No Such Undertaking: a review of the law relating to lawyers' undertakings

INTRODUCTION

Undertakings are an established feature of the legal landscape. The courts have recognised them as vital in conveyancing transactions and of much wider application. Discussion usually focusses on what a serious business it is for the party giving an undertaking and what the consequences of breach might. Less often explored is the recipient's perspective. It should not be overlooked. An undertaking should not be accepted any more lightly than one should be given.

This note looks at some of the considerations which arise.

A DEFINITION

The Solicitors Regulation Authority 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".*

In common with the Council for Licensed Conveyancers, CILEx Regulation, Bar Standards and the Faculty Office, which regulates notaries, the SRA treats compliance with undertakings as a regulatory matter.

SOME APPLICATIONS

"Undertakings," said Smith LJ in *Briggs v Law Society* [2005] EWHC 1830 (Admin), "*are the bedrock of our system of conveyancing".* The CLC similarly warned in its Risk Agenda of 2023 that *"the property transfer system will break if conveyancers do not adhere to undertakings".*

The device can be used to resolve what might otherwise be intractable conundrums. Take, for instance, a property which is bought with the help of mortgage finance. To secure its loan, the mortgagee will procure a charge against the title of the property. When the proprietor comes to sell the property on, he will need to be able to offer up clear title. This means that the charge must be removed. But the proprietor is likely to need the completion monies to redeem the mortgage to allow the lender to release its charge. What gives?

The well-established answer is that the Seller's solicitor will undertake to clear any charges on completion. This is one of the standard undertakings contained in the Law Society's Code for Completion by Post. Others include undertakings to hold documents to the order of the Buyer's solicitor and to have the Seller's authority to receive monies on completion.

A few examples from the authorities illustrate the wider application. Undertakings in costs are commonly provided in contentious matters, such as to pay the landlord's costs of an application to assign a lease as in *Goldman and anr v Abbott; Goldman and anr v Allen & Son* (1989) 2 EGLR 78, and to pay the fees of an adjudicator as in *JG Walker Groundworks v Priory Homes* (2013) EWHC 3723 (TCC).

Udall v Capri Lighting (1987) 1 QB 907 was a debt claim. The plaintiff applied for summary judgment. He consented to an adjournment on terms that the directors would grant charges over their homes. The defendant's solicitor undertook to procure the charges.

The plaintiff in *United Mining v Becher* (1910) 2 KB 296 paid monies to the defendant solicitor in anticipation of agreeing terms with his client. The solicitor undertook to return the monies if agreement had not been reached by a certain date.

In *John Fox v Bannister, King & Rigbeys* (1998) QB 925, a Mr Watts changed solicitors. He owed his old solicitors a substantial sum of money in fees. His new solicitors, who were acting for Mr Watts in the sale of a property, undertook not to release the proceeds to him until the outstanding fees were paid.

THE LIMITATIONS

A: Non-solicitors

The Law Society's *Conveyancing Handbook* confirms that undertakings may be accepted from either solicitors or licenced conveyancers. Even so, it is important to recognise that the two are not necessarily the same. This becomes clear when one looks at how an undertaking might be enforced.

In practice, the threat of a regulatory complaint might often be enough to ensure compliance. But where it is not, neither the SRA nor the CLC has the power to enforce an undertaking. Nor indeed does, CILEx Regulation, Bar Standards or the Faculty Office. It will be of limited value to the recipient to know that the defaulting practitioner might face a regulatory sanction.

In *Tradegro v Wigmore Street Investments* (2011) EWCA Civ 268, Lord Neuberger MR recognised that an undertaking might give rise to a trust, a stakeholder arrangement or a contract. Whether any of those in fact come into being will depend on all the circumstances, but there is unlikely to be much difficulty in relation to the more commonplace undertakings. In *Goldman*, for example, the Court of Appeal gave short shrift to an argument that the undertaking could not take effect as a contract because the landlord gave no consideration. It found that the landlord's agreement to deal with the application amounted to consideration.

The enquiry was historically redundant in the case of a *solicitor's* undertaking. It mattered not whether the undertaking related to the holding and application of monies, so as to introduce questions of trusts and stakeholding. It was equally irrelevant whether, on a true construction, it took effect as a contract. As far back as *In re Greaves* (Note) (1827) 1 Cr & J 374 it was established that a solicitor's undertaking would be enforced by the court even though void under the Statute of Frauds.

