Trinity Term
[2021] UKSC 32
On appeal from: [2019] EWCA Civ 335

JUDGMENT

Harcus Sinclair LLP and another (Respondents) *v* Your Lawyers Ltd (Appellant)

before

Lord Lloyd-Jones
Lord Briggs
Lady Arden
Lord Hamblen
Lord Burrows

JUDGMENT GIVEN ON

23 July 2021

Heard on 24 and 25 March 2021

Appellant
Richard Coleman QC
Philip Ahlquist

(Instructed by Your Lawyers Ltd)

Respondents
Jonathan Crow QC
Jawdat Khurshid QC
Josephine Higgs
(Instructed by Harcus Sinclair UK Ltd)

LORD BRIGGS, LORD HAMBLEN AND LORD BURROWS: (with whom Lord Lloyd-Jones and Lady Arden agree)

1. Introduction

1. This appeal involves a dispute between two law firms as to which firm can act for group claimants in respect of substantial litigation concerning diesel emissions from vehicles manufactured by Volkswagen.

2. The central issue on the appeal is whether a non-compete undertaking given by one of the law firms to the other in relation to the contemplated group litigation is unenforceable as an unreasonable restraint of trade. A related issue is whether the undertaking was a solicitor's undertaking and, if so, whether it is enforceable against the individual solicitor who gave the undertaking on behalf of his firm and also against that law firm, which is a limited liability partnership ("LLP"). If it was a solicitor's undertaking, further issues arise as to whether and how that affects the restraint of trade issue.

3. In this judgment, for reasons which appear later, we have deliberately used the trans-atlantic phrase "law firm" to encompass all business entities providing what are in the current regulatory legislation called "solicitor services". This includes solicitors practising on their own or in traditional partnership, and also the newer corporate bodies such as solicitors' limited liability partnerships ("LLPs") and limited companies now authorised to provide solicitor services.

2. The factual background

4. On 18 September 2015 the United States Environmental Protection Agency issued a notice of violation alleging that certain Volkswagen vehicles manufactured between 2009 and 2015 had been fitted with a "defeat device" which detected when the vehicle was being tested for compliance with emissions standards and manipulated the results. As a convenient shorthand, this has been referred to as the "Volkswagen emissions scandal".

5. The appellant, Your Lawyers Ltd ("Your Lawyers"), is a limited company carrying on the business of solicitors. Mr Aman Johal ("Mr Johal") is a solicitor and director of Your Lawyers.

6. The first respondent, Harcus Sinclair LLP ("Harcus Sinclair"), is an LLP carrying on the business of solicitors. The second respondent ("Mr Parker") is a solicitor and was, at the material time, a member of Harcus Sinclair.

7. Mr Johal of Your Lawyers took the view that there was a potential group claim to be pursued in respect of the manipulation of emissions by Volkswagen and Your Lawyers made preparations to get such a group claim off the ground. On 26 October 2015, Your Lawyers sent a letter before action to Volkswagen Group United Kingdom Ltd ("VWUK"), the importer of Volkswagen vehicles into the United Kingdom, which listed causes of action including fraudulent misrepresentation, unjust enrichment and breaches of various consumer regulations and of the Sale of Goods Act 1979. Thereafter, Your Lawyers engaged in correspondence with Freshfields Bruckhaus Deringer LLP ("Freshfields"), solicitors for VWUK.

8. On 26 January 2016, Your Lawyers issued a claim on behalf of five claimants, selected as representative claimants, against VWUK, in which the intention was expressed to apply for a Group Litigation Order ("GLO") under CPR Part 19 ("the January action"). By April 2016, Your Lawyers had obtained instructions from approximately 4,000 potential claimants in the proposed group claim.

9. In order to pursue a group action, it is necessary for firms to obtain, on behalf of their clients, both third party funding to cover the legal costs that would be incurred and also after-the-event insurance ("ATE insurance") to cover the risk of an adverse costs order being made against the group of clients. For these purposes, Your Lawyers engaged the assistance of Mr Fairley of Capital Interchange Ltd, a broker specialising in third party funding and ATE insurance. Mr Fairley signed a non-disclosure agreement with Your Lawyers on 19 February 2016. Mr Fairley suggested collaboration with a larger law firm that had more experience of financing and undertaking major group actions. Harcus Sinclair was such a firm.

10. Mr Parker had experience of obtaining funding for group claims and was known to providers of such third-party funding. It had crossed Mr Parker's mind that there might be a viable group claim against Volkswagen and he had asked his team at Harcus Sinclair to have a look at the background facts, but he was not convinced of the economics of a group claim. His view was that, because each individual claim would be of relatively low value, there would have to be thousands of claims for the litigation to become a viable proposition for a third-party funder.

11. Mr Fairley put Your Lawyers in touch with Harcus Sinclair and Mr Parker. He also contacted Therium Capital Management ("Therium"), a company which

provides third-party funding for litigation, raising the possibility of Your Lawyers' working alongside Harcus Sinclair.

12. Your Lawyers sent a draft non-disclosure agreement to Mr Parker on 10 April 2016. Mr Parker asked Ms Morrissey, a senior solicitor at Harcus Sinclair who was working on another group action, to take a look at the draft agreement as she had looked at a number of similar agreements in the previous year. Ms Morrissey read and considered the draft agreement and, subject to some suggested amendments, regarded the draft agreement and the restrictions it contained as acceptable for Harcus Sinclair to agree. Mr Parker signed the amended document expressly for and on behalf of Harcus Sinclair on 11 April 2016 without reading it himself. At the time, both Mr Parker and Ms Morrissey were familiar with the concept of non-disclosure agreements and understood and accepted their use by law firms seeking external advice and assistance in contemplated group actions.

13. The agreement ("the NDA") was headed as a non-disclosure agreement and identified Your Lawyers as "the Discloser" and Harcus Sinclair as "the Recipient". It materially provided as follows:

> "1. The Discloser intends to disclose information (the Confidential Information) to the Recipient for the purpose of obtaining legal advice on behalf of Claimants in a large Group Action (the Purpose).
>
> 2. The Recipient undertakes not to use the Confidential Information for any purpose except the Purpose, without first obtaining the written agreement of the Discloser. *The Recipient further undertakes not to accept instructions for or to act on behalf of any other group of Claimants in the contemplated Group Action without the express permission of the Discloser*.
>
> 3. The Recipient undertakes to keep the Confidential Information secure and not to disclose it to any third party except those who know they owe a duty of confidence to the Discloser and who are bound by obligations equivalent to those in clause 2 above and this clause 3.
>
> 4. The undertakings in clauses 2 and 3 above apply to all of the information disclosed by the Discloser to the Recipient, regardless of the way or form in which it is disclosed or recorded but they do not apply to:

> (a) any information which is or in future comes into the public domain (unless as a result of the breach of this Agreement); or
>
> (b) any information which is already known to the Recipient and which was not subject to any obligation of confidence before it was disclosed to the Recipient by the Discloser.
>
> …
>
> 7. The undertakings in clauses 2 and 3 will continue in force for six years from the date of this Agreement." (Emphasis added)

14. The dispute between the parties concerns the restriction contained in the emphasised second sentence of clause 2 of the NDA ("the non-compete undertaking").

15. After the NDA had been signed, Your Lawyers provided Harcus Sinclair with its "Litigation Pack" later the same day. The "Litigation Pack" consisted of:

(1) An overview note prepared by Your Lawyers on the proposed group claim entitled the "VW Group Litigation";

(2) Your Lawyers' letter before action to VWUK dated 26 October 2015;

(3) Correspondence with Freshfields following the letter before action;

(4) The claim form in the January action;

(5) An "Advice on Liability" provided by counsel dated 24 March 2016;

(6) A "Note on Quantum" provided by counsel dated 2 April 2016;

(7) Transcripts from proceedings in the United States; and

(8) Wikipedia information relating to the emissions events.

16. On 12 April 2016, Mr Parker sent Mr Johal an anonymised draft collaboration agreement, providing for two law firms to work together, each having their own clients. Thereafter, Harcus Sinclair and Your Lawyers discussed their proposed collaboration. There was a meeting between them on 28 April 2016, but the trial judge found that no formal agreement to collaborate, beyond the draft, was reached at that meeting. He found that there followed an informal process of collaboration, whereby the parties proceeded on the basis that they would be working towards agreeing the terms of a written collaboration agreement, and that pending its signing neither side was legally committed to collaborate.

17. On 17 August 2016, Mr Johal sent Mr Parker a further draft collaboration agreement between Your Lawyers and Harcus Sinclair. The judge said that it remained apparent from various clauses that each would have its own clients. Later drafts were also exchanged. The judge found that neither side addressed its mind at any stage to what would happen if no written collaboration agreement were agreed. Mr Johal relied on the NDA, and Mr Parker assumed that Harcus Sinclair would be free to strike out on its own or in collaboration with another firm or firms, because he had not read the NDA.

18. During the course of this informal process of collaboration, and without the knowledge of Your Lawyers, Harcus Sinclair recruited its own claimants ("the HS Group") and on 19 October 2016 issued a claim form on their behalf against, among others, the manufacturers of affected vehicles ("the October action"). The judge found that the October action derived from Harcus Sinclair's own work and the work of its counsel and was not the product, in any relevant sense, of any confidential information disclosed to Harcus Sinclair by Your Lawyers.

19. The October action was commenced by Harcus Sinclair with 67 claimants and Mr Parker reported this to Mr Johal after the event by email on 20 October 2016. Mr Johal's response of the same day expressed surprise at the content of Mr Parker's email. He interpreted Mr Parker's email as asking Your Lawyers to support the application for Harcus Sinclair to be the sole lead solicitor in the absence of a cooperation agreement. He asked Harcus Sinclair to hold off on issuing the GLO application until the manner in which they were to cooperate had been concluded. Harcus Sinclair filed its GLO application to be lead solicitor on 28 October 2016, by which time Therium had decided to fund Harcus Sinclair.

20. On 17 November 2016, Harcus Sinclair and Therium met with another law firm, Slater and Gordon, to discuss a collaboration between Harcus Sinclair and Slater and Gordon.

21. By 25 November 2016, Harcus Sinclair had decided to transfer the litigation to the second claimant, Harcus Sinclair UK Ltd ("HSUK"), for reasons unrelated to the non-compete undertaking and, as regards those who made the decision (who did not include Ms Morrissey), in ignorance of the non-compete undertaking. HSUK was the vehicle through which Harcus Sinclair conducted group litigation.

22. On 25 November 2016, Therium declined to fund Your Lawyers.

23. During October and November 2016, the informal process of collaboration between Harcus Sinclair and Your Lawyers in respect of the proposed group claim, pending the agreement of the terms of a binding collaboration agreement, was faltering, but was not treated as abandoned by either party, in their dealings with each other, and had not been finally abandoned by either party. Nor had the parties, in their dealings with each other, formally given up on the prospect of collaboration. Mr Parker, by virtue of his dealings with Slater and Gordon, would have known this was a remote prospect, but he did not communicate that knowledge to Your Lawyers.

24. On 21 December 2016, HSUK and Slater and Gordon entered into what was described as a "Co-Counsel agreement" under which they agreed to work together in the litigation. Your Lawyers was unaware of the negotiations or agreement between HSUK and Slater and Gordon.

25. On 6 January 2017, Mr Johal emailed Mr Parker asserting for the first time that Harcus Sinclair's involvement had been "on the basis that you could not accept instructions from any claimants without my authority", although he did not at that time claim that this was a solicitor's undertaking. The correspondence which followed marked the end of the informal process of collaboration.

26. On 9 January 2017, HSUK issued a press release publicising the application for a GLO, advertising its role in the emissions litigation and its collaboration with Slater and Gordon, and identifying HSUK as the firm which would be lead solicitor in the emissions litigation.

27. On 25 January 2017, HSUK issued a notice of change of acting in respect of the HS Group, replacing Harcus Sinclair as solicitors on the record in the proceedings. Harcus Sinclair provided HSUK with the legal resources (ie Harcus Sinclair's members and employees) which HSUK required to conduct the emissions litigation. Under these arrangements, Mr Parker continued to act for the HS Group in his capacity as a member of Harcus Sinclair.

28. In a witness statement filed in the emissions litigation on 14 July 2017, Your Lawyers contended that the non-compete undertaking was a solicitor's undertaking. Harcus Sinclair contends that this was the first time Your Lawyers made this assertion.

