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Briefing Note on Undertakings

Harcus Sinclair LLP v Your Lawyers Ltd

The giving and receiving of undertakings following the Supreme Court Judgment in Harcus Sinclair LLP -v- Your Lawyers Ltd

An undertaking is an agreement by a solicitor to do something, or not do something, that is relied upon by a third party. It may be given in writing, or orally and even unintentionally.

Any failure to comply with an undertaking is serious business. The undertaking may be summarily enforced by the Court by exercising its longstanding supervisory jurisdiction over solicitors and regulatory sanction may also follow.

It has long been assumed that an undertaking provided by a law firm trading as a limited company or a limited liability partnership was subject to the supervisory jurisdiction of the Court in the same way as an undertaking given by a solicitor personally or on behalf of an unincorporated partnership. In this way, any breach of undertaking was similarly assumed to be capable of being remedied by the Court inexpensively and swiftly.

These assumptions were confirmed to be wrong by the Supreme Court when it handed down Judgment in *Harcus Sinclair LLP -v- Your Lawyers Ltd* on 23 July 2021.

Consequently, all legal practitioners must be alive to the hitherto unappreciated risks of accepting an undertaking from an incorporated legal practice. By the same token, incorporated practices must expect to be asked to provide a personal undertaking.

This briefing note explains the background to the Court's ruling, its consequences and the practical steps that legal practitioners should now be taking in response.

Background to the Supreme Court Judgment

Harcus Sinclair LLP and Your Lawyers Limited are both incorporated law firms who wished to collaborate for the purposes of pursuing a group litigation claim relating the well-known VW emissions scandal. To this end, Your Lawyers provided Harcus Sinclair with confidential information relating to the litigation and, in return, Harcus Sinclair gave Your Lawyers an assurance that it would not *"accept instructions for or to act on behalf of any other group of Claimants in the contemplated Group Action"*.

Your Lawyers brought proceeding against Harcus Sinclair alleging that it had breached the assurance that it had given. The proceedings finally reached the Supreme Court. Among other things, the Supreme Court was invited to answer two questions:

- Was the assurance given by Harcus Sinclair a solicitors' undertaking; and if yes
- Could any undertaking could be enforced against Harcus Sinclair pursuant to the Court's supervisory jurisdiction with the consequence that it could be summarily enforced by way of Court proceedings

Was there a solicitors' undertaking?

On the facts, the first of these questions was answered, perhaps unsurprisingly, in the negative on the basis that the undertaking was given in a purely business capacity rather than in the course of Harcus Sinclair providing legal service to Your Lawyers.

Was the solicitor's undertaking subject to the Court's supervisory jurisdiction?

It was not necessary for the Court to make a ruling on this second question, but it proceeded to reach two conclusions which will have an impact on all legal practitioners.

First, on the law as it stood, the Supreme Court reached the view that an undertaking provided by an incorporated legal practice was not subject to the supervisory jurisdiction of the Court. This was because the Court's supervisory jurisdiction, most recently confirmed in Section 50 of the Solicitors Act 1974, may only be exercised against an officer of the Court, namely an individual solicitor. Subsequent legislation since 1974 (which has allowed legal practices to trade as incorporated bodies and indeed which has allowed conveyancing services to be provided by Licensed Conveyancers) had failed to confirm, no doubt owing to an oversight, that incorporated bodies were also subject to Section 50 of the Solicitors Act.

Second, the Supreme Court accepted that it was at liberty to 'make new law' and extend the Court's supervisory powers to an undertaking given by an incorporated law firm. However, recognising that there were "*powerful arguments both ways on this question*" the Court did not consider that it should adjudicate upon the issue in the context of a claim where it was not directly relevant (as the undertaking under review was not a solicitor's undertaking). The Court instead considered that the issue was best determined on another occasion with the input of interested parties such as the Law Society. The Court also commented that the issue might also be better left to Parliament to legislate and cure any perceived lacuna in existing legislation.

As it stands therefore, an undertaking by any incorporated legal practice is not subject to the supervisory jurisdiction of the Court.

The implication

Undertakings play a vital role in the smooth and efficient transaction of legal business. That is perhaps most evident in a standard residential conveyancing transaction which will typically involve the seller's solicitor giving a number of undertakings (not least an undertaking to discharge prior mortgages at completion and to deliver completion documents). Buyers and their solicitors rely upon these undertakings, and do so in the knowledge, that breach of the undertaking can be remedied by the Court exercising its supervisory jurisdiction, a process which is both economical and fast.

Up until now, buyers and their solicitors have readily accepted undertakings given by incorporated legal practices in the belief that they are capable of being summarily enforced. For now, at least, that assumption is wrong.

