

Enforcing solicitors' undertakings: practical implications of the Supreme Court's decision in *Harcus Sinclair v Your Lawyers* [2021] UKSC 32

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Phillip Ahlquist of Fountain Court Chambers discusses the Supreme Court's decision in *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32, on the law surrounding solicitors' undertakings.

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Introduction

In *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32, the Supreme Court addressed the law on solicitors' undertakings and the court's jurisdiction to supervise solicitors' conduct. In doing so they confirmed that as the law currently stands, the court has no jurisdiction to enforce an undertaking given by or on behalf of an incorporated law firm such as a limited company or LLP, unless that undertaking separately gives rise to a cause of action such as a contractual claim. All those involved in giving and receiving solicitors' undertakings therefore need to consider carefully who is giving the undertaking and what options there will be for enforcement if something goes wrong.

The decision in *Harcus Sinclair v Your Lawyers*

The dispute between *Harcus Sinclair* and *Your Lawyers* arose out of a non-disclosure agreement signed when the two firms were hoping to collaborate in the VW Emissions Group Litigation. *Your Lawyers*, which had already begun working up a claim, provided with documents including output from its work on the case to date under the terms of a non-disclosure *Harcus Sinclair* agreement. Among other provisions, the non-disclosure agreement provided that *Harcus Sinclair* "undertook" "not to accept

instructions for or to act on behalf of any other group of Claimants in the contemplated Group Action without the express permission of Your Lawyers". The collaboration between the two firms did not ultimately take place and when Marcus Sinclair began acting for another group of claimants, a dispute arose as to whether Marcus Sinclair was acting in breach of the requirements of the non-disclosure agreement, and whether this promise was a solicitor's undertaking. It was accepted that the non-disclosure agreement was a contract.

By the time the case reached the Supreme Court, there were three key issues:

- whether the promise in the non-disclosure agreement was unenforceable as an unreasonable restraint of trade;
- whether the term of the non-disclosure agreement was a solicitor's undertaking; and
- whether (if it was a solicitor's undertaking) it could be enforced by the court under its supervisory jurisdiction.

This last issue arose because the non-disclosure agreement was expressly signed "for and on behalf of" Marcus Sinclair LLP which, as a separate legal personality, was not a solicitor. Your Lawyers contended that the undertaking could be enforced under the supervisory jurisdiction because the jurisdiction extended to cover either or both of (i) incorporated law firms through which solicitors conduct their practices, or (ii) individual solicitors who give undertakings on behalf of those firms.

The Supreme Court concluded that the agreement was not an unreasonable restraint of trade, and that it was therefore enforceable as a contract. They also concluded that the agreement did not constitute a solicitor's undertaking.

The third issue about the enforcement of undertakings given by firms did not therefore need to be decided, but the Supreme Court addressed it, given that it had heard full argument on the issue and it was an issue of general public importance. The Court concluded that while it is open to the court to extend the jurisdiction to cover incorporated law firms, the jurisdiction does not currently extend that far, and does not apply to individual solicitors who act on behalf of their firms in giving an undertaking.

What is a solicitor's undertaking?

A solicitor's undertaking is a promise by a solicitor to do, or to refrain from doing, a certain act. As the name suggests, they can only be given by or on behalf of solicitors, not other regulated professionals such as barristers. They are routinely used in the conveyancing process, where the Law Society's Code for Completion by Post incorporates a number of undertakings to be given by solicitors acting for the parties. Undertakings are also used in litigation, usually to govern aspects of the relationship between firms involved. They are used to deal with a wide variety of matters – everything from arrangements to ensure client confidentiality or protecting client funds to arrangements about photocopying costs can be agreed by use of solicitors' undertakings.

The importance of solicitors' undertakings in the conveyancing process was described by Smith LJ *in Briggs v The Law Society* [2005] EWHC 1830 (Admin) in the following terms (at paragraph 25):

"Undertakings are the bedrock of our system of conveyancing. The recipient of an undertaking must be able to assume that once given it will be scrupulously performed. If property purchasers and mortgage

lenders cannot have complete confidence in the safety of the money they put into the hands of a solicitor in the course of a property transaction, our system of conveyancing would soon break down. The breach of an undertaking given by a solicitor damages public confidence in the profession and in the system of undertakings upon which property transactions depend."

