

If in doubt, don't assume it's a solicitor's undertaking

In its 23 July 2021 judgment, the Supreme Court tackled the severe limitations of solicitors' undertakings in the modern era in *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32. All practitioners will need to know about this vitally important unanimous judgment.

The case concerned the group litigation being brought by 43,000 Volkswagen customers for misrepresentations about diesel emissions. Harcus Sinclair LLP is an experienced group litigation law firm which provided a non-compete undertaking to Your Lawyers Ltd in order to receive confidential information about Your Lawyers' clients in the anticipated group litigation. The two firms contemplated collaborating on the group litigation but this did not materialise. Harcus Sinclair LLP proceeded to partner with Slater and Gordon and to recruit its own group of clients. The dispute arose because Harcus Sinclair LLP's vehicle for group litigation sought to be named as the lead law firm in the group litigation. Your Lawyers Ltd disputed Harcus Sinclair's right to represent such clients at all, in light of the non-compete undertaking.

The result of the appeal was that the Supreme Court, overturning the decision of the Court of Appeal, held that the non-compete undertaking was enforceable by way of injunction as a contractual covenant which, it held, was not in restraint of trade. However, the focus of this Note is on two further aspects of its decision: Was the non-compete undertaking also a solicitor's undertaking? If it was, could that solicitor's undertaking be enforced against an incorporated body like Harcus Sinclair LLP?

Critically, the Supreme Court held that there was only a narrow class of undertakings given by solicitors which would be classed as "solicitors' undertakings" such that they could be summarily enforced by the court pursuant to its inherent jurisdiction over solicitors as officers of the court.

"[112] As further guidance, we consider that in many cases it will be helpful to consider the following two questions when determining whether an undertaking is given by solicitors in their "capacity as solicitors". The first concerns the subject matter of the undertaking and whether what the undertaking requires the solicitor to do (or not to do) is something which solicitors regularly carry out (or refrain from doing) as part of their ordinary professional practice. The second concerns the reason for the giving of the undertaking and the extent to which the cause or matter to which it relates involves the sort of work which solicitors regularly carry out as part of their ordinary professional practice. If both questions are answered affirmatively then the undertaking is likely to be a solicitor's undertaking."

The Supreme Court decided that the undertaking provided by Marcus Sinclair LLP as signed by a Mr Parker, on behalf of the LLP was not a solicitor's undertaking because it related to a potential business opportunity and furtherance of the parties' business interests rather than that of any client. "Acting in their own rather than a client's business interests is not the sort of work which solicitors regularly carry out as part of their ordinary professional practice."

Further, the undertaking was given in the name of the LLP rather than Mr Parker in his personal capacity. Although its reasoning was obiter on this point the Supreme Court stated that the court does not have any supervisory jurisdiction over incorporated entities providing legal services such as LLPs, which have separate legal personality and limited liability. An LLP's undertakings cannot be summarily enforced by the courts because the LLP is not an officer of the court. The same would apply to an undertaking given by a limited company.

The Supreme Court called for an expansion to the inherent jurisdiction of the court due to the lack of protection afforded by many undertakings provided by incorporated entities and shared the trial judge's concerns about whether those dealing with incorporated law firms and solicitors' LLPs are sufficiently aware that undertakings given by them are not currently buttressed by the court's supervisory jurisdiction.

"[148] It may be that, as the judge suggested, the lacuna may be addressed by ensuring that a relevant undertaking is given personally by a solicitor, as well as, or in the alternative to, the incorporated law firm for which he or she acts. But that may not always be a satisfactory solution where summary enforcement is sought, if the individual solicitor lacks the power within his or her incorporated law firm to ensure that compliance occurs. We take the view that this is at best a partial and temporary solution. We therefore express the hope that Parliament will consider the lacuna that this judgment has confirmed in relation to undertakings given by solicitors working for incorporated law firms, particularly LLPs."

The law requires urgent reform in order for efficient legal practice to continue, particularly in areas such as conveyancing which rely heavily on undertakings. Until then, practitioners will have to consider how to ensure that clients are protected when dealing with incorporated entities.

In the short term, the solution endorsed by the court of ensuring that a personal undertaking is given by an individual solicitor is likely to be uncomfortable for many solicitors. Although solicitors have some insurance protection afforded by the wording of the SRA Minimum Terms and Conditions, the prospect of personally committing to an undertaking is likely to be considered quite a different prospect to an undertaking provided by the LLP or limited company in which the individual solicitor practises.

It will be interesting to see how many practitioners change their practices in light of this decision, to require personal undertakings from solicitors or other protections for their clients. There might be professional negligence claims arising out of over-reliance upon undertakings given by limited entities if practitioners fail to adapt.

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