So what is the status of an undertaking given by an incorporated legal practice?

Importantly, it is not the case that an undertaking given by an incorporated legal entity is of no effect at all.

There are still three remedies for breach of undertaking that might be relied on:

1. The failure of an incorporated entity to comply with an undertaking still amounts to professional misconduct and may be reported to the SRA. Whilst the SRA is not able to order that an undertaking be complied with, it is able to impose sanctions and encourage compliance.
2. An undertaking, in some circumstances, can amount to a contractual promise that can be enforced in the Courts on the basis that it is a breach of contract. (A contractual promise, of course, must involve the passing of consideration, unlike an undertaking).
3. Any future breach of an undertaking by an incorporated legal practice might of course lead to the Supreme Court extending the supervisory jurisdiction of the Court so as to enforce it.

None of these remedies, though, are as certain or effective, as a right to simply enforce breach of an undertaking by inviting the Court to deal with the matter summarily by exercising its supervisory jurisdiction.

By the same token, there is no need for panic. Indeed, it must be remembered that since 1985, residential conveyancing services have been provided without significant incident by Licenced Conveyancers (who are not subject to the Court's supervisory powers) and who have been able to give undertakings (to buyers, their solicitors and lenders) without the court's backing in terms of summary enforcement.

Practical steps to take

This decision in *Harcus Sinclair* has consequences for both those giving and receiving an undertaking.

Receiving an undertaking

Those receiving an undertaking must be alive to the risk of receiving an undertaking from an incorporated legal practice. As it stands, any breach of that undertaking is not capable of summary enforcement in the Court. Pending further Law Society Guidance, practitioners have two options to them in these circumstances:

1. Clients should be fully advised (in writing) of the limitations affecting the receipt of undertakings from incorporated practices and the risks associated with enforcing them. In some circumstances, it may be that a client might be content to proceed notwithstanding the risks, just as many buyer clients are content to deal with Licensed Conveyancers. However, failure to obtain fully informed consent, in writing, to rely upon an undertaking from an incorporated legal practice may amount to a breach of duty.
2. By way of solution, practitioners might insist on any undertaking being given by a solicitor in their personal capacity, almost certainly as well as an undertaking by the incorporated practice. It will be important, in these instances, to ensure that the individual solicitor giving the undertaking is authorised to give it. This was a "temporary solution" that was endorsed by the Supreme Court.

Giving an undertaking

On the flip side, incorporated legal practices (notably limited companies and limited liability partnerships) must expect their Directors and Members to be asked to give undertakings in their personal capacities. It is open to legal practices to refuse to give a personal undertaking (perhaps by remarking that an undertaking by an incorporated law firm is no different to one given by a Licensed Conveyancer). However, any refusal to agree might lead to transactions breaking down completely.

The giving of a personal undertaking is certainly superficially unattractive given that one of the key purposes of incorporation is to manage personal liability. Directors and Members should be comforted, though, by the fact a personal undertaking given in the course of legal transaction and for the benefit of a client will ordinarily be underpinned by the professional indemnity insurance that the legal practice will have in place.

Nonetheless, there is no better time than now for firms to review their procedures on giving undertakings.

Undertakings – best practice

The first and obvious step for law firms to take is to review any undertakings already received from an incorporated practice but not yet performed with a view to assessing any particular risk of non-compliance that might be a cause for concern.

The second step is to review the firm's own procedures for giving undertakings. Although no longer in force, the SRA issued a warning notice relating to the undertakings in 2009.

The notice reminded practitioners of the need to ensure that all undertakings were 'SMART': specific, measurable, agreed, realistic and timed.

In addition, further advice included:

- Being clear about who can give undertakings
- Ensuring all staff understand they need the client's agreement
- Being clear about how compliance will be monitored
- Preparing standard undertakings, where possible, with clear instructions that any departure be authorised in accordance with supervision and management responsibilities
- Adopting a system that ensures terms are checked by another fee-earner

This guidance remains highly relevant today.

The future?

There is no doubt that the decision in *Harcus Sinclair* has upset the apple cart, at least for now. It is to be hoped that either Parliament or the Supreme Court will eventually right the cart, but that may not happen for some time yet.

In the meantime, it will be interesting to see whether the Law Society issues formal guidance and indeed how lenders react to the *Harcus Sinclair* decision. Will either of those bodies recommend or insist on personal undertakings?

For now, legal practitioners must grapple with the issue and, it is to be hoped, work collaboratively with each other so as to ensure that the system of undertakings that is such an important feature of many legal transaction remains that way.

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