Can you still trust a solicitor to keep a promise?

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When is an undertaking not an undertaking? John Gould reports on the wake-up call sounded by the Supreme Court in *Harcus*

The Supreme Court's decision in *Harcus Sinclair LLP and another v Your Lawyers Ltd* [2021] UKSC 32, [2021] All ER (D) 87 (Jul) has caused something of a stir. Commentators have hurried into print to alert their readers to the risk that undertakings from incorporated law firms might not now be as gold-plated as they thought because the summary enforcement mechanism through the court which applies to individual solicitors as 'officers of the court' doesn't extend to corporates.

The decision in *Harcus* highlights various issues, but is not, in fact, the earth-shattering event some have claimed.

The court's lack of an inherent supervisory jurisdiction over corporate law firms has been pretty clear since the Court of Appeal's judgment in *Assaubayev v Michael Wilson & Partners Ltd* [2014] EWCA Civ 1491, [2014] All ER (D) 239 (Nov). At the risk of a lack of humility, the correct position has been stated in *The Law of Legal Services and Practice* since 2015:

> '6.167 The court's supervisory jurisdiction extends only to people (or bodies) who either are solicitors, act as solicitors or pretend to be solicitors – because someone who is not in any of those categories is neither an officer of the court nor purporting to be one. Although a recognised body is not an officer of the court, it may (like any other non-solicitor) engage the supervisory jurisdiction by pretending to be a solicitor.'

One of the useful aspects of *Harcus* is, however, the prompt it provides to look at the legal position of undertakings by solicitors and law firms more generally.

Undertakings matter

Compliance with solicitors' undertakings matters both to the recipients and more generally. The recipient's interest is not unlike a party's interest in the performance of contractual obligations. The general interest is that solicitors may be relied upon to comply with all undertakings irrespective of the significance of breach. Moses LJ put it with characteristic directness at para [9] in *Izzet v Law Society; Cazaley v Law Society* [2009] EWHC 3590 (Admin), [2009] All ER (D) 276 (Nov): 'Again it is with regret that I record that this mitigation demonstrates a complete failure to understand and appreciate the duties of a solicitor. It seems to suggest that some undertakings are more important than others, that if the undertaking relates to a trivial matter it may be breached with little serious consequence. It surely requires no emphasis that the solicitors' profession depends for its integrity on the acknowledgement by each of those who are solicitors coupled with the understanding of the public that if an undertaking is given by a solicitor it will be honoured. That proposition goes to the root of the standing and indeed justification for the profession'.

> ***"It seems unlikely that solicitors are in the habit of handing out gratuitous professional undertakings"***

The importance of undertakings for conveyancing is not in doubt and was explained by Smith LJ in *Briggs v Law Society; Awoloye Kio v Law Society* [2005] EWHC 1830 (Admin), [2005] All ER (D) 262 (Jul) at para [35] in the following way: '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.'

In *Harcus*, the court was convinced of the importance of undertakings (at para [127]): 'There can be no doubt that the underpinning of those undertakings by the availability of rapid summary enforcement under the court's supervisory jurisdiction has been a significant buttress for their reliability, and for the propriety of accepting them as part of the every-day machinery for modern conveyancing.'

What counts as an undertaking?

Perhaps the most significant aspect of the Supreme Court's decision in *Harcus* is not the confirmation of the lack of a supervisory jurisdiction over corporates, but the attempt to explain which promises by a solicitor are undertakings and which are not. If a solicitor promises their landlord that their rent will be paid today, that is not an undertaking given as a solicitor. If a solicitor promises that a client's rent will be paid today, that may well be.

In *Harcus*, it was not actually necessary to decide that undertakings could not be enforced by the court against corporates because the court decided that they weren't undertakings as such at all.

An undertaking need not involve a contract, it does not need to be supported by consideration, and it is not undermined by the fact that a contractual promise in the same terms (for example because of a lack of formality) would be unenforceable.

The undertaking must be given in his

or her 'capacity as a solicitor' to engage the court's supervisory jurisdiction. The Solicitors Regulation Authority (SRA)'s Glossary definition of undertaking does not refer to the capacity in which the undertaking is given: '[Undertaking] means 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'.

For the purpose of misconduct and the SRA, a broken promise (even if it is not an undertaking) may still justify regulatory action if, for example, it demonstrates a lack of integrity relevant to practice. The best view, however, is that undertakings are only promises given in a professional capacity.

Many undertakings, such as standard conveyancing undertakings, are self-evidently given in a professional capacity. Some promises, such as restrictive employment covenants, are not professional undertakings. Indicators that a promise is a professional undertaking include if it is given in connection with a client transaction; if it is given to a court; if it is given on a client's instructions; if it relates to money or documents held in connection with conventional transactions; or if the solicitor's relationship or dealings with the recipient arise from carrying out legal work. It may be an indicator that a promise is not a professional undertaking if it is very unusual or relates to the guarantee of payments by others.

In *Harcus*, the court identified two questions (at para [112]): 'General statements such as those set out above provide guidance but they do not lay down any definitive test. 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 promise in *Harcus* related to the protection of confidential commercial information given with a view to cooperation between two firms and insurers in a group litigation. The promise was intended to prevent the recipient of the information exploiting it for themselves. It was a reasonable and enforceable restrictive covenant, but not a professional undertaking.

The limits of the summary jurisdiction

Even in relation to individual solicitors, the summary jurisdiction may function more as a deterrent than a practical tool. While a summary application may be more attractive than conventional proceedings, it could hardly be characterised as informal. It appears to have produced very few summary orders over the years.

It is also subject to limitations. It is unlikely to be appropriate if there are material factual disputes (*Coll v Floreat Merchant Banking Ltd* [2014] EWHC 1741 (QB), [2014] All ER (D) 30 (Jun)). It may not be effective where the breach of the undertaking by a solicitor does not merit criticism because the circumstances were beyond the solicitor's control (*Thew (R & T) Ltd v Reeves (No 2)* [1982] QB 1283). In this respect, it is more limited than liability for a breach of contract.

> *"There is a strong case for standard undertakings to be modified to make it clear that they are also contractual"*

These are important limitations, because generally solicitors don't simply breach undertakings for the hell of it. The existence of an undertaking is often disputed either on the basis that what was written doesn't amount to an undertaking or what was said is disputed. Frequently undertakings are breached (or at least compliance is delayed) because circumstances have changed and a client has a good reason to object to compliance.

Undertakings & contracts

Both the SRA and the courts have identified reliance as an essential characteristic of a solicitor's undertaking. It is but a short step from reliance to contractual consideration. It seems unlikely that solicitors are in the habit of handing out gratuitous professional undertakings. In many situations, consideration will be present even if it is not expressly referred to. A sensible recipient relying on a promise would wish to ensure that that reliance was expressed as consideration. There is a strong case for standard undertakings to be modified to make it clear that they are also contractual.

The same sensible recipient would wish to ensure that the firm giving the promise was bound by the undertaking both professionally and contractually. This would mean being assured that the individual giving the undertaking either had or appeared to have the necessary authority or, as a minimum, warranted that they did.

Undertakings & misconduct

The SRA's Code of Conduct for Firms contains an express requirement in relation to undertakings:

> '1.3 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.'

The courts and the Solicitors Disciplinary Tribunal (SDT) consider the breach of an undertaking to be a serious matter. The managers of law firms are personally responsible for breaches by their firm irrespective of their own personal culpability.

Often, the threat of reporting delay in compliance with an undertaking to the SRA is sufficient to resolve the situation. If it is not, the processes for investigation and enforcement can take time. It is also the case that the disciplinary regime is not established to provide redress or compensation. The SDT has no power to award compensation. It is also likely that s 47(B) of the Solicitors Act 1974 (SA 1974) prevents it from ordering compliance.

The enforcement of undertakings

This has two aspects: firstly, enforcing performance of the undertaking; and secondly, obtaining compensation for breach.

For individual solicitors, the courts may order performance, compensation or even a penalty.

If the undertaking is enforceable as a contract with either an individual or a corporation, the usual remedies are available, including interim orders, orders to perform, compensation and costs.

A complaint to the SRA is often highly effective in practice, but if a full disciplinary process is required that may take many months and will not produce an order for performance or compensation.

A mechanism does exist by which the SRA could speedily apply pressure on corporate law firms to obtain the performance of an undertaking in a clear case. The SRA has

powers under SA 1974, s 44D to rebuke or fine up to £2,000 for rule breaches by Recognised Bodies without proof of misconduct. For Licensed Bodies, the maximum fine is £250m.

More useful is the power to impose conditions under the Authorisation of Firms Rules. These provide for the attachment of conditions to the authorisation of a corporate firm to practise:

> 'The conditions imposed by the SRA *under rule 3.1 may:*
>
> 3. specify certain requirements that must be met or steps that must be taken'

In an appropriate case, this could be to make it a condition of authorisation to practise that the step to be taken was that an undertaking be complied with. In an extreme case, a breach of rule 1.3 would provide a basis for intervention, effectively closing the practice.

So far as compensation from corporates is concerned, a breach of professional rules does not provide redress. If the undertaking relates to funds on a client account which have not been accounted for, then the SRA's Compensation Fund may be relevant. If the obligation is contractual and given in the usual course of practice, then compensation is likely to be a 'civil liability' within a firm's professional indemnity insurance.

It seems doubtful that seeking undertakings from individual solicitors within corporate firms would be a sensible approach simply to be able invoke the inherent jurisdiction. Summary applications are very rare, but undertakings from corporate firms are very common. Any sensible individual solicitor within a corporate firm should refuse such an undertaking, as performance will almost always be outside of their exclusive personal control. Transactions would be likely to be disrupted for no material mitigation of risk.

In litigation, many undertakings will continue to be enforceable under a different inherent jurisdiction referred to in *Harcus* (at para [135]): 'Thus it is not enough to attract the jurisdiction that a professional person is carrying on a function in court. A barrister is not subject to this jurisdiction, but only to the conceptually distinct inherent jurisdiction of the court to manage its processes and protect them from abuse'.

Where now?

There may well be a case for the SRA to strengthen its approach to undertakings. It could, for example, require compliance with an undertaking as a condition of continued authorisation of a corporate firm under paragraph 3.1 of its Authorisation of Firms Rules. It might make breach of rule 1.3 of its Code of Conduct for Firms a matter of strict liability which would bring it more into line with provisions dealing with client money.

The position of undertakings from corporate law firms has not suddenly changed as a result of *Harcus*. Other sections of the legal profession, such as licenced conveyancers and barristers, have public confidence without ever being 'officers of the court'. A prudent recipient of an undertaking would wish to be sure that it was contractually and professionally binding. Probably millions of undertakings are given and performed each year. When difficulty does arise, it is often because of undertakings which should never have been given or accepted, questions of authority, unclear wording or simply a lack of sufficient care and formality. Undertakings are a serious business. NLJ

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