29. By the time of the trial of the action, HSUK, acting jointly with Slater and Gordon, acted for over 43,000 clients with claims against the Volkswagen Group. Your Lawyers acted for over 9,000 clients with claims against the Volkswagen Group. Harcus Sinclair's application for a GLO was pending. The dispute between Harcus Sinclair and Your Lawyers had become an issue in that application because it was said to affect the question of who should be the lead solicitors in the intended group claim.

3. The decisions of the courts below

(1) The High Court

30. The trial was heard over four days between 27 September and 2 October 2017 before Mr Edwin Johnson QC, sitting as a deputy judge of the High Court. His judgment, [2017] EWHC 2900 (Ch), is reported at [2018] 1 WLR 2479.

31. The judge held that the non-compete undertaking took effect as a solicitor's undertaking, but that the court's supervisory jurisdiction was not available as against Harcus Sinclair. This was on the basis that the Court of Appeal in *Assaubayev v Michael Wilson & Partners Ltd* [2014] EWCA Civ 1491; [2015] PNLR 8 had decided that the court's supervisory jurisdiction over solicitors was confined to solicitors as officers of the court and did not extend to limited liability partnerships and companies through which solicitors conduct their practice. The judge also held that the court's supervisory jurisdiction was not available against Mr Parker, because he gave the undertakings contained in the NDA expressly on behalf of Harcus Sinclair.

32. As to the interpretation of the non-compete undertaking, the judge concluded that it precluded Harcus Sinclair, without Your Lawyers' express permission, from accepting instructions for, or acting on behalf of, any other group of claimants in any actual or intended group action in the English courts involving Your Lawyers' client group against anyone who could be held responsible in civil proceedings in respect of the Volkswagen emissions scandal. He rejected Harcus Sinclair's case that "the contemplated Group Action" in clause 1 of the non-compete undertaking referred only to the January action. In the judge's view, there was no ambiguity in the non-compete undertaking and its meaning was clear. The judge further held that the NDA contained an implied term whereby Harcus Sinclair undertook that HSUK

would not do anything which, if done by Harcus Sinclair, would be a breach of the non-compete undertaking.

33. The judge concluded that the non-compete undertaking, construed in this way, was not unenforceable as an unreasonable restraint of trade. In summary, he concluded that the non-compete undertaking was no more than was reasonably necessary, as at the date of the NDA, to protect Your Lawyers' legitimate interests and was commensurate with the benefits secured to Harcus Sinclair under the NDA. He considered that the non-compete undertaking was intended to protect Your Lawyers from Harcus Sinclair being well placed, as a result of the informal collaboration, to form its own group of claimants in competition with Your Lawyers, as in fact happened. In his view, the restriction of the non-compete undertaking was commensurate with the benefits Harcus Sinclair obtained of access into informal collaboration with Your Lawyers. He also concluded that the non-compete undertaking was not contrary to the public interest. He considered that there was no reason why a law firm should not be entitled to bind themselves by contract not to act in future for a particular group of persons and that there was a public interest in group action solicitors knowing that the court would enforce reasonable restrictions of this kind.

34. The judge found that Harcus Sinclair was in breach of the non-compete undertaking and the implied term. He further held that the non-compete undertaking had not ceased to have effect; that Your Lawyers had not permitted Harcus Sinclair to act for the HS Group; and that Your Lawyers had not lost the right to enforce the non-compete undertaking as a result of acquiescence, waiver or estoppel.

35. The judge concluded that Your Lawyers was entitled to an injunction for six years from the date of the NDA requiring Harcus Sinclair to cease acting for the HS Group in the emissions litigation and to procure that HSUK do likewise.

(2) The Court of Appeal

36. The appeal was heard over three days between 12 to 14 February 2019. The Court of Appeal's judgment, [2019] EWCA Civ 335, was handed down on 5 March 2019 and is reported at [2019] 4 WLR 81 and [2019] PNLR 19.

37. The Court of Appeal granted Your Lawyers permission to appeal against the judge's conclusions that the court's supervisory jurisdiction was not available as against Harcus Sinclair or Mr Parker, but dismissed that appeal. In relation to the non-availability of the jurisdiction over an LLP, the Court of Appeal considered itself to be bound by the decision in *Assaubayev v Michael Wilson & Partners Ltd*. There was a dispute between the parties as to whether the Court of Appeal had

accepted or rejected the judge's conclusion that the non-compete undertaking was a solicitor's undertaking. The Court of Appeal's order does not address the issue.

38. The Court of Appeal agreed with the trial judge's interpretation of the non-compete undertaking. It held, at para 68, that "the clear words" of the non-compete undertaking "mean what they say" and that they were not ambiguous. Harcus Sinclair was refused permission to cross-appeal on that issue by the Supreme Court.

39. The Court of Appeal said that it would want to reserve for another occasion the question whether it is permissible to imply terms into a restriction of the kind in issue in order to extend its ambit, but agreed with the trial judge that Harcus Sinclair itself acted in breach of the non-compete undertaking (if valid) by providing the services of its partners and employees to HSUK for the purpose of doing what Harcus Sinclair could not do under the non-compete undertaking.

40. In the view of the Court of Appeal, the judge had erred in law in reaching his decision on restraint of trade and it was appropriate for the court to consider the matter afresh. Having done so, the Court of Appeal held that the non-compete undertaking was unenforceable as an unreasonable restraint of trade because in summary, Your Lawyers' only legitimate interest was to protect confidential information that it was disclosing for the purpose of obtaining Harcus Sinclair's legal advice and the non-compete undertaking was not reasonably necessary to protect that legitimate interest; the non-compete undertaking was not commensurate with the benefits secured by Harcus Sinclair under the NDA, which did not include any form of collaboration under the NDA; the non-compete undertaking was wide-ranging and out of proportion to the benefit Harcus Sinclair received under the NDA; it was therefore a broader restriction than was reasonably required for the protection of Your Lawyers' legitimate interests as the party to the NDA disclosing confidential information to Harcus Sinclair. In the light of this conclusion, the Court of Appeal did not consider it necessary to determine whether the non-compete undertaking was to be regarded as reasonable in the public interest, although they observed that they were not convinced that the judge had asked the right question. The injunctions granted by the judge were accordingly discharged.

41. The Court of Appeal refused Harcus Sinclair permission to appeal on the issues of acquiescence, waiver and estoppel, after hearing full argument on them.

4. The issues

42. The parties agreed that the appeal raised six issues, which may be stated as follows:

(1) Is the non-compete undertaking a solicitor's undertaking?

(2) Does the High Court have an inherent supervisory jurisdiction over incorporated law firms, whether limited liability partnerships, such as Harcus Sinclair, or limited companies such as Your Lawyers, through both of which solicitors practise?

(3) Can the High Court's inherent supervisory jurisdiction be exercised in this case in relation to Mr Parker?

(4) If the non-compete undertaking constitutes a solicitor's undertaking that in principle is capable of enforcement against Harcus Sinclair and/or Mr Parker, should it be enforced notwithstanding that, applying contractual principles, as the Court of Appeal held, the non-compete undertaking constituted an unreasonable restraint of trade?

(5) If the non-compete undertaking was a solicitor's undertaking, was the Court of Appeal wrong in holding (if it did) that this was irrelevant to the question whether the non-compete undertaking was contrary to public policy on the grounds of restraint of trade?

(6) Was the Court of Appeal wrong in holding that the non-compete undertaking constituted an unreasonable restraint of trade?

43. It will be apparent that issues (2) to (5) depend on it being held, under issue (1), that the non-compete undertaking was a solicitor's undertaking. For reasons set out below, we conclude that it was not such an undertaking. It follows that the critical issue for the determination of the appeal is issue (6), namely whether the non-compete undertaking was an unreasonable restraint of trade. That issue will therefore be addressed first. We will then consider whether the non-compete undertaking was a solicitor's undertaking - issue (1). Since they have been fully argued, issues (2) to (5) will then be addressed, but relatively briefly since their resolution is not necessary to the decision on the appeal.

5. Issue (6): was the Court of Appeal wrong in holding that the non-compete undertaking constituted an unreasonable restraint of trade?

(1) The restraint of trade doctrine

44. Given that, prior to 2019, the highest court had not decided a case on the restraint of trade doctrine for 45 years, it is remarkable that this is the third case in three years in which the restraint of trade doctrine has been considered by the Supreme Court. In *Egon Zehnder Ltd v Tillman* [2019] UKSC 32; [2020] AC 154, the power to sever the offending restraint of trade clause from the rest of the contract was explored and a previously leading case, *Attwood v Lamont* [1920] 3 KB 571, was overruled. In *Peninsula Securities Ltd v Dunnes Stores Ltd (Bangor)* [2020] UKSC 36; [2020] 3 WLR 521, the court examined what Lord Wilson described, at para 1, as the "outer reaches" of the restraint of trade doctrine. It was held that a restrictive covenant over land, given by a developer of a shopping centre, preventing there being a rival shop to that of the claimant (who was an "anchor tenant") did not engage the doctrine; and the central reasoning of the majority of the House of Lords in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 favouring a "pre-existing freedom" test was departed from in favour of applying a "trading society" test.

45. One might think that the recent series of Supreme Court cases analysing the law on illegality (*Patel v Mirza* [2016] UKSC 42; [2017] AC 467, *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43; [2021] AC 563, *Grondona v Stoffel & Co* [2020] UKSC 42; [2021] AC 540) is also relevant. This is not least because, in the contract textbooks, illegality is usually closely linked with public policy so that, for example, contracts involving crimes are usually examined alongside contracts that are contrary to public policy, such as contracts involving sexual immorality or contracts interfering with the administration of justice or contracts in restraint of trade. But the principles governing contracts in restraint of trade are well-established and (with the exception of the rules on severance) self-contained and already reflect the type of flexibility that *Patel v Mirza* has brought to the law on contracts affected by illegality. It seems preferable, therefore, to treat the law on the enforceability of contracts in restraint of trade as being separate from, albeit similar to, the law on the enforceability of contracts affected by illegality as laid down in *Patel v Mirza*. Certainly, neither counsel in this case placed any reliance on *Patel v Mirza* in relation to the restraint of trade doctrine.

46. Most cases on the restraint of trade doctrine have concerned restraints on the seller of a business and on employees. But there have also been many cases that do not fall within either of those two categories such as the exclusive dealing and exclusive services agreements that were the subject matter of the House of Lords' decisions in, respectively, *Esso Petroleum Co Ltd v Harper's Garage (Stourport)*

Ltd [1968] AC 269 and *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308. As Lord Wilberforce made clear in the *Esso* case, at 337, the categories of contracts in restraint of trade "can never be closed".

47. In this case, the facts concern a novel situation for the application of the doctrine: a non-compete undertaking given by one law firm to another in relation to a group litigation claim. However, it is clear, and not in dispute between the parties, that the non-compete undertaking in this case does engage the restraint of trade doctrine. It follows that we are solely concerned with deciding whether the restraint of trade is unreasonable. In deciding that, it is well-established in the case law that two principles must be applied (see, eg, *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535; *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269; *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308; *Bridge v Deacons* [1984] AC 705; and see generally Heydon, *The Restraint of Trade Doctrine*, 4th ed (2018); *Chitty on Contracts*, 33rd ed (2018), paras 16-106 - 16-174); Stephen Smith, "Reconstructing Restraint of Trade" (1995) Oxford Journal of Legal Studies 565).

48. The first principle is that it is for the promisee (Your Lawyers) to establish that the non-compete undertaking is reasonable as between the parties. To satisfy this burden, the promisee must show, first, that the non-compete undertaking protects legitimate interests of the promisee and, secondly, that the non-compete undertaking goes no further than is reasonably necessary to protect those interests. There also appears to be a third element which the courts below in this case (relying on the words used by Lord Diplock in *A Schroeder Music Publishing Co Ltd v Macaulay* at pp 1315-1316) referred to as the promisee needing to show that the restriction is commensurate with the benefits secured to the promisor under the contract. Richard Coleman QC, counsel for Your Lawyers, submitted that there is no such third element at least where, as in this case, the parties are of equal bargaining power.

49. The second principle is that, 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 unreasonable as being contrary to the public interest.

50. In this case, it is the first of those two principles - the reasonableness between the parties - that raises particular difficulties although both will need to be examined. And within the enquiry as to the reasonableness between the parties, 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.

(2) A preliminary question: what type of contract is the NDA?

51. The relevant clauses of the NDA have been set out in para 13 above. It is not in dispute that the NDA, dated 11 April 2016, is contractually binding (subject to whether the non-compete undertaking is unenforceable under the restraint of trade doctrine). But it would appear that, until this matter was adverted to by Mr Coleman in the Supreme Court, the question as to what exactly is the correct contractual analysis of the NDA had not previously been raised either at first instance or in the Court of Appeal.

