacted their own versions of the 1989*Act*;[15] one has since abolished it but retained the formal written requirements for transactions relating to land,[16] and one has since abolished it completely.[17] In all provinces, provisions relating to the sale of goods have been transferred to provincial consumer protection legislation,[18] but the formal written requirements remain in most provinces for transactions relating to land.

The relevance of the question of whether email is an appropriate means for making contracts relating to land is not limited to real property transactions. Other categories of agreements have been subsequently required by legislation to be evidenced in writing and signed, including various types of consumer transactions,[19] family law agreements,[20] and agreements to retain real estate agents.[21] Jurisprudence on contracting by email may potentially be important for those other categories depending on the precise wording of the legislation at issue.

The provisions of the *Statute of Frauds* at issue in the email cases are those related to the two formal requirements for compliance, a note or memorandum and signature, "unless the agreement upon which the action is brought, or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized."[22] The case-law on these provisions demonstrates that the courts take a literal approach to their interpretation.[23]

With respect to the requirement for a note or memorandum, the courts have found that the entire contract is not required; only the essential terms of a contract for

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[15] *Statute of Frauds*, RSO 1990, c S 19, as ammended SO 1994, c 442; *Statute of Frauds*, RSNS 1989, c 442; *Statute of Frauds*, RSREI 1988, c S-6; *Statute of Frauds*, RSNB 1993, c S-14.

[16] See now: *Law and Equity Act*, RSBC 1996, c 253, s 59.

[17] *An Act to Repeal the Statute of Frauds*, CCSM, c F-158.

[18] See, for example, *Consumer Protection Act*, SO 2002, c 30.

[19] *Ibid*.

[20] See, for example, *Family Law Act*, RSO, c F -33, s 55 [*Family Law Act*].

[21] See for example, *Real Estate Act*, RSBC 1996, c 397.

[22] *Frauds*, *supra* note 1 at c 3 s 4.

[23] Since this paper presumes the previous settled case law on the meaning of the writing requirements, a brief resume of that law follows based on the extensively footnoted textbook discussions. Interested readers should consult the cases found in the following texts: GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 214-221; John D McCamus, *The Law of Contracts*, 2d ed (Toronto: Irwin Law, 2012) at 173-177. Angela Swan, *Canadian Contract Law*, 2d ed (Toronto: Lexis Nexis, 2009) at 335-337; SM Waddams, *The Law of Contracts*, 6th ed (Toronto: Canada Law Book, 2010) at 166-169.

the sale of land: the parties, the price and the property, are required.[24] The note need not take any particular form but can be a letter, will, receipt or even instructions to a telegraph clerk. The note need not be deliberately prepared as a memorandum, and a repudiation of liability can constitute sufficient written documentation as can a memorandum made for internal firm purposes. The note does not need to be contemporaneous with the contract; rather, it needs only to be made prior to the commencement of the action. There is no requirement of delivery of the note from one party to the other.

With regard to the signature requirement, the courts have found that only the party being sued or its authorized agent needs to sign. The signature can take the form of initials, a written signature, a hand-printed name, or a printed name on letterhead or an invoice. The signature may be placed anywhere on the note and need not be at the bottom of the document provided it authenticates the entire note. The name must be the true name of the party.

Finally, the courts have also permitted joinder of one or more documents to satisfy the requirement of a note containing the essential terms of an agreement relating to land. Parol evidence can be admitted to show a fair and reasonable inference that the documents are connected. Any two or more types of documents can be joined, whether mere notes, letters, an interim agreement, or a deposit receipt.

The significance of the prior case-law on what is necessary to satisfy the formal requirements for the *Statute of Frauds* is readily apparent in relation to email exchanges for the sale of land because not only are those exchanges typically informal but they are also multiple, likely deal with certain terms only, but may not be "signed" in any way contemplated when the *Statute of Frauds* was first enacted, that is, on paper. Nevertheless, the background preparation has already been done by the law on the *Act* to facilitate email into the mechanisms which may comply with the *Act*.

