



23 July 2021

## PRESS SUMMARY

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

**[2021] UKSC 32**

*On appeal from [2019] EWCA Civ 335*

**JUSTICES:** Lord Lloyd-Jones, Lord Briggs, Lady Arden, Lord Hamblen, Lord Burrows

### BACKGROUND TO THE APPEAL

This appeal arises out of a group action against the Volkswagen Group, involving over 50,000 claimants, in which it is alleged that Volkswagen vehicles were fitted with a ‘defeat device’ which manipulated the results of emissions tests (the “**emissions litigation**”). The question in this appeal is whether a non-compete clause, by which one law firm agreed with another law firm not to take part in the emissions litigation without the latter’s permission, is enforceable or not.

On 26 January 2016 Your Lawyers LLP (“**Your Lawyers**”) issued a claim against the Volkswagen Group with the intention of applying for a Group Litigation Order (“**GLO**”). Mr Johal, a solicitor at Your Lawyers, approached Harcus Sinclair LLP (“**Harcus Sinclair**”), a firm that had more experience of undertaking group actions, to propose collaborating on the emissions litigation. Your Lawyers sent a draft non-disclosure agreement (the “**NDA**”) to Mr Parker, a solicitor at Harcus Sinclair, which he signed on behalf of his firm on 11 April 2016. The NDA included a non-compete clause through which Harcus Sinclair undertook, for a period of six years, “*not to accept instructions for or to act on behalf of any other group of claimants in the contemplated group action*” without Your Lawyers’ permission. The two firms embarked upon an informal collaboration, though no formal collaboration agreement was ever reached.

During the course of this informal collaboration, Harcus Sinclair recruited claimants for its own group action. On 19 October 2016 Harcus Sinclair issued its own claim form in the emissions litigation and, on 28 October 2016, filed its own application for a GLO. On 21 December 2016 it agreed with another law firm, Slater and Gordon, to work together in the emissions litigation. On 6 January 2017 Mr Johal emailed Mr Parker asserting that Harcus Sinclair’s actions were in breach of the non-compete clause. Your Lawyers also later contended that the non-compete clause was a solicitor’s undertaking. The emissions litigation was put on hold while the dispute between the two firms was referred to trial.

The High Court found that the non-compete clause was enforceable and granted an injunction requiring Harcus Sinclair to cease acting in the emissions litigation for six years. The Court of Appeal allowed Harcus Sinclair’s appeal and held that the non-compete clause was unenforceable. Your Lawyers appealed to the Supreme Court.

### JUDGMENT

The Supreme Court unanimously allows the appeal. Lord Briggs, Lord Hamblen and Lord Burrows jointly give the sole judgment, with which Lord Lloyd-Jones and Lady Arden agree.

## REASONS FOR THE JUDGMENT

### **The first issue: is the non-compete clause unenforceable as an unreasonable restraint of trade?**

The parties agree that the non-compete clause is a restraint of trade. The issue is whether it is reasonable. This means it must be both (i) reasonable between the parties and (ii) not contrary to the public interest. To be reasonable between the parties it must protect the legitimate interests of the party seeking its protection and go no further than is reasonably necessary to protect those legitimate interests [47-50].

The critical question on (i) is whether Your Lawyers' legitimate interests are limited to those in the NDA [62]. The Court holds that they are not so limited. The fact that the parties intended or contemplated a process of informal collaboration can be considered even though the NDA did not include any obligation to do so. Your Lawyers has legitimate interests in protecting its own proposed group claim from Marcus Sinclair setting up a rival group claim [70-71]. The non-compete clause is reasonably necessary to protect those legitimate interests. It is logical and necessary that it should last for a six-year period as that roughly equates to the limitation period for claims in the emissions litigation [75]. The non-compete clause is therefore reasonable between the parties [85]. As for (ii), the non-compete clause is not unreasonable as being contrary to the public interest [87-90].

### **The second issue: is the non-compete clause a solicitor's undertaking?**

For an undertaking given by a solicitor to be a solicitor's undertaking it must be given in their "capacity as a solicitor" [103]. In addressing this test, the Court holds that in general it will be helpful to consider two questions. First, whether what the undertaking requires the solicitor to do (or not do) is something that solicitors regularly carry out (or refrain from carrying out) as part of their ordinary professional practice. Second, whether the matter to which the undertaking relates involves the sort of work which solicitors regularly carry out as part of their ordinary professional practice [112].

Harcus Sinclair's promise not to compete with Your Lawyers in the emissions litigation does not involve the sort of work which solicitors undertake not to do as part of their ordinary professional practice [117]. The matter to which the promise relates was a potential business opportunity and the reason for giving it was to further the parties' business interests rather than that of any client [118]. In giving the undertaking, Harcus Sinclair was acting in a business capacity rather than a professional capacity [119]. The non-compete clause is not a solicitor's undertaking [124].

### **The third and fourth issues: if the non-compete clause was a solicitor's undertaking, would the courts' supervisory jurisdiction apply to Harcus Sinclair and/or to Mr Parker?**

Though it is not necessary to decide these issues given the conclusions on the first two issues [125], the Court explains that the court's inherent supervisory jurisdiction over solicitors applies because of their status as officers of the court [134]. The question is whether that inherent jurisdiction should be extended to cover LLPs and limited companies providing legal services [142].

The Court decides that this is not an appropriate occasion for answering that question for three reasons. First, as the non-compete clause is not a solicitor's undertaking, anything the Court said would not bind lower courts. Second, a decision on this point would be assisted by submissions from professional and regulatory bodies such as the Law Society. Third, the question is probably better dealt with by legislation [143]. As matters stand, the non-compete clause would not have been enforceable against Harcus Sinclair as a solicitor's undertaking because Harcus Sinclair, as an LLP, is not an officer of the court. It would also not have been enforceable against Mr Parker as he gave it on behalf of Harcus Sinclair [144].

### **The fifth issue: if the non-compete clause was a solicitor's undertaking that was capable of enforcement, should it be enforced even if the non-compete clause was an unreasonable restraint of trade?**

The Court holds that if the non-compete clause was an unreasonable restraint of trade, it would not be enforceable as a solicitor's undertaking [149].

**The sixth issue: if the non-compete clause was a solicitor's undertaking, is that relevant to the question of whether, in deciding if it was an unreasonable restraint of trade, it was contrary to the public interest?**

The Court holds that the fact that a non-compete clause might be a solicitor's undertaking is of little relevance in determining whether it constitutes a restraint of trade [151].

### **Conclusion**

The appeal is allowed [152].

*References in square brackets are to paragraphs in the judgment*

### **NOTE**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:**  
<http://supremecourt.uk/decided-cases/index.html>