

## A solicitor's undertaking - a matter of honour?

Undertakings made in the course of our work for and on behalf of clients enable legal services to be delivered in a timely and efficient manner. Our strict observance of an undertaking "is an important component" of our ethical obligations we owe to the courts, our clients and our colleagues.<sup>1</sup>

It is a promise to do or not to do something.<sup>2</sup> It must be honoured and we must ensure it is delivered in a timely and effective manner.<sup>3</sup>

An undertaking should never be given without regard to its potential consequences.

Remember:

- it is usually seen as personal to us (unless otherwise stated);
- it must be given in a professional capacity;<sup>4</sup>
- it should be given in clear and unambiguous terms;
- it must be capable of performance at the time it was made;
- it must be performed in a timely and effective manner;<sup>5</sup>
- we must not seek from our colleagues, their employees or associates, an undertaking in respect of a matter that would require the cooperation of a third party who is not a party to the undertaking<sup>6</sup>.

A breach of undertaking can lead to:

- a charge of contempt of court;
- civil liability in contract or tort; or
- disciplinary proceeding.

When giving an undertaking, make certain that if disclaiming personal liability, this is clear from the undertaking itself. The Law Institute of Victoria has recommended to its members using the phrase "I am instructed that my client undertakes..."<sup>7</sup>

In *Bhanabhai & Burgess v Commissioner of Inland Revenue*<sup>8</sup>, a New Zealand practitioner was held personally liable for an undertaking given in these terms:

"We are solicitors for Golden Gate Holdings Ltd. We have been instructed to settle the sale of the units in the development and undertake that on settlement of those units [these are then specified], we will forthwith pay to you the GST component of the sale consideration."<sup>9</sup>

<sup>1</sup> Gino Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 5<sup>th</sup> ed, 2013), 723.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Australian Solicitors Conduct Rules 2012* (ASCR) rule 6.1.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> ASCR rule 6.2.

<sup>7</sup> Law Institute of Victoria, *If I give an undertaking on behalf of my client, am I personally bound by it?* <<http://www.liv.asn.au/For-Lawyers/Ethics/Common-Ethical-Dilemmas/Undertakings>>.

<sup>8</sup> [2007] 2 NZLR 478.

<sup>9</sup> [2007] 2 NZLR 478.

We should only give personal undertakings where we are able to ensure fulfilment and have control in relation to it.<sup>10</sup>

In *Legal Services Commissioner v McColm*<sup>11</sup>, a charge was brought against a solicitor alleging that he had failed to honour an undertaking given by him in writing to another firm of solicitors.

The solicitor acted for the seller of a business. A term of the contract of sale provided that \$70,000 of the sale price be retained on completion and held in the trust account of the seller's solicitor. The money was held as a retention sum for possible contract adjustments.

Prior to settlement the solicitor wrote to his colleague undertaking "to hold the sum of \$70,000 of the purchase price pursuant to the terms of special condition 10 of the contract of sale".

Due to what was accepted as human error, the sum of \$70,000 was not held in the seller's solicitor's trust account but paid out to the seller.

When the solicitor discovered the error he requested his client to restore the amount to his trust account. The seller was unable to do so. Subsequently the seller formed the opinion that no restoration was required due to what it saw as a breach by the buyer of another dependent stipulation in the contract.

The buyer in due course became aware that the retention sum was no longer held in the trust account of the seller's solicitor.

The Chief Justice held that the charge was made out.

The Commissioner accepted that the undertaking had not been deliberately breached. The Chief Justice noted that it was "unfortunate that (the seller's solicitor had) not quickly informed the purchaser of what had occurred, effectively leaving it to the purchaser itself to draw the inference..."<sup>12</sup>

The Tribunal described the conduct as falling "just short of the level of professional misconduct and that it should be characterised as unsatisfactory professional conduct..."<sup>13</sup>

The Chief Justice accepted that there were a number of matters in mitigation:

- it was an isolated incident;
- no allegation of dishonesty was made;
- the solicitor was remorseful and had apologised for the breach of undertaking;
- he indicated at an early stage that he would not contest the matter;
- he had cooperated with the investigation;
- he had not been the subject of any other adverse disciplinary finding;
- it was unlikely that he would err again;
- he has taken steps to ensure such a breach does not occur again; and
- he has restored the trust fund to alleviate the position of the buyer.

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<sup>9</sup> Ibid, [1].

<sup>10</sup> Ibid, [43].

<sup>11</sup> [2006] LPT 14.

<sup>12</sup> Ibid, 4.

<sup>13</sup> Ibid.

The solicitor was publicly reprimanded, ordered to pay a penalty of \$3,000 and the Commissioner's costs in the agreed sum of \$2,000.

Before we or our employee<sup>14</sup> or agent gives an undertaking, remember that it is a matter of honour for the undertaking to be performed in a timely and effective manner. Once an undertaking is given only the recipient or a court of competent jurisdiction can relieve us of its performance.

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<sup>14</sup> In general, an undertaking given by our employee or agent will bind us professionally: *Enenco Pty Ltd v Australian Building Construction Employees and Builders Labourers Federation (Qld Branch)* [2001] 2 Qd R 118. An undertaking given by our clerk at a settlement is seen as an undertaking by the legal practice, even if given without the proper authority of the partner, sole practitioner or legal practitioner director: *Hawkins v Gaden* (1925) 37 CLR 183.