52. Mr Coleman submitted that this was a unilateral contract. Neither party was promising to do anything merely by signing the contract. The agreement was rather that, *if* Your Lawyers were to provide confidential information to Harcus Sinclair, Harcus Sinclair would be bound by the non-disclosure and non-compete undertakings. He referred to the hypothetical example, known to all law students, of A promising money to B if B walks from London to York. B is not promising to do anything. That is why such a contract is labelled a "unilateral" contract which contrasts with the more common "bilateral" contract where both parties are promising, and binding themselves, to do something. So here Your Lawyers (the equivalent of B in that example) was not promising to do anything. But if Your Lawyers did provide the confidential information to Harcus Sinclair (the equivalent of A), then Harcus Sinclair would be bound by its undertakings. The alternative interpretation is that this was a bilateral contract in which Your Lawyers was promising to provide confidential information in return for the promises by Harcus Sinclair to comply with the non-disclosure and non-compete undertakings.

53. The unilateral contract analysis of the NDA is to be preferred because it is hard to accept that Your Lawyers would be in breach of contract if it chose not to provide the confidential information. It should be noted that, on these facts, the unilateral contract analysis does not affect the date when the contract was made. As confidential information was provided by Your Lawyers, and was provided on the same day as the NDA was signed, the contract, even if unilateral, was made on 11 April 2016.

(3) Legitimate interests of Your Lawyers flowing from the intended collaboration between the parties?

(i) The view of the judge

54. It is clear (whether one classifies the contract as unilateral or bilateral) that neither party was expressly or impliedly promising to collaborate with the other. However, in considering whether the non-compete undertaking was protecting

legitimate interests, it is important that the judge found not only that there was informal collaboration between the parties for several months after the making of the NDA in April 2016 but also that the parties intended (at the time of the NDA) that the non-compete undertaking should protect Your Lawyers in the event of the proposed collaboration not working out. It is also clear from the judge's reasoning that, at the time of the NDA, the parties intended to engage in informal collaboration.

55. Given its importance, it is helpful to set out the most relevant passages from Edwin Johnson QC's judgment on this matter of collaboration between the parties (noting that he was throughout referring to the non-compete undertaking as "sentence 2"). He said, for example:

> "[T]he important point is that sentence 2 was intended to provide the defendant with a particular form of protection in connection with the first claimant giving its advice and, more generally, in connection with the intended collaboration between the defendant and the first claimant." (para 239)
>
> "As from their entry into the NDA, the parties were engaged in negotiations over the terms of a collaboration agreement." (para 304)
>
> "Unfortunately, the parties were not able to agree such a collaboration agreement, and their period of informal collaboration came to an end, in circumstances where [Harcus Sinclair], by reason of its work during the period of informal collaboration, was well placed to form its own group of claimants in competition with the defendant. *The restriction in sentence 2 was, in my view, intended to provide the defendant with protection from just such a scenario.* I find it very hard to see how a restriction which was intended to provide this protection went beyond what was reasonably necessary, as at the date of the NDA, to protect the legitimate interests of the defendant." (para 305) (Emphasis added)
>
> "[T]he defendant had a legitimate interest in preventing [Harcus Sinclair] from using its position as advisor/*collaborator* in respect of the defendant's group of claimants to strike out alone, or in concert with another firm, and set up a rival group in competition with the defendant." (at para 306) (Emphasis added)

> "[Harcus Sinclair's] entry into the NDA, and thus *[Harcus Sinclair's] entry into the restriction in sentence 2 were what provided [Harcus Sinclair] with access into a process of collaboration with the defendant*." (at para 311) (Emphasis added)

> "When the defendant embarked on a process of collaboration with [Harcus Sinclair], there was the risk that [Harcus Sinclair] would do sufficient work of its own to be able to achieve a head start in the proposed group claim, without having to rely upon or use any confidential information provided by the defendant. Putting the matter another way, [Harcus Sinclair] would secure an advantageous position as a result of being invited to collaborate with the defendant, and as a result of collaborating with the defendant, not as a result of having access to confidential information. If the risk of that advantage being exploited by [Harcus Sinclair] was to be avoided, the NDA required sentence 2 …" (para 406)

56. The non-compete undertaking gave Harcus Sinclair access to a process of informal consultation with Your Lawyers. In the light of that intended informal collaboration, the judge clarified that Your Lawyers had legitimate interests in preventing Harcus Sinclair setting up a rival group of claimants to the group of claimants that Your Lawyers had started setting up. For example, he said, at para 300:

> "Sentence 2 … was concerned with preventing the first claimant [Harcus Sinclair] from setting up a rival group of claimants in the proposed group claim. In other words, sentence 2 was intended to prevent the very thing which has now occurred, with the HS Group. The defendant and the claimants are now in direct and acrimonious competition in the emissions litigation, in a manner which does not seem to me to be assisting any of the claimants or potential claimants in the emissions litigation."

And he explained this further at para 316:

> "The defendant in the present case did have a legitimate interest to protect, namely its own proposed group claim. The purpose of the restriction in sentence 2 was to ensure that the first claimant did not set up its own group of claimants in competition with the defendant's group. The defendant was not

> a party which had no connection with claims arising out of the emissions events, and which was seeking to prevent the first claimant from involvement in such claims. The defendant had a real and substantial interest in such claims, by virtue of its own group of claimants and by virtue of all the work which it had done, prior to the NDA, to prepare the proposed group claim."

57. The judge's view, therefore, was that Your Lawyers had legitimate interests in protecting its own proposed group claim from Harcus Sinclair setting up a rival group claim. Those legitimate interests flowed from the intended process of informal collaboration, which would be embarked upon consequent on entry into the NDA. The judge considered that the non-compete undertaking was designed to protect those legitimate interests which would not be sufficiently protected by protecting Your Lawyers against disclosure and use of its confidential information.

58. It is noteworthy that the judge's finding that the parties intended to collaborate informally under the NDA reflected Harcus Sinclair's own pleaded case and evidence. Thus, the witness statement of Mr Beresford, which stood as Harcus Sinclair's Particulars of Claim, stated:

> "the NDA was an initial document which was intended to govern the terms of the collaboration between Harcus Sinclair and Your Lawyers pending the conclusion of a more extensive 'collaboration agreement'."

(ii) The view of the Court of Appeal

59. The Court of Appeal regarded it as very important that the NDA did not include a collaboration agreement. It concisely set out its view on this matter in para 83:

> "In our judgment, YLL's legitimate interests can only be ascertained at the date of the NDA and *on the basis of its actual provisions*. The NDA was aimed at protecting the confidential information which was being disclosed for the purpose of obtaining legal advice, not at collaboration between YLL and HSLLP. Had the NDA included a collaboration agreement, it might well have been reasonable to prevent HSLLP from acting for other claimants outside that collaboration. But that was not what the NDA was about. In our view, YLL's only legitimate interest under the NDA was to protect the confidential

> information that it was disclosing for the purpose of obtaining HSLLP's legal advice. It is hard to see why a restriction that went beyond using that confidential information for its own purposes or for the purposes of other clients could be reasonable in that context." (Emphasis added)

60. The Court of Appeal was therefore indicating that the position might well have been different had the NDA included a collaboration agreement because Your Lawyers would then have had legitimate interests in protecting its group of claimants from Harcus Sinclair setting up a rival group. But Your Lawyers' legitimate interests could only be ascertained "on the basis of [the NDA's] actual provisions" and they did not include any provision about collaboration.

61. It should be stressed that the Court of Appeal was not overturning the judge's findings of fact that Your Lawyers had legitimate interests to protect *if*, as a matter of law, the judge had been entitled to take into account the parties' intentions to collaborate. It is well-established that the determination of a promisee's legitimate interests is essentially a question of fact based on evidence: see, eg, *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, 301 (per Lord Reid). But the Court of Appeal was overturning the judge, as a matter of law, on the basis that it was not open to him to make factual findings about Your Lawyers' legitimate interests where those alleged legitimate interests did not flow from any contractual provisions about collaboration in the NDA.

(iii) A critical question of law

62. It follows that, on the facts of this case, there is a critical question of law that we must decide in order to determine whether Your Lawyers had legitimate interests to protect by the non-compete undertaking. That question of law is whether one can take into account, in assessing Your Lawyers' legitimate interests, not only the NDA provisions (express or implied) but also - assessed at the time the NDA was made - the parties' non-contractual intentions or what they contemplated would occur as a consequence of entering into the contract. Put another way, does the fact that the NDA did not include any legally binding obligations to collaborate mean that it is irrelevant, in deciding on Your Lawyers' legitimate interests, that the parties intended, or contemplated, at the time the NDA was made, a process of informal collaboration consequent on the NDA?

63. Plainly there is no need for the legitimate interests to be spelt out, or referred to, in the contract. For example, it is well-recognised that, in considering the reasonableness of a restrictive covenant, an employer has a legitimate interest in preventing an ex-employee using its trade secrets or soliciting its customers: but there may be no mention of trade secrets or customers in the restrictive covenants

or elsewhere in the employment contract. Again, it is clearly established that a party's legitimate interests may flow from many contracts taken together rather than just one contract, as in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, 302, where Esso's legitimate interest was held to be "maintaining a stable system of [petrol] distribution throughout the country" (per Lord Reid). Therefore, the question we are asking is not whether a legitimate interest has to be mentioned in the contract or must flow from the contract taken in isolation from other contracts. Rather the question is whether, in determining the promisee's legitimate interests, 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.

64. No doubt it will be rare for this question to arise and to be critical to the determination of the case. Not surprisingly, therefore, the authorities on the restraint of trade doctrine have approached legitimate interests almost entirely through the lens of the contractual provisions. However, we were referred by counsel to relevant obiter dicta in three cases. On behalf of Your Lawyers, Mr Coleman referred us to *Gledhow Autoparts Ltd v Delaney* [1965] 1 WLR 1366 which concerned a restrictive covenant in a contract of employment of a travelling salesman. The Court of Appeal (Sellers, Danckwerts and Diplock LJJ) held that the restrictive covenant was unenforceable as an unreasonable restraint of trade because it went beyond protecting the employer from the non-solicitation of existing customers and therefore went beyond what was necessary to protect the legitimate interests of the employer. In stressing that the relevant time to assess the question of reasonableness was the time the contract was made, Diplock LJ said the following at p 1377:

> "The defendant was in fact employed for over six years by the plaintiffs and no doubt became a valuable servant and acquired considerable knowledge of and personal relation with the plaintiffs' customers. It is natural in those circumstances to tend to look at what in fact happened under the agreement. But the question of the validity of a covenant in restraint of trade has to be determined at the date at which the agreement was entered into *and has to be determined in the light of what may happen under the agreement, although what may happen may cover many possibilities which in the result did not happen*. A covenant of this kind is invalid ab initio or valid ab initio. There cannot come a moment at which it passes from the class of invalid into that of valid covenants." (Emphasis added)

Mr Coleman submitted that Diplock LJ's obiter dicta supported the approach of the judge in our case. While it should be noted that Diplock LJ's words referred to what might happen "under the agreement", we agree that they can be interpreted as

supporting an approach whereby the judge took into account what the parties intended, or contemplated, consequent on the NDA, in particular that there would be a period of informal collaboration.

65. In contrast, Jonathan Crow QC, counsel for Harcus Sinclair, relied on *Watson v Prager* [1991] 1 WLR 726 in which a contract between a boxer and his manager, who was also the promoter for nearly all his fights, was held to be an unreasonable restraint of trade. One reason for this was that the contract entitled the manager to exclude the boxer from any share of television receipts thereby benefiting himself in his capacity as promoter. As it turned out, the purses received by the boxer were reasonable. But at p 749, Scott J said this:

> "The reasonableness of a contract in restraint of trade must be tested not by a reference to what the parties have actually done or intend to do but by what the terms of the contract entitle or require them to do. The reasonableness of the purses received … is not in point."

