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Professional practices update

Undertakings - a guide

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Introduction

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The issues

A regulatory issue

The Solicitors' Regulation Authority ("SRA") Handbook makes performance of undertakings a matter of professional conduct. In order to comply with the mandatory SRA Principles set out in the Handbook, all solicitors must achieve Outcome O(11.2), accessible here, which requires that:

"you perform all undertakings given by you within an agreed timescale or within a reasonable amount of time"

The Indicative Behaviours which may tend to show that this Outcome has been achieved include:

- "I**B(11.5)** maintaining an effective system which records when undertakings have been given and when they have been discharged;
- **IB(11.6)** where an undertaking is given which is dependent upon the happening of a future event and it becomes apparent the future event will not occur, notifying the recipient of this."
- he Handbook expressly states that these provisions should be read in conjunction with Chapter 7 (Management of your business) in relation to the system which should be in place to control undertakings. Chapter 7 contains a number of Outcomes which must be achieved relating to such matters as governance, systems and controls, risk management, supervision and training. A detailed discussion of the sorts of policies, procedures and systems you should have in place in order to comply with Chapter 7 is outside the scope of this overview, but that Chapter should be considered closely in relation to all aspects of your practice.
- Guidance Note (iii) to Rule 8 of the SRA Authorisation Rules 2011, found here, states that one of the matters which will require consideration, in relation to ensuring that you comply with the requirement in Rule 8.2 to have suitable arrangements for compliance in place at all times, is a system for ensuring that undertakings are given only when intended, and that compliance with them is monitored and enforced.

The definition of an undertaking

The Handbook's definition of an undertaking is:

- "...a statement, given orally or in writing, whether or not it includes the word 'undertake' or 'undertaking', made by or on behalf of you or your firm, in the course of practice, or by you outside the course of practice but as a solicitor or [Registered European Lawyer], to someone who reasonably places reliance on it, that you or your firm will do something or cause something to be done, or refrain from doing something."

Although there are limits to it, this definition is very broad. No particular formalities or wording are required – for example, there is no need for the word "undertake" or "undertaking" to be used for a statement to be construed as an undertaking. A simple oral promise can in appropriate circumstances suffice.

Further, where it is ambiguous whether an undertaking is or is not being given, that ambiguity is generally resolved in favour of the recipient of the undertaking. The court has emphasised that in cases of uncertainty it is for the solicitor to make it clear that he is not intending to give an undertaking (*Reddy v Lachlan* (2000)).

Interpretation of undertakings

In the same way as an issue as to whether an undertaking has or has not been given at all will generally be resolved in favour of the recipient, so ambiguous undertakings will generally be construed in favour of the recipient (see for example *Templeton Insurance Ltd v Penningtons Solicitors LLP* (2006)).

As is discussed further below, careful thought must therefore be given to the wording of any undertaking. This includes giving careful consideration as to who is giving the undertaking. A statement by solicitors that *"we on behalf of our clients undertake..."* has sometimes been interpreted as an undertaking by the solicitors themselves: see for example Re C (1908).

Enforcement of undertakings

The recipient of an undertaking may attempt to enforce it by three methods:

- Making an application to the court, requesting the court to exercise its inherent supervisory jurisdiction in relation to the conduct of solicitors so as to enforce the undertaking. Such an application can be made on a summary basis, although the court will only exercise its jurisdiction summarily in clear cases. The following points should be noted about this jurisdiction:
  - While the courts do have a discretion in relation to the exercise of this jurisdiction, they generally take a strict approach towards the enforcement of undertakings. For example, it is no bar to enforcement that the undertaking was given by mistake, in circumstances where the solicitor no longer acts for the relevant client, or without the authority of the client (although if the recipient knows of an absence of authority, the court may take this into account). Nor is it a defence that the undertaking was that a third party should do an act, such that fulfilment of the undertaking is outside the solicitor's control, or that the solicitor would have a defence to an action at law, such as a limitation defence; however, the court may take matters such as these into account in determining whether to – and if so, how to – exercise its discretion.
  - Unless there is evidence that the undertaking is impossible to perform, the order will usually be to require the solicitor to do that which he undertook to do (and, if he then fails to comply with that order, he may be committed for contempt of court). An alternative

which the court might opt for in certain circumstances, for example in a case where it is impossible for an undertaking to be performed, is to order the solicitor to pay compensation to a recipient of the undertaking who has suffered loss (see for example *Udall v Capri Lighting Ltd* (1988)).

