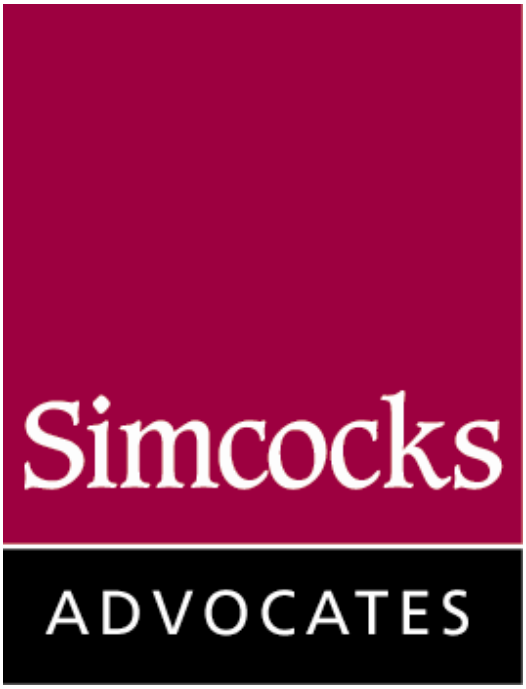

Deeds

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Introduction

A deed or any other written agreement provides evidence of the transaction it relates to.

Deeds historically had to be executed under seal and prepared on parchment paper and delivered, now they are simply written documents which must make it clear on their face that they are intended to be a deed (by stating as much) and are validly executed and delivered as a deed.

The following does not attempt to address issues such as the registration of deeds, nor any particular form of deed (ie. trust deeds etc), it is just a broad outline to assist your understanding.

Types of Deed

There are 2 types of deed:

● A **Deed of Indenture** – being a deed to which 2 or more persons are party, evidencing some act/agreement between them other than simply their consent to jointly express a common intention (ie. a conveyance would be an Indenture – one party wanting to sell and one party to buy, so two different intentions); and

● A **Deed Poll** – being a deed made by and expressing the intention of 1 party only, or made by 2 or more persons joining together to express a common intention (ie. a deed declaring a change of name).

You should be aware that if a deed is a contractual document then it is referred to as a **Specialty** (for example a loan evidenced in a deed).

Advantages of a Deed

In some instances a deed may be required. In others, where there is a choice, then the advantages of a deed are:

● The **limitation period** to enforce it (ie. a specialty) in the event of a breach of its terms is 12 years in England and 21 years in the Isle of Man. Both of these periods exceed the usual 6 year limitation period for enforcing a breach of contract. The relevant English and Manx Limitation Acts do however provide that these respective periods, after which no claim on a specialty can be brought, do not affect any action for which a shorter period of limitation is prescribed by any other provision of the Acts; and

● **No consideration** is required for a promise (a "covenant") made in a deed to make it enforceable.

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The Parts of a Deed

A deed is generally divided into several distinct parts:

1. The Heading
2. The Parties
3. Recitals
4. Operative Provisions
5. Testimonium
6. Schedules
7. Execution and Attestation

1. The Heading

A deed may be described as a deed in like terms to "*This Deed"* or "*This Indenture*". Alternatively it could be by a name such as a Conveyance, Mortgage (in the Isle of Man a Conditional Bond and Security) or Lease, according to the nature of the transaction. Sometimes it is described as both so that you will often see "*This Deed of Conveyance"*.

It is often common (although not necessary, provided that it makes the date clear elsewhere) to have the date of the deed inserted immediately after the heading (ie. "*This Deed of Conveyance is dated this day of 201X").* Alternatively, the date may come in the Testimonium.

2. The Parties

The parties to a deed are usually described immediately after the heading and following the words "BETWEEN" or "PARTIES".

It makes no difference how parties are described in a deed provided they can be identified satisfactorily. That said, it is usual for them to be described by their names and addresses, and, if they are not individuals, or they are party to the deed in a particular capacity, by a description of what they are, or in what capacity they are party, or both.

In relation to a company you will normally see something like "XYZ Limited a company incorporated in the Isle of Man with company number 12345C and having its registered office at XYZ street". In relation to a company acting in its capacity as trustee of a particular trust you would have "XYZ Limited as Trustee of the XYZ Trust and being a company incorporated in the Isle of Man…", or, alternatively, you might have the "…as Trustee of the XYZ Trust" part of the description after the full details of the company. Please note that it makes no difference where the capacity is mentioned in the description provided that it is actually mentioned, and that the description is accurate and complete. It would be best practice to insist on a company entering a deed to provide its place of incorporation, registered office address and company number in its description, as having

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this information easily to hand is of assistance if it ever came to taking enforcement action against the company – ie. service of legal proceedings is normally effected at the registered office address.