Some Recent Cases

From the earliest email cases, the courts have not hesitated to find that email communications may comply with the *Statute of Frauds*. Difficulties arise however in respect to certain aspects of email, particularly in regard to an intention to contract authentically, signified in writing. The two earliest English cases were concerned with this issue. In *J. Pereira Fernandes SA v Mehta*[25], when a company failed to pay for goods, the supplier petitioned for a winding-up, and a director of the company asked an employee to send an email to the supplier's solicitors requesting an adjournment of

[24] *Family Law Act*, *supra* note 20.

[25] *J Pereira Fernandes SA v Mehta*, [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 (BAILII)[*J Pereira*].

the hearing because he would provide a personal guarantee for the amount owed. The director's name did not appear in the body of the email but his email address was automatically inserted by an internet service provider. The proposal was orally accepted by the solicitors who sent an agreement to the director. The director did not return it, paid nothing, and argued in an action to enforce the alleged guarantee that it did not comply with the *Statute of Frauds*. Two issues arose: (i) was the email a sufficient note or memorandum; and (ii) was it sufficiently signed?

Judge Pelling Q.C. had no difficulty in disposing of the first issue to find that there was a sufficient note, that is, the fact that the offer of a guarantee was sent by email was insignificant provided it was in writing. Although the offer was orally accepted, there was an enforceable agreement if it was signed by the party to be charged, in this case, the director. There was no need for the entire guarantee to be in writing, only the essential terms.[26] The signature point proved more difficult. To the argument that every user of email knows that the recipient will always be told the address of the sender automatically, Judge Pelling compared sending an email to sending a fax or telex and wondered whether an automatically generated name and fax number on the fax would constitute a signature.[27] He stated that whenever the "signature" appeared, there must be an intention that it be a signature and that there was no evidence in the present case that the automatic addition of the sender's email address was intended to be a signature.[28] A signature must authenticate agreement to the note to satisfy the *Act*; it is not enough for the signature to appear on a document incidentally only.[29] While the Court concluded that emailed documents can be treated as signed to the same extent as a hard copy, an automated addition of an email address which also appears to be divorced from the main body of the text cannot be taken to authenticate the agreement to the note within the *Act*.[30] To conclude otherwise would have "widespread and wholly unintended legal and commercial effects."[31]

Pereira established that email exchanges can satisfy the *Statute of Frauds* provided they satisfy the underlying policy enshrined in the *Act* of the signed note as evidence of intention to contract. The key issue in email cases therefore is whether or not the email sufficiently evidences intention to make a contract.

The English Court of Appeal considered the question of email compliance in 2012 in *Golden Ocean Group Ltd. v Salgaocar Mining Industries Ltd.*,[32] in which an

[26] *Ibid*, at 1546-1548.

[27] *Ibid*, at 1550.

[28] *Ibid*.

[29] *Ibid*, at 1551.

[30] *Ibid*, at 1552.

[31] *Ibid*. See subsequently *Lindsay v O'Loughnane*, [2010] EWHC 529 (QB) per Flank J at para 95.

[32] *Golden Ocean Group Ltd v Salgaocar Mining Industries Ltd*, [2012] EWCA Civ 265 (CA) [*Salgaocar*].

Indian mining company used a Singaporean company to charter ships to transport its iron ore. The Indian company's majority shareholder negotiated through a broker with the ship-owner to charter a ship and the negotiations were carried on by email. The earliest email exchanges contemplated that the ship to be chartered for the Singaporean company was for a ten year period with an option to purchase subject to an agreement on the terms of the purchase. Subsequent emails concerned those terms but the last email which purported to be agreement to the terms from the broker on behalf of the major shareholder did not refer to a guarantee from the mining company and requested a recap of the terms. A charter-party was drafted as between the ship-owner and the broker, which provided that it was to be fully guaranteed by the Indian company, but it was never signed. In a subsequent dispute, the ship-owner claimed that the majority shareholder had guaranteed the broker's obligations under the charter-party. In addition to jurisdictional issues, the Indian company responded that the guarantee was unenforceable because it did not comply with the *Statute of Frauds* requirements to be in writing and contain a signature. It argued that the final email made no reference to the guarantee, and although an earlier email had referenced the guarantee, only certain emails could be considered under the *Act*. The trial judge[33] found the guarantee to be enforceable, noting that the email exchange was typical in negotiations for charter-parties including guarantees in an email prior to the final email. There was sufficient evidence to satisfy the requirements for the essential terms; there was no limitation on the number of emails to which reference can be made; the recap request did not mean there was no agreement in place; and the emails were signed electronically by the printed signature of the sender.

