

Solicitors' undertakings

Clark v Lucas Solicitors LLP [2009] EWHC 1952 (Ch)



This case provides a stark reminder that the Court will summarily enforce a solicitor's undertaking, albeit in circumstances where the undertaking is given out of Court, there is no question of impropriety by the solicitor concerned, and the cost of performance of the undertaking to the solicitor exceeds the damage to the claimant.

Solicitors' undertakings are a useful and valuable tool in completing property transactions, and indeed they are commonly given by solicitors thereby allowing their clients to utilise the payment of the sale price to redeem the secured indebtedness. The facts of *Clark v Lucas LLP* demonstrate that a solicitor's undertaking given without careful thought can be disastrous for the firm concerned.

The facts of *Clark v Lucas* are relatively simple. The solicitors concerned acted for a developer who was in the course of constructing several residential units. The site was subject to a mortgage in favour of a bank, and a second charge in favour of a private investor "K". In the course of the sale of one of the units to the claimants, the solicitors gave an undertaking to discharge both the bank's and K's charge over the unit before completion.

On completion the entire balance of the purchase price was paid to the bank, and in due course the bank provided the relevant notice of discharge DS3. It was expected that the developer would utilise its facility with the bank to pay K 20% of the sale price as required by the agreement between K and the developer.

However, notwithstanding the sale the bank called in the balance of its outstanding indebtedness and the developer went into administration. K was not paid.

K refused to provide the claimants with a notice of discharge DS3 in respect of the unit. His agreement with the developer did not require him to release his charge upon the sale of the unit, and furthermore the terms of his agreement now required repayment in full as the developer had entered administration. The sum due to K under his charge was approximately £1m, as opposed to the sale price of the unit which was approximately £500k.

The solicitors sought to resist performance of their undertaking on the basis that it was impossible to perform (in the sense that the solicitors could not pay). The Court reviewed the authorities concerning impossibility, notably *Udall v Capri Lighting Ltd* [1988] 1 QB 907 and *Wroth v Tyler* [1964] 1 Ch 30,

pointing out that impossibility in this sense meant circumstances which were not capable of being performed (for instance extracting a personal guarantee from a deceased person or obtaining a charge over a property which had previously been transferred to a third party). The Court pointed out that it was possible for the undertaking to be performed by the solicitors providing a cheque to K in the requisite sum.

The Court reviewed *Angel Solicitors v Jenkins O'Dowd & Barth* [2009] 1 WLR 1220 which is authority that the Court will consider limiting compensation to that which could have been contemplated at the time that the undertaking was given i.e. the sum that K might reasonably have insisted upon at the time of the transaction to release his charge over the unit in question. However, on the facts of the case the Court held that it should have been within the solicitor's contemplation that payment of the entire sum due under K's charge might be necessary in order to perform the undertaking.

Furthermore, the Court had little sympathy with the solicitor's submission that an order for performance of the undertaking was disproportionate and therefore punitive rather than compensatory. Performance would involve payment of £1m to K, whereas the unit was sold for, and was worth, only half of that sum. The Court referred to the Solicitors' Code of Conduct:

"An undertaking is binding even if it is to do something outside your control. For example, if you undertake to make a payment out of the proceeds of sale of an asset, unless you clearly state to the contrary you will be expected to make the payment even if the fund (gross or net) is insufficient..."

Finally, the Court also had little truck with the argument that in circumstances where K was a second chargee behind the bank and K's security was therefore of limited value, payment in full to K amounted to unjust enrichment.

The Court granted the application, leaving the solicitors to find £1m and with little recourse against their impecunious client.

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