

Northumbria Research Link

Citation: Hewitson, Russell (2021) Chipping Away at the Bedrock of Conveyancing. The Conveyancer and Property Lawyer, 85 (4). pp. 317-325. ISSN 0010-8200

Published by: Sweet & Maxwell

URL:

This version was downloaded from Northumbria Research Link:
<https://nrl.northumbria.ac.uk/id/eprint/48113/>

Northumbria University has developed Northumbria Research Link (NRL) to enable users to access the University's research output. Copyright © and moral rights for items on NRL are retained by the individual author(s) and/or other copyright owners. Single copies of full items can be reproduced, displayed or performed, and given to third parties in any format or medium for personal research or study, educational, or not-for-profit purposes without prior permission or charge, provided the authors, title and full bibliographic details are given, as well as a hyperlink and/or URL to the original metadata page. The content must not be changed in any way. Full items must not be sold commercially in any format or medium without formal permission of the copyright holder. The full policy is available online: <http://nrl.northumbria.ac.uk/policies.html>

This document may differ from the final, published version of the research and has been made available online in accordance with publisher policies. To read and/or cite from the published version of the research, please visit the publisher's website (a subscription may be required.)

Practice and Precedents Editor's Notes

Chipping away at the bedrock of conveyancing

Undertakings are a part of everyday practice for conveyancing solicitors to ensure the smooth progress of conveyancing transaction. As Lord Justice Smith said in *Briggs v The Law Society*¹ at para [35]:

“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.”

According to figures from HMRC there were 316,620 residential conveyancing transactions with a value of £40,000 or more in the financial year 2020 to 2021 and the provisional figure for 2021 to 2022 for such transactions is 619,190.² Both these figures are the non-seasonally adjusted figures. Each of these transactions will have involved, or will involve, more than one undertaking being given and relied upon. Whilst there is no evidence that there is an issue with undertakings in conveyancing, the decision in July 2021 of the Supreme Court in *Harcus Sinclair LLP v Your Lawyers Ltd*³ has given solicitors who rely on solicitors' undertakings some cause for concern.

What is an undertaking?

The Glossary to the Solicitors Regulation Authority's Standards and Regulations defines an undertaking as:

“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”.⁴

Paragraph 1.3 of the SRA Code of Conduct for Solicitors, RELs and RFLs states that solicitors must perform all undertakings which they give within an agreed timescale or if no timescale has been agreed then within a reasonable amount of time.⁵

What constitutes an undertakings?

Using the SRA definition and breaking it down into its constituent elements, an undertaking:

¹ *Briggs v The Law Society* [2005] EWHC 1830 (Admin).

² UK monthly property transactions, <https://www.gov.uk/government/statistics/monthly-property-transactions-completed-in-the-uk-with-value-40000-or-above/uk-monthly-property-transactions-commentary> [Accessed 8 October 2021].

³ *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32.

⁴ See <https://www.sra.org.uk/solicitors/standards-regulations/glossary> [Accessed 30 September 2021].

⁵ There is a similar obligation on firms authorised by the SRA to provide legal services in paragraph 1.3 of the SRA Code of Conduct for Firms.

- must be a statement which can either be oral or in writing but which does not have to include the words “undertake” or “undertaking”;
- must be made by or on behalf of an individual solicitor or a firm authorised by the SRA to provide legal services;
- must be made to someone who reasonably places reliance on it; and
- must be to the effect that the individual solicitor or a firm or a third party will do, cause to be done or refrain from doing something.

This is wide-ranging and can encompass statements which, whilst not intended to create an undertaking, will nevertheless do so. The previous definition of an undertaking in the Glossary to the SRA Code of Conduct 2011 also provided that if made by a firm the undertaking must have been made in the course of practice but if made by an individual could be made outside the course of practice if made by the individual as a solicitor.⁶ But this is not included in the current definition.

If any of the essential elements are missing, it is likely that it will not be an undertaking but will instead be an unenforceable promise. There is a fine line between an undertakings and a simple promise. There are no clear rules as to whether a specific set of words will amount to a undertaking or a promise, though as noted below there are recommended wordings for undertakings in conveyancing. In addition, where there is an ambiguity in the wording of an undertaking it will usually be resolved in favour of the recipient of the undertaking.⁷

A solicitor’s undertaking

The mere fact that an undertaking is given by a solicitor does not necessarily mean it will amount to a solicitor’s undertaking. This is relevant to the enforcement of the undertaking. To amount to a solicitor’s undertaking, the undertaking must be given by the solicitor in their “capacity as a solicitor”.⁸ So, an undertaking given by a solicitor in their private capacity would not amount to a solicitor’s undertaking. In *Harcus Sinclair LLP v Your Lawyers Ltd*, by way of example, it was said that an undertaking to hold or pay money in relation to the lease of a solicitor’s office space would be an undertaking given in a solicitor’s private capacity.⁹

