

Professional Undertakings – The latest Law Society guidance

At long last, the Law Society has released guidance on undertakings which all solicitors should read, including those practising in-house. Click [here](#) to access the guidance.

It's been a year since the Supreme Court judgment in *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32 highlighted the gap in the court's inherent jurisdiction to enforce undertakings so far as limited liability partnerships (and also limited companies) are concerned. You can read my note on the case [here](#).

The new Law Society guidance produces very little comfort for those relying on undertakings. The guidance recommends against individual solicitors taking the risk to personally give solicitors' undertakings (which was the solution that naturally followed *Harcus Sinclair*).

What protection is offered by an undertaking which is not enforceable under the court's inherent jurisdiction? If the undertaking is also a contract or creates a trust, the court might be able to enforce the undertaking or order compensation. If not, breach of an undertaking produces no direct remedy to the disappointed recipient of an undertaking (although the SRA may well investigate).

In contrast, a solicitor's undertaking given by an officer of the court, such as an individual solicitor or unlimited solicitors' partnership, can be enforced by the court exercising its inherent jurisdiction to make an order for specific performance of the undertaking. Essentially, a solicitor's undertaking provides gold-plated protection to the person receiving the undertaking, often giving certainty to the transaction as a whole.

Anyone buying property, or lending against property, should be warned about the difficulty in enforcing an undertaking by a solicitors' practice which is not subject to the court's inherent jurisdiction. The property conveyancing system relies on seller's solicitors giving undertakings, particularly to use funds only for the purpose of the sale and to discharge lenders' charges over the property. From anecdotal evidence and personal experience, I believe that solicitors are not warning their clients about the newly

highlighted risks in the conveyancing process, whether dealing with individual residential properties or multi-million pound commercial transactions.

On the ground, confidence in the conveyancing process remains strong. There are plenty of sanguine voices which highlight that since 1985, licenced conveyancers have been able to give undertakings without being governed by the inherent jurisdiction of the court to enforce specific performance of those undertakings. There is no clear evidence that the lack of the court's inherent jurisdiction has caused significant issues with regard to compliance with undertakings given by conveyancers.

For those of us dealing regularly with professional negligence claims, we see that even though most solicitors and conveyancers wish to comply with their undertakings, breaches do happen. In those scenarios, clients need to be properly informed about how long it could take to enforce the undertaking. In my view, legal advisers should routinely advise some clients, such as lenders and property purchasers, about the length of time that could be required to enforce undertakings and about the potential difficulties in doing so in the event that the seller's solicitors fail to comply, particularly where the court's inherent jurisdiction cannot be relied upon.

The Law Society reminds solicitors that all undertakings, including the standard undertakings used in conveyancing, should be re-negotiated if it looks unlikely that the solicitors will be able to comply. Solicitors' practices need to be alive to the precise wording of their undertaking. But for those relying on undertakings, renegotiation complicates what should be a straightforward element of a transaction - and creates new risks for clients that require further advice. Clients might end up paying more for legal advice, and could be left in limbo due to delays in enforcing undertakings under the more cumbersome process of usual civil litigation if that is the only route available.

For those entering business transactions with a solicitor's practice, rather than clients, it is worth bearing in mind that the Supreme Court in *Harcus Sinclair* also emphasised the narrow category of true 'solicitors' undertakings' which are subject to the court's inherent jurisdiction.

We all hope the government will pass new legislation to ensure that the court can directly enforce solicitors' undertakings against LLPs and limited companies but currently this does not seem to be a priority. For now, we won't hold our breath for a simple solution to

bring all solicitors' practices (and licenced conveyancers) under the umbrella of the court's inherent jurisdiction.

Unless and until Parliament legislates, it is important that the risks concerning the giving and acceptance of undertakings are fully understood by lawyers and clients. Clients may require specific advice about the enforcement of undertakings but this is not currently the norm. The lack of advice creates a serious risk of professional liability for all solicitors, particularly those involved in property transactions.

Alicia Tew
Hailsham Chambers
Alicia@tew@hailshamchambers.com
26th July 2022

Disclaimer: this article is not to be relied on as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought