THE UNCERTAINTY OVER UNDERTAKINGS

WRITTEN BY JAYNE WILLETTS SOLICITOR WITH JAYNE WILLETTS & CO SOLICITORS

The enforceability of solicitors' undertakings was considered recently by the Supreme Court in Harcus Sinclair v Your Lawyers [2021] UKSC 32.

This appeal to our highest court arose from a group action against the Volkswagen Group involving over 50,000 claimants - known as the emissions litigation. The question in the appeal was whether a non-compete clause by which one law firm (Harcus Sinclair) agreed with another law firm (Your Lawyers) not to take part in the emissions litigation without the latter's permission was enforceable or not.

The Court of Appeal held that the non-compete clause was unenforceable so Your Lawyers appealed to the Supreme Court which found in their favour. The Court held that the non-compete clause was not an unreasonable restraint of trade and was thereby enforceable.

The Court also considered whether the non-compete clause constituted a solicitors' undertaking. For an undertaking given by a solicitor to be a solicitor's undertaking, it must be given in the "capacity as a solicitor". Two questions needed to be addressed. First, whether what the undertaking requires the solicitor to do (or not to do) is something that solicitors regularly carry out (or refrain from carrying out) as part of their ordinary professional practice. Second, whether the matter to which the undertaking related involved the sort of work which solicitors regularly carry out as part of their ordinary professional practice.

It was held that Harcus Sinclair's promise not to compete with Your Lawyers in the emissions litigation did not involve the sort of work which solicitors undertook not to do as part of their ordinary professional practice. The matter to which the promise related was a potential business opportunity and the reason for giving it was to further the parties' business interests rather than those of any client.

In giving the undertaking Harcus Sinclair was acting in a business capacity rather than a professional capacity hence the non-compete clause was not a solicitors undertaking.

The Court was also asked to consider whether, if the non-compete clause was a solicitors' undertaking would the courts' supervisory jurisdiction apply to Harcus Sinclair which is an LLP, and/or to Mr Parker, the individual solicitor?

The courts have an inherent jurisdiction to supervise the conduct of solicitors as officers of the court and to use this jurisdiction to enforce undertakings given by solicitors in the course of their practice.

The ability to rely upon this inherent jurisdiction is in addition to the right to report a breach to the SRA as professional misconduct and/or the right to bring a breach of contract claim before the courts. It was not necessary to give a final ruling on this question but, as matters stand, the non-compete clause would not have been enforceable against Harcus Sinclair because Harcus Sinclair as an LLP was not an officer of the court. It would also not have been enforceable against Mr Parker as he gave the assurance on behalf of Harcus Sinclair and not in his personal capacity. It follows from that determination that the inherent jurisdiction does not presently extend to LLPs and/or limited companies.

Before one jumps to the conclusion that undertakings given by LLPs and/or limited companies are worthless, two enforcement options remain. A breach of an undertaking can still be reported to the SRA for regulatory action.

The other alternative is to pursue a breach of contract claim through the courts. Both these options are time consuming and are not as effective as an application to the court under the supervisory jurisdiction. The recipient of an undertaking applies to the court for a summary order that the solicitor complies with the undertaking he has given and in default he can be held in contempt of court – a much more efficient and speedy remedy.

The Court accepted that it would have been open to it to extend the supervisory jurisdiction in respect of solicitors to cover undertakings given by incorporated law firms but declined to do so in this case because any decision would be obiter, the Court had not received submissions from professional bodies or regulators, and because the issue may be better dealt with by legislation.

With so many of us practising through incorporated law firms rather than sole practitioner or partnership models, the inability to enforce an undertaking via the inherent jurisdiction against an LLP or a limited company is a regulatory gap that needs plugging. There can be no level playing field for legal service providers if individual solicitors practising alone or in a traditional partnership can be pursued for breach of undertaking through the courts because of their position as officers of the court whereas LLPs and limited companies and other providers such as licensed conveyancers escape that accountability. There can be no good reason for different rules.

And finally, the regulatory obligation to perform undertakings is exactly the same whether you are an individual solicitor or a firm. The rule appears at 1.3 in both the Code of Conduct for Individuals and in the Code for Firms as follows:-

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.

By way of reminder, an undertaking is defined in the SRA Glossary as meaning "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"

The absence of the word undertake or undertaking cannot often be overlooked when giving assurances to solicitors on the other side of a conveyancing transaction or indeed litigation. Undertakings are always fraught with risk and difficulty and are best avoided if at all possible.