- Commencing specific legal proceedings, if there is a cause of action - most obviously, if there is consideration for the promise given by way of the undertaking, a claim in contract. Amongst other things, this avoids the element of discretion which is present on an application to the court to exercise its inherent jurisdiction to enforce solicitors' undertakings.
- Making a complaint of professional misconduct to the SRA, which may result in disciplinary action. The SRA takes breaches of undertakings seriously.

Note, in addition, that where an undertaking is given to the court:

- A breach of the undertaking may lead to a finding of contempt of court (see for example Sandhu v Kaur (2012));
- An improperly-given undertaking may in certain circumstances lead to the making of a wasted costs order (see Salt v Corris Developments Ltd (2011)).

Guidance

In light of the issues outlined above, the following guidelines should be kept in mind in relation to the giving – and receiving – of undertakings. You should also consider the SRA's warning card on undertakings, issued in April 2009, found here, although please be aware that that warning card was issued prior to the bringing in of the SRA Handbook and therefore under the old Code of Conduct.

General guidance on the giving of undertakings

Some overarching points applicable to the giving of undertakings are as follows:

- It is important that all staff are given proper training on undertakings and the associated dangers of giving them, including on the sorts of risks and necessary precautions set out in this note.
- Internal systems and policies, recorded in an undertakings policy, should be put in place - and proper training given on these and supervision put in place so that they are followed - in relation to the giving, recording and fulfilment of undertakings:
  - Although the appropriate systems and controls will depend on the nature of the firm, including such matters as its size, client base and types of work, when putting in place or reviewing such systems and controls, matters requiring consideration will include how often undertakings are given in your practice, the nature of those undertakings (e.g. do they tend to be standard form conveyancing undertakings, or more bespoke?), the types of work undertaken and whether any of these present particular risks, who within the firm gives undertakings and whether there should be limits on who gives undertakings.
  - If your firm carries out conveyancing or other transactional property work, it is likely to be appropriate to have a specific undertakings policy for such work, which will need to cover both routine and non-routine undertakings.
  - In most firms, it is likely to be prudent to adopt a policy on undertakings which contains, amongst other things, a rule that undertakings - with the exception perhaps of routine, standard form undertakings in limited and carefully defined circumstances - may not be given without the prior agreement of a partner, who must specifically approve the wording to be used. Having in place draft standard undertakings, departure from which requires approval from a particular partner or department (or perhaps the COLP), is also likely to be sensible in most firms. It may also be appropriate for the policy in place to require approval to be obtained from the firm's risk team, risk partner or COLP in certain circumstances, such as where the undertaking involves a sum of money over a certain threshold or commits the firm to a particular course of conduct.
  - Undertakings policies, and compliance with those policies, should be reviewed regularly.
- Whenever an undertaking is requested, consideration should be given to whether it is necessary or desirable to give one. As Chapter 11 of the SRA Handbook expressly recognises, there is no obligation on solicitors to give an undertaking.
- When making a promise or giving confirmation in circumstances where it is not appropriate or desirable to give an undertaking, solicitors should be alert to the risk that the other party or parties with whom they are dealing could seek to treat that promise or confirmation as an undertaking. If this appears possible, it should be made clear, preferably in writing, that an undertaking is not being given.
- Before giving any undertaking, all necessary consents and authorities from the client must be in place. It is generally prudent for the nature of the undertaking which it is proposed to give, and the consequences of the giving of that undertaking, to be clearly explained to the client and their specific instructions, preferably in writing, obtained.
- If an undertaking is to be given, it is preferable that it is given in writing. If an undertaking has to be given orally its form should be pre-approved in accordance with the firm's policy for the approval of undertakings, and it should be confirmed, or at the very least recorded, in writing. Some particular matters to keep in mind when drafting undertakings, where they are to be given, are set out below.
- A clear and detailed record of all undertakings given should be kept. In the case of routine undertakings, it may be appropriate for records simply to be kept, in a suitably clear and obvious manner, on the relevant files and (if applicable) case management system. In the case of non-routine undertakings, a central register will be necessary, and this should be reviewed regularly by your COLP. In any event, notice should be given to any other fee-earners or business service departments within your organisation who might be affected by an undertaking given. This particularly applies if the undertaking affects money in the client account, in which case the finance department or finance administrator will need to be informed.