Enforcement of solicitors’ undertakings

There are three ways in which a solicitor can be required to comply with an undertaking. As solicitors are officers of the court, they are subject to the court’s inherent supervisory jurisdiction. So, a claim can be brought summarily for the court to enforce the undertaking. Secondly, it may be possible to make a claim on the basis that the undertaking was a contract however this is not possible if there is no consideration in the undertaking. Finally, the Solicitors Regulation Authority can bring disciplinary proceedings against a solicitor who fails to comply with an undertaking. A solicitor is required to perform an undertaking which they give, and to do so within an agreed timescale or if no timescale has been agreed then within a reasonable amount of time.¹⁰ However, the Solicitors Regulation Authority cannot require a solicitor to comply with an undertaking; it can only sanction a solicitor for breach.

⁶ See <https://www.sra.org.uk/solicitors/handbook/code> [Accessed 7 October 2021].

⁷ *Reddy v Lachlan* [2000] Lloyd’s Rep. P.N. 858.

⁸ *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32 at para [103].

⁹ *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32 at para [104].

¹⁰ SRA Code of Conduct for Solicitors, RELS and RFLs, para 1.3.

Undertakings in conveyancing

Solicitors' undertakings are used throughout the course of conveyancing transactions and without them conveyancing would not run smoothly. On exchange of contracts, they are incorporated via the Law Society's formulae for exchanging contracts by telephone and at completion via the Law Society's Code for Completion by Post. In both of these situations a number of undertakings are given and received by the conveyancing solicitors on both sides of the transaction. In addition, where there is a mortgage to be redeemed on the sale of a property, the seller's solicitors will give an undertaking to discharge the seller's mortgage. Undertakings may also be given in relation bridging finance as well as to have documents signed or executed. In commercial property transactions, undertakings are incorporated in the Protocol for Discharging Mortgages of Commercial property published by the City of London Law Society Land Law Committee.¹¹

Undertakings given by other conveyancers

Undertakings may be given in conveyancing by conveyancers who are not solicitors, such as licensed conveyancers. As such conveyancers are not officers of the court, they are not subject to the court's inherent supervisory jurisdiction. The court can only enforce such an undertaking on the basis that it was a contract where it contains consideration. Otherwise, the Council for Licensed Conveyancers may bring disciplinary proceedings against a licensed conveyancer who fails to comply with an undertaking. One of the Outcomes in the CLC Handbook is that a licensed conveyancer must comply fully with any undertaking which they give.¹² However, like the Solicitors Regulation Authority, the Council for Licensed Conveyancers has no power to direct the specific performance of an undertaking; it may only sanction a licensed conveyancer for the breach.

However, the provisions relating to undertakings given by legal executives who are members of CILEx are different. CILEx has stated that:

“Undertakings are given on behalf of the firm and not an individual. You should only give an undertaking if you are duly authorised by your firm to do so. If you are so authorised, you must ensure you comply with any procedures your firm has in relation to undertakings”.¹³

The CILEx Code of Conduct does not specifically refer to undertakings although were one to be given, it may be possible to argue that Principle 2 “maintain high standards of professional and personal conduct and justify public trust in you, your profession and the provision of legal services” and Principle 3 “behave with honesty and integrity” could result in professional disciplinary sanctions being taken if an undertaking were not observed.¹⁴

The decision in *Harcus Sinclair LLP v Your Lawyers Ltd*

¹¹ See <https://www.citysolicitors.org.uk/storage/2014/02/TS4-20212085-v6-PROTOCOL.pdf> [Accessed 7 October 2021].

¹² See <https://www.clc-uk.org/handbook> [Accessed 7 October 2021].

¹³ See https://www.cilex.org.uk/membership/practice_advice/undertakings/undertakings_on_behalf_of_firm [Accessed 7 October 2021].

¹⁴ See <https://www.cilex.org.uk/pdf/Code%20ofConduct.pdf> [Accessed 7 October 2021].

The dispute in this case did not arise out of a conveyancing transaction. Instead, it concerned a term in a non-disclosure agreement between two firms of solicitors that were contemplating entering into a formal collaboration agreement in relation to the VW Emissions Group Litigation. In return for Your Lawyers Ltd sharing confidential information about its client base, Marcus Sinclair LLP 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 Ltd]”. The collaboration between the two firms did not then go ahead and Marcus Sinclair LLP began acting for another group of claimants, consequently a dispute arose between the two firms.

