SOLICITORS' UNDERTAKINGS: LEGAL AND REGULATORY CONSIDERATIONS FOR SOLICITORS AND LAW FIRMS

A practice note considering the legal and regulatory issues which arise when giving a solicitor's undertaking.

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SCOPE OF THIS NOTE

A solicitor's undertaking is a promise by a solicitor to do, or to refrain from doing, a certain act. It is defined by the Solicitors Regulation Authority (SRA) 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" (*SRA: Standards and Regulations: SRA Glossary*).

A solicitor's undertaking must be given either by a solicitor or on behalf of a solicitor or solicitors' firm. This means that although only solicitors can give undertakings in their own name, it is possible for an employee who is not a solicitor to give a solicitor's undertaking on behalf of either an individual solicitor or a firm, if they have actual or ostensible authority to do so.

Incorporated law firms (usually structured as limited liability partnerships (LLPs) or limited companies) regulated by the SRA may give undertakings although the effect of those undertakings is more limited following recent developments in case law (see *Article, Enforcing solicitors' undertakings: practical implications of the Supreme Court's decision in Harcus Sinclair v Your Lawyers [2021] UKSC 32*).

Other regulated professionals such as barristers may not give a solicitor's undertaking, although they may have their own professional obligations and may be obliged, under their own codes of conduct, to comply with such undertakings. For example, an obligation to comply with undertakings which have been given can be found in the codes of conduct applicable to both barristers (*Bar Standards Board (BSB): BSB Handbook, Part 2 The Conduct Rules, Rule C11*) and licensed conveyancers (*Council for Licensed Conveyancers: Handbook, Overriding Principle 2*). Those obligations raise separate legal issues which are outside the scope of this note.

Solicitors' undertakings can carry considerable liability risk. Solicitors and firms must carefully consider the effect of a giving a solicitor's undertaking to minimise the risk of adverse consequences for clients and third parties, as well as the for the firm and the individual solicitor giving the undertaking.

The note summarises the legal and regulatory implications of solicitors' undertakings, including the legal requirements for identifying when an undertaking is given, the effect of giving an undertaking and the options for enforcing undertakings and consequences of breach.

PROMISES THAT CAN BE A SOLICITOR'S UNDERTAKING

There are a wide variety of situations where giving a solicitor's undertaking is standard practice, especially in the context of conveyancing of property.

Conveyancing is an area where the use of undertakings is regarded as particularly important both for society and for the legal profession. Their importance was explained in *Briggs v The Law Society [2005] EWHC 1830 (Admin)* in the following terms:

> 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. (Smith LJ at paragraph 35.)

The *Law Society's Code for Completion by Post* relies heavily on undertakings. The breadth of the undertakings used and their significance were summarised in the Supreme Court's judgment in *Harcus Sinclair v Your Lawyers [2021] UKSC 32* as follows:

> Numerous undertakings are given and received. They include: following the provisions of the Code, the redemption or discharge of mortgages out of the purchase moneys, undertakings to have the authority of seller and mortgagee to receive moneys, to deliver specified documents to the purchaser, to notify that completion has taken place to the parties and their agents and to authorise the seller's agents to release the keys to the purchaser. This efficient and economical scheme could only be prudently used by participating solicitors as part of their service to their clients if the solicitor could be sure that the various undertakings were all going to be complied with without question by all the other solicitors concerned. Where there is a chain of transactions all completing at the same time, the interlocking undertakings would be forthcoming from a significant number of different firms. (At paragraph 126.)

Undertakings are also routinely given in litigation. They may, for example, include undertakings about preserving the confidentiality of documents, or about paying the costs of another party (such as paying third party's costs of disclosure following a third party disclosure application). Undertakings are also given to the court. An undertaking given to the court raises different questions as regards enforcement: see *Undertakings to the court*.