Recognised legal entities can be named as a party to a deed, or indeed any agreement, in their own right. An individual, a company and a foundation are legal entities and can be named as a party to a deed in their own right (ie. Joe Bloggs or XYZ Limited or the XYZ Foundation). A partnership (also referred to as a "firm") and a trust are NOT separate legal entities in their own right and therefore cannot contract in their own name (ie. you cannot have the XYZ Trust or XYZ Partnership as named parties to a deed).

In each case where a deed is to be entered for the benefit of a partnership or trust, the named parties entering it MUST be the named partners of the partnership or the trustees of the trust as appropriate. You would therefore expect to see something along the lines of "Joe Bloggs of XYZ street as Trustee of the XYZ trust", or "Joe Bloggs as a partner of the XYZ Partnership". Incidentally, in relation to partners, then under the Registration of Business Names Act 1918 (of Tynwald), when a partnership's name does not consist of the names of the individual partners, such that it must be registered under that Act, section 20 of the Act makes it an offence for a firm required to be registered under it to not, in all trade catalogues, trade circulars, showcards and business letters, on or in which the business name appears and which are issued or sent by the firm, to have mentioned in legible characters, in the case of a firm, the present first names or initials thereof and present surnames, any former first and surnames, of all the partners in the firm or, in the case of a corporation being a partner, the corporate name. In otherwords, a full list of all the partners should be included in the deed. Usually you would expect all of the partners to be a party to the deed and to execute it however, if this is not the case (ie. where special authority has been granted to the executing partners only), then the details of the others should nevertheless be contained in a Schedule to the deed to comply with the Registration of Business Names Act.

A partner has no implied authority to execute deeds in the name of his co-partner, so in the absence of special authority a deed executed by one partner purporting to act on behalf of the firm would not bind the other partners – note this is contrary to the general principles of agency as applicable to a partnership so that an act done by a partner on behalf of the firm and with the authority of his co-partners is binding on the firm.

After the description of the parties it is also very common to give a party a definition by simply saying "(hereinafter referred to as the "Vendor")" or simply (the "Vendor"). In some cases the definition will be more elaborate such as, in the case of a company "(the "Vendor" which expression shall include its successors and assigns), or in the case of an individual "(the "Vendor" which expression shall include its executors and administrators)".

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Where the deed is to be executed by one person on behalf of another (ie. as an attorney, or by the receiver of a person suffering from a mental disorder) then the party on whose behalf the deed is executed should be named as the party to it, although in the case of a person suffering from a mental disorder, the name of the receiver and his address are also mentioned (the address of the mentally disordered person not being revealed). In such cases the deed should be executed in the name of the person named as a party to it, so that a receiver will sign the name of the person suffering from the mental disorder. An attorney may sign the name of his principal, or, if preferred, execute a deed in his own name and with his own signature. A liquidator, whether in a court winding up or a voluntary winding up, has power to execute documents on behalf of the company and, for that purpose, to use the company seal as necessary.

After a description of a party you may see something along the lines of "of the first part". This is relevant to a deed to which 2 or more persons or a group of persons are parties representing different interests and each person or group is commonly expressed to be of a separate part. Joint tenants, trustees, mortgagees, or partners for example, are in law considered to be one person as regards the ownership of property and are therefore usually made parties "of the one part".

Where a person is a party to a deed in different capacities (eg as a beneficiary under a trust but also as a trustee for others) the general rule is that they should not be named in more than one capacity or for more than one purpose. If, however, they are a party both in respect of a separate interest and in respect of a joint interest, then they should be named a party of one part in respect of the separate interest and a party with the other person jointly interested, of another part in respect of the joint interest.

Where some persons are parties in respect of joint interests and others in respect of joint and also separate interests, it would be sufficient in law if each person were made a party of a separate part, but this would not be in accordance with the practice of conveyancers, for joint tenants are considered to be one person as regards the ownership of property. In any case a person should execute an instrument only once, although named more than once as a party.

3. Recitals

Recitals explain the background of the deed and normally follow a description of the parties to it. It is unusual to see no recitals at all.

Recitals are not normally intended to be legally binding (although, contrary to this, they may sometimes be expressed to form part of the terms of the deed), and should not contain substantive provisions (ie. agreements, obligations etc). In construing the document its recitals are subordinate to the operative part and where the operative part is clear it is treated as expressing the intention of the parties and prevails over any suggestion of a contrary intention per the recitals. However recitals may be looked to

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where there is an ambiguity in the operative part. Section 3 of the Conveyancing Act 1908 (of Tynwald) provides that:

"Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Tynwald, affidavits, or statutory declarations, 21 years odl at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions."