The Court of Appeal agreed, but placed greater emphasis on commercial practice as the standard for determining email compliance within the *Statute of Frauds*. Writing for a unanimous Court, Tomlinson LJ confirmed that joinder of multiple email exchanges was sufficient to comply with the written requirement and whether or not there was sufficient compliance for a guarantee in an earlier email, the test should be the understanding of shipping industry professionals.[34] Several times, Tomlinson LJ emphasized the importance of commercial practice,[35] restricting its application to the facts in the case of the shipping industry but opining that the test was suitable in other commercial contexts as well. His concern at the time was to ensure that the adoption of the accepted practice was not a vehicle for injustice by permitting parties to break contracts supported by consideration or on which there has been reliance.[36] He concluded that the guarantee was a part of the charter-party and that there had been agreement evidenced in the email exchange. The guarantor could have

[33] *Ibid*.

[34] *Ibid*.

[35] *Ibid*, at para 22.

[36] *Ibid*. Adopting the position of Lord Hoffmann in *Actionstrength Ltd. v International Glass Engineering*_ [2013] UKHL 17 at para 20 [*Actionstrength*].

stipulated that he would not be bound until the charter-party was drawn up but he did not; this was not a "subject to contract" situation.[37]

The issue of authentication by signature focussed on the fact that the final email was signed simply "Guy" and whether this informality constituted compliance with the *Act*. The Court accepted the sufficiency of an electronic signature including a first name, initials, or "perhaps a nickname."[38] Again, by reference to commercial practice, the Court found communication in a familiar manner did not distract from the serious nature of the negotiation and constituted sufficient authentication.[39]

The net effect of these two English cases to date is clear: the *Statute of Frauds* requirements can be satisfied by properly authenticated email exchanges provided there is evidence of intention to contract by that medium and on the terms exchanged by that medium as assessed by a commercial practice test.

The leading Canadian decision on the requirements of formality in the *Statute of Frauds* is *Druet v Girouard*,[40] in which the purchase of a condominium was negotiated by email. After an email exchange, the purchaser made an offer to purchase the unit, including payment of the legal fees and assumption of the existing mortgage. The seller accepted, although there was no exchange of information about the outstanding mortgage and the purchaser never visited the unit at issue. About three-and-a-half hours later on that same day, the seller sent a further email stating that she had spoken to her partner, who did not own any interest in the unit, and because he did not agree to the price, she would not proceed with the sale. The purchaser argued there was a completed agreement to sell in the email exchange; the motions judge agreed and further found compliance with the *Statute of Frauds*.[41] The NB Court of Appeal decided, however, that there was no intention to enter a contract. In the course of coming to that conclusion, it cast a wide net over the *Statute of Frauds* issues and the role of intention to create legal relations when negotiations are carried on by email.

The joint judgment of Robertson and Richard JJA for the unanimous Court asked more questions than it answered; however, in *obiter dicta*, the Court thought there was no reason why emails could not satisfy the *Act*, relying on *Pereira* and the *NB Electronic Transactions Act*[42] to the effect that an electronic signature can satisfy a

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[37] *Ibid*, at para 30.

[38] *Ibid*, at para 31.

[39] *Ibid*, at paras 32, 34.

[40] *Druet*, *supra* note 2.

[41] (2011), 339 DLR (4th) 347 (NBQB).