Another context where undertakings are routinely given is to deal with solicitors' costs. For example, when a client changes solicitor in the middle of a transaction or dispute, it is common for the former solicitor to transfer the client's papers (which they would otherwise be entitled to retain until paid, under a lien) to the new solicitor only on receipt of an undertaking that their fees will be paid.

Practical Law has several standard documents for specific undertakings which are commonly given, including:

- *Standard document, Undertaking to hold title deeds.*
- *Standard document, Undertaking to stamp stock transfer form.*
- *Standard document, Undertaking to hold completion monies.*
- *Standard document, Undertaking to hold a deed of release.*
- *Practice note, Undertakings to discharge a mortgage: Law Society guidance.*
- *Practice note, Undertakings for a landlord's solicitors' costs on the grant of a licence under a lease.*
- *Standard document, Undertaking to pay costs in connection with tenant's licence.*

Although there are several standard contexts where promises are regarded as undertakings, the rules concerning solicitors' undertakings are not limited to those promises. Any promise given by a solicitor may, in principle, be a solicitor's undertaking, if it is given in their capacity as a solicitor: see *Harcus Sinclair v Your Lawyers [2021] UKSC 32, at paragraph 103*. The words "undertaking" and "undertake" are not required for a promise to be an

undertaking: the question is whether the promise is properly regarded as being an undertaking given by or on behalf of the solicitor in the required capacity.

PROMISES RECOGNISED AS SOLICITORS' UNDERTAKINGS

Examples of promises which have been recognised as solicitors' undertakings, in addition to the more common examples above, include:

- An undertaking given by a solicitor to repay money to a third party, if negotiations for an agreement between the third party and the solicitor's client did not lead to an agreement by a given date (*United Mining and Finance Corporation Ltd v Becher [1910] 2 KB 296*).
- An undertaking given by a solicitor to his client's former solicitors not to release moneys in the solicitor's possession belonging to the client until a dispute over unpaid fees had been resolved (*John Fox v Bannister King & Rigbeys [1988] QB 925*).
- An undertaking given during debt proceedings by the defendant's solicitor to the claimant's solicitor, to the effect that the directors of the defendant would provide security for its liabilities to the claimant (*Udall v Capri Lighting Ltd [1988] QB 907*).

PROMISES NOT RECOGNISED AS SOLICITORS' UNDERTAKINGS

Examples of promises which have been said not to be solicitors' undertakings include:

- A promise to hold or pay money in relation to the lease of a solicitor's office space (*Harcus Sinclair, at paragraph 104*). The Supreme Court explained that this did not involve an undertaking to do something that solicitors do as part of their ordinary professional practice because the solicitors were entering the transaction in their own right and in furtherance of the firm's business interests (*at paragraph 115*).
- A promise given under a covenant by a solicitor on leaving a firm not to work for any client of the firm for a period of time (*Harcus Sinclair, at paragraph 104*). The Supreme Court explained that this did not involve an undertaking to do something that solicitors do as part of their ordinary professional practice, as they do not routinely prevent themselves from working for clients, and because the solicitor was giving the undertaking to protect the firm's business interests (*at paragraph 116*).
- A promise given to another firm in the context of intended co-operation in group litigation not to act for a separate group of claimants in the group litigation without the recipient's consent (*Harcus Sinclair, at paragraphs 117 to 122*). The Supreme Court concluded that this did not involve an ordinary part of the solicitor's practice (agreeing not to compete for work) and was intended to protect the business interests of the recipient.
- A promise given by an assistant solicitor on behalf of his firm that a loan obtained from another firm on behalf of his firm's client would be repaid by a certain date with interest (*Geoffrey Silver & Drake v Baines [1971] 1 QB 396*). The Court of Appeal regarded this as a straightforward promise to repay a debt, and not given in the solicitor's capacity "as a solicitor".
- Promises by a solicitor to repay money due (now or in the future) to the claimant from a third party and a guarantee of a third party's obligation to repay a loan to the claimant (*Ruparel v Awan [2001] 1 Lloyd's Rep PN 258*). These were regarded by the High Court as promises to repay sums which fell due, in which there was no "solicitorial" activity being provided and which fell outside the scope of the promisor's capacity as a solicitor.

Therefore, the boundary between promises which are and are not given "in the capacity as a solicitor" can be very difficult to draw clearly. In *Harcus Sinclair*, the Supreme Court recognised that there is no definitive test, but identified two questions which it considered as helpful in determining whether an undertaking is given in a solicitor's capacity "as solicitor":

> 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. (*At paragraph 112*.)

From the perspective of the SRA Codes of Conduct, paragraphs 1.3 of both the *SRA Code of Conduct for Individuals*, which applies to solicitors, registered European lawyers (RELs) and registered foreign lawyers (RFLs) and the *SRA Code of Conduct for Firms* simply provide that SRA authorised persons must:

> Perform all undertakings given [by them] and do so within an agreed timescale or if no timescale has been agreed then within a reasonable amount of time.

As such, neither the SRA's definition of undertaking (see *Scope of this note*) nor its rule requiring compliance with undertakings, is expressly limited to promises given by solicitors in their capacity as solicitors. However, it is likely that the SRA and the Solicitors Disciplinary Tribunal (SDT) will take the same approach as indicated in the case law, given that the introduction to the SRA Codes of Conduct state that the rules "apply to conduct and behaviour relating to your practice" (in respect of individuals) and "apply in the context of your practice" (in respect of firms).

EFFECT OF GIVING AN UNDERTAKING

An undertaking, like a contract, is construed objectively. The question is how the undertaking would reasonably have been understood by the recipient: *Reddy v Lachlan [2000] Lloyds LR 858 (CA), at paragraph 15*.

In some cases, there may be ambiguity about the terms of an undertaking. There is case law indicating that in those circumstances, the undertaking will be construed so as to resolve ambiguity against the solicitor, and in favour of the recipient (*Templeton Insurance Ltd v Penningtons Solicitors LLP [2006] EWHC 685 (Ch), Lewison J at paragraph 8*).

The effect of giving a solicitor's undertaking is simple: a solicitor will be expected to comply with it, according to the terms of the undertaking, within a reasonable time. It is a strict liability and the solicitor must ensure that the undertaking is honoured.

This point is extremely important to solicitors who are asked or required to give undertakings in the course of their practice. It is essential, from the solicitor's perspective, that the undertaking involves matters which are within the solicitor's control, so that the solicitor does not find themself responsible for a breach of the undertaking over which they had no control.

If an undertaking is breached, one or more of three consequences may follow:

- The recipient may in some circumstances bring court proceedings to enforce the undertaking summarily.
- The solicitor may be reported to the SRA, and face professional sanctions either from the SRA or, if the matter is referred to it, from the SDT.
- If the undertaking also constitutes a contract or gives rise to another cause of action, the recipient may bring proceedings to enforce it.

(*Udall v Capri Lighting Ltd [1988] QB 907, at page 916D.*)

Each of these three alternatives is addressed separately below. A breach of undertaking is prima facie professional misconduct, and if court proceedings are brought in response to a breach, the court may well order that the undertaking be honoured, or order that compensation for the breach be paid.

COURT'S JURISDICTION TO ENFORCE UNDERTAKINGS

The High Court has an inherent jurisdiction to supervise the conduct of solicitors, as officers of the court. Although not limited to the enforcement of undertakings, the court's inherent jurisdiction is most often invoked in that context. The *Solicitors Act 1974* provides for regulation of solicitors' conduct by the SRA and proceedings before the SDT. Section 50(2) preserves the court's jurisdiction as follows:

> (2) 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 in respect of any solicitor, attorney or proctor admitted to practise there.

However, the practical effect of this jurisdiction is subject to a significant limit: in *Harcus Sinclair v Your Lawyers [2021] UKSC 32*, the Supreme Court confirmed that as the law currently stands, this jurisdiction is available only in respect of solicitors, not the incorporated law firms in which they practice. Given that most firms regulated by the SRA are either limited liability partnerships or limited companies, an undertaking given by a firm (as opposed to being given personally by a solicitor) may well fall outside the scope of this jurisdiction. For further details, see *Article, Enforcing solicitors' undertakings: practical implications of the Supreme Court's decision in Harcus Sinclair v Your Lawyers [2021] UKSC 32*.

The key principles underpinning the exercise of the court's jurisdiction over solicitors can be summarised as follows:

- The jurisdiction is described as being founded on professional misconduct. The conduct need not be criminal and need not be dishonest. The relevant conduct for engaging the jurisdiction is conduct which "involves a failure on the part of a solicitor to fulfil his duty to the court and to realise his duty to aid in promoting in his own sphere the cause of justice": *Myers v Elman [1940] AC 282, at page 319*.
- The jurisdiction in respect of enforcing undertakings is compensatory rather than punitive, although it retains a disciplinary slant.
- The jurisdiction will only be exercised "where the conduct of the solicitor is inexcusable and such as to merit reproof" (*R & T Thew Ltd v Reeves (No 2) (Note) [1982] QB 1283, at page 1286*).
- However, failure to comply with an undertaking "is prima facie to be regarded as misconduct" and "this is so even though [the solicitor] has not been guilty of dishonourable conduct" (*Udall v Capri Lighting [1988] QB 907, at page 917,* citing *United Mining and Finance Corporation Ltd v Becher [1910] 2 KB 296 and John Fox v Bannister, King & Rigbeys*).
- If the misconduct of the solicitor leads to a person suffering loss, then the court has power to order the solicitor to make good the loss occasioned by their breach of duty.
- In exceptional circumstances, a solicitor may be able to give an explanation for their failure to honour an undertaking, such that a court might conclude that on the facts of the case, there was no misconduct. See *Rare circumstances where a breach of undertaking might not be professional misconduct.*
- The court has a discretion as to the relief granted if a breach of undertaking is proved, but unless the solicitor can show that the undertaking is now impossible to perform, the order will usually be to require the solicitor to do that which they had undertaken to do (Re A Solicitor (Lincoln) [1966] 1 WLR 1604).

Where an undertaking is impossible to perform, the court will likely make an order requiring the recipient to be compensated for breach of undertaking (*Udall v Capri Lighting Ltd [1988] QB 907, at page 918A, Re A Solicitor [1966] 1 WLR 1604, at pages 1608D and 1609H*).

See generally *Udall v Capri Lighting Ltd [1988] QB 907, at pages 917-918*.

PROCEDURE

The court's supervisory jurisdiction over solicitors is often referred to as a "summary" jurisdiction, and one of the most attractive features of the jurisdiction is that it is ordinarily exercised through a Part 8 claim under the Civil Procedure Rules. Unlike the usual Part 7 claims, Part 8 claims involve a much shorter and simpler procedure, with straightforward exchange of written evidence and submissions, and a rapid timeline to a final decision. This can be very significant, especially where the undertaking has been given in respect of time-sensitive matters (as is often the case in conveyancing and litigation contexts).

However, where there is a substantial dispute of fact requiring that disclosure be given or evidence be heard, it is open to the court to transfer the claim to Part 7. This would require the claim to go through the longer process of pleadings, disclosure and the exchange of evidence before hearing oral evidence at trial. The court may adopt whatever procedure is appropriate to decide the issues before it, including issues of fact (*John Fox v Bannister King & Rigbeys, at pages 930-931*). This was the approach taken by the High Court in Harcus Sinclair, where the claim was originally commenced under Part 8 and was transferred to Part 7 for an expedited trial (*Harcus Sinclair LLP v Your Lawyers Ltd [2018] 1 WLR 2479, at paragraphs 19-21*).

REGULATORY SANCTIONS AND PROCEEDINGS BEFORE THE SDT

An alleged breach of undertaking may be reported, most likely by the recipient or the solicitor themselves, to the SRA. If reported to the SRA (or if the breach otherwise comes to the SRA's attention), the SRA will decide whether to investigate.

For an overview on SRA investigations and enforcement procedures, see *Practice note, SRA investigations and enforcement*. For more information on the SDT, see *Practice note, Solicitors Disciplinary Tribunal: its purpose and powers*.

The SDT's approach to determining sanctions for misconduct is set out in a Guidance Note on Sanctions, currently in its ninth edition (published December 2021) (see *SDT: Publication Of Guidance Notes On Sanctions, Other Powers and Appeals*).

It is likely that both the SRA and the SDT will regard a breach of undertaking as serious misconduct and depending on the circumstances of the case, it may merit a substantial sanction.

Allegations of misconduct are likely to include one or more of the following SRA Standards and Regulations (StaRs) breaches:

- Failing to 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 (SRA Codes of Conduct: for *firms* and *individuals*, paragraphs 1.3).
- Failing to act in a way that upholds public trust and confidence in the solicitors' profession and in legal services provided by SRA authorised persons (*SRA Principles*, principle 2).
- Failing to act with integrity (*SRA Principles*, principle 5).
- Where the undertaking is given to a client or to facilitate the progress of a client matter, failing to act in the best interests of each client (*SRA Principles*, principle 7).

In addition, the specific terms of the undertaking given may give rise to other breaches, such as breaches of the SRA *Accounts Rules*.

Neither the SRA nor the SDT has jurisdiction to make an order for redress to the recipient of an undertaking, although many solicitors facing SDT proceedings will take all possible steps to comply with the undertaking to mitigate any breach of undertaking and thereby reduce the sanction at the end of the proceedings. The SDT may also incentivise compliance by use of a suspended sanction, suspended on condition that the misconduct does not continue (which may require the undertaking to be performed if the benefit of the suspension is to be obtained).

UNDERTAKINGS AS CONTRACTS

A promise which is a solicitor's undertaking may also be a contractual promise. In Harcus Sinclair, the law firm which received the alleged undertaking was able to enforce the promise in court proceedings because it was a contract, despite it:

- Not being a solicitor's undertaking.
- Having been given by an LLP.

Although undertakings may also be contracts, this cannot be assumed. The existence of a contract depends on whether the promise given meets the ordinary rules for contract formation. The requirements for the formation of a valid contract are generally accepted as being:

- Offer and acceptance of the terms.
- Consideration.
- Intention to create legal relations.
- Certainty of terms.

Solicitors' undertakings may fail this test in relation to the consideration and intention to create legal relations requirements. Third party rights issues may also be relevant.

- Intention to create legal relations: there will always be a question of fact as to whether the parties who gave and received the undertaking intended to enter into a contractual relationship. For example, in seeking to rely on an undertaking as a contract in the context of conveyance, it would be necessary to show that the parties objectively intended either that a contract would be formed between the seller's solicitors and the buyer (in

addition to between the seller and the buyer) or that a contract would be formed between the seller's solicitors and the buyer's solicitors, which their clients would be entitled to enforce.

- Consideration: a solicitor's undertaking does not need to be supported by consideration. A unilateral promise by a solicitor in the course of their practice is regarded by the courts as enforceable under the inherent jurisdiction as a matter of professional conduct, because solicitors should honour their promises. Many undertakings will be given in a context where consideration can be identified, but that may not always be clear. Importantly, the requirement for consideration is that consideration must "move from the promisee", that is, the recipient of the undertaking (*Tweddle v Atkinson (1861) 1 B & S 393, at paragraph 399*). The recipient of the undertaking must therefore have given some form of recognisable consideration in return for the undertaking being given, albeit that the consideration does not have to be given to the solicitor in question.
- Third party rights: undertakings are routinely offered by solicitors to other solicitors. However, in many cases it will be the clients of the solicitors who have an interest in ensuring that the undertaking is honoured. If the undertaking is received by a solicitor on behalf of their client and the client gives the consideration, no issue of third party rights would arise. However, if the undertaking is received by the solicitor in their own capacity (which would have to be the case if, for example, they give the consideration), then it would have to be shown that the contract intended to confer a benefit on the client. For more information on third party rights, see *Practice note, Contracts: privity and third party rights and obligations*.

Assuming that the undertaking does amount to a contract, then it can simply be enforced as such in the ordinary way, without any need to rely on special principles or the court's supervisory jurisdiction.

UNDERTAKINGS AS TRUSTS

In very specific circumstances, an undertaking may exist in parallel to a trust, expressed in the same promise. If a solicitor gives an undertaking to a client that the client's money will be held by the solicitor to the client's order, then that will be a requirement of the trust on which the solicitor holds the client's funds. It will also be an undertaking. In those circumstances, an action for breach of trust would exist in parallel to any undertaking-based remedy, along with other possible actions against third parties for dishonest assistance of a breach of trust or knowing receipt of trust funds.

In those circumstances, a solicitor may well face disciplinary proceedings based on breaches of the SRA Accounts Rules.

AUTHORITY TO GIVE UNDERTAKINGS: WHO IS BOUND WHEN AN UNDERTAKING IS GIVEN?

The Supreme Court confirmed in Harcus Sinclair that ordinary principles of agency govern responsibility for compliance with undertakings, at least as far as the court's jurisdiction is concerned.

In *Harcus Sinclair*, the promise (which the Supreme Court also found was not a solicitor's undertaking in any event) had been contained in a contractual document signed by a senior partner of the firm "for and on behalf of" the LLP. The question therefore arose whether the partner, as the solicitor who had allegedly signed an undertaking, had any personal responsibility for the firm's compliance.

The Supreme Court concluded that the partner did not, on the application of ordinary principles of agency and separate corporate personality of the LLP (*Harcus Sinclair v Your Lawyers [2021] UKSC 32, at paragraphs 144-145*).

Accordingly, the position can be summarised as follows as regards the court's jurisdiction:

- Where a solicitor gives an undertaking on their own behalf, no issue of authority or agency arises: the solicitor is simply bound to honour the undertaking given.
- Where an employee gives an undertaking on behalf of the firm or individual solicitor, the firm or individual will be bound if the employee had authority, or ostensible authority, to bind them, in the same way as if the undertaking were a simple contract (*Geoffrey Silver & Drake v Baines*), applying the ordinary law of agency. Therefore, an employee who is not a solicitor, such as a paralegal or employed barrister, may nonetheless be able to give a solicitor's undertaking on behalf of a firm or individual solicitor. That is because the law recognises the promise as having been given by the principal and not the agent. The employee will not be bound by the undertaking personally, unless they are a solicitor and also gave the undertaking personally as well as on behalf of the firm (*Harcus Sinclair*).
- The position is the same for partners who are members of the firm and solicitors, but not employees. It would be very unusual for a partner (or for an employee who uses the title of partner) not to have ostensible authority to bind the firm, even if they have not actually been authorised to do so.

An employee who is not a solicitor may give an undertaking on behalf of a firm, but as a result of the decision in *Harcus Sinclair*, court proceedings to enforce the undertaking under its inherent jurisdiction would only be available in those circumstances if the undertaking is given on behalf of an individual solicitor or an unincorporated firm.

As with any issue of agency and authority to enter into commitments on behalf of an employer, firms' authorisation policies may well indicate when an employee has actual authority to give an undertaking on the firm's behalf. Some firms' email footers contain explanatory comments about undertakings not being given by email, which may have a bearing on ostensible authority to give undertakings by email on the firm's behalf.

