Supreme Court Revisits Restraint of Trade

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The UK Supreme Court has recently revisited the English law doctrine of restraint of trade in *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32, clarifying the scope of the necessary enquiry into whether a contractual clause restraining the ability of a party to trade is unreasonable and therefore unenforceable. The Court cautioned against slavishly focusing on the words of the contractual restraint clause alone, holding instead that the parties' non-contractual intentions may be taken into account.

The Supreme Court's decision is the third time since 2019 that it has considered the doctrine, and comes on the back of the Court of Appeal's recent decision in *Quantum Actuarial LLP v Quantum Advisory Limited* [2021] EWCA Civ 227, which we covered in a previous bulletin here. In that bulletin, we set out the general principles of the doctrine of restraint of trade. In *Harcus Sinclair*, the Supreme Court considered the specific issue of how to assess the legitimate interests of the beneficiary of the restraint, and so determine its reasonableness.

Harcus Sinclair involved a novel fact pattern for restraint of trade cases. It concerned a dispute between two law firms over which firm could act for group claimants in prospective Volkswagen diesel emissions litigation. Your Lawyers Ltd ("Your Lawyers") had approached Harcus Sinclair LLP ("Harcus Sinclair") regarding the proposed group litigation and had provided a draft Non-Disclosure Agreement ("NDA"). Harcus Sinclair executed the NDA, which contained an undertaking not to "*accept instructions for or to act on behalf of any other group of Claimants in the contemplated Group Action*", without Your Lawyers' permission, for a period of six years.

Following execution of the NDA, the two law firms exchanged information and discussed ways to collaborate. Ultimately, they failed to reach agreement, and their discussions ceased. Your Lawyers continued to try to form a group claim and gathered a group of claimants. Despite the terms of the NDA, Harcus Sinclair also formed its own group of claimants, entering into a collaboration agreement with another firm. Harcus Sinclair then sought a group litigation order from the court. The order was opposed by Your Lawyers on the basis, among other things, that Harcus Sinclair was in breach of the restraint clause. In the High Court, Your Lawyers sought and obtained an injunction

preventing Harcus Sinclair from acting for any group claimants. On appeal to the Court of Appeal, the injunction was discharged on the basis that the restraint clause was an unreasonable restraint of trade. Your Lawyers appealed to the Supreme Court.

The issues on the appeal were:

- whether the non-compete undertaking given by Harcus Sinclair to Your Lawyers was enforceable, or whether it was an unreasonable restraint of trade; and
- whether the non-compete undertaking was a solicitor's undertaking and, if so, whether it was enforceable against the individual solicitor who gave the undertaking on behalf of his firm and also against that law firm.

Restraint of Trade

There was no dispute between the parties that the non-compete undertaking in the NDA could engage the restraint of trade doctrine, and so the Court was solely concerned with whether the restraint of trade in this case was reasonable.

The Court held that it was well-established in the case law that two factors had to be considered: (i) whether the non-compete clause was reasonable as between the parties; and (ii) whether the non-compete was otherwise contrary to the public interest.

- **Reasonableness between the parties**. It is for the party trying to rely on a non-compete undertaking, in this case Your Lawyers, to establish that it is reasonable as between the parties. To do this, the Supreme Court held that Your Lawyers had to show that the non-compete clause protected a legitimate interest, and also show that the scope of the restraint went no further than was reasonably necessary to protect that interest.

  The Court explained, however, that "*there is a difficult, and largely unexplored, critical issue as to the range of enquiry that is permissible in determining whether the promisee has legitimate interests*". In particular, it had to consider whether "*one can take into account not only the contractual obligations of the parties but also (assessed objectively at the time the contract was made) their non-contractual intentions, or what they contemplated, as a consequence of entering into the contract*".

  The Supreme Court noted that in the majority of previous cases, a party's legitimate interests had been discerned almost entirely by a close examination of the provisions of the parties' contract. The Court clarified, however, that there was no need for the

legitimate interests "*to be spelt out, or referred to, in the contract*". In determining a promisee's legitimate interest, the Court would take account not only of the parties' obligations as expressed in the terms of their contract, but also of their broader intentions, assessed objectively, at the time the contract was made. In this case, the Supreme Court held that, even though the parties had not included any positive obligation in their NDA requiring them to collaborate on the preparation of group litigation, their informal intention to collaborate should be taken into account.