[42] *NB Electronic Transactions Act*, SNB 2001, c E-5.5.

signature requirement on a document that is subsequently accessible.[43] Secondly, the Court adopted the earlier paper-based joinder cases[44] to conclude that email exchanges can be joined to satisfy the *Act* and that parol evidence showing a fair and reasonable inference of connection may be used.[45] It concluded that the emails in question constituted a sufficient note.[46] Thirdly, the emails contained the essential terms.[47] The Court however declined to deal with the signature requirement. The key emails relating to offer and acceptance contained printed signatures and would have satisfied the *NB Electronic Transactions Act*, yet the Court declined to opine on their sufficiency for the *Statute of Frauds*, asking only a series of questions instead.[48] Arguably those questions, related to matters such as the need for both names in a signature, use of a standard form agreement, or a requirement of a signature on all emails, are largely answered by the previous case-law on paper memoranda since it is clear that printed names at the bottom of the key emails are sufficient to comply with the *Act*,[49] especially in light of the informality expressed in *Salgaocar*.

The Court chose instead to focus on the issue of intention to create legal relations, thereby highlighting what the *Statute of Frauds* is fundamentally about. Signed writing is not a mere formality but is formal express evidence of an underlying intention to contract on the essential terms set out in the note or memorandum. After a reminder that the test for intention is objective, that is, what a reasonable bystander would presume, the Court addressed the two classical presumptions in contract law of commercial agreements where the presumption of intention to contract is presumed and of domestic agreements where there is no presumption of intention.[50] The Court distinguished the email negotiation in the present case as a transaction between two consumers, and found that there ought to be a presumption against intention to create legal relations because the "populist view" would be that an exchange of "rapid-fire emails" is a preliminary negotiation to be followed by signing a formal and binding agreement.[51] The Court further analogized emails with postal exchanges or telephone exchanges and preferred the telephone analogy as keeping more with consumer understandings, so that the telephone exchange remained subject to writing to satisfy the *Act*.[52]

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[43] *Ibid*, ss 7, 10. *Druet*, *supra* note 2 at paras 1, 32.

[44] *Actionstrength*, *supra* note 36 at paras 32-34..

[45] *Ibid*, at para 34.

[46] *Ibid*, at para 36.

[47] *Ibid*, at para 37.

[48] *Ibid*, at para 30.

[49] *Ibid*, at para 38.

[50] *Ibid*, at para 39.

[51] *Ibid*, at para 41.

[52] *Ibid*.

Turning to the question of whether the presumption against agreement has been rebutted, the Court gave two examples of situations where that might occur: downloaded standard form contracts of purchase and sale, and closure of email with both a "signed" and a printed name.[53] In both interactions, the Court opined that the presumption might not be helpful.[54] Turning to all the circumstances to decide if the presumption has been rebutted, one was thought to be particularly important: that the purchaser offered to have a draft agreement drawn up, which might be interpreted as either after the fact of agreement or as equivalent to "subject to contract." By application of the reasonable bystander test, the Court concluded that such a person would regard an email exchange as a skeletal framework created without professional advice.[55] The Court further noted that the purchaser had never viewed the condominium, had no knowledge of its state of repair, or of the existing mortgage, and considered these facts to reinforce the position that the presumption against intention to create a binding agreement was not rebutted.[56] In the Court's view, a reasonable bystander does not purchase property sight unseen; moreover, even purchases on eBay have more legal safeguards than the present case.[57] There was no intention to create legal relations.[58]

This finding precluded the Court from definitively addressing the original *Statute of Frauds* concerns about formality which were at issue. However, in *obiter dicta*, the Court saw no reason why email exchanges should not comply with the *Act* to create enforceable agreements.[59] There was no further consideration of the more technical aspects of compliance with both the written and signature requirements. The reminder that intention is the requisite underpinning for the *Act* is significant and will be considered below. Several other recent Canadian cases have confirmed that email exchanges will satisfy the statutory requirements. In *Pintar Manufacturing Corp. v Consolidated Warehouse Group Inc.*,[60] in a brief one page endorsement, the Ontario Court of Appeal found that a guarantee satisfied the *Act* where there were multiple emails, the essential terms, consideration, and the electronic signature "Chris". In *Carttera Management Inc. v Palm Holdings Canada Inc.*,[61] in an application for a certificate of pending litigation, the Commercial List judge operated on the assumption that email exchanges were sufficient for the *Act*. While the judge granted

[53] *Ibid*, at para 42.