The questions before the Supreme Court included:

- whether this was an enforceable contractual term or an unlawful restraint of trade;
- whether it was a solicitor’s undertaking; and
- if so, whether it was enforceable as a solicitor’s undertaking under the court’s supervisory jurisdiction against Marcus Sinclair LLP and the individual solicitor who gave it.

On the first point, the court concluded, on the facts of the case, that it was not an unlawful restraint of trade and was enforceable as a contractual term.

On the second point, the court found that it was not a solicitor’s undertaking. This reasoning for this was that because the subject matter of the undertaking was a business arrangement between the two firms, the non-compete undertaking had nothing to do with legal advice and agreeing not to act for certain clients did not involve any legal activity. The reason that the undertaking was given was the furtherance of the parties’ business interests.

The Supreme Court gave guidance on how to decide if an undertaking was a solicitor’s undertaking. It suggested that two questions would assist in reaching a decision:

“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.”¹⁵

The court also found, *obiter dicta*, that even if it had been a solicitor’s undertaking, it could not be enforced on the facts against the solicitor who had signed the non-disclosure agreement. This was because the undertaking had not been given by the solicitor in his personal capacity but on behalf of his firm. He signed the agreement as the agent of his disclosed principal and therefore incurred no personal liability under it.

Enforcement of solicitors’ undertakings against incorporated bodies

On the third point, the court concluded, again *obiter dicta*, that limited liability partnerships (LLPs) and other incorporated bodies are not subject to the court’s inherent jurisdiction to enforce solicitor’s undertakings.

¹⁵ *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32 at para [112].

Lords Briggs, Hamblen and Burrows (who together gave the leading judgment) noted that the court's inherent supervisory jurisdiction rests on a solicitor's status as an officer of the court.

The Solicitors Regulation Authority regulates solicitors to provide legal services via three main types of practice:

- recognised bodies;
- recognised sole practitioners; and
- licensed bodies (ABSs).

Recognised bodies comprise LLPs and companies (together with the traditional partnership model), whilst licensed bodies comprise alternative business structures (ABSs). Data compiled by the SRA shows that in September 2021 approximately 51% of practices used an incorporated company structure, 15% were LLPs, 14% were traditional partnerships and 19% were sole practitioners.¹⁶

Management and ownership of corporate bodies carrying out legal services is open to unqualified persons. The various pieces of legislation that created these new vehicles for providing legal services are silent as to whether they were subject to the court's inherent supervisory authority or not.¹⁷

The court considered not only whether the inherent supervisory jurisdiction applied to regulated law firms including LLPs and limited companies, but also whether that jurisdiction could and should be extended so as to apply to all such bodies. The court did not rule out the possibility that the statutes could be interpreted purposively in this way. However, it declined to make a ruling on this point for three reasons:

- its decision would have been obiter;
- the court considered that a decision would be better made in a case with submissions from the Law Society and any other interested regulatory bodies; and
- the court suggested the question “is probably better dealt with by legislation than by the courts, because of the availability of procedures for consultation which the court lacks.”¹⁸

Thus, an undertaking given by an incorporated law firm is not capable of being enforced against the firm under the court's supervisory jurisdiction.

The court's supervisory jurisdiction

The court's supervisory jurisdiction to enforce solicitors' undertakings is an aspect of its inherent jurisdiction over solicitors as officers of the court. This inherent jurisdiction has its origins in medieval times.¹⁹ It is now preserved in s.50 of the Solicitors Act 1974, as amended, which provides:

¹⁶ See https://www.sra.org.uk/sra/how-we-work/reports/statistics/regulated-community-statistics/data/solicitor_firms [Accessed 7 October 2021].

¹⁷ Administration of Justice Act 1985; Limited Liability Partnership Act 2000; Legal Services Act 2007.

¹⁸ *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32 at para [143].

¹⁹ See *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32 at paras [94] to [98] for a summary of the jurisdiction and its origins.

“Subject to the provisions of this Act, the High Court, the Crown Court and the Court of Appeal respectively, or any division or judge of those courts, may exercise the same jurisdiction in respect of solicitors as any one of the superior courts of law or equity from which the Senior Courts were constituted might have exercised immediately before the passing of the Supreme Court of Judicature Act 1873.”

Thus the High Court retains power to make orders requiring them to comply with their undertakings as they are officer of the court. However, as already noted, this supervisory jurisdiction does not extend to incorporated law firms. This distinction was summarised by the Supreme Court as follows:

“... 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.”²⁰

How this distinction applies in a conveyancing context can be illustrated by considering the enforcement of a solicitor’s undertaking to discharge a mortgage on completion. If the mortgage is not discharged so that there is non-compliance with such an undertaking and it was given by a solicitor or an unincorporated partnership, then the recipient can apply to the High Court or, where appropriate, to the County Court²¹ to enforce the undertaking under the court’s inherent supervisory jurisdiction. The recipient can use the procedure under Part 8 of the Civil Procedure Rules to seek summary relief without the need to go through the full process of pleadings, disclosure and trial. However, if the undertaking was given by a limited company or an LLP (including by a solicitor acting on behalf of such an incorporated body) or by someone who is not a solicitor then the supervisory jurisdiction is not available and one of the alternative options must be used to enforce the undertaking.