Not every promise by a solicitor is an undertaking. Crucially, it must be a promise given by the solicitor in his or her "capacity as a solicitor" (see *Harcus Sinclair* at paragraph 103). Solicitors' undertakings typically fall into well-established categories such as:

- undertakings in conveyancing transactions,
- undertakings to hold client documents subject to a former solicitor's lien, and
- undertakings to pay the costs of another party's actions.

On occasion (as happened in *Harcus Sinclair*) there may be a dispute as to whether a promise by a solicitor is a "solicitor's undertaking", that is whether it was a promise made in the capacity of a solicitor. That will ultimately be a question of fact, but in *Harcus Sinclair* the Supreme Court gave guidance on tests which may clarify whether the undertaking was given in that capacity, suggesting at paragraph 112 that two questions would assist in that analysis:

"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."

Different corporate structures of law firms

There are complex rules and requirements around the business models which can be used by a law firm, especially following the implementation of the Legal Services Act 2007 allowing for "alternative business structures" or "ABSs". The enforcement of undertakings does not directly depend on these issues, but instead relates to the use of options available to all businesses: whether the business is an incorporated legal person in its own right, or whether it is not. In summary, the main options are to carry on business in one of the following models:

- as a **sole trader**, where one solicitor is the firm's only manager or "principal", and is trading in their own name. There is no separate company structure, and the solicitor is an individual who owns all the assets of the business and is liable for all of its obligations. That solicitor may have employees, but ultimately the 'firm' is the individual solicitor and the employees act on his or her behalf.
- as a **traditional partnership**, where a number of solicitors join together in the partnership and trade under one name. They are all jointly liable for obligations undertaken in the name of the partnership, but ultimately that is a personal liability. The partnership itself has no separate legal personality or liability.
- As a **limited company**, where the lawyers are directors and/or employees of a limited company. The limited company is owned by shareholders (who will generally be the senior

lawyers in the business, unless the company is an ABS). The company owns the assets of the business and is liable for its obligations.

- As a **limited liability partnership (LLP)**, where the lawyers are members and/or employees of the LLP. The LLP is owned by its members and the LLP owns the assets of the business and is liable for its obligations.

Leaving aside the question of ownership by non-lawyers in ABSs (which was not considered by the Supreme Court), the key point for enforcing undertakings is whether the business is incorporated, that is, a limited company or LLP. If the business is **not incorporated**, then it has no separate legal existence and the undertaking will have been given by, or on behalf of, one or more individual solicitors: either the sole trader or all of the members of the traditional partnership. If the business is **incorporated**, then it has a separate legal existence. That legal entity is not a solicitor and not subject to the court's jurisdiction to supervise solicitors' conduct.

Data compiled by the SRA from July 2021 indicate that as at that time, approximately 66% of practices used either a limited company structure or an LLP structure. For more information see [SRA, Breakdown of solicitor firms \(July 2021\)](#).

Enforcement of solicitors' undertakings

There are four different routes by which a solicitor or firm might face proceedings as a result of failing to comply with an undertaking given:

- A claim under the court's supervisory jurisdiction to enforce the undertaking;
- A claim on the basis that the undertaking was a contract (or was given in a deed);
- A claim based on a fact-specific cause of action such as negligence or breach of trust;
- Professional disciplinary proceedings, most likely brought by the regulator (SRA) in front of the Solicitors Disciplinary Tribunal (SDT).

Each of these routes has different rules and limitations, which are considered separately below. The key point arising from the decision in *Harcus Sinclair* is that as **the law currently stands, an undertaking given by an incorporated law firm (that is a limited company or LLP) is not capable of being enforced against the firm under the court's supervisory jurisdiction**. Unless particular circumstances mean that there is another type of claim available, the only way to obtain redress if an incorporated law firm breaches its undertaking is to bring a contractual claim – which is itself only available if the undertaking was given in a way which was intended to create a contractual relationship and meets the requirements for having done so.

By contrast, if the undertaking was given by an individual solicitor in their own name (rather than in the name of the firm), or was given by a sole solicitor's practice or by an unincorporated partnership, then the court can exercise its supervisory jurisdiction to make an order enforcing the undertaking or granting compensation for its breach, and it can do so on a summary basis without a full trial.

There is therefore a very significant difference in the options for enforcing the undertaking, depending on the person who gives the undertaking and the regulatory structure used by their business. **Firms and clients who receive undertakings will need to give careful thought to this issue, and**

those who are asked to give undertakings will need to be aware of the implications of the undertaking given.

The Court's supervisory jurisdiction over solicitors as officers of the court

The court's jurisdiction to supervise the conduct of solicitors as "officers of the court" is a part of the High Court's inherent jurisdiction. The historical origins of this jurisdiction can be traced back to mediaeval times: see *Harcus Sinclair* at paragraphs 94 to 98 for a summary of the jurisdiction and its origins. The jurisdiction is now expressly preserved in section 50 of the Solicitors Act 1974.

The effect of the preservation of the jurisdiction is that the High Court retains power to make orders disciplining solicitors for misconduct and requiring them to comply with their obligations because they are officers of the court. However, incorporated law firms, which have been permitted to provide legal services as corporate entities since the Administration of Justice Act 1985 came into force, are not officers of the court and are not subject to this jurisdiction.

The Supreme Court summarised the effect of this change at paragraph 137 of its judgment in *Harcus Sinclair* in stark terms:

"a solicitor's undertaking given by (say) Smith & Jones LLP on a Friday would not be buttressed by the court's power of summary enforcement, whereas an identical undertaking given by the Smith & Jones partnership on the previous Monday, before its members incorporated as an LLP on the Wednesday, would be. In that example exactly the same solicitors who had constituted the former partnership would be the members (ie owners and managers) of the LLP which succeeded to the same practice. But the LLP would not itself be a solicitor, or an unincorporated association of solicitors. It is a separate legal person, distinct from the solicitors who own and manage it."

The Supreme Court's decision in *Harcus Sinclair* clarifies that the court could develop its jurisdiction to cover incorporated law firms, but the court declined to do so in that case (see paragraphs 140 to 143 of the judgment). The question of whether the jurisdiction should be extended is a difficult one, but as long as that position remains the law, it will have a significant impact on the enforcement of undertakings given by solicitors.

For example, firms working on conveyancing transactions will be very familiar with the use of the Law Society's Code for Completion by Post, which provides for the use of several undertakings to enable completion of conveyancing transactions to run smoothly. One significant example is the undertaking by a seller's solicitor to redeem or obtain discharges of mortgages on completion of the conveyance.

If the undertaking on mortgage redemption is breached, then a purchaser may need to enforce it. If the undertaking was given by a solicitor or unincorporated partnership, then the purchaser can bring court proceedings under the supervisory jurisdiction to enforce it. The purchaser can use the CPR Part 8 procedure to seek relief on a summary basis, that is without going through the full process of pleadings, disclosure and trial. A much simpler process of the exchange of written evidence and a short hearing will be sufficient. That application can be made to the High Court or, where appropriate, to the County Court, which is able to exercise the same jurisdiction by virtue of section 142 of the County Courts Act 1984.

On the other hand, if the undertaking was given by a limited company or an LLP (including by a solicitor acting on its behalf) or by someone who is not a solicitor or their representative, then the supervisory jurisdiction is not available. The question then is what other routes are available to enforce

an undertaking, and, by extension, what can be done at the outset to make sure an undertaking is enforceable.

Options for obtaining enforceable undertakings and other routes for possible enforcement of undertakings given by firms.

If the law firm giving the undertaking is not an incorporated legal entity, either because it is a sole practitioner's practice or a traditional, unincorporated practice, then the common law position continues to apply and the limitations on the court's supervisory jurisdiction will not cause difficulties.

If an undertaking is to be received and relied on, then it is likely to be in the client's best interests that the client is able to enforce the undertaking, should it prove necessary to do so. There are a number of ways in which that might be achieved.

Personal undertakings from solicitors

If the solicitor gives the undertaking personally, and makes it clear that they are not doing as an agent for the law firm, then this will bring the undertaking within the scope of the court's jurisdiction.

However, as the Supreme Court noted in *Harcus Sinclair* at paragraph 148, this is an imperfect solution. As a general rule, the court will not order the specific performance of an undertaking that it is impossible for the solicitor to honour (*In Re a Solicitor [1966] 1 WLR 1604*). If the solicitor who gives the undertaking does not have the authority necessary to ensure that the firm complies with the undertaking, or if it is impossible for the firm to do so, then the court is unlikely to require it to be performed, and any order for compensation could only be made against the individual solicitor.

Undertakings given by contract or deed

In *Harcus Sinclair*, the law firm which received the alleged undertaking was able to enforce the promise, despite it not being a solicitor's undertaking and having been given by an LLP, because it was a contract. The decision illustrates the potential value to a recipient of an undertaking in making sure that the undertaking can, if necessary, be enforced as a contractual claim.

Many undertakings may also be contracts, but this cannot be assumed. The requirements for a valid contract are generally accepted as being:

- Offer and acceptance of the terms;
- Consideration;
- Intention to create legal relations; and
- Certainty of terms.

There are two particular requirements where undertakings may well fail this test: consideration and intention to create legal relations. Third party rights issues may also be relevant.

- **Intention to create legal relations.** This is potentially a significant issue in the classic situation where a law firm gives an undertaking in the context of acting for a client in a conveyancing transaction. In order for a disappointed buyer to have a claim against the seller's

incorporated law firm, it would be necessary to show a contractual claim which would mean either (i) that a contract had been formed between the seller's solicitors and the buyer (in addition to between the seller and the buyer) or (ii) that a contract had been formed between the seller's solicitors and the buyer's solicitors, which their clients are entitled to enforce.

Both of those are ultimately factual questions for which there will be no universal answer: the existence of a contractual claim certainly cannot be assumed. There are grounds for arguing that it would be easier to infer an intention to create legal relations in the conveyancing context where the Code for Completion by Post represents a long-standing precedent for solicitors to assume personal liabilities enforceable by the other party to their client's transaction. However, it might be said that the solicitors' firms only intended to give the usual professional undertakings and not to assume any separate contractual liability, either to each other or to each other's clients. If the latter analysis is preferred, there would be no contract.

- **Consideration.** A solicitor's undertaking does not need to be supported by consideration. A unilateral promise by a solicitor in the course of his or her practice is regarded by the courts as enforceable under the inherent jurisdiction as a matter of professional conduct, because solicitors should honour their promises. Many undertakings will be given in a context where consideration can be identified, but that may not always be clear. Importantly, the requirement for consideration is that it must "move from the promisee", that is the recipient of the undertaking. The recipient of the undertaking must therefore have given some form of recognisable consideration in return for the undertaking being given, albeit that the consideration does not have to be given to the law firm in question.

If the law firm is to give the undertaking by deed or in a contract, it would clearly be desirable for that to be expressly acknowledged between the parties involved, to avoid the difficulties of having to establish that a contract has been formed. All necessary documentation will need to be prepared. That documentation would need to state clearly the undertaking that is being given and make explicit the binding nature of the promise. All the requirements for a valid contract or deed will need to be complied with.

Professional conduct implications

A solicitor and firm's professional conduct obligations are distinct from the question of enforcement of an undertaking in civil courts. In addition to any civil claim, a law firm which breaches an undertaking might well face professional misconduct allegations before the SDT. However, the SDT **cannot** enforce the undertaking by making an order giving redress to the disappointed recipient of the undertaking.

Unlike the court's supervisory jurisdiction, the SRA's rules apply to incorporated firms. Outcome 1.3 of the Code of Conduct for Firms 2019 simply provides:

"You perform all **undertakings** given by you and do so within an agreed timescale or if no timescale has been agreed then within a reasonable amount of time."

An undertaking, for the purpose of the Code of Conduct, is defined widely:

"a statement, given orally or in writing, whether or not it includes the word "undertake" or "undertaking", to someone who reasonably places reliance on it, that you or a third party will do something or cause something to be done, or refrain from doing something."