66. Mr Crow further relied on *Coppage v Safety New Security Ltd* [2013] EWCA Civ 1176; [2013] IRLR 970, in which a non-solicitation restrictive covenant in an employment contract was held to be a reasonable restraint of trade and therefore enforceable by the employer. In summarising the relevant principles in determining the reasonableness of the restrictive covenant, Sir Bernard Rix included the following at para 9:

> "The question of reasonableness has to be asked as of the outset of the contract, looking forwards, *as a matter of the covenant's meaning*, and not in the light of matters that have subsequently taken place (save to the extent that those throw any general light on what might have been fairly contemplated on a reasonable view of the clause's meaning) … In that context, the validity of a clause is not to be tested by hypothetical matters which could fall within the clause's meaning as a matter of language, if such matters would be improbable or fall outside the parties' contemplation." (Emphasis added)

67. However, although not directly referred to by counsel, it appears that the most important cases - in the sense that the decisions to some extent rested on this point - are two further cases on restrictive covenants in employment contracts: *Allan Janes LLP v Johal* [2006] EWHC 286 (Ch); [2006] ICR 742, and, at first instance, *Egon Zehnder Ltd v Tillman* [2017] EWHC 1278 (Ch). The latter case was ultimately appealed to the Supreme Court which restored Mann J's decision at first instance but without commenting on the point with which we are now concerned. In both

cases, one issue was whether one should take into account, in assessing the reasonableness of the restriction, that the employee might be promoted. It was held that, applying the obiter dicta of Diplock LJ in *Gledhow Autoparts Ltd v Delaney*, which was set out in both cases, one should indeed take that into account because it was contemplated at the time the contract was made. This was so even though (presumably) there was no contractual obligation to promote the employee. In *Allan Janes LLP v Johal*, Bernard Livesey QC (sitting as Deputy Judge of the High Court) said at paras 38-39:

> "38. The defendant contends that the case needs to be looked at on the basis that she has personally dealt with only a small proportion of the clients of the firm and has turned out not to be very good at marketing herself and generating new clients. I do not accept that submission. It is contrary to the fundamental principle that the reasonableness of the restriction must be interpreted in accordance with what was in the contemplation of the parties at the date when the contract was made and not as matters in the end turned out. The reason for this is that the covenant will have been formed at the beginning of the employment in the light of what was in the contemplation of the parties at that time. If the covenant was unreasonable for those expectations it will be wholly unenforceable [,] not partly unenforceable to the extent of what the outcome turned out to be …
>
> 39. Since the defendant was recruited into a senior position with a mutual hope that it would mature into a partnership offer, it clearly was within the actual contemplation of the parties that the claimant would promote the defendant to all its actual and target clients, that she would assist in marketing, would generate relationships with actual and potential clients and might well be successful in generating clients from just the sort of introductions as were the natural consequence of each of the marketing events on which the claimant spent its money."

68. Similarly, in *Egon Zehnder Ltd v Tillman* Mann J said at para 27:

> "That is not to say that one only looks at the actual position as at the date the employment started. If one looked at that position alone few covenants would be valid because in most cases the employee will not have engaged fully enough with the business to justify it. One has to go further and look at what

> was in the contemplation of both parties. That contemplation can include promotion. Diplock LJ made plain the appropriateness of looking at the contemplated future, and the question of promotion was dealt with in *Allan Janes LLP v Johal* [2006] ICR 742."

69. A similar approach was taken in another first instance decision, *Pickwell v Pro Cam CP Ltd* [2016] EWHC 1304 (QB); [2016] IRLR 761. This did not concern promotion but rather the contemplated qualification, and gaining of experience, of two trainee agronomists. The relevant restrictive covenants were concerned to protect the employer once the trainees were qualified and experienced. Judge Curran QC, sitting as a judge of the High Court, held that, in the light of the contemplated qualification and gaining of experience of the employees, the restrictive covenants protected the employer's legitimate interests. He applied *Allan Janes LLP v Johal* and cited the paras set out above from the judgment in that case. However, it may be argued that this decision is not quite on the point we are here concerned with because, in contrast to the promotion cases, it would appear that there was a contractual obligation, under the contract of employment, to train and provide experience to the two employees (assuming they remained employees).

70. In our view, the submission of Mr Coleman is correct on this crucial question of law. In determining the legitimate interests of the promisee one can take into account what the parties (objectively) intended or contemplated, consequent on the contract, at the time the contract was made as well as the contract terms. In addition to relying on the obiter dicta of Diplock LJ, and on the two first instance decisions referred to in paras 67-68 above (although no previous case has been concerned with the precise issue in this case and the facts of those two cases were plainly very different from those in this case), we rely on the following five general reasons.

> (i) Provided the enquiry is confined to the parties' intentions, or what they contemplated, at the time the contract was made, it is hard to accept that there is any good reason of principle or policy why a party should be prevented from seeking to protect its interests by a clause which anticipates what both parties intended, or contemplated, would occur even if they have not reached any binding agreement to bring about that occurrence.
>
> (ii) The very adoption of the phrase "legitimate interests" rather than "legally protected interests" suggests that one is not just concerned with what flows from the parties' legal rights.
>
> (iii) In other areas of the law of contract where the phrase "legitimate interest" is used, the relevant legitimate interest can extend beyond the contractual rights of the parties. For example, the modern test for whether a

term is unenforceable, because it is a penalty, is whether or not the stipulated sum, judged at the time of the making of the contract, is out of all proportion to a legitimate interest of the claimant in the performance of the contract: *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* [2015] UKSC 67; [2016] AC 1172. On the facts of the *ParkingEye* case, it was accepted, at para 99, that in considering ParkingEye's legitimate interest in performance it was relevant to consider the interests of third parties (who had no rights under the contract) in the sense that encouraging the prompt turnover of car parking space was for the benefit of the owners of the operator of the retail park and members of the public. See generally *Chitty on Contracts*, 33rd ed (2018), para 26-218.

(iv) Although not a direct parallel, it may be regarded as relevant that, in interpreting contracts, the law has shifted from any historically narrow focus on what lies within the "four corners of the contract" to taking into account the factual matrix. That is, the accepted modern approach to interpreting a term in a contract is to ask what the term (viewed in the light of the whole contract) would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made: see Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912, and *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, para 39.

(v) We have seen that the preferable analysis of the contract in this case was that it was a unilateral contract. It may be thought particularly difficult to confine the analysis of a legitimate interest to the contractual obligations of the parties where only one party (Harcus Sinclair) was promising to do anything. Put another way, the Court of Appeal regarded it as important that Your Lawyers had no legal obligation to collaborate but, if the unilateral contract analysis is correct, Your Lawyers had no legal obligation to do anything.

71. It follows, with great respect, that the Court of Appeal made an error of law in overruling the judge's reasoning that one could take into account the parties' non-contractual intentions to collaborate informally. Your Lawyers did have legitimate interests to protect through the non-compete undertaking and the Court of Appeal was wrong, as a matter of law, to determine Your Lawyers' legitimate interests without taking into account the parties' non-contractual intentions (or contemplation) to collaborate informally. Although it would appear that neither the judge nor the Court of Appeal was referred to the obiter dicta and first instance decisions considered above, the judge was correct that, in addition to the contractual obligations, one can also take into account (assessed at the time the contract was made) the non-contractual intentions of the parties, or what they contemplated, as a consequence of entering into the contract. And once one clarifies that legal position,

the judge was fully entitled to decide on these facts that, as set out in paras 56-57 above, Your Lawyers did indeed have legitimate interests, flowing from the intended informal collaboration, which it was protecting by the non-compete undertaking. This was not a case where there was no legitimate interest to protect: the undertaking did not fall foul of protecting Your Lawyers "against competition per se" (to use the words of Lord Atkinson in *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, 700).

(4) The other two elements of reasonableness between the parties

72. We have seen in para 48 above that, if legitimate interests are established, the party (the promisee, here Your Lawyers) seeking to enforce the undertaking must go on to establish that the undertaking does not go further than is reasonably necessary to protect those interests; and it appears that the promisee must also establish that the restriction is commensurate with the benefits to the other party (the promisor, here Harcus Sinclair) secured under the contract. We now turn to those other two elements.

(i) Was the non-compete undertaking reasonably necessary to protect the legitimate interests of the promisee?

73. The primary controversy here is over the length of time of the non-compete undertaking. It was to last for six years. Mr Crow submitted that that was far too long and that the most that might have been justified to protect legitimate interests of Your Lawyers (assuming, contrary to his submissions, that there was such an interest going beyond the protection of the confidential information) would be, say, a six-month non-compete undertaking which would have served to protect Your Lawyers' head-start in the emissions litigation.

74. The judge was of the view that the six-year period was rational and necessary in order to keep Harcus Sinclair out of the emissions litigation (other than with Your Lawyers' consent). As he explained, at para 297:

> "This period of time was, as I understand the position, selected to ensure that, by the time this period expired, claims arising out of the emissions events would, or would be likely to have become statute barred."

He went on at para 310:

> "It is … difficult to see how sentence 2 could have been narrower, whilst still protecting the defendant's legitimate interests … in terms of protecting the position of the defendant against a rival group of claimants formed by the first claimant. If sentence 2 was to protect the legitimate interests of the defendant, it needed to have the width which I have construed it to have."

This all led to his conclusion at para 317:

> "I conclude that the defendant has discharged the burden of justifying the restriction in sentence 2 as one which … was no more than was reasonably necessary, as at the date of the NDA, to protect the legitimate interests of the defendant …"

75. It can be seen that the judge's approach here was dependent on his analysis of Your Lawyers' legitimate interests. Following on from our agreement with that analysis, we agree with the judge on this aspect as well. Once it is seen that Your Lawyers had legitimate interests in protecting its own proposed group claim from Harcus Sinclair setting up a rival group claim, it was logical and necessary for the non-compete undertaking to last for a six-year period that would roughly equate to the limitation period for claims in the emissions litigation. And of course the restriction was solely concerned with the emissions litigation. Harcus Sinclair was not being restricted in any way from carrying on all the rest of its normal business as solicitors. In that sense, we accept Mr Coleman's submission that the restriction was a narrow one.

76. The criticism of the judge by the Court of Appeal entirely rested on the Court of Appeal's narrow view of Your Lawyers' legitimate interests which we have rejected above. At paras 77-78, the Court of Appeal precisely said that, because the judge had erred in his analysis of the legitimate interests of Your Lawyers, the judge had been asking himself the wrong question when it came to what was reasonably necessary to protect those interests. And at para 84, the Court of Appeal went on:

> "[W]e take the view that a broad Restriction preventing HSLLP ever acting for other claimants in the Emissions Litigation, inserted into an otherwise unobjectionable NDA, cannot possibly be reasonably necessary to protect YLL's legitimate interests. That much is obvious, we think, once those legitimate interests are identified. The judge's error was to think that the NDA allowed for a period of informal collaboration, which YLL had the legitimate right to protect. YLL might have had

such a right if it had entered into any kind of collaboration agreement, but it did not."

77. Our conclusion is therefore that, in line with what we have said on the legitimate interests of Your Lawyers, the Court of Appeal was making an error of law in overruling the judge's decision that the non-compete undertaking of six years did not go beyond what was reasonably necessary to protect Your Lawyers' legitimate interests.

(ii) Was the restriction commensurate with the benefits secured to the promisor under the contract?

78. We have clarified above that a critical question of law in this case is whether the legitimate interests of the promisee can rest on the non-contractual intentions of the parties, or what they contemplated, at the time the contract was made. A parallel issue, equally rare, arises in looking at the benefits to the promisor. Are the relevant benefits purely those conferred by the provisions of the contract or can they include benefits that are intended, or contemplated, by the parties but which the promisee is not legally bound to provide to the promisor?

79. Certainly, it is true that references to this element being concerned with the "quantum of consideration" (see, for example, Lord Macnaghten in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd*, at p 565, and Lords Reid and Pearce in the *Esso* case, at pp 300 and 323) might suggest that one is purely concerned with the benefits to which the promisor is contractually entitled. The same can be said about Lord Diplock's speech in *A Schroeder Music Publishing Co Ltd v Macaulay* in which he referred, at pp 1315-1316, to benefits "secured … under the contract". But, for example, the tips a waiter would receive, in addition to the weekly wage paid by the employer, were taken into account in *Howard v Danner* (1901) 17 TLR 548; and in *Pickwell v Pro Cam CP Ltd* at paras 61-63, the contemplated commercial opportunities opened up for the trainee agronomists by signing the relevant contracts, even though not contractually guaranteed, were regarded as relevant in considering the adequacy of the consideration. Moreover, it would be illogical to take account of the non-contractual intentions of the parties, or what they contemplated, in determining the legitimate interests of the promisee and then to confine the focus to contractual benefits when determining whether the restriction is commensurate with the benefits to the promisor. In our view, therefore, for essentially the same reasons that we have set out above in relation to the promisee's legitimate interests, the benefits to the promisor can extend beyond the contractual consideration. The references in past cases to the quantum of consideration and to benefits secured under the contract merely reflect the fact that, almost always, the focus is on the contractual provisions; and the issue in this case of considering non-contractual intentions, or what the parties contemplated, rarely arises. What this

means on the facts of this case is that in addition to the confidential information provided by Your Lawyers (which was the consideration under the unilateral contract), one can take account of the benefits intended or contemplated as flowing from the informal collaboration.