Giving an Undertaking

Its useful to review what you should bear in mind when giving an undertaking. In 2009 the Solicitors Regulation Authority issued a Warning Card in relation to undertakings and the recommendations it contained are as valid today as they were then. They recommended that undertakings be specific, measurable, agreed, realistic and timed.

The previous warning card on this topic which was issued in 1993 by the Law Society explained what was meant by these concepts:

- **Specific:**

“Undertakings should refer to a particular task or action which has been clearly identified and defined. Do not give general or open-ended undertakings, such as an undertaking to discharge “all outstanding mortgages on a property” or “the usual undertaking”. Make sure that any

²⁰ *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32 at para [137].

²¹ The County Court can exercise the same jurisdiction as the High Court by virtue of s.142 of the County Courts Act 1984.

undertaking to pay monies out of a fund is qualified by the proviso that the fund comes into your hands, and that it is sufficient.”

- Measurable:

“Undertakings should include agreed measures or steps which are understood by both parties and can be easily monitored or checked, so that there can be no dispute as to whether an undertaking has been fully discharged. If an undertaking involves the payment of a sum of money, make sure the amount is clear or that it is easy to calculate. Ambiguous undertakings will be construed in favour of the recipient.”

- Agreed:

“Undertakings should be expressly agreed by both the person giving them and the person receiving them and should be confirmed in writing. They may be given orally or in writing and are binding even if they do not include the word 'undertake' – beware of inadvertent undertakings. Ambiguous undertakings will be construed in favour of the recipient.”

- Realistic:

“Undertakings should be achievable. Before giving an undertaking consider carefully whether you will be able to implement it. If any events must happen before you will be able to implement your undertaking, it is good practice to spell out those events on the face of the undertaking. An undertaking is still binding even if it is to do something outside your control. As you give the undertaking – you can stay in control.”

- Timed:

“Undertakings should indicate when, or on the happening of which event, they will be implemented. In the absence of an express term, there is an implied term that an undertaking will be performed within a reasonable time, having regard to its nature.”

The Solicitors Regulation Authority also recommends that a regulated person or firm should:

- be clear about who can give undertakings;
- ensure all staff understand they need the client’s agreement;
- be clear about how compliance will be monitored;
- maintain a central record to ensure and monitor compliance;
- prescribe the manner in which undertakings may be given;
- prepare standard undertakings, where possible, with clear instructions that any departure be authorised in accordance with supervision and management responsibilities;
- adopt a system that ensures terms are checked by another fee-earner;
- confirm oral undertakings (given or received) in writing;
- copy each undertaking and attach it to the relevant file; label the file itself; and
- ensure all staff understand the undertakings they give.

Conclusion

The decision in *Harcus Sinclair LLP v Your Lawyers Ltd*²² has highlighted the uncertainty as to whether the recipient of an undertaking can it summarily enforce it as a solicitor’s undertaking. The Supreme Court made it clear that the undertaking in the case which had been

²² *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32.

given by a solicitor for and on behalf of an LLP would not have been enforceable against the LLP or the solicitor, even if it had been a solicitor's undertaking.

Having different rules which apply to the enforcement of an undertaking given by an unincorporated partnership to those which apply to one given by an incorporated body is not satisfactory. The Supreme Court expressed concern about:

“whether those dealing with incorporated law firms, and with solicitors' LLPs in particular, are sufficiently aware that undertakings given by them are not currently buttressed by the court's supervisory jurisdiction.”²³

However, to date, this lack of summary enforcement appears not to have caused practical difficulties with enforcement of undertakings. Whilst summary enforcement may not be available, there remains the possibility of enforcing the undertaking by bringing a claim for breach of contract or by the threat of a report to the Solicitors Regulation Authority. In the short term, the Supreme Court suggested that the problem may be addressed by ensuring that the undertaking is given by a solicitor personally, as well as or in the alternative to an incorporated body. However, that supposes that the solicitor will be prepared to give that undertaking, which they may not given that they may not have the power within their incorporated body to ensure compliance. Thus, it remains unsatisfactory unless and until Parliament addresses the issue. In the meantime, solicitors accepting an undertaking from an incorporated body should proceed with caution (for example, they might look to ensure there is consideration in any undertaking given by an incorporated body) and advise their clients as to the enforceability of such undertakings.

Russell Hewitson

²³ *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32 at para [148].