

## Insights

# NEW PERSPECTIVES: LEGAL ASSIGNMENTS IN ASSET-BASED LENDING

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The City of London Law Society Financial Law Committee (*FLC*) has issued a note to guide parties and their legal advisors on executing legal assignments under section 136 of the Law of Property Act 1925 (*LPA 1925*) in view of recent case law (*the Note*). This Note is endorsed by the City of London Law Society Company Law Committee and focuses on assignments executed by attorneys on behalf of English and overseas companies and English limited liability partnerships (LLPs) in a business setting.

## SCOPE OF THE NOTE

The Note is aimed at business transactions and does not cover assignments by consumers or other individuals. It also emphasises the importance of considering the wider implications of each transaction, including any regulatory and tax implications.

## LEGAL REQUIREMENTS UNDER SECTION 136

Section 136 of the LPA 1925 requires a legal assignment of “any debt or other legal thing in action to be”:

- Absolute (so not purporting to be by way of charge only)
- In writing
- Under the hand of the assignor
- Of which express notice in writing of the assignment has been given to the debtor or trustee

## RECENT CASE LAW: FRISCHMANN V VAXEAL HOLDINGS SA

The Note references the recent High Court decision in *Frischmann v Vaxeal Holdings SA*, which considered whether an assignment by Dr Frischmann of loans and a guarantee to his son was a legal assignment in the circumstances where the assignment was executed by Dr Frischmann’s son

under a lasting power of attorney. The Court concluded that the requirement under Section 136 of the LPA 125 for a legal assignment to be “by writing under the hand of the assignor” means that the assignor themselves must sign the assignment. Where an attorney or agent signed on behalf of the assignor, the assignment may only take effect as an equitable assignment, and not a legal assignment.

## APPLICATION TO ENGLISH COMPANIES AND LLPS

The FLC has stated that the decision in *Frischmann* relates to assignments by individuals and has expressed its opinion that an assignment by an English company or an English LLP is valid if executed by an attorney, as reflected in Section 47 of Companies Act 2006. The FLC listed several factors in the Note that informed their opinion, namely:

### LEGISLATIVE AUTHORITY

A company, unlike an individual, cannot sign its own name. Therefore, by implication, it has the power to appoint agents to act on its behalf. This is reflected in the Companies Act 2006, which outlines how a company may execute documents. In particular, Section 47(1) of the Companies Act 2006 allows a company to empower a person as its attorney to execute deeds or other documents on its behalf. Section 47(2) states that such documents have the same effect as if executed by the company itself.

### CASE LAW SUPPORT

This principle was also expressed in the cases of *re Diptford Parish Lands and In Re the Charitable Trusts Acts, 1853 to 1925*. In that case, a petition for appeal under section 11 of the Charitable Trusts Act 1869 had to be made in writing under the hand of the appellants. The petition, signed by the appellants' solicitor, was upheld by the Judge, who ruled that an actual physical signature by the appellant was not necessary if signed by an authorised agent of the appellant. The appellant, a Parochial Church Council, could not sign under its own hand, and therefore the Judge concluded that an agent's signature was sufficient for the purpose of section 11.

### LPA 1925 PROVISIONS

The LPA 1925 itself contains provisions (sections 74(3) and 74(4)) dealing with execution by corporations, allowing an attorney appointed by a corporate donor to execute instruments, including assignments. These provisions are supplemented by section 74(6), which states that any mode of execution or attestation authorised by law or practice is effective as if section 74 had not been passed.

### CONSISTENCY WITH FINANCIAL COLLATERAL REGULATIONS

This position is consistent with The Financial Collateral Arrangements (No.2) Regulations 2003, pursuant to which regulation 4(3) dispenses with the requirement for a signature for financial collateral arrangements, recognising that a legal assignment may be executed on behalf of a company.

## **EXECUTION PROVISIONS FOR ENGLISH LLPS**

For English LLPs incorporated under the Limited Partnerships Act 2000, the execution provisions set out in sections 43 to 47 of the Companies Act 2006 apply but with modifications as per the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009.

## **APPLICATION TO OVERSEAS COMPANIES**

The Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 apply sections 43 and 44 of the Companies Act 2006 with modifications. Section 47 does not apply to overseas companies, but an attorney of an overseas company may sign a legal assignment on behalf of that company if permitted by the laws of the jurisdiction where the company is incorporated.

## **IMPORTANCE TO ASSET-BASED LENDING**

The sale and assignment of accounts receivables is a common feature of asset-based lending. While the nature of the assignment (as a legal assignment or an equitable assignment) does not determine the characteristics of that assignment as a true sale or a secured loan, ensuring that the sale meets the requirements for a “legal assignment” is fundamental as it is capable of being enforced as a property transaction against the assignor (and therefore third parties) and provides the lender with greater legal certainty if the debtor claims a right of set-off or needs to be pursued for payment through the Courts.

## **CONCLUSION**

This note issued by FLC provides timely guidance for companies executing legal assignments under section 136 of the LPA 1925. Parties should of course refer to the full document and consult with their legal advisors to ensure compliance with all relevant legal requirements.

## **RELATED PRACTICE AREAS**

- Funds Finance
- Finance
- Financial Institutions

## MEET THE TEAM



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