80. At para 301 (redacted) and para 406, the judge indicated that the informal collaboration would give Harcus Sinclair access to the work already done, and information already acquired, by Your Lawyers as well as knowledge of any deficiencies in the approach of Your Lawyers which could be exploited. He was therefore linking these benefits back to his analysis of Your Lawyers' legitimate interests flowing from the intended informal collaboration. In short, there was a potentially lucrative business opportunity arising from the intended informal collaboration. At paras 311-312, he said the following:

> "311. Looking at the matter from the point of view of the benefit to [Harcus Sinclair], [Harcus Sinclair's] entry into the NDA, and thus [Harcus Sinclair's] entry into the restriction in sentence 2 were what provided [Harcus Sinclair] with access into a process of collaboration with the defendant. If that process of collaboration resulted in a collaboration agreement with [Your Lawyers], [Harcus Sinclair] and [Your Lawyers] would be acting together in the proposed group claim, and [Harcus Sinclair] would enjoy the benefits of that collaboration. If not, [Harcus Sinclair] would have to accept that it would not be free to set up its own group of claimants, in competition with [Your Lawyers]. As I understand the relevant law, it is not appropriate for me, in judging reasonableness, to try to decide whether there was substantial equivalence between the scope of the restriction in sentence 2 and what [Harcus Sinclair] received in exchange for entering into the NDA. It seems to me however that the bargain I have described in this paragraph was a perfectly reasonable commercial bargain. It opened the way to a potentially lucrative business opportunity for [Harcus Sinclair].
>
> 312. Putting the matter another way, … [Harcus Sinclair] agreeing to the restriction in sentence 2 [was] commensurate with the benefits secured by [Harcus Sinclair] as a result of entering into the NDA."

81. The Court of Appeal disagreed with the judge because it was taking a narrow view of the legitimate interests being protected. In its view, the proposed collaboration was irrelevant. It said at para 79:

> "The judge described that bargain as perfectly reasonable - and as opening 'the way to a potentially lucrative business opportunity' for HSLLP. In our view, the problem with this approach is simply that the judge has misdescribed the bargain. The Restriction was given in exchange for the disclosure of confidential information and, perhaps, the opportunity to provide some legal advice on the basis of it. It was not provided in exchange for any collaborative opportunity. As we have said, collaboration is not mentioned in the NDA."

And again at para 86:

> "It follows from what we have said already that the Restriction was also not commensurate with the benefits secured by HSLLP under the NDA. HSLLP was not securing any form of collaboration under the NDA. It was securing disclosure of confidential information to enable it to give some legal advice. The Restriction was wide ranging and out of proportion to the benefit HSLLP received under the NDA."

82. Again we agree with the judge. Once one accepts the judge's analysis that Your Lawyers' legitimate interests flowed not merely from the contractual provisions but also from the intended informal collaboration then, correspondingly, the relevant benefits to Harcus Sinclair extended beyond the contractual provisions to include the contemplated business opportunity arising from that collaboration. Therefore, the Court of Appeal was making an error of law in overruling the judge's decision that the restriction in the non-compete undertaking was commensurate with the benefits to Harcus Sinclair secured under the contract. "Secured under the contract" should be given a wide meaning to include the contemplated benefits to Harcus Sinclair arising from the intended informal collaboration.

83. It follows from this that it is unnecessary for us to consider Mr Coleman's submission (referred to in para 48 above), based primarily on Lord Diplock's speech in *A Schroeder Music Publishing Co Ltd v Macaulay*, that this third element may not be required at least where the parties are of equal bargaining power as on the facts of this case. But, as we shall see below, we certainly do regard it as being of general relevance in considering the reasonableness between the parties that there was no inequality of bargaining power in this case.

(5) Five further general points on reasonableness between the parties

84. There are five further points in support of the conclusion that the judge's decision on reasonableness between the parties should not have been overturned by the Court of Appeal.

(i) The hearing before the judge extended over four days during which the judge heard evidence from 12 witnesses. As the Court of Appeal recognised, in a trial of this sort, an appellate court should be very careful about overturning the judge who can be expected to have an understanding of the details that surpasses that of an appellate court. Of course, the Court of Appeal was entitled to intervene if the judge made a material error of law.

(ii) The Court of Appeal was wrong in its view that, in applying the restraint of trade doctrine, the judge erred in taking account of facts subsequent to the making of the NDA: see para 74 of the Court of Appeal's judgment. The judge made it clear on several occasions (directing himself, as Mr Coleman put it) that the relevant test had to be applied at the time the NDA was made and not subsequently: see, for example, paras 293, 298, 299, 305 and 317 of his judgment. On a fair reading, everything he said about subsequent events was being related back to the intentions of the parties, or what was in their contemplation, at the time the contract was made.

(iii) Although in determining the third element in assessing reasonableness between the parties, we have found it unnecessary to consider Mr Coleman's submission that Lord Diplock's speech in *A Schroeder Music Publishing Co Ltd v Macaulay* means that the third element is inapplicable at least where the parties are of equal bargaining power, we do regard it as being of general relevance in considering reasonableness between the parties that the parties here were two law firms of equal bargaining power. If anything (as the Court of Appeal recognised at para 87), Harcus Sinclair may be regarded as being the "stronger" party, because it was more experienced in these matters, than Your Lawyers. The judge accepted that Mr Parker did not himself read the NDA before signing it but, for an experienced solicitor not to bother to read an agreement he was signing is plainly his own responsibility, and, in any event, a qualified colleague did read the NDA and made suggested changes to it. In our view, it is of general relevance that in assessing the reasonableness of the NDA as between the parties one could reasonably expect these parties to look after their own interests and to know what they were doing and the risks that they were taking. This is consistent with the thrust of Lord Diplock's speech which focused on the fairness of the bargain and avoiding the enforcement of unconscionable bargains. Lord Reid forcibly put this point in the *Esso* case at p 300:

> "Where two experienced traders are bargaining on equal terms and one has agreed to a restraint for reasons which seem good to him the court is in grave danger of stultifying itself if it says that it knows that trader's interest better than he does himself."

See similarly Lord Morris of Borth-y-Gest at p 305, Lord Hodson at p 320, and Lord Pearce at p 323. See also, in the context of a restraint in a solicitors' partnership agreement, *Bridge v Deacons* [1984] AC 705, 717 (Lord Fraser of Tullybelton giving the opinion of the Privy Council).

(iv) Although for the reasons given above, we agree with the judge that the legitimate interests of Your Lawyers extended beyond the protection of confidential information, we think there is some force in Mr Coleman's submission that, even if one were just protecting confidential information, a non-compete undertaking may be needed. This is because it is often difficult to prove what is and what is not confidential information and, in particular, whether that information has been misused. A non-compete undertaking may be a useful means of ensuring that confidential information is protected without needing to prove, through protracted litigation, that the information has been misused. See, eg, *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472, 1479, *Thomas v Farr Plc* [2007] EWCA Civ 118; [2007] ICR 932, para 42; Heydon, *The Restraint of Trade Doctrine*, 4th ed (2018), pp 120-121.

(v) Although one must be careful not to slide away from the relevant time for viewing matters being the time the contract was made, it is of overall relevance, not least in considering the benefits to Harcus Sinclair, that, while Mr Parker started off with scepticism about the prospects for a group claim against Volkswagen, his view, even by the time the contract was made in April 2016, had been altered by reason of his involvement with Your Lawyers. See the judge's (redacted) findings at paras 48 and 75.

(6) Conclusion on reasonableness between the parties

85. For the reasons set out in relation to each of the three elements, and taking into account the five further points just considered, the judge was entitled to conclude that Your Lawyers has established that the non-compete undertaking was reasonable as between the parties. The Court of Appeal was incorrect to have overturned the judge on this aspect of reasonableness.

86. As the promisee has succeeded in establishing that the non-compete undertaking is reasonable as between the parties, the burden shifts to the promisor

(Harcus Sinclair) to establish that the undertaking is unreasonable as being contrary to the public interest. It is to that question that we now turn.

(7) Unreasonable as being contrary to the public interest?

87. We can deal with this principle relatively briefly. The judge decided in short measure (paras 318-324) that the non-compete undertaking was not contrary to the public interest. This was for four main reasons:

> (i) As laid down in *Bridge v Deacons* [1984] 1 AC 705, in which a restrictive covenant in a solicitors' partnership agreement was held not to be an unreasonable restraint of trade, there is no public policy against a solicitor (at least one in the position of a departing partner) undertaking not to continue to act for a client. This is supported by the fact that, in general, a solicitor is entitled to refuse to act for a particular person.
>
> (ii) There is a public interest in law firms knowing that the courts will enforce a reasonable non-compete undertaking such as the one in this case because non-enforcement would undermine firms seeking external advice and assistance in respect of a proposed group claim.
>
> (iii) The restriction in this case merely prevented Harcus Sinclair "acting for a group of claimants other than [Your Lawyers'] group of claimants in respect of one set of claims arising out of one particular set of events (the emissions events)" (para 321). The judge's view was that such a limited restriction was not damaging any public interest.
>
> (iv) As there were a number of firms willing and able to run group claims of this type, it was not contrary to the public interest for Harcus Sinclair to be removed from the pool (other than if acting with Your Lawyers). In other words, the choice of solicitor, and hence access to justice, was not being significantly affected.

88. The Court of Appeal, at para 88, said that, given its decision that the non-compete undertaking was unreasonable between the parties, it was unnecessary for it to say anything about the public interest. In any event, it said that it had not been taken to the relevant factual background. All it did say was that it was not convinced that the judge had been asking the right question - because again the judge was treating collaboration between the two firms as relevant - and, had he done so, the Court of Appeal was not sure the same conclusion would have been reached.

89. Mr Crow's brief submissions on this issue were to the effect that, had the right question been asked by analysing the NDA without reference to collaboration, the judge should have decided that the non-compete undertaking was not in the public interest. This was essentially because it deprived claimants of the ability to choose an experienced firm to represent them.

90. It is our view that the judge was entitled to reach the decision he took, for the reasons he gave, that the non-compete undertaking was not unreasonable as being contrary to the public interest. For the reasons we have given earlier, he was correct to analyse the NDA by taking into account the intended informal collaboration and, therefore, he did not here ask the wrong question. There is no ground for us now to overrule his decision on this issue.

91. It should finally be noted that Mr Coleman submitted that an additional factor supporting the judge's decision on the public interest is that there is a public interest in solicitors' undertakings being upheld. As we explain below under issue (1), it is our view that Harcus Sinclair was not here giving a solicitor's undertaking in the sense of triggering the inherent supervisory jurisdiction of the court. This submission therefore falls away for the purposes of this case. In any event, this submission is what issue (5) is concerned with and we briefly deal with that issue below at para 150.

(8) Conclusion on issue (6)

92. For all these reasons, it is our view that the Court of Appeal was wrong in holding that the non-compete undertaking constituted an unreasonable restraint of trade.

6. Issue (1): Is the non-compete undertaking a solicitor's undertaking?

93. We are concerned in this section with the question whether the non-compete undertaking is by its very nature a solicitor's undertaking, rather than with the question (which arises from the fact that Harcus Sinclair is an incorporated law firm rather than an individual solicitor or traditional solicitors' partnership) whether any undertaking which it might give could be a solicitors' undertaking enforceable by the court. That question is addressed in the next section.

94. The court's supervisory jurisdiction to enforce solicitors' undertakings is an aspect of its inherent jurisdiction over solicitors as officers of the court. This inherent jurisdiction has its origins in medieval times.

95. In around the 13th century the profession of attorney emerged. Attorneys managed the formal aspects of the litigation process, such as representing absent clients, taking out writs, gathering evidence, liaising with other court officials and, where necessary, instructing counsel. They were admitted to the legal profession by the court in which they intended to practise, in contrast to barristers who were admitted by the Inns of Court. On admission, an attorney's name was entered on the roll and he became an "officer of the court". This title reflected the fact that attorneys were appointed by the court, required to attend court at regular intervals, benefited from privileges attached to the office and worked closely alongside the clerical staff of the courts. Attorneys were "sworn to good behaviour" on admission and were bound to adhere to strict professional standards, with the courts assuming an inherent jurisdiction to ensure that those standards were upheld - see generally *Holdsworth, A History of English Law*, vol 6, 2nd ed (1937), pp 432-434.

96. Over time the solicitors' profession developed. The Court of Chancery admitted solicitors as officers of the court in the 1600s. The Attorneys and Solicitors Act 1729 provided for both attorneys and solicitors to be enrolled by the courts in which they practised on the swearing of an oath and made provision for training and examination of fitness to practise prior to admission.