- Dates for compliance with undertakings given should be carefully diarised and monitored. Where an undertaking is given which is dependent upon the happening of a future event, the occurrence - and the likelihood of the occurrence - of that future event should be monitored. The recipient of an undertaking should be kept informed of any delays in fulfilling it, and, in accordance with IB(11.6) of the SRA Handbook, the recipient of an undertaking dependent upon the happening of a future event should be notified immediately where it becomes apparent that that event will not occur.
- Once an undertaking given by you is satisfied, it is generally wise to make a formal request to be released so that there is written evidence of the fulfilment of the undertaking. You should record, against your record of undertakings, when each undertaking has been discharged (or, if applicable because you have agreed with the recipient that you will not have to perform the undertaking, when the recipient has formally released you from the undertaking).
- A breach of undertaking will be a failure to comply with the terms and conditions of a firm's authorisation and will therefore need to be recorded by the firm's COLP and reported to the SRA, in accordance with Rule 8.5 of the SRA Authorisation Rules.

Drafting undertakings – general guidance

Where an undertaking is to be given, extreme care should be taken in its drafting or formulation, not least because of the principle that where an undertaking is ambiguous it will be interpreted in favour of the recipient. The undertaking should have the following characteristics – see also the SRA's warning card on undertakings, referred to above:

- Specific:
  - The promise given should relate to a specific task or action which can be, and has been, clearly identified and defined – for example, "to return the documents listed in the attached schedule within two weeks of [a specific, defined event]". General or open-ended undertakings, such as an undertaking to discharge "all outstanding mortgages on a property", should be avoided.
  - You should be clear about whether it is you or your client who is giving the undertaking. Where it is possible, with the client's agreement, to arrange matters such that the client will be the provider of the undertaking, it may be preferable to do so. In that event, you should convey the undertaking using wording such as "Our client will undertake to do X". As has been noted above, wording such as "We undertake to you on behalf of our client" may be interpreted as amounting to an undertaking by you rather than by your client, so should be avoided if this is not the intention.
  - It is also prudent to adopt a policy within your organisation as to precisely which entity should be expressed as giving an undertaking where it is to be given by you rather than by the client. Generally, it is likely to be most appropriate for it to be given by the firm, LLP or corporate entity rather than by the individual partner or fee earner involved. Where the entity is a LLP or corporate body, it should be noted that the approach taken will have implications for the enforcement consequences available to the recipient of the undertaking, because the court's inherent jurisdiction (as opposed to its ability to hear a claim for, say, breach of contract) applies only to individual solicitors (including those in a partnership) as officers of the court and not to corporate entities.
- Measurable:
  - In order to avoid a dispute as to whether an undertaking has been fully discharged, an undertaking should include agreed measures or steps which are understood by both parties and can easily be monitored or checked. For example, if an undertaking involves money the amount should be stated or a means by which it can easily be ascertained should be identified.
  - Undertakings to use "best endeavours" or "reasonable endeavours" are best avoided due the scope for dispute as to what these terms require.
- Agreed:
  - Again in order to avoid disputes, the wording of any undertaking given should be agreed expressly between the person giving it and the person receiving it. As noted above, undertakings should preferably be given in writing but, if this is not possible, they should be confirmed, or at the very least recorded, in writing.
- Realistic and within your control:
  - As set out above, an undertaking will be binding even if it is to do something outside your control. It is therefore important that you only undertake to do things within your control and which you will be able to implement. If the occurrence of a particular event, not within your control, is a pre-condition to performance of the undertaking, that should be clearly stated.
  - Because of the risk of bank failure, it is prudent, if at all possible, not to word undertakings so as to make a commitment to pay a sum of money to another party. Instead they can be worded so as to provide simply that you will give instructions to your bank to pay the money.
- Timed:
  - An undertaking should indicate when, or on the happening of which (precise and clearly defined) event, it will be fulfilled. In the absence of an express term, there is an implied term that the undertaking will be performed within a reasonable time.
  - As has been noted above, if the undertaking includes a deadline, this should be diarised carefully in order to ensure that the deadline is not missed. Where the undertaking must be fulfilled on the occurrence of a particular event, whether - and, if so, when - that event is likely to occur should also be closely monitored.