It remains to be seen whether the SDT will take the same approach. It may take a slightly different approach, because under paragraph 8.1 of the *SRA Code of Conduct for Firms*, managers of firms are responsible for the firm's compliance with the Code. Accordingly, while a partner who gives an undertaking in the firm's name may not be responsible for compliance in their capacity as the person who gave the undertaking, they will be responsible for compliance with it under paragraph 8.1. That liability is joint and several if there are other managers in the firm, but a partner who is so closely involved in the relevant matter that they give the undertaking and had direct responsibility for its breach would likely face a much heavier sanction than other partners who were entirely uninvolved.

RARE CIRCUMSTANCES WHERE A BREACH OF UNDERTAKING MIGHT NOT BE PROFESSIONAL MISCONDUCT

In certain specific circumstances, a court or tribunal may find that although an undertaking has not been honoured, the solicitor in question is not guilty of professional misconduct. In *Udall v Capri Lighting*, Balcombe LJ noted that a failure to comply with an undertaking is prima facie regarded as misconduct, even if the conduct of the solicitor in question is not dishonourable, but that exceptionally an explanation could be offered to avoid a finding of misconduct.

It would be very rare for a court or tribunal to consider that a breach of undertaking is not misconduct given:

- The importance of undertakings (especially in conveyancing).
- The likely reliance on them by third parties.
- The fact that solicitors give undertakings voluntarily.

The most likely situation where a finding of no misconduct might be made would be if a solicitor gave an undertaking as to actions which were reasonably believed at the time of the undertaking as being within their control, but where that reasonable belief that the solicitor could ensure compliance was ultimately proved to be wrong because of a third party's actions or some significant external event. If the developments rendering performance impossible were foreseeable, or if the solicitor did not consider the risk that it might be impossible to perform the undertaking, then a court or tribunal would be more likely to conclude that the solicitor acted improperly in giving the undertaking and find the solicitor culpable for the breach.

The fact that compliance with an undertaking is impossible is not sufficient to prevent a finding of misconduct or enforcement. See *Court's jurisdiction to enforce undertakings*.

UNDERTAKINGS TO THE COURT

Any person can give an undertaking to the court. If they do so, then it may be a contempt of court if the undertaking is breached, and the court may make orders to enforce the undertaking or punish the contempt in the exercise of its inherent jurisdiction. That is a related jurisdiction to the supervisory jurisdiction over officers of the court, but it is conceptually different from a "solicitor's undertaking", which can be enforced by the court even where the undertaking given had nothing whatsoever to do with court proceedings: the fact that a solicitor is an officer of the court means that the court becomes involved in ensuring that promises made by solicitors are honoured.

Although the court's two jurisdictions are distinct, an undertaking to the court by a solicitor or firm would still be an undertaking within the meaning of the term in the StaRs. A breach of an undertaking to the court could lead to disciplinary proceedings and sanctions in the same way as a breach of an undertaking to another party. The SDT would likely regard a breach of an undertaking given to the court as being serious professional misconduct requiring a firm sanction in the absence of strong mitigating circumstances.

MONITORING COMPLIANCE WITH UNDERTAKINGS

Under paragraphs 2.1, 2.2 and 2.5 of the *SRA Code of Conduct for Firms,* firms are required to have effective governance structures, arrangements, systems and controls in place to ensure that the StaRs are complied with by the firm and by its managers and employees. Firms are required to keep records to demonstrate compliance and to identify, monitor and manage material risks.

Given these obligations, it is good practice for firms to require all undertakings given to be recorded on a centralised database, which can then be used to ensure that the undertakings have been properly performed. Any breaches can then be addressed promptly, with all necessary steps being taken to mitigate issues arising, and the matter being reported to the SRA if necessary. For a checklist summarising points to consider before giving a solicitors' undertaking, see *Checklist, solicitors' undertakings*. For more on the StaRs and reporting obligations, see *Practice note, SRA Principles and Codes of Conduct: reporting obligations and whistleblowing.*