[54] *Ibid*.

[55] *Ibid*, at para 50.

[56] *Ibid*, at para 51.

[57] *Ibid*, at para 53.

[58] *Ibid*, at para 54. See also: *Leoppky v Meston* (2008) 40 BLR (4th) 69 (Alta QB).

[59] *Ibid*, at para 3.

[60] *Pintar Manufacturing Corp. v Consolidated Warehouse Group Inc.*, 2011 ONCA 805.

[61] *Carttera Management Inc. v Palm Holdings Canada Inc.*, 2011 ONSC 4573.

the order, the justice expressed doubts that an electronic signature which explicitly stated that it could not be interpreted to form a contract was sufficient to comply with the *Statute of Frauds*,[62] although the *Act* should be given a fair and liberal interpretation.[63]

Discussion

The foregoing cases display great unanimity both on what is required for an email exchange to comply with the *Statute of Frauds* and on the problem of complying with the *Act*. The requirements do not differ from the paper-based requisites for a signed memorandum enforceable pursuant to the *Act*. The written requirement is fulfilled by the use of email itself, the presence of the essential terms in any form or format, including informal expressions, and joinder will be invoked to link exchanges by virtue of parol evidence showing a fair and reasonable inference of connection. The signature requirement is fulfilled, provided that the real name of the party to be charged is present either formally or informally, that is, it may be the whole name, initials or a first name, and may be an electronic signature or printed. The signature may be anywhere on the page, but however it is indicated or wherever it appears, it must show authentication of intention to enter legal relations on the essential terms. An automated email address provided by an internet server does not show intention to contract, nor does a name qualified by a statement that its addition is not agreement to the terms for contractual purposes. The focus of the NB Court of Appeal on intention, which a signature is meant to vindicate, is well-founded since that is the most difficult requirement with which to comply. All the cases required an authenticating signature and confirmation that the purpose of that signature was to show intention to contract on the essential terms. Although the focus in *Druet* on intention at first glance appears to be a diversion from the issues relating to email negotiations and the *Statute of Frauds*, *Druet* identifies the most important issue in the virtual world of how to satisfy the authenticating signature requirement under the *Act*.

Taking the cases together, there are three tests proposed for different stages of the analysis: (i) would a reasonable person conclude that there is an intention to contract on the essential terms of the agreement (*Druet*)? (ii) If so, has there been compliance with the *Act* on the basis of a fair and liberal interpretation of the *Act* (*Pereira*, *Druet*, *Canttera*)? And (iii) if so, would commercial practice confirm the appropriateness of the manner of contract in the case (*Salgaocar*)? These are very familiar tests in contract law. Equally familiar is the possibility that courts will differ on what a reasonable person would conclude, a fair and liberal interpretation, and good commercial practice. Nevertheless, no novel tests were proposed and courts have centuries of practice in applying each test.

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[62] *Ibid*, at paras 11-12.

[63] *Ibid*, at para 13.

Of the three tests as applied in the cases under consideration, the most problematic is the first as applied in *Druet*. The *Statute of Frauds* has been subject to a fair and liberal interpretation for about 350 years and commercial practice for about 250 years since Lord Mansfield's day. While neither is without its difficulties in practical application, both have known standards for assessment, the former by virtue of the incrementally developed earlier case-law and the latter by virtue of expert evidence if necessary. The test of intention must always be assessed on the unique facts of every case.