This is because solicitors are officers of the court. This sets them apart from licenced conveyancers, legal executives, barristers and notaries. A solicitor is subject to the court's supervisory oversight. This empowers the court to enforce a solicitor's undertaking under the inherent jurisdiction. It is a summary procedure. Statements of case, witness statements and disclosure can all be dispensed with. This makes the process quicker and cheaper and easier than an action for breach of contract or breach of trust.

In *Harcus Sinclair v Your Lawyers* (2022) AC 1271, the Supreme Court expressed the view that:

> *There can be no doubt that the underpinning of those* (standard conveyancing) *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. This is not because there is a history of frequent non-compliance*

> *followed by court enforcement. Rather, the mere existence of that ready and swift means of enforcement made it inherently unlikely that a solicitor would fail to comply.*

That said, the court recognised elsewhere in its judgment that licenced conveyancers had been able since 1985 to provide satisfactory undertakings without the backing of summary enforcement. It went on, as well, to confirm that the availability of the inherent jurisdiction was subject to a major limitation.

B: Incorporated practices

The problems of incorporated solicitors' practices were not at first recognised. In *Clark v Lucas Solicitors* [2009] EWHC 1952 (Ch) and *Global Marine Drillships v La Bella and ors* [2014] EWHC 2242 (Ch), it seems to have been taken as read that an undertaking given by an LLP could be enforced under the inherent jurisdiction.

This was called into question after *Assaubeyev v Michael Wilson* [2014] EWCA Civ 1491. In that case, Clarke LJ expressed the view that, while corporate entities can and often do provide legal services, that does not make them officers of the court. The point was *obiter* and the context was different but the reasoning impeccable. Any lingering doubts were laid to rest by *Harcus Sinclair*. The discussion strictly speaking remained *obiter*, but it is now accepted that the inherent jurisdiction cannot be called upon to enforce an undertaking given by an LLP or limited company.

It would have been no answer in *Harcus Sinclair* to say that the individual responsible for giving the undertaking was himself a solicitor. It was clear that he did not give it in his own capacity but rather as a member of the LLP.

The position was different in *Global Marine Drillships*. There, the solicitor ill-advisedly – and disastrously, as the Judge observed - gave undertakings in her personal capacity as well as on behalf of the practice. This left her exposed to a seven-figure liability. The Law Society has since discouraged the practice. It is unlikely that many solicitors would be prepared to make the same commitment. The undertaker might, after all, be digging their own grave.

In an era when the majority of solicitors' practices are LLPs or limited companies, this represents a drastic devaluation of solicitors' undertakings. The Supreme Court was alive to this. It evidently recognised the absurdity of a state of affairs in which:

> *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.*

It accepted that there was nothing in the governing legislation to prevent it from extending the inherent jurisdiction to incorporated practices, but "*with considerable reluctance,*" it declined to determine the point.

Its reasons for exercising restraint were threefold. First, having already decided the case in favour of the solicitors, any pronouncement would necessarily have been *obiter*. Secondly, it considered that a court deciding the issue would benefit from submissions from interested professional and regulatory bodies. Thirdly, it concluded that the question would be better addressed by Parliament than the courts.

In a case where the inherent jurisdiction cannot be prevailed upon, one could see it argued that the solicitor receiving the undertaking had a duty to explain this to the client. That is not to say that the point would be a good one. In *Ruparel v Awan* [2001] 1 Lloyd's Rep PN 258, the court proceeded on the assumption that it was improbable that the recipient would be familiar with the niceties of the inherent jurisdiction.

C: Undertaking not given in professional capacity

It is occasionally propounded that representations made by solicitors in their private life might be enforceable as solicitors' undertakings. This is wide of the mark. The courts have made clear since at least

1910 that the inherent jurisdiction is concerned only with undertakings given by solicitors in their professional capacity.

When Hamilton J came to hear *United Mining* in April of that year, he was able to draw on a passage from *Cordery on Solicitors* to the effect that "*the Court will summarily enforce undertakings given by a solicitor in that character… But the solicitor must be acting professionally".*

Several of the authorities have involved undertakings to pay money. In *Geoffrey Silver & Drake v Baines* [1971] 1 QB 396, both parties were solicitors' practices. A solicitor employed by the defendant borrowed money from the plaintiff on behalf of a client. He gave an undertaking in the name of the firm to repay the loan with interest. The client defaulted. The plaintiff sought to enforce the undertaking. The principal of the defendant firm maintained that he knew nothing about it. He sought to repudiate liability. Chapman J gave judgment for the plaintiff.

In the Court of Appeal, Lord Denning MR spoke of the difficulties of defining when a solicitor gives an undertaking *qua* solicitor. He indicated that it would be likely to amount to a solicitor's undertaking if it concerned money which he had in his hands or how monies he expected to receive were to be disbursed. Together with Widgery LJ, he was satisfied that an undertaking to pay a debt was not a solicitor's undertaking. Megaw LJ felt it unnecessary to decide the point. This was because the court was unanimous that there was too much in issue in the case for the summary procedure to be applied.

United Bank of Kuwait v Hammoud and ors; City Trust v Levy [1988] 3 All ER 418 concerned the activities of a dishonest solicitor named Kenneth Emmanuel at two different firms. At each, he helped to persuade a lender to advance monies to an accomplice on the strength of an undertaking from the firm to make repayment when due. At first instance, the two cases were heard by different Judges. They reached opposing conclusions.

In the Court of Appeal, the question was framed as being whether the undertaking could be considered to be within the ordinary authority of a solicitor. Staughton LJ did not cite *Geoffrey Silver & Drake* but evidently drew on it in identifying two requirements. The first was that "*a fund to draw on must be in the hands of, or under the control of, the firm; or at any rate there must be a reasonable expectation that it will come into the firm's hands".* The second was that "*the actual or expected fund must come into their hands in the course of some ulterior transaction which is itself the sort of work that solicitors undertake".*

Neither requirement was met on the facts, but the lenders nevertheless prevailed. The court held that it was enough that they had reasonably believed that the undertakings were within a solicitor's ordinary authority.

A non-monetary undertaking was considered in *Harcus Sinclair*. The case arose from the Volkswagen emissions litigation. Your Lawyers saw the potential for a group action. On the advice of a broker specialising in litigation funding, it approached Harcus Sinclair with the idea of collaborating. It asked the practice to sign a non-disclosure agreement. Alarmingly, a partner attended to this without troubling to read it. The agreement contained an undertaking not to accept instructions for any other group of claimants without the permission of Your Lawyer.

The idea of a collaboration withered away. Harcus Sinclair partnered instead with Slater Gordon. Your Lawyer was sufficiently put out to bring proceedings. The Judge construed the non-compete undertaking as a solicitor's undertaking. The Court of Appeal's judgment focussed on other aspects of the case. It is unclear what it made of that point. The parties differed as to whether or not it agreed with the Judge.

The Supreme Court took a different view. It agreed with Leading Counsel for Harcus Sinclair that, in determining whether one is dealing with a solicitor's undertaking, it is relevant to take account of whether the undertaking was given in a transaction involving a client and whether it was given to a court or a third party. It described these as "*indicators*". It added some more of its own. These were whether the solicitor was acting on instructions and whether it was acting in a personal or business capacity or a professional capacity.

The court observed that the authorities did not identify a definitive test. It shied away from formulating one but gave guidance which came close to the same thing. It indicated that it will often be helpful to ask two questions. First, whether the undertaking required the solicitor to do or refrain from doing something which

solicitors regularly do as part of their ordinary professional practice. Secondly, what the reason for the undertaking was and whether it related to the sort of work which solicitors regularly carry out as part of their ordinary professional practice. It is likely, it suggested, to be a solicitor's undertaking if the answer to both questions is 'yes'

In applying them to the facts of the case, it had no difficulty in holding that the non-compete undertaking was not a solicitor's undertaking. As to the first question, it concluded that solicitors are in practice to carry out work, not to disqualify themselves from doing so. As to the second, the undertaking was not given in the interests of any client but to further the parties' business interests: in the case of Your Lawyer, to protect a commercial opportunity and in the case of Harcus Sinclair, as a condition of receiving information to allow it to assess the merits of collaboration.