The Court also held that:

- Where two parties are of equal bargaining power, a court should approach the question of reasonableness on the basis that such parties can generally be expected to be able to look after their own interests and agree terms that are reasonable between themselves. This factor was of particular importance in the *Quantum Actuarial* case (referred to above and detailed in our previous update here), and indicates that the Court may be reluctant to find a clause is unreasonable.

- The duration of the non-compete clause in this case, six years from the date of the NDA, was reasonable, since it was logical and necessary for it to last for a period roughly equating to the limitation period that would apply to the group claims.

- The restriction in this case was concerned solely with particular contemplated diesel emissions litigation, and Harcus Sinclair was not restricted in carrying on any other part of its business.

On that basis, the Court concluded that the non-compete undertaking was reasonable as between the parties.

- **Public interest**. If the promisee succeeds in establishing that the non-compete undertaking is reasonable as between the parties, the burden shifts to the promisor to establish that the undertaking is nevertheless unreasonable as being contrary to the public interest.

The Supreme Court considered that the non-compete undertaking was not contrary to public interest in this case, since:

- there was no public policy against a solicitor undertaking not to continue acting for a client;

- there was a public interest in law firms knowing that the courts would enforce a reasonable non-compete undertaking;

- the restriction in this case was narrow; and
- there were a number of firms willing and able to run group claims, and it was not contrary to the public interest for Harcus Sinclair to be removed from the pool – the removal of Harcus Sinclair did not mean that the ability of group litigants to access justice would be unduly restricted.

Accordingly, the Supreme Court held that the non-compete undertaking in the NDA was enforceable. The Supreme Court therefore allowed Your Lawyers' appeal, reinstating the injunction to prevent Harcus Sinclair from representing any group litigants in the anticipated Volkswagen diesel emissions litigation.

SOLICITORS' UNDERTAKING

As an alternative argument, Your Lawyers had submitted that the non-compete undertaking in the NDA amounted to a solicitor's undertaking. Under English law, an undertaking given by a solicitor is given special importance, and a solicitor may be found in breach of their professional obligations and face serious consequences if they fail to comply with such undertaking. Your Lawyers argued that, since solicitors are considered officers of the Court, the Court should exercise its supervisory jurisdiction and compel Harcus Sinclair to comply with the non-compete undertaking irrespective of whether it was an unenforceable restraint of trade.

The Supreme Court considered two points. First, it concluded that since the promise not to pursue group litigation was not given by Harcus Sinclair as part of its ordinary professional practice of representing clients, but was instead given by Harcus Sinclair acting in its own business interests, the non-compete did not amount to a "solicitors' undertaking". Accordingly, Your Lawyers' alternative argument was rejected.

The Supreme Court also considered a broader question whether, had the non-compete undertaking been a "solicitors' undertaking", it would have bound not only the solicitor who signed it, but the whole of Harcus Sinclair as a firm. However, given the Court's finding that the restraint clause was reasonable, and that it did not amount to a "solicitors' undertaking", the Supreme Court considered, "*with considerable reluctance*", that it was unnecessary and inappropriate to determine whether its supervisory jurisdiction extended to incorporated law firms as well as to individual solicitors on this occasion. The point therefore remains undecided for the time being.

KEY TAKEAWAYS

The Supreme Court's decision is a helpful confirmation that, when considering whether a non-compete clause is reasonable to protect the parties' legitimate interests, the extent of the legitimate interests that may be protected is not determined solely by reference to the wording of the contract itself, but may take into account the surrounding circumstances. It will remain useful for parties to continue to record clearly in their contracts the scope of what a non-compete clause is intended to protect, but a failure to do so may be capable of cure by providing evidence of the parties' contemporaneous intentions.

As for the reach of the Court's supervisory jurisdiction over solicitors, the case highlights the unsatisfactory position with regard to solicitors' undertakings in the context of incorporated law firms, and the need for further attention to this issue.

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