Particular issues in conveyancing transactions

Conveyancing is an area of work in which undertakings are particularly important, and in which it is particularly important to be alive to the issues and dangers inherent in giving and receiving them. Some particular points to bear in mind are as follows:

- The Law Society's formulae for exchange of contracts and Code for Completion by Post contain certain undertakings. If you are to give an undertaking in a conveyancing context you must ensure that the wording is appropriate and its implications understood. It is important to ensure, by means of appropriate training, guidance and policies, that all staff within your organisation carrying out conveyancing work fully understand the undertakings they are giving and the implications of the same.
- You should ensure that replies by you to requisitions on title concerning mortgages specify exactly which mortgages or charges you intend to discharge. Vague replies may well result in your being liable to discharge all charges - whether you are in funds to do so or not.
- You should not give unconditional undertakings without sufficient enquiry into the amount owed on prior charges – and you should not simply rely on what your client tells you in this regard. Where possible, you should seek to limit your undertaking to a specific sum.
- If your ability to comply with an undertaking depends upon action to be taken by another solicitor, you should ensure that he or she will be able to comply, i.e. by obtaining an undertaking to a similar effect.
- Where you are acting for a buyer, you should normally seek to limit the completion undertaking to an undertaking to give instructions to the bank, as suggested above in relation to undertakings to pay sums of money generally.
- Beware of banks' "standard form" undertakings. For example, they may sometimes go beyond what is within your control. If you have concerns about undertakings you are being asked to give, you may consider raising this with the Law Society. In early 2012, in response to concerns raised by various solicitors with the Law Society about undertakings which they were being asked to give by HSBC, which in turn the Law Society raised with HSBC, HSBC revised its requested undertakings.

Accepting undertakings from other solicitors

Much of the guidance above is as relevant to accepting undertakings as it is to giving undertakings. Before accepting an undertaking, you should check whether the nature of the obligation and the time for its performance are sufficiently clear. You should also take all necessary or appropriate steps to verify the identity and relevant characteristics of the solicitor offering the undertaking.

One area in which it is particularly crucial to ensure that an undertaking is suitable before relying on it is in a conveyancing transaction, including in particular where you act for buyer and mortgagee and propose to proceed to completion on the basis of an undertaking from the seller's solicitor to discharge an existing registered charge over the subject property. A full explanation of what is required before reliance can safely be placed on such an undertaking is outside the scope of this overview, but any firm undertaking conveyancing work should make sure that all of its conveyancing staff are fully conversant with these issues. If there is ever any doubt about such matters, specific advice should be sought.

In litigation, if you are given an undertaking regarding payment of your costs, its important that it be made express that those costs are payable in any event; otherwise, the undertaking is likely to be discharged if the matter not proceed.

A failure to take the precautions outlined in the preceding three paragraphs, such that (for example) you rely on undertakings given by other parties in circumstances where you should not have done, may lead to you being found liable in negligence to your client. If in any doubt about accepting an undertaking, fee-earners should refer the matter to someone more senior such as a partner or the COLP, and it is sensible to include such a procedure within your undertakings policy.

Further advice should be taken before relying on the contents of this summary.

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