97. A considerable overlap of the professions of attorney and solicitor developed and they were merged by the Supreme Court of Judicature Act 1873, which by section 87 provided that all persons admitted as solicitors, attorneys or proctors (who practised in the ecclesiastical and admiralty courts), and all other persons entitled to practise in the old courts, were to be called "Solicitors of the Supreme Court" and "deemed" to be "Officers of the Supreme Court". The supervisory jurisdiction previously exercised by the old courts of law and equity over solicitors and attorneys was expressly transferred to the newly created Supreme Court.

98. The inherent supervisory jurisdiction in respect of solicitors has been preserved in successor statutes: see section 25 of the Supreme Court of Judicature (Consolidation) Act 1925, and section 50 of the Solicitors Act 1974. Section 50(2), as amended, provides:

> "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."

99. Although the Solicitors Disciplinary Tribunal established under the Solicitors Act 1974 is now the primary forum for the consideration of allegations of solicitor misconduct, the court's inherent supervisory jurisdiction continues to play an important role in relation to solicitors' undertakings due, in particular, to the court's powers of summary enforcement. The court's jurisdiction may be invoked on an application to the court and without the need to commence a separate action. Whilst the court has a discretion as to the procedure to be adopted, it has often been exercised without pleadings, disclosure or oral evidence - see *Geoffrey Silver & Drake v Baines* [1971] 1 QB 396 at 402F per Lord Denning MR; *John Fox v Bannister King & Rigbeys* [1988] QB 925 per Lord Donaldson MR at 931F-H; and, more generally in relation to the summary jurisdiction, the judgment of Balcombe LJ in *Udall v Capri Lighting Ltd* [1988] QB 907, pp 916H-918D.

100. As explained by Nicholls LJ in the *Fox* case at p 928B-C the inherent jurisdiction "is exercised, not for the purpose of enforcing legal rights, but for the purpose of enforcing honourable conduct on the part of the court's own officers". As stated by Hamilton J in *United Mining and Finance Corpn Ltd v Becher* [1910] 2 KB 296, p 305:

> "The conduct which is required of solicitors is to this extent perhaps raised to a higher standard than the conduct required of ordinary men, in that it is subject to the special control which a Court exercises over officers so that in certain cases they may be called upon summarily to perform their undertakings, even where the contention that they are not liable to perform them is entirely free from any taint of moral misconduct."

101. Solicitors are expected to abide by solicitors' undertakings and may be called upon to do so summarily if they do not do so - see the *Fox* case at p 928C per Nicholls LJ. Failure to implement a solicitor's undertaking is prima facie to be regarded as misconduct on the solicitor's part - see the *Udall* case at p 917F per Balcombe LJ.

102. Solicitors' undertakings are frequently given in litigation and in relation to transactional work, particularly conveyancing. Their importance in conveyancing was explained by Smith LJ in *Briggs v The Law Society* [2005] EWHC 1830 (Admin) at para 35 as follows:

> "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."

A solicitor's undertaking involves a promise to do or refrain from doing a certain act. It will often be contractual, but it need not be and there is no requirement of consideration or of legal enforceability. For example, in *In re Greaves (Note)* (1827) 1 Cr & J 374 the Court of Common Pleas held that the fact that an undertaking was void, as a result of contravening the Statute of Frauds, was no bar to its enforcement - see the *Fox* case at 931F, per Sir John Donaldson MR; the *Udall* case at 919, per Kerr LJ.

103. The mere fact that the undertaking is given by a solicitor does not make it a solicitor's undertaking. The generally accepted test is that the undertaking must be given by the solicitor in his or her "capacity as a solicitor" - see, for example, *United Mining and Finance Corpn Ltd v Becher* at p 306 per Hamilton J; *Geoffrey Silver & Drake v Baines* at 402G per Lord Denning MR; the *Fox* case at 928 per Nicholls LJ; *United Bank of Kuwait v Hammoud* [1988] 1 WLR 1051 at 1063 per Staughton LJ. It is the fact that the undertaking is given professionally that engages the court's supervisory jurisdiction. The court is concerned with undertakings given by solicitors in their professional capacity rather than in some other capacity, such as their private capacity - see *Geoffrey Silver & Drake v Baines* at 403G per Widgery LJ.

104. An example of an undertaking given by solicitors in their capacity as solicitors would be an undertaking to hold money or deeds to another's order in relation to a property transaction in respect of which they were engaged by a client. An example falling on the other side of the line would be an undertaking to hold or pay money in relation to the lease of a solicitor's office space. Another such example, falling outside what counts as a solicitor's undertaking, and closer to the facts of this case, would be an undertaking 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, as in *Bridge v Deacons* [1984] 1 AC 705. It has never been suggested that such covenants are or should be summarily enforceable as solicitors' undertakings.

105. In the courts below it was argued by Harcus Sinclair that an undertaking can only be a solicitor's undertaking if it is given in connection with a transaction involving a client or if it is given to the court or to a third party. Before this court, Mr Crow for Harcus Sinclair did not maintain that these were determinative matters. He did, however, submit that they are important indicators of whether an undertaking is a solicitor's undertaking and are therefore relevant matters to take

into account. We agree that they are common and relevant indicators. Other such indicators are whether the solicitor is acting on instructions and whether the solicitor is acting in a personal or business capacity rather than a professional capacity.

106. The difficulty of determining in borderline cases whether, in giving an undertaking, solicitors are acting in their capacity of solicitors is illustrated by the case law.

107. Examples of undertakings held to be given by solicitors acting in their capacity as solicitors include the following. An undertaking by a solicitor to repay money to a third party in the event that negotiations for an agreement between the third party and the solicitor's client did not result in agreement by a certain date - see *United Mining and Finance Corpn Ltd v Becher*. An undertaking by a solicitor given to his client's former solicitors not to release moneys in his possession belonging to the client until a dispute between them over unpaid fees had been sorted out - see *Fox*'s case. An undertaking, provided in the context of proceedings brought for the recovery of moneys due, given by the defendant's solicitor to the claimant's solicitor that the directors of the defendant would provide security for its liabilities to the claimant by creating second charges in the claimant's favour on their personal properties - see the *Udall* case.

108. Examples of undertakings held not to be given by solicitors acting in their capacity as solicitors include the following. An undertaking given by an assistant solicitor on behalf of his firm that an advance of moneys obtained for a client of the firm from another firm of solicitors would be repaid by a certain date with interest at 2% a month - see *Geoffrey Silver & Drake v Baines*. An undertaking by a solicitor to repay moneys due or to become due to the claimant from a third party and a guarantee of a third party's obligation to repay a loan to the claimant with interest - see *Ruparel v Awan* [2001] 1 Lloyd's Rep PN 258.

109. In a number of the authorities the issue of whether the undertaking was a solicitor's undertaking overlapped with the issue of whether it bound the solicitor's partnership. In *United Bank of Kuwait v Hammoud* Staughton LJ regarded these issues as raising effectively the same question. In that context he commented as follows, at p 1063, having regard to the evidence in that case:

> "First, in the case of an undertaking to pay money, 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. Solicitors are not in business to pledge their own credit on behalf of clients unless they are fairly confident that money will be available so that they can reimburse themselves. Secondly, 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. It is not the ordinary business of solicitors to receive money or a promise from their client, in order that without more they can give an undertaking to a third party. Some other service must be involved."

110. Statements to similar effect were made in *Geoffrey Silver & Drake v Baines*. At pp 402G to 403B Lord Denning MR stated as follows:

> "The first question in the present case is whether the solicitor gave the undertaking 'in his capacity as a solicitor'. This is difficult to define. But I think it will usually be found, in regard to money, that it is an undertaking to pay money which *he has in his hands on trust, or on an undertaking* that he will apply it in a particular way. Thus if a solicitor is acting for a client on the sale of land and gives an undertaking to a bank that he will pay over so much of the money, when received, to the bank, the undertaking is given 'in his capacity as solicitor': see *In re A Solicitor (Lincoln)* [1966] 1 WLR 1604. So also, if a solicitor gives an undertaking that he will hold a sum of money in his hands pending the conclusion of negotiations, that too is given in his capacity as a solicitor, as in *United Mining and Finance Corpn Ltd v Becher* [1910] 2 KB 296. But this case is very different from either of those cases. The solicitor here was not holding money in his hands at all. All that happened was that Mr Batts received money and paid it over to a client, Mr Izzet, and promised to repay it to Mr Silver. It was an undertaking to repay money lent. That is all. It was at good interest too, 2% a month. The money may have been for the benefit of a client. But that does not matter. It was in truth nothing more nor less than an undertaking to repay money lent. That is not an undertaking 'in his capacity as a solicitor'."

At p 403G to 404C Widgery LJ stated as follows:

> "… the first requirement of the exercise of that jurisdiction, as Lord Denning MR has pointed out, is that the undertaking in question must have been given by the solicitor in the course of his activities as a solicitor. It must be given by him professionally as a solicitor and not in his personal capacity. The reason for that is clear enough, because a remedy of this kind is intended primarily to discipline the officers of the court,

> to ensure the honesty of those officers. The court is thus concerned only with their activities as solicitors, and anything done by a solicitor in his private capacity is outside this jurisdiction.
>
> What is the position here? … On its face it is simply an undertaking to repay a debt which is being contracted by the solicitor in question. If a solicitor borrows money personally and incurs a personal obligation in that regard, his promise to pay that money is not a promise in his capacity as a solicitor, even though he sits in his office when he receives the money and even though he acknowledges the debt on his professionally headed notepaper. Another possible view of this particular case is that this was in truth the giving of a guarantee by a solicitor for a debt incurred by his client. But looking at it in that way it seems to me to make no difference. Here again one cannot describe this as an act done in the capacity of a solicitor merely because a client of the partnership was involved in the transaction. The position, of course, would have been wholly different if the sense of the transaction had been that the solicitor was to receive this money and undertake to apply it in a particular way. In those circumstances one would have a conventional type of solicitor's undertaking."

111. These passages were cited in *Ruparel v Awan* in which *United Bank of Kuwait v Hammoud United* and *Silver & Drake v Baines* were regarded by the deputy High Court judge, David Donaldson QC, as supporting the following general proposition, as stated at p 262:

> "… The mere fact that the giver of the undertaking happens to be a solicitor is not enough. The undertaking must … be given as part of or in connection with a transaction or activity which is 'solicitorial'."

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.

113. This can be illustrated by reference to the three examples given in para 104 above.

114. An undertaking to hold money or deeds to order in relation to a property transaction in respect of which solicitors were engaged by a client: (i) involves an undertaking to do something which solicitors do regularly as part of their ordinary professional practice when acting for clients in relation to property transactions, and (ii) is given to facilitate a property transaction for a client which is the sort of work which solicitors regularly carry out as part of their ordinary professional practice.

115. An undertaking to hold or pay money in relation to the lease of a solicitor's office space: (i) does not involve an undertaking to do something which solicitors do regularly as part of their ordinary professional practice because it involves the solicitors acting in relation to the property transaction in their own right and for their own business interests rather than on behalf of any client, and (ii) the reason for giving the undertaking is furtherance of the firm's business interests rather than that of any client and acting in their own name and for their own benefit is not the sort of work which solicitors regularly carry out as part of their ordinary professional practice.

116. An undertaking by a solicitor not to work for the clients of a firm which a solicitor was leaving: (i) does not involve an undertaking not to do something which solicitors regularly refrain from doing as part of their ordinary professional practice as solicitors because they are not in practice to preclude themselves from acting for clients, and (ii) the reason for giving the undertaking is protection of the firm's business interests rather than that of any client and the cause or matter to which it relates is the business of the firm rather than any professional service.

117. Addressing the first of these questions in relation to the facts of the present case, the subject matter of the undertaking is a promise not to compete with another law firm. That does not involve the sort of work which solicitors undertake not to do as part of their ordinary professional practice. Solicitors are in practice to carry out work, not to disable themselves from doing so and it is difficult to conceive of circumstances in which a solicitor's non-compete undertaking could ever be given on behalf of a client.

118. Addressing the second of these questions, the undertaking was given because it was required by Your Lawyers before they would disclose confidential

information to Harcus Sinclair. Your Lawyers required the undertaking because it wanted to protect the business opportunity it had identified. Harcus Sinclair wanted to see the confidential information in order to consider whether to pursue that business opportunity in collaboration with Your Lawyers. The cause or matter to which the undertaking related was a potential business opportunity. The reason for giving the undertaking was furtherance of the parties' business interests rather than that of any client and acting in their own rather than a client's business interests is not the sort of work which solicitors regularly carry out as part of their ordinary professional practice.