(SRA, Standards and Regulations Glossary (last updated 31 December 2020))

All firms are subject to the obligation in Outcome 1.3, and any individual who gives an undertaking is also subject to the same obligation in Outcome 1.3 of the Code of Conduct for Solicitors, RELs and RFLs (registered European lawyers and registered foreign lawyers). The distinction recognised in the scope of the court's inherent jurisdiction does not therefore exist in the SRA's rules of professional conduct.

The consequence of this is that it is professional misconduct for any firm not to comply with an undertaking (at least in the absence of special circumstances justifying its conduct) and that the SRA may take action, either internally or by referring allegations to the SDT, against a firm which breaches an undertaking given on its behalf.

It is not clear how the SDT would approach the sharp distinction drawn by the Supreme Court in *Harcus Sinclair* between personal undertakings given by a solicitor in their own name and undertakings given by a solicitor in the name of their firm. At paragraphs 144 to 147, the Supreme Court rejected the argument that a partner of the LLP who signed the undertaking on behalf of the firm might be subject to the court's inherent jurisdiction: the Supreme Court considered that just as any other agent who signs on behalf of a company or LLP, he dropped out of the picture and incurred no personal liability. It is yet to be seen whether the SDT will follow the same approach; it may conclude that the undertaking is nonetheless "given by" the solicitor within the meaning of Outcome 1.3 of the Code of Conduct.

Irrespective of whether individual solicitors may be responsible in the eyes of the SDT for undertakings they give on behalf of firms, the inclusion of Outcome 1.3 in the Code of Conduct for firms means an incorporated firm will be accountable to the regulator and to the SDT for any breach of an undertaking given on its behalf. The current limitations in the court's inherent jurisdiction recognised in *Harcus Sinclair* do not mean that firms are not required to comply with undertakings; the consequence is simply that recipients of undertakings which are breached cannot seek to have them enforced, or to be compensated for the breach, if the undertakings were given by an incorporated law firm, unless there is a free-standing cause of action.

Negligence and breach of trust

In addition to these three general options, which are at least **potentially** available in all circumstances, there are also specific claims that might be available in certain specific factual situations. For example:

- If a law firm gives an undertaking to its own client about how the client's money will be held in the client account (such as an undertaking that it will be held to the client's order) then a breach of that undertaking may amount to a breach of trust.
- A firm which breaches an undertaking to its own client may be liable in negligence, assuming that the client suffers a loss.

In the conveyancing context, the purchaser might also be able to sue the vendor (or vice versa). However, one of the reasons why undertakings have been regarded as so important is that they have been recognised as introducing obligations which are independent of the contract of sale (see the Privy Council's decision in *Damodaran s/o Raman v Choe Kuan Him [1980] AC 497* at paragraph 502). A claim on an undertaking is not dependent on bringing a claim against the solicitor's client, who may well not have the money or insurance cover to be able to pay a judgment ordered against them.

A law firm may also face a professional negligence claim from its own client if it accepts an undertaking from a limited company or LLP in circumstances in which the undertaking is not enforceable, and the

client suffers loss as a result of the undertaking having been breached without a remedy for enforcement or compensation being available.

All of these claims would be subject to the usual rules relevant to claims in contract, negligence or for breach of trust. They will not be available for all undertakings, and it cannot be assumed that any given undertaking will be supported by an enforceable obligation. Nevertheless, a solicitor or client faced with a situation where an undertaking has been given by an incorporated firm and then breached may be able to identify a remedy from the circumstances of the case.

Insurance

One further practical implication is that firms who give or rely on undertakings will need to ensure that the firms giving undertakings have insurance in place which will cover any liability for failure to comply with undertakings. Before giving any undertakings personally or by contract or deed, firms should check that their professional indemnity insurance would cover liability arising from a personal undertaking or a contractual arrangement which replicates an undertaking. Given the requirements of the minimum terms for solicitors' professional indemnity cover it may well be that existing policies do have the relevant coverage, but firms should check before giving undertakings that the specific terms of their policies are sufficient.

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