

# CHAPTER 14

## PROFESSIONAL UNDERTAKINGS

### 14.01 Binding nature of an undertaking

1. Definition
2. Personal capacity
3. Undertaking by non-partner on behalf of the firm
4. Undertaking by partner
5. Responsibilities continue
6. Oral, written or implied
7. Evidence of an oral undertaking
8. No obligation to give or receive undertakings
9. Future undertakings
10. Avoid 'usual undertakings'
11. Pay for copies from solicitors
12. Conditional delivery
13. Undertaking to accept service of an originating process
14. Undertaking fulfilled in reasonable time
15. Fraudulent undertakings
16. Undertakings only to be accepted from qualified persons
17. Implied undertaking deemed to be given by the firm

### 14.02 Performance of undertakings

1. Must be able to comply personally
2. No counter-undertaking
3. Fulfilment of undertaking from a solicitor's resources
4. Undertakings bind enrolled solicitors
5. Disputes as to performance
6. Law Society has no power to release from undertakings
7. Delay in enforcing undertakings does not release
8. Undertakings not binding in certain circumstances
9. Undertakings in conveyancing matter

### 14.03 In-house solicitors

1. Insolvency of unqualified person
2. Head of department responsible
3. Care to be taken when head of department is unadmitted person
4. Practice Direction N

### 14.04 Undertaking binds giver and receiver only

1. Undertakings received for benefit of client
2. Assignment of undertaking
3. Passing of undertakings to acquiring firm

4. Ceasing to act for a client - no implied release from undertaking

14.05 Ambiguous undertakings

1. Importance of precise terms
2. Exercise care in wording of undertakings

14.06 Implied terms

1. Undertaking as to costs
2. Undertakings to pay imply sufficient funds
3. Undertaking to pay from proceeds of sale

14.07 Consideration

1. Disciplinary action
2. Effect of consideration on an undertaking

14.08 Undertakings binding even if beyond control

1. Caution before giving an undertaking
2. Undertakings for the payment of money
3. Subsequent events

14.09 Undertakings 'on behalf of' clients and others

1. Exclude personal liability
2. Contrast with statement of client's intentions
3. Obtain client's authority for an undertaking

14.10 Clients' instructions

1. Liability where changed instructions
2. Set-off or lien

14.11 Demanding payment for not complaining

#### 14.01 Binding nature of an undertaking

**An undertaking shall only be given by a solicitor and is binding upon him personally, and if given in the course of practice, also binds his firm.**

##### **Commentary**

1. An undertaking is any unequivocal declaration of intention made orally, in writing or by conduct by a solicitor addressed to someone who reasonably places reliance on it.
2. A solicitor is personally bound by an undertaking given by him in his personal capacity.
3. Where a solicitor gives an undertaking on behalf of his firm, the undertaking binds him personally and the firm.
4. Where a partner gives an undertaking on behalf of his firm, the undertaking binds him and his partners personally and the firm.
5. A partner will remain responsible for his firm's undertakings given while he was a partner notwithstanding his ceasing to be a partner or dissolution of the firm.
6. A professional undertaking need not necessarily include the word 'undertake'.
7. Although an oral undertaking has the same effect as a written one, there may be evidential problems as to its existence unless there is available a contemporaneous note, transcript or written confirmation of its terms. If the recipient confirms the terms of the oral undertaking and the giver does not promptly repudiate those terms, this is likely to be accepted as sufficient evidence of the existence and terms of the undertaking.
8. There is no obligation on a solicitor either to give or accept an undertaking. Although there is a duty to act in a client's best interests this does not imply a duty to assume or underwrite a client's financial or other obligations.
9. A promise to give an undertaking at some future date will be treated as an undertaking, provided the promise sufficiently identifies the terms of the undertaking and provided any conditions precedent have been satisfied.
10. Promises to give the 'usual undertaking' or an undertaking on the 'usual terms' should be avoided as there may be doubt as to what is 'usual'. The terms of an undertaking should always be set out with clarity in order to avoid disputes.
11. When a solicitor asks another solicitor to supply him with copies of documents, there is an implied undertaking to pay a proper charge for them. The charges for photocopying are set out in the *Solicitors (General) Costs Rules* (Cap. 159 sub. leg. G).