119. In summary, this was a business arrangement and in giving the undertaking Harcus Sinclair was acting in a business capacity rather than a professional capacity. As the Court of Appeal commented at para 98, it was "part of the commercial relationship between solicitors".

120. In the course of oral argument before the Court of Appeal the Chancellor observed that the non-compete undertaking was "not the usual stuff of solicitors' undertakings" and asked whether there is "any case which is anything close to this in the whole history of the jurisdiction of the court over its officers". Your Lawyers has been unable to identify any such case.

121. The judge reached a contrary conclusion. His essential reasoning is set out at paras 236 to 239 of his judgment:

> "236. It seems to me quite clear that the undertaking in sentence 2 was given by the first claimant as part of a solicitorial service. I say this for the following reasons.
>
> 237. The NDA recorded, in clause 1, that the defendant intended to disclose information to the first claimant 'for the purpose of obtaining legal advice' from the first claimant. The giving of legal advice is a classic instance of a solicitorial service.
>
> 238. Looking at the matter more widely, the NDA was put in place at the outset of a process of collaboration between the defendant and the first claimant in respect of the working up of the defendant's group claim. The working up of this group claim involved a set of activities which can all be correctly described as solicitorial services. Preparing a legal claim for a client or a group of clients is another classic instance of a solicitorial service.

> 239. The whole point of sentence 2 was to protect the defendant from the first claimant accepting instructions from or acting on behalf of any other group of claimants in the contemplated group action. I will have to decide what precisely these words meant in the next section of this judgment. For present purposes the important point is that sentence 2 was intended to provide the defendant with a particular form of protection in connection with the first claimant giving its advice and, more generally, in connection with the intended collaboration between the defendant and the first claimant."

122. The judge did not address the subject matter of the undertaking and whether it involved the sort of work which solicitors undertake as part of their ordinary professional practice. Had he done so he would have been bound to conclude that it did not. In so far as he considered the reason for the giving of the undertaking and the cause or matter to which it related he did so in an unrealistically narrow manner. It is correct that the NDA states that the confidential information was to be provided "for the purpose of obtaining legal advice" from Harcus Sinclair and that that is a solicitorial service. The non-compete undertaking has, however, nothing to do with the provision of legal advice. It does not assist in the giving or understanding of any such advice. It is addressing an entirely different matter, namely the protection of Your Lawyers' business interests. The advice was not being provided to Your Lawyers as an actual or potential client of Harcus Sinclair, but as a potential business collaborator. As the judge recognised, the non-compete undertaking related to the intended collaboration between the two firms - ie the proposed business arrangement between them. A business arrangement between two law firms is not the sort of work which solicitors undertake as part of their ordinary professional practice. It is a business matter rather than a professional matter, even if the business in question relates to the provision of professional services. In determining whether the non-compete undertaking was a solicitor's undertaking, the judge did not therefore address the right questions, and, if and to the extent that he did, he did so incorrectly and this led him to reach the wrong conclusion. In so doing he erred in law.

123. Mr Coleman for Your Lawyers submitted that the capacity in which Harcus Sinclair was acting is a matter of fact and that it is not appropriate for this Court to review or replace the decision of the judge. Whilst there may be some cases in which the issue of capacity turns on matters of fact, in most cases it is likely to involve a mixed question of fact and law, and it does in this case. Having full regard to the factual findings made by the judge, he has adopted an erroneous legal approach to the issue of capacity and reached a wrong conclusion. His decision can and should be overturned; and, as the Court of Appeal did not directly address this issue, it is appropriate for this court to overturn the judge's decision that the non-compete undertaking was a solicitor's undertaking.

124. For all these reasons, we conclude that the non-compete undertaking was not a solicitor's undertaking.

7. Issues 2 and 3: Does the court's supervisory jurisdiction over solicitors apply to Harcus Sinclair or to Mr Parker?

125. Our conclusion that the non-compete undertaking given by Harcus Sinclair is not by its nature a solicitor's undertaking means that it is not necessary to decide whether, if it had been, it could have been enforced against either (i) Harcus Sinclair or (ii) Mr Parker under the court's supervisory jurisdiction. But both those issues were fully argued, and the question as to the boundaries of that jurisdiction in the much wider market for legal services, which may now be provided by corporate entities as well as individuals and old-style partnerships, was one of the reasons for the giving of permission to appeal to this court. The question is one of general public importance because of the significant structural role played by solicitors' undertakings in the smooth and efficient transaction of legal business by legal services providers, both in connection with litigation before the courts and in purely transactional matters, such as conveyancing.

126. A typical residential conveyancing transaction affords a good illustration of what is at stake. Most residential conveyancing adopts the Law Society's Code for Completion by Post. This enables the parties' solicitors to avoid the time, expense and inconvenience of an old-style completion where the solicitors all attend in person and transact face to face. 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.

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. 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. The

undertaking did not depend for its enforcement upon it being given contractually, supported by consideration. Thus a solicitor's undertaking has a value greater than that of the client for whom the solicitor acts, as is noted in the following passage in *Emmet & Farrand on Title*, vol 1, at para 8.025:

> "A purchaser will often accept an undertaking by the vendor's solicitor when he would not accept an undertaking by the vendor himself. Thus in *Damodaran s/o Raman v Choe Kuan Him* [1980] AC 497 at 502, the Privy Council recognised that: 'The main purpose and value of a solicitor's undertaking in transactions for the sale of land is that it is enforceable against the solicitor independently of any claims against one another by the parties to the contract of sale.' If the undertaking is signed by the vendor's solicitor it should make clear whether the solicitor accepts liability personally."

128. In 1974, when Parliament last re-affirmed the courts' continuing inherent supervisory jurisdiction over solicitors, they collectively enjoyed a status-based near-monopoly over the provision of a wide range of legal services. It was protected by section 20 of the Solicitors Act 1974 which made it a criminal offence for an unqualified person to act as a solicitor, and by other provisions (since repealed) which prohibited anyone other than a solicitor from performing aspects of conveyancing and probate services. But that all changed. First, the Administration of Justice Act 1985 ("AJA 1985") enabled solicitors to own and manage corporate bodies which were permitted to provide the same services as had until then been provided by solicitors acting alone or in traditional partnership. Secondly, the same Act introduced a separate regulatory scheme for licensed conveyancers, pursuant to which they now provide conveyancing services similar to those provided by conveyancing solicitors, under the regulatory supervision of the Council of Licensed Conveyancers. Thirdly, the Limited Liability Partnership Act 2000 then provided a new form of corporate body, the limited liability partnership, which has since proved to be the main corporate vehicle through which solicitors, formerly practising in partnership, have been able to practise by using a corporate body with limited liability. An LLP is a corporate body with separate legal personality, unlimited capacity and limited liability: see section 1(2) of the Act of 2000. Fourthly a much more fundamental liberalisation of the legal services market was introduced by the Legal Services Act 2007 ("LSA 2007") under which both ownership and management of authorised corporate entities providing what were called "reserved legal activities" were extended to unqualified persons. In this section we will refer to solicitors' LLPs and limited companies providing legal services as incorporated law firms.

129. Neither the AJA 1985 nor the LSA 2007 made any express reference to the court's inherent jurisdiction over solicitors, nor whether that jurisdiction did or did

not extend to licensed conveyancers or to incorporated law firms when providing services of the type formerly only provided by solicitors (termed "solicitor services": see section 9 of the AJA 1985). But there may have been a widespread assumption that it did, at least in relation to solicitors' LLPs. In both *Global Marine Drillships Ltd v La Bella* [2014] EWHC 2242 (Ch) and *Clark v Lucas Solicitors LLP* [2009] EWHC 1952 (Ch); [2010] 2 All ER 955, the High Court purported to exercise its inherent jurisdiction over a solicitors' LLP, in the absence of any argument that it could not do so.

130. That question first arose as an issue for decision in the *Assaubayev* case. The respondent Michael Wilson & Partners ("MWP") was a limited company incorporated in the British Virgin Islands, managed by Michael Wilson, an English solicitor. MWP was not authorised to provide legal services under either the AJA 1985 or the LSA 2007, but it agreed to provide legal services to the appellants under a retainer agreement which contained an arbitration clause. The services provided included litigation before the English courts. MWP began arbitration proceedings to resolve a dispute as to fees, and the appellants countered with proceedings in the High Court, in part invoking the court's inherent supervisory jurisdiction, which was alleged to apply not only to solicitors, but to a person pretending to be a solicitor. MWP applied to stay the High Court proceedings because of the pending arbitration. MWP failed before the Master, but succeeded both before the judge and in the Court of Appeal. It was common ground (at least in the Court of Appeal) that, if the court had an inherent supervisory jurisdiction over MWP, then it could not be exercised by an arbitrator. The judge considered it inappropriate to decide, at least at that stage, whether the court did have an inherent supervisory jurisdiction over MWP, but granted a stay pending a ruling by the arbitrator as to his own jurisdiction over MWP's fees claim.

131. The Court of Appeal dismissed the appellants' appeal. Giving the leading judgment, Christopher Clarke LJ expressly declined to decide whether the court's inherent supervisory jurisdiction extended to MWP. He decided that even if it did (on the basis that MWP had pretended to be a solicitor) that was not a good reason for refusing to let the arbitration take its course, while staying the court proceedings in the meantime, as the judge had ordered. But he reached a clear view (albeit necessarily obiter) that the inherent supervisory jurisdiction did not extend to incorporated bodies authorised to provide legal services under either the AJA 1985 or the LSA 2007. This was because, as reflected in section 50 of the Solicitors Act 1974 and in the leading authorities including *In re Grey* [1892] 2 QB 440, 443 and *John Fox v Bannister King and Rigbeys* [1988] QB 925, that jurisdiction was based upon a solicitor's status as an officer of the court, and nothing in the 1985 or 2007 Acts conferred that status on any of the incorporated bodies thereby authorised to provide solicitor services.

132. Your Lawyers drew the deputy judge's attention to the *Assaubayev* case following the end of closing submissions and conceded that the deputy judge was bound to follow it and to conclude that the inherent supervisory jurisdiction did not apply to a solicitors' LLP like Harcus Sinclair. The claim that Mr Parker was subject to that jurisdiction in relation to the non-compete undertaking was pursued, but unsuccessfully. The deputy judge expressed some disquiet about the consequences, to which we will return.

133. The Court of Appeal also considered itself bound to follow the *Assaubayev* case on the extent of the inherent supervisory jurisdiction, but gave permission to Your Lawyers to raise it by way of cross-appeal so as to leave it open for argument in this court. It upheld the judge's decision that Mr Parker was not subject to that jurisdiction in relation to the non-compete undertaking.

134. The result of the way in which the matter proceeded in the courts below is that it was only in this court that the question has been fully argued whether the inherent supervisory jurisdiction applies to a regulated incorporated law firm, whether an LLP like Harcus Sinclair or a limited company like HSUK. In our view the question is not merely whether the jurisdiction does so apply but whether, in the light of the admission of approved incorporated bodies to the class of persons authorised to provide solicitor services, it should be extended so as to apply to all or some of such bodies. We phrase the question in that way because, prior to 1985, it is clear, for the reasons given by Christopher Clarke LJ in the *Assaubayev* case, that the jurisdiction applied to solicitors because of their status, as officers of the court, rather than to particular functions which they performed in or out of court (subject to the functional limitation, in relation to undertakings, that they be given in the capacity of a solicitor). Incorporated law firms authorised to provide solicitor services are not officers of the court. This is both because the authorising legislation has not made them so, and because the court has yet to recognise any incorporated body as one of its officers, confining itself to the recognition of individuals, whether they be solicitors, liquidators, bailiffs, receivers or sequestrators.

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. This is because a barrister is not an officer of the court. Conversely solicitors, simply because of their status as officers of the court, are subject to the jurisdiction in relation to the provision of conveyancing services, even though those services usually have nothing at all to do with the court's processes. The jurisdiction applies to one and not the other purely because of the difference of status between them.

136. Prior to the coming into force of the relevant provisions in the AJA 1985 there was nothing inconvenient in defining the extent of this jurisdiction by reference to status, because solicitors were, with minimal exceptions, the only persons authorised to provide solicitor services, including conveyancing, probate and the conduct of litigation in court. Thus a status-based supervisory jurisdiction covered almost all the relevant functional ground.