D: Exceptional situations

In *Bolam v Friern Hospital* (1957) 1 WLR 582, McNair J famously directed the jury that a doctor "*is not negligent if he has acted in accordance with a practice accepted as proper by a responsible body medical men skilled in that particular art*". The *Bolam* test is the starting point in any professional negligence claim. A Privy Council case involving undertakings in a conveyancing transaction was an early indication that it will not always be conclusive.

Edward Wong v Johnston Stokes & Master (1984) AC 296 was an appeal from the Court of Appeal of Hong Kong. It involved what was referred to throughout the opinion as a "Hong Kong style" completion. This involved the Buyer's solicitor releasing monies against an undertaking from the Seller's solicitor to provide duly executed title documents. In this instance, the Seller's solicitor had not complied with his undertaking. Instead, he had absconded with the money.

There was compelling evidence, including from the President of the Law Society of Hong Kong, that this was the almost invariable practice in that jurisdiction. The Board accepted this. It acknowledged that the practice was well suited to conditions in Hong Kong. It even went as far as to say that it did not want to discourage its continuance.

It nevertheless accepted that the solicitor had been negligent. This was because the risk of embezzlement was foreseeable, and had in fact been foreseen in a Law Society report. The solicitor could have guarded against the risk by satisfying herself that the Seller's solicitor had the authority of its client to receive the purchase monies. This is the genesis of the undertaking which now appears in the Code for Completion by Post[1].

Where this leaves an English practitioner was explored in *Patel v Daybells* (2001) EWCA Civ 1229. In the usual way, the Seller's solicitor had undertaken to clear charges on completion. This was in fact not done until much later, after the Seller's solicitor was joined to proceedings. The Judge accepted criticisms of *Wong* made by Counsel for the solicitors but felt constrained to accept that it might be negligent to proceed in reliance on an undertaking from the Seller's solicitor. On the facts, however, he found that breach had not been made out.

The Court of Appeal restated the general principle, which had by then been confirmed by the House of Lords[2], that conformity to a common practice is not an automatic defence: the practice must be demonstrably reasonable and responsible. But it doubted, as Robert Walker LJ (giving the judgment of the court) put it "*whether the Privy Council's views about conveyancing in Hong Kong 25 years ago are directly applicable to conveyancing in England twelve years ago".* In dismissing the appeal, the court accepted the proposition put forward by Leading Counsel for the solicitors that reliance on a solicitor's undertaking to discharge a mortgage will not be negligent other than in an exceptional situation.

It left open what exceptional situations might be but cited the evidence of the conveyancing expert called by the solicitors that it would not be normal or advisable to accept an undertaking where the lender was not a

[1] As was discussed in *Patel* (*op cit*) and *P&P Properties v Owen White and Caitlin; Dreamvar v Mishcon de Reya* (2019) Ch 273
[2] In *Bolitho v City & Hackney HA* (1998) AC 232

member of the Council for Mortgage Lenders or where the value of the transaction exceeded the minimum level of professional indemnity cover.

The authors of the Conveyancing Handbook draw inconsistent conclusions from this. In one chapter, they suggest that, in the two scenarios identified, an undertaking should not be accepted. They posit that it might be necessary for completion to proceed in the traditional way with a face-to-face meeting at the solicitors' offices.

Yet, in an appendix to which that chapter cross refers, they suggest no more than that additional steps should be considered These, they indicate, might include obtaining written confirmation of authority from the lender, insisting on transferring completion monies directly to the lender and procuring a warranty that the Seller's solicitor has sufficient insurance cover. None of this is framed in mandatory language. The authors do, however, consider it essential that the client is warned of the risks and required to give clear instructions that it is willing to take them.

DISCUSSSION

Undertakings remain an essential device, particularly in conveyancing transactions. But their limitations should be kept in mind. The possibility of summary enforcement has now been severely curtailed. Not only does the inherent jurisdiction have no application to licensed conveyancers, but also it cannot be invoked against an incorporated solicitors' practice. Even if the undertaking is given by an individual solicitor or on behalf of a traditional firm, it will only be enforceable as a solicitor's undertaking if given in a professional capacity. There are certain scenarios in which it has long been routine practice to obtain undertakings. But exceptional circumstances might require a departure from that practice. In more novel situations, it will need to be carefully considered whether a proposed undertaking gives the comfort desired.

Further Information

Given the generality of the note it should not be treated as specific advice in relation to a matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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Caytons
Changing Perceptions

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