12. If a solicitor sends to another solicitor documents or money subject to an express condition, the recipient is subject to an implied undertaking to return the documents or money forthwith, without making copies of the documents, if he is unwilling or unable to comply with the condition upon which they were sent. Further, if documents or money are sent to a solicitor subject to the condition that they should be held to the sender's order, the recipient is subject to an implied undertaking that he will return the documents or money to the sender on demand. In these circumstances, cheques or drafts must not be presented for payment without the consent of the sender.
13. A solicitor who has undertaken to accept service of an originating process on behalf of a client should as far as practicable endorse acceptance of service and return it on the day of receipt.
14. In the absence of an express term, there is an implied term in a professional undertaking that it is to be performed within a reasonable time having regard to its nature. If there is any delay, the giver is under an obligation to keep the recipient of the undertaking informed.
15. A fraudulent undertaking given by one partner without any actual or implied authority may still be binding upon the innocent partners. See *United Bank of Kuwait Ltd v Hammoud* [1988] 3 All ER 418.
16. A solicitor should take care only to accept an undertaking given by a person qualified to give such an undertaking.
17. Any implied undertaking given on behalf of the firm shall be deemed to be given by the partners of that firm.

#### 14.02 Performance of undertakings

##### **A solicitor must honour the terms of a professional undertaking.**

##### **Commentary**

1. The wording and extent of any undertaking should be carefully considered before it is given since a solicitor becomes personally bound by any undertaking given by him or his partners. The giving of an undertaking by a solicitor is not to be taken lightly and an undertaking should never be given unless the solicitor giving it is certain that he personally can comply with it.
2. A solicitor who has given an undertaking should not subsequently seek to impose a further condition or undertaking in return for compliance with the original undertaking, e.g. a solicitor who has undertaken to return documents cannot subsequently impose a further undertaking on the recipient of the original undertaking.

3. An undertaking to pay money out of proceeds of sale of a property does not imply that such an undertaking takes effect only if the proceeds of sale come into the hands of the solicitor giving the undertaking. If such a restriction is intended, it must be incorporated in the undertaking itself, otherwise the solicitor giving the undertaking may be required to satisfy the payment from his own resources.
4. A solicitor must honour an undertaking for so long as his name remains on the Roll and regardless of whether he holds a current practising certificate or not.
5. The Law Society cannot intervene where there is a genuine dispute as to whether the undertaking has been performed or where the performance of the undertaking turns on a disputed point of law. These are matters for the court to resolve.
6. The Law Society has no power to order the release of a solicitor from the terms of an undertaking. This is a matter for the person entitled to the benefit of the undertaking or the court.
7. A solicitor cannot claim to be released from an undertaking on the basis that the recipient has been slow in drawing his attention to the breach.
8. An undertaking procured by the fraud or deceit of the recipient will not bind the maker. (see also Principle 14.01 Commentary 15).
9. The responsibilities in respect of undertakings given in conveyancing matters are no different from those in relation to undertakings given in any other types of transactions and the Principles applicable to undertakings in general will apply.

### 14.03 In-house solicitors

**A solicitor in employment outside private practice is personally responsible for honouring his professional undertakings.**

#### **Commentary**

1. A solicitor in employment outside private practice must carefully consider the personal implications of an undertaking, particularly those given in the course of his employment, for example, because of the possibility that the employer might become insolvent or otherwise refuse to fulfil the undertaking. This will not affect the personal responsibility of the solicitor for the undertaking.
2. A solicitor who is the head of a legal department in commerce, industry or Government is responsible for undertakings given by members of his department qualified to give an undertaking.

3. Solicitors who accept an undertaking from legal departments in commerce, industry or Government should take particular care where the head of the department is an unadmitted person to ensure that the undertaking was given by a solicitor.
4. See also Practice Direction N and in particular to paragraph 9.

#### **14.04 Undertaking binds giver and receiver only**

**An undertaking will normally be required to be honoured only as between the giver and the recipient.**

##### ***Commentary***

1. Where a solicitor has received an undertaking for the benefit of his client and the client instructs another solicitor in his place, then unless for good reason the former solicitor objects or by its terms the undertaking provides to the contrary, the benefit of the undertaking will remain vested in the client and can be enforced at the client's request by the new solicitor.
2. A solicitor cannot assign the burden of an undertaking (and thus claim to be released from its terms) without the express approval of the recipient.
3. Where a solicitor acquires a practice from another and consequently takes over the conduct of a matter in which there is an undertaking outstanding, the acquiring solicitor is not liable on the undertaking unless he accepts liability by expressly or impliedly adopting the undertaking. If he does adopt the undertaking, the giver of the original undertaking nevertheless remains liable under it until he expressly obtains a release from the recipient.
4. There is no implied term in an undertaking that a solicitor is deemed to be released should he subsequently cease to act for the particular client. If this term is desired, it should be incorporated in the undertaking.

#### 14.05 Ambiguous undertakings

**An ambiguous undertaking is generally construed in favour of the recipient.**

##### **Commentary**

1. Care should be taken to word undertakings in precise terms and this is particularly applicable to an undertaking given to a layman.
2. Care should be taken when giving or accepting an undertaking which includes words such as 'to use best endeavours' or 'best efforts'. What constitutes 'best endeavours' or 'best efforts' is arguable and each case must be construed on its own facts. Generally, such phrases and other such potentially ambiguous terms should be avoided.