In *Druet*, the Court applied the reasonable person test to carve out a third presumption in its application to consumer contracts in addition to the two classical presumptions related to commercial and domestic agreements. While it was the case that neither vendor nor purchaser were commercial parties in the sense of being in the business of buying or selling real estate, the category of consumer is normally privileged in law (and largely by legislation only) by virtue of being a party of lesser bargaining power in relation to a business party. The usual consumer transaction is one between a business and a non-business or consumer party, not between two consumers, and the reason certain legal rules are modified is to compensate for bargaining disparities so as to reduce the possibility of unconscionable agreements. The disparities between the two "consumers" here were not great, although existent in relation to the state of the unit and the terms of the mortgage; yet the purchaser was willing to assent to the sale without knowledge of these. The question is whether they were more analogous to commercial or domestic parties and relationships, or simply, *sui generis.*

Commercial relationships assume some bargaining disparities and the presumption in favour of contract accepts this assumption; there has probably never been a contract negotiated between two parties of absolutely equal bargaining power. The presumption in favour of contract is based on the presence of consideration in arm's length transactions whereas domestic relationships are based on the presumption of non-arm's length transactions which are to be protected for their duration, however long or short. The relationship between the parties in *Druet* is more analogous to the commercial relationship because it is arm's length, there is consideration, and there is no underlying domestic relationship to be protected. The presence of a small bargaining disparity on the facts is within the norm of bargaining disparities in commercial rather than domestic relationships. Even if one wished to create a third category of consumer relationships, the relationship is more analogous to the commercial relationship and so should be the presumption.

Is a presumption in favour of contract sustainable on the facts of *Druet*? Would a reasonable bystander think that there was an intention to contract to sell the condominium unit? Notwithstanding an information deficit in relation to the state of the unit and the mortgage, a reasonable person might well conclude that there was an intention to contract as indeed evidenced by the email exchange. It is not unknown to

purchase property sight unseen or for a buyer to have sufficient financial assets for a mortgage on a property priced at $155,000. It follows that it is not unreasonable to presume an objective intention to contract, subject to rebuttal of that presumption on the facts. Nor is it clear that contracting by email should make any difference. Reasonable people use the Internet for many of the same purposes once performed by letter, telephone and fax. In short, on the scanty facts reported in the case, it is reasonable to presume an intention to contract as well as formal sufficiency for enforceability pursuant to the *Statute of Frauds*. The Court did not question the appropriateness of contracting to sell property by email and there seems to be little doubt that a commercial practice test is also completely satisfied.

After *Druet*, the focus of courts in these types of cases will likely be on the presence of intention to contract, now that there is near universal acceptance of email as another method of communication in contract making. These cases suggest that there is no real difference from other methods of communication in cases. *Druet* suggested that the use of standard form contracts might also pose a barrier to contracting by email by reducing the likelihood of intention to contract, but arguably the use of such contracts should be no more a barrier to finding intention than the use of paper-based standard form contracts. Reasonable people enter standard form contracts by email regularly. If there is some concern that intention may be influenced by the ease of the medium or confusion with the entertainment content of much of the Internet, courts still retain the discretion to decide if there is intention and authenticating signature on the facts. A reasonable person today should also be expected to take some care for themselves when negotiating by email as was required of them when negotiating orally or in writing. Moreover, as *Salgaocar* and *Canterra* show, if there is concern about email negotiations, a party can always expressly provide either that the email exchange is subject to written contract or that a signature is not such for the purposes of the *Statute of Frauds* or to show intention to contract. The enthusiasm with which most people have embraced email communications is no more an excuse for carelessness and subsequent regret when making contracts than making contracts by any other medium. Now that most people have adopted email as they did mail, telephone and fax, there is no reason for courts to adopt special tests to protect them.

Conclusion

These early email cases in relation to the *Statute of Frauds* are not difficult nor are their outcomes unexpected. *Druet* especially is significant because not only does it confirm, albeit in *obiter dicta*, what the others confirm about the acceptability of email negotiations for an enforceable agreement pursuant to the *Statute of Frauds*, but it highlights the fundamental purpose of the *Act* as a means for confirming agreement to significant contracts such as for the sale of property or for guarantees. The Court's focus on intention to create legal relations was correct notwithstanding the earlier suggestion that another outcome might have been more appropriate in the age of email negotiations.