Recitals are usually listed as numbered or alphabetical paragraphs (if they are lettered paragraphs then you would expect the operative provisions to be numbered) and commonly follow the words "WHEREAS" or "RECITALS".

4. Operative Provisions

Operative provisions set out the rights and obligations of the parties to the deed and are normally found immediately after the recitals following the testatum which is usually expressed as "NOW WITNESSETH AS FOLLOWS", or similar words to that effect.

The **Law Reform (Enforcement of Contracts) Act 1956** (of Tynwald) provides that certain contracts are simply unenforceable unless they are in writing and signed by the parties. The contracts that must meet these requirements are basically a guarantee of the obligations of another, and any contract for the sale or disposition of land or any interest in land (this includes a trust of land, a charge (mortgage) over land etc).

In addition to the requirement that some agreements must be in writing, various statutory provisions require documents to be in the form of a deed in specified cases – the most important of these is in legislation relating to property, for example:

Conveyancing Act 1908 (of Tynwald) section 28 states:

"(1) A person to whom any power, whether coupled with an interest or not is given, may, by deed, release or contract not to exercise, the power.

(2) A person to whom any power, whether coupled with an interest or not, is given, may, by deed, disclaim the power; and, after disclaimer, shall not be capable of exercising or joining in the exercise of the power."

* Please note that (1) is subject to certain exceptions such as assents by personal representatives, disclaimers of onerous property by a trustee in bankruptcy or a liquidator, leases or other tenancies not requiring to be in writing, vesting order of a court etc.

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5. Testimonium

This is a clause that is so named as it used to begin formally with the words "*In eujus rei testimonium"*. It is basically the concluding part of the deed and normally placed after the operative provisions and before the schedules – it connects the signatures to the document.

It is now a clause which, for deeds, begins with "IN WITNESS", or for other forms of document may begin with "AS WITNESS". It will not materially effect the deed whichever form is used. When the execution is by one person on behalf of another, the testimonium should, unless it has been fully dealt with in a recital, state this fact and the authority for delegation. The clause is not necessary to make the deed valid but it preserves the evidence of its due execution, is important and should really be included.

A full testimonium might read:

"IN WITNESS whereof the parties hereto have hereunto executed this agreement as a deed this the day month and year first before written"

Or for a testimonium where the deed is executed by attorney under an ordinary power of attorney:

"IN WITNESS whereof this deed has been executed on behalf of [donor –ie. person granting the power of attorney] *by his attorney* [name] *of* [address] *and by* [details of other parties] *this the day month and year first before written."*

6. Schedules

It is usual for any schedules to follow the testimonium but come before the signatures. By doing this the idea is that nothing else can be added to the body of the deed.

7. Execution and Attestation

This is the signatures and witnesses page.

To be validly executed by an individual a deed must be signed by the individual in the presence of a witness who should sign to acknowledge their witnessing of the signature and provide their details. If a deed is to be signed at the maker's direction then 2 witnesses are required. There are other rules which apply where an individual cannot read or write.

For an Isle of Man company incorporated under the Companies Acts 1931 – 2004 a deed can be executed in the name of the company by affixing the company seal, or, if it does not have a seal, by being signed by 2 directors or 1 director and the company secretary - **OSIRIS TRUSTEES LIMITED AND OTHERS v OAKLEY 2009 MLR 432 (CA)**.

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The Companies Act 1931 specifically states that provided it is so signed and makes it clear on its face that it is intended to be a deed "*and expressed (in whatever form of words) to be executed by the company*" it shall be so executed. Therefore you could well have "*Executed by XYZ Limited*" or "*Executed for and on behalf of XYZ Limited*" or a myriad of combinations. It may also state "*by any two directors or a director and the company secretary*". It may also state that it is executed as a deed, not in the testimonium, but at the point of execution as "*Executed as a deed by…."*

For an Isle of Man company incorporated under the Companies Act 2006 the requirements are simpler in that section 86 of that Act provides that:

"(1) A company may, by affixing its common seal thereto, make or execute any written contract, deed, instrument or other document.

(2) A company need not have a common seal, however, and the following subsections apply whether it does or not.

(3) An oral contract may be made, and a written contract, deed, instrument or other document may be made or executed on behalf of a company by any person acting under its authority, express or implied.

(4) A written contract, deed, instrument or other document made or executed by a company which makes it clear on its face that it is intended by the person or persons making it to be a deed has effect, upon delivery, as a deed; and it shall be presumed, unless a contrary intention is proved, to be delivered upon it being so executed.