#### 14.06 Implied terms

**In general no terms will be implied into a professional undertaking. Some exceptions are:**

1. In an undertaking as to the payment of costs:
  - (a) when a solicitor gives an undertaking to pay another solicitor's costs in connection with a matter, the undertaking will be discharged if the matter does not proceed unless, in the undertaking, there is an express provision that the costs are payable in any event;
  - (b) an undertaking to pay another solicitor's costs is deemed to be an undertaking to pay 'proper costs' whether expressed to be so or not. Unless otherwise stated proper costs are those which would be allowed on taxation. For this reason it is always open to the giver of an undertaking to require the bill to be taxed, provided that this requirement is communicated promptly and the undertaking then takes effect on the bill as taxed;
  - (c) an undertaking to pay the costs of a professional agent other than a solicitor is similarly an undertaking to pay 'proper costs'. However, unless the agent's professional body has means whereby it can determine whether the costs are proper or not, a bona fide dispute as to quantum will have to be resolved through the court.
2. If an undertaking is given to pay money out of a fund at some specified time, there is an implied warranty that the fund will be sufficient for that purpose. Accordingly, if so desired, it is crucial that this warranty is negated in the undertaking itself.

3. Where an undertaking is given to pay a sum of money out of the proceeds of sale of an asset, there is no implied term that the sum is payable out of the net proceeds. Consequently, it is essential that any undertaking of this nature should stipulate what deductions have been agreed.

#### 14.07 Consideration

**An undertaking does not have to constitute a legal contract for disciplinary action to be taken in respect of a breach.**

##### *Commentary*

1. Breach of an undertaking can give rise to disciplinary action even if no consideration was given for the undertaking.
2. If an undertaking is expressed to be given for consideration but through no fault of the solicitor giving the undertaking, that consideration has failed, the undertaking will be discharged. Consequently, where there is consideration, it should be expressly stated in the undertaking itself.

#### 14.08 Undertakings binding even if beyond control

**An undertaking is still binding even if it is to do something outside the solicitor's control.**

##### *Commentary*

1. Before giving an undertaking a solicitor must carefully consider whether he will be able to implement it. It is no defence to a complaint of professional misconduct that the undertaking was to do something outside the solicitor's control (for example, that it was dependent upon action being taken by a third party and that the action has not been taken) unless the undertaking was suitably qualified (see also Principle 14.02 Commentary 1).
2. If an undertaking involves the payment of money, a solicitor must decide whether he is able to give such an undertaking, since he can be required to discharge this out of his own and his partners' resources. If asked to give such an undertaking, a solicitor must consider the possibility of his client being made bankrupt; a client's bankruptcy will not discharge such an undertaking. Further, the client's trustee in bankruptcy may have a prior claim over the fund from which the



solicitor has agreed to remit monies, as may a garnishee (see also Principle 14.06 Commentary 2).

3. An undertaking will not be affected by events which occur subsequently, unless these events are provided for in the undertaking itself.

#### **14.09 Undertakings 'on behalf of' clients and others**

**A solicitor will be held personally liable to honour an undertaking which he has given on behalf of a client or another person unless such liability is expressly and clearly disclaimed in the undertaking itself.**

##### ***Commentary***

1. Accordingly, where it is not the solicitor's intention to be personally bound, the undertaking should be worded so as to exclude personal liability on the part of the solicitor.
2. There is a distinction between a professional undertaking (including one given on behalf of a client) and a mere statement of a client's intentions or an agreement between solicitors as agents for their clients which is clearly without the assumption of any personal liability.
3. Since a solicitor will be personally bound to honour his undertakings, it is essential that before giving an undertaking he has his client's express or implied authority to do so. Where a solicitor gives an undertaking without such authority and as a result, his client suffers loss, the client's remedies may include, where appropriate, a claim in negligence against his own solicitor.

#### **14.10 Clients' instructions**

**A solicitor cannot avoid liability on an undertaking by pleading that to honour it would be a breach of his duty owed to his client.**

##### ***Commentary***

1. A solicitor cannot avoid liability on an undertaking on the ground that his client has changed his instructions. Furthermore, a solicitor should not act on his client's instructions where to do so would breach an undertaking given by him on or in accordance with his client's previous instructions.

2. A solicitor cannot avoid the obligations on an undertaking by claiming set-off or lien unless he has qualified the undertaking appropriately.

#### **14.11 Demanding payment for not complaining**

**A solicitor must not demand compensation for refraining from reporting an alleged breach of undertaking.**