137. But this fundamentally changed in and after 1985. Licensed conveyancers became authorised to conduct conveyancing. Solicitor LLPs eventually became authorised to conduct the whole range of legal services formerly conducted by solicitors, whether as sole practitioners or, more importantly, in partnership. At this point a status-based delineation of the ambit of the court's supervisory jurisdiction began to distinguish between different classes of persons (collectively referred to in this judgment as "law firms") providing the same legal services in competition with each other. Furthermore, 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. In that example exactly the same solicitors who had constituted the former partnership would be the members (ie owners and managers) of the LLP which succeeded to the same practice. But the LLP would not itself be a solicitor, or an unincorporated association of solicitors. It is a separate legal person, distinct from the solicitors who own and manage it.

138. A debate whether the court should extend its supervisory jurisdiction in this way presupposes that it is at liberty to do so. A main argument advanced by the respondents in this court is that there is no such liberty. It is said that by section 50 of the Solicitors Act 1974 Parliament confined the jurisdiction to solicitors as officers of the court, and that the absence of any conferral of that status on the newly authorised incorporated law firms in the AJA 1985 or the LSA 2007, or by amendment of section 50 of the Solicitors Act 1974, means that the jurisdiction cannot be extended to them.

139. We are not persuaded that this is an insuperable objection. Section 50 repeats the substance of a provision originally appearing in section 87 of the Supreme Court of Judicature Act 1873 which created the Supreme Court of Judicature and the High Court. Its effect is not to replace a previously inherent jurisdiction with a new statutory jurisdiction, set in stone unless altered by Parliament, but rather to recognise a continuing inherent jurisdiction as residing in the newly created courts in the same way as it had in the old courts which were being replaced. A similar technique was deployed in relation to the power to grant injunctions, in section 25(8) of the 1873 Act. This did not replace the previously inherent equitable jurisdiction, and it has continued to develop and extend into new fields, such as the freezing

order, the search order, the *Norwich Pharmacal* and *Bankers Trust* orders, anti-suit injunctions and, most recently, the website blocking order.

140. Nor can section 50 of the Solicitors Act 1974 be read as containing some kind of Parliamentary prohibition. While it recognised that the inherent supervisory jurisdiction over solicitors had indeed been based until then on their status as officers of the court, it was silent as to whether it might become appropriate to extend it, and the circumstances which call that question now into sharp focus did not then exist. In our view, it is therefore open to us as a matter of developing the inherent jurisdiction of the court (or, perhaps, as a purposive interpretation of section 50) to treat a solicitor's undertaking as extending to an undertaking given by an incorporated law firm.

141. The question whether the inherent jurisdiction might be extended to incorporated law firms as providers of legal services formerly only provided by solicitors does not appear to have been the subject of judicial consideration in the *Assaubayev* case, although Christopher Clarke LJ was well aware of what (at para 62) he called "curial creativity" in relation to inherent jurisdiction. As in this case, it was not necessary to do so. So we do not regard that case as a binding precedent against doing so.

142. We recognise that there are powerful arguments both ways on this question, with different force in relation to different types of incorporated law firms. The strongest argument in favour seems to us to be that the court's buttressing of professional undertakings within the provision of "solicitor services" ought fairly to be equally available across all types of provider: ie that the jurisdiction should now be applied along functional lines, to all authorised providers of solicitor services, rather than continue to be status-based. There is in that respect an analogy with the way in which, for certain purposes, the Civil Procedure Rules treat as a solicitor any person (individual or incorporated) authorised to conduct litigation under the LSA 2007: see CPR 6.2(d) and 42.1. This functional approach is of particular force in relation to a solicitors' LLP which, although a separate legal person from the solicitors who own and manage it, is the vehicle by which they provide solicitor services, and on behalf of which they continue to give solicitors' undertakings. The strongest argument against is that, from 2007, incorporated law firms need no longer be owned, controlled or even managed by solicitors, and that conveyancing services have been available from 1985 from licensed conveyancers, who have apparently been able to provide satisfactory undertakings without the court's backing in terms of summary enforcement.

143. However, with considerable reluctance, we do not consider that this case is an appropriate occasion for making a decision whether, and if so how far, to extend that inherent jurisdiction. This is for three main reasons. First, our views would only

have the force of *obiter dicta*, for the reasons already explained. This is not, as it turns out, a case about a solicitor's undertaking at all. It would not therefore bind lower courts. Secondly, we consider that a properly informed decision would much better be made with the assistance of submissions from the Law Society, and from any other professional or regulatory body with a legitimate interest such as, for example, the Council of Licensed Conveyancers or the Solicitors' Regulation Authority. Thirdly, although this continues to be an inherent jurisdiction, this question is probably better dealt with by legislation than by the courts, because of the availability of procedures for consultation which the court lacks. In the context of this case, we have not been provided with much of the evidence and information about the operation and structure of today's law firms that we would need to develop the law properly in this area.

144. The result is that, as matters stand, the non-compete undertaking would not have been enforceable against Harcus Sinclair even if it had been in the nature of a solicitor's undertaking, because Harcus Sinclair is not an officer of the court (and indeed, as we have made clear at para 137 above, Harcus Sinclair, as an LLP, is not a solicitor). As for Mr Parker, even if the non-compete undertaking had been in the nature of a solicitor's undertaking, we agree with the courts below that he is not liable to perform it at the direction of the court exercising its undoubted jurisdiction over him as one of its officers, for the simple reason that he did not give it in his personal capacity, but only on behalf of Harcus Sinclair. He signed the NDA as the agent of his disclosed principal Harcus Sinclair and thereby, in accordance with the settled principles of agency law in the context of contracts, incurred no personal liability under it.

145. We can see no good reason why a different rule should apply to the enforcement of a solicitor's undertaking under the court's supervisory jurisdiction. Where a solicitor gives an undertaking expressly on behalf of an ordinary unincorporated partnership of which he (or she) is a partner, then he is bound by it, and therefore subject to the court's jurisdiction to enforce it, precisely because he is a partner, not because he was the human instrument by which the partnership (ie all the partners including him) gave it. While the partner who gave the undertaking is acting as an agent for the other partners (see section 5 of the Partnership Act 1890), that partner does not "drop out of the picture" (as a disclosed agent normally would) but is jointly liable, as a partner, with all the other partners (see section 9 of the Partnership Act 1890). The critical difference where the undertaking is given on behalf of a solicitors' LLP (or a limited company) is that it binds only the separate legal person constituted by the LLP, not its solicitor members. The solicitor who gave the undertaking "drops out of the picture". That in our view is the inevitable consequence of the separate legal personality, and limited liability, of the LLP.

146. Your Lawyers submit that the matter is not determined by a conclusion that Mr Parker incurred no contractual liability under the NDA which he signed. He

should as an officer of the court have ensured that it was complied with by Harcus Sinclair, even if (i) Harcus Sinclair is not amenable to the court's supervisory jurisdiction and (ii) the undertaking which the NDA contained did not bind him personally.

147. We do not consider that it makes any difference to the amenability of a solicitor to the court's supervisory jurisdiction that he or she actually signs an undertaking for a body which is not itself an officer of the court, while incurring no personal liability for its performance, save that it may constitute evidence that the solicitor knew about it, (an inference which Mr Parker persuaded the judge should not be drawn against him, because he did not read the NDA before signing it). We leave open for another occasion the question whether a solicitor may attract the court's supervisory jurisdiction by actively procuring the non-compliance by an incorporated law firm with an undertaking of a type which, if it had been given by a solicitor, would have been a solicitor's undertaking. It does not arise in the present case because the non-compete undertaking was not of that type.

148. In the meantime, we share the judge's concern about whether those dealing with incorporated law firms, and with solicitors' LLPs in particular, are sufficiently aware that undertakings given by them are not currently buttressed by the court's supervisory jurisdiction. We note, however, that the following passage appears in the latest online version of *Cordery on Legal Services*, at para 319:

> "Given that most solicitors now practise through some form of entity, the practical effect of the decision [of the Court of Appeal] in *Harcus Sinclair* is that most undertakings can now only be enforced by a breach of contract claim. Alternatively, an aggrieved party can hope that the risk of being reported to the SRA will encourage compliance. This clearly falls well short of the protections that made undertakings such a powerful tool, and clients and law firms alike may want to review their reliance upon them."

It may be that, as the judge suggested, the lacuna may be addressed by ensuring that a relevant undertaking is given personally by a solicitor, as well as, or in the alternative to, the incorporated law firm for which he or she acts. But that may not always be a satisfactory solution where summary enforcement is sought, if the individual solicitor lacks the power within his or her incorporated law firm to ensure that compliance occurs. We take the view that this is at best a partial and temporary solution. We therefore express the hope that Parliament will consider the lacuna that this judgment has confirmed in relation to undertakings given by solicitors working for incorporated law firms, particularly LLPs.

8. Issue (4): if the non-compete undertaking constitutes a solicitor's undertaking that in principle is capable of enforcement against Harcus Sinclair and/or Mr Parker, should it be enforced notwithstanding that, applying contractual principles, as the Court of Appeal held, the non-compete undertaking constituted an unreasonable restraint of trade?

149. Although it is not necessary for us to deal with this issue, we heard full argument on it. We can express our views on it very briefly. It is clearly correct that solicitors' undertakings are enforceable, under the courts' inherent supervisory jurisdiction, even though they may not be contractually binding. This may be, for example, because the undertaking is not supported by consideration or does not comply with the formalities that would be required for a contractual undertaking of that nature (see para 102 above). The explanation for this willingness to uphold a wider range of promises in the context of solicitors' undertakings than under the law of contract is because, in the exercise of its inherent supervisory jurisdiction over officers of the court, the courts are concerned to uphold particularly high standards of conduct irrespective of some of the rules imposed in contract law (see para 100 above). But that policy of upholding particularly high standards for solicitors plainly does not mean that none of the rules of contract law are applicable to solicitors' undertakings. Certainly, it is important that those rules of contract law often grouped together as dealing with "illegality and public policy", which include the rules on restraint of trade, should also be applied to solicitors' undertakings. The policy of upholding high standards for solicitors does not entail the legal enforceability of solicitors' undertakings that are in restraint of trade or are otherwise contrary to public policy or involve illegality. It cannot be correct because, as a matter of policy, it would be inconsistent, to decide that the non-compete undertaking in this case was contractually unenforceable as an unreasonable restraint of trade while then deciding that it was enforceable, as being a reasonable restraint of trade, as a solicitor's undertaking. The relevant public policy underpinning the law on restraint of trade applies equally to contracts and to solicitors' undertakings.

9. Issue (5): if the non-compete undertaking was a solicitor's undertaking, was the Court of Appeal wrong in holding (if it did) that this was irrelevant to the question whether the non-compete undertaking was contrary to public policy on the grounds of restraint of trade?

150. As with issue (4), although it is not necessary for us to deal with this issue, we heard full argument on it and can express our views in very short measure. We accept that there are good policy reasons for solicitors' undertakings to be upheld, just as there are good policy reasons for contracts to be binding. When a solicitor's undertaking or a contract is alleged to be in restraint of trade, the law needs to reconcile the good policy reasons for upholding the solicitor's undertaking or contract with the good policy reasons for denying enforceability. In general terms, one can say that the major reconciliation required is between a policy of upholding

freely made contracts and undertakings and the policy of upholding freedom of competition. It is not clear that anything is added to the force of upholding freely made contracts and undertakings by treating a solicitor's undertaking (even if that is a solicitor's undertaking in the sense of triggering the inherent supervisory jurisdiction of the court) as significantly different from a contractual undertaking given by, for example, an accountant or the seller of a business. At most, applying the specific policy explained above of upholding particularly high standards because solicitors are officers of the court, the fact that there is a solicitor's undertaking (triggering the inherent supervisory jurisdiction of the courts) may be regarded as an additional factor to be taken into account in considering the restraint of trade principle of reasonableness in the public interest. But even if one were to accept that the fact that one is concerned with a solicitor's undertaking has some relevance in applying the restraint of trade doctrine, it seems most unlikely that the fact that one is concerned with a solicitor's undertaking will be determinative if the undertaking would otherwise be an unreasonable restraint of trade.

10. Conclusion

151. For all these reasons we conclude that the non-compete undertaking given by Harcus Sinclair is not unenforceable as an unreasonable restraint of trade; that it was not a solicitor's undertaking; that, if it was a solicitor's undertaking, it would not have been enforceable under the court's summary jurisdiction over its officers against Harcus Sinclair because Harcus Sinclair is not an officer of the court or against Mr Parker as it was not given by him in a personal capacity; that it would not have been enforceable if it had constituted an unreasonable restraint of trade, and that its status as a solicitor's undertaking is of little relevance in determining whether it constitutes a restraint of trade.

152. In the light of our conclusion on the restraint of trade issue, we would allow the appeal.