(5) This section applies to contracts, deeds, instruments and other documents made or executed in the Isle of Man or elsewhere."

So that for a 2006 Act company a deed may be executed by the affixing of the common seal or on behalf of the company by any person acting under its authority, express or implied. In otherwords, the person signing need not be a director and the signature need not be witnessed for the execution to be valid.

The attestation clause where a deed is signed by an individual could say:

SIGNED [and DELIVERED]	:	
as a Deed by Joe Bloggs		
in the presence of:	:	……
		Joe Bloggs
Signature of Witness	:	
Name of Witness		
Address of Witness		
	:	
Occupation	:	

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The attestation clause where a deed is signed by an attorney under an ordinary power of attorney, signing in his own name, could say:

SIGNED AS A DEED and DELIVERED	:	
on behalf of the above-named	:	……
[name of person granting POA] by		[name of attorney]
his above named attorney	:	
[attorney's name]		
in the presence of:	:	
Signature of Witness	:	
Name of Witness		
Address of Witness		
	:	
Occupation	:	

Two potential attestation clauses where a deed is executed by a company incorporated under the 1931-2004 Companies Acts would be:

1.

The Common Seal of	:	
XYZ Limited was hereunto		
affixed to this deed	:	
in the presence of:		
	:	…….
……		Common Seal of XYZ Limited
Director	:	
……	:	
Director/Secretary		
	:	

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2.

EXECUTED AS A DEED	:	
BY XYZ Limited		…….
acting by 2 directors or	:	Director
1 director and the company secretary		
	:	
		…….
	:	Director/Company Secretary

It is generally accepted that where a deed is executed by a company by 2 directors or a director and the company secretary signing it they effectively witness each other's signatures so that no separate witness is required.

The attestation clause where a deed is executed by a company incorporated under the Companies Act 2006 might be:

EXECUTED AS A DEED	:	
BY XYZ Limited		
by its duly authorised representative	:	…….
[insert name]		Authorised Representative
	:	
	:	

The Requirement of Delivery

Delivery is a legal requirement for a deed.

Delivery originated as a physical act (handing over the document), but it is now a rule that evidences an intention to be bound by deed. The requirement of delivery fixes the date when the executed deed takes effect. If a deed is delivered but is not to take effect until some future date it is called an **escrow.**

When a company executes a deed there is a statutory implied presumption that it has also been delivered by the company on the date of its execution unless a contrary intention is shown. In otherwords, it is quite usual for a company to simply execute a deed without saying it is also delivered. With an individual the deed should rightly state whether it is to be delivered by the individual on signing(ie. by saying "Signed and Delivered as a Deed"), or, if delivered at another date, it should state the date of delivery.

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The Execution by Companies of Deeds Abroad

Under the Companies Act 1931 (of Tynwald) section 31 provides that a company may appoint (under a power of attorney) any person as its attorney to execute deeds on its behalf in any place outside of the Isle of Man. This is fundamentally different to the "domestic" requirement on 1931 Act companies where they have to be signed by 2 directors or 1 director and company secretary. (ie. always two different people) whether or not a seal is also affixed. The provision permits only 1 person (the authorised attorney) to execute the deed abroad on behalf of the company, in order for the company to be bound by it.

Section 32 then provides that a company, if so authorised in its articles, may have an official seal (same as the original seal but with the name of every place it can be used on it) for use outside the Isle of Man. Again, a company can by writing under its normal common seal authorise anyone to affix the said official seal for use abroad in such a foreign place. The authority of the person affixing it lasts for the term granted to him by the company, or, if no term is granted, until it is revoked by the company. When using such a seal, the person so authorised to affix it must certify the deed with the date and place where it was affixed.

An attestation clause for such a deed exercised abroad by a duly appointed attorney might read:

Executed as a Deed by	:	
XYZ Limited		
acting by its attorney	:	…….
[name of attorney]		[Attorney's name]
	:	
	:	

Some may go further and state the date and nature of the document authorising the attorney as such.

The meaning of certain expressions found in deeds

"This Deed is supplemental to…" the Conveyancing Act 1908 (of Tynwald) section 29 states:

"(1) A deed expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the deed so expressed or directed were made by way of indorsement on the previous deed, or contained a full recital thereof."

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"Premises" are the words in the operative part that describe the parties and the transaction involved.

"***Parcels"*** are the words in the premises that describe any property involved.

"Locus sigilli" is the position indicated for placing the seal – normally a little round circle.

"***These presents***" simply means present statements.

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